

Submission to the Parliamentary Joint Committee on Human Rights: Religious Discrimination Bill 2021 (Cth) and related bills

December 2021



251 Morphett Street, Adelaide, SA 5000
GPO BOX 1146, Adelaide SA 5001
08 8226 3355 | commissionercyp@sa.gov.au

Email: religionbills@aph.gov.au

Thank you for the opportunity to provide feedback to the Parliamentary Joint Committee on Human Rights Inquiry into the Religious Discrimination Bill 2021 and related bills.

As South Australia's Commissioner for Children and Young People, my mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* is to promote and advocate for the rights, interests and wellbeing of all children in South Australia.

The rights of every child as set out in the United Nations Convention on the Rights of the Child (the UNCRC) are universal, inalienable, indivisible and interdependent. Article 14 of the UNCRC protects children's freedom of thought, conscience and religion, so long as this does not limit the fundamental rights and freedoms of others.

Although Clause 64 of the Bill claims that the Act gives effect to Australia's obligations under the UNCRC and other international human rights instruments, the Bill appears to give the right to freedom of religion precedence over other rights.

I am concerned that the Bill will unjustifiably limit children and young people's other fundamental rights and freedoms set out in the UNCRC, including the right to be free from discrimination (Article 2) and the rights to education (Articles 28 and 29) and health (Article 24).

As such, I do not support the Bill in its current form. I am concerned that the Bill is disproportionate and unjustified insofar as it:

- Appears to provide legal cover for bullying, harassment, homophobia, sexism, ableism and other forms of prejudice that will impact children and young people, particularly LGBTQIA+ young people, young women and children with disability; and
- Overrides state and territory anti-discrimination legislation and existing protections, including on the grounds of race, religion, sex, disability, gender identity or sexual orientation.

The following Clauses are of particular concern:

- **Clause 11** – Conduct in relation to employment by religious educational institutions – overriding certain State or Territory laws
- **Clause 12** – Statements of belief
- **Clause 15** – Discrimination on the ground of religious belief or activity – qualifying body conduct rules

Background and summary of recommendations

In anticipation of the introduction of this Bill, I wrote to the Attorney-General Senator the Hon Michaelia Cash in November 2021 to highlight the need to consider the rights and voices of children and young people as a group whose lives and education will be shaped by this legislation, but whose voices are not usually heard.

I drew particular attention to my recent report *No Exceptions: Creating Safer Schools for LGBTQIA+ Students*, which captures the views of young people in South Australia about their perceptions and experiences of discrimination in religious schools, as well as what they believe would make schools more inclusive.ⁱ

The report follows my 2020 *Blame Game* Report into the impact of school exclusions, where a number of students attending religious schools raised concerns that they or their peers were treated unfairly or differently on the basis of their sexuality or gender identity.ⁱⁱ

No Exceptions presents the findings of a survey I created at the end of 2020 to inform my response to proposed changes to South Australia's *Equal Opportunity Act 1984 SA*. The proposed changes sought to clarify that essential service providers, including religious schools, cannot rely on religious exceptions to justify discrimination against students on the basis of sexuality or gender identity.

While such clarification has not yet been legislated in South Australia, I remain concerned about the extent to which this Bill seeks to override existing anti-discrimination legislation and undermine existing protections for young LGBTQIA+ people and other marginalised groups.

Although there are noted examples of religious schools that actively promote and practice inclusivity, many young people nevertheless told me that they feel unsafe in school environments and that adults often don't show them the respect or protection they want or need.

These findings are consistent with research showing that LGBTQIA+ young people have disproportionately poorer mental health outcomes compared to the general population and that this is directly related to their experiences in society and service systems, including school environments.ⁱⁱⁱ

That any child should feel unsafe or insecure in their interaction with adults, whether at home, while in care, at school, or in other community settings, reflects directly on us as adults, and it is our responsibility to do something about it. In light of the above, I make the following recommendations to ensure the Bill better balances the right to religious freedom with the rights to non-discrimination and equality:

1. That the provisions relating to employment by religious educational institutions:

- a. Do not allow religious schools to positively discriminate in employment practices, unless a particular religious belief is a genuine occupational requirement; and
- b. Do not override existing federal, state or territory anti-discrimination laws.

2. That the 'Statements of Belief' provisions are removed from the Bill.

3. That further legislative protections are introduced to ensure that LGBTQIA+ students cannot be excluded, expelled or otherwise discriminated against at school.

If you would like to discuss anything further, please do not hesitate to contact my office.

Yours sincerely,



Helen Connolly

Commissioner for Children and Young People SA

1. **That the provisions relating to employment by religious educational institutions:**
 - a. **Do not allow religious schools to positively discriminate in employment practices, unless a particular religious belief is a genuine occupational requirement; and**
 - b. **Do not override existing federal, state or territory anti-discrimination laws.**

Clause 11 of the Bill provides that religious schools can preference people of a particular religious belief or activity in their employment decisions regardless of State or Territory legislation, so long as the preference complies with a publicly available policy and is given 'in good faith'.

The requirement for these institutions to reveal this discrimination through publicly available policies is positive insofar as it promotes transparency. However, this office remains concerned that this Clause effectively legitimises discriminatory employment practices in a way that may impact the safety and wellbeing of students.

It is important to ensure that protection against religious discrimination does not come at the expense of reducing protections against other forms of discrimination.

It is concerning that this Clause will override state anti-discrimination laws, including those that make it unlawful for religious schools or institutions to discriminate against employees on the basis of their gender identity, sexual orientation, marital status or other protected attribute.

This office is of the view that the only circumstances in which religious organisations should be allowed to discriminate in relation to employment is where a particular religious belief is a genuine occupational requirement. The wellbeing and engagement of students in schools is bolstered by a diverse workforce as it reflects society and teaches children and young people to appreciate and respect different beliefs and backgrounds.

Further, as further explored in Recommendation 3, the Bill should not be enacted until further legislative protections are introduced for LGBTQIA+ students.

2. That the 'Statements of Belief' provisions are removed from the Bill.

It is concerning that Clause 12 of the Bill overrides federal and state anti-discrimination law to make 'statements of belief' legal if such statements are 'made in good faith' and 'genuinely considered to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'.

The standard of what makes a reasonable 'statement of belief' in Clauses 12 and 15 of the Bill is unclear, and whether a statement is made 'in good faith' appears to be open to interpretation.

This Office acknowledges that statements will not be protected if they are 'malicious', considered likely to 'threaten, intimidate, harass or vilify a person or group' or to encourage a serious offence. However, it appears these limitations and the lack of clarity regarding the standard for reasonable expressions of belief do not provide people sufficient protection from statements that can cause significant and unjustified emotional and psychological harm, particularly if aimed at young people.

As Beyond Blue already notes in a submission to this Inquiry, such comments are particularly harmful ‘when made by people in positions of trust and influence’, such as teachers or health professionals.

This Office is concerned that the Bill appears to provide legal cover for bullying, harassment, homophobia, sexism, ableism or other forms of prejudice that are likely to impact children and young people’s wellbeing, safety, relationships and educational engagement, particularly LGBTQIA+ young people, young women and children with disability.

The LGBTQIA+ young people who responded to my 2020 survey about discrimination at religious schools described how students are excluded, punished, segregated, ‘disowned, shamed, ridiculed, bullied and/or belittled because of gender/sexual identity, or their opinions’.

Some LGBTQIA+ students shared their experience of being ‘outed’ publicly by school staff without their permission. This included being ‘outed’ to parents. Young people described this as a breach of their trust and a significant risk to their safety.

“It can come in many different forms. A teacher doesn’t have to be shouting hate speech at a student to qualify for a discriminating act. Subtle ignorant comments may not be as malicious but can still be damaging.”

– 17 year old

“they don’t mention the topic, students are bullied for it and when someone’s yelling slurs in class they don’t care.”

– 15 year old

Further, as noted in other submissions to this Inquiry, it would be unprecedented for the ‘statement of belief’ provisions to override state and territory discrimination law. Such provisions are also inconsistent with other anti-discrimination legislation insofar as the focus is the intent of a statement and the rights of the person making the statement, rather than the impact of the statement on another’s wellbeing right to be free from discrimination.^{iv}

3. That further legislative protections are introduced to ensure that LGBTQIA+ students cannot be excluded, expelled or otherwise discriminated against at school.

I note the Australian Law Reform Commission (ALRC) is considering the framework of religious exemptions and will provide its report 12 months after the passage of the Religious Discrimination Bill. I also note the Government’s expectation that the detailed drafting will give effect to its position that a ‘student is not expelled from a school on the basis of their gender or sexuality’.

However, this cannot be ensured. Further, given the extent of discrimination being described by LGBTQIA+ children and young people, further protections are needed to protect students from other forms of discrimination beyond exclusion and suspension.

While some LGBTQIA+ young people described the impact of formal school suspensions, exclusions or expulsions, the most significant concerns focused on the cumulative impact of day-to-day experiences of indirect and direct discrimination in school environments where they are harassed, made fun of, shamed, ignored, excluded, ‘othered’ or ‘publicly outed’.

“Treating them differently to others and preferring the ‘straight’ kids over the ones they know to be a part of the lgbt+.”
– 17 year old

“Young people are vulnerable, teachers are supposed to prepare them for the world and right now LGBTQIA+ kids in religious schools are learning that the world hates them. And while in some ways that’s quite accurate, they should be safe in schools and they aren’t.”
– 19 year old

It is significant that some young people who responded to my survey saw ‘taking gay kids out of religious schools’ as the only solution. The onus should be on those providing education services to create safe environments for all students, regardless of their identity.

While I welcome the federal government’s commitment to amend the *Sex Discrimination Act 1984 (Cth)* to protect LGBTQIA+ students, this does not allay concerns outlined above that this Bill appears to undermine rather than strengthen anti-discrimination protections for children and young people.

ⁱ Connolly, H. Commissioner for Children and Young People, South Australia, 2021. No Exceptions: Creating Safer Schools for LGBTQIA+ students. Available at <https://www.ccyp.com.au/wp-content/uploads/2021/08/20210825-No-Exceptions-FINAL-Screen-1.pdf>.

ⁱⁱ Connolly, H. Commissioner for Children and Young People, South Australia, 2020. The Blame Game: The perspectives of South Australian children and young people on the causes and impacts of education exclusion and why we need to stop blaming children for system failure. Available at <https://www.ccyp.com.au/wp-content/uploads/2020/12/Screen-The-Blame-Game-Report-Low.pdf>.

ⁱⁱⁱ Hill et al. 2021. Writing Themselves In 4: National Report. The Health and Wellbeing of LGBTQIA+ Young People in Australia. Available at https://www.latrobe.edu.au/_data/assets/pdf_file/0010/1198945/Writing-Themselves-In-4-National-report.pdf. Australian Government, Productivity Commission, 2020. Mental Health Inquiry. Volume 2, p. 93. Available at <https://www.pc.gov.au/inquiries/completed/mental-health/report/mental-health-volume2.pdf>.

^{iv} For example, Tasmania’s *Anti-Discrimination Act 1998* provides a framework that considers such statements as incompatible with the human right to be free from discrimination. Available at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1998-046>.