

**Kevin Boreham**

### **Submission to Senate Legal and Constitutional Affairs References Committee**

This submission to the Committee refers to the Senate referral of the following matter on 13 November 2018:

Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984*, with particular reference to proposals for amendments to current legislation, and any related matters.

This submission focuses on the compatibility with human rights of the reported Government draft bill which would allow schools to enact rules that indirectly discriminate in order to uphold the doctrines of their religion. This provision would replace the existing provision allowing for direct discrimination against staff ('LGBTIQ staff') and students ('LGBTIQ students') but this provision is equally repugnant to international and domestic human rights law.

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#### **Direct discrimination**

Section 38 of the *Sex Discrimination Act 1984* (Cth) ('the SDA') as amended by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) ('the 2013 Act') allows *direct* discrimination, namely it is not unlawful under the Act for a religious educational institution to discriminate 'on the ground of the other person's ... sexual orientation [or] ... gender identity ... in connection with employment'<sup>1</sup> or 'in connection with the provision of education or training by an educational institution'.<sup>2</sup>

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<sup>1</sup> SDA s 38(1).

<sup>2</sup> SDA s 38(3).

This is the law even though the Parliamentary Joint Committee on Human Rights found that the statement of compatibility for the 2013 Act did not ‘justify extending the ... broad religious exemptions in the SDA to the new grounds introduced in the bill’.<sup>3</sup>

The Government and Opposition now appear to agree to repeal the provision in SDA s38(3), which allows a religious school to refuse to enrol or to expel LGBTIQ students, but the Government does not accept the Opposition position that the exemption in respect of LGBTIQ staff should also be repealed.<sup>4</sup>

### **Indirect discrimination**

The High Court has said that ‘indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such "equal" treatment is that the former is in fact treated less favourably than the latter.’<sup>5</sup>

It has been reported that the Government’s draft bill would provide that religious schools may indirectly discriminate against LGBTIQ students on the grounds of sexuality or gender identity where it is reasonable, including if it is imposed in “good faith in order to avoid injury to the religious sensibilities of adherents of that religion”. It also reportedly states the educational institution in discriminating in this way must have “regard to the best interests of the student”.<sup>6</sup>

International law as well as domestic law prohibits indirect discrimination. The UN Human Rights Committee which monitors compliance with the International Covenant on Civil and Political Rights (‘the ICCPR’) states that discrimination<sup>7</sup> should be understood to imply any distinction, exclusion, restriction or preference which ... *has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*<sup>8</sup>

The Government’s proposed provision would impact ‘less favourably’ on LGTBIQ staff or students who would be more likely to cause ‘injury to the religious sensibilities of adherents of that religion’ than their heterosexual peers. Associate Professor Neil Foster, in a recent address to Anglican School Principals, provided a number of examples where this would occur including where ‘a student who is gay wants to make that a public matter for discussion

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<sup>3</sup> Parliamentary Joint Committee on Human Rights, *Sixth Report 2013, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* [1.227]

<sup>4</sup> Richard Ferguson, ‘Labor push for LGBTI students inquiry’, *The Australian*(online), 12 November 2018 <https://www.theaustralian.com.au/national-affairs/labor-push-for-lgbti-students-inquiry/news-story/5ac95ae83c8ecf6f314701af52e5494b>

<sup>5</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ).

<sup>6</sup> Paul Karp, ‘Labor says Coalition has ‘stuffed up’ discrimination talks to protect LGBT students’, *The Guardian* (online), 25 October 2018 <https://www.theguardian.com/australia-news/2018/oct/25/labor-says-coalition-has-stuffed-up-discrimination-talks-to-protect-lgbt-students>

<sup>7</sup> ICCPR Arts 2(1) and 26.

<sup>8</sup> Human Rights Committee, *General Comment No 18: Non-discrimination*, 37<sup>th</sup> sess, (1989) [7] [emphasis added].

and activism in the school’ or ‘openly advocates for acceptance of a view of homosexuality contrary to that of the Bible.’<sup>9</sup>

The provision that any religious school must ‘have regard to the best interests of the student’ also conflicts with the Convention on the Rights of the Child (‘the CROC’) which requires that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child *shall be a primary consideration*.<sup>10</sup>

The reported recommendations of the ‘Ruddock Inquiry’ much more accurately reflects the CROC in stating that in discriminating against LGBTIQ students a religious school must ‘have regard to the best interests of the child as the primary consideration in its conduct [emphasis added].’<sup>11</sup>

The provision indirectly limiting rights of LGBTI students is also contrary to the Yogyakarta Principles, adopted by human rights experts to ‘reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity.’<sup>12</sup> Under the Yogyakarta Principles the State is obliged to:

Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity’<sup>13</sup>

### **Permissible exemptions**

The Government’s proposed provision, should it proceed, would need to be carefully re-drafted to meet the international law test for permissible limitation on rights.

The UN Human Rights Committee acknowledges that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’<sup>14</sup>

The Parliamentary Joint Committee on Human Rights reflected this point in its comment on the 2013 Act as a bill that ‘any differential treatment arising from these exemptions [for religious schools] must meet the test for legitimate differential treatment to be consistent with

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<sup>9</sup> <https://lawandreligionaustralia.files.wordpress.com/2018/11/anglican-education-commission-pres-nov-8.pdf>.

<sup>10</sup> CROC Art 3(1) [emphasis added]

<sup>11</sup> ‘Read the full 20 recommendations from the religious freedom review’, *Sydney Morning Herald* (online), 12 October 2018 <<https://www.smh.com.au/politics/federal/read-the-full-20-recommendations-from-the-religious-freedom-review-20181011-p50918.html>>

<sup>12</sup> *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 26 March 2007 <http://yogyakartaprinciples.org/>

<sup>13</sup> Ibid 21.

<sup>14</sup> Human Rights Committee, above n8 [13].

the right to non-discrimination. In other words, the differential treatment must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.<sup>15</sup>

## **Conclusion**

The Government's proposed provision indirectly limiting the rights of LGBTI students, and possibly staff, is incompatible with the human rights conventions by which the Parliamentary Joint Committee on Human Rights judges compatibility with human rights under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). It should not proceed unless it can be re-cast for compatibility with the international and domestic law test for a permissible limitation on rights.

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<sup>15</sup> Parliamentary Joint Committee on Human Rights, above n3 [1.226]