

Interregional Comparison:

Australia

The Practices and implications of LGBTI anti-discrimination legislation
Alice Molan, Registered Foreign Lawyer

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The Australian system

AUSTRALIAN LEGAL SYSTEM





The laws

THE RELEVANT LAWS

Jurisdiction	Legislation	Field of protections
Federal	Sex Discrimination Act 1984	LGBTI
NSW	Anti-Discrimination Act 1977	LGT[I]
VIC	Equal Opportunity Act 2010 Charter of Human Rights and Responsibilities Act 2006	LGBT[I]
QLD	Anti-Discrimination Act 1991	LGBT[I]
WA	Equal Opportunity Act 1984	LGBT
SA	Equal Opportunity Act 1984	LGBT[I]
TAS	Anti-Discrimination Act 1998	LGBTI

THE RELEVANT LAWS

Jurisdiction	Prohibited conduct	Coverage areas	Exemptions
Federal	Direct and indirect discrimination	Work; education; goods and services; accommodation; land; clubs; administration of Commonwealth programs; requests for information.	Genuine occupational qualification; charities; religious bodies; educational institutions established for religious purposes; services only able to be provided to one sex.
NSW	Direct and indirect discrimination; vilification	Work; education; goods and services; accommodation; registered clubs	Employment in certain private households or by private educational authority; private educational authorities; certain shared private residences; sports; superannuation; charities; religious bodies; aged residential care; not for profits.
VIC	Direct and indirect discrimination; victimisation; Advertisements; authorising or assisting discrimination; discriminatory request for information.	Employment; education; goods and services; accommodation; clubs and club members; disposal of land; sport; local government.	Religious bodies and religious schools; genuine occupational requirements; welfare services and measures; special needs; protection of health and safety; competitive sporting activities; political clubs; standards of dress.

THE RELEVANT LAWS

Jurisdiction	Prohibited conduct	Coverage areas	Exemptions
QLD	Direct and indirect discrimination; incitement of hatred, serious contempt for or severe ridicule.	Work; education; goods and services; superannuation; insurance; dispositions of land; accommodation; club membership and affairs; administration of government programs; local government.	Welfare; promotion of equal opportunity; public health where necessary; health and safety in workplace; religious bodies; charities; sport; legal incapacity.
WA	Direct and indirect discrimination; victimisation; advertisements	Employment and similar relationships; education; access to places and vehicles; goods, services and facilities; accommodation; land; clubs; sport; application forms; superannuation.	Certain private household employment arrangements; certain accommodation; competitive sport; charities; voluntary bodies; religious bodies; educational institutions established for religious purposes; aged care accommodation.
SA	Direct and indirect discrimination; victimisation	Work; associations; qualifying bodies; educational authorities; land, goods, services and accommodation.	Genuine occupational requirements; religious educational institutions; charities; sport; religious bodies.
TAS	Direct and indirect discrimination; inciting hatred, serious contempt for, or severe ridicule; victimisation; promoting discrimination.	Employment; education and training; provision of facilities, good and services; accommodation; membership and activities of clubs; administration of government programs; industrial agreements.	Charities; disadvantaged groups; special needs; equal opportunities.



Exemptions - examples

EDUCATIONAL INSTITUTIONS

Educational institutions are exempt from anti-discrimination laws in some jurisdictions in certain circumstances.

Exemptions from LGBTI discrimination provisions include:

Religious
educational
institutions hiring
staff

Religious
educational
institutions in
respect of students
and other persons

Private educational
institutions

None

RELIGIOUS BODIES

Most Australian jurisdictions have carve outs for religious bodies from the anti-discrimination provisions.

Generally, jurisdictions will exempt from the anti-discrimination provisions conduct in connection with the training, education and ordination of religious members (eg priest, ministers etc).

There are also general exemptions available to “religious bodies” being:

A body established for a religious purposes

A body established to propagate religion

An entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles

RELIGIOUS BODIES

Where done by a religious body, certain acts or practices more generally will be exempt from the anti-discrimination provisions:

the act or practice
confirms with doctrines,
tenets or beliefs of
religion

the act or practice is
[reasonably] necessary
to avoid injury to
religious sensibilities of
adherents to that religion



Case study

CYC v Cobaw 2014

Supreme Court of Victoria

Facts

- Christian Youth Camps Ltd (“**CYC**”), a company that leases land from Christian Brethren Trust (“**CBT**”) and runs a camp resort.
- CYC was not the manager for or on behalf of CBT.
- CYC had Christian objects in its constitution.
- CYC refused to allow a camp for same sex attracted persons run for the purpose of suicide prevention at the camp property.

CYC v Cobaw 2014

Supreme Court of Victoria

Direct discrimination

- refusal of accommodation
- ‘on the basis of’ sexual orientation
- treated persons with attribute less favourably than would others

CYC v Cobaw 2014

Supreme Court of Victoria

Exemption

(2) Nothing in Part 3 applies to anything done by a body **established for religious purposes** that –

(a) **conforms** with the **doctrines** of the religion;
or

(b) is **necessary** to **avoid injury** to the religious sensitivities of people of the religion

CYC v Cobaw 2014

Supreme Court of Victoria

Established for a religious purpose

CYC not “*a body established for religious purposes*”

CYC v Cobaw 2014

Supreme Court of Victoria

Doctrines of the religion

Even if CYC was a body established for religious purposes:

- the conduct of its camps business is not a ‘religious activity’
- ‘in relation to decisions made in the course of a secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise’

CYC v Cobaw 2014

Supreme Court of Victoria

Doctrines of the religion

Even if doctrinal questions did arise:

- The turning away of homosexual persons was not conduct that “conformed with” the doctrines of the religion.
- In order to benefit from the exemption it is necessary to show that the doctrine requires, obliges, dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did.
- This language is read into the exemption on legislative purpose grounds.

CYC v Cobaw 2014

Supreme Court of Victoria

Necessary to avoid injury to religious sensitivities

- Must be no alternative to engaging in the conduct if religious sensitivities are to be avoided.
- Judged from an objective standpoint.
- History of CYC demonstrated that it was not necessary to avoid injury to religious sensitivities to refuse bookings to same sex attracted people.

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