



just.equal



Queensland Human Rights Commission
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To the Commission

Submission re Review of Queensland's Anti-Discrimination Act

Thank you for the opportunity to provide this submission in response to the Review of Queensland's Anti-Discrimination Act: Discussion Paper, released last year.

Just.Equal Australia is a national organisation advocating for the rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) Australians.

In this context, we provide the following responses to specific questions in the Discussion Paper, and recommend reforms to the *Anti-Discrimination Act 1991* (Qld) to ensure LGBTIQ people in Queensland are able to live their lives free from discrimination.

Question 26: Should there be a new definition of gender identity, and if so, what definition should be included in the Act?

Yes, there should be a new definition of gender identity in the *Anti-Discrimination Act 1991* (Qld).

The current definition excludes people with nonbinary and other forms of gender diverse identities, as well as inappropriately conflating matters of gender identity with matters of sex characteristics (addressed further in our response to Question 36, below).

A new definition should be added to ensure all trans and gender diverse people are able to access the Act's protections against discrimination and vilification.

In terms of how the new definition should be worded, we support consideration of the definition in section 213G of the *Public Health Act 2005* (Qld), as identified on page 97 of the Discussion Paper:

- (1) *Gender identity, of a person, is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth.*
- (2) *Without limiting subsection (1), the gender identity, of a person, includes-*
 - (a) *the person's personal sense of the body; and*
 - (b) *if freely chosen – modification of the person's bodily appearance or functions by medical, surgical or other means; and*
 - (c) *other expressions of the person's gender, including name, dress, speech and behaviour.*

We also support consideration of a similar, abbreviated, approach to this issue in the *Equal Opportunity Act 2010* (Vic):

'gender identity means a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.'

The adoption of either definition would ensure better protection under the Act for nonbinary and other gender diverse people in Queensland.

Recommendation: Yes, there should be a new definition of gender identity, to ensure a diverse range of gender identities, including nonbinary, are protected. This definition should be developed based on consideration of the definitions in the *Public Health Act 2005* (Qld) and *Equal Opportunity Act 2010* (Vic).

Question 27: Should there be a new definition of sexuality, and if so, what definition should be included in the Act?

Yes, there should be a new definition of sexuality in the *Anti-Discrimination Act 1991* (Qld).

The current definition (as meaning ‘heterosexuality, homosexuality or bisexuality’), is neither best practice, nor does it ensure that people with other sexual orientations – such as pansexual, or who describe their sexuality as queer – are protected under the Act.

In terms of how the new definition should be worded, we support consideration of the definition in section 213E of the *Public Health Act 2005* (Qld), which is highlighted on page 97 of the Discussion Paper:

‘Sexual orientation, of a person, means the person’s capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than 1 gender.’

We also support consideration of the shorter definition adopted in the *Equal Opportunity Act 2010* (Vic):

‘sexual orientation means a person’s emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender.’

The adoption of either definition would ensure better protection under the Act for people whose sexuality is not ‘heterosexual, homosexual or bisexual’, including pansexual or queer.

Recommendation: Yes, there should be a new definition of sexuality under the Act to ensure pansexual and queer people are protected. This definition should be developed considering definitions in the *Public Health Act 2005* (Qld) and *Equal Opportunity Act 2010* (Vic).

Question 30: Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?

Yes, Just.Equal Australia supports the inclusion of a protected attribute of expunged homosexual conviction under the Act.

This would strengthen the protections against discrimination offered by the existing expungement scheme to people who should never have been convicted in the first place.

However, we also note that the expungement scheme itself remains incomplete, as it does not offer expungement to people who were charged or convicted as a result of the unequal age of consent for anal intercourse which operated in Queensland between 1991 and 2016, a discriminatory legal regime which was based on homophobia and biphobia.

Recommendation: Yes, there should be a new protected attribute for expunged homosexual conviction under the Act.

Question 36: Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?

Yes, there should be an additional protected attribute of sex characteristics under the Act.

This is essential to ensure that people born with innate variations of sex characteristics (intersex people) are protected against discrimination and vilification.

In terms of how this attribute should be defined, we defer to the views of Intersex Human Rights Australia, and the definition outlined in their submission:

‘sex characteristics means a person’s physical features relating to sex, and includes:

- (a) the person’s genitalia and other sexual and reproductive parts of the person’s anatomy; and*
- (b) the person’s chromosomes; and*
- (c) the person’s hormones; and*
- (d) secondary features emerging as a result of puberty.*

At this point, we also note that Just.Equal Australia endorses the entire Intersex Human Rights Australia submission, including its recommendations to:

- prohibit unnecessary medical interventions and provide for independent oversight, building on forthcoming proposals in the ACT
- reform the Criminal Law Act to update the definition of ‘sexual reassignment’ procedures to ‘give a person the genital appearance of a particular sex’ to criminalise such practices on persons unable to personally give informed consent
- introduce protections against ‘genetic discrimination’, and
- ensure no sports exemptions apply on grounds of sex characteristics.

Recommendation: Yes, an additional attribute of sex characteristics should be added to the Act, defined as proposed by Intersex Human Rights Australia. Just.Equal Australia also endorses the other recommendations made in the IHRA submission to the current inquiry.

[Questions 41, 42 and 44 considered together]

Question 41: Should the scope of the religious bodies’ exemption be retained or changed? In what areas should exemptions for religious bodies apply, and in relation to which attributes?

Question 42: Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?

Question 44: Should the religious educational institutions and other bodies exemption be retained, changed or repealed? If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

Just.Equal Australia supports significant changes to the current approach to religious exceptions under the *Anti-Discrimination Act 1991* (Qld) which, other than one area, has fallen behind best practice in Australian anti-discrimination law.

In this section, we will discuss these exceptions across four topics:

- LGBTQ students in religious schools
- LGBTQ teachers and other workers in religious schools
- Other LGBTQ employees, and
- LGBTQ people accessing services other than education.

LGBTQ students in religious schools

Just.Equal Australia welcomes the Act's current approach to the issue of LGBTQ students in religious schools, which reflects best practice within Australia (alongside Tasmania, the ACT and Northern Territory).

Namely, that the general religious exception in section 109 does not apply to the provision of education, which is then supplemented by section 41, which only allows religious schools to discriminate against students on the basis of religious belief, and only at the point of enrolment.

This is an important safeguard, which ensures that religious schools do not discriminate against LGBTQ children and young people under the guise of religious views (for example, on the basis of whether they affirm statements like 'god created man and woman, therefore transgender people don't exist').

The strength of this approach was demonstrated by the recent example of Citipointe Christian College, with statements from the Queensland Human Rights Commission indicating that their actions were likely to be in breach of the Act.

We therefore do not recommend any changes to the protections offered to students under the Act.

LGBTQ teachers and other workers in religious schools

Unfortunately, the provisions in relation to LGBTQ teachers and other workers in religious schools, while not the worst in the country, nevertheless fall well short of best practice.

This is for a number of reasons, including that section 25, which regulates this area, allows for schools to discriminate on the basis of sexuality and gender identity, even though these personal attributes are irrelevant in determining whether a person has the ability to perform the role of teacher, principal or other school employee.

In contrast, jurisdictions like Tasmania, the ACT and – in recently-passed but not yet commenced amendments in Victoria – religious schools are only allowed to discriminate on the grounds of religious belief, and not in relation to any other attribute.

Another problem with section 25 is that, in practice, it creates a 'Don't Ask, Don't Tell' regime for LGBTQ teachers, where religious schools are allowed to sack LGBTQ teachers if

they know their sexual orientation and/or gender identity, but are not allowed to inquire about these attributes.

This is a thoroughly discredited approach, that failed in the US military, and fails in Queensland schools. Teachers who are constantly fearful of having their core attributes disclosed are not going to be performing to the best of their abilities, to the detriment of the children they teach.

Finally, the approach in section 25 – which allows discrimination against LGBTQ teachers and other workers who are out at work – falls well short of community standards.

In an opinion poll conducted by YouGov Galaxy in January 2022, on behalf of Just.Equal:

- 62% of respondents agreed that ‘it should be against the law for religious schools to dismiss or refuse to hire teachers who are bisexual, gay, lesbian or transgender’, versus
- Only 26% who agreed that ‘religious schools should be legally able to dismiss or refuse to hire teachers who are bisexual, gay, lesbian or transgender’, with
- 13% of respondents indicating ‘don’t know’.

A majority of respondents across all political preferences (Coalition, Labor, Green), male and female, all ages (18-34, 35-49, 50-64 and 65+), and all mainland states supported the rights of LGBTQ teachers in religious schools.

Of particular relevance, this included 59% support for LGBTQ teachers in Queensland, compared to only 27% who supported discrimination against them by religious schools (with 14% undecided).

In terms of how LGBTQ teachers and other workers in religious schools should be protected, the Tasmanian *Anti-Discrimination Act 1998* has protected them for decades, while the ACT *Discrimination Act 1991* has protected them since 2019.

However, the recently-passed amendments to the Victorian *Equal Opportunity Act 2010* will become best practice when they commence, because they combine a prohibition on discrimination other than religious belief with an inherent requirements test. Specifically, new section 83A will provide that:

‘Religious educational institutions: employment

- (1) *A person may discriminate against another person in relation to the employment of the other person in a particular position by a relevant educational entity in the course of establishing, directing, controlling or administering an educational institution if-*
 - (a) *conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and*
 - (b) *the other person cannot meet that inherent requirement because of their religious belief or activity; and*
 - (c) *the discrimination is reasonable and proportionate in the circumstances.*

- (2) *The nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is to be conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (1)(a).*
- (3) *This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).'*

Just.Equal supports the introduction of a similar provision in the *Anti-Discrimination Act 1991* (Qld) to protect LGBTQ teachers against discrimination by religious schools.

Recommendation: Section 25 of the *Anti-Discrimination Act 1991* (Qld) should be repealed, with new exceptions which limit the ability of religious schools to discriminate in employment to the grounds of religious belief only, and not on other attributes like sexuality or gender identity. This should be based on proposed section 83A of the Victorian *Equal Opportunity Act 2010*.

Other LGBTQ employees

From Just.Equal Australia's perspective, it is obviously not only LGBTQ teachers and other workers in religious schools who need better access to anti-discrimination protections, but LGBTQ employees of religious organisations generally.

In our view, they should all be judged on their ability, not their sexuality or gender identity.

In this context, both Tasmania and Victoria point the way forward.

Under the Tasmanian *Anti-Discrimination Act 1998*, religious organisations may only discriminate on the grounds of religious belief or affiliation or activity, and only where it is a genuine occupational requirement of the role. Section 51(1) provides:

'A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.'

While proposed section 82A of the Victorian *Equal Opportunity Act 2010* states:

Religious bodies-employment

- (1) *A person may discriminate against another person in relation to the employment of the other person in a particular position by a religious body if-*
- (a) *conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position; and*
 - (b) *the other person cannot meet that inherent requirement because of their religious belief or activity; and*
 - (c) *the discrimination is reasonable and proportionate in the circumstances.*

- (2) *The nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (10(a)).*
- (3) *This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).*

Recommendation: The *Anti-Discrimination Act 1991* (Qld) should be amended so that religious organisations may only discriminate against employees on the basis of religious belief, and only where it is a genuine occupational requirement of the role. This provision should be drafted considering the approach in section 51(1) of the *Anti-Discrimination Act 1998* (Tas) and proposed section 83A of the *Equal Opportunity Act 2010* (Vic).

LGBTQ people accessing services (other than education)

Under the *Anti-Discrimination Act 1991* (Qld), religious organisations outside education (and some types of accommodation), enjoy an extremely broad exception, allowing them to discriminate in service delivery, including on the basis of sexuality and gender identity.

Specifically, section 109(1)(d) provides that:

'The Act does not apply in relation to-

- (d) unless section 90 (Accommodation with religious purposes) applies- an act by a body established for religious purposes if the act is-*
- (i) in accordance with the doctrine of the religion concerned; and*
 - (ii) necessary to avoid offending the religious sensitivities of people of the religion.'*

Just.Equal can see no justification for such a broad exception, especially where it allows discrimination on the basis of sexuality, gender identity, relationship status, sex and even disability and race.

Once again, the Tasmanian and (proposed) Victorian approaches show possible ways forward on this issue.

In particular, the general exception in the Tasmanian *Anti-Discrimination Act 1998* only applies to religious belief, and does not allow discrimination on the basis of other attributes:

'Section 52 Participation in religious observance:

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to- (d) any other act that –

- (i) is carried out in accordance with the doctrine of a particular religion; and*
- (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.'*

Victoria has adopted a slightly different approach, in that it has narrowed the exception in relation to service provision where it involves the delivery of publicly-funded services (such

as health, aged care or housing), with proposed section 82B of the *Equal Opportunity Act 2010* (Vic) providing:

Religious bodies – provision of government funded services

(1) A person may discriminate against another person if the discrimination is constituted by, or relates to, one of the following-

- (a) a religious body refusing to provide government funded goods or services to a person on the basis of the person's religious belief or activity;
- (b) a religious body determining the terms on which government funded goods or services are provided to a person on the basis of the person's religious belief or activity;
- (c) a religious body subjecting a person to any detriment, in connection with the body's provision of government funded goods or services to the person, on the basis of the person's religious belief or activity;

where-

- (d) the refusal, the terms or subjecting the person to the detriment, as the case requires, is in conformity with the doctrines, beliefs or principles of the religious body's religion or is reasonably necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
- (e) the discrimination is reasonable and proportionate in the circumstances.

Note that Just.Equal Australia does not support a differentiation between whether a service is publicly-funded or not – all people should be able to engage with all services in the public sphere without having to fear discrimination on the basis of attributes like sexuality or gender identity. However, we suggest that adding a requirement such as 82B(1)(e) – that any 'discrimination is reasonable and proportionate in the circumstances' – appears to be a sensible way forward, especially when combined with the existing Tasmanian approach.

Recommendation: Section 109 of the *Anti-Discrimination Act 1991* (Qld) be amended to limit the ability of religious organisations to discriminate in the provision of services to the ground of religious belief only, based on the approach in section 52 of the Tasmanian *Anti-Discrimination Act 1998*, with further consideration of adding a requirement that any discrimination must be 'reasonable and proportionate in the circumstances', along the lines of proposed section 82B(1)(e) of the Victorian *Equal Opportunity Act 2010*.

Question 45: Are there reasons why the work with children exemption should not be repealed?

No, Just.Equal Australia does not see any valid reason to retain the work with children exemption in the Act.

We note that section 28(1) of the *Anti-Discrimination Act 1991* (Qld), isn't just one of the worst provisions in the Queensland Act, but it is one of the worst provisions in any Australian anti-discrimination law, anywhere. It currently provides that:

'Work with children

It is not unlawful to discriminate on the basis of lawful sexual activity or gender identity against a person with respect to a matter that is otherwise prohibited under subdivision 1 if-

- (a) the work involves the care or instruction of minors; and*
- (b) the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person's actions.'*

This is simply transphobia via legislation. There is no justification for discriminating against trans and gender diverse people in this way, including by contributing to a misinformed stereotype of trans and gender diverse people as somehow posing a threat to children.

By excluding trans and gender diverse people from a wide range of jobs, this provision also contributes to higher rates of unemployment amongst this community.

Recommendation: Section 28(1) of the *Anti-Discrimination Act 1991* (Qld), which allows discrimination in employment against trans and gender diverse people where it involves working with children, and therefore encourages stigma and discrimination against this community, must be repealed.

Question 46: Are there reasons why the Act should not apply to provision of assisted reproductive technology services?

No, Just.Equal Australia does not see any valid reason why the Act should not apply to the provision of assisted reproductive technology services.

Section 45A, which currently allows discrimination in ART on the basis of relationship status and sexuality, is both outdated, and not based on any legitimate policy rationale.

Both single parents, and rainbow families, are capable of successfully raising children, and providing them with the love and nurture which they require to thrive. This provision should be repealed to ensure that all Queenslanders are able to start a family without discrimination on the basis of who they are.

Recommendation: Section 45A of the *Anti-Discrimination Act 1991* (Qld), which allows discrimination in the provision of assisted reproductive technology services on the basis of relationship status and sexuality, must be repealed.

Thank you in advance for taking this submission into consideration as part of this important review. Please do not hesitate to contact us, at the details provided, should you require further information.

A final recommendation

Just.Equal Australia urges the review to support an amendment to the Queensland Anti-Discrimination Act that is modelled on section 17(1) of the Tasmanian Anti-Discrimination Act.

Section 17(1) says

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e) , (a), (b), (c), (d), (ea), (eb) and (k), (f) , (fa) , (g) , (h) , (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

The attributes are:

Age

Race

Disability

Sexual orientation

Lawful sexual activity

Gender

Gender identity

Intersex variations of sex characteristics

Pregnancy

Breastfeeding

Marital status

Relationship status

Family responsibilities

Parental status

Section 17(1) is unique in Australia in that it prohibits demeaning and denigrating conduct on such a broad range of grounds.

Section 17(1) has proved immensely valuable in Tasmania for protecting members of stigmatised and marginalised minorities from such conduct. The largest proportion of complaints are from people with disability followed by women and people of colour.

We have attached a pamphlet from a coalition of Tasmanian groups defending section 17(1) from being overridden by the Religious Discrimination Bill. The pamphlet provides a summary of the social good fostered by section 17(1) including landmark cases that have helped foster greater equity and inclusion, as well as responses to critics of the provision.

Sincerely

Rodney Croome AM

On behalf of Just.Equal Australia