

## **Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018**

### **Labor Senators Dissenting Report**

1.1 The leak of the recommendations of the Ruddock Review has prompted significant public debate regarding the rights of LGBT (lesbian, gay, bisexual, transgender) students and teachers. Much of the debate has focussed on existing exemptions in the *Sex Discrimination Act 1984 (SDA)* that allow faith-based educational institutions to discriminate against students, teachers and staff on the basis of various attributes including sexual orientation and gender identity.

1.2 Subsequent to reports about the Review's recommendations, both the Government and Opposition expressed support for changing the law to ensure that students cannot be discriminated against on the basis of their sexuality.

1.3 With a view to removing this discrimination Senator Wong introduced the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 into the Senate on the 29<sup>th</sup> of November 2018.

1.4 Instead of acting on this issue the Government has in its report to the parliament on this inquiry recommended that the bill not be passed and that the bill and its amendments be referred to the Australian Law Reform Commission.

1.5 Rather than seeking to immediately ensure that school students are not discriminated against by religious educational institutions on the basis of their sexual orientation, gender identity, marital or relationship status or pregnancy the Government continues to defer the issue.

1.6 Labor respects the rights of parents to send children to the school of their choice and to have their children educated in accordance with their religious convictions.

1.7 Labor respects that many parents choose religious schools because they want their children to be grounded in the identity and mission of a particular religious faith.

1.8 Labor has been prevented from being able to meet our commitment to legislate to remove discrimination against students and staff in faith based schools in this Parliament. Labor Senators are aggrieved that the Government has failed to set sufficient sitting days to allow a debate on these issues to take place.

1.9 Labor is deeply disappointed that the Government has failed to act on its commitment to legislate on this question and has instead subjected young people who are currently without protection from discrimination to an ongoing and divisive debate.

1.10 Labor notes that it appears at this stage it is unclear if there is a majority to pass the legislation without amendments that would compromise its intent to prevent

discrimination. However, it is clear there is a majority of the parliament opposed to discrimination and the parliament must work to prioritise resolution of this issue.

### **Background to this Bill**

1.11 The Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (the bill) seeks to amend the SDA to prevent schools from discriminating against students on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution.<sup>1</sup>

1.12 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.<sup>2</sup>

1.13 This bill 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 other attributes named in the SDA.

1.14 The bill does not seek to amend the SDA to address the issue of discrimination against staff employed by religious schools.<sup>3</sup>

### **Impact of discrimination**

1.15 As heard through the inquiry LGBT students experience far higher rates of bullying and depression than their peers, and are significantly more likely to attempt suicide as young adults. Research has found that faith-based schools that discourage the disclosure of sexual diversity and fail to establish safe and inclusive learning environments for students with diverse sexualities exacerbate these statistics.<sup>4</sup>

1.16 Labor believes that all students should be protected from discrimination on the basis of gender, sexuality, and the other attributes covered by the SDA. The committee heard stories of the suffering that this discrimination can and has caused.

1.17 Anna Brown and Lee Carnie highlight the scenario of seventeen year Thalia who described her experiences in a religious boarding school as a teenager.<sup>5</sup>

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<sup>1</sup> Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, Explanatory Memorandum, p. 2

<sup>2</sup> Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, Explanatory Memorandum, p. 1.

<sup>3</sup> Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, Explanatory Memorandum, p. 3.

<sup>4</sup> Australian Discrimination Law Experts Group, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Submission 587, 25 January, 2019, pg. 2

<sup>5</sup> Anna Brown and Lee Carnie, Human Rights Law Centre, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Submission 282 – Attachment 3, 21 November 2018, pg. 9

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*“Due to my mother’s homophobia I was sent to a strict Catholic boarding school where I was forced to scrub floors and walls on my hands and knees and pray multiple times a day. I am not religious and it was an extremely homophobic environment. Within a month I was on anti-depressant[s] and expelled after attempting suicide because ‘Suicide is a sin and so it was not acceptable to take part in the school.’”*

1.18 The Australian Marriage Equality also told the tale of LGBT children.<sup>6</sup>

*“I attended Catholic school for 13 years. I did not identify as a lesbian until I was late into my twenties, but I knew quite a few girls who identified in high school, and they had a very difficult time. One I know sought help from a teacher, who broke confidence and spoke to the principal, and my friend was under threat of being expelled if she did even the smallest thing wrong (“just give me one reason”) due to her sexuality.”*

1.19 Labor is concerned that the amendments to the act will undermine the existing tests of reasonableness as Lee Carnie in Sydney told the committee:

*“It is exceptionally broad, uncertain and creates confusion. It introduces a blanket exemption for religious teaching, regardless of the content of these teachings and whether they are harmful. It undermines the existing test of reasonableness, which requires an objective consideration of disadvantage facing a student.”*

1.20 This concern was further echoed by the Ms Kate Eastman from the Law Council of Australia in Sydney telling the committee that:

*“If somebody stands up and professes those views in a classroom, is section 21(2) engaged? Is that denying a student access or limiting the student's access to a benefit provided by the education authority? Is it expelling a student, or is it subjecting a student to any other detriment?’ Simply making those comments in a classroom, without some much broader context or something else, is unlikely to even get you, in effect, to first base for the purpose of the Sex Discrimination Act.”*

1.21 Rebecca Reynolds from the National LGBTI Health Alliance highlights how students, and staff, were afraid to speak out due to risk of action from the school administration.<sup>7</sup>

*When I identified as trans, I was at a Christian school and my mum worked there as a teacher. So I always had this fear that if I told one of my friends my secret, it would humiliate and cause my mother to lose*

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<sup>6</sup> Australian Marriage Equality, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Submission 282\_Attachment 4, pg. 10

<sup>7</sup> Rebecca Reynolds, Executive Director, National LGBTI Health Alliance, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Submission 323 – Attachment 2, February 2018, pg. 7

*her job. Unfortunately there were no gay or trans people at my school. At least whom were out. Looking back I should have told somebody*

1.22 Dr Tiffany Jones from the Department Educational Studies at Macquarie University highlights how students and staff feel safer, and experience less abuse at schools which have protective policies in place.<sup>8</sup>

*Communicating local policy protections to students is helpful – when protective policies are known LGBTIQ students are significantly more likely to feel safe (75% v. 45%); and significantly less likely to experience physical abuse (23% v. 47%) or attempt suicide (13% v. 22%) (Jones, 2015).*

1.23 In addition, the mere fact that the discrimination is permitted by law has sent a negative message to young LGBT people and young parents that their identity is not worthy of protection from discrimination on the same basis as other attributes such as race or disability. Labor is greatly concerned that the exemption to the SDA for religious organisations, rather than simply providing for religious freedom, can be seen as mandate to discriminate.

1.24 The Labor Party notes the strongly held views of the LGBTI community and the majority of Australians who supported marriage equality that such a mandate for discrimination should simply not exist on our statute books.

1.25 The children who might suffer discrimination under these exemptions are often experiencing the most vulnerable period of their lives. It is critical that legislation which enables and exacerbates the trauma of children be removed.

### **Right of schools to uphold their religious ethos**

1.26 Labor strongly affirms the right of faith-based educational institutions to uphold their ethos. Schools can with the passing of this legislation continue to be assured that the ethos and values of their schools are respected and protected. There is also strong support from a great many schools with religious affiliations to ensure that they provide education and do not discriminate against their students.

1.27 Many churches made statements to say that they do not use the exemptions. The Anglican Church Diocese of Sydney reinforced this in their submission.<sup>9</sup>

*“Anglican schools do NOT want a “right to discriminate”. Anglican schools do not sack teachers because they are gay, and they don’t expel students because they are gay. Anglican schools do not bully LGBTI students and teachers, nor indeed do they tolerate any bullying within their school communities.”*

1.28 This sentiment was echoed to the committee by Archbishop Coleridge from the Australian Catholic Bishops Conference:<sup>10</sup>

<sup>8</sup> Dr Tiffany Jones, Department Educational Studies, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Submission 233, January 2019, pg. 6

<sup>9</sup> Rev. Dr Michael Stead, Anglican Church, Diocese of Sydney, Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 Submission 46, 10 January, 2019, Pg. 3

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*“Catholic schools do not use the exemptions in the Sex Discrimination Act to expel or otherwise discriminate against students on the grounds of sexual orientation, gender identity or intersex status.”*

**1.29** Ms Ann Maree Rebgetz, Board Director of Secondary Principals Australia and principal of St James College in Spring Hill in Brisbane told the committee:

*“Catholic secondary principals have a strong moral compass in relation to the treatment of secondary students in our schools. They believe that inclusivity, as a gospel value, must reign supreme in the treatment of their clientele. This translates into the safeguarding of all students, and particularly those students who are in a minority and may feel marginalised. Religious schools should not be able to discriminate against students on the basis of their sexual orientation and identity.”<sup>11</sup>*

1.30 There is clear evidence based on the experience of states who have already removed such exemptions from their anti-discrimination laws that school ethos and teaching have not been affected by these changes.

1.31 Labor draws on the experiences of schools in state and territories where anti-discrimination laws already cover students under state and territory laws. As Ms Betts, Executive Director, Brisbane Catholic Education Office told the committee in questioning that Catholic schools were happy to comply with Queensland anti-discrimination law:<sup>12</sup>

**Ms Betts:** *As you know, we are required to be compliant with law at both the federal and the state level. The Queensland Anti-Discrimination Act does not allow us to discriminate against students, so we don't and, even if there was an exemption in that act, we would not apply it.*

**Senator PRATT:** *So you've had no cause to want to advocate for an exemption to the Queensland laws?*

**Ms Betts:** *There have been changes to those laws over the last 20 years and there certainly has been advocacy around those laws, the details of which I can't recall because it would go back 10 years now, but that exemption has never been included in the act.*

**Senator PRATT:** *Has that in any way interfered with your capacity to instruct students according to the doctrine and teachings of the Catholic Church and the school ethos?*

**Ms Betts:** *Not to my knowledge.*

1.32 Some churches raised concerns that removal of the exemptions would be see schools becoming subject to litigation. However, Labor notes that the evidence before

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<sup>10</sup> Archbishop Mark Coleridge, President, Australian Catholic Bishops Conference, Committee Hearing, Brisbane, Wednesday, 6 February 2019 Page 13

<sup>11</sup> Ms Ann Maree Rebgetz, Board Director of Secondary Principals Australia, Committee Hearing, Brisbane, Wednesday, 6 February 2019, Page 13

<sup>12</sup> Ms Betts, Executive Director, Brisbane Catholic Education Office Committee Hearing, Brisbane, Wednesday, 6 February 2019, Page 14

the committee showed that discrimination cases are uncommon before the courts and that the overwhelming number of cases are resolved through mediation:<sup>13</sup>

*“People need to understand that discrimination cases are notoriously difficult to run, so much so that former High Court Judge Michael Kirby said that the field of antidiscrimination law is littered with the bodies of the wounded complainants. Launching an action under a federal discrimination law statute requires the financial and emotional resources that many victims of discrimination simply do not possess. On top of that, the vast majority of discrimination complaints, because of the way our system works—we have a cost jurisdiction, so people have to be prepared to expose themselves financially in order to bring a case to court—the vast majority are resolved through conciliation and settled without even going near a court. I think we just have to keep that in mind.”*

1.33 Labor is very concerned that both teachers and students who have suffered detriment because of discrimination on protected attributes under the SDA have no recourse or redress because of permanent religious exemptions. It is also clear that the lack of protections means that those treated less favourably are unable to protect themselves from discrimination or prevent it from occurring.

1.34 Labor notes that inquiry heard from many religious LGBTI people as well as other people of faith are in favour of reform. As the Reverend Doctor Josephine Inkpin, Co-Chair, Equal Voices told the committee:<sup>14</sup>

*“If you fail to remove the discriminatory powers, you keep us chained up to the past and old arguments. Instead, our nation needs to explore the constructive paths that are opening up in some religious quarters, such as the Edmund Rice Safe and inclusive learning communities statement and the Church of England's Valuing all God's children guidelines for addressing homophobia, biphobia and transphobia schools. These provide religious energy to explore these issues and enable all children to flourish without abrogating official Catholic and Anglican positions on issues such as marriage law.”*

### **Teachers and staff**

1.35 Labor affirms its commitment to legislating to remove exemptions from the SDA not only for students but also for teachers and other staff.

1.36 Labor upholds the right of schools to ensure the fidelity of teachers to their school in their conduct within the school. Labor notes evidence before the committee that schools need to rely on exemptions to uphold the fidelity of an employee to their school.

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<sup>13</sup>Anna Brown, Equality Australia, Committee Hansard, Thursday, 7 February 2019, Page 78

<sup>14</sup>Reverend Doctor Josephine Inkpin, Co-Chair, Equal Voices Committee Hearing, Brisbane, Wednesday, 6 February 2019 Page 41

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CHAIR: I might just ask a couple of questions as chair now. I have in front of me Good Works: The Catholic Church as an Employer in Australia, and it has a provision in it around discrimination and harassment within the section about the right to a supportive workplace. ... It says, with respect to exemptions from any antidiscrimination legislation, that the church organisations need to be 'positive and precise in their approach to employment practices'. It says: ... some positions, while not requiring the employee to be a practising Catholic, will still require a commitment not to offend the religious susceptibilities of the organisation by the maintenance of a manner of life and stated beliefs which are in keeping with the teachings of the Catholic Church (e.g. all staff in educational institutions) ... Could you please give me an example of what you mean by 'manner of life and stated beliefs' with respect to the teachings of the Catholic Church?

Mr Collins: An example would be of a teacher who was not supportive of the teachings of the church in relation to a range of matters and who voiced that belief with students or with other staff in a fairly public manner. That would be an issue which would be of concern to the employer—being inconsistent with what you've just read out.

It was noted in the course of this exchange within the committee that the exemptions can't be used to uphold this kind of fidelity as a failure to uphold a specific teaching, but rather needs to be pursued through the contract with the employee. This view was reinforced by the Independent Education Union.

1.37 Mr Anthony Odgers, the assistant federal secretary at the Independent Education Union of Australia, highlight that very few institutions actually overtly use these exemptions from discrimination legislation.<sup>15</sup>

*“Lastly, our experience is that, in the context of rapidly expanding diversity amongst students and staff in schools, only a small and diminishing minority of employers in non-government schools seek to utilise or do utilise the exemptions from discrimination legislation. The majority of employers, perceiving a conflict of interest involving a breach of an employee’s fidelity, treat the issue as a contractual matter”.*

*“Yes. Just in terms of the practical understanding of this, I spoke earlier on of the dividing line. That dividing line is about what you say in public; not only in the context of your own sexuality – I’m sure all members of the committee would be aware of the consequences for people who just seek to disparage their employer or any element of their employer’s business. That is a basic breach of trust, the fidelity component of the relationship. That is the offence. Perhaps not in these instances, which are controversial, but, in most cases where an employee is forced to accept that they are in breach of their employment*

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<sup>15</sup> Mr Anthony Odgers, Assistant Federal Secretary, Independent Education Union of Australia, 19 November 2018, pg. 46 and pg. 49

*contract in respect of the matters that are dealt with by the exemptions, the breach of contract will have occurred around something they've said or done in a public manner. It won't have been as a result of a breach of contract wherein the employer pretends to say, 'You may not be in a single-sex relationship.'*"

1.38 Notwithstanding the fact that in the main schools do not rely on anti-discrimination exemptions to uphold the fidelity of an employee to the employer. The inquiry last year highlighted clear examples of discrimination.

1.39 Evidence again from the independent education unions highlighted the following.<sup>16</sup>

Mr Odgers: There are individuals, in some cases, or there are groups, in some cases, that have what our members would identify as extreme intolerance of behaviours. They're not so much concerned about public statements that might be made by teachers and by other members of staff but as to the person's conduct. Of the examples that are quoted here—which are mostly examples of where an employer has sought to go into a person's private life without that person making any statement that would be necessarily contrary to the employer's beliefs or the beliefs of the employer's faith based group—a lot of these cases come from a very small group of employers.

1.40 Labor is concerned about the very real stress and fear experienced by employees within some schools as a result of these exemptions. Even if a school is otherwise supportive, the fact that the exemptions exist creates a fundamental risk to employees' livelihood, particularly if the school's attitude were to change.

#### **Amendments to the legislation**

1.41 Labor is concerned that amendments put forward to the bill would carve out and entrench discrimination against certain groups in particular—that is, on the basis of sexual orientation, gender identity or relationship status, in particular circumstances. This is completely contrary to the intent of Labor's Bill.

1.42 The Government amendments to the bill would allow discrimination to continue against LGBT students in religious schools.

1.43 The amendment sheet KQ148 circulated would allow discriminatory policies and indirect discrimination in our schools.

1.44 Amendments KQ150 and KQ151 are similar in that they seek to introduce new matters to be taken into account in determining reasonableness under indirect discrimination, which adds unnecessary complexities and may fail to protect LGBT students.

1.45 The Centre Alliance has proposed an amendment which changes the wording from 'body' to 'educational institution'. Throughout the inquiry the committee heard that the scope of subsection 37(3) is very broad due to the use of the term 'bodies

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<sup>16</sup> Committee Hansard, Monday, 19 November 2018, Page 50



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established for religious purposes.’ For example, the Australian Human Rights Commission (AHRC) demonstrated the need 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.”*

1.46 The Law Council of Australia recommended to the committee:

*“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>17</sup>*

1.47 Labor would support an appropriate amendment to clarify the definition of an educational institution. We do not support further amendments from the Government as they are completely unnecessary and cause confusion and undermine the intent of the bill.

### **Conclusion and recommendations**

1.48 Labor is proud to have put forward this bill which will remove the exemptions within the Sex Discrimination Act that allows religious educational institutions to discriminate against children in connection with the provision of education or training.

### **Recommendations**

1.49 Labor recommends that the Senate amend the bill to clarify the scope of educational institutions in section 37 of the SDA.

1.50 Labor recommends that the bill be passed with the above amendment only.

**Senator Louise Pratt**  
**Australian Labor Party**

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<sup>17</sup> Law Council of Australia, *Submission 415*, p. 27.

