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Submission to the NSW Law Reform Commission for its

Review of the Anti-Discrimination Act 1977 (NSW)

Unlawful conduct

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1) Terms and Definitions

Term	Definition
CP	The NSW LRC Consultation Paper
ADA	The <i>Anti-Discrimination Act 1977</i> (NSW)
LGBT+	Lesbian, gay, bisexual and transgender people, and others with diverse sexual orientations and/or gender identities
The Thesis / Study	Dr McLeay's PhD thesis
Religious Bodies or Organisations	Unless otherwise specified, refers to religious service providers including and agencies that deliver publicly-funded services in social welfare, aged care or healthcare to the community.
Religious Educational Authorities	Religiously-affiliated schools, delivering primary or secondary education.
Evangelical / evangelicalism	A Protestant religious movement / tradition influential in many denominations around the world. Its teachings, beliefs, doctrines and culture are predominantly conservative on issues of sexuality and gender identity.
Non-denominational school	A type of school affiliated with the evangelical tradition, independently governed and non-denominational. Nationally, Themelic schools number approximately 450, or about 17 per cent of all religious schools.

I. Introduction

Thank you for the opportunity to make this submission to what the LRC's Consultation Paper ('CP') accurately describes as a 'complex and sensitive area'.

This submission addresses how certain kinds of religious bodies operate employment where rights to religious freedom and non-discrimination or equality intersect. The submission draws upon my recent doctoral research and thesis.¹ The religious bodies in focus are those that provide services to the wider public in areas such as education, welfare, aged care and health care. Typically, these types of organisations provide their services with funding from governments at state and/or federal levels. Those employed by religious bodies lack protections otherwise provided by the *Anti-Discrimination Act 1977* (NSW) ('ADA'), not just based on religious grounds but on all

¹ Angus McLeay (2024), 'Seeking clarity: How Christian organisations manage rights to religious freedom and non-discrimination for LGBT+ employees' (PhD thesis, College of Arts, Law and Education, University of Tasmania).

grounds, by virtue of exceptions. The scope of these exceptions and their intersection with the right to religious freedom in the employment is the focus of this submission.

This submission addresses questions in the CP related to exceptions for religious bodies under questions 7.1, 7.2 and 7.5, as follows:

[Question 7.1]

(1) Should the ADA provide exceptions for: “the appointment of any other person in any capacity by a body established to propagate religion”?

(2) If so, what should these exceptions cover and when should they apply?

[Question 7.2]

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

[Question 7.5]

(2) If you think the Act should provide exceptions in this area:

(a) what attributes should the exceptions apply to?

(b) what requirements, if any, should duty holders meet before an exception applies?

II. Background

1) PhD Thesis Overview

The aims of my doctoral study included:

- 1) Describing the laws, workplace experiences, management practices, and worldviews related to the intersection of LGBT+ rights and religious freedom according to leaders of religious organisations; and,
- 2) Evaluating the effects of policy, legislation and institutional practices on these rights.

The study relied on 46 in-depth interviews with senior leaders of 43 organisations. The interviews were with leaders of 25 schools and 18 agencies, generally a principal or CEO. Interviews were conducted between 2021 and 2023 and focused on how employment

operated considering rights to religious freedom and LGBT+ non-discrimination. Three main areas were covered by interviews:

- 1) The religious expression, values, identity and mission of the organisation.
- 2) The nature of employment practices related to discrimination in general, and specifically as applicable to LGBT+ staff.
- 3) Views on debates about religious freedom / discrimination.

Organisations were affiliated with seven Christian denominations, with Catholic-affiliation most common, followed by Anglican. Organisations were affiliated with churches from a broad spectrum of Christian religious expressions, from more conservative to more liberal orientations. About 60 per cent of the organisations were affiliated with churches that were predominantly conservative in terms of views on same-sex relationships, about 30 per cent were associated with contexts with mixed approaches to same-sex relationships and 10 per cent were associated with churches that were predominantly accepting of same-sex relationships (in practice if not necessarily in official teaching).

Organisations in the study operated in all states and territories (with multiple organisations in each state or territory), of which 14 operated in NSW. This enabled comparisons of experiences and practices under different kinds of exceptions, with most organisations operating under either broad or narrow types of exceptions.

While the dataset of organisations reflects a broad representation of Christian denominations and contexts, it is not necessarily representative of the full variety of Christian or religious organisations. My research was qualitative and aims to give insights into meanings, patterns, systems and structures shaping the participating organisations. Its application to organisations beyond those in this study depends on similarities in characteristics and contexts, or on evidence from other sources suggesting wider application.

The nearest comparable academic study to this research was published fifteen years ago by Carolyn Evans and Beth Gaze.² Their study examined a more limited range of religious schools in three states. They found that those leading religious schools held a variety of views about discrimination, and while some leaders were aligned with church authorities, a number were not. Their findings are confirmed and further expanded in my study. Another significant and recent contribution to these issues was made by the Australian Law Reform Commission report on religious educational institutions and anti-discrimination laws.³ Evidence from that report confirms key findings from my study.

III. Recommendations

Recommendation 1: Exceptions in the ADA for religious bodies and religious educational authorities should be limited to the ground of religious belief and practice.

Recommendation 2: Exceptions in the ADA for religious bodies and religious educational authorities be limited to roles where an inherent requirement related to religious belief and practice can be demonstrated.

IV. Exceptions for Religious Bodies and Religious Educational Authorities

1) Introduction

This section addresses the questions raised by the CP at 7.1 and 7.2 in relation to the exceptions related to employment in ss 56(c) and 56(d) and argues that the scope of exceptions can be narrowed to one ground, religious belief and practice; and that

² Evans, C & Gaze, B (2010) 'Discrimination by religious schools: views from the coal face', *Melbourne University Law Review*, vol. 34, no. 2, pp. 392–424.

³ Australian Law Reform Commission (2023) *Maximising the realisation of human rights: religious educational institutions and anti-discrimination laws* (ALRC Report 142). See also the ALRC report on stakeholder consultations, *Religious educational institutions and anti-discrimination laws* (Background Paper ADL2).

‘inherent requirements’ should be a criterion for exceptions related to employment.⁴ Making these changes are highly unlikely to interfere with religious freedom in employment by most kinds of religious bodies. The submission also addresses parts of questions raised in the CP at 7.5 related to private educational authorities, and in particular the attributes to which exceptions should apply [2(a)] and the tests that duty-holders should meet to gain the benefit of an exception [2(b)].

2) Reliance on Narrow Exceptions: One Ground

My study shows that to the extent that religious bodies and educational authorities seek to rely upon exceptions (as an expression of religious freedom) the *sole ground* relied upon is *religious belief and practice*. Accordingly, it is unnecessary for exceptions to permit discrimination on other grounds as a way of protecting religious freedom.

Of the 43 Christian organisations that participated in my study two distinct approaches to the principle of non-discrimination in employment were evident. About 4 in 5 of the organisations (35 in total) showed support for the principle of non-discrimination in workplace policy and practice. These organisations were all affiliated with ‘mainstream’ denominations, such as Catholic, Anglican, Uniting and other long-established Protestant denominations.⁵ Mainstream organisations rejected discrimination on all grounds, while others accepted discrimination on the ground of religious belief and practice for roles where that attribute was a relevant qualification for the role (or an inherent requirement).

About 1 in 5 of the organisations (8 in total) resisted the principle of non-discrimination for employees. Resistance to non-discrimination was evident from workplace policies, practices and other workplace indicators. For instance, 6 of 8

⁴ The CP notes that in the Victorian anti-discrimination legislation when ‘determining the inherent requirements of the position, the nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be considered’, 149 [7.107].

⁵ Australia’s largest church survey, the National Church Life Survey, classifies the following denominations as ‘mainstream’: Anglican, Lutheran, Presbyterian, Uniting. However, ‘mainstream’ should not be interpreted to mean the largest in terms of regular attendance. For instance, in 2024 Pentecostal churches had the second highest weekly attendance of all denominations while Uniting church attendance ranked fifth.

organisations had no workplace anti-discrimination policies and the remaining 2 organisations had limited policies.

a) Mainstream Organisational Employment

Among the Mainstream organisations leaders supported non-discrimination as an important norm in employment. Some leaders argued that discrimination would be justifiable if the attribute was relevant to the role:

Structured discrimination in employment, or saying that ‘you have to be a certain kind of person or religion to do A, B or C’, I see so few places where there’s a valid argument for that. It’s hard to justify bringing in something like that into the mainstream workforce [referring to religious agencies such as this one]. If you are an Anglican pastor at an Anglican church, I can understand you want an Anglican-qualified person. You can say, ‘Well, that’s logical, you can get that.’ (CEO, Catholic agency)⁶

Leaders of Mainstream organisations, both schools and agencies, accepted norms of non-discrimination in very similar ways to the ‘mainstream workforce’. In some cases, leaders supported, or at least accepted, that certain roles in their organisations had religious qualifications or were of a religious character and therefore it might be necessary to permit discrimination on the ground of religious belief and practice:

Interviewer: And so the idea of the attributes in the discrimination system is that if they're irrelevant to *best fit* - they're irrelevant. What you're saying - and please check me if I'm correct – [is that] if you were seeking to hire a teacher for the maths department, or whatever it might be, and that teacher was in fact the best maths teacher for that position, and they also happened - you found out some way - to have a particular sexual orientation other than heterosexual, you wouldn't see that as relevant to the decision [to hire]?

Principal: No, that’s right, I wouldn’t.

⁶ All participants in my study are anonymised in compliance with University ethics. Quotes come from different participants and organisations and are representative of the wider dataset.

Speaker 1 Can you imagine a situation in any Catholic school where it should be relevant, or would be relevant?

Principal: No...[but] when you get up to those high [senior] positions, like my position and so on, then yes, I would see it as relevant, just from the viewpoint that I have to uphold *all* the teachings of the [Catholic] church.

Interviewer: So there is a distinction there between a role that has an 'embodying' role?

Principal: Yep. I'm the representative of the bishop, basically, at the school. That's obviously delegated authority. I need to uphold, to a higher degree, than a regular staff member. (Principal, Catholic school)

Employment practices among Mainstream organisations were based on alignment between the employee and their employer, based on criteria such as best fit, values-alignment, experience and similar traits. For the vast majority of roles, an employees' personal beliefs or personal lifestyle was irrelevant:

From the point of employment when we employ people, we don't restrict anybody [applicant] on the basis of faith [identity] ... We do expect that those [applicants], whatever faith they have, that they would be supportive of the school's values, ethos and Christian beliefs. And by that, we just ask that they don't go in any way to speak against, or undermine, those values. (principal, Catholic school)

Employees of Mainstream organisations were understood by the leaders of those organisations to be able to align with and support the mission of the organisation regardless of personal characteristics, whether religious or otherwise. Attributes such as sexual orientation, gender identity and marital status were irrelevant to the ability of an employee to support the religious mission and values of the organisation. Therefore, aside from the ground of religious belief and practice in respect of a small number of positions (in some, not all Mainstream organisations), an exception to discriminate on other grounds did not impair religious freedom.

b) Non-denominational School Employment

Schools referred to here as ‘non-denominational’ revealed a distinctly different approach to employment compared with Mainstream organisations. Nonetheless, their employment system was structured to rely upon religious belief and practice as the primary basis of discrimination.

In Non-denominational schools, the ground of religious belief and practice was central to the employment contract and was the basis by which the schools would exclude prospective or current employees over issues of sexual orientation:

The anti-discrimination law was reviewed and I can't discriminate on any one of those protected attributes. I can discriminate, though, if someone doesn't live out what we define as our religious beliefs and tenets. So some people argue, "so you can discriminate because someone's gay" and I say "no I can't because they're gay, I can only discriminate because of what they live out in their faith." (Non-denominational school principal, emphasis original)

In this comment, the principal identifies a clear distinction between grounds of discrimination because the anti-discrimination law in that jurisdiction expressly prohibits discrimination on the ground of sexual orientation (‘I can’t [discriminate] because they’re gay’). Rather than sexual orientation, the basis for the discrimination is religious belief and practice (‘what they live out in their faith’). Designating religious belief and practice as the relevant ground was crucial to the principal’s assertion of lawful employment practice.

This same approach to employment prevailed among all the Non-denominational schools in my study. The employment system was coherent and similar across jurisdictions, so schools in jurisdictions such as NSW (broad exceptions) operated in the same way as schools in jurisdictions such as Victoria (narrow exceptions). Regardless of the type of exceptions, the school employment system was essentially the same.

c) Conclusion

The organisations in my study reflected very diverse religious traditions, especially with respect to views on sexual orientation and gender identity. If any ground was relied upon

as a basis to discriminate – and most organisations did not discriminate on any ground – they relied on religious belief and practice. Importantly, all organisational leaders reported that anti-discrimination law was not interfering with their religious freedom in employment. This similarity in employment systems across non-denominational schools existed regardless of jurisdiction and the scope of anti-discrimination law exceptions. Four of the non-denominational schools operated under narrow-type exceptions and four under broad-type exceptions (such as NSW) with no apparent differences in employment practices or structures.

In response to the Questions 7.1, 7.2 and 7.5 as they relate to the scope of exceptions relevant to employment and the attributes that should be covered:

Recommendation 1: Exceptions in the ADA for religious bodies and religious educational authorities should be limited to the ground of religious belief and practice.

V. Criteria for Exceptions: Inherent Requirements

This section addresses the questions raised by the CP at 7.1(2), 7.2 and 7.5(2)(b) and argues that inherent requirements should be one of the criterion relevant to when exceptions can apply. My study shows that religious organisations used inherent requirements in some shape or form, albeit with distinct differences between the group of non-denominational schools and the Mainstream organisations. Since inherent requirements are already used without impairment to religious freedom, they can be added as a criterion of exceptions without interfering with religious freedom. According to the CP, the ADA treats the inherent requirement of a role as comprised of factors such as past training, qualifications and experience relevant to the role, performance and other reasonable factors.⁷

⁷ *Anti-Discrimination Act 1977* (NSW) s 49D(4), s 49E(3), s 49F(2), s 49G(3), s 49J(2), s 49K(2), s 49V(4), s 49W(3), s 49X(2), s 49Y(3), s 49ZB(2), s 49ZC(2).

1) Mainstream organisations – inherent requirements

Factors constitutive of inherent requirements were routinely reported in Mainstream organisational employment, such as qualifications for certain roles. For instance, all Catholic principals described a narrow range of roles as having the inherent requirement that it be performed by an observant Catholic:

Interviewer: Are there any positions in the school at all that require someone to be of Catholic faith?

Principal: These positions are appointed by the [Catholic religious order]: Principal and Deputy Principal are expected [to be Catholic]; within the school itself positions that are appointed by the principal, the ‘assistant principal mission and identity’ would be one that would be expected to be a Catholic and practicing, the other position would be the religious education coordinator. Beyond that we wouldn’t expect as a criteria for appointment that they would be Catholic. (Principal, Catholic school)

The principal describes three specific roles with an inherent requirement to be performed by a person identifying as Catholic (in a practicing or observant sense). This qualification was only relevant to these specific roles, as the principal states, ‘beyond [those roles] we wouldn’t expect as a criteria for appointment that they would be Catholic.’

Similarly, agencies had roles with inherent requirements:

Interviewer: Are there any positions where being Catholic, or a practicing Catholic, is a requirement?

CEO: We do have one position, which is called Director of Mission and Culture. It’s not required to be religious, but we’ve always had a religious aspect in that role and you would have to be Catholic to do that, I would think. (CEO, Catholic agency)

In this Catholic social welfare organisation the Director of Mission and Culture was said to have a ‘religious aspect in that role’, indicating that a religious qualification was an inherent requirement. No leader of a Mainstream organisation reported or suggested a conflict between the religious freedom of the organisation and inherent requirements.

2) Non-denominational schools - inherent requirements

Inherent requirements were applied to employment by non-denominational schools, although in a 'supersized' and unusual manner. In these schools, all roles regardless of nature or seniority had an inherent requirement related to religious belief and practice:

What we're saying is: to be a maths teacher at the school, you need to be a committed Christian who understands that Jesus Christ is your Lord and Saviour, because maths is the language God gave us to explore his creation. You can't just pull those two things apart and say 'maths is maths'. (Principal A)

Another principal stated that when it came to employment it was,

non-negotiable, that every staff member ... from our groundsmen to our principal need to be active Christians with an active faith and a commitment to [the school values and beliefs]. (Principal B)

And a third stated that,

To be a staff member here is [to] have a [faith-based] ministry role, and your ministry role as a staff member – for all staff – is that you will live out the [school's] doctrinal basis in your life, and you'll be a witness to that, to the community, staff and parents. (Principal C)

The concept of inherent requirements did not interfere with religious freedom, rather it was a critical element of the employment system in non-denominational schools.

3) Conclusion

Question 7.5 (2)(b) asks what requirements, if any, should duty holders meet before an exception applies? My study shows that religious organisations from a wide variety of backgrounds already use inherent requirements in their employment system. No threat to religious freedom was reported from doing so, rather in the case of non-denominational schools, inherent requirements were of 'supersized' significance.

Recommendation 2: Exceptions in the ADA for religious bodies and religious educational authorities be limited to roles where an inherent requirement related to religious belief and practice can be demonstrated..