



8 November 2018

The Hon Christian Porter MP
Attorney-General
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Concerns about proposed amendments to the *Sex Discrimination Act 1984* (Cth)

We write on behalf of legal academics and practitioners with significant experience and expertise in anti-discrimination law.

We are writing to express our concerns about the proposed amendments to the *Sex Discrimination Act 1984* (Cth) (the SDA), to protect lesbian, gay, bisexual and transgender (LGBT) students against discrimination by religious schools, as reported in the media on 25 October 2018.

We support the repeal of subsection 38(3). However, we do not support, and strongly counsel against, the proposed new subsection 7B(2)(d), which we understand is as follows

if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is a primary school or a secondary school and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

- (i) whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and
- (ii) whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.

The proposed amendment is flawed and should not be enacted for the following reasons.

The provision will be ineffective

Removing the existing exception in s 38(3) without also amending s 37(1)(d) will have no effect. Section 37(1)(d) offers a potentially wider exception than that offered by s 38.

Expanding the exception

The existing exception in s38(3) is limited to discrimination on the ground of a person's sexual orientation, gender identity, marital or relationship status or pregnancy, but the proposed amendment would not be so limited.

The proposed amendment to s7B would introduce a religious consideration in respect of all attributes – sex, intersex status, and potential pregnancy as well as those covered in s 38(3). This is well beyond the announced policy intention, and at odds with what has been reported as a recommendation of the 'Ruddock' religious freedoms review.

Complexity and confusion

Even if the scope of the amendment was confined to the attributes 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.

The current law allows for schools to impose reasonable conditions on students to promote the school's values, through the existing definition of indirect discrimination in the Act. Under the law as it is, a religious school is able to impose a reasonable condition, requirement or practice that has, or is likely to have the effect of disadvantaging LGBT students.

The current test for reasonableness in the SDA is inclusive, and the factors that a court is required to take into account are objective:

- (a) The nature and extent of the disadvantage resulting from the actions of the respondent;
- (b) The feasibility of overcoming or mitigating the disadvantage; and
- (c) Whether the disadvantage is proportionate to the result sought by the respondent.

At odds with this approach, the proposed amendment inserts two subjective criteria, distorting and undermining the objective inquiry required by the definition and the emphasis it places on proportionality.

Australian anti-discrimination legislation is notoriously complex. It is an unfortunate feature of our jurisprudence that many court decisions have further complicated the law, rather than simplifying it. The proposed amendment will introduce further unnecessary complexity and uncertainty.

Alternative approach

We understand that the policy aim is to prevent discrimination against LGBT students while allowing room for schools to maintain a religious ethos. Importantly, this policy aim can be achieved without amending s 7B. The amendments should simply:

- repeal subsection 38(3) of the SDA; and
- amend section 37 to clarify that subsection 37(1)(d) does not apply to the treatment of students by religious schools.

No further amendments are required to achieve the stated policy aim.

We would be happy to meet with you to discuss these concerns. We will be in contact with your office shortly to seek a meeting.

Yours sincerely,



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