



21 November 2018

Secretary
Senate Legal and Constitutional Affairs Committee
By email:

Dear Secretary

Re: Questions on notice arising from Senate Legal and Constitutional Affairs References Committee public hearing into religious freedom, Monday 19 November 2018

I refer to my appearance before the committee on Monday. I undertook to respond to the following questions on notice.

Senator Fierravanti-Wells asked the following question at the hearing on 19 November 2018:

Senator Fierravanti-Wells: Most particularly to you, Ms Mitchell, from the Human Rights Commission: I'd be interested to know whether you have or can assist the committee with the provision of actual formal complaints where the religious exemptions have been invoked. That's in relation to all three of those categories: the students, the staff and the contractors. I appreciate that you're here in your capacity as National Children's Commissioner, but I wonder whether you could assist us particularly from the perspective of the Australian Human Rights Commission?

The answer to the honourable senator's question is as follows:

The Australian Human Rights Commission (the Commission) does not have any record of the exemptions provided for by section 38 of the *Sex Discrimination Act 1984* (Cth) (SDA) being relied upon by an education provider in response to a complaint of discrimination under the SDA.

It is noted that from the time the SDA was amended to include sexual orientation, gender identity and intersex status as protected attributes (August 2013), until the end of the 2018 financial year, the Commission received three complaints by school students who alleged discrimination in the area of education on the basis of their sexual orientation or gender identity. The exemptions in section 38 were not relevant to any of these complaints.

In the same time period as above, the Commission received approximately five complaints from staff at schools and colleges alleging discrimination on the basis of

their gender identity, sexual orientation and marital status respectively. The exemptions in section 38 were not relevant to any of these complaints.

Senator Kitching asked the following question at the hearing on 19 November 2018:

Senator Kitching: Ms Mitchell, could you outline the process by which a complaint comes to your attention?

Ms Mitchell: Complaints can be made on the grounds of discrimination that are set out in the various national antidiscrimination laws. If it meets the threshold for that—

Senator KITCHING: What test do you use?

Ms Mitchell: I could provide that information to you. We do have information that sets that out. It's not in front of me at the moment, but I can easily provide that information to you.

Senator KITCHING: But, essentially there's a threshold if—

Ms Mitchell: We don't have anything to do with the handling of complaints. It's in a separate area. We don't directly get involved with that.

Senator KITCHING: Under the National Children's Commissioner's role, is there a regulatory part of it as well? Is that how it's set up?

Ms Mitchell: No, I have no role in dealing with individual matters. The role is set out in the Australian Human Rights Commission Act, and my role is to determine to what extent Australia is meeting its obligations under various international treaties, including the Convention on the Rights of the Child, which clearly states that all children have a right to education.

Senator KITCHING: Do you base the analysis of whether we are meeting those obligations on the cases that come to the Human Rights Commission? Is that the process?

Ms Mitchell: To some extent, the trend data from those complaints is helpful in determining whether there is a systemic issue or not, but I also base the analysis on research, expert opinion and what I find out from children and young people themselves.

Senator KITCHING: So you're able to go across the states and, for example, interview children who may have suffered discrimination?

Ms Mitchell: Absolutely. For instance, in the project on teen parents and their children, I was able to access a number of young parents through services and supports. I was able to survey 89 young parents or pregnant young people, and I talked directly in workshops to 77 young parents. So access was gained through various services that were helping those young people.

Senator KITCHING: In relation to the women who are pregnant, are you interviewing their partners as well?

Ms Mitchell: Yes, where their partners were around.

Senator KITCHING: If you're able to furnish the committee with that information, that would be very useful.

Ms Mitchell: You want information on the complaints process, and you also want information about how thresholds are determined?

Senator KITCHING: Yes, I do. I think that would be very interesting. Thank you.

The answer to the honourable senator's question is as follows:

Section 46P of the *Australian Human Rights Commission Act 1986* (Cth)(AHRC Act) sets out the requirements for lodging a complaint of unlawful discrimination.

The requirements include:

- The complaint must be in writing and allege that unlawful acts, omissions or practices have occurred.
- It must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination.
- The complaint must set out as fully as practicable the details of the alleged acts, omissions or practices.

Section 46PF of the AHRC Act requires the President (or her delegate), to consider whether to inquire into the complaint having regard to the matters referred to in section 46PH of the AHRC Act, (which sets out the grounds for termination of a complaint). If the President is of the opinion that a complaint should be terminated, the complaint is terminated without inquiry.

When considering whether a complaint should be terminated without inquiry (or at any stage in the process), a relevant consideration is whether an exemption may apply that would make the conduct complained of 'not unlawful'. It is noted that for the religious exemption in section 38 to be found to apply, the respondent educational institution would need to provide or point to information to support that the discrimination has taken place "...in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".¹

If a complaint is not terminated without inquiry, the Commission will inquire into and attempt to resolve the complaint through conciliation. In the 2017-18 reporting year, of the complaints the Commission received under the SDA where conciliation was attempted, 74% of the complaints were resolved.

Senator Pratt asked the following question at the hearing on 19 November 2018:

Commissioner Mitchell, could you take something on notice for me and you might need to direct this to other parts of the commission. Senator Fierravanti-Wells asked about the number of complaints received in this area. Can you also ask whether it would be usual to receive complaints in this area in relation to the Sex Discrimination

Act exemptions and their application to schools because of the exemptions. It would seem unusual that you would receive those complaints, because the exemptions exist, so it would be helpful if the commission could take on notice the kinds of complaints they can take and the kinds of complaints that either don't meet the threshold test or are unlikely to make it forward because people don't bring them forward, because they don't meet that threshold test.

The answer to the honourable senator's question is as follows:

Of the total number of complaints under the SDA that the Commission receives each year, the number relating to the area of education makes up a very small percentage. For example, in the 2017-18 reporting year of the 552 complaints the Commission received under the SDA, only 12 complaints were in the area of education. It is noted that all of these complaints were in relation to tertiary education and none involved students of educational institutions established for religious purposes.

A review of the complaints received under the SDA in the area of education over the past five years indicates that a majority involved allegations of sexual harassment (which is not covered by the section 38 exemptions) and sex discrimination and did not involve educational institutions established for a religious purpose.

If the Commission receives a complaint that meets the requirements of section 46P of the AHRC Act, the question of whether an exemption contained within section 38 of the SDA applies to the subject matter of the complaint would not arise until an inquiry had commenced and a response sought from the respondent educational institution.

Senator Kitching asked the following question at the hearing on 19 November 2018:

Senator Kitching: Ms Mitchell, the chair's question prompted me to think of this: given the rights of a child to have an education, do you ever receive complaints where, for example, a child in an Abrahamic faith school may say, 'I am not of such a strict religious belief, and I feel I am being discriminated against'? For example, a child may go to a school which may be much stricter than their home life. Do you ever receive complaints about that?

The answer to the honourable senator's question is as follows:

The example provided by Senator Kitching does not involve alleged discrimination on the basis of religious belief in circumstances where the Commission has jurisdiction to inquire, namely discrimination in the area of employment or an act or practice of

the Commonwealth. Therefore, the Commission would be unable to accept a complaint of the kind outlined by Senator Kitching.

At the federal level, a person who suffers discrimination in employment on the basis of religion can make a complaint to the Commission, pursuant to the *Australian Human Rights Commission Act 1986* (Cth). This implements Australia's human rights obligations under the *International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation*. The Commission has the function of inquiring into and attempting to reach a settlement of such complaints through conciliation.

The Commission also has the function of inquiring into complaints about acts or practices by or on behalf of the Commonwealth or under a Commonwealth enactment which may be inconsistent with articles 18 (freedom of religion) or 26 (right to non-discrimination, including on the basis of religion) of the ICCPR or the Religion Declaration.

Please do not hesitate to contact my office for any queries or further information. I hope that this information is of assistance to the committee.

Yours sincerely
Megan Mitchell
National Children's Commissioner

¹ Section 38(3) of the *Sex Discrimination Act 1984* (Cth).