

2018

Discrimination Amendment Bill 2018

Explanatory Statement

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DISCRIMINATION AMENDMENT BILL 2018

This explanatory statement relates to the *Discrimination Amendment Bill 2018* as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Purpose of the Bill

The *Discrimination Amendment Bill 2018* (the Bill) makes reforms to the *Discrimination Act 1991* to:

- Strengthen protections against discrimination for both students and employees/contractors in educational institutions conducted for religious purposes; and
- Provide a limited exception for educational institutions conducted for religious purposes to discriminate against employees and contractors, and students on admission, but only on the grounds of religious conviction, and not other protected attributes such as sexuality.

Overview of amendments

The Bill introduces amendments to the *Discrimination Act* to repeal the exceptions in s 33 of the Act that allow educational institutions conducted for religious purposes to discriminate against students and employees/contractors in relation to any protected attribute, including sexuality and gender identity.

The Bill introduces a limited exception allowing religious educational institutions to discriminate in employment or contracting, only on the grounds of the religious conviction of employees or contractors. This exception does not apply unless the religious educational institution has published its policy in relation to staff matters and this is readily accessible to current and prospective employees and contractors.

The Bill amends an existing limited exception in relation to students, which allows religious educational institutions to discriminate in relation to admission of a student, but only on the grounds of religious conviction of the student (or their family). This exception will not apply unless the religious educational institution has published its policy in relation to admissions and this is readily accessible to prospective and current students and families.

The Bill also clarifies that a general exception for religious bodies in s 32 will not apply to employment or contracting; or the admission, treatment and continued enrolment of students; in religious educational institutions.

Human Rights Considerations

The amendments proposed in this Bill are intended to rectify limitations on human rights arising from existing exceptions for religious educational institutions in s33 of the *Discrimination Act*. These amendments promote the right to equality and non-discrimination in s8 of the *Human Rights Act 2004* (HR Act), and the rights of children to protection (s11(2)). They also provide greater protection for the right of employees to privacy (s 12).

The amendments limit the right to freedom of thought, conscience, religion and belief protected in s14 of the HR Act. They engage and potentially limit the right of parents to ensure the religious and moral education of a child in conformity with their convictions (s27A). As discussed in more detail below,

in the context of the scheme of the *Discrimination Act* as a whole, and other safeguards which apply, these limitations are reasonable and proportionate in accordance with s 28 of the HR Act.

Right to freedom of thought, conscience, religion and belief.

Nature of the right affected

The right to freedom of thought, conscience, religion and belief in s14 of the HR Act is drawn from Article 18 of the International Covenant on Civil and Political Rights (ICCPR). The UN Human Rights Committee has confirmed that the right to freedom of thought, conscience and religion “is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”¹

The right to have or adopt a religion or belief is a matter of individual thought and conscience, considered to be absolute and unqualified in international law, and no limitation of this aspect of the right would be considered reasonable. However, the right to ‘manifest’ or ‘demonstrate’ religion or belief, which would include the provision of religious education, may impact on others and may thus be subject to reasonable limitation.² This aspect of the right will not extend to every act or omission which is in some way inspired, motivated or influenced by religious belief but must be intimately linked to the religion or belief.³

The importance of the purpose of the limitation

The amendments introduced in this bill are intended to achieve an important and legitimate objective, in preventing serious harms resulting from discrimination against vulnerable children and young people and their families in the provision of education, on grounds including sexuality, gender identity, pregnancy, race and intersex status. The limitations are aimed to promote the right to equality and non-discrimination and the right of children to the protection they require during their education.

The impact on vulnerable students of being treated unfavourably at school on the grounds of sexuality or other protected attributes such as gender identity, can be serious and may cause long term harm. LGBTIQ young people are already at considerably greater risk than other young people of harm including suicide and self-harm and these risks are likely to be increased in a school environment which is experienced as isolating, unsupportive or discriminatory.

The current exception would also allow unfavourable treatment of students in relation to all other protected attributes, including pregnancy, race or intersex status. The Ruddock Review into the protection of religious freedoms in Australia concludes that such exceptions are inconsistent with community expectations and recommends that “Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status” (recommendation 8).

The amendments are also intended to provide greater protection to teachers and other staff in religious educational institutions to be free from discrimination in employment based on personal attributes such as their race, sexuality, relationship status or pregnancy. These amendments protect the rights of teachers and other staff to privacy in their personal lives and to equality in employment.

Overall the amendments serve a further important purpose in reaffirming the central importance and value of diversity and inclusiveness in our Canberra community.

¹ UN Human Rights Committee General comment No. 22 (48) (art. 18) CCPR/C/21/Rev.1/Add.4, 27 September 1993

² *Eweida and ors v United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 15 January 2013, 30.

³ *Ibid.*

The nature and extent of the limitation

In removing general exceptions currently available for religious educational institutions in relation to discrimination in the provision of education, and in employment practices, the amendments place some limitations on the ability of religious schools to demonstrate or manifest religious beliefs.

The repeal of s33 will limit the ability of religious schools to take certain actions in relation to students and employees on the basis of protected attributes, such as suspending or expelling a student because of their sexuality or gender identity, causing any other detriment to students on those grounds, or terminating a teacher who enters into a de-facto relationship.

However, the *Discrimination Act* as amended retains important protections for freedom of religion and religious education. In particular, the amendment does not affect the exception provided in s 46 of the *Discrimination Act* which specifically authorises religious schools to discriminate against students on the grounds of religious conviction in relation to the admission of the student to the school, where the school is conducted solely for students having a religious conviction other than that of the student.

This protection is important for religious schools to enable preference to be given to students of a particular religion. Section 46 of the *Discrimination Act* gives recognition to the collective aspect of the right to religion and the support that a religious school community can provide to students and families. As Evans and Ujvari note:

[O]ne of the motives for religious groups to create religious schools is to create schools where their religious needs are well understood and respected in practice and where their children can be part of the mainstream school community, even if they are in a minority within the broader community... The capacity to create student bodies with some degree of religious homogeneity arguably has the highest claim to being important to maintain religious freedom and the least negative proven consequences in terms of undermining discrimination laws and equality more generally.⁴

The creation of a new exception in s46(2) will mean that discrimination in relation to employment of teachers and staff on the grounds of religious conviction will not be unlawful, provided that the discrimination is in order to enable or better enable the educational institution to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of the particular religion. This exception recognises the importance of religious schools having the autonomy to employ teachers and staff who will be part of the religious community of the school and contribute to the religious education of students.

Further, while religious schools will no longer have the benefit of a broad exception in s33(2), the *Discrimination Act* will not prevent religious schools from teaching religious precepts and beliefs or imposing reasonable requirements on students and staff that reflect the religious values and teachings of the school. This is because the *Discrimination Act* distinguishes between direct and indirect discrimination. While it would be unlawful to treat an individual student unfavourably because of a protected attribute, it would not be unlawful to impose a general requirement or condition on all students even though this may disadvantage a student who has a protected attribute, provided that this requirement is reasonable. The *Human Rights Act* and the right to religious freedom would be relevant in interpreting the requirement of what is reasonable in the context of a religious school.

Finally, s109 of the *Discrimination Act* provides that the Human Rights Commission may, on application, grant an exemption to allow conduct that would otherwise amount to unlawful

⁴ Carolyn Evans and Leilani Ujvari, *Non-discrimination laws and religious schools in Australia*: (2009) 30 *Adelaide Law Review* 31.

discrimination. If there was a particular practice conducted by a religious school that might amount to direct discrimination against a student or employee, but this treatment is genuinely required in accordance with a religious precept, the school could seek an exemption from the Human Rights Commission. In considering such applications the Commission would have regard to human rights, including the right to religious freedom, as well as the objectives of the *Discrimination Act*.

The relationship between the limitation and its purpose

It is difficult to determine the extent of discrimination currently experienced by students and employees in religious schools in Canberra. While complaints regarding these issues are generally low, LGBTIQ young people and other vulnerable students in religious schools may find it difficult to raise issues of concern with their schools or external agencies and may fear attracting unwanted attention. The presence of broad exceptions for religious schools may deter potential complainants from raising concerns with the ACT Human Rights Commission.

These amendments will remove barriers to complaints for students and employees. The amendments and the swift response to public concerns raised about potential discrimination in schools also send an important signal to religious schools and the broader community regarding the importance of equality rights and inclusiveness for all Canberrans.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

While a range of options were considered to seek to address the concerns raised in relation to the scope of discrimination permitted by s33, the complete repeal of this section was determined to be the only option that would provide sufficiently clear and unequivocal signal to the community and to students, teachers and schools regarding the importance of equality and inclusiveness in education.

In the context of the *Discrimination Act* as a whole, the amendments are proportionate to the aim sought to be achieved and are the least restrictive approach reasonably available to achieve this objective.

Right to education

Nature of the right affected

Section 27A (3)(b) provides that:

To ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

The right to education is drawn from Article 13 of the International Covenant on the Economic Social and Cultural Rights. The UN Committee on Economic Social and Cultural rights notes in General Comment No. 13, that the right to freedom of religious education is constrained by minimum standards which must be consistent with the educational objectives set out in Article 13 (1). These objectives include that education be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups.

Article 29 of the Convention on the Rights of the Child further requires that the education of the child shall be directed to:

the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations', and 'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of

sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

Importance of the purpose of the limitation

As stated above, any limitation on the rights of parents to choose education in conformity with religious conviction is intended to serve an important purpose of protecting the right to equality and non-discrimination of students, families and teachers in the context of education.

The nature and extent of the limitation

Any limitation on the right to education is consistent with the minimum educational standards recognised by the UN Committee, which provide inherent constraints on the right to religious freedom within an educational context. These limitations support the rights of students to equality and dignity in their education.

The relationship between the limitation and its purpose

Any limitations on the right to education has a rational connection with protecting equality rights of students and teachers and other staff, and protecting other human rights including the rights of children to the protection they require, and the rights of teachers and staff to privacy.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

As discussed above, the amendments proposed are the least restrictive means reasonably available to provide a clear signal regarding the need to protect students and teaching staff from discrimination.

Overall, the Discrimination Act as amended by this Bill will better protect the human rights of vulnerable students and families, and promote equality of all Canberrans. While the amendments engage and limit rights to religious freedom and freedom of education, these limitations are reasonable and proportionate in the context of the Act as a whole.

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Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Discrimination Amendment Act 2018*.

Clause 2 — Commencement

This clause provides for the Act to be commenced on a day fixed by the Minister by written notice. If the Act has not commenced within 6 months beginning on the notification day it automatically commences on the first day after that period.

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act, which is the *Discrimination Act 1991*.

Clause 4 – Religious bodies section 32(d)

This clause amends section 32(d) to introduce an exception to this provision for ‘defined acts’.

Clause 5 – New section 32(2)

This clause defines the term ‘defined act’ for the purposes of section 32.

‘Defined act’ is defined as the employment or contracting of a person by the religious body to work in an educational institution or the admission, treatment or continued enrolment of a student at an educational institution.

Together, clauses 4 and 5 provide an exception to the broad exclusion of operation of Part 3 of the *Discrimination Act 1991* in relation to the acts and practices of religious bodies. Part 3 will continue to operate in relation to ‘defined acts’, so that it will be unlawful for a religious body to discriminate against a contractor or employee or a student in an educational institution, unless the exceptions in s 44 or s 46 (or other provisions) apply.

Clause 6 - Educational institutions conducted for religious purposes section 33

This clause repeals section 33 of the *Discrimination Act 1991* which provided an exception from the operation of sections 12, 13 and 18 regarding discrimination in contracting, employment and education in relation to educational institutions conducted for religious purposes.

Clause 7 – Religious educational institutions – New sections 46(2) to (5)

This clause introduces new sub-sections in s 46 to provide a specific exception for religious educational institutions in relation to discrimination on the grounds of religious conviction in contracting and employment.

The exception provided in new sub-section 46(2) applies only where the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed; and the discrimination is intended to enable, or better enable, the educational institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings.

New subsections (3) provides that the exception in s 46(1) relating to discrimination on the ground of religious conviction in relation to the admission of students does not apply unless the educational institution has published a policy regarding ‘student matters’ and this policy is readily accessible to prospective and current students at the institution.

New subsections (4) provides that the exception in s46(2) relating to discrimination on the ground of religious conviction in relation to contracting or employment of staff does not apply unless the educational institution has published a policy regarding ‘staff matters’ and this policy is readily accessible to prospective and current students at the institution.

New sub-section (5) defines the term ‘staff matters’ to mean the employment of a member of staff of the institution; or the engagement of a contractor to do work in the institution. It defines the term ‘student matters’ to mean the admission of a student at the institution.