

EQUALITY CAMPAIGN SUBMISSION

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

1. Executive Summary

Following the announcement of the results of the Australian Marriage Law Postal Survey on 15 November, the Parliament moved promptly to pass the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Much of the public and parliamentary debate surrounding this Act focused on whether it adequately protected religious freedom. Indeed it was in the context of this public debate that the then Prime Minister announced on 22 November 2017 the appointment of an Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion.¹ Although the report of the Expert Panel is yet to be made public, a copy of the recommendations were leaked to the media. This sparked a national debate, especially around the issue of the Inquiry, namely legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff. This was because many Australians were surprised and outraged to learn that under current anti-discrimination laws schools and other services run by religious bodies are able to legally discriminate against LGBTI children, clients and workers.

We welcome the opportunity to make this submission to the Legal and Constitutional Affairs References Committee on legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.

The Australian Marriage Law Postal Survey saw the community vote overwhelmingly for fairness and equality for LGBTI people. They did not vote for more discrimination. We submit that the law already goes too far in allowing religious organisations to discriminate through broad exemptions in federal and state discrimination laws. We want equality for all children to learn, and equality for all people to do their job.

This submission briefly considers the relevant international and national legal framework, as well as the need to balance the right to freedom of religion with other human rights, including the right to freedom from discrimination and the right to equality, before looking at the lessons that can be drawn from the campaign for marriage equality.² This submission will also include several stories from students and teachers who share their experiences of discrimination in schools.

This submission will recommend the repeal of legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity.

¹ Prime Minister, "Media Release: Ruddock to examine religious freedom protection in Australia", 22 November 2017. Available from: <https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia>

² This submission draws on material prepared by the Human Rights Law Centre.

2. Background

2.1 About Australian Marriage Equality and Australians for Equality ('the Equality Campaign')

Australian Marriage Equality is a national organisation that worked for equal marriage for all consenting adults, as we believe a person's gender or sexuality should not affect their legal rights and responsibilities under Australian law. The volunteer based organisation was first formed in 2004 to campaign against proposed amendments to the *Marriage Act 1961* (Cth) limiting marriage as only between a man and a woman. Since then the organisation grew with representation across most States and Territories and played a leading role in growing support for marriage equality in the community and the parliament.

Australians for Equality is a national organisation established to improve the wellbeing and circumstances of LGBTI people in Australia and their families and children. Australians for Equality was established in November 2015, following the plebiscite policy announcement by the Coalition, and works to end discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Australia's marriage laws.

In 2016 the two organisations launched the Equality Campaign, a national campaign to achieve marriage equality through a parliamentary vote. In 2017, after the Federal Government decided to resolve the issue of marriage equality by holding the Australian Marriage Law Postal Survey. The Equality Campaign led the 'YES' campaign.

The Yes campaign was a campaign of millions of conversations about real people's lives. The Yes campaign knocked on 102,620 doors, made over 1 million calls with real people chatting with Australians about equality, handed out 5 million leaflets reminding people to post their Yes, distributed 250,000 posters, gave away 150,000 badges to wear Yes with pride, and covered our streets with 1 million Yes stickers. In all 15,600 people volunteered, many for their first ever campaign.

The Equality Campaign worked hard to bring Australians together. While the survey and the debate it generated was unnecessary and divisive, achieving marriage equality was a unifying moment for our nation. This was reflected in the results of the Australian Marriage Law Postal Survey: of the eligible Australians who expressed a view on the question, the majority indicated that the law should be changed to allow same-sex couples to marry, with 7,817,247 (61.6%) responding Yes and 4,873,987 (38.4%) responding No. Nearly 8 out of 10 eligible Australians (79.5%) expressed their view. All states and territories recorded a majority Yes response. 133 of the 150 Federal Electoral Divisions recorded a majority Yes response, and 17 of the 150 Federal Electoral Divisions recorded a majority No response.

Following the announcement of the results of the Australian Marriage Law Postal Survey on 15 November, the Parliament moved promptly to pass the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Much of the public and parliamentary debate surrounding this Act focused on whether it adequately protected religious freedom. Indeed it was in the context of this public debate that the then Prime Minister announced on 22 November 2017 the appointment of this Expert Panel to examine whether Australian law

adequately protects the human right to freedom of religion.³ Although the report of the Expert Panel is yet to be made public, a copy of the recommendations were leaked to the media. This sparked a national debate, especially around the issue of the Inquiry, namely legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff. This was because many Australians were surprised and outraged to learn that under current anti-discrimination laws schools and other services run by religious bodies are able to legally discriminate against LGBTI children, clients and workers.

The Equality Campaign wants equality for all children to learn, and equality for all people to do their job.

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2.2 Terms of Reference

The Legal and Constitutional Affairs References Committee shall examine and report on legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984*, with particular reference to proposals for amendments to current legislation, and any related matters.

³ Prime Minister, "Media Release: Ruddock to examine religious freedom protection in Australia", 22 November 2017. Available from: <https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia>

3. General principles

3.1 Legal framework

(a) International human rights law

Freedom of thought, conscience and belief is a fundamental human right. This right is protected under international law and allows people of faith to practice their religion free from persecution and discrimination. For example, Art 18(1) of the International Covenant on Civil and Political Rights (ICCPR) states:⁴

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.

This obligation was elaborated on by the United Nations Human Right Committee in *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, which is regarded as the best distillation of the international law obligation to protect freedom of religion or belief. Professor Carolyn Evans states that General Comment 22 is “the most comprehensive and detailed international law instrument giving substance to the protection of freedom of religion or belief under art 18 of the ICCPR” and that it “should be understood as an authoritative and expert overview of the obligations under the ICCPR”.⁵

Relevantly, these international instruments distinguish the freedom of thought, conscience, religion or belief (which is absolute) from the freedom to manifest religion or belief (which can be limited if such limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others). This distinction will be considered in detail later in this submission.

(b) Australian law

The Australian Constitution recognises freedom of religion in s 116:

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 any office or public trust under the Commonwealth

The language of this provision is largely borrowed from two provisions of the US Constitution; Art VI cl 3 and the First Amendment. Section 116 is limited in two important respects. First, s 116 only applies at a federal level; there is nothing in s 116 that prevents a State from making a law that establishes a religion, imposes a religious observance, prohibits the free

⁴ See also the Universal Declaration of Human Rights of 1948 and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981, and the United Nations Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)* (Office of the High Commissioner for Human Rights, 1993).

⁵ Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012) 33.

exercise of religion, or imposes a religious test as a qualification for public office.⁶

Interestingly, proposals to amend s 116 to make it applicable to the States were rejected at referendums held in 1944 and 1988. Second, s 116 only prohibits the making of laws. This means that s 116 only directly restricts the exercise of legislative power and any impact it has on the exercise of executive or judicial power is indirect.

Section 116 has only been argued in a handful of cases before the High Court and so far no law has been struck down by the High Court as inconsistent with s 116.

Three States or Territories also explicitly protect religious freedom: Tasmania,⁷ the Australian Capital Territory,⁸ and Victoria.⁹

There is also some protection of religious freedom in federal and state legislation. For example, the Australian Human Rights Commission has identified three areas where protections currently exist:¹⁰

- discrimination law in most Australian jurisdictions prohibits discrimination on the grounds of religion in areas such as education, employment and access to good and services;
- exemptions to laws that prohibit discrimination on the grounds of age, gender and sexual orientation are given to religious bodies in particular circumstances; and
- state-based religious vilification or hate laws can protect freedom of religion by allowing people to exercise their religion free of fear of threats, intimidation or hostility.

3.2 The right to freedom of religion and its limits

The right to freedom of religion includes the beliefs of all religions as well as the right not to profess any religion or belief. Religious freedom is inherently linked to the enjoyment of other human rights, including freedom of thought, conscience, speech and association. Although the right to freedom of religion is a fundamental human right that should be protected under law, it should not come at the expense of other rights. Rights need to be protected and balanced in a coherent legal framework.

For the LGBTI community it is particularly important that the right to freedom of religion is protected and balanced against the right to freedom from discrimination and the right to equality. Non-discrimination and equality rights are central features of the major human rights treaties. For example, rights of equality and non-discrimination are included in the following international instruments:

⁶ See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

⁷ See s 46 of the *Constitution Act 1934* (Tas).

⁸ See s 14 of the *Human Rights Act 2004* (ACT).

⁹ See s 14 of the *Charter of Human Rights and Responsibilities 2006* (Vic).

¹⁰ Australian Human Rights Commission, *Religious Freedom Roundtable – Issues Paper* (22 October 2015) 5.

- International Covenant on Civil and Political Rights (articles 2.1, 14, 24, 25 and 26);
- International Covenant on Economic, Social and Cultural Rights (article 2.2);
- Convention on the Elimination of All Forms of Racial Discrimination (articles 1, 2, 4 and 5);
- Convention on the Rights of the Child (article 2);
- Convention on the Elimination of All Forms of Discrimination Against Women (articles 2, 3, 4 and 15);
- Convention on the Rights of Persons with Disabilities (articles 3, 4, 5 and 12); and
- implicitly in the Convention Against Torture (since treatment being discriminatory can also contribute to it being found to be “degrading”).

One way in which these rights could be appropriately balanced would be for Australia to adopt a comprehensive bill of rights that protects and balances all fundamental human rights.¹¹ Although we would support this approach, it seems unlikely given that the Prime Minister has stated that “The Government is particularly concerned to prevent uncertainties caused by generally worded Bill of Rights-style declarations”.¹²

(a) The distinction between religious belief and conduct

As outlined above, when considering religious freedom it is important to distinguish between religious belief and religious conduct or action. The freedom to hold religious belief is absolute. This is necessarily so; it is not possible for a legislator or court to regulate or restrict what a person or persons believes or thinks. There is no way for the legislator or court to even know what a person or persons thinks in their hearts and minds. It is, however, possible for a legislator or court to regulate or restrict the way in which a person or persons acts or conducts themselves in accordance with what they believe or think. However just because it is possible to regulate or restrict religious conduct or action, it does not mean that all such conduct or action should be regulated or restricted. Rather the approach adopted under international law is that while the freedom to hold religious beliefs is absolute, the freedom to manifest religion or belief (that is the conduct or action taken in reliance on or in accordance with religious belief) may be limited but 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*” (emphasis added).¹³ The rights of equality and non-discrimination do not interfere with religious belief and they should be accommodated within the regulation of religious conduct in a way that is directly related and proportionate to the specific need on which they are predicated.

¹¹ See George Williams and Daniel Reynolds, *A Charter of Rights for Australia*, 4th ed (UNSW Press, 2017).

¹² Prime Minister, “Media Release: Ruddock to examine religious freedom protection in Australia”, 22 November 2017. Available from: <https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia>

¹³ Article 18(3) of the ICCPR.

In its 2015 Religious Freedom Roundtable Issues Paper, the Australian Human Rights Commission correctly articulated the importance of equality and non-discrimination in the context of religious freedom in these terms:¹⁴

Human rights are underpinned by the assumption of the inherent equality and dignity of all individuals. Consequently, the right to religious freedom must accommodate the right that all people are equal before the law and are entitled to the equal protection of the law without any discrimination. This means that people must be treated equally by law and government irrespective of their faith, age, disability, gender, race, sexual orientation, gender identity, intersex status or other irrelevant personal attribute.

Religious belief should not be used as a justification to water down Australia's discrimination laws.

The distinction between freedom of belief and conduct is especially important due to the potential for far-reaching religious freedom to lead to the suppression not merely of freedom of religion of others but to other rights as well.¹⁵ Nowak contends that this is because of the inherently controversial character of freedom of religion; most religious faiths believe their faith to represent the "absolute truth", therefore necessarily rejecting the faiths of others.¹⁶

(b) The distinction between public and private spheres

Another critical distinction relevant to the regulation of religious conduct is the distinction between the public and private spheres. This is significant as this distinction marks the point at which the religious beliefs of one person or a group of persons will impact on other people and society generally. Once a religious practice impacts upon other people who do not also believe in that religion, the capacity of a government to regulate those activities are enlivened. This is not to say that public activities of a religion are denied the protection of freedom of religion, rather it means that the impact of these activities on others will be relevant for the legislator or court engaging in the balancing exercise.

¹⁴ Australian Human Rights Commission, *Religious Freedom Roundtable – Issues Paper* (22 October 2015) 5.

¹⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (N.P. Engel Press, 2005) 408.

¹⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (N.P. Engel Press, 2005) 409.

(c) Determining appropriate limitations

The considerations discussed above were correctly summarised by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its Interim Report last year on the *Legal Foundations of Religious Freedom in Australia*.¹⁷

The right to hold a religion or belief is absolute. The right to manifest a religion or belief is not absolute, as the manifestation of one's beliefs may impact the enjoyment of the rights of other people. The appropriate limitations on the right to manifest a religion or belief are carefully considered in international human rights jurisprudence, including within the ICCPR itself. Among other requirements, any limitations on the right to manifest one's religion or belief must be specifically prescribed in law, must be reasonable and proportionate, and, significantly, must be necessary to achieve a legitimate aim or respond to a pressing public or social need.

We submit that prohibiting discrimination on the basis of sexuality, gender identity or intersex status, even when done so on the basis of religious belief, is a reasonable and proportionate limitation on religious freedom that is necessary to achieve fairness and equality for LGBTI people. Indeed, this is the moral and political lesson that can be drawn from the results of last year's Australian Marriage Law Postal Survey and the subsequent debate over religious freedom.

¹⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations of Religious Freedom in Australia* (Parliament of the Commonwealth of Australia, 2017), 29.

4. Lessons from the campaign for marriage equality

Last year 12,727,920 (79.5%) eligible Australians participated in the Australian Marriage Law Postal Survey. Although this was a profoundly difficult time for LGBTI people and their families and friends, it is essential to acknowledge that the Australian community voted overwhelmingly for fairness and equality for LGBTI people. The Australian community did not vote for more discrimination.

This clear mandate for fairness and equality was reflected in the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) that was passed by the Parliament on 7 December 2017. This Act was the result of a robust Senate inquiry and presented a workable compromise that delivered marriage equality for LGBTI couples whilst protecting the religious celebration of marriage. It was also the subject of considerable public debate before, during and after the postal survey, and was passed overwhelming by both Houses of Parliament. In passing this Act, the Parliament rejected the legally unorthodox and unnecessary amendments that were introduced into the Parliament in the name of religious freedom that would have wound back discrimination protections for LGBTI people.

4.1 Religious Freedom Review

On 22 November 2017 the then Prime Minister established an Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion.¹⁸ Although the report of the Expert Panel is yet to be made public, a copy of the recommendations were leaked to the media. This sparked a national debate, especially around the issue of the Inquiry, namely legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff. This was because many Australians were surprised and outraged to learn that under current anti-discrimination laws schools and other services run by religious bodies are able to legally discriminate against LGBTI children, clients and workers.

Following the public outcry, there was a bipartisan commitment to end discrimination against children in schools on the basis of sexuality. The Equality Campaign strongly supports this commitment. However, it is also important to protect trans and gender diverse students and teachers and other school staff from, discrimination.

Children in schools should be focusing on classes, homework and building friendships, not living in fear of mistreatment because of who they or their families are. Children have been asked to leave their school because they have come out, or because of their parents being part of LGBTI communities.

Teachers should be focusing on educating their students, not worrying about losing their job. No employee should face discrimination when the reason has nothing to do with their job.

¹⁸ Prime Minister, "Media Release: Ruddock to examine religious freedom protection in Australia", 22 November 2017. Available from: <https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia>

It is accepted that most religious schools do not use their exemptions to discriminate, and instead provide supportive and inclusive environments for their students and staff. However, in 2018 it is time Australia's anti-discrimination laws reflect that it is no longer acceptable to treat people unfair simply because of who we are and who we love.

4.2 Stories of discrimination

Last month, the Equality Campaign, the Human Rights Law Centre and Rainbow Families Victoria asked LGBTI people to share their experiences of discrimination in schools – as students or teachers – where they were targeted because of who they are or who they love. In 48 hours, more than 800 responses were received from people across Australia sharing stories of being bullied, threatened or expelled because of their sexuality or gender identity. Here is a small collection of some of the stories shared with us by students and teachers about their experiences.

(a) Experiences of students

"I am currently a student in an extremely religious school, and I am gay. Every day I have to deal with homophobic comments made casually, being told I will go to hell, and that I am not human. Everyday LGBT students and teachers are treated lesser than their peers. I have witnessed gay students being attacked, I have watched people vandalise gay students' lockers, I have seen someone smash a gay teacher's car windows. We do not need to face more discrimination then we already do."

"I attended Catholic school for 13 years. I did not identify as a lesbian until I was late into my twenties, but I knew quite a few girls who identified in high school, and they had a very difficult time. One I know sought help from a teacher, who broke confidence and spoke to the principal, and my friend was under threat of being expelled if she did even the smallest thing wrong ("just give me one reason") due to her sexuality."

"I have spent the past six years at an Anglican girls' school in the eastern suburbs of Sydney. LGBTQIA+ topics are banned and there has been stoic backlash from the executive team when these issues are discussed or students choose to be open about their identity. My transgender brother had to leave the school for fear of coming out to the religious institution. I am bisexual and I have been personally told by teachers/staff that my existence is a sin simply because of the people I love. I have been unable to exist authentically at the place where I spend almost every day ... this legislation will literally make places like this HELL for LGBTQIA+ students. I can only thank my lucky stars that I complete my HSC this year and can be out of that place for good. But I fear for younger/future LGBTQIA+ students that attend the school."

"I was bullied, physically and verbally abused, and then unwillingly outed to the rest of my peer group as a lesbian student at a Catholic school. I was also threatened with corrective rape by teenage boys ... The fact my school taught that LGBT+ people were abominable

sinner created an environment where I felt unsafe and perilously aware I could be expelled at any time for any perceived homosexual behaviour.”

“I worked at a Catholic school and have had a student write and submit a suicide note as a cry for help, expressing the pressure of the Catholic values and fear if she was to come out.”

“Basically it was six weeks before my HSC and [the school] set a meeting with me and my mother to talk ... about the "issue" of my sexuality. After this meeting the conclusion was that they would take it to the school board to see what will be done, whether or not I would be expelled ... A week later I had another meeting saying I could stay in school on these conditions: (1) I could not mention/talk about my sexuality at school. (2) I would be excluded from some school functions. (3) I had to see a councillor weekly until I left school. I didn't agree with this but with only six weeks left I had to suck it up and deal with it. It left me feeling very angry and stressed.”

“I was actively involved in creative arts, business and hospitality, music ensembles, representative council, student prefect council, student support mediators, as well as [assisting] with student admin duties as an officer for the student services office ... the high school made the HSC process harder, by repeatedly throwing me regularly into the counsellor's office because I was apparently "sick" because I was gay. I remember regularly coming home from school and locking myself in my room and crying for hours.”

(b) Experiences of teachers

“I am a lesbian and was informed by the religious pastors in my workplace that my sexuality was wrong and I would be punished if I continued. I was 18 years old. I learnt nothing but that I was no good and worthless but I was still a lesbian. I was born this way.”

“At the ripe young age of 22, I was sacked from an Anglican boarding school, because another member of staff read my mail from a girlfriend, and told the headmistress. She promptly sacked me saying I was 'an economic liability' in a posh private school. I was sent up to Westminster to a psychiatrist, who examined me for 2 hours, and came to the conclusion, I was much more sane than the people who had referred me'. I was totally devastated, and cruelly isolated by the staff, after doing a great job with the students.”

“I teach at a conservative Catholic Primary school. I am constantly afraid that someone will find out and that I will lose my job. I am the main income earner and my employment is incredibly important. I worry that I will lose my job. I worry that my employer won't give me a good reference if she finds out. This could affect my future employment opportunities. I feel like a criminal and I have done nothing wrong.”

“As a gay teacher myself, I have faced years of being terrified in schools and replaced the name of my partner with a female name.”

4. Conclusions

The Equality Campaign submits that the religious exemptions that allow discrimination against LGBTI people in employment, education and delivery of goods and services and other areas should be repealed. Limited exemptions may be permitted for the training and appointment of ministers of religion or priests and other activities with a close nexus to religious observance, practice, teaching or worship.

In the alternative, the exemptions should be narrowed in line with the federal policy position on aged care. In 2013, the *Sex Discrimination Act* was amended to include new protections from discrimination on the basis of relationship status, sexual orientation, gender identity and intersex status. The religious exemptions in the SDA excluded activity that related to the provision of Commonwealth Funded Aged Care.¹⁹ This limitation on the exemption has operated successfully for a number of years and should be replicated in other areas of government funded services delivery, including education.

Unfair exemptions for religious groups fundamentally undermine the integrity of laws which are supposed to protect against discrimination on the basis of sexual orientation, gender identity or sex characteristics.

All children should be accepted for who they are at school. Every person should be able to do their job without having to hide who they are. Every school should be inclusive of diverse families in the school community.

As such, the Equality Campaign urges this Committee to recommend the repeal of legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity.

¹⁹ Section 23(2)(a) of the *Sex Discrimination Act 1984* (Cth).