



## **Australian Education Union**

### **Submission to the**

### **Australian Law Reform Commission Religious Educational Institutions and Anti-Discrimination Laws Inquiry**

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# **Australian Education Union Submission to the Australian Law Reform Commission Religious Educational Institutions and Anti-Discrimination Laws Inquiry**

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## **Introduction**

The Australian Education Union (“AEU”) makes this submission on behalf of over 195,000 AEU members employed in government schools, public early childhood centres, public vocational, technical and further education and training providers, and in disability services. The AEU campaigns for free, quality, and accessible public education, for the fair distribution of education funding, and in the pursuit of human and trade union rights including the elimination of discrimination against all students and all education workers.

It is the position of the AEU that the current exempting of religious educational institutions from the effect of key anti-discrimination provisions of the *Sex Discrimination Act*<sup>1</sup> and *Fair Work Act*<sup>2</sup> codifies bigotry, offending Australia’s secularism and sense of fairness. No educational institution, regardless of sector, should be permitted to expel a student or dismiss a worker because of who they are or who they love. Accordingly, the AEU supports the urgent and total removal of these exemptions.

## **Social control**

The exemptions to discrimination protections currently under consideration exist because churches in Australia have, since colonisation, practiced social control over Australians’ gender, sexual identity, and sexualities by codifying religious “values” in Australia’s laws, undermining the principle of secular government, and marginalising vulnerable Australians.

The previously dominant conservative religious conception of gender roles – fixed and hierarchical, entrenching man’s ascendancy over woman – and of gender identity and sexuality, has, since colonisation, placed women in subordinate and vulnerable legal positions in relation to men, denied the very existence of gender identities beyond man and women and disparaged non-heterosexual sexual relationships. In demonstrating the impact of women’s precarious legal position in Australia, it is important to reflect on historical practice. At the turn of the 20th century, most Australian women were prohibited from voting; until the late 20th century, it was illegal for most Australian women to have a termination of pregnancy; and for most of the 20<sup>th</sup> century, women had no protection against rape within their marriage, could

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<sup>1</sup> <https://www.legislation.gov.au/Details/C2014C00002>

<sup>2</sup> <https://www.legislation.gov.au/Details/C2017C00323>

not seek a divorce without proof of wrong-doing, and could be married off as a child. Today, women continue to disproportionately suffer from patriarchal domestic and family controlling behaviour, violence, and murder.

Further, the impact of such codification of laws has been significant for LGBTIQ+ Australians with anti-homosexuality laws being adopted from England in colonial Australia. For example, until 1924 the punishment for gay sex in New South Wales was no less than life imprisonment and in Victoria, it was the death penalty.<sup>3</sup> The full decriminalisation and expunging of convictions for such homosexual offences is an ongoing process to this day.

The Australian community now strongly rejects legal structures that embed discriminatory practices. This rejection manifested most recently in the endorsement by the majority of Australians of marriage equality leading to the amendment of the *Marriage Equality Act*<sup>4</sup> on 9 December 2017. The process of removing these archaic concepts from our laws is ongoing and this review by the Australian Law Reform Commission has the capacity to take another step towards building an Australian society that truly embraces equality and values every member of the community for who they are.

### ***Contextualising the proposed reforms***

It would be naïve to characterise the reforms now proposed as a neutral, ahistorical exercise in the ‘balancing of rights’ between religious and non-religious Australians. The AEU supports the protection of all Australians from discrimination, but the current protection of religious educational *institutions’* prerogatives to expel and sack women and LGBTIQ+ Australians is out of step with contemporary community values. The AEU emphatically rejects legalising an employer’s power to expel students and sack education workers due to their gender, sexual identity, and/or sexualities. Every education setting must be a safe and welcoming space for staff, students, and families, irrespective of who they are, what they believe or who they love.

Discriminatory practices based on someone’s sex, sexuality, and/or gender identification such as homophobia, transphobia, biphobia, heterosexism and monosexism, not only have a devastating impact on those who are subjected to them, but they are an infringement of workers’ and students’ rights and must be challenged and eliminated.

Every person has the right to identify, or not identify themselves in a chosen way regarding their own sex, sexuality and gender and must not be discriminated against for doing so.

### ***Secular education funding***

The proposed reforms are a key step in advancing secularism in the provision of Australian education funding. The principle of secularism in Australian governments requires that governments do not use education funding to promote religious values. Likewise, governments’ education funding must not be misused by an educational institution to promote religious values. An educational institution in receipt of funding from government must abide by the secular conditions imposed by government, central to which should be that all students and workers should fully enjoy Australia’s anti-discrimination protections. No educational institution, regardless of sector should be permitted to expel a student or dismiss a worker,

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<sup>3</sup> <https://www.sydneycriminallawyers.com.au/blog/the-historical-offence-of-homosexuality-in-australia/>

<sup>4</sup> <https://www.legislation.gov.au/Details/C2018C00441>

because of who they are, what they believe or who they love. The AEU considers it fundamentally inconsistent with the concept of secular government that educational institutions in receipt of government education funding should be permitted to discriminate against students and workers.

## **Response to general propositions and technical proposals**

### ***General propositions***

<b>Proposition</b>	<b>AEU comment</b>
A1	Support with changes. Additionally, the protection against discrimination should also extend to where the student has a “family member, carer, <u>or any personal associate</u> ” with a protected attribute.
A2	Neutral. Additionally, religious educational institutions should not be permitted to use government-provided education funding for religious purposes.
A3	<p>Oppose where a religious educational institution is in receipt of government education funding.</p> <p>In any event, this is opposed as the proposed protection of students is inadequate. Teaching of religious doctrines and beliefs on sex and sexual orientation presents a significant risk of harm to students. Any permission to teach such beliefs must further be qualified by referencing the religious educational institution’s duty of care, requirements of curriculum, <u>and the institution’s obligations to protect students from discrimination, bullying, sexual harassment, and occupational health and safety risks.</u></p>
B1	Support with changes. The protection against discrimination should also extend to where the worker has a “family member, carer, <u>or any personal associate</u> ” with a protected attribute.
B2	Neutral.

B3	<p>Oppose where a religious educational institution is in receipt of government education funding.</p> <p>In any event, this is opposed as the protection of workers is inadequate. Requiring the teaching of religious doctrines and beliefs on sex and sexual orientation presents a significant risk of harm to workers. Any permission to teach such beliefs must be further qualified by referencing the religious educational institution's duty of care, requirements of curriculum, <u>and the institution's obligations to protect workers from discrimination, bullying, sexual harassment, and occupational health and safety risks.</u></p>
C1 and C2	<p>Oppose. Any preferencing of staff based on a worker's religious belief should be limited <u>only to ordained or principally religious roles</u> (e.g. priest, minister) – religious preferential hiring should not extend to the broader cohort of workers in religious educational institutions (e.g. teachers, principals, support staff).</p>
D1, D2, and D3	<p>Strongly oppose. Would create a novel and unnecessary power to terminate employees in addition to existing broad common law employer powers over employees.</p> <p>The concept of “actively undermining” raises the spectre of harmful “don't ask, don't tell” treatment of employees in religious educational institutions.</p> <p>The concept of “ethos” is unclear and too broad, potentially allowing the institution's religious authority to take action despite the contrary views of parents, the community, or any other adherents of the religion.</p> <p>Drafting does not include reference to procedural fairness.</p> <p>In creating new federal employer rights to terminate employees, may override anti-discrimination protections in state and territory laws.</p>

### ***Technical proposals***

<b>Proposal</b>	<b>AEU comment</b>
P1 and P2	Support. Core reforms to remove religious educational institutions' anti-discrimination exemptions relating to students and workers.
P3 and P4	Support. Necessary to give effect to Propositions A and B.

P5	Support. Additionally, the <i>Fair Work Act</i> currently provides exceptions to anti-discrimination protection is the reason for the discrimination is due to the “inherent requirements” of an employee’s role. The broad discretion this affords religious employers to impose religious “inherent requirements” on employees provides a loophole for religious employers to avoid the intent of these reforms. The “inherent requirement” exceptions in the <i>Fair Work Act</i> should be removed except as provided for under Commonwealth anti-discrimination law.
P6	Reflecting comments at A1 and B1 above, P6 should be amended to extend protection to students and workers on the basis of their family members, carers, <u>or any personal associate</u> .
P7	Oppose, see comments at A3 and B3. Oppose where a religious educational institution is in receipt of government education funding. Additionally, the proposal is unworkable – religious educational institutions’ teachings on sex, sexuality, and gender are frequently intertwined yet irreconcilable with the teaching the curriculum.
P8	Oppose, see comments at C1 and C2. Any preferencing of staff based on a worker’s religious belief should be limited <u>only to ordained or principally religious roles</u> (e.g. priest, minister) – religious preferential hiring should not extend to the broader cohort of workers in religious educational institutions (e.g. teachers, principals, support staff).
P9	<p>Strongly oppose. See comments at D1, D2 and D3. Would create a novel and unnecessary power to terminate employees in addition to existing broad common law employer powers over employees.</p> <p>The concept of “actively undermining” raises the spectre of harmful “don’t ask, don’t tell” treatment of employees in religious educational institutions.</p> <p>The concept of “ethos” is unclear and too broad, potentially allowing the institution’s religious authority to take action despite the contrary views of parents, the community, or any other adherents of the religion.</p> <p>Drafting does not include reference to procedural fairness.</p> <p>In creating new federal employer rights to terminate employees, may override anti-discrimination protections in state and territory laws.</p>
P10	Oppose, see comments at C1, C2, D1, D2 and D3.

P11	Support expanding the power of the Australian Human Rights Commission to inquire into the potentially discriminatory acts and practices of religious educational institutions.
P12	Neutral. However, the blunt tool of exemptions should not be used to stand in for education of individuals and organisations of their anti-discriminations obligations.
P13	Support. Any guidance should be developed in consultations with unions and workers.
P14	Support. The priority should be to strengthen anti-discrimination provisions in <i>Fair Work Act</i> to align with Commonwealth anti-discrimination laws.