



28 February 2022

Scott McDougall
Human Rights Commissioner
Level 20
53 Albert Street
Brisbane QLD 4000

By email: adareview@qhrc.qld.gov.au

Dear Commissioner.

Review of the *Anti-Discrimination Act 1991* (Qld)

Pride in Law appreciates the opportunity to participate in the Queensland Human Rights Commission's ('QHRC') review of the *Anti-Discrimination Act 1991* (Qld) ('ADA').

Pride in Law is Australia's first and only national non-political legal association, aimed at connecting lesbian, gay, bisexual, transgender, intersex, queer, and questioning ('LGBTIQ+') members of the legal community and their allies. We work to increase visibility, education and advocacy on LGBTIQ+ issues in the law and legal profession. This submission has been compiled by our Queensland Chapter, whose members have substantial expertise on the law as it affects the LGBTIQ+ community in Queensland.

Firstly, we commend the QHRC for the manner in which you have thus far engaged and consulted with stakeholders in the ADA review. We hope that this thoughtful process will lead to a workable piece of legislation that is free from unintended consequences and addresses the substantive policy intent of the desired reforms.

We acknowledge the many diverse views that exist in our society, but ultimately believe that LGBTIQ+ people deserve to feel safe and respected at school, in the workplace, when receiving healthcare, and in broader community settings. This includes equal protection under the law and the right to be free from discrimination. We endorse the QHRC's position that anti-discrimination legislation and subsequent interpretation must be human rights compatible.

Our submission is limited to those areas that specifically impact the LGBTIQ+ community in Queensland.

Definitions

The LGBTIQ+ community is heterogeneous and covers a wide spectrum of various attributes that include different forms of sex, sex characteristics, sexuality, gender identity, and gender expression. The complexity and evolving dynamics of this field require legislation that is sufficiently flexible such that it can accommodate continual advances.¹ The current definitions of "gender identity" and "sexuality" do not reflect the spectrum of attributes that exist within the LGBTIQ+ community. Importantly, the definition of "gender identity" attempts to capture people who are trans, gender diverse and intersex, incorrectly conflating these terms under a singular definition.

¹ See generally Charlotte Knight and Kath Wilson, 'Setting the Context: Definitions and Terminology' in Charlotte Knight and Kath Wilson, *Lesbian, Gay, Bisexual and Trans people (LGBT) and the Criminal Justice System* (Palgrave MacMillan, 2016) 11; Michele J Eliason, 'An Exploration of Terminology related to Sexuality and Gender: Arguments for Standardizing the Language' (2014) 2992 *Social Work in Public Health* 162.

Accordingly, we recommend the definitions of “gender identity” and “sexuality” be amended. We suggest that the QHRC have regard to the definition of “sexuality” under the *Sex Discrimination Act 1984* (Cth) and the definitions of “sexuality” and “gender identity” under the *Public Health Act 2005* (Qld). We also suggest that consideration be given to a separate definition of “intersex” to appropriately differentiate and capture people born with variations in sex characteristics.

Grounds of discrimination

We highlight the Legal Affairs and Safety Committee’s recent report on the *Inquiry into serious vilification and hate crimes*, recommending that anti-vilification provisions should be expanded to protect the attributes: gender and/or sex; sexual orientation; gender identity and/or gender expression; sex characteristics and/or intersex status.² We recommend that the grounds of discrimination in the ADA also suitably account for these attributes, to ensure appropriate protection for the LGBTIQ+ community and promote consistency in the law.

We also agree that an expunged homosexual conviction should be explicitly covered in the grounds of discrimination, particularly given that people in Queensland must take active steps to apply for such convictions to be expunged.

Discrimination on combined grounds

In its current form, the ADA does not explicitly recognise that discrimination can occur on the basis of one or more, or a combination of, particular attributes. Some examples include: a trans man who breastfeeds; a deaf lesbian; a single gay father; a bisexual Catholic. Accordingly, Pride in Law would welcome recognition of discrimination on the basis of one or more, or a combination of, particular attributes. We suggest that similar language could be used to that included in s 3.1 of the *Canadian Human Rights Act* RSC 1985 c H-6, being ‘one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds’.

General exemptions

There are a number of general exemptions of relevance to the LGBTIQ+ community. It is vital that the review consider the remnants of Australia’s historic acceptance of institutionalised prejudice against the LGBTIQ+ community, and the exemptions should be examined within this lens to ensure the legal framework sets the right balance.

Sport

The issue of restricting participation in sport on the basis of sex or gender identity involves an unfortunate but necessary balancing of competing individual rights. Studies show that young people who participate in athletics have better mental and physical health than their peers who do not participate in athletics.³ It is also widely acknowledged that young transgender people are at significantly greater mental health risk than their peers.⁴ Separately, non-binary experiences are often forgotten, and while there may be some overlap with trans experiences, non-binary people must navigate the difficult binary female/male distinction that exists in sport. Accordingly, Pride in Law believes that any discussion of participation in sport must start with compassion, empathy and concern for trans, gender diverse and non-binary people, in particular young trans, gender diverse and non-binary people, some of whom have been put in complex, painful and traumatic positions in the current debate over participation in sport.

² Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into Serious Vilification and Hate Crimes* (Report No 22, 2022) ix.

³ Eime, R.M., Young, J.A., Harvey, J.T. et al, 'A systematic review of the psychological and social benefits of participation in sport for children and adolescents: informing development of a conceptual model of health through sport.' (2013) 10:98 *International Journal of Behavioral Nutrition and Physical Activity* 1-2

⁴ Strauss P, Cook A, Winter S, Watson V, Wright Toussaint D, Lin A, 'Associations between negative life experiences and the mental health of trans and gender diverse young people in Australia: findings from Trans Pathways' (Cambridge University Press, 2019) 1-2.

This discussion must also recognise the inherent differences in competitive and non-competitive sport. That is, that meaningful participation is a relevant consideration as to how participation in sport might be restricted. For example, sporting activities for youth exist because it is recognised that children should not compete against adults. Youth sport is further categorised by age because strength, stamina and physique is also age dependent. Some sports are categorised by weight because it would be inherently unfair for an individual competitor who weighs 50kg to compete against someone who weighs 80kg. Organisations like the Paralympics exist to provide opportunities for people with physical and mental disabilities to meaningfully participate and compete against people of similar skill and ability. Separate categories for males and females exist for the same reason.

The QHRC Discussion Paper references the International Olympic Committee's ('IOC') framework for the participation of transgender and intersex athletes in Olympic sport, requiring that people should be able to compete in the category that best aligns with their self-identified gender.⁵ Yet this framework has been criticised by scientists associated with the International Federation of Sports Medicine and European Federation of Sports Medicine for prioritising inclusion over science at the highest level of athletic competition and ignoring problems with implementation.⁶

Pride in Law considers the current requirements under the ADA, that participation in a competitive sporting activity may be restricted to either males or females if restriction is reasonable based on a range of factors, strikes an appropriate balance of rights. Pride in Law also supports the inherent flexibility in the current provisions that allow courts to determine what exemptions are appropriate based on strength, stamina or physique. It is important that the legislation remain flexible to enable it to accommodate the most up to date evidence in this field. Retaining the provision is also consistent with most other state and federal anti-discrimination legislation, which enhances consistency.

More broadly, Pride in Law supports efforts to systemically address and encourage the participation in sport by trans, gender diverse, and non-binary people while preserving the inherent need to ensure that competitive sport remains fair for all participants (for example, through the investigation of "open" categories of competition where appropriate).

Religious bodies

Pride in Law respects all communities, religions, beliefs and each person's fundamental right to freedom of religion, which necessarily includes the right to freedom *from* religion. The right to freedom of thought, conscience, religion, and belief – which includes the right to practice religion through worship, practice, or teaching – is protected under international human rights instruments, and in Queensland by the *Human Rights Act 2019* (Qld). Accordingly, Pride in Law is generally supportive of retaining the exemptions that allow religious bodies to discriminate in matters relating to the ordination, training and selection of religious leaders by religious bodies.

Religious bodies, however, should not be permitted to rely on religious exemptions where such bodies receive public funds to provide essential services to the broader community. The QHRC Discussion Paper highlights the trend in Australian anti-discrimination law to narrow the exemptions, most recently in South Australia. Pride in Law recommends that religious bodies should not 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.

⁵ This is also consistent with the Australian Law Reform Commission's position in its 'Guidelines for the inclusion of transgender and gender diverse people in sport' (2019).

⁶ Pigozzi et al, 'Joint position statement of the International Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC framework on fairness, inclusion and non-discrimination based on gender identity and sex variations' (2022) 8(1) *British Medical Journal Open Sport & Exercise Medicine* 1.

General occupational requirement

The current exemption allows religious schools to hire and fire on the basis of sexuality and gender identity. In Australia, religious schools make up a significant proportion of the education sector and receive considerable amounts of public funding. The Australian Schools Directory reports that Queensland has 1,730 schools, of which 1,280 schools are run by the Queensland Government, 282 schools are Catholic Education providers, and the remaining 172 schools are independent.⁷ The Independent Schools Queensland 2020 Membership Report noted 176 independent schools, of which 36 are non-denominational, 2 are Islamic and 1 Jewish, leaving the remaining 137 affiliated with Christian religious bodies.⁸ The vast majority of private schools in Queensland are thus affiliated with Christian religious bodies. This provides religious bodies (in particular, Christian bodies) with substantial influence over Australian society, despite larger than ever numbers of Australians identifying as having no religion.

This inevitably places significant restrictions on LGBTIQ+ teachers seeking employment opportunities in private schools, supported by state funding. Many businesses are today encouraging and championing diversity and the values that diversity brings to a business. More and more, people are encouraged to “bring their whole selves to work”. Yet, in the vast majority of private schools in Queensland, teachers face disciplinary action and adverse employment decisions for simply being who they are in the workplace.

The current exemption does not allow discrimination on the basis of age, race, or impairment. As these are a person’s innate characteristics, the legislation implies that a person’s sexuality or gender identity are simply a lifestyle choice. Many LGBTIQ+ people would not view their sexuality or gender identity as a choice. There is also an argument to be made that if religious organisations, in particular religious schools, want to be free to continue practicing discrimination in employment decisions in the name of religious values, at minimum they should not be in receipt of substantial taxpayer funding to do so.

Accordingly, it is Pride in Law’s position that where a religious body receives taxpayer funds it should not be permitted to discriminate in employment on any ground except for religious belief, affiliation or activity. This is the approach currently adopted in Tasmania and under consideration in Victoria.

Working with children

Pride in Law agrees that the current provisions perpetuate outdated stereotypes that transgender and intersex people pose inherent risks to children and would welcome the removal of this exemption.

Assisted reproductive technology services

Given that marriage equality laws are in force in Australia, it is unreasonable that the exemption relating to assisted reproductive technology services (‘ARTS’) persists. Accordingly, Pride in Law recommends that this exemption be removed.

As an aside, Pride in Law recommends that the review of the ADA should be coupled with a review of other Queensland based legislative instruments to remove structural barriers that LGBTIQ+ people face in accessing ARTS. For example, section 24 of the *Status of Children Act 1978* (Qld) sets out parentage presumptions which arise from marriage, but refers only to a “woman and her husband”.⁹ There is no equivalent presumption in relation to a “woman and her wife” or a “man and his husband”. Pride in Law suggests that consideration be given to section 60H of the *Family Law Act 1976* (Cth), which does not distinguish between sex/gender in relation to the “other intended parent” of a child. As these provisions affect the fundamental rights of a child and its parents, including

⁷ Australian Schools Directory, ‘Queensland’ (Web page) www.australianschoolsdirectory.com.au.

⁸ Independent Schools Queensland, *2020 Membership Report* (Report, 2021) <https://www.isq.qld.edu.au/media/opekjw/mz/2020-membership-report.pdf>.

⁹ *Status of Children Act 1978* (Qld) s 24.

inheritance rights, we recommend the *Status of Children Act 1978* (Qld) also be updated in a way that is inclusive of the LGBTIQ+ community.

In summary, it is our overarching recommendation that the ADA review must recognise the fundamental, and sometimes competing, individual human rights that come into play. The Religious Discrimination Bill 2021 and the Citipointe Christian College incident have highlighted the importance of striking the right balance to ensure that the law protects all of us, equally.

If you have any queries regarding the contents of this letter, please contact us by phone on 0408 188 089 or by email at president.qld@prideinlaw.org.

Yours sincerely,

M Bidwell

Michael Bidwell
President, Pride in Law (Qld)
Direct Line: +61 488 188 089

B Thompson

Dr Brooke Thompson
Vice President, Pride in Law (Qld)
Direct Line: +61 402 361 037

E Hansson

Ellie Hansson
Advocacy Officer, Pride in Law (Qld)
Direct Line: +61 431 169 706