

## Chapter 3

### Views on the bill and circulated amendments

3.1 Evidence received by the committee drew out several key issues relating to the bill and the circulated amendments. These issues can be characterised as follows:

- the need to remove legislative exemptions which permit discrimination against LGBTIQ+ students;
- the meaning of 'education' and 'educational institution';
- the ability for religious educational institutions to teach in accordance with their beliefs;
- indirect discrimination and the 'reasonableness' of rules imposed by religious educational institutions;
- discrimination against employees of educational institutions;
- the need for further consideration by the Australian Law Reform Commission (ALRC); and
- the case for immediate, targeted reform.

3.2 This chapter will examine each of these issues in turn before presenting the committee's recommendations.

#### **The need to remove legislative exemptions that permit discrimination against LGBTIQ+ students**

3.3 A number of submitters supported the bill's intention of removing the legislative exemptions in the *Sex Discrimination Act 1984* (SDA) which allow faith-based educational institutions to discriminate against students on the basis of sexual orientation, gender identity or intersex status. In setting out their positions, many of these submitters emphasised the importance of protecting LGBTIQ+ (lesbian, gay, bisexual, transgender/gender diverse, intersex and queer) students against the damaging effects of discrimination.<sup>1</sup>

3.4 Equality Australia stated it was 'reasonable, necessary and proportionate' to prohibit faith-based educational institutions from discriminating against students on

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1 See for example: Rainbow Families Queensland, *Submission 249*, p. 1; Rainbow Families Victoria, *Submission 190*, p. 1; Equality Australia, *Submission 282*, p. 1; Anglican Church of Australia Public Affairs Commission, *Submission 16*, p. 3; Law Council of Australia, *Submission 415*, p. 20; Alannah and Madeline Foundation, *Submission 7*, pp. 4–5; Civil Liberties Australia, *Submission 230*, p. 1; Australian Lawyers Alliance, *Submission 4*, pp. 6–7; Asian Australian Alliance, *Submission 340*, p. 1; PFLAG Perth, *Submission 175*, p. 1; Public Interest Advocacy Centre, *Submission 173*, p. 5; LGBTI Legal Service, *Submission 278*, p. 3; Caxton Legal Centre, *Submission 13*, p. 2; Amnesty International, *Submission 172*, p. 2.

the basis of their sexual orientation or gender identity.<sup>2</sup> It emphasised the need to protect the right to equality and the right to education for LGBTIQ+ students:

LGBTQ+ students should be able to learn in educational environments where they are supported and accepted for who they are. No students should be expelled or disciplined because of an inherent part of their identity. No child should have to live in fear of being mistreated and cast out of an educational institution where they have spent years learning and developing close personal friendships which promote positive mental health and wellbeing.<sup>3</sup>

3.5 The National LGBTI Health Alliance highlighted the adverse consequences for the overall health and wellbeing of young LGBTIQ+ people that could flow from experiences of discrimination. It explained:

Although most LGBTI Australians live healthy and happy lives, an overwhelming amount of research evidence has consistently demonstrated that a disproportionate number experience poorer mental health outcomes and have higher risk of suicidal behaviours than non-LGBTI people. These health outcomes are directly related to experiences of stigma, prejudice, discrimination and social exclusion on the basis of an individual's sexual orientation, gender identity and/or variations in sex characteristics.<sup>4</sup>

3.6 Amongst those submitters that expressed support for the overarching intention of the bill, there were a wide range of views on the merits of the bill and circulated amendments. Submitters raised concerns about the potential unintended consequences that could arise from the current drafting; highlighted the need to ensure balance between competing priorities; and provided suggestions on how their respective concerns could be addressed. These views are discussed further on in this chapter.

3.7 Additionally, the committee received evidence from submitters who opposed the bill. Some argued that it represented an unacceptable incursion on religious freedom, while others asserted that it would introduce uncertainty into the SDA and would lead to much broader, unintended consequences. Submitters also argued the changes would create unnecessary conflict and ambiguity in school communities.<sup>5</sup>

3.8 For example, the Australian Christian Lobby characterised the bill as an incursion on religious freedom and warned that 'given a broad interpretation', the

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2 Equality Australia, *Submission 282*, p. 6.

3 Equality Australia, *Submission 282*, p. 5.

4 National LGBTI Health Alliance, *Submission 323*, p. 2.

5 See for example: Institute for Civil Society, *Submission 702*, p. 1; Australian Christian Lobby, *Submission 56*, p. 1; Christian Democratic Party, *Submission 55*, p. 4; Australian Family Association, *Submission 22*, p. 7; Association of Heads of Independent Schools of Australia, *Submission 177*, pp. 2–3; Australian Family Coalition; *Submission 232*, p. 5; Family Council of Victoria, *Submission 649*, p. 1; Australian National Imams Council, *Submission 351*, pp. 1–2; Reverend Bruce Meller, Clerk of Assembly, Presbyterian Church of Australia, *Proof Committee Hansard*, 7 February 2019, p. 49; Mr Erik Hofsink, Public Advocate, Australian Association of Christian Schools, *Proof Committee Hansard*, 7 February 2019, p. 22.

proposed amendments to the SDA could 'conceivably be used to restrict the content of all religious instruction.<sup>6</sup> It emphasised the importance of the current exemptions contained in the SDA:

[Subsection] 38(3) [which the bill seeks to repeal] has a role to play in preventing schools from having their faith-based teachings, particularly around sexual ethics, unduly interfered with.<sup>7</sup>

3.9 Similarly, FamilyVoice Australia argued for the protection of religious freedom and rejected the need to repeal the exemptions for faith-based schools contained in the SDA :

Legislating to water down already inadequate exemptions in the *Sex Discrimination Act [1984]* would further infringe upon religious freedom and the rights of parents. If there is any move to change the *Sex Discrimination Act* exemptions, it should be to strengthen rather than weaken the very limited protection that presently exists.<sup>8</sup>

### **The meaning of 'education' and 'educational institution'**

3.10 Item 1 of the bill proposes the inclusion of a new paragraph—subsection 37(3)—to the general exemption for religious bodies in section 37 of the SDA to provide that the general exemption in paragraph 37(1)(d) 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.<sup>9</sup>

3.11 The government expressed concern that the effect of the new subsection 37(3) would be much broader than intended due to the use of the term 'bodies established for religious purposes':

...item 1 is overly broad and is not appropriately adapted to its stated intention. As drafted, item 1 would limit the general exemption in paragraph 37(1)(d) for all bodies established for religious purposes, not just for religious educational institutions. In practice, this would restrict the ability for intrinsically religious bodies such as churches, synagogues or mosques to provide education in accordance with their religious beliefs or ethos. Many religious bodies provide religious education to their adherents, such as through theological colleges. It is the government's position that

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6 Australian Christian Lobby, *Submission 56*, p. 1.

7 Australian Christian Lobby, *Submission 56*, p. 5.

8 FamilyVoice Australia, *Submission 180*, p. 9.

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

religious bodies should be free to conduct such education in accordance with the doctrines of their faith.<sup>10</sup>

3.12 Government amendment KQ147 seeks to address this concern by removing proposed subsection 37(3) entirely from the bill.<sup>11</sup>

3.13 A number of stakeholders also noted that as currently drafted, proposed subsection 37(3) may have a broader operation than intended, particularly in relation to the terms 'education' and 'body established for religious purposes'.

3.14 For example, the Australian Human Rights Commission (AHRC) noted that it would be beneficial to clarify the scope of sections 37 and 38 of the SDA as amended by the bill:

The term 'body established for religious purposes' would cover bodies such as temples, churches, mosques and synagogues. Moreover, it is conceivable that an 'act or practice connected with the provision, by the body, of education' could include a church-run seminar on marriage, a Torah study course run by a synagogue, or even a sermon in a mosque. Hence, it would be useful to clarify the scope of sections 37 and 38 of the SDA, as amended by the Bill.

3.15 The Anglican Church Diocese of Sydney remarked that as currently worded there were 'significant, presumably unintended' consequences of the proposed subsection 37(3), and cautioned of the danger that the ordinary teaching activities of religious bodies would be caught within the very broad scope of the exemption. Instead, the diocese indicated it supported a change of wording proposed by Professor Patrick Parkinson in order to provide clarity to the subsection.<sup>12</sup>

3.16 The Law Council of Australia (Law Council) observed that the proposed subsection 37(3) was 'too broadly worded'.<sup>13</sup> It set out the need for clarity around the term 'body established for religious purposes', given that a range of educational activities (for example, bible study, relationship counselling, welfare and youth work) may be run by religious bodies:

...it would be beneficial to tighten the wording of proposed subsection 37(3) to 'educational institutions which are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', rather than 'a body established for religious purposes'. This would mean that bodies established for religious purposes, which are not such educational institutions, would rely on paragraph 38(1)(d) with respect to teaching in accordance with religious doctrine.<sup>14</sup>

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

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

12 Anglican Church Diocese of Sydney, *Submission 46*, p. 6.

13 Law Council of Australia, *Submission 415*, p. 42.

14 Law Council of Australia, *Submission 415*, p. 27.

3.17 The Law Council further advised that this alternate wording would mean that proposed subsection 37(3) would then only apply to the acts or practices of faith-based schools, colleges, universities and other institutions at which education or training is provided. It would exclude acts or practices which are connected with the provision of education by, for example, churches, synagogues or mosques.<sup>15</sup>

3.18 Additionally, the Monash University Castan Centre for Human Rights Law identified the need to amend the wording of proposed subsection 37(3) to provide more specificity around what constitutes 'education':

The amendment uses the term 'education', which is potentially broad enough to include the education provided, for example, by Sunday schools and seminaries. The term 'education' should be replaced with 'primary or secondary school education or university or vocational education' or similar.<sup>16</sup>

3.19 Despite recognising the need to clarify the scope of subsection 37(3), several submitters argued that amendment KQ147 put forward by the government was not the correct way to address the problem.

3.20 The AHRC stated that amendment KQ147 was 'unsatisfactory' as it may allow educational institutions to continue to rely on the general exemption in paragraph 37(1)(d) following the repeal of subsection 38(3) as set out in Item 2 of the bill.<sup>17</sup>

3.21 Instead, the AHRC endorsed the Centre Alliance amendment (Sheet 8614), stating the it addressed the concerns about the scope of the subsection 37(3) 'more specifically' by replacing the word 'body' with the words 'educational institution'.<sup>18</sup> It explained:

This amendment [Sheet 8614] would clarify that the bill only purports to affect the education and training activities of educational institutions, not other religious bodies. For this reason, the Commission recommends that the amendment outlined in Sheet 8614 be adopted.<sup>19</sup>

3.22 A number of other submitters also supported the Centre Alliance amendment.<sup>20</sup>

3.23 Other submitters supported government amendment KQ147.<sup>21</sup> For example, Professor Michael Quinlan, a Professor of Law at the University of Notre Dame, who

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15 Law Council of Australia, *Submission 415*, p. 42.

16 Monash University Castan Centre for Human Rights Law, *Submission 187*, p. 3.

17 Australian Human Rights Commission, *Submission 171*, p. 10.

18 Australian Human Rights Commission, *Submission 171*, p. 10.

19 Australian Human Rights Commission, *Submission 171*, p. 10.

20 See for example: Rainbow Families Victoria, *Submission 190*; p. 1; Rainbow Families Queensland, *Submission 249*, p. 1; Public Interest Advocacy Centre, *Submission 173*, p. 13;

21 See for example: Australian Association of Christian Schools, *Submission 168*, p. 3; Christian Schools Australia / Adventist Schools Australia, *Submission 167*, p. 10; Australian Christian Higher Education Alliance, *Submission 220*, p. 11.

submitted in a private capacity, argued that given the 'shortcomings' of inserting proposed subsection 37(3), amendment KQ147 'would be an improvement' on the bill.<sup>22</sup>

### **Ability for religious educational institutions to teach in accordance with their beliefs**

3.24 The committee heard concerns that the bill would undermine the ability of religious educational institutions to teach in accordance with the doctrines, tenets, beliefs or teachings of their faith.

3.25 For example, the Anglican Church Diocese of Sydney indicated that faith-based schools had concerns that without the protection of subsection 38(3) of the SDA, the act of teaching from religious texts might expose a school to accusations of discrimination which would expose them to litigation. It explained:

For example, a student who identifies as having a non-binary gender may object to bible readings in chapel services which refer to the creation of humanity as male and female. We would hope that, if this issue had to be litigated, the courts would recognise that this was neither direct nor indirect discrimination for the purposes of the Act. However, it would be preferable by far to ensure that the SDA provided clarity on this issue.<sup>23</sup>

3.26 Government amendment KQ149 seeks to address these concerns by inserting a new section 7F into the SDA to ensure that religious educational institutions will be able to maintain their religious ethos and teach in accordance with their religious values.<sup>24</sup>

3.27 Proposed new section 7F provides that nothing in the SDA renders it unlawful to engage in teaching activities if that activity:

- a) is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and
- b) is done by, or with the authority of, an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings.<sup>25</sup>

3.28 The explanatory memorandum for KQ149 provided further detail on the need for the amendment:

During public discussions on the issue of religious exemptions in the SDA, religious schools throughout Australia have clearly stated that they do not rely upon the existing exemption in subsection 38(3) to expel students solely on the basis of their sexual orientation. However, many faith-based schools have raised concerns that the removal of this exemption entirely

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22 Professor Michael Quinlan, *Submission 72*, p. 7.

23 Anglican Church Diocese of Sydney, *Submission 46*, pp.4, 8.

24 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ149*, p. 3.

25 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ149*, p. 3.

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may challenge their ability to teach in accordance with their religious beliefs or ethos.<sup>26</sup>

3.29 A number of submitters indicated that they supported amendment KQ149 as a way to protect the ability of faith-based schools to teach in accordance with their religious beliefs and ethos.<sup>27</sup>

3.30 For example, the Australian Catholic Bishops Conference called the amendment 'most important' as it would insert section 7F as a 'positive statement of freedom of religion'.<sup>28</sup>

3.31 Dr Alex Deagon, a senior lecturer in law at the Queensland University of Technology, who submitted in a private capacity, described his thoughts on the insertion of 7F as outlined in KQ149:

This is a positive step which should be passed in conjunction with a more general provision which allows religious educational institutions to impose uniform rules of behaviour and conduct in good faith according to the doctrine of that religion. This would protect the freedom of religious educational institutions to educate in accordance with their religious ethos without fear of being subject to direct or indirect discrimination claims. It is worth noting this change would not protect other religious bodies such as churches, mosques and synagogues as mentioned above, and must go further in that respect.<sup>29</sup>

3.32 However, other submitters raised concerns with the amendment.<sup>30</sup>

3.33 For example, the AHRC stated that it did not support KQ149, in part because there was a risk that the amendment could make certain forms of direct discrimination lawful, an outcome that would undermine the agreed objective of the bill.<sup>31</sup>

3.34 The AHRC also noted that section 7B of the SDA already provided that teaching in accordance with a religious belief or ethos will not amount to indirect discrimination if any conditions or requirements imposed on students are reasonable in all the circumstances, and that this constituted an adequate protection for educational institutions.<sup>32</sup>

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26 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ149*, p. 3.

27 See for example: Christian Schools Australia / Adventist Schools Australia, *Submission 167*, p. 10; Australian Christian Higher Education Alliance, *Submission 220*, p. 11;

28 Australian Catholic Bishops Conference, *Submission 224*, p. 11.

29 Dr Alex Deagon, *Submission 3*, p. 6.

30 See for example: Equal Voices, *Submission 223*, p. 3; Amnesty International, *Submission 172*, p. 2; Lee Carnie, Director of Legal Advocacy, Equality Australia Sydney, *Proof Committee Hansard*, 7 February 2019, pp. 78–79.

31 Australian Human Rights Commission, *Submission 171*, p. 12.

32 Australian Human Rights Commission, *Submission 171*, p. 12.

3.35 The Law Council submission included an in-depth discussion on whether there was a need for proposed new section 7F in order to ascertain whether faith-based educational institutions would be precluded from teaching in accordance with their religious doctrines, tenets and beliefs if the bill was passed.<sup>33</sup> Ultimately it concluded:

The Law Council does not consider that there is a risk that educational institutions will be unable to teach the doctrines, tenets or beliefs of that religion or creed in a reasonable manner without the risk of engaging in unlawful discrimination. It therefore queries the necessity of proposed section 7F.<sup>34</sup>

3.36 Additionally, the Law Council raised specific concerns about a number of aspects of the proposed new section, including:

- the very broad definition of 'teaching activity';
- that 7F would provide an exemption from both direct and indirect discrimination under the SDA;
- that 7F would extend to exempting discrimination, direct or indirect, on the ground of a person's sex, intersex status, potential pregnancy, breastfeeding or family responsibilities;
- that 7F appears to extend beyond educational institutions to teaching activities conducted by other individuals, provided that they are done 'with the authority' of an educational institution; and
- unlike existing subsection 38(3), 7F does not require that the discrimination also be 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>35</sup>

3.37 In light of these concerns, the Law Council stated that it did not support amendment KQ149.<sup>36</sup>

3.38 The Monash University Castan Centre for Human Rights Law argued that proposed section 7F appeared to be 'poorly thought out'.<sup>37</sup> It provided an example of the potential negative impact the new section could have:

The Sex Discrimination Act bans discrimination and it bans sexual harassment. Proposed section 7F would permit teachers at religious schools to sexually harass students in class, provided that the conduct amounting to harassment accords with the beliefs of the religion. Proposed section 7F would permit a religious school to introduce a rule that female students are not permitted to enrol in higher level mathematics subjects (for example, if

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33 Law Council of Australia, *Submission 415*, pp. 35–38.

34 Law Council of Australia, *Submission 415*, p. 38.

35 Law Council of Australia, *Submission 415*, pp. 38–39.

36 Law Council of Australia, *Submission 415*, p. 39.

37 Monash University Castan Centre for Human Rights Law, *Submission 187*, p. 3.

the religion has a belief that a woman's place is in the home and therefore girls have no need to study higher level mathematics).<sup>38</sup>

3.39 Professor Quinlan provided the committee with a different observation on the amendment. He noted that as currently drafted, the KQ149 may not provide protection to all religious bodies:

This suggested amendment to the Bill applies to indirect and direct discrimination which is to be preferred. However it applies only to educational institutions and so may leave other religious bodies involved in providing education such as Sunday schools, churches and mosques subject to the new s37(3). This provision would also apply only to the teaching activity itself which may leave inadequately protected some religious schools which take a holistic approach to their religious community and wish all interactions between all students and all staff to be within a context which is consistent with the teachings of their particular faith tradition.<sup>39</sup>

### **The 'reasonableness' of rules imposed by religious educational institutions**

3.40 Another issue raised during the inquiry was the impact the bill may have on the ability of religious educational institutions to impose reasonable rules in relation to student conduct.

3.41 Government amendments KQ148, KQ150 and KQ151 seek to address these concerns. As noted in Chapter 2 of this report, KQ150 and KQ151 provide alternative amendments to each other, as well as to KQ148.<sup>40</sup>

3.42 KQ148 inserts a proposed new section 7E into the SDA to ensure that the repeal of current subsection 38(3) as proposed in the bill does not undermine the ability of religious educational institutions to impose reasonable rules in relation to student conduct.<sup>41</sup>

3.43 New subsection 7E(1) clarifies that religious educational institutions are permitted to impose or enforce reasonable rules regarding student conduct consistent with their particular religious ethos. It provides three specific criteria to determine whether, for the purposes of current subsection 7B(1) of the SDA, a rule is reasonable:

- a) whether the condition, requirement or practice is imposed in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed;
- b) whether the condition, requirement or practice is imposed, or proposed to be imposed, in a manner that is consistent with a policy of the educational institution; and

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38 Monash University Castan Centre for Human Rights Law, *Submission 187*, p. 3.

39 Professor Michael Quinlan, *Submission 72*, p. 7.

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

41 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ148*, p. 3.

c) if the student is a child – in imposing, or proposing to impose, the condition requirement or practice, the educational institution has regard to the best interests of the child.<sup>42</sup>

3.44 New subsection 7E(2) seeks to ensure that the practices and policies of religious educational institutions are open and transparent by imposing a policy requirement on educational institutions proposing to impose a condition, requirement or practice under the proposed new subsection 7E(1). Namely, a policy of a religious educational institution must:

- be in writing;
- be publicly available;
- set out the educational institution's policy in relation to adherence to its doctrines, tenets, beliefs or teachings; and
- comply with any other requirements prescribed by regulations.<sup>43</sup>

3.45 The explanatory memorandum for KQ148 listed three examples of school rules which would be 'reasonable' if all of the criteria of proposed 7E were met:

- a school policy that requires attendance at weekly chapel services;
- a school policy that requires students to adhere to certain standards of dress, language and conduct in the use of school facilities; and
- a school policy that students must not actively advocate against the doctrines, tenets, beliefs or teachings of the school.<sup>44</sup>

3.46 Amendments KQ150 and KQ151 both introduce an amendment to current subsection 7B(2) of the SDA to provide 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. KQ150 applies to all religious educational institutions, while KQ151 specifies that only primary or secondary schools are affected.<sup>45</sup>

3.47 A number of submitters expressed support for the government amendments. For example, the Anglican Church Diocese of Sydney indicated that it supported the

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42 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ148*, p. 3.

43 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ148*, p. 4.

44 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ148*, p. 4.

45 Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ150*, p. 2; Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, *Supplementary Explanatory Memorandum relating to Amendment Sheet KQ151*, p. 2.

new section 7E, while also offering an alternative approach to achieve a similar result.<sup>46</sup>

3.48 Christian Schools Australia and Adventist Schools Australia also proffered support for KQ148, stating that it provided clarity to schools and students and ensured that boundaries would be 'not only fair, but clear' to all parties.<sup>47</sup>

3.49 The Australian Catholic Bishops Conference acknowledged that it was reasonable for religious schools to be required to have written, publicly available policies.<sup>48</sup> It expressed support for KQ148, and also KQ150 or KQ151 as 'second-best' alternatives.<sup>49</sup>

3.50 Dr Renae Barker, a law lecturer at the University of Western Australia who submitted in a private capacity, emphasised that where the law permits people, especially children, to be discriminated against in the interest of protecting and rights and freedoms of others, it is crucial that the discrimination is made transparent. She noted that in the case of religious schools, such transparency would allow families to make an informed decision about their child's education.<sup>50</sup> She explained:

Indirect discrimination will still be a feature of religious schools under the exemption in section 7B of the *Sex Discrimination Act 1984* (Cth). I therefore support the inclusion of a transparency requirement in the amendment contained in document KQ148, namely the insertion of section 7E(2)...<sup>51</sup>

3.51 Other submitters raised concerns about the government amendments.<sup>52</sup> For example, the AHRC expressed reservations about the need for KQ148, noting that it considered that the current form of section 7B of the SDA contained appropriate protection for religious schools to teach and organise their affairs in accordance with their beliefs. It further stated:

By definition, discrimination involves unfavourable treatment on the basis of a protected attribute. The Commission has been unable to identify a circumstance in which unfavourable treatment towards a child on the basis of his or her sexual orientation or gender identity could be in the child's best interests. To avoid suggesting otherwise, the Commission does not support

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46 Anglican Church Diocese of Sydney, *Submission 46*, p. 8.

47 Christian Schools Australia / Adventist Schools Australia, *Submission 167*, p. 10

48 Australian Catholic Bishops Conference, *Submission 224*, p. 11.

49 Australian Catholic Bishops Conference, *Submission 224*, p. 11.

50 Dr Renae Barker, *Submission 681*, pp. 12–13.

51 Dr Renae Barker, *Submission 681*, p. 12.

52 See for example: National LGBTI Health Alliance, *Submission 323*, p. 4; Rainbow Families Victoria, *Submission 190*, p. 1; Rainbow Families Queensland, *Submission 249*, p. 1; Amnesty International, *Submission 172*, p. 2; Lee Carnie, Director of Legal Advocacy, Equality Australia Sydney, *Proof Committee Hansard*, 7 February 2019, pp. 78–79.

including in the SDA a provision that allows discrimination where it is deemed to be in a child's best interests.<sup>53</sup>

3.52 The Law Council also stated that it did not support amendment KQ148, citing concerns that it overrides the existing 7B reasonableness test contained in the SDA which requires consideration of all the relevant circumstances of the matter, including the nature and extent of the resulting disadvantage to an individual, the feasibility of overcoming or mitigating the disadvantage, and whether it is proportionate to the result sought.<sup>54</sup>

3.53 The Law Council expressed concern that the proposed section 7E would encourage a blanket approach to be adopted by educational institutions, without requiring that regard be had for the merits of individual cases:

It [proposed 7E] would not, for example, require a school to consider ways of mitigating or avoiding any disadvantage or harm caused to an individual student, regardless of the level of distress involved or the student's vulnerability.<sup>55</sup>

3.54 Additionally, the Law Council noted that the proposed section 7E may lead to unintended consequences that would ultimately disadvantage LGBTIQ+ students:

The Law Council is concerned that over time, proposed section 7E may in fact lead to increasing numbers of schools adopting blanket policies which, while neutral on their face (and therefore do not raise alarm for parents enrolling their children), in effect disadvantage vulnerable LGBTI students. This would undermine their rights to equality and non-discrimination. It notes that indirect discrimination may be considered a more 'insidious' form of discrimination. While it understands that arguments for greater transparency and clarity may be attractive, it would be concerned if this were at the cost of individual students' wellbeing.<sup>56</sup>

3.55 The Australian Discrimination Law Experts Group informed the committee that it did not support, and in fact 'strongly counsel[led] against' the proposed new subsection 7E in outlined in KQ148, as well as proposed new paragraph 7B(2)(d) contained in KQ150. It argued:

Even if the scope of the amendment were confined to the attributes currently covered by s 38(3), the addition of further factors to the test of reasonableness adds unnecessary complexity to defining indirect discrimination, will distort the existing test for reasonableness, and will actually fail to adequately protect LGBT students from discrimination.<sup>57</sup>

3.56 The Public Interest Advocacy Centre noted that amendments KQ148, KQ150 and KQ151 were substantively similar as all would amend the existing test for

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53 Australian Human Rights Commission, *Submission 171*, p. 12.

54 Law Council of Australia, *Submission 415*, p. 29.

55 Law Council of Australia, *Submission 415*, p. 29.

56 Law Council of Australia, *Submission 415*, p. 29.

57 Australian Discrimination Law Experts Group, *Submission 587*, p. 4.

reasonableness in section 7B. It argued that the three amendments were 'flawed' and should be rejected as they added 'elements of subjectivity into an established test that is primarily objective in nature'.<sup>58</sup>

### **Discrimination against employees of religious educational institutions**

3.57 Although the bill proposes to prevent religious schools from discriminating against students on the basis of sexual orientation, gender identity or intersex status, it does not seek to address the issue of such discrimination against staff and contractors employed by religious schools.<sup>59</sup>

3.58 Senator the Hon. Penny Wong explained the rationale for this approach:

Given the short number of sitting days left between now and the election, we do have to prioritise – and children are our priority... Labor is committed to removing exemptions which relate to LGBTI staff at religious schools... We know there is broad support across parliament to deal with the issue of staff. We are dealing now with the issue of children. We accept that there are complexities in relation to the issues of teachers and staff, and we intend to continue to work with relevant stakeholders on this. However, we are not prepared to hold up the change for students while that work goes on.<sup>60</sup>

3.59 A number of submitters asserted that the bill should be amended to address the issue of discrimination against staff.<sup>61</sup>

3.60 For example, PFLAG (Parents, Families and Friends of Lesbians and Gays) Perth stated:

The parents of PFLAG have LGBTIQ children that both study and work at religious institutions, we see no justifiable reason for them to be treated differently under the anti-discrimination law due to their age.<sup>62</sup>

3.61 The amendment circulated by the Australian Greens (Sheet 8601) seeks to address these concerns by extending the operation of the bill to include staff and contract workers of faith-based educational institutions.<sup>63</sup>

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58 Public Interest Advocacy Centre, *Submission 173*, pp. 12–13.

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

60 Senator the Hon. Penny Wong, *Senate Hansard*, 29 November 2018, p. 9074.

61 See for example: Public Interest Advocacy Centre, *Submission 173*, p. 10; Asian Australian Alliance, *Submission 340*, p. 1; Equality Australia, *Submission 282*, p. 11; South Australian Rainbow Advocacy Alliance, *Submission 227*, p. 3; Rainbow Catholics InterAgency for Ministry, *Submission 225*, p. 4; Rainbow Families Queensland, *Submission 249*, p. 1; Rainbow Families Victoria, *Submission 190*, p. 1; Reverend Doctor Josephine Inkpin, Co-Chair, Equal Voice Queensland, *Proof Committee Hansard*, 6 February 2019, pp. 40, 43; Mr Chris Watt, Federal Secretary, Independent Education Union of Australia, *Proof Committee Hansard*, 7 February 2019, p. 58.

62 PFLAG Perth, *Submission 175*, p. 1.

3.62 Some submitters stated that although they supported removing discrimination against staff, they felt the matter should be dealt with separately, as is the intention of the bill.

3.63 For example, the Law Council recommended that any amendments to SDA exemptions for employees and contractors of religious educational institutions should only be taken after careful consideration of their interaction with other relevant federal provisions, such as those within the *Fair Work Act 2009* and the *Australian Human Rights Commission Act 1986*.<sup>64</sup>

3.64 Dr Renae Barker noted that although the discrimination by schools against LGBTI+ staff and contractors was an 'important issue', it should be considered separately.<sup>65</sup>

3.65 Similarly, Mr Edward Santow, Human Rights Commissioner at the AHRC noted:

....we [the AHRC] do not believe that there should be an exemption that permits discrimination against staff, including teachers. What we've also said is that amending the law in this space has some complexity to it. It would also need to consider the relevant provisions of the Fair Work Act, for example. That's why we say that needs to be done in a very carefully considered way.<sup>66</sup>

### **The need for further consideration by the Australian Law Reform Commission**

3.66 A number of inquiry participants expressed concern about the haste in which the bill and amendments had been drafted and argued that rushed legislative change could lead to unintended, detrimental consequences. They emphasised that the intersection of various human rights raised significant and complex matters that needed to be properly investigated in order to allow for a balanced and reasonable solution. As a remedy to these concerns, submitters suggested that the matter be referred to the ALRC for an in-depth examination of the issues at play.<sup>67</sup>

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

64 Law Council of Australia, *Submission 415*, p. 46. See also Ms Kate Eastman SC, Chair, Equal Opportunity Committee, Law Council of Australia, *Proof Committee Hansard*, 7 February 2019, p. 91.

65 Dr Renae Barker, *Submission 682*, p. 14;

66 Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, 7 February 2019, p. 9.

67 See for example: Professor Michael Quinlan, private capacity, *Proof Committee Hansard*, 6 February 2019, pp. 5, 7; Mr Mark Spencer, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia, *Proof Committee Hansard*, 7 February 2019, p. 23; Professor Mark Sneddon, Executive Director, Institute for Civil Society, *Proof Committee Hansard*, 7 February 2019, p. 52.

3.67 For example, Professor Quinlan commented that a referral to the ALRC of the issues relevant to the bill 'should facilitate taking the overt and unhelpful politics out of this important, but complex issue'.<sup>68</sup>

3.68 Dr Deagon also drew a similar conclusion, highlighting the short time frame in which the bill and amendments were drafted:

The other thing that we have to remember, as the other witnesses have indicated, is that this legislation was rushed, in a sense. This bill was rushed and it came out of a heated debate about the existence and the purpose of the exemptions. So I think the recommendation of the Australian Law Reform Commission is a sensible one, which will then enable the commission to have a more detailed and objective look at this issue and then propose some more detailed and considered legislation, which can then be debated.<sup>69</sup>

3.69 Archbishop Mark Coleridge, President of the Australian Catholic Bishops Conference agreed with the need to refer the matter to the ALRC:

That would be very much our position, that this is not an isolated issue to be treated in some kind of ideological vacuum. It is an important issue and one that we've been dealing with for years in our schools. This is not new. It's an important issue that is situated in a very, very large set of contexts, the broadest of which—as I have said, and echoing the previous speakers—is the renegotiation of the relationship between religion and the state. That's a massive phenomenon that is unfolding in this culture at this time. And we don't want to turn our back on it or put our head in the sand: we're part of it. So, yes, our preference would be very strongly to set this particular issue about the treatment of students in the schools within the much larger context which helps us to understand the implications of any decision which we or the parliament may make.<sup>70</sup>

3.70 The Attorney-General's Department informed the committee that a referral of matters relating to religious exemptions to the ALRC was an option the government was actively exploring:

Given the complexity of the issue, the government has committed to consulting with states and territories on terms of reference for the Australian Law Reform Commission to inquire into religious exemptions. That consultation is underway with a view to making that reference.<sup>71</sup>

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68 Professor Michael Quinlan, *Submission 72*, p. 1.

69 Dr Alex Deagon, private capacity, *Proof Committee Hansard*, 6 February 2019, p. 8.

70 Archbishop Mark Coleridge, President, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 6 February 2019, p. 14.

71 Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Proof Committee Hansard*, 7 February 2019, p. 99.

### **The case for immediate, targeted reform of section 38(3)**

3.71 As noted above, a number of submitters urged the committee to reject the bill and amendments and instead defer wide-reaching legislative change until after the matter had been examined by the ALRC.

3.72 However, other submitters emphasised the pressing need to ensure that school students are not able to be denied enrolment or expelled by religious educational institutions on the basis of their sexual orientation, gender identity or intersex status.

3.73 For example, the Anglican Church Diocese of Sydney explained why it felt there was a sense of urgency:

We urge both houses of parliament to work in a bipartisan way to resolve this issue as a matter of urgency. The urgency is not because religious schools across the country are expelling or mistreating LGBTI students. The urgency is because the misinformed public debate on this matter has created the deep division in the community and has been deeply distressing students and staff—LGBTI and otherwise, Christian and otherwise—at our Anglican schools.<sup>72</sup>

3.74 When asked by the committee how to address this, the Diocese suggested that a more targeted amendment to subsection 38(3) of SDA could be enacted as an interim measure. Dr Glenn Davies, the Archbishop of Sydney explained:

....I commented in response to a Senator's question that one of the options open to the Senate was to deal only with the issues related to expulsion of students at this time, and wait for the input from the Australian Law Reform Commission before addressing the wider issues of discrimination later. This suggestion emanated from the media attention given to this particular issue, and the Prime Minister's commitment to remove the possibility of LGBTI students being expelled.<sup>73</sup>

3.75 In response to a question on notice, Dr Davies provided the committee with a suggestion of how such a targeted amendment could be achieved through the addition of a phrase to current subsection 38(3). However, he stressed that he believed that his proposed wording 'did not go far enough' because it only addressed the issue of enrolment. He reiterated that the position of the Diocese was that subsection 38(3) in its current form was causing distress and confusion in their school communities and that his suggested amendment would not resolve those concerns. He emphasised:

Our Anglican Schools do not discriminate against LGBT students, and legislation which gives them the right to discriminate against any student is deeply problematic. As we have argued in our written submission, it is

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72 Most Reverend Dr Glenn Davies, Archbishop of Sydney, Anglican Church Diocese of Sydney, *Proof Committee Hansard*, 7 February 2019, p. 33.

73 Most Reverend Dr Glenn Davies, Archbishop of Sydney, Anglican Church Diocese of Sydney, answers to questions on notice (7 February 2019), received 7 February 2019, p. 1.

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urgent that Section 38(3) be repealed and the policy void that this would create regarding doctrine, tenets and beliefs is filled by parliament.<sup>74</sup>

3.76 The committee asked the Attorney-General's Department to comment on the feasibility of a targeted amendment to subsection 38(3) to specifically deal with the matter of expulsions and admissions of students. The department advised that it would be 'technically possible'.<sup>75</sup>

### **Committee view**

3.77 The committee recognises that the issues raised by the bill are of great concern to the Australian community. The large volume of written submissions and form letters the committee received, as well as the wealth of information provided by witnesses at the public hearings, clearly demonstrated the public interest in the matter.

3.78 The committee notes that many sectors of the community agree that students at faith-based schools should not be discriminated against on the basis of sexual orientation, gender identity or intersex status. These stakeholders, the committee included, do not dispute the harm that arises when LGBTIQ+ children are subject to discriminatory behaviour.

3.79 The committee also observes that political bipartisanship exists on the principle of the matter, and that there have been public commitments from the Prime Minister, the Leader of the Opposition and some of the minor parties to repeal the SDA exemptions that allow religious educational institutions to expel students on the basis of their sexuality, gender identity or intersex status.

3.80 However, while the committee considers it necessary and appropriate to prohibit discrimination against LGBTIQ+ school students, it is of the view that this should not occur at the expense of the ability of religious educational institutions to maintain their ethos through what they teach and the rules of conduct that they impose on their students.

3.81 Religious freedom is a vital aspect of Australian society and religious communities should feel respected and protected. Additionally, faith-based schools have a unique and important role to play in Australia's education system. It is imperative that they are able to maintain their religious ethos and teach in accordance with their beliefs, without the threat of legal liability.

3.82 The committee considers the bill at the centre of this inquiry to be flawed. Although the circulated government amendments represent a reasonable and sensible attempt to remedy the overreach and unintended consequences of the bill while still honouring its original intent, the committee is of the opinion that matters of

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74 Most Reverend Dr Glenn Davies, Archbishop of Sydney, Anglican Church Diocese of Sydney, answers to questions on notice (7 February 2019), received 7 February 2019, p. 1 (emphasis omitted).

75 Ms Kristin Crawford, Director, Human Rights Unit, Attorney-General's Department, *Proof Committee Hansard*, 7 February 2019, p. 99.

anti-discrimination and religious freedom are too important and too complex to be dealt with in haste.

3.83 Rather than a piecemeal, reactionary approach, as exemplified by the poor drafting of the bill and the short time frame allocated for this inquiry, the committee believes a more considered, holistic proposition is required to ensure that the matter is resolved in the best possible way.

3.84 In light of this, the committee is recommending that the bill and all circulated amendments not be passed. Instead, in-depth consideration of this matter must be conducted by the ALRC in order to properly and comprehensively assess the consequences arising from any potential legislative changes. The committee considers that such a referral will allow for a proper exploration of all the issues at stake and lead to a plan for cohesive, balanced reform.

#### **Recommendation 1**

**3.85 The committee recommends that the bill and circulated amendments not be passed.**

#### **Recommendation 2**

**3.86 The committee recommends that the bill, circulated amendments and all relevant matters be referred to the Australian Law Reform Commission for full and proper consideration.**

**Senator the Hon Ian Macdonald**

**Liberal Party of Australia**