



18 January 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary

Submission to inquiry on Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (the Bill)

Freedom for Faith is a christian legal think tank which is concerned to see religious freedom protected and promoted in Australia. It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Church Ministries, the Presbyterian Church of Australia, the Seventh-Day Adventist Church in Australia, and the Anglican Diocese of Sydney. It has strong links and works co-operatively with a range of other churches and christian organisations across Australia, including many faith based school groups.

The Bill was drafted without public consultation, without engagement with stakeholders, and without engaging with the recommendations of the (as then unreleased) Ruddock Inquiry report. There has been no evidence that LGBTI students have been expelled or suffered other forms of discrimination from faith based schools on the basis of their protected attributes. There are however widely held concerns among faith based schools that simply removing exemptions without providing at least equivalent legal rights may impact on their ability to teach, staff and operate in accordance with their beliefs.

In this submission we will confine ourselves to the specific issues raised by the Bill. For a broader consideration of the relationship of religious freedom to discrimination and a discussion of the issues facing schools, we refer the committee to Chapter 4 of our submission to the Philip Ruddock led Expert Panel considering religious freedom - <https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submissions/freedom-faith>

In relation to the Bill we make the following comments:

1. The most significant problems with the Bill arise from the amendment to s.37 of the Act.
2. The intent of the Bill is to remove discrimination against students. By repealing s38(3) and inserting s37(3) religious educational institutions lose the ability to directly take into account

marital status, pregnancy, sexual orientation and gender identity when dealing with students and providing education to students.

3. However there are seemingly unintended consequences that arise from this drafting:
 1. the Bill refers to “education” and is not confined to “educational institutions”. The s 37 amendment extends to any body established for religious purposes – including even churches. All religious bodies providing ‘education’ are potentially captured by this changes. This would extend far beyond schools to churches, synagogues, mosques in their weekly teaching. The public teaching of the faith, and particularly the instruction of children is a central feature of communal religious life recognised under international law.
 2. The Bill is not limited to children under 18. The s 38 amendment extends to any educational institution where education or training is provided, including tertiary theological colleges with an explicitly religious approach. We have been approached by theological colleges, educational institutions and missionary sending organisations concerned that the Bill will interfere with their religious freedom to instruct in accordance with their beliefs. These institutions are adult educational institutions. Only the narrowest category of “priests, ministers of religion or members of a religious order” are protected under the Act - but most will not fall within this category.
4. It is unclear what is meant by providing that schools cannot discriminate on the basis of gender identity. Clearly, it would prohibit expulsion or disciplinary action because of a child’s expressed gender identity. Beyond that though, the SDA clearly allows for some sex-segregated facilities and activities such as sports; in relation to schools particularly, the law is less than clear about how protection of gender identity is to be applied in relation to sex-segregated schools and facilities especially for children who may express some gender confusion but have yet to embark upon a path towards transitioning (and may, in the end, become comfortable in their natal sex). Does it mean that they cannot organise themselves on the basis of sex for sex-segregated activities in ways which deny to a student who identifies with another gender, the right to be treated as if he or she were of that gender? On an overnight school trip, must a natal girl who identifies as a boy but has not had any medical intervention to alter gender characteristics, be allowed to stay in the boys’ rooms? What about a natal boy with all the male genitalia intact, sleeping in the girls’ rooms? The law is vague on this, and both schools and students need, and deserve, clarity.
5. The Bill provides a ‘reasonableness test’ for indirect discrimination (7B(1)). The explanatory memorandum suggests this will be sufficient to maintain the religious character of the school by imposing ‘reasonable conditions, requirements or practices on students in accordance with the doctrines, tenets, beliefs or teachings of their particular religion or creed.’ Secular courts cannot and should not determine whether the faith-based school beliefs and practice are reasonable. This would effectively become a judgement on which religious beliefs are permissible.
6. The new s 7E in Government Amendment KQ148 provides that students may be regulated by a uniform rule in accordance with the religious ethos of the school if done so in good faith and in the “best interests of the child.” However a rule or code of conduct is not directed to children individually so much as children in a school collectively. Rules are about the proper organisation of the school rather than the best interests of any one child within it. It would be preferable for the Bill to reference “the best interests of the children in the educational institution.” This still leaves the problem of a secular court being required to make judgements on what rules are in the ‘best interests’ of children in accordance with community belief.
7. Insertion of s 7F by the Government Amendment KQ149 would allow any ‘religious educational institution’ to engage in any teaching activity which is done in good faith according

to the doctrine of that religion. It would be preferable to deal with the issues of students and teachers and teaching in the same parliamentary debate and package of legislation. Schools require clarification on all of these fronts. This proposed amendment does not deal with the problems faced by faith based bodies that are not 'educational institutions.' A more general provision which allows all religious educational institutions to impose uniform rules of behaviour and conduct in good faith according to the doctrine of that religion would be welcomed.

There is a legitimate concern that 'activists' will abuse anti-discrimination laws to intimidate, harass and oppress people of faith by bringing vexatious anti-discrimination complaints that rely upon the vague wording of these laws and the notion that the expression of ideas which offend may amount to 'discrimination'.

As set out in our submission to the Ruddock Inquiry we believe the exemptions can be removed from the SDA if there is at the same time an assertion of a positive right at law for faith based institutions to select staff, teach and operate in accordance with their beliefs. Whether through a positive right or by substantive amendments the freedom of schools and parents needs to be protected. This Bill does not strike an appropriate balance between the protection of competing rights.

Yours faithfully

Michael Kellahan
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Freedom for Faith