

Justice and Community Safety Directorate

Changes to the ACT's Discrimination Act

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On Thursday, 1 November, The Minister for Social Inclusion and Equality, Andrew Barr, and Minister for Justice, Shane Rattenbury introduced the Discrimination Amendment Bill 2018 into the Legislative Assembly.

This Bill amends the *Discrimination Act 1991* to clarify exceptions for religious schools, to provide greater protection to students and staff from discrimination based on protected attributes such as sexuality and gender identity.

The ACT is a human rights jurisdiction, and the Discrimination Amendment Bill 2018 is an example of the Government's commitment to ongoing reforms to promote the equality of all Canberrans.

Why are discrimination laws being amended in the ACT?

We are making changes to the Discrimination Act to strengthen protections against discrimination for students and staff in non-government schools, so that it will not be lawful to discriminate on the basis of sexuality, gender identity or other protected attributes.

We recognise that non-government schools in the ACT care deeply about the welfare of their students and most reject the idea that they would discriminate against students because of their sexuality or other attributes. Many non-government schools also have inclusive policies regarding employment and are supportive of LGBTIQ staff.

However, as a Territory committed to human rights, it is not consistent with our values of equality, diversity and inclusion to have exceptions in our discrimination laws that could allow students or teaching staff to be subject to discrimination because of their sexuality, gender identity or other protected attributes.

What does the Bill do?

The Bill amends the Discrimination Act 1991 to:

- prohibit discrimination against students by religious schools on any ground, except the religious conviction of a student (or family), and then only in decisions about admission, and
- prohibit discrimination against employees and contractors by religious schools on any ground except the religious conviction of the employee or contractor. Discrimination on the ground of religious conviction may be permissible only apply where it is intended to enable, or better enable the religious school to be conducted in accordance with its religious doctrines, tenets, beliefs or

teachings.

- Require that religious schools that wish to rely on the limited exceptions publish policies about their admission criteria for students or employment practices to ensure consistency and transparency. These new requirements will be set out in section 46 of the Discrimination Act (as amended).

Which organisations does this Bill affect?

The Bill will affect religious non-government schools or other educational institutions in the ACT conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

The Bill will limit the exceptions that religious schools would otherwise have been able to rely on to excuse discriminatory practices against students and staff. Religious schools will now be subject to the same prohibitions on unlawful discrimination that apply to other educational institutions (other than the limited exceptions allowing discrimination on the grounds of religious conviction).

How will the Bill protect students and employees?

Students:

The Bill significantly narrows the instances where religious schools are permitted to discriminate against a student.

If the Bill is passed, the only area in which a religious school will be authorised to discriminate against a student will be in the admission process, and only on the ground of the religious conviction of the student (or family). This is intended to allow schools to discriminate in favour of students who share the religious conviction of the school community (for example an Islamic school may make it a criteria of admission that a child or their family is of Muslim faith).

For a religious school to rely on the exception, it must have a clear policy about criteria of religious conviction applied to admissions and make sure the policy is readily accessible by both current and prospective students.

Staff:

If the Bill is passed, it will remove the broad exception that may currently allow discrimination against staff and contractors in religious schools in relation to sexuality, gender identity and range of other protected attributes.

If the Bill is passed, religious schools will only be permitted to discriminate against an employee or contractor on the ground of the religious conviction of that employee or contractor and not on any other ground.

To rely on this narrow exception, the religious school would have to show that discrimination was intended to enable, or better enable the school to be conducted in accordance with its religious doctrines. In addition, the religious school would need to publish policies setting out any criteria for staff relating to religious conviction, and ensure that these policies are readily available to current and prospective staff.

What do non-government schools need to do to comply with the amended law?

The Bill reduces the scope of exceptions that apply specifically to religious non-government schools. This means that religious schools will now be prohibited from discriminating against students or staff in relation to any protected attribute, other than religious conviction. Religious schools will need to consider whether they currently impose requirements or undertake practices that discriminate against staff or students on any protected ground.

The Bill does not require non-government schools to take any other action unless they seek to impose discriminatory requirements relating to religious conviction, in the admission of students, or in the employment or contracting of staff.

Any such requirements must be included in policies that are readily available to current and prospective staff or students. If a complaint is made regarding unlawful discrimination, the existence of a policy setting out criteria relating to religious conviction would be a relevant factor in determining whether a religious school could rely on the exception in section 46 of the Discrimination Act.

Where a school considers that they have a genuine religious need to conduct a particular discriminatory practice that would be prohibited by the Discrimination Act, the school may decide to make an application to the ACT Human Rights Commission for an exemption.

Will current students and employees be protected?

For both students and employees, the short answer is a yes, once the new law comes into effect. As the exception to unlawful discrimination only relates to admission of students, discrimination against students already enrolled in religious schools will not be permitted on any ground.

Current staff will be protected from discrimination on any grounds other than religious conviction. The narrower exception allowing discrimination on the grounds of religious conviction will apply to existing staff on an ongoing basis. However, to rely on this exception the school would need to show that any discrimination was intended to enable, or better enable, the school to be conducted in accordance with its religious doctrines. To rely on this exception the school must also have published policies about the way that any religious conviction requirements apply to staff.

Does this affect the right to religious freedom?

The amendments in this Bill were carefully considered to ensure that the right to freedom of religion is not unreasonably limited, while protecting individuals from discrimination.

Under the Human Rights Act 2004 which is modelled on the International Covenant on Civil and Political Rights (ICCPR), there is a distinction between the freedom to have or adopt a religion, and the freedom to demonstrate one's religion.

Freedom to have or adopt a religion must not be limited in any circumstances. No one should be forced to hold a particular belief or to denounce their religion. However, reasonable limitations are permitted on the right to demonstrate religious belief as this affects others in the community. In this context, demonstration

of a religion includes establishing seminaries or religious schools and the teaching of religion or belief.

International human rights law permits restrictions on the freedom to demonstrate religion or belief if the limitations are reasonable and necessary to protect rights and freedom of others. The right to equality and freedom from discrimination is a fundamental human right and is the foundation of many other human rights.

The Discrimination Act as amended will still allow religious schools to admit students and employ staff who share the religious conviction of the school community. It should not affect the ability of religious schools to teach their beliefs and the tenets of their religion. If religious schools do have a genuine and reasonable need to discriminate against staff or students in a way that would otherwise be unlawful, they may also seek an exemption from the ACT Human Rights Commission. In determining exemption decisions the Commission will consider relevant human rights including the right to religious freedom, as well as the objects of the Discrimination Act.

Overall, the Discrimination Act as amended by this Bill will better protect the human rights of vulnerable students and families, and promote equality of all Canberrans. While the amendments engage and limit rights to religious freedom and freedom of education, these limitations are reasonable and proportionate in the context of the Act as a whole.