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NSW Law Reform Commission  
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## IEUA NSW/ACT SUBMISSION

### Review of the *Anti-Discrimination Act 1977 (NSW)*: Unlawful conduct

#### Introduction

The Independent Education Union of Australia NSW/ACT Branch (IEU) welcomes the opportunity to contribute to the New South Wales Law Reform Commission's review of the *Anti-Discrimination Act 1977 (NSW)* (AD Act). This submission is provided as a supplement to our submission dated 15 April 2024 and has been prepared in response to the first consultation paper.

#### About the IEU and this submission

The IEU represents approximately 32,000 teachers, support staff, and administrative employees working in non-government educational institutions across New South Wales and the Australian Capital Territory. Our members are employed predominantly in Catholic and independent schools, many of which are operated or administered by religious bodies. We also represent staff in early childhood education and care centres (ECECs), as well as in post-secondary settings such as private vocational colleges and English language institutions serving international students.

The IEU strongly believes that every person in NSW should be free from discrimination, vilification, and prejudice. As an industrial organisation and given our membership coverage, our submission focuses on the application of the AD Act within employment contexts, particularly in faith-based non-government schools operated by religious bodies and other private educational authorities. Accordingly, we address only those aspects of the consultation paper that directly affect our membership.

As outlined in Part 4 of our previous submission, IEU members have not fully benefited from the protections provided under the AD Act due to the breadth of exemptions and exceptions contained within the Act. Drawing on the experiences of our members, we highlight the dire impact of the exceptions available under the Act and advocate for their removal to uphold the rights of all workers equally.

## Anti-Discrimination laws and human rights

International human rights law recognises the fundamental right of individuals to be free from discrimination. This right is, in fact, a cornerstone of many human rights treaties that Australia has ratified, including the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. The IEU believes that all workers should enjoy these rights equally and without exception.

In order to ensure that these rights are upheld, individuals must have access to justice, that is, to be able to enjoy those rights and enforce them if those rights are infringed. The current framework under the AD Act, particularly the broad exceptions for religious bodies and private educational authorities, undermines this access to justice and perpetuates inequality.

### 1. TESTS FOR DISCRIMINATION

#### a. Direct discrimination and the comparator test

Direct discrimination is conceptually straightforward. It occurs when a person is ‘treated less favourably’ because of a protected attribute. However, the legal test for establishing direct discrimination requires identifying a comparator to demonstrate that the person with the protected attribute is treated less favourably because of the protected attribute. We consider this test is inadequate and impractical for several reasons including the following:

- Difficulties in finding a comparator: it is virtually impossible to identify a real or even hypothetical comparator who shares all relevant circumstances except the protected attribute. This makes the test ineffective and overly rigid.
- Causation: The complainant must prove the protected attribute was the reason for the treatment. This can be difficult to prove if the decision-maker is affected by unconscious bias, which is inherently difficult to detect and measure because bias often manifests in subtle, systemic ways. An unconscious bias may be born out of ingrained cultural or institutional norms that disadvantage certain groups.

#### **Case Study 1: Gender Bias in a Western Sydney Islamic School**

In an Islamic school located in western Sydney, the board members consistently appoint male Headmasters while women are placed in other lower-paid roles. Board members may be unable to detect any discriminatory action due to unconscious bias and cultural normalisation.

In consideration of the issues above, the IEU supports the use of the ‘unfavourable treatment’ test which is already adopted in Victoria and the ACT. This proposed test focuses on the unfavourable outcome caused by having one or more protected attributes. It would also be helpful if the Act made clear that it is not relevant whether the decision-maker intended to discriminate, as occurs in the *Equal Opportunity Act 2010* (Vic). Such a test would better reflect the realities of workplace discrimination.

#### b. Indirect discrimination

Indirect discrimination is a more common type of discrimination that occurs in workplaces. However, it is difficult to prove because this type of discrimination is less obvious. Under the AD Act, proving indirect discrimination at work requires establishing that:

- A condition or requirement has been imposed in the workplace by the employer; and
- A person with a protected attribute is unable to comply with such a condition or requirement; and
- A substantially higher proportion of people who do not have the attribute can comply with it; and
- The condition or requirement imposed by the employer is not reasonable having regard to the surrounding circumstances.

The IEU shares the concerns raised in the consultation paper that this test is overly complex and often unworkable, particularly in small workplaces or where comparator data is limited. Like the test for direct discrimination, identifying a valid comparator group is especially challenging in sectors like education, where workforce demographics may distort proportionality assessments.

**Case Study 2: Promotion Positions Full Time Policy in a Catholic High School**

A Catholic high school in Sydney implemented a policy requiring all teachers in promotion positions to work full-time to ensure continuity and consistency. While seemingly neutral, this condition disproportionately affects women, who are more likely to have primary caring responsibilities and therefore may seek to work on a part-time basis. However, establishing that indirect discrimination has occurred is challenging because the education sector is a female-dominated industry. Additionally, there are other protected attributes, such as age, which come into play that may distort the proportions required for the test. For example, the requirement may be harder for women of child-bearing age to satisfy compared with men of child-bearing age but not harder for women who are single or older.

This case study highlights the need for reform.

The IEU supports the adoption of a simplified ‘disadvantage-based’ test for assessing indirect discrimination, as used in the ACT, and proposed in Queensland and Western Australia. The disadvantage-based approach, which focuses on the impact of a condition or requirement on individuals with protected attributes, will more aptly accommodate the practical realities of discrimination at work. The IEU considers that the “unable to comply” element unnecessarily complicates the test for indirect discrimination, especially if applied literally, as can be seen in the case study above.

The IEU notes that both above case studies, even if established as discriminatory, fall outside the scope of the AD Act because of the broad exceptions for private educational authorities (see Section 5 below).

**c. Shifting the burden of proof**

The IEU endorses the shifting of the burden of proof to the respondents (usually the employer) once a prima facie case has been established. Employers will have greater access to relevant information and resources, which enable them to produce evidence more easily. Shifting the burden compels employers to justify their actions or decisions and provide evidence that supports their justification. In demonstrating that no discrimination occurred, the effect of this shift is to promote transparency and accountability.

This approach already exists in discrimination cases pursuant to the general protections provisions of the *Fair Work Act 2009* (Cth) (FW Act). We consider the shifting of the burden

of proof as a fundamental matter of procedural fairness and more importantly, an effective way to improve access to justice for individuals.

In addition, the IEU supports the adoption of the approach used in the United Kingdom and Ireland where the complainant can ask a respondent to complete a questionnaire gathering information about the complaint before proceedings are initiated. Although the respondent is not compelled to respond, the complainant may ask a tribunal to draw an adverse inference based on the response or lack of response<sup>1</sup>.

## 2. DISCRIMINATION: PROTECTED ATTRIBUTES

### a. Carer's responsibilities

The AD Act provides broader protections for individuals with caring or familial responsibilities compared to the federal *Sex Discrimination Act 1984* (Cth). The federal legislation prohibits direct discrimination against individuals with caring responsibilities. We therefore support the expansive approach in the AD Act to safeguarding these rights.

#### **Case Study 3: Resolution for a Female Teacher with Caring Responsibilities**

The IEU successfully resolved a matter involving a female teacher at a girls' high school who sought flexible work hours due to her caring responsibilities. Her request was denied and at the time of the matter, the teacher did not have an avenue to challenge the denial of the request through the Fair Work Commission. The matter was initially conciliated in the NSW Anti-Discrimination Tribunal based on the provisions of the AD Act. When unresolved, it was referred to the NSW Civil and Administrative Tribunal (NCAT) where a settlement was reached to the satisfaction of the teacher.

Note that under the AD Act, there is no exception for employment by a private educational authority in relation to carer's responsibilities.

The consultation paper poses a question as to whether the definition needs to be amended in the AD Act.

We recommend that a definition be retained but broadened to offer the capacity to cover a broader spectrum of familial, caring, and kinship relationships, that exist in Australia's multicultural contexts. We would also support the inclusion of 'parental status' as a distinct protected attribute arising from caring responsibilities. Our preference for a broader interpretation of caring responsibilities means we do not support the adoption of the definition of 'carer' under the *Carers (Recognition) Act 2010* (NSW), as it is too restrictive.

### b. Disability discrimination

We acknowledge that the definition of 'disability' under the AD Act is similar to the broad and inclusive definition provided in the federal *Disability Discrimination Act 1992* (Cth) (DD Act).

Under the AD Act, disability is defined as:

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<sup>1</sup> See discussion in "Reducing the Burden of Proving Discrimination in Australia" by Dominique Allen, accessible at: <https://classic.austlii.edu.au/au/journals/SydLawRw/2009/24.html>

*“disability” means:*

- (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body, or*
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or*
- (c) the malfunction, malformation or disfigurement of a part of a person's body, or*
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or*
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.”<sup>2</sup>*

In comparison, the DD Act defines “disability” in section 4 as:

*“disability”, in relation to a person, means:*

- (a) total or partial loss of the person's bodily or mental functions; or*
- (b) total or partial loss of a part of the body; or*
- (c) the presence in the body of organisms causing disease or illness; or*
- (d) the presence in the body of organisms capable of causing disease or illness; or*
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or*
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that:*
  - (h) presently exists; or*
  - (i) previously existed but no longer exists; or*
  - (j) may exist in the future (including because of a genetic predisposition to that disability); or*
  - (k) is imputed to a person.*

*To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.”<sup>3</sup>*

While similar provisions to sections 4(h) to (k) of the DD Act exist in the AD Act, they are not included within the definition of 'disability'. Instead, these elements are addressed under section 49A of the AD Act, specifically:

*“A reference in this Part to a person's disability is a reference to a disability:*

- (a) that a person has, or*
- (b) that a person is thought to have (whether or not the person in fact has the disability), or*
- (c) that a person had in the past, or is thought to have had in the past (whether or not the person in fact had the disability), or*
- (d) that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the disability).”*

Both the AD Act and the DD Act extend protection to individuals experiencing temporary disabilities, such as injuries. In our experience, these protections are invaluable in the

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<sup>2</sup> Section 4 of the AD Act

<sup>3</sup> Section 4 of DD Act

employment context because they ensure that workers affected by workplace injuries are covered under anti-discrimination provisions. However, we prefer the language used in the DD Act, which more clearly captures these circumstances.

**Case Study 4: Protecting Injured Workers**

A principal at a school for specific purposes sustained a psychological injury due to unreasonable demands from parents. Following a period of absence, her treating medical practitioners recommended reasonable adjustments to her work arrangements to support her return. The employer declined to implement these adjustments, resulting in a deterioration of her condition. Although the injury was temporary, we believe the provisions of the AD Act would have applied to her situation. However, we were unable to escalate the matter due to the exemption for private educational authorities in relation to disability discrimination at work, which is discussed later in this submission.

We consider the existing protections under disability discrimination provisions of the AD Act to be sufficiently broad, encompassing a wide range of conditions, including psychological and mental impairments. However, we believe the provisions would benefit from clearer language and recommend incorporating section 49A into the definition of 'disability' to enhance clarity and consistency.

**c. Marital or domestic status**

Anti-discrimination provisions relating to “marital or domestic status” may have limited practical application in most workplace contexts. However, this protected attribute is particularly relevant in the faith-based non-government school sector. In these settings, employment decisions can be influenced by actual or perceived marital status, often intersecting with religious or cultural expectations.

**Case Study 5: Marital Status and Employment in a Catholic Primary School**

A male principal at a Catholic primary school in a small town in northwest New South Wales experienced a marital breakdown and began living separately from his spouse, although they remained legally married. The Catholic diocesan employer raised concerns regarding community speculation about his personal relationships. These concerns contributed to a deterioration in the employment relationship, ultimately rendering his position untenable. The principal felt he had no choice but to resign and had little recourse to challenge his employer’s undue pressure.

The exceptions available to religious bodies and private educational authorities have the effect of allowing faith-based schools to make employment decisions that are discriminatory. There is little to no scope for the employee to challenge decisions on the basis of whether they are made in accordance with the doctrines or beliefs of the religion or are reasonable.

The effectiveness of the protection against discrimination based on marital or domestic status is currently limited. We call for a review of the exception to enhance these protections, particularly in private educational authorities.

**d. Sex vs gender discrimination**

The use of binary and non-binary language is gaining traction as our contemporary society expands the use of neutral language. Whilst there is growing acceptance in the broader

community of non-binary gender concepts, the IEU experience with private educational institutions is the opposite.

**Case Study 6: Non-Binary Title Usage in a School Context**

A teacher at a Catholic secondary school in Sydney, who identified as non-binary, used the title 'Mx'. Three years into their employment, a newly appointed principal raised the matter with the Catholic Diocese head office as their employer. The employer subsequently directed the teacher to use either 'Miss' or 'Ms' rather than 'Mx'. Upon refusal to comply with the direction, the teacher was given the choice to resign or face termination. The teacher chose to resign.

Critical to the case study is the fact that the teacher's performance and delivery of educational outcomes were not impacted by their chosen title. Their gender identity did not affect their ability to meet the inherent requirements of the role.

The IEU supports a broadening of the concept of sex discrimination to include discrimination based on gender. However, to maximise the effectiveness of the protections afforded by anti-discrimination laws, we need to review the exceptions available under the AD Act. Any effort to broaden the scope of protected attributes must be matched by a reassessment of statutory exceptions, such as those afforded to private educational authorities and religious bodies. Failing to review these exceptions means the positive impact and effectiveness of any reforms will be curtailed.

**e. Transgender**

The AD Act currently prohibits discrimination based on transgender status. The consultation paper considers whether this protected attribute should be changed. On this issue, the IEU supports the adoption of "gender identity" as a more inclusive protected attribute. We note that this position aligns with findings of the Federal Court of Australia, which recognises that the concept of gender identity encompasses not only transgender status but also other kinds and aspects of gender identification<sup>4</sup>. In our view, adopting a more expansive definition would enhance the AD Act's capacity to reflect and respond to evolving societal understandings of gender. It would also strengthen the legal framework's ability to protect individuals whose gender identity does not conform to traditional binary classifications.

However, the practical effectiveness of such reforms is significantly undermined by the broad exceptions currently afforded to religious bodies and private educational authorities, including in relation to transgender discrimination (see Section 38C(3) for example).

**Case Study 7: Gender Affirmation and Religious Belief**

A science teacher employed for over a decade at a prestigious Protestant school in Sydney initially identified as male. Several years into the teacher's employment, he decided to undergo a gender affirmation procedure. During a 12-month secondment to a university, the teacher had gender affirmation surgery and used this time to complete the process. After the 12 months secondment, the teacher intended to return to work identifying as female. Prior to the return to work, the school convened an off-site meeting and advised the teacher that, in accordance with the religious doctrine of the Protestant church, gender is understood as a binary construct determined by God. On this basis, the teacher was informed she would not be welcomed back. She subsequently resigned from her decade-long employment.

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<sup>4</sup> Tickle v Giggle for Girls Pty Ltd (No 2) [2024] FCA 960, 333 IR 296 [74]

As with Case Study 6, the teacher’s gender identity had no bearing on her professional competence or ability to deliver educational outcomes. This case illustrates how religious exemptions can override existing protections provided by the AD Act, thereby undermining the objects of anti-discrimination legislation.

To ensure the AD Act remains effective, any expansion of protected attributes must be accompanied by a critical review of existing exceptions, particularly those that apply to religious bodies and private educational authorities.

### **3. DISCRIMINATION: POTENTIAL NEW PROTECTED ATTRIBUTES**

#### **a. Interaction between state legislation and federal laws**

General Protections under the *Fair Work Act 2009* (Cth) (FW Act)

Part 6 of the IEU’s submission dated 15 April 2024 highlights the consequential impact of the AD Act’s exceptions in relation to the operation of the general protections provisions under the FW Act.

Under section 351(2) of the FW Act, any adverse action taken based on protected discriminatory grounds is not considered unlawful where the action 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.**

“Anti-discrimination law” is defined in Section 351(3) to include the AD Act and federal anti-discrimination legislation.

Notably, Section 351 of the FW Act is broader in relation to the protected attributes covered than the AD Act. Section 351(1) states:

*“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, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.”<sup>5</sup>*

A question arises as to whether the operation of the exception under section 351(2)(a) of the FW Act precludes employees from pursuing general protections claims in their entirety if

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<sup>5</sup> Section 351(1) of the Fair Work Act 2009 (Cth)

the protected attribute is not included in both the AD Act or federal anti-discrimination legislation.

A second question arises if the protected attribute is included in the AD Act but is subject to an exception. For example, in instances where the discriminatory conduct based on sex is exempted under the AD Act in relation to a private educational authority, the statutory exceptions or exemptions contained within the AD Act operate to permit certain bodies or organisations to engage in conduct that would otherwise constitute unlawful discrimination. The *Sex Discrimination Act 1984* (Cth) (SD Act) contains a different exemption for educational institutions established for religious purposes where the person who discriminates does so “... *in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed...*” (section 38(1)), wording that is consistent with the exception contained in Section 351(2) (c) of the FW Act.

To complicate it further, Section 10(3) of the SD Act provides that:  
“(3) *This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.*”

It seems clear that residents of New South Wales are in fact doubly disadvantaged compared to those residing in other states and territories. This is why the IEU has long called for a review of the AD Act’s exceptions and exemptions.

#### **b. New protected attribute: industrial activity**

The IEU supports the call advanced by Unions NSW in its submissions for the introduction of a new protected attribute of industrial activity within the AD Act. This reform will safeguard employees from discriminatory treatment arising from their participation and association with industrial activities.

While the FW Act provides some protections for employees under its general protections provisions, these are limited in scope. Under the FW Act, employees are protected from adverse action associated with being a member (or not) of an industrial organisation and being engaged (or not) in industrial activity<sup>6</sup>. However, those protections are limited to actions that would meet the definition of adverse action under section 342 of the FW Act. It does not provide a holistic protection for employees that may be participating, organising, assisting or promoting industrial activity.

If we were to introduce industrial activity as a new protected attribute, the effect would be a stronger legal framework that would support freedom of association, a universal right recognised under international human rights laws. We are aware that jurisdictions such as Victoria and the Australian Capital Territory have adopted broader definitions of industrial activity. The IEU endorses the adoption of similarly expansive provisions in NSW.

This reform is particularly relevant to our membership base, which includes a significant number of employees in independent schools and early childhood education and care sectors who choose to maintain private union membership. Establishing industrial activity as a protected attribute would foster a cultural shift towards greater transparency and inclusivity and reinforce the legitimacy of employee participation in collectivism.

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<sup>6</sup> Section 346 of the FW Act

### **c. New protected attribute: religious belief**

The IEU recognises and supports freedom of religion to be upheld in Australia. We encourage the inclusion of religious belief as a new protected attribute within AD Act. The rationale behind this reform is to ensure individuals are protected from discrimination because they either hold (or not) religious belief and should include any participation (or not) in religious activities connected to the religious belief.

Recognising religious belief as a protected attribute would align AD Act with international human rights obligations, including Article 18 of the International Covenant on Civil and Political Rights, which guarantees freedom of thought, conscience, and religion.

To ensure the integrity and uniformity of anti-discrimination protections, the IEU recommends that religious bodies should generally be subject to the same obligations as other entities. This approach promotes equality before the law, respects individual dignity, and reinforces the principle that no organisation should be above fundamental human rights protections. Put simply, the introduction of the protected attribute should be complemented by the removal of exceptions which currently exist for religious bodies and private educational authorities.

However, the IEU would not oppose religious educational institutions such as schools being able to discriminate at the point of engagement giving preference to a person of the same religion as the religious educational institution; or during employment, in respect of appointment to a position where it is an inherent requirement of the position to hold the religious belief of the religious educational institution.

#### **Case Study 8: Exclusion from Ongoing Employment Due to Religious Requirements in Catholic primary school**

A teacher who identifies as Buddhist was employed on a temporary basis at a Catholic primary school in South Sydney. She was advised by the Principal that to be eligible for an ongoing role and to teach Religious Education, she would need to obtain a Graduate Certificate in Religious Education. Acting on this advice, the teacher enrolled in the course and paid the tuition fees personally. However, upon presenting her enrolment confirmation, she was informed that the employer's policy prohibits non-Catholics from teaching Religious Education. As a result, she was not considered for an ongoing position within the Catholic school system and subsequently secured employment in a government school.

The case study exemplifies the tension between the right of an individual to hold a religious belief against the right of a faith-based educational institution.

However, these competing rights need not be irreconcilable. The employer could have accommodated her in a role not requiring her to teach Religious Education, including by making arrangements for another teacher to teach that part of the curriculum. The mere fact that a teacher adheres to a different religious belief does not, in and of itself, preclude her from competently delivering a curriculum aligned with the school's religious ethos. Should the teacher be unwilling or unable to meet this expectation, then arguably she is not fulfilling the inherent requirements of the role. Any decision made by the school in not appointing or retaining the teacher would therefore be justified, not based on her religious belief, but on her inability to perform the essential duties of the position.

In such scenarios, broad exceptions available to religious bodies or private educational authorities need not apply. There is clear merit in introducing religious belief as a protected

attribute, as it serves a protective function enshrined in legislation. Introducing these protected attributes instil standards of behaviour expected in our society, which indicate that anything less is not tolerable. They will set the tone to the community and create change to cultural norms that are more progressive and inclusive.

#### **4. EXCEPTIONS: RELIGIOUS BODIES**

Section 56 of the AD Act provides broad exceptions for religious bodies:

*“Nothing in this Act affects:*

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,*
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,*
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or*
- (d) 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.”*

This exception is very broad and produces absurd consequences, including immunity from prohibitions against sexual harassment, racial vilification, and other forms of unlawful conduct. It also extends to areas unrelated to religion, such as discrimination on the basis of age, disability, etc.

There is no definition of a “body established to propagate religion”, referred to in subsections (c) and (d), but the paragraphs are broad enough that they could refer to non-government faith-based schools commonly established by religious bodies. For example, schools that are operated by the Trustees of the Roman Catholic Church in the various dioceses.

Paragraph (c) could potentially apply to all employment decisions by religious non-government schools if they are held to fall within this provision and would remove the few protections that exist under the AD Act for these employees in relation to race, carer’s responsibilities and age discrimination.

It is also worth noting that many religious schools are operated by a corporate entity that is separate from the Church itself. Not all the students are from the relevant religion, and the schools are in receipt of large amounts of government funding (over \$6 billion).

In our view, non-government faith-based schools should be explicitly excluded from Section 56 but could be the subject of specific provisions. We also consider the general exception for religious bodies should be removed.

#### **5. EXCEPTIONS: PRIVATE EDUCATIONAL AUTHORITIES**

##### **a. Limit exception to religious schools**

The IEU has long called for the removal of the exception for private educational authorities.

Not all private educational authorities are religious.

Although many non-government schools have a religious basis, not all schools do. For example in 2024 there were over 90 independent secular schools in NSW educating 29,000 students<sup>7</sup>.

Early childhood education and care services are also private educational authorities that are not normally religious. There are over 4,000 early childhood education and care services in NSW that are required by national law to offer an educational program and only about 150 of these would have a religious affiliation<sup>8</sup>.

There are many other private vocational colleges and colleges for overseas students that do not have any religious affiliation that would fall within the term “private educational authority”. There are over 1,000 registered training organisations in NSW, many of which would be private.

The IEU therefore considers there is no rationale for retaining any exception for “private educational authorities” from the operation of the AD Act. Private educational authorities are covered by provisions in relation to race, carer’s responsibilities and age discrimination and the exceptions should be removed for all other attributes and be replaced by specific provisions applying to faith-based schools, if required.

#### **b. Religious schools**

The specific exceptions for private educational authorities across a range of protected attributes<sup>9</sup> permit conduct that would otherwise constitute unlawful discrimination and fall short of prevailing community standards.

These exceptions permit private educational authorities to discriminate in employment in sex, disability, transgender grounds, homosexuality, or marital or domestic status. The exception for sex extends to related areas such as pregnancy and breastfeeding.

#### **Case Study 9: Denial of a Permanent Promotions Position Appointment in a Catholic Secondary School**

A teacher was appointed to a promotions position in acting capacity at a Catholic secondary school in Newcastle. The teacher, who is in a same-sex relationship, subsequently applied for the role when it was advertised as a permanent appointment. Despite her exemplary performance during the acting appointment period, she was not selected for the ongoing role. The Catholic diocesan employer’s decision was not based on merit or professional capability, but rather on the conflict between her sexual orientation and the religious ethos of the school.

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<sup>7</sup> Independent Schools NSW Snapshot, 2025 Edition, by the Association of Independent Schools. Accessible:

<https://www.aisnsw.edu.au/Resources/WAL%204%20%5BOpen%20Access%5D/Independent%20Schools%20in%20NSW%20Snapshot%202025%20Edition.pdf>

<sup>8</sup> Early Childhood Education and Care Regulations in NSW Independent Review, May 2025, Chris Wheeler Consulting, Accessible: [https://education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/Final\\_Report\\_-\\_Early\\_Childhood\\_Education\\_and\\_Care\\_Regulation\\_in\\_NSW\\_Independent\\_Review\\_-\\_May\\_2025.pdf](https://education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/Final_Report_-_Early_Childhood_Education_and_Care_Regulation_in_NSW_Independent_Review_-_May_2025.pdf) at p32.

<sup>9</sup> For example, section 25(3)(c), section 49D(3)(c), section 38C(3)(c), section 49ZH(3)(c), and section 40(3)(c) of the AD Act.

#### **Case Study 10: Denial of Continuation of Promotion Position**

A teacher with a Coordinator position in a Catholic systemic secondary School in Wollongong has been in a same sex relationship for over 10 years. The teacher was called into a meeting with the Head of Human Resources of the Catholic Diocesan Head Office and informed that she had been seen with her partner and baby at a local shopping centre. The incident was reported to the Bishop. The Catholic Diocesan employer decided to move the teacher to another school without a promotion position.

These case studies underscore the need for reform to ensure that such exceptions do not operate as a shield for discriminatory conduct that causes irreparable harm to individuals. The IEU does not oppose the inclusion of exemptions or exceptions in legislation, however any such provisions must be demonstrably reasonable, proportionate, and necessary to achieve a legitimate aim. The provisions should also not be used in an arbitrary way, in that behaviour or a status that has long been known to an employer becomes unacceptable following a complaint. Note that in a number of cases, including the case study above, the employer's response was to transfer the employee, presumably to a school where the employee was not known, rather than terminate the employment.

We also note that exemptions in federal legislation are narrower than the AD Act in that they require that any act must be done:

- (i) in good faith; and*
- (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

There is no such requirement in the AD Act.

Some schools require employees to sign contracts containing very comprehensive clauses on lifestyle and religious beliefs.

It is not axiomatic that the role of a teacher requires compliance with religious lifestyle requirements. Arguably, the roles of non-teaching employees such as school clerical and administrative staff, teacher's aides, operational staff, and school bus drivers are even less likely to be impacted by such requirements. Contractual conditions, when protected by broad statutory exceptions, permit discriminatory practices that are inconsistent with the objectives of the AD Act and broader community expectations.

Accordingly, faith-based private educational authorities should not receive automatic exceptions in relation to any protected attribute of the AD Act.

We have also seen these faith-basis lifestyle clauses appear in bargaining for enterprise agreements. Notably, these private educational authorities intend to expand the operation of these clauses to justify disciplinary action taken against employees that do not adhere to their religious doctrines.

An example of a provision contained in a faith-based clause is below:

If a teacher acts contrary to the lifestyle and conduct requirements set out in this clause the matter will be dealt with in accordance with the normal school procedures in relation to conduct and performance management. This may result in the termination of employment, as a reasonable and proportionate response to a fundamental and essential condition of employment.

The IEU does not oppose expectations or standards of behaviour which reflect a private educational authority's values including those that are based on religious beliefs. However, any standards imposed should be reasonable in the context of an individual who is performing their role competently without impinging on their rights. For instance, the clause above alludes to the "*termination of employment as a reasonable and proportionate response to a fundamental and essential condition of employment*". Our concern is that this clause could potentially deprive an individual of their right to be protected from unfair dismissal as provided for in the FW Act.

Exceptions to anti-discrimination laws lead to a situation where certain groups or bodies are provided with a status above the law and essentially have a right to discriminate. We do not believe that any bodies, whether private educational authorities or religious bodies, should be given the unfettered right to discriminate. We therefore call for significant reforms in these aspects of the AD Act.

### **IEU Recommendations**

1. The IEU recommends the adoption of the 'unfavourable treatment' test which focuses on the unfavourable outcome caused by having one or more protected attributes.
2. The IEU recommends the adoption of a simplified 'disadvantage-based' test for assessing indirect discrimination, which focuses on the impact of a condition or requirement on individuals with protected attributes.
3. The IEU recommends the shifting of the burden of proof in anti-discrimination matters to the respondents (usually the employer) once a prima facie case has been established. The shift of the burden of proof promotes procedural fairness and improves access to justice for individuals. Alternatively, the IEU supports the adoption of the approach used in the United Kingdom and Ireland, where a complainant requests that a respondent completes a questionnaire gathering information. The failure to provide a response could lead to an adverse inference drawn by the relevant tribunal.
4. The IEU recommends a broadening of the definition for carer's responsibilities to cover a broader spectrum of familial, caring, and kinship relationships, that exist in Australia's multicultural contexts. We would also support the inclusion of 'parental status' as a distinct protected attribute arising from caring responsibilities.
5. The IEU recommends a review of the exception to enhance protections in relation to marital status, particularly in private educational authorities.
6. The IEU recommends broadening the protected attribute on the basis of sex to include discrimination based on gender as well as a review of the exceptions for religious bodies and private educational authorities that are available under the AD Act.

7. The IEU recommends the adoption of “gender identity” as a more inclusive protected attribute to the existing “transgender” grounds. This expansion should also include a critical review of existing exceptions, particularly those that apply to religious bodies and private educational authorities.
8. The IEU recommends the introduction of a new protected attribute of industrial activity within the AD Act. This reform will safeguard employees from discriminatory treatment arising from their participation and association with industrial activities.
9. The IEU recommends the inclusion of religious belief as a new protected attribute within AD Act.
10. The IEU recommends that non-government faith-based schools should be explicitly excluded from Section 56. We also recommend that the general exception for religious bodies should be removed from the AD Act.
11. The IEU recommends the exceptions for private educational authorities should be removed from all protected attributes under AD Act.

## **Conclusion**

This review presents a critical opportunity to modernise the AD Act and we submit that there is a need for the removal of outdated exceptions and expansion of the scope of protected attributes.

The AD Act permits broad exceptions for religious bodies and private educational authorities, enabling discriminatory practices that are increasingly misaligned with contemporary community standards and human rights principles. It is the IEU’s view that these exceptions undermine the AD Act’s primary purpose of promoting equality and preventing discrimination in public life. The IEU strongly recommends the removal of these exceptions. This submission provides case studies from IEU members’ experience to illustrate the adverse impact of such provisions on employees in faith-based educational settings.

Furthermore, we call for the introduction of new protected attributes such as religious belief and industrial activity. The introduction of such protected attributes represents a positive step towards improving the effectiveness of the AD Act to keep up with contemporary and evolving community standards.

These reforms are needed to uphold the dignity and rights of all individuals and foster inclusive workplaces. More importantly, they are needed to ensure that anti-discrimination law in NSW reflects the values of our diverse, multicultural and democratic society.

This is not a new issue for the IEU.

The case of \_\_\_\_\_ is just one of the many profound examples of the devastating consequences of discriminatory conduct permitted by the exceptions for religious bodies under the AD Act. The issue of exceptions for private educational authorities and religious organisations in NSW anti-discrimination law remains a current and pressing concern.

**Carol Matthews**  
**Secretary**  
**Independent Education Union of Australia NSW/ACT Branch**