**STANDARD BRIEFING NOTE 3**

**RELIGIOUS BODIES EXEMPTIONS and ANTI-DISCRIMINATION LAWS**

This Briefing Note contains key points, key terms, background information and examples of practical application as well as links to further information and local contacts. It does not contain legal advice and should be used as a starting point for further research t rather than an authoritative source. Feedback on its contents is welcome.

**Key Points**

* Australia is in the middle of an impassioned debate about how to appropriately balance freedom from discrimination with freedom of religious expression. This debate, which has its recent origins in the push for marriage equality, has been reignited by discussions at the Commonwealth level to introduce new legal protections for discrimination on the grounds of religious belief and to re-examine existing exceptions relating to the treatment of non-heterosexual and transgender or non-binary staff and students by religious schools.
* There are practical and legal complexities surrounding these proposed changes.
	+ What impact will they have on people of faith in Australia and their rights to make decisions about their lives and their families in line with their religious beliefs?
	+ What impact will they have on vulnerable minority groups, who may experience discrimination or exclusion on the basis of attributes including trans status or sex characteristics or sexual orientation?
	+ How will the changes made at the federal level (which are subject to certain Constitutional limits) impact on the laws at the state level.
* At the State and Territory level, uncertainty surrounds the content and operation of relevant anti-discrimination laws, and significant differences exist across jurisdictions. Some jurisdictions, such as Tasmania and the Australian Capital Territory take a narrow approach to religious bodies exceptions, permitting discrimination against students and staff of religious schools only on religious grounds. Other jurisdictions employ a range of different tests to determine whether for religious bodies can lawfully discriminate against others in the area of employment or education in line with their religious beliefs.
* These different legislative responses have practical implications for those seeking to exercise their right to freely express their religion and those demanding protection from discrimination. It also has significant implications for those contemplating reform to these laws.

**Background on existing Federal Laws**

All Australian jurisdictions make it unlawful to discriminate against a person on the basis of their sex, sexual orientation, or marital or relationship status, and most also protect against discriminate on the basis of a person’s gender identity. The prohibition on discrimination on the basis of these attributes extends to the provision of goods and services, including education and health services.

All Australian jurisdictions also acknowledge that anti-discrimination laws must also coexist with other equally important rights and freedoms, including freedom of thought, conscience, religion and belief. As a result, all Australian jurisdictions exempt certain ‘core internal aspects of religion’ (such as the appointment, training or ordainment of priests or ministers) from the general unlawful discrimination provisions.

There are currently no explicit protections against discrimination on the grounds of religious belief at the Commonwealth level, the Commonwealth Government has promised to introduce a *Religious Discrimination Bill* in 2019.

The relevant Commonwealth laws that deal with LGBT related rights are found in the *Sex Discrimination Act 1984* (Cth) (SDA). This Act focuses on prohibiting discrimination on the grounds of sex and gender, and also contains protections against discrimination on the grounds of sexual orientation and gender identity. These protections make it unlawful for educational authorities to discriminate against students or staff on the grounds of sexual orientation or gender identity.

The existing SDA also contains a range of exemptions for religious bodies. These include provisions that allow discrimination in the provision of accommodation by religious bodies; in the ordination, appointment and training of priests or ministers of religion; and by educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided that the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion’.

Interestingly, the SDA makes it clear that this exemption does *not* apply to the provision of Commonwealth-funded aged care thorough provisions inserted in 2013.

Provisions guarding against discrimination in the area of employment also exist under the *Fair Work Act 2009* (Cth)*,* which prohibit employers, including religious schools, from taking 'adverse action' against, or terminating the employment of, employees on the basis of certain protected attributes. Exceptions also exist under this regime which permit religious institutions to avoid these requirements if the action meets the ‘good faith’ and ‘religious susceptibilities’ tests.

**Background on existing South Australian laws**

In South Australia, anti-discrimination laws are found in the *Equal Opportunity Act 1984* (SA). South Australian laws apply to individuals living or operating in South Australia, and to the South Australian Government. Sometimes there is an overlap with the federal laws, and a person experiencing discrimination can make a claim under both South Australia and federal laws. What South Australia doesn’t have to make its laws line up with the federal laws, there are often good practical, normative and legal reasons for ensuing the laws are not inconsistent.

There are currently no explicit protections against discrimination on the grounds of religious belief under the *Equal Opportunity Act 1984* (SA), although protections exist for religious dress (*Equal Opportunity Act 1984* (SA) s85T).

The SA Act prohibits discrimination on the ground of sexual orientation and gender identity, in both direct and indirect forms, including by school and educational authorities. There are also a number of exceptions, including in the area of employment of teachers for religious schools and by religious bodies in the appointment and related training of members of a religious order. For example, section 34(c) of the *Equal Opportunity Act 1984* (SA) states that discrimination on the ‘ground of gender identity or sexual orientation’ in relation to employment in an educational institution will be lawful if the school is administered 'in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion'. In order to take advantage of this exception, the religious educational authority must have a written policy setting out its discriminatory employment practices and provide a copy of the policy to anyone who is interviewed for or offered employment with the institution. The policy should also be made available to students, prospective students and parents and guardians of students and prospective students of the institution and to other members of the public.

Section 50(1)(c) of the SA Act also provides a broad exemption with respect to ‘*any other practice* of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion’. This provision has been criticised as providing a ‘blank cheque’ for religious organisations to discriminate in any number of areas, including employment, education, health and service delivery. However, the extension of the section 50 exemption to discrimination by religious schools against gay or transgender *students* does not appear to have been contemplated by the SA Parliament when enacting the relevant provisions. Despite this, it is at least arguable that the scope of s 50(1)(c) extends to discriminatory treatment of students attending religious schools.

The potentially uncertain scope of the religious bodies exception attracted the particular attention of the South Australian Law Reform Institute in its 2016 report into the exceptions in the *Equal Opportunity Act 1984* (SA). In response, the Institute recommended that the broad scope of the religious bodies exemption in section 50 be amended to make it clear that no students should be treated unfairly due to their gender identity, intersex status or sexual orientation; and that religious schools are not authorised to discriminate against current or potential employees simply due to these attributes. The Institute also recommended further changes to the existing exception relating to employment in religious educational institutions, and that specific protections against discrimination on the grounds of religious belief be included in the Act.

**Background on Ruddock Review**

In November 2017, and against the background of the marriage equality reforms,the Turnbull Government commissioned an ‘independent review’ into religious freedom in Australia. This Review was conducted by an Expert Panel led by the Hon Phillip Ruddock and had a broad terms of reference to consider the 'intersections between the enjoyment of the freedom of religion and other human rights', as well as reflecting on the findings of other relevant reviews with similar themes.

The Panel received more than 15,500 submissions, many of which drew attention to the religious bodies exemptions in Australia's anti-discrimination laws and their impact on non-heterosexual or transgender students and teachers. Some submissions called for an end to the religious bodies exemptions in the SDA, others called for a Religious Freedom Act to give religious institutions a positive right to uphold their values in employment and admission practices.

The key Religious Freedoms Review recommendations relating to exceptions to anti-discrimination laws and forming the focus of the ALRC's inquiry can be summarised as follows:

* abolish exceptions or exemptions that allow religious bodies to lawfully discriminate against students on the grounds of race, disability, pregnancy or intersex status, and review such provisions in the area of employment in religious schools 'having regard to community expectations'
* ensure that any exceptions for religious schools do not permit discrimination against existing employees solely on the basis of marital status.
* preserve the existing exceptions for religious educational institutions in the SDA but require the schools to have a publicly available policy outlining its position and explaining how the policy will be enforced, and when it comes to students, that the school has had regard to the best interests of the child as the primary consideration in its conduct.
* NSW and SA should amend their anti-discrimination laws 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.

Outside of these specific recommendations that now form part of the ALRC terms of reference, the *Religious Freedoms Review* also recommended that Commonwealth, State and Territory governments should consider the use of 'objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion'.

The Government accepted many of the recommendations made by the Expert Panel and promised to introduce a Religious Discrimination Bill into Parliament in 2019 and establish a new Freedom of Religion Commissioner within the ALRC.

**Further information**

* Australian Human Rights Commission – [including briefing notes on the issue of freedom of religion](https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/factsheet-guide-protections-freedom-religion-2019)v
* [Human Rights Law Centre](https://www.hrlc.org.au/lgbti-rights)
* [Equality Australia](https://equalityaustralia.org.au/)
* [*Sex Discrimination Act 1984* (Cth)](https://www.legislation.gov.au/Details/C2014C00002)
* [*Fair Work Act 2009* (Cth)](https://www.legislation.gov.au/Details/C2017C00323)
* [*Equal Opportunity Act 1984* (SA)](https://www.legislation.sa.gov.au/LZ/C/A/EQUAL%20OPPORTUNITY%20ACT%201984.aspx)
* [Expert Panel Report, Commonwealth, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018)](https://pmc.gov.au/domestic-policy/religious-freedom-review)
* [Australian Government, *Australian Government Response to the Religious Freedom Review* (13 December 2018),](https://www.pm.gov.au/media/government-response-religious-freedom-review)
* [South Australian Law Reform Institute, Report ‘*Lawful Discrimination’: Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status* (June 2016),](https://law.adelaide.edu.au/system/files/media/documents/2019-01/eo_exemptions_final_report.pdf)
* Evans, Carolyn and Beth Gaze, ‘Discrimination by Religious Schools: Views from the Coal Face’ (2010) 34 *Melbourne University Law Review* 392
* Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (2017, Cambridge)