



Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff

Submission to the Senate Legal and Constitutional
Affairs References Committee

15 November 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs References Committee inquiry into the legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.
2. The ALA notes the extremely short timeframe within which the Committee is expected to report on this inquiry. Accordingly, this submission will be brief.

Repeal section 38(3) of the *Sex Discrimination Act 1984*

3. Under section 21 of the *Sex Discrimination Act 1984* (Cth) (SDA):

(1) It is unlawful for an educational authority 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:

(a) by refusing or failing to accept the person's application for admission as a student; or

(b) in the terms or conditions on which it is prepared to admit the person as a student.

(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:

(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;

(b) by expelling the student; or

(c) by subjecting the student to any other detriment.

4. However, under section 38(3) of the SDA:

(3) 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.

5. The ALA submits that the operation of the section 38(3) exemption to section 21 of the SDA causes significant disadvantage to and discrimination against LGBTI students. The ALA strongly supports the repeal of the section 38(3) exemption.

Amend section 37 of the *Sex Discrimination Act 1984*

6. Under section 37 of the SDA:

(1) Nothing in Division 1 or 2 affects:

(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;

(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; or

(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.

7. The ALA is concerned that the exception offered by section 37(1)(d) that allows faith-based educational institutions to discriminate against LGBTI students, teachers and staff is potentially much broader than that which is currently provided by section 38(3). Accordingly,

merely repealing the exemption contained in section 38(3) will, of itself, not prevent discrimination against LGBTI students and staff.

8. The ALA therefore recommends that section 37 should be amended to clarify that the exception provided in section 37((1)(d) does not apply to the treatment of students, teachers or staff by faith-based educational institutions.

Proposed amendment to section 7B of the *Sex Discrimination Act 1984*

9. The ALA is aware that the Government is considering changes to the 'reasonableness test' in section 7B of the SDA, which allows indirect discrimination in situations where it is 'reasonable in the circumstances' (section 7B(1)).
10. Under the amendments which are being considered by the Government, section 7B(2) would be amended to include an additional consideration to be taken into account to decide whether a condition, requirement or practice is reasonable in the circumstances. The proposal is to add a new section 7B(2)(d) which states:

(d) if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is a primary school or a secondary school and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and

(ii) whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.

11. The ALA is opposed to such an amendment to section 7B(2). The ALA considers that this amendment would allow faith-based educational institutions to continue to discriminate against students, teachers and staff. Moreover, the ALA notes that the proposed amendment would broaden the attributes and circumstances in which faith-based educational institutions could discriminate against students, teachers and staff. The ALA notes that the current

exemption in section 38(3) is limited to discrimination on the ground of a person's sexual orientation, gender identity, marital or relationship status or pregnancy. The proposed amendments to section 7B(2) would permit religious considerations in respect of all attributes including gender, intersex status and potential pregnancy, as well as those currently identified in section 38(3).

12. The ALA considers that the effect of repealing section 38(3) and the recommended amendment in respect of section 37(1)(d), as indicated above, would be completely undermined and negated if the proposed amendment to section 7B were enacted.
13. The ALA submits that achieving the dual policy goals of preventing discrimination against LGBTI students, staff and teachers, while allowing faith-based educational institutions to maintain a religious ethos, can be achieved by repealing section 38(3) and amending section 37 as indicated above. The ALA submits that the proposed amendments to section 7B are not necessary and will only serve to allow faith-based educational institutions to continue to discriminate against LGBTI students, staff and teachers.

Conclusion

14. The Australian Lawyers Alliance (ALA) appreciates the opportunity to have input into the Senate Legal and Constitutional Affairs References Committee inquiry into the legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff. The ALA would welcome the opportunity to appear before the Committee to further explain its views.

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President

Australian Lawyers Alliance