



Australian
Human Rights
Commission

President and Commissioners

16 November 2018

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

Dear Committee Secretary,

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

The Australian Human Rights Commission is Australia's national human rights institution. We thank the committee for the opportunity to make this submission.

The Australian Human Rights Commission has long advocated for comprehensive protection for all human rights set out in international law. This includes effective legal protection for the human rights that are most directly relevant to the Committee's current inquiry—freedom of religion and belief, and protection against discrimination on the grounds of: sex, relationship or marital status; pregnancy; sexual orientation and gender identity.

Most recently, the Commission made an extensive submission to the Religious Freedom Review in February 2018. A copy of this submission is attached for the Committee's information.

That submission urges the Australian Government to consider expanding the circumstances in which federal anti-discrimination law protects against discrimination on the basis of religion or other belief (recommendation 4). In relation to the existing regime of exemptions in the *Sex Discrimination Act 1984* (Cth) (SDA), the Commission recommended:

... that the Government examine alternatives to the current system of religious exemptions to anti-discrimination laws, including a general

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limitations clause, and that proposed changes should adhere to Australia's obligations under international law. (Recommendation 6)

On a number of other occasions dating back to 1992 the Commission has recommended that current exemptions to the SDA be reviewed, including most recently in our submission to the Joint Standing Committee on Foreign Affairs and Trade Inquiry Into the Status of the Human Right to Freedom of Religion and Belief (ongoing) and our submissions to the Attorney-General's Department Inquiry into the Consolidation of Commonwealth Discrimination Law in 2011 and to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012.

The National Children's Report 2017 also considered the application of the SDA exemptions to the situation of young parents. Recommendation 13 states:

The Australian Government, through the Council of Australian Governments' Attorneys-General Council, should work with states and territories to review their laws, policies and practices to ensure that discrimination against a child or young person on the ground of their pregnancy, breastfeeding or parental status/responsibilities is prohibited without exceptions.

The report is available online at <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2017>.

As a matter of general principle, the Commission makes the following points in relation to the protection of religious freedom and the current exemptions in the SDA.

First, human rights are universal, inalienable, indivisible, interdependent and interrelated. Care must be taken to accommodate human rights wherever they come into tension. This includes the right to freedom of religion and the right to be free from discrimination on the basis of sex, sexual orientation and gender identity.

Secondly, federal law should be amended to include a general prohibition against discrimination on the basis of religion or other belief. This would help to incorporate important elements of Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR) into Australia's domestic law.

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Thirdly, consideration should be given to replacing the current exemptions to the SDA with a general limitations clause.

A general limitations clause would clarify that conduct which is necessary to achieve a legitimate objective, including freedom of religion, and is a proportionate means of achieving that objective, is not discrimination.

Notably, this committee recommended in 2008 that the exemptions in s 30 and ss 34–43 of the SDA—including those for religious organisations—be replaced by a general limitations clause. (See further: Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36.)

Any general limitations clause would need to be carefully worded in order to avoid allowing discriminatory acts that are currently unlawful.

The combination of a new protected attribute and a general limitations clause would remove the need for many, and possibly all, of the current religious exemptions to the SDA.

Fourthly, the Commission notes that the existing exemptions to the SDA have been in place for a lengthy period without review. They should be reviewed with regard to Australia's international human rights obligations to ensure that any restriction on the exercise of other human rights is strictly necessary and results in the minimal interference possible.

Accommodating the relevant human rights in legislation such as the SDA can be challenging, and requires careful legislative drafting. The Commission looks forward to providing comment on any specific Government law reform proposal in due course.

Yours sincerely,

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