



South Australian Rainbow Advocacy Alliance Inc.

On Kurna land

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26 November 2020

By email

The Hon Vickie Chapman MP
Attorney-General's Department
Legislative Services
LLPSubmissions@sa.gov.au

Dear Attorney-General,

Feedback on draft Equal Opportunity (Religious Bodies) Amendment Bill 2020

Thank you for inviting our feedback on the draft Equal Opportunity (Religious Bodies) Amendment Bill 2020 (the Bill).

The South Australian Rainbow Advocacy Alliance (SARAA) is a not-for-profit community organisation that advocates for the health and rights of LGBTIQ+ South Australians. In developing our feedback, we've consulted with our LGBTIQ+ members and supportive partner organisations.

In April 2019, SARAA assisted the Hon Michelle Lensink MLC and the Department of Human Services SA (DHS) to host the LGBTIQ+ Roundtable, during which discrimination was raised as a key concern by the 43 LGBTIQ+ community members in attendance. Community members expressed concerns that discrimination forms a barrier to LGBTIQ+ people accessing essential services and supports, including health, education, housing, and employment services. As result, a key recommendation from the LGBTIQ+ Roundtable was for the South Australian Government to remove exemptions from anti-discrimination legislation that allow faith based organisations to discriminate against people on the basis of their gender identity, sexual orientation or intersex status. SARAA is therefore pleased to see the South Australian Government taking action to address concerns of the LGBTIQ+ community as raised at the Roundtable, and we welcome the opportunity for reform.

Having reviewed the draft Bill, we generally support its intent and broadly welcome what is being proposed, however we believe the reforms should go further to protect LGBTIQ+ South Australians from discrimination.

Our feedback on specific areas of the Bill to which we wish to provide comment are set out in further detail below. We also recommend the careful consideration of submissions from organisations such as Equality Australia for an analysis of other possible amendments to the Act that are not outlined within our submission, as well as the expertise of peak bodies such as YACSA and COTA SA to more thoroughly examine the impact of this Bill for particular parts of the LGBTIQ+ community.



Remove s 50(1)(c) exemption allowing religious bodies to discriminate for religious purposes, except in limited circumstances

Section 50(1)(c) of the *Equal Opportunity Act 1984 (SA)* ('the Act') currently provides a broad exemption that allows religious bodies to discriminate on the grounds of sex, sexual orientation, gender identity or intersex status¹. The Bill attempts to limit this exemption by restricting its operation with respect to certain types of services, including children's education, health care and disability support.

While we support the intent of limiting the scope of the religious bodies exemption to discrimination, this has the effect of continuing to allow religious bodies, other than those listed as exempt from the operation of s 50(1)(c), to continue discriminating against LGBTIQ+ people.

We believe that all South Australians should be able to work, study and access services without fear of discrimination, regardless of where they work or study or the type of service they're accessing. We're concerned the Bill only protects LGBTIQ+ people from discrimination when accessing or working for some service but not others, and that this protection appears to be made on a seemingly arbitrary basis.

For example, the Bill's proposed amendment to s 50(1)(c)(ii) would prevent a religious homelessness service from discriminating against LGBTIQ+ people if the organisation is providing them with accommodation, but discrimination would still be permitted if the organisation is only providing non-accommodation support such as food relief or case management.

Further, we're concerned that the Bill's approach of listing certain types of services in s 50(1)(c) will create confusion for LGBTIQ+ community about whether they'll potentially face discrimination accessing a service or not. This has the potential to make LGBTIQ+ community members reluctant to access such services, which in turn may result in negative health and welfare outcomes for our already vulnerable community.

On this basis, we propose amending the Bill to remove s 50(1)(c) entirely.

We note that the recommendation to remove paragraph (c) in the first instance was also made by the South Australian Law Reform Institute (SALRI) in the report *'Lawful discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender, identity, sexual orientation and intersex status*.²

¹ While we use the term 'intersex status' throughout this submission in accordance with the language in the Act, we recognise that this term has been replaced by 'sex characteristics' in other states and territories in line with current practice.

² South Australian Law Reform Institute (SALRI), *'Lawful discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender, identity, sexual orientation and intersex status*, report, June 2016. Available at https://law.adelaide.edu.au/system/files/media/documents/2019-01/eo_exemptions_final_report.pdf.



Adopt a 'discrimination by application' model

We accept that in exceptionally limited circumstances religious bodies may need to discriminate on the grounds of sex, sexual orientation, gender identity or intersex status. We believe that even if s 50(1)(c) is removed entirely, the Act already provides adequate coverage for these circumstances.

Sections 50(1)(a)-(ba) outline a limited number of circumstances in which religious bodies can discriminate on the grounds of sex, sexual orientation, gender identity or intersex status, for example appointing a religious minister.

We propose that if a religious body needs to discriminate on the grounds of sex, sexual orientation, gender identity or intersex status for reasons other than those explicitly outlined in ss 50(1)(a)-(ba), they make an application for the South Australian Civil and Administrative Tribunal to grant an exemption to the Act consistent with the powers currently outlined in s 92.

This represents a fairer and more robust approach to balancing the need to both protect the LGBTIQ+ community from discrimination, while allowing religious bodies to discriminate in limited and exceptional circumstances. Rather than the blanket approach undertaken by s 50(1)(c), this model would allow exceptions to be assessed on a case-by-case basis and granted only where there's a genuine and reasonable need to discriminate. It would serve to place the onus of proving that discrimination is warranted on the discriminator, rather than the person being discriminated against.

In addition to the existing provisions in relation to Tribunal granted exemptions, we propose that the Bill be amended to ensure any exemption granted by SACAT under s 92 be published on a publicly available and searchable register. This would ensure transparency and allow members of the public to know who has the right to discriminate and on what basis.

Many members of the LGBTIQ+ community are reluctant to seek help from religious organisations even in times of crisis due to a fear of being discriminated against, and this delay in help seeking behaviours often results in poorer health outcomes.³ Requiring an organisation to openly publicise discriminatory policies will assist LGBTIQ+ people in knowing whether or not they can safely access specific services, which will result in LGBTIQ+ people being more likely to approach LGBTIQ+ affirming religious organisations when needing support. We note this could be achieved by adopting the 'discrimination by application' model, or amending s50(1)(c) in line with the approach taken in s 34(3) of the Act.

We note that this 'discrimination by application' model was examined by SALRI in their 2015 issues paper on this issue, which stated:

³ Waling, A., Lim, G., Dhalla, S., Lyons, A., & Bourne, A. (2019). Understanding LGBTIQ+ Lives in Crisis. Bundoora, VIC & Canberra, ACT: Australian Research Centre in Sex, Health and Society, La Trobe University & Lifeline Australia. Monograph 112. DOI: 10.26181/5e782ca96e285. ISBN: 978-0-6487166-5-5. Available at <https://www.lifeline.org.au/media/usdp3jhg/understanding-lgbti-lives-in-crisis-2019.pdf>.



“All jurisdictions currently provide for the granting of exemptions to anti-discrimination provisions by application. The ability to have a case-by-case approach leads to a flexible system, whereby the rights of those who are discriminated against are only encroached upon where it is determined, by an appropriately equipped body, that there is a need for the discriminatory action.”⁴

Concerns with the list of services outlined in the Bill

In the first instance we strongly recommend the government adopt our above proposals relating to s 50(1)(c) and s 92, based on our outlined concerns. If the government chooses to retain the approach currently outlined in the Bill we believe that the additional services below need to be added:

- Financial support/financial counselling
- Legal support
- Food relief
- Tertiary education
- Welfare services generally

We have included these services for two reasons.

First, most of these services are of critical importance to people in times of crisis, including LGBTIQ+ people. They are also often taxpayer funded. No one should be denied access to legal aid, food support or financial assistance during a period of vulnerability, especially if that service is funded by taxpayers.

Secondly, we believe tertiary education should be added to the list as similar services (primary/secondary education and foster care) are already included in the currently proposed list of reforms for s 50(1)(c).

We note that due to the broad variety of health, education and welfare services that are offered in South Australia, it is difficult to adequately capture all relevant services within s 50(1)(c), and that even with the additional services listed above there are almost undoubtedly other types of services that should be included. It is for this reason that we again recommend the removal of s 50(1)(c) in the first instance, in order to ensure that LGBTIQ+ people are not discriminated against when accessing any necessary services.

⁴ South Australian Law Reform Institute (SALRI), *‘Lawful discrimination’: The effect of exceptions under the Equal Opportunity Act 1984 (SA) on Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) South Australians*, issues paper, December 2015. Available at https://law.adelaide.edu.au/system/files/media/documents/2019-01/eo_act_exceptions_issues_paper_final.pdf.



Protections for LGBTIQ+ staff in religious schools

We're disappointed to see the Bill fails to address the exemption in s 34(3) that allows religious schools to discriminate on the grounds of sexual orientation, gender identity or intersex status in regards to employment. This is a missed opportunity to make much needed reforms to protect LGBTIQ+ staff within these schools.

As stated previously, we believe that all South Australians should be able to work without fear of discrimination. We thus believe that s 34(3) should be removed for three main reasons.

First, we recognise that LGBTIQ+ people often won't acknowledge their sexuality or gender identity (or become aware of their intersex status) until later in life. If an LGBTIQ+ person is already employed at a religious school prior to this point, then their LGBTIQ+ status will have no bearing upon their ability to undertake the tasks associated with their employment and we do not believe their employer should have the right to discriminate against them or terminate their employment under these circumstances.

Secondly, we note that many LGBTIQ+ people are religious. We respect the right of religious schools to require their staff to share a common ethos and belief system, but an LGBTIQ+ person of that faith is equally capable of abiding by this belief system as a non-LGBTIQ+ person is. As a result of this, we believe it is more appropriate to allow religious schools to discriminate on the basis of religious belief rather than on the basis of LGBTIQ+ status.

Third, we believe it is unreasonable for an employer to ask a person about their sexuality, gender identity or intersex status, unless this is directly relevant to the role they are employed in or applying for. LGBTIQ+ status does not prevent a person from being an exceptional teacher, or filling any other role within a school, and we don't believe that any employer should have the right to discriminate on this basis.

For all of these reasons, we believe that s 34(3) is unnecessary, unfair and should be removed to protect current and future employees in religious schools.

Additional funding for Equal Opportunity Commission

Finally, we're concerned that these changes may be confusing for LGBTIQ+ community members to navigate and understand which services they can access free from discrimination. The complexity of both this area of law and its administrative system makes it difficult for LGBTIQ+ community members to know when they've been discriminated against and when they have grounds to make a complaint.

To address this increased complexity in an already difficult to navigate system, we recommend the government consider increasing funding and resources of the Equal Opportunity Commission to



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allow them to adequately educate the community about these reforms and respond to resulting discrimination complaints.

Summary

In summary, our recommendations are:

1. Remove the s 50(1)(c) exemption, preventing religious bodies from discriminating except in limited circumstances.
2. Adopt a 'discrimination by application' model, where religious bodies can apply to SACAT for an exemption to the Act under s 92.
3. If the government chooses to retain the approach of limiting s 50(1)(c), amend the Bill to further limit that section's operation in relation to the following additional services:
 - Financial support/financial counselling
 - Legal support
 - Food relief
 - Tertiary education
 - Welfare services generally.
4. Remove s 34(3) to protect LGBTIQ+ staff in religious schools.
5. Increase funding of the Equal Opportunity Commission to allow them to adequately educate the community about these changes and respond to discrimination complaints.

We will make this submission publicly available to ensure our members and supporters are aware of our position on these matters.

Thank you again for the opportunity to comment on the proposed Bill. We would be very happy to discuss these matters with you further.

If you wish to discuss these matters further, please contact Matthew Morris, Chair, SARAA.

Yours sincerely,

Matthew Morris
Chair
South Australian Rainbow Advocacy Alliance