

Chapter 2

Overview of the bill and circulated amendments

Current legal framework

2.1 Commonwealth anti-discrimination law, including the *Sex Discrimination Act 1984* (SDA), provide protection against discrimination. The SDA gives effect to Australia's international human rights obligations and protects individuals from discrimination and unfair treatment on the basis of one of the protected attributes.¹

2.2 The SDA makes it unlawful to discriminate against a person on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities in certain areas of public life, including education.²

2.3 The SDA currently contains a number of exemptions that provide that in certain circumstances some forms of discrimination are not unlawful. For example, sections 37 and 38 of the SDA set out the circumstances in which it is not unlawful for 'religious bodies' and 'educational institutions established for religious purposes' to discriminate against a person on the basis of an attribute protected by the SDA.³

2.4 Section 37 contains general exemptions regarding the activities of religious bodies. Specifically, subsection 37(1)(d) provides that nothing in Division 1 or 2 of the SDA 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 injury to the religious susceptibilities of adherents of that religion'.⁴

2.5 The concept of 'a body established for religious purposes' is not defined in the SDA, an approach consistent with other terms relating to religion (such as 'religious order') which are similarly not defined.⁵

2.6 Through an exemption from section 21 of the SDA, subsection 38(3) of the SDA permits educational institutions established for religious purposes to discriminate against students in connection with the provision of education or training on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy. This exemption does not apply to discrimination on the basis of sex, intersex status, potential pregnancy or breastfeeding.⁶

1 Attorney-General's Department, *Submission 228*, p. 2.

2 Attorney-General's Department, *Submission 228*, p. 2.

3 Attorney-General's Department, *Submission 228*, p. 4.

4 Attorney-General's Department, *Submission 228*, p. 4.

5 Attorney-General's Department, *Submission 228*, p. 4.

6 Attorney-General's Department, *Submission 228*, p. 4.

2.7 Specifically, subsection 38(3) permits conduct by religious educational institutions that would otherwise constitute unlawful discrimination under section 21 of the SDA in relation to:

- the admission of new students;
- denying or limiting a student's access to benefits;
- the expulsion of a current student; and
- subjecting a student to any other detriment.⁷

2.8 In order for the discrimination to be permitted under subsection 38(3), the educational institution must be conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the conduct must be in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.⁸

2.9 An 'educational institution' is defined in section 4 of the SDA to include a school, college, university or other institution at which education or training is provided.⁹

2.10 States and territories also have anti-discrimination laws in place. The grounds for and degrees of protection offered to individuals vary across each jurisdiction.¹⁰

The bill

2.11 The Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (the bill) was introduced into the Senate on 29 November 2018 by Senator the Hon. Penny Wong.¹¹

2.12 The bill seeks to amend the SDA to prevent schools from discriminating against students on the basis of sexual orientation, gender identity or intersex status.¹²

2.13 Senator Wong noted when speaking on the bill:

The bill does one thing, and one thing only; that is, to ensure that every Australian child, no matter their gender or sexual orientation, is treated equally. It will make this country a more equal place, nothing more.¹³

7 Attorney-General's Department, *Submission 228*, p. 5.

8 Attorney-General's Department, *Submission 228*, p. 5.

9 Attorney-General's Department, *Submission 228*, p. 4.

10 For a more detailed explanation of the legal frameworks in place in each state and territory, see: Senate Legal and Constitutional Affairs References Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination, November 2018, pp. 13–20.

11 *Journals of the Senate*, No. 133, 29 November 2018, p. 4331.

12 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Explanatory Memorandum*, p. 2.

13 Senator the Hon. Penny Wong, *Senate Hansard*, 3 December 2018, p. 9127.

2.14 The explanatory memorandum for the bill outlined the parameters of the proposed changes to the SDA:

This bill would not affect the operation of the indirect discrimination provisions in the SDA, which will continue to operate in a manner that allows faith-based institutions to impose reasonable conditions, requirements or practices on students in accordance with the doctrines, tenets, beliefs or teachings of their particular religion or creed.¹⁴

2.15 Item 1 of the bill is an amendment to section 37 of the SDA. Through introducing a new subsection 37(3), it will limit the effect of the exemption contained in paragraph 37(1)(d) by providing that the exemption does not apply to an act or practice of a body established for religious purposes if:

(a) the act or practice is connected with the provision, by the body, of education; and

(b) the act or practice is not connected with the employment of persons to provide that education.¹⁵

2.16 It will remove the capacity of bodies established for religious purposes that provide education to directly discriminate against students on the basis of their sexual orientation, gender identity or intersex status.¹⁶

2.17 Item 2 of the bill repeals subsection 38(3) of the SDA. It removes the exemption from the protections against discrimination in section 21 of the SDA. As the explanatory memorandum noted:

Item 2 is required to give effect to this bill's intention because subsection 38(3) would otherwise permit direct discrimination on the grounds of sexual orientation or gender identity in connection with the provision of education or training by an educational institution (where that education or training is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if that discrimination is carried out in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed).¹⁷

2.18 The bill does not seek to amend the SDA to address the issue of discrimination against staff employed by religious schools.¹⁸

14 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Explanatory Memorandum*, p. 1.

15 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Explanatory Memorandum*, p. 2.

16 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Explanatory Memorandum*, p. 2.

17 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Explanatory Memorandum*, p. 3.

18 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Explanatory Memorandum*, p. 3.

Circulated amendments to the bill

Government amendments

2.19 The Government circulated five proposed amendments to the bill: KQ147, KQ148, KQ149, KQ150, and KQ151.

2.20 Some of the amendments are mutually exclusive and cannot be adopted concurrently.¹⁹

2.21 In introducing the amendments, Senator the Hon. Michaelia Cash, Minister for Small and Family Business, Skills and Vocational Education stated:

These are modest and sensible amendments, and they protect the ability of religious schools to impose reasonable rules in relation to the behaviour and conduct of the entire school. These amendments would give certainty to Australian students and families by ensuring that they are protected from discrimination on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy, whilst at the same time preserving the ability of religious educational institutions – and, again, we're talking about religious educational institutions–, to impose nothing more and nothing less than reasonable rules, and these rules must be imposed in good faith and also have regard to the best interests of the student.²⁰

2.22 Amendment KQ147 removes Item 1 of the bill on the grounds that the item is not required to meet the stated intention of the bill and adds unnecessary complexity into the SDA.²¹

2.23 Amendment KQ148 introduces a new section 7E into the SDA. It ensures that the repeal of the exemption for religious educational institutions to discriminate against students under subsection 38(3) does not undermine the ability of religious educational institutions to make reasonable rules in relation to student conduct, if done in accordance with a publicly available policy.²²

2.24 Amendment KQ149 introduces a new section 7F into the SDA. It ensures that the repeal of the exemption for religious educational institutions to discriminate against students under subsection 38(3) does not undermine the ability of religious educational institutions to teach in accordance with the doctrines, tenets, beliefs or teachings of their faith.²³

19 Attorney-General's Department, *Submission 228*, pp. 7 and 9.

20 Senator the Hon. Michaelia Cash, Minister for Small and Family Business, Skills and Vocational Education, *Senate Hansard*, 3 December 2018, p. 9121.

21 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ147*, pp. 2– 3.

22 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ148*, p. 2.

23 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ149*, p. 2.

2.25 Amendment KQ150 introduces an amendment to subsection 7B(2) of the SDA. It provides that additional factors must be taken into account when determining whether a condition, requirement or practice is reasonable, where the condition, requirement or practice is imposed by a religious educational institution in relation to a student.²⁴

2.26 Amendment KQ151 also introduces an amendment to subsection 7B(2) of the SDA. It provides that additional factors must be taken into account when determining whether a condition, requirement or practice is reasonable where the condition, requirement or practice is imposed in relation to a student by an educational institution that is a primary school or secondary school, and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.²⁵

2.27 Amendments KQ150 and KQ151 provide alternative amendments to each other, as well as to KQ148.²⁶ Senator Cash outlined the Government's intentions for these amendments:

In the event that particular amendment, on sheet KQ149 – the amendment to clarify that religious educational institutions may engage in teaching activities – does not get up, the coalition then proposes to move an additional amendment [KQ150], and that amendment will seek to clarify the reasonableness test for religious educational institutions. In the event that amendment [KQ150] does not get up, then we will seek to move a further amendment [KQ151] to clarify the reasonable test for primary and secondary religious schools.²⁷

Australian Greens amendment

2.28 The Australian Greens circulated an amendment to the bill, contained in Sheet 8601. It seeks to reword new subsection 37(3) and repeal section 38 in its entirety, and would remove the existing exemptions in the SDA relating to discrimination by faith-based educational institutions in respect of staff or contractors.²⁸

2.29 Senator Janet Rice detailed the intention of the amendment as follows:

Senator Wong's bill acknowledges that section 38(3) [of the SDA], relating to exemptions for educational institutions in the provision of education or training, needs to be repealed to remove discrimination against students. We are simply proposing the same for staff and contractors.

24 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ150*, p. 2.

25 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ151*, p. 2.

26 Attorney-General's Department, *Submission 228*, pp. 7 and 9.

27 Senator the Hon. Michaelia Cash, Minister for Small and Family Business, Skills and Vocational Education, *Senate Hansard*, 3 December 2018, p. 9124.

28 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Amendment Sheet 8601*, p. 1.

Secondly, we are proposing to remove the new carve-out that Senator Wong is proposing in the proposed new section 37(3)(b)....By removing the ability of bodies established for religious purposes to discriminate in the provision of education, as Senator Wong does in proposed section 37(3)(a), these bodies would also no longer be allowed to discriminate against staff. It's only by adding in 37(3)(b), a clause that limits 37(3)(a), that bodies established for religious purposes will be able to discriminate if the act or practice is connected with the employment of persons to provide that education...The Greens' amendments propose to remove this unnecessary, harmful and discriminatory clause²⁹

Centre Alliance amendment

2.30 The Centre Alliance circulated an amendment to the bill, contained in Sheet 8614. It seeks to narrow the scope of the bill's proposed subsection 37(3) by replacing references to 'a body' to 'an educational institution'.³⁰

29 Senator Janet Rice, *Senate Hansard*, 29 November 2018, p. 9081.

30 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Amendment Sheet 8614*, p. 1.