Submission to the Legal and Constitutional Affairs References Committee

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

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The purpose of this brief submission is to draw to the Parliament's attention some important, but overlooked, legal issues concerning matters the Committee has been asked to address in this reference. These issues concern discrimination on the basis of gender identity.

In summary, there are grave doubts about the constitutionality of provisions concerning discrimination on the basis of gender identity in the provisions of the Sex Discrimination Act 1984 (hereafter, SDA) which are proposed to be amended by the Discrimination Free Schools Bill 2018. Even if the provisions are constitutional, the Committee needs to consider how the provisions making it unlawful for schools to discriminate on the basis of gender identity are to be reconciled with provisions in the SDA which make it lawful to discriminate on the basis of sex.

Given that this reference is being rushed, and that the Committee is now to report by November 26 h 2018, I can only set out the issues briefly for the Committee to consider.

My recommendation is that the Senate take further time to seek advice on the constitutional and interpretative issues raised by this submission and that consideration of legislation to amend the SDA so far as it concerns schools should proceed no further until the necessary constitutional advice is received and the complex relationship between any proposed changes and other provisions in the SDA are fully considered.

Background

The issues with which the Legal and Constitutional Affairs References Committee is concerned in this inquiry arise from amendments made to the SDA by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 towards the end of the life of the last Labor government. As has become apparent in recent weeks, these amendments have caused a great deal of difficulty. They created a legal right for faith-based schools to discriminate against students on the basis of sexual orientation that, to the best of my

knowledge, no faith-based school organisation had sought. They have had other unintended consequences.

The Discrimination Free Schools Bill, which is one proposal before the Parliament to address these issues, seeks to deal with some of these problems while creating others. For example, if s.38(3) of the SDA is removed, thereby prohibiting any discrimination against students based upon a person's sexual orientation, gender identity or marital or relationship status, then currently unclear provisions concerning discrimination on the basis of gender identity will be applicable not only to secular schools but also to faith-based schools raising the possibility of new conflicts between religious belief and the requirements of anti-discrimination laws.

The constitutional basis for anti-discrimination laws

The federal Parliament has very limited constitutional powers to enact laws concerning discrimination. The constitutional basis rests mainly upon the external affairs power. Certain provisions may also have an alternative basis. This was recognised in the Labor Government's Human Rights and Anti-Discrimination Bill 2012. The Government of the time identified the external affairs power as the only one that could support all aspects of that Bill. It identified a small number of other placita of s.51 of the Constitution that could support specific provisions.

High Court decisions over a number of years have made clear that the Parliament cannot pass any laws it may choose, based merely upon the fact that the proposed law could be said to deal with a subject that has been considered in an international convention. To be constitutionally valid, the proposed legislation must implement an international obligation or secure a benefit under a treaty. In *Victoria v Commonwealth* (1996) 187 CLR 416 at [34], Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ explained the general principles:

> To be a law with respect to "external affairs", the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. Thus, it is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end… Where a treaty relating to a domestic subject-matter is relied on to enliven the legislative power conferred by s.51(xxix) the validity of the law depends on whether its purpose or object is to implement the treaty.

The legislation may implement part of a treaty or Convention, and it does not have to be entirely consistent with a Convention, provided that the deficiencies are not so substantial as to be inconsistent with the Convention.[2] It is not sufficient that an issue is a matter of international

[1] Consolidation of Commonwealth Anti–Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012 Exposure Draft, Explanatory Notes, November 2012, p. 15.

[2] In *Victoria v Commonwealth* (1996) 187 CLR 416 at 459, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said: "Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a

concern without there being a treaty or Convention which is being implemented in some way or other.[3]

It is very doubtful indeed that a law could be validly enacted pursuant to the external affairs power by reference to just one Article of the International Covenant on Civil and Political Rights, (the ICCPR), taken in isolation. International law recognises that human rights are not only universal and indivisible, but also interdependent and interrelated, and that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.[4] As is well understood, different human rights are not infrequently in conflict with one another and balances must be found between them. So legislation that cherry picks Article 26 concerning non-discrimination, ignoring other rights guaranteed by the ICCPR, cannot be a proper implementation of that Convention. Article 26 must be read in the light of other Articles in the Convention, including Article 18 (freedom of religion), Article 22 (freedom of association) and Article 27 (rights of ethnic minorities).

Until 2013, there were no difficulties with the constitutional basis for federal anti-discrimination laws. They rested on specific Conventions concerned with discrimination, such as race and sex, not on the general provisions of the ICCPR. So, for example, the Sex Discrimination Act 1984, as enacted originally, rested upon the Convention on the Elimination of Discrimination Against Women (CEDAW).

In relation to discrimination in employment, an additional basis could be the International Labour Organisation's Discrimination (Employment and Occupation) Convention no 111, 1958, although, relevantly to the provisions on employment of staff in schools, this must be read in the light of other international human rights conventions and jurisprudence. The UN Human Rights Committee in its General Comment on discrimination[5] has said that international law does not require 'identical treatment in every instance'[6] and 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'.[7] General Comment 22, on Article 18 (Freedom of Thought, Conscience or Religion) is also relevant.[8]

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measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Conventions."

[3] *Alqudsi v Commonwealth* [2015] NSWCA 351 at [147], per Leeming JA.

[4] Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, ¶ 5, U.N. Doc. A/CONF.157/24 (1993).

[5] Human Rights Committee, General Comment 18 (Non-Discrimination) (Thirty-seventh session, 1989).

[6] Ibid, para 8.

[7] Ibid, para 13.

[8] *General Comment 22*, [8] says: 'States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2,

The proposals in the Discrimination Free Schools Bill, insofar as they concern employment of staff, need to be considered in the light of reports of the UN's Special Rapporteur on Freedom of Religion or Belief, which deal in detail with the issue of employment in faith-based organisations. Because the proposed amendments to the Fair Work Act in the Discrimination Free Schools Bill do not include a provision affirming the positive right of faith-based schools and other faith-based organisations to employ staff, taking into account the school's religiously defined raison d'être and corporate identity,[9] those provisions cannot be reconciled with Australia's international human rights obligations concerning freedom of religion. However, that is a submission for another day, without the time pressures created by the short reporting period for this reference.

The constitutional problems with the 2013 amendments

The Discrimination Free Schools Bill seeks, inter alia, to further amend amendments made by the Parliament in 2013 following their introduction by the Labor Government of the day. Those amendments to the SDA made it unlawful (subject to the various exceptions) to discriminate on the basis of sexual orientation, gender identity and intersex status.

These amendments were not supported by any specific international convention to which Australia is a signatory. The amendments could not be supported on the basis of CEDAW, as the SDA had been when originally enacted. However, there seems to be a growing acceptance that the general anti-discrimination provisions in international human rights law include discrimination on the grounds of sexual orientation, even if recognition of this is far from universal in the international community. [0] This may be sufficient to justify the provisions of the 2013 legislation as constitutionally valid, so far as they concern sexual orientation and rely upon the external affairs power.

It is possible also that there is a constitutional basis for prohibiting discrimination against people who have an intersex condition. The Act defines *intersex status* as having physical, hormonal or genetic features that are:
(a) neither wholly female nor wholly male; or
(b) a combination of female and male; or
(c) neither female nor male.

3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there.'

[9] See Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

[10] See e.g. Françoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN* (2007).

Discrimination against someone with a combination of male and female genitalia arguably comes within the definition of discrimination on the grounds of sex. That is not a matter dealt with by CEDAW, or as far as I am aware, other international human rights conventions to which Australia is a signatory, but might be constitutional at the margins as dealing with sex discrimination in a wider context.

However, it seems very difficult to find a constitutional basis for the 2013 amendments concerned with gender identity. Discrimination on the basis of gender identity is not the subject of a specific treaty like CEDAW and nor could it plausibly be said that by enacting anti-discrimination provisions concerning gender identity, the Parliament is in some way giving effect to a Convention or treaty.

A particular problem is that the definition in the SDA is very broad, and does not apply only to post-operative transsexuals or those who have clinically diagnosed gender dysphoria. The SDA definition would also seem to include those who identify as 'non-binary' or who in an earlier generation would have been described as 'transvestites' or 'cross-dressers'. The definition specifically includes people who have not gone through any form of hormonal or surgical treatment. Not all people who identify as 'transgender' choose to accept medical treatments.

What then is gender identity? The Australian Government Guidelines on the Recognition of Sex and Gender (revised 2015) (at [13]) says: "Gender is part of a person's personal and social identity. It refers to the way a person feels, presents and is recognised within the community. A person's gender may be reflected in outward social markers, including their name, outward appearance, mannerisms and dress." It is very hard to argue that discrimination against a person on the basis of how a person feels and presents is a matter covered by international conventions prohibiting discrimination.

It is only very recently that courts in certain western countries have begun to grapple with what may constitute unlawful discrimination in this context, particularly in relation to people who have not completed a transition to live as the opposite gender through hormonal treatment and surgery. The first cases on this issue have yet to be considered by the US Supreme Court. The answers to problems that are emerging from concerns about discrimination based on gender identity are also far from obvious. Should a person born male, and who has reached adulthood with no hormonal or surgical treatment that alters physical characteristics associated with being male (including genitalia, body mass and physical strength), be regarded, for the purposes of sex-segregated sporting competitions as female, because the person feels and presents as female?

[11] The definition is "the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth".

If there is any constitutional basis in external affairs, it would need to be limited to employment and founded upon the 1958 ILO Convention. However, even this would require a very broad reading of that Convention, which primarily concerns discrimination on the basis of "race, colour, sex, religion, political opinion, national extraction or social origin".

For these reasons, I consider that there are the most serious doubts about whether the 2013 amendments, so far as they concern gender identity, can find constitutional justification in the external affairs power. It is possible that a constitutional basis could be identified in some other placitum of s.51 of the Constitution, such as the corporations power. However, the use of the corporations power for a purpose such as how schools deal with students would be unprecedented, with major implications for the future of federalism. The Parliament would need to be satisfied that the interpretation of the Constitution on which reliance was placed is not far-fetched or fanciful.

It follows from this that unless the Parliament, properly advised on the constitutional position, is satisfied on the balance of probabilities that its proposed legislation is constitutional, it should not make any laws which further extend the prohibition on discrimination on the basis of gender identity to organisations which are not currently subject to those laws. In short, the Parliament should not now apply the prohibition to faith-based schools which are currently exempted by operation of s.38 of the SDA. Furthermore, if it is satisfied that the amendments passed in 2013 concerning gender identity were made without constitutional power, the proper course, and indeed the only responsible course, would be for the Parliament to repeal them altogether.

The interpretative problem in the context of school education

In the context of schools, what does the prohibition on discrimination because of gender identity actually mean? Assuredly, it means that no school would be justified in expelling a student who identifies with the opposite gender. If a child who is enrolled in a boys' school wishes to identify as female, then it would be unlawful to expel that student on the basis of the child's preferred gender identity. It would also be unlawful to punish the student in some other way. I know of no school, faith-based or otherwise, that would wish to do so. Such cases give rise to difficult pastoral and medical issues, but are not matters of school discipline.

Beyond this, what if anything, is the boys' school required to do? Is it unlawful to continue referring to the boy by the first name under which he was enrolled or which is recorded on his birth certificate? If the child is in a mixed gender school, must it, as a matter of law, allow the child to wear the girls' uniform to the extent that it is different from the boys' uniform? In high school, does non-discrimination require allowing a child who feels and identifies as being of the opposite sex, to participate in sex-segregated sports competitions organised for that opposite sex?

Does the law require a natal female who now wishes to transition to identify as male, to be accepted by a boys' school? Conversely, does it require that a natal male who now wishes to

transition to identify as female be allowed to enrol in a girls' school? What is in the best interests of both the student experiencing gender dysphoria and the other students at the school, especially considering that single-sex schools are established for a host of well-considered reasons? These are complex and difficult questions.

These issues of what discrimination on the basis of gender identity actually means, are complicated generally; but especially in relation to a child who may not yet have received any medical treatment to alter his or her physical characteristics and bodily appearance. Such a child may only be at the stage of expressing a desire to 'transition' to a preferred gender identity (a wish that may well prove to be transient). [2] Medical intervention may involve puberty blockers for prepubertal children, hormone treatment, and then surgical intervention (normally as an adult, if the surgery would lead to infertility). The legislation needs to be interpreted in its application to children and young people who may be at quite different stages of the process of 'transitioning'.

The SDA clearly distinguishes between sex and gender identity. Certain provisions are based upon biological sex (see e.g. s.30). It is lawful for single sex schools to exist. So as part of this reference concerned with discrimination in schools, it would be helpful for the Committee to consider the extent to which it is lawful for schools to organise themselves, their facilities or their activities (such as sports) on the basis of sex without falling foul of the prohibition on discrimination on the basis of gender identity. If the prohibition is to be extended to faith-based schools, they are entitled to have legislation that makes it clear what is, and is not, unlawful.

In my view, these matters are best left to schools to deal with on a case by case basis in consultation with the young person and his or her parents and doctors, without having to be concerned with the possible application of anti-discrimination laws.

The 2013 amendments were flawed inasmuch as they did not deal with these complex issues in relation to schools, and the proposed amendments in the Discrimination Free Schools Bill 2018 exacerbate the problems.

Legislation that deals with such difficult and sensitive issues should not be passed in a rush.

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[12] Most prepubertal children seen at clinics specialising in gender identity issues resolve those issues by the time of puberty if a watching and waiting approach is adopted. See J Ristori & T Steensma, 'Gender dysphoria in childhood' (2016) 28 *International Review of Psychiatry* 13 for a review of the research. On the debates concerning diagnosis and clinical interventions see J Temple Newhook et al, 'A critical commentary on follow-up studies and "desistance" theories about transgender and gender non-conforming children' (2018) 19 *International Journal of Transgenderism* 212, and the reply by a leading Canadian expert: K Zucker, 'The myth of persistence: Response to "A critical commentary on follow-up studies and 'desistance' theories about transgender and gender non-conforming children" by Temple Newhook et al. (2018)' at p.231 of the same volume.