

CONSOLIDATION - COMPARATIVE ANALYSIS - RELIGIOUS EXEMPTIONS

Current provisions

The ADA and SDA both contain exemptions for religious bodies. Both Acts contain a general exemption for any acts or practices that conform to the doctrines, tenets or beliefs of the relevant religion or are necessary to avoid injury to the religious sensitivities of adherents of that religion (section 35 ADA and para 37(d) SDA). This general test is almost identical across the ADA and SDA (except that the SDA refers to 'religious susceptibilities'). The ADA and SDA provisions both apply to a religious body which is 'a body established for religious purposes'. The exemptions apply in relation to all of the grounds of discrimination covered by the Acts (ie under the SDA this includes sex, marital status, pregnancy, potential pregnancy and family responsibilities).

The SDA religious exemption also covers several other specific activities including:

- the ordination or appointment of priests, Ministers of religion or members of any religious order (para 37(a))
- training or education of persons seeking ordination or appointment as a priest, Minister of religion or member of any religious order (para 37(b))
- selection of persons to perform duties or functions in connection with any religious observance or practice (para 37(c)), and
- accommodation provided by a religious body (ss23(3)(b)).

These activities do not have any further qualification (ie it is not necessary to show that the activity conforms to the doctrines, tenets or beliefs of the religion or is necessary to avoid injury to the religious susceptibilities of adherents etc). These exemptions also apply to all grounds of discrimination covered by the Act.

The SDA also contains specific exemptions for educational institutions established for religious purposes (section 38) in relation to the employment of staff and the provision of education and training. Specifically, section 38 provides exemptions for:

- discrimination on the grounds of sex, marital status or pregnancy in the employment of members of staff or contract workers (ss 38(1) and (2)), and
- discrimination on the grounds of marital status or pregnancy in connection with the provision of education or training (ss 38(3)).

In order to rely on section 38, the discrimination must be in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion'. Section 38 only applies in relation to 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', where 'educational institution' is defined as a school, college, university or other institution at which education or training is provided (section 4).

There are also exemptions to discrimination under the *Fair Work Act 2009* (Cth) for any action taken against a staff member of a religious institution, where the action is taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or

creed (subsections 153(2), 195(2) and 351(2)). A religious institution includes ‘an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’.

There are no religious exemptions under the RDA or DDA.

Major inconsistencies

- The religious exemptions under the SDA expressly cover a number of specific activities, as well as a ‘catch-all’ provision covering any acts or practices that conform to the doctrines, tenets or beliefs of the relevant religion (whereas the ADA and Fair Work Act provisions are framed as a general provision only).
- The SDA expressly covers religious educational institutions, whereas the ADA and Fair Work Act refer to ‘a body established for religious purposes’ (ADA) and ‘an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’ (FWA).
- The qualifier to the religious purpose test under the religious educational institution exemptions in the SDA and the exemption in the Fair Work Act differs from that under the ADA and SDA general religious bodies exemptions. The former provisions require the act to have been done ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of the religion’, whereas the latter provisions refer to the act being ‘necessary to avoid injury to the religious susceptibilities of adherents of that religion’.

Issues

A number of issues were raised regarding the religious exemptions in the SDA during the Senate Committee inquiry into the effectiveness of the SDA in 2008. These issues included:

- Several organisations raised issues with the fact that the exemptions applied ‘automatically’ for religious organisations and do not require any justification by the religious organisation for why the exemption should apply. Nor is there any requirement for religious bodies to demonstrate how they are promoting equality of women and men as far as is possible within the parameters of their doctrines, tenets or beliefs. It was suggested that the permanent exemptions be removed, but that some sort of process should be retained for balancing the right to freedom of religion with the right not to be discriminated against.
- Submissions were made by UNIFEM Australia that the exemptions are inconsistent with CEDAW, particularly Article 5, which requires state parties to take all appropriate measures to eliminate ‘customary and all other practices based on the idea of the inferiority or the superiority of either sex or on stereotyped roles for men and women’, and Article 11 which recognizes the right of women not to be discriminated against in employment.
- Several organisations, including the Australian Education Union, advocated for the removal of the exemption in section 38 for religious educational institutions, particularly on the basis that these institutions are the recipients of public funding and that people should not be required to forgo their ordinary human rights when they commence employment in religious schools. (The ALRC had also recommended removal of the exemption in its *Equality Before the Law* report.)

- Concerns were raised regarding the drafting of section 37 and 38 (by the Anti-Discrimination Commissioner of Tasmania, and similar concerns raised by the Ordination of Catholic Women and UNIFEM). The phrase in subsection 37(d) and section 38 ‘to avoid injury to the religious susceptibilities of adherents of that religion’ was criticized as being too broad because it may permit discrimination on the basis that an act will injure the religious susceptibilities of some adherents of a religion. Others submitted that the drafting of the provisions should be limited, proportionate and clearer.
- It was submitted by UNIFEM that section 38 should not include discrimination on the grounds of pregnancy or sex. In this regard, Christian Schools Australia explained to the Committee that the exemption in section 38 is not relied upon to discriminate on the basis of sex or pregnancy and that it is the marital status of employees and potential employees which is of concern to Christian schools.
- It was submitted by the Independent Education Union that section 38 should require that the discrimination be reasonable in the circumstances as well as ‘in good faith’, as the concept of ‘good faith’ is subjective, too wide ranging and departs from the way other provisions of the Act apply.
- It was also submitted by the Independent Education Union that section 38 should relate only to an employee’s conduct during a selection process, in the course of their work or in doing something connected with their employment, and should not interfere with employees’ private lives.
- Australian Christian Schools raised concerns that the existing drafting of section 38 may not be broad enough. The concern arose out of a NSW Administrative Decisions Tribunal case which interpreted section 56 of the NSW Act as requiring the tribunal to consider Christianity as the particular religion, rather than the particular denomination that operated the relevant foster care service at the centre of the case. The Committee noted, however, that the NSW provision was drafted more narrowly than section 38 of the SDA. (This decision appears to have been overturned on appeal – *Members of the Board of the Wesley Mission Council v OV and OW (No 2) [2009] NSWADTAP 57* – in which the appeal panel preferred a broader definition of ‘religion’.)

In its report, the Senate Committee on Legal and Constitutional Affairs recommended that further consideration be given to reviewing the operation of section 38 of the SDA, to:

- retain the exemption in relation to discrimination on the basis of marital status; and
- remove the exemption in relation to discrimination on the grounds of sex and pregnancy; and
- require a test of reasonableness.

The ALRC recommended removal of the exemption in section 38 (*Equality Before the Law Report*). However, if the exemption was to be retained, the ALRC recommended that, at the very least, the exemption should be removed in relation to discrimination on the ground of sex and pregnancy and the exemption for discrimination on the ground of marital status should be amended to require a test of reasonableness. The ALRC’s view was that:

Religious freedom and the right to enjoy culture and religion must be balanced with the right to equality and with the principle of non-discrimination. The statutory exemption prefers one right over another and precludes any consideration of where the balance

between the rights should be. Women employed in religious educational institutions should have the same right to be free from discrimination as other women.

HREOC inquiry: HREOC considered the religious institutions exemption in its *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation - Discrimination on the ground of sexual preference* (HRC Report No 6, March 1998). The inquiry involved a complaint of discrimination in employment based on sexual preference under the *Human Rights and Equal Opportunity Commission Act 1986*. The Commission considered that the requirement that the distinction be made ‘in good faith’ requires a subjective test. However, it is not sufficient that the relevant distinction is made in good faith – the distinction must also be made ‘in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’. The Commission considered that this latter element of the provision introduced an objective element.

State and Territory Religious Exemptions

Religious bodies

Jurisdiction	Section	Exemption
NSW	56	Similar to s37 SDA, but applies to: <ul style="list-style-type: none"> the appointment of any other person in any capacity by a body established to propagate religion; and refers to ‘a body established to propagate religion’
VIC	81-84	Contains provisions equivalent to s37(a) to (c) SDA Acts in conformity with religious doctrines etc: <ul style="list-style-type: none"> in all areas except employment: anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital or parental status or gender identity by a religious body that conforms with the doctrines, etc of the religion; or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion in relation to employment: where conformity with the doctrines etc of the religion is an inherent requirement of the particular position and the person does not meet that inherent requirement (based on same grounds as above)
QLD	25, 109	Same as s37 SDA, but applies to: <ul style="list-style-type: none"> an act by a body established for religious purposes if the act is in accordance with the doctrine of the religion concerned; and necessary to avoid offending the religious sensitivities of people of the religion and does not apply in the work-related area or education area In relation to employment - exception for a body established for religious purposes if: <ul style="list-style-type: none"> the employee openly acts (in the course of the person's work) in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs; and it is a genuine occupational requirement that the person act in a way consistent with the employer's religious beliefs
WA	66, 72	<ul style="list-style-type: none"> Contains equivalent provision to s37 SDA Exception for discrimination on basis of religious or political conviction in relation to employment where the employer is a religious body

		providing a medical or other health related service if the work relates to participation in any religious observance or practice
SA	50, 85ZM	SEX, CHOSEN GENDER, SEXUALITY: Similar to s37 SDA, but applies to: <ul style="list-style-type: none"> the administration of a body established for religious purposes in accordance with the precepts of that religion MARITAL or DOMESTIC P'SHIP STATUS - excepts: <ul style="list-style-type: none"> the ordination or appointment of priests, ministers of religion or members of a religious order; the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order
TAS	27, 42, 51, 52	SEX - Excepts discrimination by a religious institution, if it is required by the doctrines of the religion of the institution RELIGIOUS BELIEF OR ACTIVITY – excepts: <ul style="list-style-type: none"> discrimination in circumstances covered by s37, SDA, discrimination in relation to employment if participation in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment Places of cultural or religious significance - Excepts discrimination on the ground of race in relation to places of cultural or religious significance if in accordance with the customs of the culture or the doctrines of the religion
ACT	32, 44	Same as s37 SDA, but applies to: <ul style="list-style-type: none"> any other act or practice of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. Excepts discrimination by a religious body on the ground of religious conviction in relation to employment in a hospital or other place in which health services are provided, if the duties of the employment involve participation in the teaching, observance or practice of the relevant religion
NT	43, 51	Same as s37 SDA, but applies to: <ul style="list-style-type: none"> an act by a body established for religious purposes if the act is done as part of any religious observance or practice Places of cultural or religious significance - A person may restrict access to land, a building or place of cultural or religious significance by people who are not of a particular sex, age, race or religion if in accordance with the culture or doctrine of the religion

Religious educational institutions

Jurisdiction	Section	Exemption
NSW	25(3), 31A(3), 38C(3), 38K(3), 40(3), 46A(3), 49D(3), 49L(3), etc	- Broad exceptions for private educational authorities for discrimination on ground of sex, transgender, marital or domestic status, disability and homosexuality in relation to employment and provision of education (doesn't have to be connected to religion)
VIC	39, 83, 84	- For all areas other than employment - anything done by an educational institution conducted in accordance with religious doctrines, beliefs or principles on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital or parental status or gender identity that conforms with the doctrines, beliefs or principles of the religion; or is reasonably necessary to avoid injury to the religious sensitivities of adherents

		<p>of the religion</p> <p>- In relation to employment – where conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position; and the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement</p>
QLD	25, 41	<p>All attributes except age, race or impairment - Excepts discrimination in relation to employment where employer is an educational institution under the direction/control of a body established for religious purposes, where:</p> <ul style="list-style-type: none"> • the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer’s religious beliefs, • in connection with person’s work and • it is a genuine occupational requirement that the person act in a way consistent with the employer’s religious beliefs
WA	66, 73	<p>Employment -</p> <ul style="list-style-type: none"> • excepts discrimination on any grounds covered by Act by an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed - same test applies as s38 SDA • excepts discrimination by an employer or principal (which is a private educational authority) on the ground of a person’s religious or political conviction if the duties of the employment relate to participation in any religious observance or practice <p>Provision of education or training - Excepts discrimination on any grounds covered by Act (other than race, impairment or age) if the discrimination is in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class/group who are not adherents of that religion or creed</p>
SA	34, 85Z, 85ZE	<p>Employment -</p> <ul style="list-style-type: none"> • excepts discrimination on ground of chosen gender and sexuality in relation to employment by an educational institution administered in accordance with the precepts of a particular religion if the discrimination is founded on the precepts of that religion • excepts discrimination against same-sex domestic partners on the ground of martial or domestic p'ship status for the purposes of an educational institution (as described above) if the above provision does not apply <p>Religious appearance or dress - excepts discrimination by an educational authority administered in accordance with the precepts of a particular religion against a student because the student appears or dresses in a manner required by, or symbolic of, a different religion</p>
TAS	51	<p>- Excepts discrimination on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable the educational institution to be conducted in accordance with those tenets, beliefs, teachings, etc</p>
ACT	33,44, 46	<p>- Excepts discrimination (on any grounds covered by Act) against a person</p> <ul style="list-style-type: none"> • in relation to employment or • in relation to the provision of education or training <p>by an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – same test applies as s38 SDA</p> <p>- Excepts discrimination on the ground of religious conviction by an</p>

		educational authority in relation to employment if the duties of the employment involve participation in the teaching, observance or practice of the relevant religion
NT	30, 37A	<p>An educational authority that operates an educational institution in accordance with the doctrine of a particular religion may:</p> <ul style="list-style-type: none"> • discriminate against a person in the area of work on the grounds of religious belief or activity or sexuality if the discrimination is in good faith to avoid offending the religious sensitivities of people of the particular religion; or • exclude applicants who are not of that religion (applies to provision of education)