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Gay and Lesbian Health Alliance of SA (GLHA) Submission

SALRI Review of Exceptions to Equal Opportunity Law in SA

This submission will specifically address the religious exemptions in the *Equal Opportunity Act (1984) SA*.

A. Employment in Religious Schools.

1. Section 34(c) of the *EO Act* states that discrimination on the 'ground of chosen gender or sexuality' in relation to employment or engagement for the purposes of an educational institution will not be unlawful where:

(a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion.'

GLHA understands (although disagrees with) the belief of various religious denominations that homosexuality is a sin according to biblical interpretation and therefore do not wish to hire gay or lesbian teachers. However, where is the biblical admonition against transgender or intersex people? Have religious organisations provided satisfactory reasons to SALRI for wanting exemptions to enable them to 'lawfully discriminate' against transgender and intersex people?

2. GLHA supports the statement in the SALRI *Issues Paper* at Note 49 page 22: *SALRI appreciates the complexity of this issue. There may well not be a simple or comprehensive solution. It may be that a subtler and more nuanced approach is*

preferable to the existing exceptions in the EO Act. The religious school sector is both diverse and complicated and there are likely to be great differences in how religious schools approach anti-discriminations laws and the use of exceptions such as in the EO Act.

As an example of the complexity of the issue, GLHA notes that four major religious schools in the Adelaide area are members of the Safe Schools Coalition SA. They are St Peters College (Anglican), Pulteney Grammar (Anglican), Scotch College (Uniting Church), and Westminster College (Uniting Church).

'Safe Schools Coalition Australia is a Commonwealth funded program dedicated to making schools safer and more inclusive for same sex attracted, intersex and gender diverse students, staff and families. This program takes a whole school approach to support all staff to understand their role in creating safe and inclusive learning environments. It goes beyond the classroom to look at school policy, practice, the school environment and student leadership opportunities.'

<http://www.shinesa.org.au/community-information/sexual-gender-diversity/safe-schools-coalition-sa/>

3. GLHA strongly supports clarification of Section 50(1)(c) of the *EO Act* to ensure that religious schools cannot lawfully discriminate against **students** on the grounds of sexual orientation, gender, gender identity and intersex status. In this we are in agreement with the Equal Opportunity Commission of SA.

B. Provision of Health Services by Religious Organisations.

1. GLHA strongly agrees with the statement in the SALRI *Issues Paper* at Note 51, page 23: *The concern with religious exceptions comes down to an exercise in balancing the right to non-discrimination with the right to religious freedom. Provisions that are obviously directed at protecting the rights of religious bodies to freely practice their religion are generally uncontroversial. Where the exceptions extend to areas less related to the practice of religion, for example the employment of teaching and non-teaching staff in religious schools, or the provision of aged or health care, the role of the exceptions in protecting religious freedom becomes less*

clear. In these cases, it is arguable that the balance should tip towards greater consideration of the rights of LGBTIQ people.

By way of argument GLHA supports the writer of Submission 27 to the *SALRI Audit Review*:

Exemptions from anti-discrimination legislation for religious bodies must be removed from the Equal Opportunity Act 1984, particularly if those bodies receive State funding or any exemptions from, or reduction in, State rates and charges. This is more important than ever as government funded services contract and people have correspondingly few choices other than to use services from religious providers.

(Issues Paper p 28)

C. Options for Reform.

1. GLHA strongly supports Option D: Exceptions by Application Only. This would put the onus on the organisation or institution to prove a case for exception. For example: that hiring an intersex or transgender person would be injurious *to the religious susceptibilities of the adherents of that religion*. This would solve the problem of trying to continually fine-tune relevant sections of the *EO Act* in an attempt to get the right balance *between the need to protect people against discrimination and other important rights or interests, such as the need to respect religious practices and freedom of religious belief (p14 Issues Paper)* in light of contemporary social and community values and expectations.

2. Failing the acceptance of Option D, GLHA supports Option B: Modify Certain Exceptions. GLHA supports the view reflected in the submissions to the Audit Report that the current exceptions appear to operate in a way that discriminates excessively against LGBTIQ people beyond what is reasonable and necessary to protect the legitimate interests of religious bodies. For example, we agree that the ambiguity in the current draft of sections of the *EO Act* allows discrimination against LGBTIQ

people in ways that go *beyond the intention of the exception to protect religious freedom.*

In fact, those religious schools who are taking advantage of the ambiguity in the current EO Act are acting contrary to the Government's clear intention, outlined by Mr Atkinson, the then Attorney-General, in 2009:

*In general, the State ought not to interfere in the practice of religion and ought not to compel any person to act against his or her conscience. Consequently, the Bill proposes to limit this exception to the only thing for which it is known to be used. **It would not be available to all institutions run on religious principles, but would be limited to schools. It would not apply to the treatment of students but only the hiring of staff.** Further, the Bill proposes that these schools should publicly disclose this policy. That way, both parents and prospective staff will know where the school stands. The Bill would require the school make the policy available on request and to publish the policy on the school's website if it has one. (p 15 Issues Paper).*

It would seem that changes were made before the Bill was passed. (See p 20 Issues Paper). For example, 'schools' has been changed to 'educational authority administering the institution'. Does this mean the South Australian Commission for Catholic Schools (SACCS), which has oversight of education in all Catholic schools and sets directions, allocates resources and **develops policies** for Catholic schools in South Australia, has written the policy relating to lawful discrimination against LGBTIQ teachers based on 'chosen gender or sexuality', for all Catholic schools in SA?

It would seem that individual schools do not have to write their own policy. **Does anyone know how this section of the Act has been interpreted? Does the EOC know? Does the A-G know?**

A further change was the omission of the injunction that the policy must be published on the school's website if it has one. Whereas under the injunction a school would have to publicly declare its 'lawful discrimination' policy against LGBTIQ teachers, the

Act has put the onus on the public to ask ‘the educational authority’ if they want that information. This smacks of hypocrisy. On the one hand the educational authority is claiming exception based on ‘the precepts of a particular religion’, yet seemingly doesn’t want to have to publicise the fact. **Why??**

GLHA contends that ‘educational authority administering the institution’ be changed back to ‘school/s’, and that the injunction that a school which adopts an exception policy ‘*must publish the policy on the school’s website if it has one*’ be added.

If it is the case that an educational authority such as the SACCS writes the exception policy for all of the schools under its authority, then this can be seen as a measure of control and forced conformity to traditional views by religious hierarchies. It is not a true reflection of the spectrum of views and attitudes towards sexuality and gender in individual schools. This issue should be thoroughly investigated.

GLHA believes that individual schools should write their own exception policy if they choose to have one, and be required to publish that policy on their school websites. Those which do not wish to have an exclusion policy should *not* be covered by a blanket policy issued by an educational authority.

In defence of this position, GLHA highlights *Footnote 63, p 21, Issues Paper which states: on many occasions school employers and even priests did not adhere to the official policy of the Catholic Church because they ‘view such a policy as uncaring, harmful, intolerant and in conflict with the social justice teachings of the Catholic Church’* (Victorian Independent Education Union, Submission, Victoria Government Department of Justice, Review of Exceptions and Exemptions in the Equal Opportunity Act 1995 (April 2008) [5.1.3]).

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Chairperson

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