

8 December 2018

To: Committee Secretary
Senate Legal & Constitutional Affairs Committee
Parliament House
Canberra (by email)

Dear Secretary

Please accept this submission on the proposed SDA amendment Bill. I am a retired marine damage assessor with an interest in Commonwealth law and Australia's Constitution.

I urge the major parties, indeed Parliament, to avoid making similar mistakes in amending the SDA as were made a year ago with the Marriage Act. The MA amendments have two shortcomings :

1. They fail to separate the functions of Church & State by not reserving civil solemnisations for civil servants or professional marriage celebrants only. Whilst the MA prior to December 2017 did not separate C&S either, the December amendment changing the legal definition of marriage to the union of 2 people marked a natural delineator at which civil & religious solemnisations should have been separated.
2. They fail to recognise that churches are private organisations & clergy (plus the new celebrant class of religious marriage celebrant) are private individuals. On the contrary, the amended Act retains clergy and (now) religious marriage celebrants as authorised marriage celebrants, agents of the state, licensed to solemnise civil marriages.

Prior to December 2017, when there was no dispute that legal marriage was the union of a man & a woman, the Act authorised clergy to refuse civil solemnisations to any couple on a broad-based, non-specific basis - S.47 ((now S.47(1) & (2)) refers. The Attorney-General of the time is on public record as urging a "strengthening" of S.47 & a "belt & braces" addition to the Section to achieve that aim.

As a result the December 2017 amendments include a new S.47(3) taken, ironically, from SDA wording which give more specific grounds than the old S.47 for clergy to refuse to solemnise civil marriages - namely - "if any of the following applies (a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation (b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion (c) the minister's religious beliefs do not allow the minister to solemnise the marriage."

(Time will tell if S.47(3) breaches the Constitution. Using the doctrines, tenets or beliefs of a minister's religion to allow him/her to refuse to solemnise a civil marriage seems very much like imposing a religious observance upon couples so refused).

When the SDA was amended in 2013 to add discrimination because of one's sexual orientation, gender identification or intersex status, S.37(1)(d) was added as an exemption - "Nothing in Divisions 1 or 2 (discrimination in work/in other areas) affects 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 injuries to the religious susceptibilities of adherents of that religion." Similarly, under S.38 - Educational Institutions

established for Religious Purposes - "that are conducted in accordance with religious doctrines, tenets, beliefs or teachings" are exempted from discrimination allegations made in respect of staff/contractor employment or student interface provided the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

As with the amended MA in respect of churches, no recognition is given in the SDA that religious educational institutions are private organisations.

To protect them from allegations of discrimination the sensible thing to do would be to exempt them **on that ground**. Something like - "The prohibitions in this Act from discriminating on the grounds of sex, sexual orientation, gender identification, intersex status, marital or relationship status, do not apply to the teaching policies or rules of private faith-based educational institutions provided that the written policies or rules are publically available & fully discussed with prospective adult students & with prospective school age children & their parents/guardians."

(With agreement, the above exemption should be expanded to encompass teacher/school contractor employment and, more broadly, to the teachings of religious bodies or religious organisations).

Yours faithfully

Paul Nolan