



Anglican Church of Australia

Public Affairs Commission

11 January 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Re: Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018

I refer to the inquiry into the above Bill and circulated amendments.

Thank you for the invitation to the Anglican Church of Australia to make submissions to the inquiry. This has been referred to the Public Affairs Commission (PAC) of the Anglican Church of Australia (ACA). The PAC is a body set up, amongst other matters, to respond to aspects of public affairs as referred by the Primate, Standing Committee or General Synod or initiated by the PAC. The views outlined in this submission are only the views of the PAC and should not be taken to reflect the opinion of the ACA, the Primate, the Standing Committee or any of the Dioceses. You are likely to receive a variety of different submissions from Anglican bodies across the country.

Principles

1. Religious freedom is an internationally recognised and vital human right (Article 18 of the UN Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights "ICCPR"). However, within Australia, religious freedom only has limited legal protection. The ACA has often affirmed the importance of freedom of religion and its manifestation in the related freedoms of speech, association and conscience for a healthy and mature society. It has called for legislative protections for religious freedom in Australia.
2. Religious vocation and practice is a way of life and thus extends to all aspects of life, including the political, social and the economic aspects. It includes the rights to set up religious schools, rights for parents to ensure children have an education in accordance with their parents' convictions and to prepare and distribute religious publications. (See Article 18 ICCPR and UN Human Rights Committee General Comment 22.) For some, especially Indigenous religions, it includes the need to

protect and maintain sacred areas. In the case of an organisation set up by a religious body for religious purposes, where the whole enterprise may be designed to advance the religious mission, issues of religious practice and vocation apply not only to the work of ministers of religion but also to lay members of staff who are all engaged to participate in that same mission. Religious freedom should not be artificially confined to a narrow concept.

3. At the same time, freedom from discrimination (such as on the grounds of gender, sexuality, religion and the like) is also a fundamental human right. These human rights and freedoms from discrimination should not be characterised as “competing rights” to religious freedom but as similar types of basic rights, all of which need to be protected as much as possible, especially for minority groups and those who are vulnerable.
4. Religious freedom therefore does not stand on its own as an absolute right. Article 18(3) of the ICCPR allows for “such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Both religious freedom and freedom from discrimination should be protected to the fullest extent practicable and if they conflict, it will be necessary to find solutions and accommodations that minimise interference with human rights as far as possible. Distinctions may need to be drawn between an actual infringement of fundamental rights on the one hand and matters which may just cause some offence or upset on the other.
5. As religious freedom and freedom from discrimination are both fundamental human rights, it makes more logical sense for these to be protected together in a comprehensive piece of human rights legislation in which such rights can be protected and assessed together in a similar context.
6. For a similar reason, the PAC has also supported a consolidation of anti-discrimination legislation so that freedoms from discrimination on various grounds, such as gender, sexuality, relationships, age, ability, religion, race and the like should be protected together in a similar way.
7. It is unfortunate that protection of religious freedom has in recent times been linked with discrimination on the grounds of sexuality and marriage equality when the real needs for religious freedom are likely to be more significant in relation to such matters as the freedom to worship and refrain from work on certain days, the freedom to dress in ways consistent with religious beliefs and the ability to prevent the destruction of sacred sites and the like. As always, legislative protection tends to be needed more for vulnerable and minority groups, especially groups whose views may be considered strange or unreasonable by the majority of the population.
8. However, given the piecemeal nature of the current human rights protections whereby religious freedom finds only limited protection by way of exemptions to particular anti-discrimination laws, we set out below our submissions on how freedom from discrimination on the grounds set out in the *Sex Discrimination Act 1984* and freedom of religion may both be protected in proposed amendments related especially to schools.

Submissions on amendments to the *Sex Discrimination Act 1984* (Cth) (“SDA”)

9. Many Anglican schools and school organisations have indicated that they seek to cultivate values of care, compassion and inclusivity and thus have no intention of discriminating against students or teachers on the grounds sexuality or gender identity.
10. Since sexual orientation and gender identity are widely regarded as inherent matters, like race, age or disability, that people are in most cases born with or unable to choose otherwise, the community would generally see it as unfair and a denial of human rights to discriminate against people on the grounds of possessing such attributes. There is also much evidence of the adverse (including suicidal) impacts on young people resulting from such discrimination. It would be inappropriate to allow schools to expel, exclude or penalise people on the grounds of their sexual or gender identity or that of their parents.
11. As a result, subject to the matters set out below, the PAC supports the removal of the exemptions in s37(1)(d) and s38 of the SDA in relation to discrimination against students and staff of schools or tertiary educational institutions run by faith-based institutions on the grounds of the protected SDA attributes, especially any discrimination that may result in exclusion, expulsion, dismissal, bullying or other penalties against students or general staff.

The above comments are made in relation to registered or accredited schools and tertiary institutions, not to education or teaching in other settings like religious instruction or worship in churches, temples, mosques, Aboriginal or Torres Strait Islander rituals and ceremonies, or private homes etc. which need to remain exempt under s37(1)(d).

The removal of these particular aspects of the exemptions could occur by way of a “carve out” of the exemption provisions of s37(1)(d) in a similar manner to that for Commonwealth-funded age care services.

12. However, in order to protect the freedom of religious bodies to manifest, proclaim, teach and act in accordance with their beliefs, it is essential that:
 - (1) exemptions remain in s37(1)(a) to (c) in relation to the ordination and appointment and training of ministers and appointing people for religious observances or practices eg chaplains and any others engaged in ministry, religious practices or teaching in these schools and tertiary institutions; and
 - (2) more limited exemptions are set out to provide that nothing in the SDA prevents faith-based institutions conducted in accordance with the doctrines, tenets or beliefs of their particular religion or creed from proclaiming or teaching such doctrines. This exemption should, reflecting parts of Recommendations 5 and 7 of the May 2018 report of the Expert Panel on Religious Freedom, be able to be relied on only if:
 - (a) the act of teaching or espousing the doctrine to be exempted is carried out in good faith in accordance with the doctrines, tenets or beliefs of the particular religion of the institution;
 - (b) it is expressly set out in a policy that is publicly available;

- (c) prospective staff and prospective students and their parents were informed of the said policy.

We note that the government's proposed SDA amendments to the indirect discrimination provisions, especially in proposed s7F, have also sought to articulate such an exemption and the proposed s7E(2) sets out a similar transparency of policy requirement.

13. The result of paragraph 12 above is that religious freedom to teach and act in accordance with the doctrines of the religion under which the institution is conducted is retained and that engaging in such teaching or acting on the said doctrines is not to be regarded as discriminatory or in breach of the SDA as long as:
- (a) such teaching activity is conducted in a manner that does not impose any other detriments or penalties on people on the grounds of their sexuality, gender or other attributes protected under the SDA, and
 - (b) the institutions have given explicit prior warning of their doctrines to prospective staff and students as outlined in paragraph 12(2) above.

The requirements for policies and transparency about doctrines of the religion under which the institution is conducted will help parents, students and staff to make an informed choice about their association with the school. It may also assist in relation to difficult questions of fact and evidence as to what those doctrines are, especially where there may be many different interpretations within a religion or even within the same religious denomination. It is important to retain the reference to the doctrines of *the religion or creed* to avoid staff members, including the school leadership, imposing their own arbitrary subjective religious views.

14. The exemption in paragraph 12 above should be worded in such a way so that students cannot be penalised for debating or disagreeing with the doctrines taught and cannot be pressured into hiding or changing their sexual orientation, or, subject to paragraph 16 below, their gender identity or inter-sex status. There will no doubt be many differing opinions on a range of school policies and religious beliefs from time to time that can be discussed and debated in an appropriate manner. The key issue is to ensure that these are all treated in a consistent way which does not single out students on the basis of the protected attributes in the SDA.
15. The comments in paragraphs 14 above have been made in relation to students. We support the extension of the provisions or enactment of similar provisions referred to in paragraphs 12 to 14 to general school staff not covered by s37(1)(a) to (c) of the SDA (see paragraph 12(1) above). However, it should also be permissible and reasonable for faith-based educational institutions, like other organisations, to require staff to uphold the ethos and mission of the organisation. This might make it harder for staff to openly disagree with the doctrines under which the educational institution is conducted if bound by neutral and generally applicable employment contracts not to undermine the ethos and mission of the institution, the contents of which will be made clearer by the requirement for transparency and prior disclosure of any religious doctrines the teaching of which is to be exempted from the SDA. Such employment conditions should not single out people on the basis of their sexuality or gender identity. For example, such neutral conditions may be equally aimed at

preventing staff, in the course of their duties at a religious school, from advocating that students should become atheists.

Nothing in the SDA or proposed amendments will prevent faith-based educational institutions from giving preferences to engaging staff who may share the religious beliefs of the institution, including beliefs on issues of sexuality. Freedom of religion should include the freedom to establish schools for their religious mission and to give preferences to staff who will actively embrace and participate in that. This should also be made transparent.

16. We note that none of the proposed amendments seek to affect the provisions of s21(3) of the SDA which allow for single-gender schools, faith-based or otherwise, and are not calling for any change to this.

17. We understand that the Expert Panel Review has been referred to the Australian Law Reform Commission for further analysis. We look forward to a more comprehensive review and to making further submissions in relation to that inquiry.

Yours faithfully,

Dr Carolyn Tan,
Chair of the Public Affairs Commission,