

## **Independent Education Union of Australia NSW/ACT Branch Preliminary Submission to the Law Reform Commission of NSW – *Anti-discrimination Act* Review 27 September 2023**

### **About the IEU**

The Independent Education Union of Australia NSW/ACT Branch (IEU) is part of a federal union with coverage of teachers and support staff in non-government educational institutions in all states and territories. In NSW and the ACT, our branch has around 32,000 members employed predominantly in Catholic and independent schools. However, we also represent employees in early childhood education and care centres (ECECs) and post-school settings such as private vocational colleges and English language colleges for overseas students.

### **Position on *Anti-Discrimination Act***

The IEU considers anti-discrimination laws in NSW and Australia to be important protections for basic human rights. We support strengthening the anti-discrimination regime that enables individuals to be free from discrimination in all areas of life.

Our submission will focus on the *Anti-discrimination Act* exemptions as they apply to religious bodies and private education institutions, particularly within the context of employment. Our members are employed within the private educational institutions which have been exempt from the protections afforded by the *Anti-discrimination Act*. It is our strong view that these anti-discrimination exemptions should be lifted to ensure that our laws reflect contemporary community standards.

### ***Anti-discrimination Act* exemptions**

The IEU does not support the broad scope of exemptions under the Act for employees in private educational institutions. We would also expect that most private educational institutions would not oppose removal or limitation of many of the current exemptions.

The specific exemptions applying to employment in a private educational authority are as follows.

## Sex

Section 25 provides a range for protections for employees and applicants for employment against discrimination on the grounds of sex. Section 24 provides that *“something is done on the ground of a person's sex if it is done on the ground of the person's sex, a characteristic that appertains generally to persons of that sex or a characteristic that is generally imputed to persons of that sex”*. However, Section 25(3)(c) provides that the protection does not apply to employment by a private educational authority.

## Disability

Section 49D provides that it is unlawful for an employer to discriminate on the ground of disability against employees and applicants for employment. Again, there is an exemption for employment by a private educational authority in Section 49D(3)(c).

## Marital or domestic status

Pursuant to Section 40, it is unlawful for an employer to discriminate on the ground of marital or domestic status against employees and applicants for employment. There is an exemption for employment by a private educational authority in Section 40(3)(c). Note that this applies to workplaces where there is no religious ethos, such as the vast majority of ECECs, post-school training and a significant number of schools. All employees are caught, from the casual teacher to the ground staff, maintenance worker and cleaner.

## Homosexuality

Pursuant to Section 49ZH, it is unlawful for an employer to discriminate on the ground of homosexuality against employees and applicants for employment. There is an exemption for employment by a private educational authority in Section 49ZH(3)(c).

## Transgender

Pursuant to Section 38C, it is unlawful for an employer to discriminate on the ground of homosexuality against employees and applicants for employment. Again, there is an exemption for employment by a private educational authority in Section 38C(3)(c).

## Religious Bodies

In addition to the absolute exemptions for private educational authorities listed above for specific grounds of discrimination, there is also a broad exemption for religious bodies. Section 56 Religious Bodies provides an exemption for *“the appointment of any other person in any capacity by a body established to propagate religion”* and *“any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion”*.

## **Limitation on *Fair Work Act* rights**

The *Fair Work Act* provides protection for employees against adverse action for discriminatory reasons. Section 351 Discrimination is as follows [emphasis added]:

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual*

*orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

(2) However, subsection (1) does not apply to action that is:

**(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or**

**(b) taken because of the inherent requirements of the particular position concerned; or**

**(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – taken:**

**(i) in good faith; and**

**(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.**

Therefore, the effect of the exemptions in the NSW legislation is to import a second set of exemptions to the federal legislation. In some cases, the *Fair Work Act* provides a convenient remedy for employees who consider they have been discriminated against and it is unclear why this remedy should be barred to employees in NSW private educational authorities.

#### **Final comment**

The effect of exemptions under the *Anti-discrimination Act 1977* (NSW) in relation to employees in non-government educational authorities (including religious schools) are far broader than those in other jurisdictions. The IEU would welcome the opportunity to make a detailed submission on these issues.

