



Community
Legal Centres
NSW

20 November 2018

Committee Secretary
The Senate Legal and Constitutional Affairs References Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Submission to the Inquiry on Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff

Kingsford Legal Centre (**KLC**) and Community Legal Centres NSW (**CLCNSW**) welcome the opportunity to make this submission. However, we note we are only able to provide limited comments due to the extremely short consultation period, with the matter being referred to the Committee on 13 November 2018 with submissions due on 20 November 2018. We are disappointed that the important and complex issue of promoting and protecting the human rights of students and staff in faith-based educational institutions will not be subject to greater consultation due to this extremely short timeframe. Additionally, we note that the final report of the Religious Freedom Review (**the Ruddock Review**) has not yet been formally publicly released and that it is unclear what the Commonwealth government's proposed legislative response to the Ruddock Review is.

Summary of recommendations

KLC and CLCNSW recommend that:

1. Religion be a protected attribute under federal anti-discrimination law. Religion should be defined broadly to include both having a religion or belief and not having a religion or belief.
2. Protections against religious vilification be introduced at the federal level.
3. Religious organisations which receive public funding or perform a service on behalf of government should not be exempt from federal anti-discrimination laws.

4. a) All exemptions, including religious exemptions should be removed from the SDA and replaced with a general limitations clause that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim. The general limitations clause should be drafted to ensure that acts that are currently unlawful under the *Sex Discrimination Act 1984* (Cth) remain unlawful. In determining the application of the general limitation clause, the judiciary should be required to consider the objectives of the *Sex Discrimination Act 1984* (Cth).
4. b) In the alternative, all religious exemptions (with the exception of subsections 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth)) be removed from federal anti-discrimination law.
5. The federal government introduce a Human Rights Act.

About Kingsford Legal Centre and Community Legal Centres NSW

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2017 KLC provided 266 advices in the area of discrimination, which was over 16% of all advice provided. These statistics indicate that discrimination remains a common experience for our clients and community.

Community Legal Centres NSW

CLCNSW is the peak representative body for almost 40 community legal centres in NSW. CLCNSW supports, represents and advocates for its members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

Community legal centres are independent non-government organisations that provide free legal services to individuals and communities, at times when that help is needed most, and particularly to people facing economic hardship.

CLCNSW represents the views of community legal centres to the government and broader community, advocates on key law reform and policy issues, and supports community legal centres to improve the efficiency and quality of services they deliver to the community.

Freedom of religion and the right to equality and non-discrimination under international human rights law

Freedom of religion is protected under Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR):

“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.”¹

While freedom of religion or belief is a non-derogable right (a right that cannot be suspended, even in a state of emergency), the freedom to manifest one’s religion may be subject to limits under Article 18(3) of the ICCPR:

“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.”

The right to equality and non-discrimination is protected under Article 26 of the ICCPR:

“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.”

Freedom of Religion under Australian Law

Protections under the Constitution

Freedom of religion has limited protection under the Australian Constitution. Section 116 of the Constitution provides:

“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for an office or public trust under the Commonwealth.”

Section 116 essentially limits the Commonwealth Parliament from enacting laws that establish a ‘state religion’ or prohibit the free exercise of religion. However, this protection is limited as it only applies to the Commonwealth, not states and territories, and does not apply to all government action, but only to legislation or actions taken under legislation.

Protections under anti-discrimination law

Case study: Jake

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 (1) (‘ICCPR’).

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school.

We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.

KLC and CLCNSW submit that religious freedom could be better protected under federal anti-discrimination law. There is limited protection against discrimination on the basis of religion at the Commonwealth level. The *Fair Work Act 2009* (Cth) prohibits discrimination on the basis of religion in modern awards, enterprise agreements, adverse action and termination.² While section 351 of the *Fair Work Act* prohibits discrimination on the basis of religion in employment, this law is only in effect where a state or territory law that prohibits religious discrimination is in place. This means in states such as NSW, where religion is not a protected attribute under state discrimination law, complainants who have suffered religious discrimination have no access to effective remedies.

Case study: Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled, and he was not allowed to continue his studies. This caused significant distress to Ali and his family.

We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

The *Australian Human Rights Commission Act 1986* (Cth) only protects against religious discrimination if it has the effect of impairing equality of opportunity or treatment in employment or occupation.³ However, there are no enforceable remedies for complainants under this scheme.

Being subject to discrimination has a negative impact on individuals' health and wellbeing. Research on the link between religious discrimination and health indicates that religious discrimination increases the risk of anxiety and depression.⁴ Additionally, individuals experiencing discrimination in employment may suffer financial distress as a result of not being hired or dismissed.

KLC and CLCNSW recommend that religion should be a standalone protected attribute in Commonwealth discrimination law, to increase protection of the right to freedom of religion.

² *Fair Work Act 2009* (Cth) ss 153, 195, 351, 772.

³ *Australian Human Rights Commission Act 1986* (Cth) s 3(1).

⁴ VicHealth, *How Does Freedom of Religion and Belief Affect Health and Wellbeing? Building Health by Supporting Diversity and Reducing Discrimination* (2011).

Religion should be defined broadly to include both having a religion or belief and not having a religion or belief.

Recommendation:

We recommend that:

1. Religion be a protected attribute under federal anti-discrimination law. Religion should be defined broadly to include both having a religion or belief and not having a religion or belief.

Vilification on the ground of religion

Section 18C of the *Racial Discrimination Act 1975* (Cth) protects against vilification done because of race, colour or national or ethnic origin.⁵ Religious groups that are found by the court to be a recognised 'racial' group can use section 18C to complain of religious vilification. For example, members of the Jewish faith, a recognised ethno-religious group, can use section 18C to complain about anti-Semitic comments or conduct. However, persons of other faiths that are not recognised ethno-religious groups, such as Christians, Muslims and Hindus, are not afforded any protection against religious vilification by federal anti-discrimination laws.

Case Study -Zeinab

Zeinab is Muslim and wears the hijab. One day, while waiting in line at a café, a fellow customer starting yelling at her. The customer said, "go back to your country, terrorist". When Zeinab went back to the café the following week, the same customer was there and yelled at her again, saying "If you love Islam...I'll fucking show you", calling Zeinab a "fucking murderer", saying "maybe you have a knife to kill me because Muslims kill people", and telling Zeinab to "fuck off".

Zeinab was very intimidated and shaken by this incident and reported it to the police. We advised Zeinab that she was unable to take action under section 18C, as it doesn't protect Muslims against religious vilification.

Protections against religious vilification should be introduced at the federal level, in order to protect people from harm and distress caused by religious hatred.

Recommendation:

We recommend that:

2. Protections against religious vilification be introduced at the federal level.

⁵ *Racial Discrimination Act 1975* (Cth) s 18C.

Balancing freedom of religion and the right to equality and non-discrimination

Religious exemptions

Permanent exemptions from Commonwealth discrimination law exist for religious organisations for the protected attributes of age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities. The exemptions permit religious organisations to discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.⁶

The *Sex Discrimination Act 1984* (Cth) ('**SDA**') permits religious bodies to discriminate against people on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in:

- the ordination or appointment of priests, ministers of religion or members of any religious order;
- the training or education of people seeking ordination or appointment as priests, ministers or of religion; and
- the training or education of people to participate in religious observance or practice.⁷

Subsection 37(1)(d) of the SDA permits bodies established for religious purposes to discriminate against people on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in relation to acts or practices that conform to the doctrines, tenets or beliefs of that religion; or are necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Section 38 of the SDA permits educational institutions established for religious purposes to discriminate against employees and contract workers on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy, where:

- the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
- the person who discriminates does so in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Subsection 38(3) of the SDA permits educational institutions established for religious purposes to discriminate in the provision of education or training on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy. This effectively gives licence to religious schools to discriminate against students. For example, under this

⁶ *Age Discrimination Act 2004* (Cth) s 35; *Sex Discrimination Act 1984* (Cth) ss 37, 38.

⁷ *Sex Discrimination Act 1984* (Cth) s 37.

exemption, religious schools can refuse to admit students or expel students based on their sexual orientation or gender identity, or on the basis of their parents' sexual orientation.

Many religious organisations, including schools, receive public funding for performing a service on behalf of government. A vast range of social and welfare services are managed by faith-based organisations. While the law prohibits religious organisations receiving public funding from discriminating in the provision of aged care, religious organisations providing services in education, adoption, employment assistance and child welfare services are free to discriminate against prospective employees, employees and people accessing these services, including students.

Religious exemptions remove protections against discrimination for a large number of people who access or are employed by government funded services. For example, 1,324,133 students attended non-government schools in 2017.⁸ Approximately 20% of all students attend Catholic schools⁹, and between 2018 and 2027 the Federal government will invest \$145.3 billion in funding for non-government schools.¹⁰ Religious educational institutions are also a significant employer in Australia. For example, the Catholic Education Office employs more than 10,000 people in the Sydney Archdiocese,¹¹ while the Sydney Anglican School Corporation employs 1, 350 staff.¹²

KLC and CLCNSW submit that the religious exemptions in the SDA are archaic, do not reflect community values, and fail to meet Australia's obligations under international human rights law. We note that LGBTI young people are more likely to experience mental health issues, anxiety and depression than the general population:

- LGBTI people aged 16 and over are nearly three times more likely to diagnosed with depression in their lifetime;
- LGBTI young people aged 16 to 27 are five times more likely to attempt suicide during their lifetime;
- 16% of LGBTI young people aged 16 to 27 reported that they had attempted suicide;
- 42% of LGBTI young people aged 16 to 27 reported having thoughts about suicide;
- 33% of LGBTI young people aged 16 to 27 reported having self-harmed, 41% reported thoughts of harming themselves;
- 47.7% of LGBT people (48.2% women; 29.3% men) aged 16 to 24 reported being diagnosed or treated for a mental disorder in the past three years;

⁸ Australian Bureau of Statistics, *4221.0 Schools, Australia 2017 – Summary of Findings* (2 February 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features22017>>.

⁹ ABC News, *Here's how Australia's Schools are Funded – and we promise not to mention Gonski* (30 May 2017) <<http://www.abc.net.au/news/2017-05-30/school-funding-explained-without-mentioning-gonski/8555276>>.

¹⁰ Department of Education and Training, *School Funding*, <<https://www.education.gov.au/funding-schools>>.

¹¹ Catholic Education Office, *Employment* (2018) <<https://sydcatholicschools.nsw.edu.au/employment/>>.

¹² The Anglican Schools Corporation, *Report 2017*, 6 <http://www.tasc.nsw.edu.au/resources/PDFs/Publications/%202017_Synod_Report.pdf>.

- 43.5% of Transgender and Gender Diverse people aged 18 to 19 have a major depressive syndrome;
- 21.7% of Transgender and Gender Diverse people aged 18 to 19 have an anxiety syndrome; and
- LGBT young people aged 16 to 24 average K10 score of 23.8, indicating high levels of psychological distress.¹³

Allowing religious schools to discriminate against LGBTI children is not acceptable given the adverse impact this discrimination has on their mental health, social networks and access to education.

Religious organisations which receive public funding or perform a service on behalf of government should not be exempt from anti-discrimination laws. These exemptions send a message that discrimination is acceptable in our community, which contributes to the entrenchment of systemic discrimination against vulnerable groups of people. It allows the right to freedom of religion to prevail over other rights protected by international human rights law, including the right to live free from discrimination.

Recommendation:

We recommend that:

3. Religious organisations which receive public funding or perform a service on behalf of government should not be exempt from anti-discrimination laws.

Replacing religious exemptions with a general limitations clause

Religious exemptions in federal anti-discrimination law are complex and make it difficult for rights-holders and duty-bearers to understand their rights and responsibilities. These exemptions entrench systemic discrimination and do not require religious bodies to consider whether they could achieve the same objective by non-discriminatory means. The blanket religious exemptions in the SDA are broad, and require no analysis of reasonableness, necessity, proportionality or legitimacy of aims. One fundamental right (freedom of religion) should not be automatically privileged above other fundamental rights (right to non-discrimination and equality) by the granting of a permanent blanket exception.

KLC and CLCNSW support the removal of all exemptions, including religious exemptions, from the SDA, to be replaced with a general limitations clause. A general limitations clause would deem discriminatory actions or conduct to be lawful when such actions or conduct are a reasonable, necessary and proportionate means of achieving a legitimate aim. This would allow a more thorough examination where the right to freedom of religion and the right to equality and non-discrimination appear to be in conflict, and consideration of how these rights can be best balanced. The general limitations clause should be drafted to ensure that acts that are currently unlawful under the SDA remain unlawful. In determining

¹³ National LGBTI Health Alliance, *The Statistics at a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* < <https://lgbtihealth.org.au/statistics/>>.

the application of the general limitation clause, the judiciary should be required to consider the objectives of the SDA.

Removing these religious exemptions and replacing them with a general limitations clause would ensure that freedom of religion is not privileged over and above other rights, yet is still adequately protected.

If a general limitations clause is not accepted, KLC and CLCNSW submit that in the alternative, all religious exemptions (with the exception of subsections 37(1)(a)-(c) of the SDA which provide for the training and ordination of ministers of religion) be removed from the SDA.

Recommendation:

We recommend that:

4. a) All exemptions, including religious exemptions, should be removed from the *Sex Discrimination Act 1984* (Cth) and replaced with a general limitations clause that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim. The general limitations clause should be drafted to ensure that acts that are currently unlawful under the *Sex Discrimination Act 1984* (Cth) remain unlawful. In determining the application of the general limitation clause, the judiciary should be required to consider the objectives of the *Sex Discrimination Act 1984* (Cth).
4. b) In the alternative, all religious exemptions (with the exception of subsections 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth)) be removed from federal anti-discrimination law.

Leaked proposed amendments to the *Sex Discrimination Act 1984* (Cth)

KLC has viewed leaked proposed amendments to the SDA, the Sex Discrimination Amendment (Protecting students) Bill 2018 and has serious concerns about these proposed amendments. We note we have signed on to the attached Public Interest Advocacy Centre and Human Rights Law Centre letter dated 8 November 2018 that details these concerns (see **Attachment A**).

Promoting comprehensive protection of rights in a national Human Rights Act

Australia is party to the key international human rights conventions, and has an obligation to adopt laws and other measures to give effect to the human rights enshrined in these treaties in domestic law. However, Australia is yet to give comprehensive protection to human rights in domestic law. Currently, human rights in Australia are protected through a myriad of federal, state and territory laws, policies and practices, and through the common law. KLC and CLCNSW are concerned that the current legal framework makes it difficult for ordinary Australians to identify their rights and freedoms, and to understand the extent to which their rights are recognised at law. The complex interactions of the various sources of law also make it difficult to concisely articulate how these legal rights work. This hinders the promotion of respect for fundamental human rights.

KLC and CLCNSW believe that it would assist ordinary Australians' understanding of their rights and responsibilities to set these out in one single document. Australian law currently adopts a bottom-up approach, addressing the protection of each right individually. This is an unsatisfactory approach in which some fundamental rights are adequately protected whilst others are not protected at all. We submit that this creates too much ambiguity and leaves too many gaps. KLC and CLCNSW recommend that the most appropriate way to ensure freedom of religion is protected under Australian law is for the enactment of a national human rights act.

Enacting a national Human Rights Act would allow more concise classification and better protection of human rights and freedoms, including freedom of religion. A national Human Rights Act would also recognise that human rights are indivisible, and would not privilege some rights over others.

Additionally, we note that there is broad support for a national Human Rights Act. The National Human Rights Consultation in 2009 found that the majority of those attending community roundtables favoured a Human Rights Act, and 87% of those who presented submissions to the Committee expressing a view on the question were in support of such an Act.

Recommendation:

We recommend that:

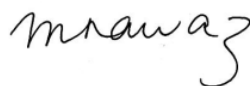
5. The federal government introduce a Human Rights Act.

If you wish to discuss our submission, please contact us at m.nawaz@unsw.edu.au.

Yours faithfully,
KINGSFORD LEGAL CENTRE



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