



Law Council  
OF AUSTRALIA

# Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018

Senate Legal and Constitutional Affairs Legislation Committee

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-Elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Human Rights Committee, and the New South Wales Law Society (**NSW LS**) in the preparation of this submission. It also draws upon recent contributions made by the New South Wales Bar Association (**NSW Bar**) and Law Society of South Australia (**LSSA**) with respect to its recent submission to the Senate Legal and Constitutional Affairs References Committee, regarding legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.

## Executive Summary

1. The Law Council is pleased to respond to the inquiry by the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (**the Bill**).
2. The Law Council considers that the Committee's inquiry must be based on an understanding of Australia's relevant international human rights obligations, particularly with respect to: the freedom to manifest one's religion; the right to equality and non-discrimination; and the obligation to ensure that in all actions concerning children, the best interest of the child is a primary consideration.
3. While some human rights are absolute, in other cases, limitations on human rights are possible provided that certain standards are met. In such cases, fundamental rights and freedoms will frequently need to be balanced against each other. In the current context, the right of a person to exercise his or her freedom of religion must be balanced against the rights and freedoms of persons who will be impacted by that exercise. While freedom of religion is a fundamental human right which should be protected under law, the manifestation of religion should not be protected at the expense of other rights and freedoms. In this respect, rights and freedoms should be protected and balanced in a coherent legal framework.
4. The Law Council considers that ideally, any anti-discrimination legislative reforms should be approached in a comprehensive rather than piecemeal manner. It is important not only to have regard to the *Sex Discrimination Act 1984* (Cth) (**SDA**) provisions, but also to opportunities to consolidate and strengthen federal protections against discrimination on the basis of religion, and other relevant federal legislative provisions. The Law Council considers that in line with any reforms, an improved mechanism which provides for the enforcement of rights in accordance with international human rights law is needed, such as a national human rights act. This would also help to overcome the current fragmented approach to federal anti-discrimination legislation.
5. Notwithstanding this position, the Law Council generally supports the passage of the Bill, which repeals existing SDA exemptions which apply to religious educational institutions with respect to students. It considers that children should not be discriminated against. It does not support laws which add to lesbian, gay, bisexual and transgender (**LGBT**)<sup>1</sup> children's trauma or stigmatise them by permitting discrimination by religious educational institutions. Such laws are not in the best interests of children, which must be a primary consideration which is given high priority and greater weight than other considerations. The Law Council's Justice Project indicates that significant harm is done to LGBTI+ children who experience discrimination.
6. However, the Law Council also supports an amendment to narrow the effect of proposed subsection 37(3), which limits the scope of the existing paragraph 37(1)(d) exemption. It is concerned that proposed subsection 37(3) is too broadly

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<sup>1</sup> LGBTI+ refers to Lesbian, Gay, Bisexual, Transgender and Intersex. The '+' can include other letters, including Q (Queer or Questioning), A (Asexual), or P (Pansexual). The acronym is intended to be inclusive of a diverse group of people based on sex characteristics, intersex status, gender expression and sexual orientation: Law Council of Australia, 'Making your practice LGBTI+ friendly' (online), <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/making-your-legal-practice-lgbti-friendly>>. Used above, 'LGBT' refers to Lesbian, Gay, Bisexual and Transgender, noting that intersex people are not caught by the existing exemptions under s38 (3).

framed and would apply to prevent, for example, churches, synagogues or mosques who offer religious tuition as part of their functions, from accessing the paragraph 37(1)(d) exemption. It recommends that subsection 37(3)(d) should apply to acts or practices of 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'. This is similar, although not identical, to the position proposed in Amendment 8614.

7. The Law Council does not support proposed Amendments KQ147 to KQ151. It is concerned that these amendments are unnecessary having regard to existing SDA provisions, particularly with respect to those concerning indirect discrimination, and in light of its recommendation that subsection 37(3) be amended. It is further concerned about the breadth and impact of several of these amendments, and that they would override a more balanced and flexible approach being adopted to competing rights and interests, in the specific circumstances of the relevant scenarios put forward as the rationale for the Amendments. Existing SDA provisions enable such an approach to be taken.
8. With respect to Amendment 8601, the Law Council considers that if discrimination of people who are employed or contracted by religious schools is to be maintained under relevant SDA exemptions, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect. It queries whether, in light of the harm and unfairness caused due to such exemptions – to both teachers and students – there is sufficient justification for that harm. However, a key concern is the need for consistency across the legislation in this area, noting the SDA exemptions' interactions with other relevant federal provisions – such as under the *Fair Work Act 2009* (Cth) (**the FWA**) and the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRC Act**). Decisions to repeal or amend the SDA exemptions in this area should, therefore, be only taken in the context of comprehensive consideration of the full suite of relevant legislation.

## Context

9. This submission draws upon the Law Council's:

- [submission](#) to the Senate Legal and Constitutional Affairs References Committee (**the References Committee**) regarding legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff (21 November 2018) (**the References Committee Submission**); and
- [submission](#) to the Expert Panel appointed by the former Prime Minister, The Hon Malcolm Turnbull MP, to examine whether Australian law adequately protects the human right to freedom of religion (**the Expert Panel**). The now-Prime Minister, The Hon Scott Morrison MP, released the Expert Panel's final report<sup>2</sup> of 11 May 2018 on 11 December 2018 (**the Expert Panel Report**). Relevant recommendations of the Expert Panel are described below.

### Relevant international obligations

10. The High Court has described freedom of religion as the 'essence of a free society', and the concept of religion as being 'of fundamental importance to the law'.<sup>3</sup> Freedom of religion has long been recognised as a fundamental human right.

11. Article 18(1) of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>4</sup> recognises that the right to freedom of religion includes both freedom to have or to adopt a religion or belief, as well as freedom to manifest one's religion or belief in worship, observance, practice and teaching:

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

12. The freedom to have or to adopt a religion or belief is not capable of being subject to limitation: article 18(2). Freedom to manifest one's religion or beliefs, on the other hand, may be subject to limitation. In this regard,

- article 18(3) of the ICCPR provides:

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or **the fundamental rights and freedoms of others** [emphasis added]; and*

- article 18(4) of the ICCPR provides that:

*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal*

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<sup>2</sup> *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018 (**the Expert Panel Report**).

<sup>3</sup> *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983), 154 CLR 120, at 130.

<sup>4</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified on 17 December 1990.

*guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

13. Australia is also a party to a number of international human rights instruments requiring State parties to take measures to protect religious freedom. These include the *Convention relating to the Status of Refugees 1951*,<sup>5</sup> *International Labour Organization Convention 111: Discrimination (Employment and Occupation) Convention 1958*,<sup>6</sup> the ICCPR<sup>7</sup> and the *International Labour Organization Convention 158: Termination of Employment Convention 1982*.<sup>8</sup>

14. The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (the Religion Declaration)*<sup>9</sup> is not a treaty, but is a valuable tool for interpreting the scope of article 18 of the ICCPR. It prohibits unintentional and intentional acts of discrimination and defines discrimination in article 3 as:

*Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.*

15. Article 6 of the **Religion Declaration** stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, but not limited to:

- worshipping and assembling, and maintaining places for this purpose;
- establishing and maintaining charitable or humanitarian institutions;
- practising religious rites and customs;
- writing and disseminating religious publications;
- teaching of religion and belief;
- soliciting voluntary financial support;
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief;
- observing religious holidays and ceremonies; and
- communicating with individuals and communities on matters of religion and belief.

16. The right to equality and non-discrimination is also a fundamental human right that is essential to the protection and respect of all human rights. Article 26 of the ICCPR provides that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. It requires State Parties to prohibit and guarantee protection against discrimination on the basis of 'race, colour, sex,

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<sup>5</sup> Article 1.

<sup>6</sup> Article 1(a).

<sup>7</sup> Articles 18, 26 and 27.

<sup>8</sup> Article 5(d).

<sup>9</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res 36/55, UNGAOR, 36th sess, UN Doc A/36/684 (1981).

language, religion, political or other opinion, national or social origin, property, birth or other status'. The phrase 'other status' in article 26 of the ICCPR has been interpreted by human rights treaty bodies to include attributes including sexual orientation.<sup>10</sup>

17. Article 2(1) of the ICCPR further requires that State parties undertake to respect and ensure to individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR, without distinction of any kind, including on the basis of sex, religion, or other status. The United Nations Human Rights Committee stresses that this obligation is both negative and positive in nature – State parties must refrain from the violation of the rights recognised by the ICCPR,<sup>11</sup> and have a positive duty to ensure these rights, including through legislation, judicial or administrative action and education.<sup>12</sup>
18. Children have special rights under human rights law, taking into account their particular vulnerabilities. Under a number of treaties, particularly the *Convention on the Rights of the Child*<sup>13</sup> (**CRC**), the core principles include that:
  - rights are to be applied without discrimination;<sup>14</sup> and
  - the best interests of the child are to be a primary consideration.<sup>15</sup>
19. As noted by the Parliamentary Joint Committee on Human Rights (**PJCHR**):
  - Human rights law requires that in all actions concerning children the best interests of the child must be a primary consideration. This must be assessed from the child's perspective rather than that of their parents or the state.
  - It not only requires that the rights of the child be taken as a primary consideration when different interests are being considered, it also provides that any laws that are open to interpretation are interpreted in a way which most effectively serves the child's best interest and any decision that will affect a specific child or children generally must evaluate any possible impact on the child.
  - What is in the best interests of the child should be able to be adjusted according to the specific situation of the child or children affected and consider their personal context and needs.
  - While the best interests of the child may not be the only relevant consideration, it is to be given high priority, and is not to be considered

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<sup>10</sup> Human Rights Committee, *Toonen v Australia*, Communication No 488/1992 (1992); Human Rights Committee, *Young v Australia*, Communication No 941/2000 (2003) [10.4].

<sup>11</sup> And any restrictions on any of those rights must be permissible under the relevant provisions of the ICCPR. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of ICCPR rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of an ICCPR right: Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties of the Covenant*, UN Doc.CCPR/C/21/Rev.1/Add. 13, 80<sup>th</sup> sess (29 March 2004), [6].

<sup>12</sup> *Ibid*, [7].

<sup>13</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**).

<sup>14</sup> CRC, Art 2.

<sup>15</sup> CRC, Art 3(1).

as just one of several considerations; larger weight should be given to what serves the child best.<sup>16</sup>

### Addressing tensions

20. Under international human rights law, certain human rights are absolute, and no limitation upon them is permissible.<sup>17</sup> For all other human rights, limitations may be imposed, provided certain standards are met. As noted above, the right ‘to freedom of thought, conscience and religion’ in article 18(1) of the ICCPR is absolute. On the other hand, the right ‘either individually or in community with others and in public or private, to manifest [one’s] religion or belief in worship, observance, practice and teaching’ can be subject to limitations, as article 18(3) makes clear, ‘as prescribed by law’ and which ‘are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.
21. Where limitations are permissible, as in the case of the manifestation of religious belief, fundamental rights and freedoms will frequently need to be balanced against each other. In the current context, the right of a person to exercise his or her freedom of religion must be balanced against the rights and freedoms of persons who will be impacted by that exercise. The Law Council notes that while freedom of religion is a fundamental human right and should be protected under law, the manifestation of religion should not be protected at the expense of other rights and freedoms. In this respect, rights and freedoms should be protected and balanced in a coherent legal framework.
22. If there is a tension or conflict between the exercise of the right to manifest one’s religion and the rights and freedoms of others, protecting the exercise of the right to manifest one’s religion may involve imposing limits upon or diminishing rights of others such as, for example, a person’s right to freedom from discrimination on the ground of sexual orientation. The United Nations Human Rights Committee has provided some guidance as to the interpretation of article 18 in this context:

*In interpreting the scope of permissible limitation clauses [to Article 18], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination.*<sup>18</sup>

23. In further considering when limitations on human rights may be permissible, the Law Council endorses the analytical framework adopted by the PJCHR. In general, where a provision appears to limit rights, the PJCHR considers whether and how:
  - the limitation is prescribed by law;
  - the limitation is aimed at achieving a legitimate objective;
  - there is a rational connection between the limitation and the objective; and

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<sup>16</sup> PJCHR, *Guide to Human Rights* (June 2015) (PJCHR Guide), 47.

<sup>17</sup> See the Law Council’s *Policy statement on Human Rights and the Legal Profession: Key Principles and Commitments*, May 2017, paragraph 19.

<sup>18</sup> Human Rights Committee (HRC), *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience of Religion)*, UN Doc CCPR/C/21/Rev.1, 48<sup>th</sup> sess, (30 July 1993), [8].

- the limitation is proportionate to that objective.<sup>19</sup>
24. Consistent with this approach, proportionality plays an important role in human rights and anti-discrimination law. To be justified, a restriction or limitation must have a legitimate aim and the means used to achieve this aim must be necessary and proportionate.<sup>20</sup> Limitations must respond to a pressing public or social need, and be directly related, and proportionate, to the specific need on which they are based.<sup>21</sup>
25. In considering proportionality, factors which might be relevant include:
- whether there are other less restrictive ways to achieve the same aim;
  - whether there are effective safeguards or controls over the measures;
  - the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
  - whether affected groups are particularly vulnerable; and
  - whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of the individual case.<sup>22</sup>
26. While the Law Council has not been able to conduct a full review of relevant caselaw in this area, a demonstration of a balancing approach is provided by the decision of *Catholic Care v The Charity Commission for England and Wales*<sup>23</sup> which applied section 193 of the *Equality Act 2010* (UK), requiring any restriction of the provision of benefits by charities to be in pursuit of a charitable instrument and a proportionate means of achieving a legitimate aim.<sup>24</sup> In that case, while the objectives of the religious institution were considered legitimate, it was ultimately determined, on the weight of evidence, that ‘religious conviction did not provide sufficient justification for the proposed discrimination in the context of a public activity such as adoption’.<sup>25</sup>
27. The NSW LS further notes the example of the 2013 case of *Eweida and others v The United Kingdom*, in which the European Court of Human Rights held that the national courts had struck the right balance between the employer’s right to secure the rights of others and the applicants’ right to manifest their religion’ in finding that an employee’s refusal to carry out certain duties which they believed would condone homosexuality constituted appropriate grounds for dismissal.<sup>26</sup> It also raises the

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<sup>19</sup> PJCHR Guide, 7-9. See the Law Council’s *Policy statement on Human Rights and the Legal Profession: Key Principles and Commitments*, May 2017, paragraph 19.

<sup>20</sup> Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), at [8].

<sup>21</sup> *Ibid.*

<sup>22</sup> PJCHR Guide, 8.

<sup>23</sup> *Catholic Care (Diocese of Leeds) v Charity Commission of England and Wales* [2012] UKUT 395 (Upper Tribunal (Tax and Chancery), Sales J, 2 November 2012). For a further example of a recent judicial approach to resolving tensions with respect to rights (in this instance, freedom of religion and the right of patients to equal access to healthcare), see *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* 2018 ONSC 579.

<sup>24</sup> This test reflects the jurisprudence of the European Court of Human Rights in determining whether differential treatment would be justified for the purposes of Article 14 (non-discrimination) of the European Charter of Human Rights (that is, in order to be justified, a differential treatment must have an objective and reasonable justification).

<sup>25</sup> [46] of the printed case.

<sup>26</sup> *Case of Eweida and Others v The United Kingdom* [2013] ECtHR Nos. 48420/10, 59842/10, 51671/10 and 3656/10.

national example of *Bull & Bull v Hall & Preddy*, decided by the United Kingdom Court of Appeal in 2012, in which the Court held that laws prohibiting discrimination on the grounds of sexual orientation were a 'necessary and proportionate intervention' to protect the rights of others. The Court affirmed that:

*No individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application.*<sup>27</sup>

## Approach to reform

28. The Law Council considers that ideally, anti-discrimination reforms should be approached in a comprehensive rather than piecemeal manner. It is important not only to have careful regard to the SDA exemptions, but also to:

- opportunities to consolidate and perhaps strengthen the protections against discrimination and vilification on the basis of religion at the federal level. In this context, the United Nations Human Rights Committee has noted its concerns regarding the 'lack of direct protection against discrimination on the basis of religion at the federal level'.<sup>28</sup> The current protections for religious freedom in Australia at the federal level are fragmented and inconsistent; and
- other relevant anti-discrimination prohibitions and exemptions which operate at the federal level.
  - For example, as discussed below, with respect to the field of employment, there is a need to consider the interaction of any proposed SDA reforms with other existing legislation.<sup>29</sup>
  - More broadly, anti-discrimination exemptions can be found in a raft of federal instruments including the SDA, FWA, AHRC Act and the *Age Discrimination Act 2004* (Cth) (**ADA**). These exemptions provide scope for religious organisations – including, but not limited to, faith-based educational institutions – to discriminate, in certain circumstances, against individuals based on a range of attributes, from their age to their sexual orientation. If there is to be a review, and potentially reform, of the exemptions available to faith-based educational institutions, the exemptions for other religious bodies should similarly be reviewed. Concerns have been raised by some of the Law Council's constituent bodies and advisory groups that these existing exemptions are permanent, broad, and do not require analysis of reasonableness and proportionality.
  - The NSW LS further draws attention to the appropriateness of current exemptions as they apply to religious organisations which receive public funding to conduct essential services in education, aged care, child welfare, adoption and employment services. While the SDA states that religious organisations that receive Commonwealth funding for aged

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<sup>27</sup> *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83, 65.

<sup>28</sup> Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102nd session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), at [17].

<sup>29</sup> For example, FWA, ss351(1)-(2); ss772(1)-(2).

care cannot discriminate against individuals,<sup>30</sup> there is no such prohibition on discrimination for the other services.

29. Any option for reform in this area should promote the understanding that human rights are 'universal, indivisible and interdependent and interrelated'.<sup>31</sup> The Law Council considers that if the protection of religious freedom is to be strengthened, it should be accompanied by an improved mechanism which provides for the enforcement of rights in accordance with international human rights principles through a consolidation of Australia's anti-discrimination legislation or a comprehensive legislative bill of rights that recognises and protects fundamental human rights. The Law Council submits that this an achievable outcome, which would help to overcome the current fragmented approach to federal anti-discrimination legislation.

30. As discussed above, while the freedom to have or adopt a religion or belief is absolute, the freedom to manifest one's religion may be subject to limits in accordance with international human rights principles. The Law Council cautions against any outcome that would allow for the manifestation of religious belief whilst permitting forms of discrimination that are currently unlawful under federal anti-discrimination law.

31. For the above reasons, the Law Council has previously recommended that:

- amendments to the SDA's exemptions for religious institutions should ideally be considered within a more comprehensive analysis of:
  - opportunities to consolidate and, in accordance with international human rights law, strengthen federal protections against discrimination on the basis of religion;
  - other anti-discrimination exemptions for religious bodies across a range of federal laws;
- an improved mechanism to recognise and protect human rights in accordance with international human rights principles, such as a consolidation of federal anti-discrimination legislation or a National Human Rights Act.
- At the very minimum, the Committee should avoid recommendations that would allow for the manifestation of forms of discrimination that are currently unlawful under federal anti-discrimination law.<sup>32</sup>

## Current provisions

32. At the federal level, the SDA provides protection against the fundamental right to equality and non-discrimination on the grounds of sex,<sup>33</sup> sexual orientation,<sup>34</sup> gender

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<sup>30</sup> Under SDA, s 37(2). This provides that s 37(1)(d) does not apply to an act or practice of a body established for religious purposes if: (a) the act or practice is connected with the provision by the body of Commonwealth-funded aged care; and (b) the act or practice is not connected with the employment of persons to provide that aged care.

<sup>31</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at [5].

<sup>32</sup> Law Council References Committee submission, 15.

<sup>33</sup> SDA s 5.

<sup>34</sup> SDA, defined s 4(1) and see s 5B.

identity;<sup>35</sup> intersex status;<sup>36</sup> marital or relationship status;<sup>37</sup> pregnancy or potential pregnancy;<sup>38</sup> breastfeeding;<sup>39</sup> and family responsibilities.<sup>40</sup> As noted above, the Law Council considers that it may be timely to consider whether Australia needs a Bill of Rights to deal with these matters in a holistic manner.

33. The relevant definitions are set out in Part I and include both 'direct' and 'indirect' discrimination.<sup>41</sup> For example, with respect to discrimination on the ground of sexual orientation, subsection 5A(1) defines direct discrimination, and subsection 5A(2) defines indirect discrimination.

1) *For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's sexual orientation if, by reason of:*

- (a) *the aggrieved person's sexual orientation; or*
- (b) *a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or*
- (c) *a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.*

2) *For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.*

(3) *This section has effect subject to sections 7B and 7D.*

34. The definitions provided with respect to other grounds are in similar terms.<sup>42</sup>

35. There are two key issues in identifying 'direct discrimination' for the purpose of section 5(1):

- asking whether there has been less favourable treatment by a person with the particular attribute. This involves comparing the treatment experienced by a person with, and a person without, the attribute in the same or similar

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<sup>35</sup> SDA, defined s 4(1) and see s 5B.

<sup>36</sup> SDA, defined s 4(1), see s 5C.

<sup>37</sup> SDA, defined s 4(1), see s 6.

<sup>38</sup> SDA, defined s 4B, see s 7.

<sup>39</sup> SDA, s 7AA.

<sup>40</sup> SDA, s4A, see s 7A.

<sup>41</sup> With the exception of the definition of discrimination on the ground of family responsibilities, which is limited to direct discrimination.

<sup>42</sup> SDA, ss 5-7A.

circumstances. If all persons are treated the same way, there can be no direct discrimination at all.

- Asking 'why' did the less favourable treatment occur. If one of the reasons for the less favourable treatment is the person's attribute, then the definition of direct discrimination will be satisfied.<sup>43</sup>

36. The reasonableness of a person's actions are not relevant to direct discrimination. Sometimes if people are treated in the same way, the treatment might give rise to 'indirect' discrimination which is addressed by subsection 5(2). It defines indirect discrimination to cover circumstances where the same treatment might result in a disparate or adverse impact for people with a particular attribute.
37. Reasonableness is relevant to indirect discrimination. Section 7B sets out the reasonableness test which applies to any consideration of indirect discrimination across the SDA, in any relevant area. It provides that a person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or has likely to have, the disadvantaging effect mentioned in, for example, subsection 5A(2)<sup>44</sup> if the condition, requirement or practice is reasonable in the circumstances.
38. The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
  - the nature and extent of the disadvantage resulting from the imposition, or proposed imposition of the condition, requirement or practice; and
  - the feasibility of overcoming or mitigating the disadvantage; and
  - whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.<sup>45</sup>
39. This is a non-exhaustive list and other matters may be taken into account.
40. Under section 7C, the person who did the alleged unlawful act bears the burden of proving that the imposition of the condition, requirement or practice was reasonable in the circumstances, because of section 7B.
41. It is important that these definitions only operate to make discrimination unlawful if the condition in question comes within Part II of the SDA. The definitions do not stand alone.
42. Part II of the SDA sets out the areas where discrimination will be unlawful. It is unlawful to discriminate against a person on the basis of the grounds listed above, in areas of public life including employment, education and the provision of goods and services.<sup>46</sup>
43. Particularly relevant provisions include (but are not limited to):
  - section 14 – prohibiting discrimination in employment or superannuation;

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<sup>43</sup> The recent United Kingdom decision in *Lee v Ashers Baking Company Ltd & Ors (Northern Ireland)* [2018] UKSC 49 highlights the importance of examining the reasons why alleged discrimination occurred, particularly.

<sup>44</sup> As well as ss 5(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA (2): SDA, s 7B(1).

<sup>45</sup> SDA, s 7B (2).

<sup>46</sup> SDA, ss 14-27.

- section 16 – prohibiting discrimination against contract workers;
- section 21 – prohibiting discrimination in the area of education; and
- section 24 – prohibiting discrimination in the provision of goods, services and facilities.

44. For example, section 21 provides that it is unlawful for an educational authority<sup>47</sup> to discriminate against a person on the ground of the person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

- by refusing or failing to accept the person’s application for admission as a student;<sup>48</sup>
- in the terms or conditions on which it is prepared to admit the person as a student;<sup>49</sup>
- by denying the student access, or limiting the student’s access, to any benefit provided by the educational authority;<sup>50</sup>
- by expelling the student;<sup>51</sup> or
- by subjecting the student to any other detriment.<sup>52</sup>

45. However, section 21 does not apply to a refusal or failure to accept a person’s application for admission at an educational institution which is conducted solely for students of a particular sex, or education or training at a certain level is provided only or mainly for students of a particular sex.<sup>53</sup>

### **Exemptions - students**

46. Division 4 of Part II contains exemptions from the SDA provisions. Most relevant is subsection 38(3) which provides that:

*Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person’s sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

47. The Law Council is not aware of any judicial consideration of this exemption.

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<sup>47</sup> An ‘educational authority’ means a body or person administering an educational institution. An ‘educational institution’ means a school, college, university or other institution at which education or training is provided: SDA, s 4(1).

<sup>48</sup> SDA, s 21(1)(a).

<sup>49</sup> SDA, s 21(1)(b).

<sup>50</sup> SDA, s 21(2)(a).

<sup>51</sup> SDA s 21(2)(b).

<sup>52</sup> SDA s 21(2)(c).

<sup>53</sup> SDA, s 21(3).

48. Subsection 38(3) is not a blanket exception. An educational institution seeking to rely upon it must demonstrate that:

- it is conducted in accordance with the specific doctrines, tenets, belief or teachings of a religion or creed;
- the relevant action (e.g. expelling a student, or refusing his or her admission) is in good faith; and
- the relevant action is for the purpose of avoiding injury to the religious susceptibilities of adherents to the religion or creed.

49. However, subsection 38(3) is broad and generalised in its application. For example, it applies not only to students but 'any persons' in connection with the provision of education or training and applies to religious educational institutions from kindergartens to tertiary institutions.

50. Also relevant is paragraph 37(1)(d) below:

37 Religious bodies

(1) *Nothing in Division 1 or 2 affects:...*

- d) *any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*

51. While the Law Council understands that this exemption is less commonly relied upon by educational institutions than subsection 38(3), as it is more onerous, it may still cover instances of discrimination by such institutions against LGBT students.

### **Exemptions – employees and contractors**

52. The most relevant SDA exemptions for religious educational institutions and employees and contractors are in subsections 38(1) and (2) as follows:

(1) *Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

(2) *Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid*

*injury to the religious susceptibilities of adherents of that religion or creed.*

53. The Law Council is not aware of any direct judicial consideration of this exemption.<sup>54</sup>
54. Also relevant is paragraph 37(1)(d), which is described above. This sits alongside broader subsection 37(1) exemptions which may be tangentially relevant to the area of employment regarding:
- (a) *the ordination or appointment of priests, ministers of religion or members of any religious order;*
  - (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; and*
  - (c) *the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice.*<sup>55</sup>

## Expert Panel Report

55. On 13 December 2018, the Expert Panel's Report and the Government response were released, after the Bill was introduced. Relevant recommendations made by the Expert Panel with respect to religious schools and students (having regard to existing laws across all Australian jurisdictions) were:
- Recommendation 7: The Commonwealth should amend the SDA to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
    - (a) *the discrimination is founded in the precepts of the religion;*
    - (b) *the school has a publicly available policy outlining its position in relation to the matter;*
    - (c) *the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated; and*
    - (d) *the school has regard to the best interests of the child as the primary consideration in its conduct.*<sup>56</sup>
  - Recommendation 8: Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.<sup>57</sup>

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<sup>54</sup> Although the former HREOC's *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference*, Report No 6, 1998, concerning a complaint made under s 32(1)(b) of the then *Human Rights and Equal Opportunity Commission Act 1986*(Cth) and the Commission's inquiry into the complaint pursuant to s 31(b) of the Act, is relevant.

<sup>55</sup> SDA, s 37(1)(a)-(c).

<sup>56</sup> Expert Panel Report, 69.

<sup>57</sup> *Ibid.*

56. Relevant recommendations made by the Expert Panel with respect to employment in religious schools were:

- Recommendation 5: The Commonwealth should amend the SDA to provide that religious schools can discriminate in relation to the employment of staff and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:
  - (a) *the discrimination is founded in the precepts of the religion;*
  - (b) *the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced; and*
  - (c) *the school provides a copy of the policy in writing to employees and contractors.*<sup>58</sup>
- Recommendation 6: Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.<sup>59</sup>

57. In its response to the Expert Panel Report, the Australian Government indicated that the above recommendations, along with Recommendation 1,<sup>60</sup> required further consideration.<sup>61</sup> Its response stated that:

*... the Government recognises the complexity of the legal and drafting issues surrounding the framework for religious bodies in anti-discrimination law across all Australian jurisdictions. The Government also notes that central to the Review's recommendations 1 and 5 to 8 is an acknowledgement that any legislative changes in this area are best conducted in a way which ultimately harmonises and makes more consistent parallel laws in each Australian jurisdiction. In this regard, the Government notes that any potential changes to the Fair Work Act require a formal process of engagement and consultation with the States and Territories.*

*Accordingly, the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to consider recommendations 1 and 5 to 8 of the Review with a view to settling upon a legislative mechanism that would, on a nationally consistent basis, achieve the twin purposes of limiting or removing altogether (if practical) legislative exemptions to prohibitions on discrimination based on a person's identity, while also protecting the*

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<sup>58</sup> Expert Panel Report, 63.

<sup>59</sup> Ibid.

<sup>60</sup> Recommendation 1 is that 'Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations': Ibid, 46.

<sup>61</sup> Australian Government, *Australian Government Response to the Religious Freedoms Review*, December 2018,

*right of religious institutions to reasonably conduct themselves in a way consistent with their religious ethos.*<sup>62</sup>

## The Bill and proposed amendments

### **Bill's provisions and intent**

58. On 6 December 2018, the Senate referred the Bill to the Committee for inquiry and report by 11 February 2019. The Bill was introduced by Senator Penny Wong. It amends the SDA and is designed to remove exemptions for discrimination by religious educational institutions against students.

59. The Bill is brief. It proposes to:

- repeal subsection 38(3); and
- insert new subsection 37(3), providing that:

*Paragraph 37(1)(d) does not apply to an act or practice or a body established for religious purposes if:*

*(a) the act or practice is connected with the provision, by the body, of education; and*

*(b) the act or practice is not connected with the employment of persons to provide that education.*

60. The Bill's Explanatory Memorandum notes that:

*... over recent years, there has been growing concern in the community about the ongoing appropriateness of and the need for the exemptions from the SDA conferred on religious schools in relation to the sexual orientation, gender identity or intersex status of students. The leaking of parts of the Ruddock Review into Religious Freedoms in October 2018 led to a significant increase in community discussion about the need to remove these exemptions from the SDA because of their potential to impact students attending religious schools.*<sup>63</sup>

### ***Law Council response***

61. The position adopted in the Bill is similar to that adopted by the Law Council in its submission to the References Committee. It recommended that:

- subsection 38(3) of the SDA should be abolished; and
- section 37 of the SDA should be amended to clarify that paragraph 37(1)(d) does not apply to the treatment of students by religious schools.

62. The Law Council continues to support these positions. It considers that children should not be discriminated against. It does not support laws which add to LGBT children's trauma or stigmatise them by permitting discrimination by religious educational institutions. Such laws are not in the best interests of children. As noted

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<sup>62</sup> Ibid, 21.

<sup>63</sup> Parliament of the Commonwealth of Australia, Senate, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Explanatory Memorandum (**the Explanatory Memorandum**), 1.

above, the best interests of children must be a primary consideration, which is given high priority and greater weight than other considerations under international law.

63. The Law Council remains particularly concerned that LGBT students in religious educational institutions are highly vulnerable, having regard to its recent Justice Project findings<sup>64</sup> that:
- (a) *LGBTI+ people generally experience high rates of discrimination and harassment. For example, the 2012 Private Lives 2 survey report found that 25.5 per cent of survey respondents experienced homophobic abuse or harassment in the previous 12 months.<sup>65</sup> A further 8.7 per cent reported experiencing threats of violence or actual physical violence.<sup>66</sup> In the 2014 First Australian National Trans Mental Health Study 64.8 per cent of participants reported experiencing discrimination or harassment.<sup>67</sup> Private Lives 2 found that 44 per cent of LGBTI+ people in Australia hid their sexual orientation or gender identity in public.<sup>68</sup> In addition to outright attacks and discrimination, LGBTI+ people must deal with homophobia and/or transphobia in every facet of public life, and within their families and social groups.<sup>69</sup>*
  - (b) *Experiences of discrimination and social exclusion contribute to LGBTI+ people facing a higher prevalence of a range of risk factors that increase disadvantage, a reality that is sometimes referred to as ‘secondary victimisation’;<sup>70</sup>*
  - (c) *research indicates very poor levels of mental health amongst LGBTI+ groups generally,<sup>71</sup> including high rates of suicide. Studies have found that same-sex attracted Australians have up to 14 times higher rates of suicide attempts than their heterosexual peers,<sup>72</sup> and up to 50 per cent of transgender people have attempted suicide at least once in their lives.<sup>73</sup>*

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<sup>64</sup> Law Council of Australia, *Justice Project – Final Report* (August 2018), LGBTI+ Chapter, 8-10; 14-17.

<sup>65</sup> AHRC, National Consultation Report, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, (2015), 15 (**Resilient Individuals**), citing William Leonard et al, ‘Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians’ (Monograph Series Number 86, The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012) (**Private Lives 2**).

<sup>66</sup> AHRC, *Resilient Individuals*, 15, citing William Leonard et al, *Private Lives 2*.

<sup>67</sup> Zoe Hyde et al, School of Public Health, Curtin University, *The First Australian National Trans Mental Health Study: Summary of Results* (2014), v.

<sup>68</sup> Leonard et al, *Private Lives 2*, 45-46.

<sup>69</sup> Michael Flood and Clive Hamilton, *Mapping homophobia in Australia*, Australia Institute Web Paper (2005), 3-13 <[http://www.glhv.org.au/files/aust\\_inst\\_homophobia\\_paper.pdf](http://www.glhv.org.au/files/aust_inst_homophobia_paper.pdf)>.

<sup>70</sup> Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9 citing Angela Dwyer, ‘Policing Lesbian, Gay, Bisexual and Transgender People: A Gap in the Research Literature’ (2011) 22 *Current Issues in Criminal Justice* 3, 415.

<sup>71</sup> Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9 citing Gabi Rosenstreich, National LGBTI Health Alliance, *LGBTI People: Mental Health and Suicide Revised 2<sup>nd</sup> Edition* (2013) (**LGBTI People: Mental Health**), 3 <[http://lgbtihealth.org.au/sites/default/files/Biefing\\_Paper\\_FINAL\\_19\\_Aug\\_2-11.pdf](http://lgbtihealth.org.au/sites/default/files/Biefing_Paper_FINAL_19_Aug_2-11.pdf)>.

<sup>72</sup> Rosenstreich, *LGBTI People: Mental Health*, 3 citing Commonwealth Department of Health and Aged Care, *LIFE – A framework for prevention of suicide and self-harm in Australia: Learnings about suicide* (2000).

<sup>73</sup> Ibid citing Domenico Di Ceglie, ‘Gender Identity Disorder in Young People’, (2000) *Advances in Psychiatric Treatment* 6, 458-466; National Transgender HIV/AIDS Needs Assessment Project (Australia), University of New South Wales, *Transgender lifestyles and HIV/AIDS* (1994); Jay McNeil et al, *Trans Mental Health Study* (2012) <[www.scottishtrans.org](http://www.scottishtrans.org)>.

- (d) *LGBTI+ young people are particularly affected by poor mental health.<sup>74</sup> Research has indicated that 55 per cent of young LGBTI+ women (aged 16–24) experienced high or very high psychological distress compared to 18 per cent in the national population. Additionally, 40 per cent of young LGBTI+ men experienced high psychological distress compared to seven per cent in the mainstream population.<sup>75</sup>*

64. In this context, the NSW Bar has previously noted that:

*Religion and religious belief is a choice. In contrast, a person's sex, sexual orientation, gender identity or intersex status is not a choice. Moreover, discrimination on any of those grounds in an educational context has the potential to cause lasting damage to the self-esteem, dignity and self-worth, and hence mental health, of children through the denial of their identity; the denial of an immutable characteristic fundamental to their identity. There is accordingly less justification for an exemption from the anti-discrimination provisions in an educational context, both in respect of the damage done to them directly and in respect of teachers/ staff on account of the transferred impact on students when teachers/staff are discriminated against, or when there are no teachers/staff like them; that is when there is a transferred denial of who they are, or the absence of any affirmation of who they are.*

65. The Law Council considers that, given the harm and unfairness caused as a result of subsection 38(3), there is insufficient justification for that harm in order to protect a right to freedom of religious expression by discriminating against students in faith-based schools. It considers that to accord a freedom to a person to manifest his or her religion in a way that breaches the rights of children to have their rights in international covenants ensured to them without distinction, Australia, as party to those covenants, would have to point to justifications that are profound, specific, strong and clear.
66. The Law Council notes arguments by religious schools that such exemptions should remain available, even though they are infrequently used.<sup>76</sup> However, it submits that such exemptions are, by their very nature, harmful, noting the important role played by legislation in norm-setting amongst the community.
67. It notes that members of the Law Council's Human Rights Committee have also questioned the precise extent to which discrimination against LGBT students is supported through existing religious doctrine, which is principally concerned with the definition of marriage.

### ***Exemptions for employees and contractors***

68. The Law Council notes that the Bill is focused on addressing exemptions for discrimination against students at religious educational institutions, rather than employees or contractors. As such, it does not address the existing exemptions in subsections 38(1)-(2), and proposed subsection 37(3) does not apply to acts or

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<sup>74</sup> Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9.

<sup>75</sup> St Kilda Legal Service, *Submission to the Justice Project*, citing Rosenstreich, *LGBTI People: Mental Health*.

<sup>76</sup> Jordan Baker, 'Devastating: Anglican heads' letter prompts anger and division', *The Sydney Morning Herald* (online), 3 November 2018.

practices connected with the employment<sup>77</sup> of persons to provide education.<sup>78</sup> This will mean, for example, that discrimination can continue within schools with respect to the hiring and firing of staff who are, for example, women, unmarried and pregnant, transgender, gay and lesbian.

69. The Law Council recently submitted to the References Committee there is scope to consider whether the current use of broad, permanent exemptions such as subsections 38(1)-(2), and paragraph 37(1)(d) strikes the appropriate balance between the freedom to manifest one's religion and protections for other rights in this area. It submitted that if discrimination of people employed or contracted by religious schools is to be maintained, Parliament needs to consider whether this is justified, necessary and proportionate to what schools are trying to protect.
70. However, the Law Council also considers that any amendments in the area of employment should have careful regard to the full suite of relevant federal legislation addressing discrimination in the area of employment by religious bodies. Its concerns, including regarding the damaging impact of discrimination experienced by staff and contractors, the secondary impact of this discrimination upon students, and the interactions between different federal provisions are set out below with respect to proposed Amendment 8601. This discussion also recommends that this should be an area of further review and consideration by Parliament or the ALRC as appropriate. The Law Council notes that the Australian Government has expressed an intention to consult with the states and territories on the terms of a potential reference to the ALRC on five recommendations that deal with exemptions to anti-discrimination provisions.<sup>79</sup> In the Law Council's view, exemptions regarding students should be dealt with promptly rather than be referred to the ALRC, although employment exemptions, due to their complexity, may appropriately be referred to the ALRC.<sup>80</sup>

### ***Indirect discrimination***

71. As noted above, the Bill's Explanatory Memorandum states that:

*... The Bill would not affect the operation of the indirect discrimination provisions in the SDA, which will continue to operate in a manner that allows faith-based education institutions to impose reasonable conditions, requirements or practices in accordance with the doctrines, tenets, beliefs or teachings of their particular religion or creed.*<sup>81</sup>

72. The Law Council wishes to clarify that:

- (a) existing section 37, including paragraph 37(1)(d), provides an exemption generally from the prohibitions against discrimination on certain grounds contained in Division 1 or 2. This includes prohibitions against both direct and indirect discrimination, drawing on the definitions in Part I; and

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<sup>77</sup> 'Employment' includes part-time and temporary employment as well as work under a contract for services: SDA, s 4(1).

<sup>78</sup> The Bill, proposed paragraph 37(3)(b).

<sup>79</sup> Australian Government, *Australian Government Response to the Religious Freedoms Review*, December 2018 <<https://www.attorneygeneral.gov.au/Media/Pages/Government-response-to-religious-freedom-review.aspx>>.

<sup>80</sup> Law Council of Australia, 'Increased religious protections supported, but would be better dealt with in a comprehensive National Human Rights Act' (Media Release, 13 December 2018) <<https://www.lawcouncil.asn.au/media/media-releases/increased-religious-protections-supported-but-would-be-better-dealt-with-in-a-comprehensive-national-human-rights-act>>.

<sup>81</sup> Explanatory Memorandum, 1.

- (b) subsection 38(3) provides an exemption from the prohibitions set out in section 21, concerning discrimination in the area of education. Again, this relates to both direct and indirect discrimination.

73. Therefore, the Bill's proposed amendment restricting the impact of paragraph 37(1)(d) and repeal of subsection 38(3) will narrow the exemptions available with respect to both direct *and* indirect discrimination by religious educational bodies concerning students.
74. However, the existing definitions of, and prohibitions on, discrimination will continue to act as threshold tests. This will include whether disadvantageous conditions, requirements or practices which are imposed<sup>82</sup> by faith-based educational institutions constitute indirect discrimination.
75. As noted, section 7B provides that if a condition, requirement or practice is reasonable in the circumstances, it is not discrimination.<sup>83</sup> The application of the reasonableness test is further explored below.

### ***Proposed subsection 37(3)***

76. The Law Council notes that proposed subsection 37(3) has a potentially broader operation than its previous recommendation regarding paragraph 37(1)(d).
77. While it recommended that paragraph 38(1)(d) should not apply to the treatment of students by religious schools, proposed subsection 37(3) refers to 'a body established for religious purposes' if 'the act or practice is connected with the provision, by the body, of education'.<sup>84</sup>
78. This terminology is somewhat broader than either a religious school or an 'educational institution', which is used elsewhere in the SDA and refers to a 'school, college, university or other institution at which education or training is provided'.<sup>85</sup> The terminology may, for example, include a church, synagogue or mosque which offers religious tuition to children and adults, such as bible study or a Sunday school in the case of a church, as part of its functions. It could also include the provision of marriage and relationship education by such bodies to couples entering into marriage.
79. The Law Council recently supported the removal of legal restrictions on marriage by same-sex couples. However, it also supported the protection of religious freedom, and considered it reasonable to allow ministers of religion to conduct religious marriage ceremonies in accordance with the tenets and doctrines of their religion.<sup>86</sup> This position is now reflected in the *Marriage Act 1961* (Cth).<sup>87</sup>
80. It follows that ministers of religion should not be required to provide marriage or relationship education to, for example, same-sex couples, if to do so would be

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<sup>82</sup> Or proposed to be imposed: SDA, s 7B.

<sup>83</sup> SDA, s 7B(1).

<sup>84</sup> And the act or practice is not connected with the employment of persons to provide that education: The Bill, proposed s 37(3).

<sup>85</sup> SDA, s 4(1).

<sup>86</sup> Law Council of Australia, *Marriage Amendment (Same-Sex Marriage) Bill*, Submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, 19 January 2017.

<sup>87</sup> Which provides that ministers of religion or religious marriage celebrants may refuse to solemnise a marriage: *Marriage Act 1961* (Cth), ss 47(3), 47A. See also SDA, ss 40(2)(2A)-(2AA).

contrary to the doctrines, tenets or beliefs of their religion, or would injure the religious susceptibilities of adherents of that religion.

81. The Law Council further considers that the provision of other kinds of religious-based education, such as that provided by a church, or a mosque, should not be excluded from the operation of the paragraph 37(1)(d) exemption. It notes that in order to attract the exemption, they would need to demonstrate that an act or practice:

- (a) conformed to the doctrines, tenets or beliefs of that religion; or
- (b) was necessary to avoid injury to the religious susceptibilities of adherents of that religion.

82. It considers that proposed subsection 37(3) should be amended to provide that:

*... paragraph 37(1)(d) does not apply to an act or practice of an **educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed***<sup>88</sup> if:

- (a) *the act or practice is connected with the provision, by the **institution**, of education; and*
- (b) *the act or practice is not connected with the employment of persons to provide that education.*

83. This would mean that proposed subsection 37(3) would only apply to the acts or practices of faith-based schools, colleges, universities and other institutions at which education or training is provided. It would exclude acts or practices which are connected with the provision of education by, for example, churches, synagogues or mosques.

84. The Law Council notes that the Centre Alliance's proposed amendment 8614, which is outlined below, is similarly directed towards narrowing the scope of subsection 37(3), from 'a body established for religious purposes' to an 'educational institution established for religious purposes'. This proposal is discussed below and the Law Council agrees with its intent. It suggests that Parliament may wish to align the language of subsection 37(3) with the section 38 exemption to avoid confusion as to the potential difference between an 'educational institution established for religious purposes' and 'educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.

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<sup>88</sup> Emphasis added.

**Recommendations:**

- **Proposed subsection 37(3) of the Bill should be amended to provide that paragraph 37(1)(d) does not apply to an act or practice of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed if:**
  - (a) the act or practice is connected with the provision, by the institution, of education; and**
  - (b) the act or practice is not connected with the employment of persons to provide that education.**
- **Subject to this, the Bill should be passed.**

**Proposed amendments**

85. The Australian Government (**the Government**) has proposed five separate amendments to the Bill, which all differ in degree and effect. Two further amendments have also been proposed by Centre Alliance (as discussed above) and the Australian Greens.
86. The Government has proposed five separate amendments, KQ147 to KQ151. The extent to which these amendments are intended to be cumulative or alternative to one another is not entirely clear. The Government proposed these amendments prior to releasing the Expert Panel report and its response.

***KQ147 (Government)***

***Would enable repeal of subsection 38(3) only***

87. The amendment would retain the Bill's repeal of the subsection 38(3) exemption.
88. It would, however, oppose proposed subsection 37(3). This would mean that the existing paragraph 37(1)(d) exemption could continue to apply to acts or practices by religious bodies which are connected with the provision of education, provided that certain conditions were met. That is, the acts or practices would need to conform to the doctrines, tenets or beliefs of the religion, or be necessary to avoid injury to the religious susceptibilities of adherents of that religion.
89. The Government states that this amendment is necessary for the below reasons.
90. *First*, it states that the existence of the more specific exemption for educational institutions in section 38 of the SDA indicates that 'a body established for religious purposes' under paragraph 37(1)(d) does not include a religious educational institution. Further, maintenance of subsections 38(1) and (2) will continue to provide an exemption for religious educational institutions' conduct in relation to employment decisions.<sup>89</sup>

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<sup>89</sup> The Parliament of the Commonwealth of Australia, Senate, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Supplementary Explanatory Memorandum Relating to Amendment Sheet KQ147 (**Explanatory Memorandum to KQ147**), 3.

91. In response, the Law Council notes that there is a presumption in statutory interpretation of *expressum facit tacticum*: where a particular procedure (or power) is designed to achieve something, other procedures are excluded.<sup>90</sup> Under this presumption, where a statute confers only one power to take the relevant action this confines the generality of another apparently applicable power.<sup>91</sup>
92. However, this is a presumption only, and the application of the presumption depends on the particular text, context and purpose of the statute.<sup>92</sup> There remains a possibility that a religious school may seek to rely on paragraph 37(1)(d) with respect to potentially discriminatory conduct against students, especially if subsection 38(3)(d) is removed. In this light it is noted that:
- It is clear that, but for subsection 37(2), a 'body established for religious purposes' under paragraph 37(1)(d) could extend to a body which provides Commonwealth-funded aged care - that is, a church-based aged care facility. This suggests that it may also extend to a religious educational institution; and
  - When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously clear.<sup>93</sup> This underlines the need for a clear signal from Parliament that paragraph 37(1)(d) is not intended to apply to religious educational institutions.
93. Therefore, the Law Council considers that it would be valuable to clarify how paragraph 37(1)(d) will operate with respect to religious educational institutions.
94. *Secondly*, the Government states that proposed subsection 37(3) would remove the ability of bodies established for religious purposes to provide education that is consistent with their doctrines, tenets or beliefs without the risk of engaging in conduct amounting to unlawful discrimination, noting that there is no limitation placed upon the scope of the term 'education'.<sup>94</sup> It is concerned that proposed subsection 37(3) may exclude a range of educational activities from the paragraph 37(1)(d) exemption. These include a sermon, bible study, a Buddhist meditation seminar, a marriage course, relationship counselling, or welfare and youth work in the course of community development.<sup>95</sup>
95. The Law Council notes that many such activities will be run by churches, mosques, synagogues or other religious bodies. As noted, it considers that it would be beneficial to tighten the wording of proposed subsection 37(3) to 'educational institutions which are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', rather than 'a body established for religious purposes'. This would mean that bodies established for religious purposes, which are not such educational institutions, would rely on paragraph 37(1)(d) with respect to teaching in accordance with religious doctrine.

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<sup>90</sup> *Anthony Horden and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J).

<sup>91</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 280 ALR 18 at [50], French CJ.

<sup>92</sup> *Plaintiff M70*, French CJ.

<sup>93</sup> *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

<sup>94</sup> Explanatory Memorandum to KQ147, 3.

<sup>95</sup> *Ibid.*

96. To the extent that activities such as a sermon, bible study, marriage or relationship counselling are conducted or hosted by the faith-based educational institutions themselves, the Government's suggestion that there is a risk that such educational activities may amount to unlawful discrimination must be considered. This issue is discussed below with respect to Amendment KQ149. In summary, the Law Council considers that it is highly unlikely that faith-based educational institutions would be prevented from teaching religious doctrine in a reasonable manner.

**KQ148 (Government)**

***Provides that conditions, requirements or practices imposed by religious educational institutions regarding students are deemed reasonable if certain conditions are met***

97. The amendment would insert new section 7E into Part I of the SDA (after current section 7D), which as noted, contains general definitions of 'direct' and 'indirect' discrimination. It would affect the section 7B reasonableness test, which as noted, applies to any consideration of whether certain conduct constitutes indirect discrimination across the SDA.

98. Proposed subsection 7E(1) provides that for the purposes of section 7B, a condition, requirement or practice which is imposed (or proposed to be imposed) in relation to a student by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed is reasonable if:

- (a) *it is imposed in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and*
- (b) *it is imposed in a manner that is consistent with a policy of the educational institution that complies with certain requirements; and*
- (c) *if the student is a child, in imposing the condition, requirement or practice, the educational institution has regard to the best interests of the child.*

99. Proposed subsection 7E(2) would further provide that a policy of an educational institution is compliant if it is:

- (a) *in writing;*
- (b) *publicly available;*
- (c) *sets out the educational institution's policy in relation to adherence to its doctrines, tenets, beliefs or teachings; and*
- (d) *complies with any other requirements prescribed by regulation.*

100. The Explanatory Memorandum<sup>96</sup> states that it is necessary to clarify that religious educational institutions are permitted to impose or enforce reasonable rules regarding student conduct consistent with their particular religious ethos.<sup>97</sup> It considers that

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<sup>96</sup> Parliament of the Commonwealth of Australia, Senate, *Sex Discrimination (Removing Discrimination Against Students) Bill 2018*, Supplementary Explanatory Memorandum Relating to Amendment Sheet KQ148 (**Explanatory Memorandum for KQ148**).

<sup>97</sup> *Ibid*, 3.

these amendments will provide certainty and transparency for students and their families, as well as certainty to religious believers that they can continue to establish and maintain educational institutions in accordance with their religious beliefs.<sup>98</sup>

101. The Explanatory Memorandum provides three examples of school requirements for which it says greater clarity is needed:

- (a) student attendance at a school's weekly chapel service;
- (b) adherence to teachings in uniform and facility use; and
- (c) advocacy inconsistent with ethos of school.<sup>99</sup>

102. The Law Council does not support this amendment. It is concerned that it overrides the existing section 7B reasonableness test. As discussed, this test requires consideration of all of the relevant circumstances of the matter, including the nature and extent of the resulting disadvantage to an individual, the feasibility of overcoming or mitigating the disadvantage, and whether it is proportionate to the result sought.

103. The Law Council is concerned that proposed section 7E encourages a blanket approach to be adopted by educational institutions, without requiring that regard be had to the merits of the individual case, or the flexibility to treat different cases differently. It would not, for example, require a school to consider ways of mitigating or avoiding any disadvantage or harm caused to an individual student, regardless of the level of distress involved or the student's vulnerability.

104. As noted above, under international human rights law, limitations on rights should be: prescribed by law; pursue a legitimate aim; and be necessary to pursue that aim, which requires an assessment of their proportionality. Key factors relevant to whether a limitation is proportionate include whether the measure provides sufficient flexibility to treat different cases differently, or imposes a blanket policy without regards to the merits of the individual case. Proportionality must be considered in the particular circumstances of a case, on a case by case basis.

105. Further, the Law Council is concerned that proposed section 7E merely requires the educational institution to have regard to the best interests of the child in imposing a condition, requirement or practice. It does not require this to be a 'primary consideration', contrary to Australia's obligations under the CRC, as discussed above. Nor is it clear that the best interests of an individual child must be considered. For instance, the Explanatory Memorandum's examples indicate that the school will consider the best interests of all of its students at the time the policy is made and released. It states that, at this point:

*'The school is satisfied that the policy is in the best interests of each of its students, as it is clear, provided publicly and ensures the maintenance of the religious ethos of the school'.<sup>100</sup>*

106. As noted above, 'what is in the best interests of the child should be able to be adjusted according to the specific situation of the child or children affected and consider their personal context or needs'.<sup>101</sup> It is unclear that this will occur or is intended. Instead the emphasis appears to be on the group as a whole.

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<sup>98</sup> Ibid, 4.

<sup>99</sup> Explanatory Memorandum for KQ148, 3-4.

<sup>100</sup> Ibid, 4-5.

<sup>101</sup> PJCHR Guide, 47.

107. The Law Council is concerned that over time, proposed section 7E may in fact lead to increasing numbers of schools adopting blanket policies which, while neutral on their face (and therefore do not raise alarm for parents enrolling their children), in effect disadvantage vulnerable LGBTI students. This would undermine their rights to equality and non-discrimination. It notes that indirect discrimination may be considered a more 'insidious' form of discrimination. While it understands that arguments for greater transparency and clarity may be attractive, it would be concerned if this were at the cost of individual students' wellbeing.
108. On this basis, the Law Council also has reservations about the Expert Panel's recommendation 7, which states that the SDA should be amended to exempt certain forms of discrimination by religious schools provided that (*inter alia*) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.<sup>102</sup>
109. Finally, the existing exception in subsection 38(3) is limited to discrimination on the ground of a person's sexual orientation, gender identity, marital or relationship status or pregnancy, whereas proposed section 7E would not be limited. It would introduce a religious consideration in respect of all attributes – including sex, intersex status, potential pregnancy, breastfeeding and family responsibilities. This would be a backwards step in the Law Council's view. It notes that the Expert Panel found no justification for discrimination by religious schools with respect to students on the basis of certain grounds including pregnancy or intersex status.<sup>103</sup>
110. The Law Council further queries the necessity of proposed section 7E with respect to the examples raised, as discussed below.

#### Attendance at Weekly Chapel Service

111. The first example raised in the Explanatory Memorandum is that it is a requirement of attendance at the school that the students attend the weekly chapel service. While it unfortunately lacks specificity, and much in this area depends on the facts of the individual case, the Law Council notes that this may lead to a situation in which, for example, a gay student is distressed by the content of the services, refuses to attend and is expelled.<sup>104</sup>
112. The threshold question is whether a situation may engage the section 21 prohibitions. Paragraph 21(2)(a) provides that it is unlawful for an educational authority to discriminate against a student, on grounds including the student's sexual orientation, by expelling the student.
113. The next question is whether this constitutes direct or indirect discrimination under the SDA, having regard to section 5A, which concerns discrimination on the ground of sexual orientation. The school would indicate that the expulsion was because of the failure to attend. The child would not be expelled because of his or her sexual orientation, so there is no direct discrimination according to subsection 5A(1).
114. The question is then whether the requirement to attend weekly chapel is indirect discrimination according to subsection 5A(2). This provides that a person discriminates against another person on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition,

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<sup>102</sup> Expert Panel Report, 69 (Recommendation 7).

<sup>103</sup> Ibid.

<sup>104</sup> Explanatory Memorandum for KQ148, 3.

requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.

115. It has previously been held that the words 'requirement or condition' should be given a broad or liberal interpretation to enable the objects of the legislation to be fulfilled.<sup>105</sup> In this instance, the 'condition, requirement or practice' may be the requirement that the student attend the weekly chapel service, whose content involves sermons in favour of traditional marriage and against same-sex activity.
116. A condition, requirement or practice must have, or be likely to have, the effect of 'disadvantaging' persons of the same sexual orientation as the complainant. The AHRC has noted that the term 'disadvantaging' is not defined in the SDA and there is little discussion of the concept in the case law concerning the SDA.<sup>106</sup>
117. However, there is some assistance provided with respect to the disadvantage as it applies under the *Disability Discrimination Act 1992* (Cth) (the **DDA**) indirect discrimination test.<sup>107</sup> In determining whether an aggrieved person is 'able to comply' with a requirement or condition, the relevant question is whether a complainant would suffer 'serious disadvantage'<sup>108</sup> in complying with it. In *Hurst v Queensland*,<sup>109</sup> a requirement or condition that a school student be taught in English without Auslan assistance was held to be 'serious disadvantage', as she was deprived of the opportunity to reach her full potential and, perhaps, to excel.<sup>110</sup> The causal link with the disability is directed at the effect of the discriminator's conduct: that is, because of the disability, the conduct had the disadvantageous effect.<sup>111</sup>
118. With respect to the SDA provisions, the focus is on whether a group of people with the same attributes as the complainant would be disadvantaged by the condition, requirement, or practice.<sup>112</sup> It is not simply that an individual suffered harm. Having regard to the above material, depending on the circumstances, it may be difficult to establish to establish 'disadvantage' in this sense, in which case there would be no indirect discrimination.
119. However, if the circumstances meant that that a weekly chapel service attendance requirement, which exposed a student to sermons in favour of traditional marriage

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<sup>105</sup> Eg, *Waters v Public Transport Corporation* (1991) 173 CLR 349 (**Waters**), 393 (Dawson and Toohey JJ), 406-407.

<sup>106</sup> Although it has been accepted, however, that a requirement for an employee to work full-time is likely to disadvantage women, who are more likely to seek part time work to meet their family responsibilities: *Hickie v Hunt & Hunt* [1998] HREOCA 8 (**Hickie**), [6.17.10]; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 (**Mayer**), [69]-[73].

<sup>107</sup> Noting that the formulation of the DDA indirect discrimination test differs somewhat to the SDA: Under subsection 6(2) of the DDA, indirect discrimination occurs (subject to subsections 6(3) and 6(4)) if a person discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if: (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability. Much of the discussion of 'disadvantage' relates to paragraph 6(2)(b), whether the aggrieved person can comply with the condition or requirement.

<sup>108</sup> *Clarke v Catholic Education Office* [2003] FCA 1085, [49], upheld on appeal *Catholic Education Office v Clarke* (2004) 138 FCR 121; also *Hurst v Queensland* (2006) FCR 562 (**Hurst**), 580 [106], 585 [134]; *Travers v New South Wales* [2001] FMCA 18.

<sup>109</sup> *Hurst*, 584 [125].

<sup>110</sup> *Hurst*, 584 [125].

<sup>111</sup> *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 (**Sklavos**), 86.

<sup>112</sup> SDA, s 5(2); as with the DDA, s 6(2)(c).

was considered likely to 'disadvantage' a person of the same sexual orientation as the student - particularly if the chapel service content consistently addressed this topic with force – questions of reasonableness would arise.

120. Under subsection 7B(1), if the weekly chapel service attendance requirement was considered 'reasonable in the circumstances' it would *not* be discriminatory. The non-exhaustive list of matters to be taken into account in deciding reasonableness includes:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition of the condition, requirement or practice; and
- the feasibility of overcoming or mitigating the disadvantage; and
- whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.<sup>113</sup>

121. The following passage from *Secretary, Department of Foreign Affairs & Trade v Styles*<sup>114</sup> has been described as 'the starting point'<sup>115</sup> in determining reasonableness:

*The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.*<sup>116</sup>

122. The test of reasonableness is objective, having regard to the circumstances of the case.<sup>117</sup> The subjective preferences of the aggrieved person cannot be determinative of the reasonableness of the impugned requirement, although they may be relevant in assessing whether the requirement or condition was reasonable.<sup>118</sup> While not of itself determinative, the relevant factors to be taken into account in the application of the objective test will usually include whether reasonable alternatives exist that might accommodate the interests of the aggrieved person.<sup>119</sup> However, in assessing reasonableness, the question is not whether a 'better' or more informed decision could have been reached.<sup>120</sup>

123. In the current case of a faith-based educational institution imposing a weekly chapel attendance requirement, which may involve sermons in favour of traditional marriage, a range of relevant circumstances would arise. These may include:

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<sup>113</sup> SDA, s 7B (2).

<sup>114</sup> (1989) 23 FCR 251

<sup>115</sup> *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J).

<sup>116</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 387 (Brennan J) 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed).

<sup>117</sup> *Sklavos*, 97 [80] (Bromberg J), citing *Catholic Education Office v Clarke* (2004) 138 FCR 121 at [115] (Sackville and Stone JJ), with whom Tamberlin J agreed).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* In *Waters* at CLR 395, ALR 546, per Dawson and Toohey JJ (with whom Deane J agreed on this point, at CLR 383-4; ALR 537-8), there was a focus on 'the availability of alternatives of achieving the alleged discriminator's objectives without recourse to the requirement or condition'.

<sup>120</sup> *Commonwealth v HREOC*, 113 (Sackville J).

- the school's reasons for conducting these teachings, including whether the requirement is imposed in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion;
- the need for the school to uphold the purposes for which the school was established, including to uphold the rights of individuals to manifest their religion in worship, observance, practice or teaching; and the rights of parents/guardians to ensure the religious and moral education of their children in conformity with their own convictions;
- the needs of the educational institution to need to maintain order by ensuring student compliance with school rules;
- the frequency, and way in which, the relevant subject matter is taught during weekly chapel sessions;
- the nature and extent of any disadvantage to the student resulting from the requirement to attend chapel, such as his or her level of distress and noting his or her level of vulnerability;
- if the student is a child, the best interests of the child, which should be viewed as the primary consideration;
- the feasibility of overcoming or mitigating this disadvantage, for example, by permitting the student to elect not to attend a particular sermon if it would cause distress; and
- whether the disadvantage is proportionate to the result sought by the educational institution.

124. Having regard to these factors, the Law Council considers that it is highly unlikely that a faith-based educational institution's imposition of a weekly requirement to attend chapel would be considered unreasonable per se. This would significantly frustrate the purposes behind the school's establishment and impede the rights of individuals to manifest their religion.

125. However, it is possible that a school or educational institution might be required to be sufficiently flexible to accommodate the needs of an individual gay or lesbian student who is likely to experience significant distress or psychological harm, particularly a student who is of an age and capacity to express their feelings and having regard to his or her vulnerability. The Law Council notes that the degree of flexibility demonstrated by respondents to alternative, less restrictive solutions, has been considered relevant to determining their reasonableness in broader caselaw examples.<sup>121</sup> In the present scenario, this might, for example, require making arrangements for the student to elect not to attend a particular sermon/s which will focus on sexuality or marriage, or adjusting the manner in which a sermon is delivered.

126. In the Law Council's view, this would reflect a reasonable outcome, which an educational institution would be capable of managing without undermining its purposes, the manifestation of individuals' religion or discipline within the school.

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<sup>121</sup> Such as in the case of an employer's refusal to accommodate an applicant's request for part-time work: Hickie, [4.5.30]; Mayer, [75]-[76].

127. The Law Council considers that proposed section 7E under Amendment KQ148 is not necessary to address the example of weekly chapel attendance requirements.

#### Adherence to Teachings in Uniform and Facility Use

128. The second example raised in the Explanatory Memorandum for KQ148 is that a school may wish to set policies requiring students to adhere to certain standards of dress, language and conduct in the use of school facilities. These policies would be applied uniformly to all students.<sup>122</sup>

129. The Law Council considers that the description of this example in the Explanatory Memorandum is insufficiently clear to enable detailed comment, or to justify proposed section 7E. It is not clear:

- what specific kinds of school policies setting standards of dress, language and conduct in the use of school facilities are envisaged and how they would be framed;
- how they would be needed to avoid injury to the religious susceptibilities of adherents of a particular religion or creed; or
- that such policies would not be permitted if the Bill were passed, having regard to key SDA provisions including the reasonableness test discussed above.

130. Again, much depends on the facts of the case, and it is difficult to draw conclusions in the abstract. One possible example of a 'standards of dress' requirement which is neutral on its face would be a requirement to wear the prescribed school uniform. A transgender child, whose gender identity, gender expression or behavior does not align with their female sex assigned at birth, may wish to wear the prescribed uniform for boys.

131. The Law Council would not support the application of proposed section 7E in this scenario, as it would override consideration of the particular circumstances at hand, including the specific needs and wellbeing of the child, the nature and extent of the disadvantage caused to the child, the vulnerability of transgender children generally, and consideration of how the school could avoid or mitigate the disadvantage.

132. Again, the Law Council thinks that it would be possible, and preferable for, the school to maintain reasonable requirements regarding the wearing of prescribed school uniform generally for its students, while enabling flexibility to accommodate a particular child's needs such as in the circumstances above.

#### Advocacy inconsistent with ethos of school

133. The third example raised in Explanatory Memorandum for KQ148 is that a school has a policy that students must not actively advocate against the doctrines, tenets, beliefs or teachings of the school.<sup>123</sup> According to this description, this policy might extend to the student's activities outside of school, as well as during school hours.

134. Again, this example lacks specificity and 'advocacy' is not further explained. However, having regard to recent reports regarding the Anglican Church's position on

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<sup>122</sup> Explanatory Memorandum for KQ148, 4-5.

<sup>123</sup> Explanatory Memorandum for KQ148, 5.

advocacy,<sup>124</sup> one example of 'advocacy' might be a lesbian, gay, transgender or intersex student's advocacy in favour of expressions of human sexuality contrary to the church's doctrines of marriage, or gender fluidity.

135. The Law Council is concerned that there are a range of important rights involved in this scenario. As well as the right of individuals to manifest their religion, these include the best interests of the child as a primary consideration, his or her rights to equality and non-discrimination, and freedom of expression.
136. Further, a child who is in the process of 'coming out' is often at a particular stage of vulnerability, and it is essential that the child have access to adequate support mechanisms and networks, particularly in instances where their families or friends are unsupportive. This might include joining local or national LGBTI support centres, or online networks, whose activities include providing counselling and individual support with broader advocacy activities. A student may feel empowered by joining these advocacy activities, such as attending a local rally, or seeking legislative or policy change with other like-minded individuals.
137. The Law Council is concerned that legislation enabling the imposition of blanket policies by schools in this area may result in situations in which a vulnerable student feels isolated, ashamed and unable to access support, and his or her wellbeing consequently suffers. Again, it considers that the existing 'reasonableness' test, with its requirements to consider multiple perspectives and to work through alternative, less harmful solutions having regard to the individual circumstances facing a school and a student, is a better approach. This is preferable to an outcome which may lead to the silencing of an individual student.

#### **KQ149 (Government)**

##### ***Provides general exemption for 'teaching activity' by religious educational institutions***

138. This amendment would insert proposed new section 7F, after proposed new section 7E (as discussed in Amendment KQ148 above). This would provide general exemption from the SDA's prohibitions against both direct and indirect discrimination for educational institutions established for religious purposes.
139. Proposed subsection 7F(1) would provide that:
- Nothing in the SDA renders it unlawful to engage in teaching activity if that activity:*
- (a) *is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and*
  - (b) *is done by, or with the authority of, an educational institution that is conducted with those doctrines, tenets, beliefs or teachings.'*
140. 'Teaching activity' is defined in proposed subsection 7F(2) as 'any kind of instruction of a student by a person employed or otherwise engaged by an educational institution'.

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<sup>124</sup> Michael Koziol, 'Sydney Anglicans set to ban gay weddings and pro-LGBTI advocacy on church property', *Sydney Morning Herald* (online), 19 October 2018, <https://www.smh.com.au/politics/federal/sydney-anglicans-set-to-ban-gay-weddings-and-pro-lgbti-advocacy-on-church-property-20181018-p50aga.html>.

141. The Explanatory Memorandum for Amendment KQ 149 states that many faith-based schools have raised concerns that the removal of existing subsection 38(3) may challenge their ability to teach in accordance with their religious beliefs or ethos. This amendment is intended to clarify that educational institutions established for religious purposes are able to maintain teaching activities that are in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular creed.<sup>125</sup>
142. The example is provided that a faith-based school ‘teaches that its doctrines, tenets, beliefs or teachings prescribe a particular view on a moral matter, or a particular understanding of social institutions. The teaching is provided in good faith. The school complies with section 7F.’<sup>126</sup> It does not further outline what kinds of religious teachings might be envisaged.
143. It is assumed that this risk relates to the teaching of religious doctrine that, for example, sexual activity should only occur between a man and a woman. This requires consideration of the SDA’s relevant definitions and prohibitions.

Would faith-based educational institutions be precluded from teaching in accordance with their religious doctrines, tenets or beliefs if the Bill was passed?

144. The most relevant prohibition is paragraph 21(2)(c), which prohibits an educational authority from discriminating against a student on the ground of the student’s specified attributes,<sup>127</sup> by ‘subjecting the student to any other detriment’.
145. The argument may be that an educational authority’s teachings that, according to its religious doctrines etc, sexual activity should be restricted to a man and woman within marriage are harmful to a gay or lesbian student’s psychological wellbeing and mental health. If so, this could be considered a ‘detriment’ and engage section 21.
146. The next issue is whether such teachings constitute ‘discrimination’ according to the definitions in Part I of the SDA. This again involves consideration of section 5A.
147. The Law Council considers that such teachings would be unlikely to meet the definition of direct discrimination under subsection 5A(1). This is because, in delivering its teachings, the educational authority would not be treating a gay or lesbian student less favourably than, in circumstances that are the same or not materially different, it treats a person with a different sexual orientation.
148. The question is whether the teachings would constitute indirect discrimination under subsection 5A(2). Having regard to the definitions above, it may be accepted:
- that the relevant ‘condition, requirement or practice’ is the requirement that the student attend its teachings, or the practice of the teachings themselves, which promote traditional views of marriage and sexuality; and
  - that this would be likely to have the effect of ‘disadvantaging’ persons of the same sexual orientation as the complainant.
149. Again, it may be difficult to establish that teachings in favour of traditional marriage would be considered likely to ‘disadvantage’ a person of the same sexual orientation as the student, having regard to certain caselaw principles outlined above.

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<sup>125</sup> Parliament of the Commonwealth of Australia, Senate, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Supplementary Explanatory Memorandum Relating to Amendment Sheet KQ149 (**Explanatory Memorandum to KQ149**), 3.

<sup>126</sup> Ibid.

<sup>127</sup> Sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding: SDA, s 21(2).

150. However, if they were teachings considered indirect discrimination according to subsection 5A(2), again the question of whether they were considered 'reasonable in the circumstances' under section 7B would arise. This again requires regard to all of the relevant circumstances, including those matters set out in the non-exhaustive list at subsection 7B(1).

151. In this regard, a range of relevant circumstances would arise. These could include:

- the school's reasons for conducting these teachings, including whether the requirement or practice is imposed in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion;
- the need for the school to uphold the purposes for which the school was established, including to uphold the rights of individuals to manifest their religion in worship, observance, practice or teaching; and the rights of parents/guardians to ensure the religious and moral education of their children in conformity with their own convictions;
- the frequency and manner in which the subject matter is taught;
- the nature and extent of any disadvantage to the student resulting from the teaching and the requirement to attend it; such as his or her level of distress and noting his or her level of vulnerability;
- if the student is a child, the best interests of the child, which should be viewed as the primary consideration;
- the feasibility of overcoming or mitigating this disadvantage, for example, by permitting the student to elect not to attend a particular lesson if it would cause distress; and
- whether the disadvantage is proportionate to the result sought by the educational institution.

152. Having regard to these factors, and noting that each case turns on its facts, the Law Council considers that it is highly unlikely that a faith-based educational institution's reasonable teachings of its views on marriage according to its own religious doctrines, tenets and so on would breach the SDA's provisions. This would significantly frustrate the purposes behind the school's establishment and impede the rights of individuals to manifest their religion.

153. However, as with the example of the weekly chapel attendance requirement, it is possible that a school or educational institution might be required to be sufficiently flexible to accommodate the needs of an individual gay or lesbian student who is likely to experience significant distress due to the effects of these teachings, particularly a student who is of an age and capacity to express their feelings and having regard to his or her vulnerability. In the present scenario, this might, for example, require making arrangements for the student to elect not to attend a particular lesson or class which will focus on sexuality or marriage, or adjusting the manner in which a subject is taught.

154. In the Law Council's view, this would reflect a reasonable outcome, which an educational institution would be capable of managing without undermining its purposes or the manifestation of individuals' religion.

155. For these reasons, the Law Council does not consider that there is a risk that educational institutions will be unable to teach the doctrines, tenets or beliefs of that religion or creed in a reasonable manner without the risk of engaging in unlawful discrimination. It therefore queries the necessity of proposed section 7F.

#### Specific concerns about proposed section 7F

156. The Law Council is concerned that proposed section 7F contains a very broad definition of 'teaching activity' as it:

- is not restricted to activities undertaken by a teacher, but 'any person employed or engaged by the educational institution'. This could include for example, a grounds person, or receptionist;
- means 'any kind of instruction of a student'; and
- could encompass activity outside, as well as inside, a classroom, such as on the sports ground.

157. Further, proposed section 7F provides an exemption from both direct and indirect discrimination under the SDA. It would extend to instances in which individual students were treated less favourably as part of the 'teaching activity'. For example, this might involve:

- providing inferior tuition to a student on the basis of, for example, their gender, sexual orientation or gender identity. This might involve segregating transgender students from the class and teaching them in another room, or by video;
- imposing more onerous requirements on certain students because of these factors, such as requirements to attend individual classes with a priest or rabbi to 'overcome' their sexual orientation, or 'conversion therapy';
- excluding girls from parts of a biology class, because sex education is considered unsuitable for girls according to religious doctrine; or
- requiring a same-sex oriented student to pay penance for their sins, as part of a class on sexuality.

158. Unlike existing subsection 38(3), proposed new section 7F also provides an exemption for discrimination against a person on any ground covered by the SDA. Subsection 38(3) provides an exemption only with respect to particular grounds (a person's sexual orientation, gender identity, marital or relationship status, or pregnancy). Section 7F would extend to exempting discrimination, direct or indirect, on the ground of a person's sex, intersex status, potential pregnancy, breastfeeding or family responsibilities. This would be a backward step.

159. It appears to extend beyond educational institutions to teaching activities conducted by other individuals, provided that they are done 'with the authority of' an educational institution'.<sup>128</sup> This may, for example, include teaching activities which are conducted offsite by camp staff who are contracted by the educational institution. This contrasts with existing subsection 38(3), which requires that the discrimination be 'in

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<sup>128</sup> Proposed subsection 7F(2).

connection with the provision of education or training *by* the educational institution' (emphasis added).

160. It would only require that the discrimination in question be 'in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', and that it is done by, or with the authority of, an educational institution conducted in accordance with these doctrines, etc. Unlike existing subsection 38(3), it does not require that the discrimination also be 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

161. For the above reasons, the Law Council does not support Amendment KQ149.

**KQ150 (Government)**

***Amends section 7B reasonableness test with respect to indirect discrimination (religious educational institutions)***

162. This amendment proposes new paragraph 7B(2)(d), which would add to the existing paragraph 7B(2) reasonableness test concerning whether conditions, acts or practices constitute indirect discrimination.

163. Paragraph 7B(2) provides that the matters to be taken into account in determining whether a condition, requirement or practice is reasonable include:

- (a) the nature and extent of the resulting disadvantage;
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person imposing the condition, requirement or practice.

164. New paragraph 7B(2)(d) would add that the matters to be taken into account in determining reasonableness must also include:

- (a) *whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed; and*
- (b) *whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.*

165. According to the Explanatory Memorandum for Amendment KQ151, these additional criteria:

*...reflect the fact that religious educational institutions may be permitted to impose or enforce rules regarding student conduct consistent with the doctrines, tenets, beliefs or teachings of that institution, provided those rules are reasonable in all the circumstances. The amendments will provide greater certainty to the public about the role and reach of religious educational institutions,*

*while ensuring an appropriate balance between freedom of religion and the rights of students to be free from discrimination*.<sup>129</sup>

166. It provides the same examples as those discussed at Amendment KQ148 in support of Amendment KQ150: attendance at weekly chapel service; adherence to teachings in uniform and facility use; advocacy inconsistent with ethos of educational institution.

167. This amendment bears some similarity to Amendment KQ148. However, unlike that Amendment:

- (a) it is not a 'deeming' provision which effectively overrides the section 7B reasonableness test if its criteria are met. Rather, it adds criteria which must be considered in addition to the non-exhaustive list in subsection 7B(2); and
- (b) it does not require the condition, requirement or practice to be imposed consistently with a policy of the educational institution that is in writing, publicly available etc.

168. The Law Council has previously indicated that it does not support such an amendment.<sup>130</sup> While this approach is preferable to KQ148's deeming provision, as a court must be convinced by the evidence addressing all the criteria that the condition is reasonable, it considers that the Amendment is unnecessary and unjustified.

169. As discussed above regarding KQ148, the existing section 7B reasonableness test is a non-exhaustive list, and the relevant caselaw emphasises that *all* the circumstances of the case must be taken into account.<sup>131</sup> This includes consideration of the additional matters proposed to be included in paragraph 7B(2)(d). As discussed in detail in KQ148, the Law Council considers that the three examples canvassed as the rationale for KQ150 can be handled appropriately under the existing reasonableness test.

170. The intention behind new paragraph 7B(2)(d) seems to be that it would be a law of general application, to be given life through school rules, rather than individually addressing the circumstances of a particular student. This appears from the discussion in the Explanatory Memorandum examples, which emphasise the need of schools to issue policies of general application.<sup>132</sup>

171. However, as noted above, under international human rights law, limitations on rights should be: prescribed by law; pursue a legitimate aim; and be necessary to pursue that aim, which requires an assessment of their proportionality. Key factors relevant to whether a limitation is proportionate include whether the measure provides sufficient flexibility to treat different cases differently, or imposes a blanket policy without regards to the merits of the individual case. Proportionality must be considered in the particular circumstances of a case, on a case by case basis. Paragraph 7B(2)(d) may be problematic if it leads towards more blanket policies being imposed, through school rules, rather than an assessment of individual circumstances.

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<sup>129</sup> Parliament of the Commonwealth of Australia, Senate, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Supplementary Explanatory Memorandum Relating to Amendment Sheet KQ150 (**Explanatory Memorandum for KQ150**), 3.

<sup>130</sup> Law Council, References Committee Submission, 21.

<sup>131</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263.

<sup>132</sup> Explanatory Memorandum for KQ150, 4-5.

172. Further, there is no requirement that the educational institution have regard to the best interests of the student as ‘a primary consideration’, as required under the CRC. Therefore, other considerations may be given larger weight despite the likelihood that a condition, requirement or practice which has the effect of eg barring a child from a school would have be harmful to the child. The examples also appear to contemplate that the best interests of the students will be considered as a whole, when the policy is imposed, rather than with respect to an individual student.<sup>133</sup>
173. Proposed paragraph 7B(2)(d) inserts specific matters concerning religious schools and students into general definition provisions – that is, into SDA’s general test of reasonableness with respect to the definition of indirect discrimination. This test applies to a wide range of scenarios which may constitute indirect discrimination, well beyond schools and students. It is inappropriate that the general test should place specific emphasis on this one issue.
174. The existing exception in subsection 38(3) is limited to discrimination on the ground of a person’s sexual orientation, gender identity, marital or relationship status or pregnancy, but proposed paragraph 7B(2)(d) would not be limited. It would introduce a religious consideration in respect of all attributes – including sex, intersex status, potential pregnancy, breastfeeding and family responsibilities.
175. While this approach may be thought preferable as it permits indirect discrimination only, the Law Council notes that both indirect discrimination and direct discrimination lead to disadvantageous outcomes for the individuals involved. As noted, in some ways, indirect discrimination may be considered a more ‘insidious’ form of discrimination.
176. Finally, proposed paragraph 7B(2)(d) would add to existing complexity in this area of law.
177. The Law Council does not support Amendment KQ150.

***KQ151 (Government)***

***Amends section 7B reasonableness test with respect to indirect discrimination (primary or secondary schools)***

178. This amendment is almost identical to those proposed in KQ 150. The difference is that proposed paragraph 7B(2)(d) would apply more narrowly, namely, only to religious educational institutions which are primary schools or secondary schools.
179. The Law Council does not support this amendment for the reasons set out above with respect to Amendment KQ151.

***8614 (Centre Alliance)***

***Carve-out from paragraph 37(1)(d) exemption would apply to religious ‘educational institutions’, not religious ‘bodies’***

180. This amendment would narrow the scope of the Bill’s proposed subsection 37(3).
181. As discussed, existing paragraph 37(1)(d) in the SDA provides a general exemption for any act or practice of a body established for religious purposes, if it conforms to

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<sup>133</sup> Ibid.

the doctrines, tenets or beliefs of the religion, or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

182. Proposed subsection 37(3) in the Bill provides that paragraph 37(1)(d) does not apply to an act or practice of a body established for religious purposes if:

- (i) the act or practice is connected with the provision, by the body, of education; and
- (ii) the act or practice is not connected with the employment of persons to provide that education.

183. This amendment would replace the references to 'a body' to 'an educational institution'.<sup>134</sup> The Law Council notes that unlike the term 'educational institution'<sup>135</sup>, the term 'body' is not defined in the SDA or Bill.

184. While there is no Explanatory Memorandum, the Amendment indicates that these changes are intended to address teaching religious doctrine in settings other than educational institutions.

185. As noted above, the Law Council agrees that proposed subsection 37(3) may be too broadly worded. It recommends above that proposed subsection 37(3) should be amended to provide that:

*... 'paragraph 37(1)(d) does not apply to an act or practice of an **educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed**'<sup>136</sup> if:*

- (a) *the act or practice is connected with the provision, by the **institution**, of education; and*
- (b) *the act or practice is not connected with the employment of persons to provide that education.*

186. The Law Council suggests that the wording 'educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' mirrors that used in existing section 38.

187. This would mean that proposed subsection 37(3) would only apply to the acts or practices of faith-based schools, colleges, universities and other institutions at which education or training is provided. It would exclude acts or practices which are connected with the provision of education by, for example, churches, synagogues or mosques.

### **8601 (Australian Greens)**

#### ***Would remove exemptions for discrimination by religious educational bodies against staff and contractors as well as students***

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<sup>134</sup> Subsequent references to 'the body' would be replaced by 'the institution'.

<sup>135</sup> An 'educational institution' means a school, college, university or other institution at which education or training is provided: SDA, s 4(1).

<sup>136</sup> Emphasis added.

188. This amendment is intended to remove the SDA's existing exemptions with respect to discrimination by faith-based educational institutions in respect of staff or contractors. It would

- reword new subsection 37(3):
  - this would provide that paragraph 37(1)(d) does not apply to an act or practice of a body established for religious purposes if the act or practice is connected with the provision, by the body, of education; and
  - it would remove the additional requirement under paragraph 37(3)(b) that the act or practice is not connected with the employment or persons to provide that education.
- repeal section 38 in its entirety, including exemptions under subsections 38(1) and 38(2) with respect to faith-based educational institutions and staff or contractors.

189. The Law Council recently submitted to the References Committee its view that there is scope to consider whether the current use of broad, permanent exemptions such as subsections 38(1)-(2), and paragraph 37(1)(d) strikes the appropriate balance between the freedom to manifest one's religion and protections for other rights in this area. It submitted that, if discrimination against people employed or contracted by religious schools is to be maintained, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect.

190. It queries whether, in light of the harm and unfairness caused by such exemptions – to both teachers and students – there is sufficient justification for that harm. Concerns in this area include:

- the harms experienced by LGBTI+ people – adults and children - who experience discrimination and harassment in the Australian community. These findings are highly concerning. In this light, it is important to consider not only the harm caused to the LGBT school staff or contractors affected by such exemptions, but also to LGBT students who witness discrimination occurring against their teachers or other staff. In this context, the NSW Bar has reinforced that the lasting harm caused to LGBT children's self-esteem, dignity and self worth, and hence their mental health, stems both from the damage done them directly and:  
  
*... and in respect of teachers or staff on account of the transferred impact on students when teachers or staff are discriminated against, or when there are no teachers or staff like them; that is when there is a transferred denial of who they are, or the absence of any affirmation of who they are.*
- arguments by religious schools that such exemptions should remain available, even though they are infrequently used.<sup>137</sup> However, as noted above, it is concerned such exemptions are, by their very nature, harmful; and
- members of the Law Council's National Human Rights Committee query the precise extent to which discriminatory conduct against LGBT staff is

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<sup>137</sup> Jordan Baker, 'Devastating': Anglican heads' letter prompts anger and division', The Sydney Morning Herald (online), 3 November 2018.

supported through existing religious doctrine, except with respect to the definition of marriage. In this context, it observes that compared to subsections 38(1)-(2), paragraph 37(1)(d) more closely requires any actions taken to be based in existing doctrine. That is, it must be an ‘an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’

191. Some of the Law Council’s constituent bodies and members of its Human Rights Committee have supported the repeal of subsections 38(1) and (2), while others have queried the ongoing justification of these permanent and broad subsections.
192. However, the Law Council has also emphasised the need for careful consideration of broader federal legislation in the field of employment, noting the SDA exemptions’ interactions with other relevant provisions – such as under the Fair Work Act 2009 (Cth) (**the FWA**)<sup>138</sup> and the Australian Human Rights Commission Act 1986 (Cth) (**the AHRC Act**).
193. A key concern regarding any amendment to SDA exceptions in employment is the need for consistency as between the relevant legislation. The exemption in subsection 38(1) of the SDA is narrower than those in other laws applying to employment. A key question is whether any amendment to subsection 38(1) SDA would make a difference if the comparable provisions in the FWA remained.
194. For example, the exception in subsection 38(1) of the SDA is limited to offering employment and dismissal only.

### **s 38 Educational institutions established for religious purposes**

*(1) Nothing in paragraph 14(1)(a) [arrangements for who should be offered employment] or (b) [determining who should be offered employment] or 14(2)(c) [dismissing the employee] renders it unlawful for a person to discriminate against another person on the ground of the other person’s sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

195. This is narrower than the exceptions in other Commonwealth employment laws.
  - **subsection 351(1) of the FWA** - prohibits ‘adverse action’ by employers (which includes dismissal, as well as altering an employee’s position to his or her prejudice)<sup>139</sup> because of an employee’s/prospective employee’s *inter alia* sex, sexual orientation, marital status, pregnancy, religion.
  - The relevant exceptions under subsection 351(2) include:

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<sup>138</sup> For example, FWA, ss351(1)-(2); ss772(1)-(2).

<sup>139</sup> Under s 342 of the FWA, ‘adverse action’ includes dismissal of an employee, injuring them in their employment, prejudicially altering their position, discriminating between them and other employees, refusing to employ a prospective employee, or discriminating against them in the terms or conditions the employer offers.

- subsection 38(1) of the SDA<sup>140</sup>;
  - actions which are not unlawful under anti-discrimination laws in force in the place where the action is taken, such as state and territory laws;<sup>141</sup> and
  - paragraph 351(2)(c) *if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--the action is taken* [eg employment is terminated or an employee's position is prejudicially altered etc]:
    - i. *in good faith; and*
    - ii. *to avoid injury to the religious susceptibilities of adherents of that religion or creed.*
- **subsection 772(1) of the FWA** – prohibits termination by employers of an employee's employment because of *inter alia* sex, sexual orientation, marital status, pregnancy, religion.<sup>142</sup> The exception<sup>143</sup> is the same as subsection 351(2)(c).
- **subsection 32(1) of the AHRC Act**, which, with paragraph 31(b), enables the AHRC to inquire into complaints of discrimination in employment and occupation. The expression 'discrimination' is defined in section 3 of the AHRC Act and means any distinction, exclusion or preference made on the basis of e.g. sex or sexual orientation<sup>144</sup> that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. However, the section 3 definition excludes any distinction, exclusion or preference:

*... (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.*<sup>145</sup>

196. If subsections 38(1)-(2) alone were repealed, paragraphs 351(2)(1)(a) and 351(3)(a)-(h) of the FWA would continue to import the defences contained in state and territory laws. This would result in inconsistent protections being available depending on where the discrimination occurs.

197. Decisions to repeal or amend the SDA exemptions should, therefore, be only taken in the context of comprehensive consideration of the full suite of relevant legislation. There is a need to consider carefully the ramifications of repealing or amending these subsections in light of other existing federal provisions.

<sup>140</sup> Under the FWA, ss 351(2)(a) and 351(3)(ad)).

<sup>141</sup> Under FWA, ss 351(2)(1)(a) and 351(3)(a)-(h).

<sup>142</sup> FWA, s 772(1)(f).

<sup>143</sup> Under s 772(2)(b).

<sup>144</sup> Under AHRC Act, s 3(b) and *Australian Human Rights Commission Regulations 1989* (Cth), reg 4, which extends the relevant grounds to sexual orientation.

<sup>145</sup> AHRC Act, s 3(d).

**Recommendations:**

- **If discrimination against people employed or contracted by religious schools is to be maintained under the relevant SDA provisions, there needs to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect.**
- **Any amendments to SDA exemptions for employees and contractors of religious educational institutions should only be taken after careful consideration of their interaction with other relevant federal provisions, including under the FWA and the AHRC Act, and the need for broader amendments.**