



Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Senate Inquiry

21 January 2019

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Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
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- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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Recommendations

Recommendation 1

The Committee recommends to Parliament that the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 should be passed, with amendment.

Recommendation 2

The Committee recommends that Parliament support Senator Patrick's amendments to clarify that proposed new section 37(3) covers educational institutions, including schools, colleges and universities, rather than all education provided by religious bodies.

Recommendation 3

The Committee recommends that Parliament support the removal of exceptions in both the Sex Discrimination Act and Fair Work Act that allow religious schools to discriminate against LGBT teachers and other staff, and that legislation to achieve this outcome is passed concurrently with the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018.

Recommendation 4

The Committee recommends that Parliament rejects the Government's amendment to remove the carve-out to section 37(1)(d), as found in proposed new section 37(3) of the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018.

Recommendation 5

The Committee recommends that Parliament rejects the Government's amendments to the test for reasonableness for indirect discrimination within the Sex Discrimination Act.

Recommendation 6

The Committee recommends the Parliament rejects the Government's amendment to allow discrimination against LGBT and other students in the course of 'teaching activity'.

Recommendation 7

That the Committee call for the Government not to refer the issue of religious exceptions to anti-discrimination laws to the Australian Law Reform Commission, and instead to legislate immediately to protect LGBT students against discrimination by religious schools.

Recommendation 8

That the Committee support the principle that national consistency should not be achieved at the cost of increasing discrimination against LGBT students or teachers in any jurisdiction.

1. Striking a better balance

PIAC welcomes the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 ('the Bill'), and related amendments.

We have a long history of engagement on issues related to anti-discrimination law. In the past 12 months, this has included:

- Our submission to the Religious Freedom Review, chaired by Mr Philip Ruddock¹ (see **Attachment A**), and
- Our submission to the recent Senate Legal and Constitutional Affairs References Committee Inquiry into Anti-Discrimination Exceptions for Religious Schools² (see **Attachment B**).

This submission draws on both of these submissions and, consistent with them, argues that the *Sex Discrimination Act 1984* (Cth) should be amended to strike a better balance between supporting religious freedom and protecting lesbian, gay, bisexual, transgender and intersex (LGBTI) students, teachers and other staff at religious schools.

1.1. Religious freedom and the right to non-discrimination

The Bill raises two potentially-competing human rights – although, as we shall see below, we believe both can be successfully accommodated.

Freedom of religion is a human right protected by Article 18 of the International Covenant on Civil and Political Rights ('the ICCPR'), which states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Importantly, while the freedom to have a religious belief (or not to have a religious belief) in paragraph 1 is absolute, and cannot be restricted by State Parties to the ICCPR, the manifestation of these beliefs in paragraph 3 can be subject to appropriate restrictions, including to protect the fundamental rights and freedoms of others.

One such right is the right to be free from discrimination, as set out in Article 26 of the ICCPR:

¹ PIAC, *Submission to the Religious Freedom Review*, 14 February 2018, available at: <https://www.piac.asn.au/2018/02/14/submission-to-the-religious-freedom-review/>

² PIAC, *Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into Anti-Discrimination Exceptions for Religious Schools*, 26 November 2018, available at: <https://www.piac.asn.au/2018/11/26/submission-to-senate-legal-and-constitutional-affairs-references-committee-inquiry-into-anti-discrimination-exceptions-for-religious-schools/>

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

'Other status', in the current context, includes sexual orientation and gender identity (while sex characteristics – or intersex status – fall under either sex or other status).

Therefore, the right to manifest religious belief can be limited to ensure lesbian, gay, bisexual, transgender and intersex people are protected against discrimination, including LGBTI students, teachers and other staff in religious schools.

In our view, an appropriate balance can be achieved by preserving the ability of religious schools to discriminate in the admission of students, and the employment of teachers and other staff, on the attribute of religious belief – but not on the basis of other protected attributes, such as sexual orientation, gender identity or sex characteristics.

In this way, religious schools can continue to serve the religious community in which they operate, including to ensure the religious and moral education of children in conformity with their convictions (as provided in Article 18, paragraph 4 of the Covenant).

This is the balance which should be struck in Australian anti-discrimination legislation, including the *Sex Discrimination Act 1984* (Cth) as well as the equivalent laws of the states and territories.

1.2. Best practice laws

Several Australian jurisdictions have already introduced anti-discrimination laws which strike the above-described balance.

The best, and longest-standing, example is the Tasmanian *Anti-Discrimination Act 1998* which has, since its inception more than twenty years ago, protected LGBT students, teachers and other staff against discrimination while allowing religious schools to discriminate in admission and employment in relation to the attribute of religious belief.

This includes in section 51(2):

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

And in section 51A:

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.
- (2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.
- (3) Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection.

(4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person's parents or the other person's grandparents.

A similar approach to LGBT students in religious schools has also been adopted in the *Queensland Anti-Discrimination Act 1991*.

Discrimination against students (section 39)³ and prospective students (section 38)⁴ is prohibited, while section 41 provides that:

An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment may exclude-

- (a) applicants who are not of the particular sex or religion; or
- (b) applicants who do not have a general, or the specific, impairment.

Importantly, section 109(2) of the *Anti-Discrimination Act 1991* (Qld), which establishes the broad exceptions which are otherwise available to religious institutions, provides that these exemptions do not apply in the education area.⁵

Therefore, religious schools in Queensland are able to discriminate on the basis of religious belief in the admission of students, but they are not able to discriminate against students on the basis of their sexual orientation or gender identity.

Significantly, these provisions have been in place since the *Discrimination Law Amendment Act 2002* (Qld), meaning these laws have operated successfully for more than 16 years.

Another jurisdiction which has chosen to allow religious schools to discriminate in the admission of students on the basis of religious belief, while prohibiting discrimination against students on the basis of sexual orientation and gender identity, is the Northern Territory.

This is because, while section 29 of the *Anti-Discrimination Act* (NT) prohibits discrimination against students generally, section 30(2) provides that '[a]n educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular

³ An educational authority must not discriminate-
(a) in any variation of the terms of a student's enrolment; or
(b) by denying or limiting access to any benefit arising from the enrolment that is supplied by the authority; or
(c) by excluding a student; or
(d) by treating a student unfavourably in any way in connection with the student's training or instruction.

⁴ An educational authority must not discriminate-
(a) in failing to accept a person's application for admission as a student; or
(b) in the way in which a person's application is processed; or
(c) in the arrangements made for, or the criteria used in, deciding who should be offered admission as a student;
or
(d) in the terms on which a person is admitted as a student.

⁵ Section 109(1)(d) provides that 'The Act does not apply in relation to... an act by a body established for religious purposes if the act is-
(i) in accordance with the doctrine of the religion concerned; and
(ii) is necessary to avoid offending the religious sensitivities of people of the religion' while section 109(2) provides that 'An exemption under subsection (1)(d) does not apply in the work or work-related area or in the education area.'

religion may exclude applicants who are not of that religion.' There is no equivalent section allowing discrimination against LGBT students.

The most recent jurisdiction to adopt a best practice approach to this issue is the Australian Capital Territory, with the passage of the *Discrimination Amendment Act 2018*.⁶

Under this law, the *Discrimination Act 1991* (ACT) will be amended so that the general religious exception in section 32 does not apply to

an act or practice in relation to-

- (a) the employment or contracting of a person by the body to work in an educational institution; or
- (b) the admission, treatment or continued enrolment of a person as a student at an educational institution.

The existing section 46 of the *Discrimination Act 1991* (ACT) already allows for religious schools to discriminate 'in relation to... a person's application for admission as a student at an educational institution that is conducted solely for students having a religious a religious conviction other than that of the applicant.'

However, the recently-passed amendments will add to this provision. The Act will also allow discrimination by religious schools in relation to employment, if:

- (a) the institution is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed; and
- (b) the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings.⁷

Importantly, religious schools will not be able to discriminate in relation to either the admission of students, or employment of teachers and other staff, on the basis of their religious belief, unless the educational institution has published its relevant policies, and those policies are available to prospective and current students,⁸ and prospective and current employees and contractors,⁹ respectively.

Therefore, when these amendments commence, the ACT will join Tasmania in prohibiting discrimination against LGBT students, teachers and other staff, while Queensland and the Northern Territory continue to prohibit discrimination against LGBT students.

All four allow religious schools to discriminate on the basis of religious belief in terms of student admissions, while Tasmania, the ACT and the Northern Territory¹⁰ expressly allow discrimination on the basis of religious belief in terms of employment of teachers and other staff.¹¹

⁶ Although note that these amendments have yet to commence.

⁷ New section 46(2)

⁸ New section 46(3)

⁹ New section 46(4)

¹⁰ Section 37A(a)(i) *Anti-Discrimination Act* (NT)

¹¹ Queensland has adopted a somewhat more complicated approach in section 25 of the *Anti-Discrimination Act 1991*, which allows discrimination by religious schools where it is a genuine occupational requirement and a range of other factors are satisfied.

These jurisdictions demonstrate that a balance can be achieved to simultaneously support religious freedom while protecting LGBTI people against discrimination.

1.3. Sex Discrimination Act 1984 (Cth) falls short of best practice

The *Sex Discrimination Act 1984* (Cth) ('the SDA') falls a long way short of this best practice approach.

The exceptions which are provided to religious schools in section 38 of the Act are exceptionally broad, allowing discrimination against teachers,¹² contractors¹³ and students¹⁴ on the basis of their sexual orientation, gender identity, marital or relationship status and pregnancy.¹⁵

This is supplemented by the general religious exception in section 37(1)(d) which provides that:

'Nothing in Division 1 or 2 affects:

(d) any other act of practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'

On its face, this provision would also apply to religious schools.

In PIAC's view, these exemptions are excessively broad and not proportionate to the end of protecting religious freedom. It appears that any act of discrimination by religious bodies, regardless of its consequences, is permissible if it conforms with any of the doctrines, tenets or beliefs of a religion, regardless of their significance. Similarly, any injury to 'religious susceptibilities' of even some members of a religion would appear to be enough to invoke the exceptions, regardless of how serious the injury may be to a person who is discriminated against.

These exceptions therefore fail to strike an appropriate balance and amount to unjustifiable infringements on the right to non-discrimination.

The SDA should therefore be amended without delay to remove the ability of religious schools to discriminate both in the admission of students and employment of teachers and other staff, on the basis of irrelevant attributes such as sexual orientation, gender identity and marital or relationship status.

This can be achieved by repealing section 38 entirely, and amending section 37 to ensure that section 37(1)(d) no longer applies to religious educational institutions (in a similar way to the current carve-out in section 37(2) which ensures these exceptions do not allow Commonwealth-funded aged care services operated by religious organisations to discriminate against people accessing these services).¹⁶

¹² Section 38(1)

¹³ Section 38(2)

¹⁴ Section 38(3)

¹⁵ While religious schools can discriminate against teachers and contractors on the basis of sex, but not against students.

¹⁶ 'Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
(a) the act of practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
(b) the act or practice is not connected with the employment of persons to provide that aged care.'

1.4. Other issues

Changes to sections 37 and 38 of the SDA would be an important first step in achieving a balance between religious freedom and the right to be protected against discrimination.

While beyond the scope of the present inquiry, PIAC notes that two additional changes should then follow to more fully provide for this balance.

The first is to provide for a protected attribute of religious belief (or lack of religious belief) in Commonwealth anti-discrimination law. This would bring the Commonwealth in line with the majority of states and territories, with only NSW and South Australia also failing to fully cover this attribute.¹⁷

We note that such a reform is in line with Recommendation 15 of the Religious Freedom Review:

The Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.¹⁸

In PIAC's view, 'appropriate exceptions' for religious schools would involve including similar exceptions to those in Tasmania and the ACT, allowing religious schools to discriminate on the basis of religious belief in the admission of students and employment of teachers (while not allowing discrimination on other attributes).

The second change required is to ensure consistency between the SDA and the *Fair Work Act 2009* (Cth) ('FWA').

The FWA includes religious exceptions in relation to adverse treatment in section 351:

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (2) However, subsection (1) does not apply to action that is:
 - (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
 - (b) taken because of the inherent requirements of the particular position concerned; or
 - (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed- taken
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

¹⁷ In NSW discrimination on the basis of race includes 'ethno-religious origin' (*Anti-Discrimination Act 1977* (NSW) s 4), while in South Australia, discrimination on the basis of 'religious appearance or dress' is prohibited in work or study (*Equal Opportunity Act 1984* (SA) Part 5B).

¹⁸ With Recommendation 16 calling for equivalent protections for religious belief in the anti-discrimination laws of NSW and South Australia.

Section 772(2) of the *Fair Work Act 2009* (Cth) contains similar religious exceptions in relation to unfair dismissal.¹⁹

To provide for consistency, the FWA should therefore be amended to ensure that religious educational institutions are only allowed to discriminate on the basis of religious belief in employment, and not only the basis of other protected attributes like sexual orientation and gender identity.²⁰

2. The Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018

The Bill achieves some, although not all, of the outcomes of the best practice legislation described above.

Positively, it would effectively remove the ability of religious schools to discriminate against students on the basis of their sexual orientation or gender identity (as well as marital or relationship status and pregnancy).²¹

It does this by both repealing section 38(3), the section which specifically allows religious schools to discriminate against students on the basis of these attributes, while also inserting the following provision into section 37:

(3) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:

- (a) the act or practice is connected with the provision, by the body, of education; and
- (b) the act or practice is not connected with the employment of persons to provide that education.

However, it should be noted that this legislation would do nothing to protect LGBT teachers against discrimination.

Despite this, these amendments are clear and relatively straight-forward, and should be passed (with one amendment, see discussion at 3.1 below) as a matter of priority to make schools a safe place for all students irrespective of their sexual orientation and/or gender identity.

Recommendation 1

The Committee recommends to Parliament that the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 should be passed, with amendment.

3. Cross-Bench and Greens Amendments

Two sets of non-Government amendments have been circulated in relation to the Bill, from Centre Alliance Senator Rex Patrick, and Greens Senator Janet Rice, respectively.

¹⁹ However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:
(a) the reason is based on the inherent requirements of the particular position concerned; or
(b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – the employment is terminated:
(i) in good faith; and
(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

²⁰ Amendments should be made to sections 153(2), 195(2), 351(2) and 772(2). At the same time the FWA should be amended to include gender identity and sex characteristics (Intersex status) as protected attributes, given they are currently omitted from the protection provided by the FWA.

²¹ Noting that intersex status is not included in the specific exception in 38(3), and is generally accepted that the broader religious exception in 37(1)(d) should not be interpreted to allow discrimination on this attribute either.

3.1. Centre Alliance Amendments

The amendments circulated by Senator Patrick²² seek to clarify that the proposed new section 37(3), which limits the operation of the general religious exception in section 37(1)(d), applies specifically to religious educational institutions rather than to education provided by religious bodies more generally.

The new wording of section 37(3) would therefore be:

(3) Paragraph (1)(d) does not apply to an act or practice of *an educational institution* established for religious purposes if:

- (a) the act or practice is connected with the provision, by the *institution*, of education; and
- (b) the act or practice is not connected with the employment of persons to provide that education.

Educational institution is already defined in section 4 of the Act to mean ‘a school, college, university or other institution at which education or training is provided.’

These amendments are intended to address concerns, expressed by Professor Parkinson and others, that the proposed section 37(3) as currently drafted would capture ‘Sunday school’ provided by Christian churches, and other forms of informal education by religious bodies.

PIAC supports this amendment as it clarifies the operation of the Bill and is consistent with the Bill’s intention, namely protection of students against discrimination in educational institutions.

Recommendation 2

The Committee recommends that Parliament support Senator Patrick’s amendments to clarify that proposed new section 37(3) covers educational institutions, including schools, colleges and universities, rather than all education provided by religious bodies.

3.2. Greens Amendments

The amendments circulated by Senator Rice²³ address a different issue, by seeking to include amendments to the Bill that amend the Act to also prohibit discrimination against LGBT teachers and other staff.

It does so in two ways. First, by repealing the sections – 38(1) and 38(2) – that specifically allow religious schools to discriminate on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy in relation to the employment of staff and hiring of contractors.

Second, it would amend the proposed new section 38(3) so that the general religious exception in section 37(1)(d) does not apply to anything done in relation to education by religious bodies, including discrimination against people accessing those services and in employment.

PIAC urges the Committee to support these amendments. As indicated earlier, PIAC views the removal of discrimination against LGBT teachers as being essential to achieving an appropriate balance between religious freedom and the right to non-discrimination. Such a change would also be an important step towards national consistency in line with best practice as demonstrated by the legislative schemes in Tasmania and, more recently, the ACT.

²² On sheet 8614.

²³ On sheet 8601.

As also noted above, PIAC also calls for changes to the *Fair Work Act* to provide for consistency in the protection provided to LGBT teachers.

Recommendation 3

The Committee recommends that Parliament support the removal of exceptions in both the Sex Discrimination Act and Fair Work Act that allow religious schools to discriminate against LGBT teachers and other staff, and that legislation to achieve this outcome is passed concurrently with the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018.

4. Government Amendments

The Government has circulated five amendments to the Bill, although substantively they fall into three categories:

- Removing the carve-out for section 37(1)(d)
- Amending the reasonableness test for indirect discrimination, and
- Including new protections for ‘teaching activity’.

We believe all three categories, and all five sets of amendments, should be rejected for the reasons set out below.

4.1. Removing the carve-out to section 37(1)(d)

The first Government amendment²⁴ would remove the proposed new section 37(3) which, as noted above, reads:

(3) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:

- (a) the act or practice is connected with the provision, by the body, of education; and
- (b) the act or practice is connected with the employment of persons to provide that education.

If passed, this would mean that section 37(1)(d) of the Act would retain potential application to the area of education provided by religious organisations, including religious educational institutions.

Therefore, even though the specific exception that allows religious schools to discriminate against students on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy (section 38(3) of the Act) would still be repealed, the continued operation of section 37(1)(d) would allow discrimination as long as it ‘conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’

This would fundamentally undermine the purpose of the Bill, and should be rejected.

PIAC is aware of arguments that, because section 38 applies to the field of education, section 37(1)(d) does not apply to this area, and therefore repealing section 38(3) alone would be sufficient to protect LGBT students against discrimination.

We find this argument unconvincing. The wording of existing section 37(1)(d), on its face, covers education provided by religious organisations. There is, at the very least, sufficient uncertainty that the law should be amended to remove any ambiguity.

²⁴ Sheet KQ147.

Notably, jurisdictions that have general religious exceptions that are drafted in a similar way to the *Sex Discrimination Act*, and which have amended their laws to protect LGBT students against discrimination by religious schools – Queensland and most recently the Australian Capital Territory – have both explicitly limited the application of their general religious exception to ensure it does not apply to education.²⁵

For example, the *Anti-Discrimination Act 1991* (Qld) provides an exception to ‘an act by a body established for religious purposes if the act is- (i) in accordance with the doctrine of the religion concerned; and (ii) necessary to avoid offending the religious sensitivities of people of the religion’²⁶ but then clarifies that this exception ‘does not apply in the work or work-related area or in the education area.’²⁷

Meanwhile, the ACT *Discrimination Amendment Act 2018* amended the general religious exception in 32 of the *Discrimination Act 1991* (ACT), and inserted a new section 32(2), with the effect that the general religious exception does not apply to a ‘defined act’:

by a religious body, means an act or practice in relation to-
(a) the employment or contracting of a person by the body to work in an educational institution; or
(b) the admission, treatment or continued enrolment of a person as a student at an educational institution.

Therefore, the experience of both Queensland and the ACT suggests that as well as repealing any specific exception which allows discrimination against LGBT students, there is a concurrent need to ensure any general religious exception does not allow an alternative means for religious schools to discriminate against students on these grounds.

Recommendation 4

The Committee recommends that Parliament rejects the Government’s amendment to remove the carve-out to section 37(1)(d), as found in proposed new section 37(3) of the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018.

4.2. Amending the reasonableness test for indirect discrimination

The second category of Government amendments are those that would amend the reasonableness test for indirect discrimination within the Act.

There are in fact three different sets of amendments which would achieve this (presumably being moved in the alternative), including two that would add a new section 7B(2)(d),²⁸ and one that would insert a new section 7E, in the Act.

There are some differences between these amendments. For example, KQ150 would apply to all educational institutions, while KQ151 only applies to religious primary or secondary schools and not universities or colleges. Meanwhile, the proposed new section 7E (in KQ 148) includes a

²⁵ The Tasmanian *Anti-Discrimination Act 1998* does not include general religious exceptions, while the Northern Territory *Anti-Discrimination Act* general religious exception is drafted differently to the *Sex Discrimination Act*, and applies to ‘religious observances or practices’ (section 51(d)).

²⁶ Section 109(1)(d).

²⁷ Section 109(2).

²⁸ Sheets Q150 and KQ151 respectively.

requirement that educational institutions must have published policies to justify the discrimination concerned, with those policies made publicly available.²⁹

However, all three amendments are substantively similar in that they would all amend the existing test for reasonableness found in section 7B, by adding special considerations for religious educational institutions.

Specifically, they all would add as a factor to consider, whether 'the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'

As outlined in a joint letter from PIAC, the Human Rights Law Centre and discrimination law experts from around the country, to the Attorney-General the Hon Christian Porter, in November 2018 (see **Attachment C**),³⁰ proposed changes to the test for reasonableless are flawed and should not be enacted.

There are multiple reasons for this, including the fact that the test for reasonableness for indirect discrimination applies to all grounds covered by the Act (including sex, intersex status and potential pregnancy) rather than just those grounds currently included in section 38(3) which allow religious schools to discriminate on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy. Therefore, in a Bill that is intended to reduce discrimination against LGBT students, it may actually make discrimination against other students easier.

The proposed amendments should also be rejected as they add elements of subjectivity into an established test that is primarily objective in nature.

Currently, section 7B requires a court to take into account the following factors:

- (a) the nature and extent of the disadvantage resulting from the actions of the respondent;
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the respondent.

At odds with this approach, the Government's proposed amendments insert subjective criteria, distorting and undermining the objective inquiry required by the definition and the emphasis it places on proportionality.³¹

As noted in the joint letter to Attorney-General Porter:

²⁹ Specifically, proposed new section 7E(b) provides that 'the condition, requirement or practice is imposed, or proposed to be imposed, in a manner that is consistent with a policy of the educational institution that complies with subsection (2)', with subsection (2) then stating: 'A policy of an educational institution complies with this subsection if the policy:
(a) is in writing; and
(b) is publicly available; and
(c) sets out the educational institution's policy in relation to adherence to its doctrines, tenets, beliefs or teachings; and
(d) complies with any other requirements prescribed by the regulations for the purposes of this paragraph.'

³⁰ PIAC et al, Letter to Attorney-General Christian Porter Regarding Proposed Amendments to Test for Reasonableness in Indirect Discrimination, 8 November 2018, available at <https://www.piac.asn.au/wp-content/uploads/2018/11/18.11.08-PIAC-HLRC-Letter-to-AG-1.pdf>

³¹ All three amendments also require that a school 'in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student' which is also to some extent subjective and is incongruous sitting alongside the existing list of more-objective factors.

Australian anti-discrimination is notoriously complex. It is an unfortunate feature of our jurisprudence that many court decisions have further complicated the law, rather than simplifying it. The proposed amendment [to the test for reasonableness] will introduce further unnecessary complexity and uncertainty.

Perhaps the most important reason why these amendments should not be passed is that there is no legitimate problem which they are attempting to ‘fix’.

Even with the repeal of section 38(3), and the carve-out to section 37(1)(d), of the Act, there is nothing to prevent religious educational institutions from engaging in reasonable activity based on the religious ethos of the school.

This includes activity that may disadvantage LGBT students, provided it passes the existing test of reasonableness in section 7B (considering the extent of the disadvantage, the feasibility of overcoming it and whether the disadvantage is proportionate to the outcome sought).

It is not clear why religious schools require a special test of ‘reasonableness’. Nor is it clear what conditions, requirements or practices religious schools are currently imposing, or wish to impose, that would not meet the existing test for reasonableness.

It is notable that those jurisdictions that have already prohibited discrimination against LGBT students have not considered it necessary to amend their respective tests for indirect discrimination to include specific consideration of the ‘doctrines, tenets, beliefs or teachings’ of religious schools.

In these circumstances, the case for change is simply not made out.

Recommendation 5

The Committee recommends that Parliament rejects the Government’s amendments to the test for reasonableness for indirect discrimination within the Sex Discrimination Act.

4.3. New protection for ‘teaching activity’

The third set of amendments circulated by the Government establishes a new protection for ‘teaching activity’ in religious schools. These would fundamentally undermine the purpose of the changes proposed by the Bill by allowing both direct and indirect discrimination in the course of broadly defined ‘teaching activity’ at religious schools.

Proposed new section 7F provides:³²

Educational institutions established for religious purposes

(1) Nothing in this Act renders it unlawful to engage in teaching activity if that activity:

(a) is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and

(b) is done by, or with the authority of, an educational institution that is conducted in accordance with those doctrines, tenets, beliefs or teachings.

(2) In this section:

teaching activity means any kind of instruction of a student by a person employed or otherwise engaged by an educational institution.

³² Sheet KQ149.

There are a number of serious problems with this amendment. It is unclear what justification exists for the provision, and it appears neither reasonably necessary nor proportionate to allow religious schools to operate in this way, contrary to the principle of non-discrimination.

First, the section would apply to all protected attributes under the SDA. While the current specific exception allowing discrimination against students by religious schools covers sexual orientation, gender identity, marital or relationship status or pregnancy (section 38(3)), this new provision would extend permissible discrimination on the basis of sex, intersex status and potential pregnancy.

Second, it permits both indirect and even direct discrimination against students. For example, it would allow a teacher at a religious school to refuse to teach an LGBT student, or refuse to allow them to participate in a classroom activity, if the teacher is acting in good faith and in accordance with the beliefs of that religion.

Third, the proposed definition of ‘teaching activity’ is incredibly broad. It applies to ‘any kind of instruction’, which could include activity inside or outside of the classroom, including directions about behaviour, disciplinary action or even concerning dress codes (which is particularly relevant for trans and gender diverse students). It also applies to any ‘person employed or otherwise engaged’ by a school, meaning it does not need to be performed by a teacher, and could be done by volunteers or others.

It is important to emphasise that nothing in the Bill prohibits religious instruction or the reasonable conduct of a religious school in accordance with its values.

This amendment would fundamentally undermine the purpose of the Bill. It should be rejected.

Recommendation 6

The Committee recommends the Parliament rejects the Government’s amendment to allow discrimination against LGBT and other students in the course of ‘teaching activity’.

5. Reference to Australian Law Reform Commission

Finally, PIAC notes that the Government, in its response to the Religious Freedom Review, has proposed to refer the issue of religious exceptions to anti-discrimination laws to the Australian Law Reform Commission (ALRC) for further review.

From the Government response:

Accordingly, the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to consider recommendations 1 and 5 to 8 of the Review with a view to settling upon a legislative mechanism that would, on a nationally consistent basis, achieve the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to prohibitions on discrimination based on a person’s identity, while also protecting the right of religious institutions to reasonably conduct themselves in a way consistent with their religious ethos.

Other than recommendation 1 – which proposes that ‘those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations’ – these recommendations all relate specifically to discrimination by religious schools.

We strongly oppose the referral of the issue of discrimination against LGBT and other students to the Australian Law Reform Commission rather than by having this issue addressed by the Commonwealth Parliament as a matter of urgency.

As described above, there are already best practice laws in this area in Tasmania and the Australian Capital Territory. They have set a clear precedent for the Commonwealth, and other jurisdictions, to follow in order to ensure that LGBT students and teachers are not discriminated against while also supporting the religious freedom of schools and their communities to preference students and teachers of that religious background.

We also express caution about references in this possible referral to settling upon a legislative mechanism that would operate 'on a nationally consistent basis'. While national consistency is a worthwhile objective, it should be achieved by raising the standard to best practice. It must not be achieved by overriding the best practice laws of places like Tasmania and the Australian Capital Territory,³³ thereby increasing the range of circumstances in which LGBT students and teachers can be discriminated against.

Recommendation 7

That the Committee call for the Government not to refer the issue of religious exceptions to anti-discrimination laws to the Australian Law Reform Commission, and instead to legislate immediately to protect LGBT students against discrimination by religious schools.

Recommendation 8

That the Committee support the principle that national consistency should not be achieved at the cost of increasing discrimination against LGBT students or teachers in any jurisdiction.

³³ And Queensland and the Northern Territory in relation to LGBT students (although not teachers).