



**Submission to the Senate Standing Committee  
on Legal and Constitutional Affairs Inquiry into  
Sex Discrimination Amendment (Removing  
Discrimination Against Students) Bill 2018**

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On behalf of the Castan Centre for Human Rights Law

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Dear Committee

I am an Associate Professor of Constitutional Law at Monash University. I provide this submission on behalf of the Castan Centre for Human Rights Law.

***The Bill***

The Bill provides a modest approach to protecting students from discrimination.

The Bill does two things. First, proposed section 37(3) removes the ability of schools (including religious schools) to discriminate against students in the provision of education.

This amendment puts schools (including religious schools) in the very same position as aged care facilities (including religious aged care facilities). Section 37(2) of the *Sex Discrimination Act* has the effect that aged care facilities (including religious aged care facilities) are not permitted to discriminate in the provision of aged care services. Proposed section 37(3) uses the same language as section 37(2) and simply replaces 'aged care' with 'education'.

Religious aged care facilities have operated for years under this legal regime without any problems. There is no reason to think that religious schools operating under the same legal regime will face any problems.

Another reason to be confident that removing the ability of religious schools to discriminate against students will not cause any problems is because the recent Ruddock Religious Freedom Review tells us so. Some States already prohibit religious schools from discriminating against students and the Ruddock Religious Freedom Review tells us that there are no problems in those States. The Ruddock Religious Freedom Review concluded that there is no need for exemptions from State anti-discrimination laws to

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permit religious schools to discriminate against students. The Review says at paragraph 1.273:

To the extent that some jurisdictions do not currently allow religious schools to discriminate against students on the basis of sexual orientation, gender identity and gender characteristics, the Panel sees no need to introduce such provision. Very few religious schools or organisations submitted that this was necessary.

In simple terms, the effect of the Bill is really just to make the legal situation that has operated for some time in a number of States without problem apply nation-wide.

There may be a case for slightly tweaking proposed section 37(3). 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.

Secondly, the Bill repeals section 38(3). This amendment is a consequential amendment and is necessary to ensure that proposed section 37(3) operates and cannot be circumvented.

### ***The proposed Government amendments***

#### *Proposed section 7B(2)(d)*

The Government's proposed new section 7B(2)(d) is unnecessary and redundant given the proposed section 7E.

#### *Proposed section 7E*

The Government's proposed new section 7E introduces a new reasonableness test applicable to religious schools.

Currently, indirect discrimination is not unlawful if the practice or policy said to be discriminatory is reasonable. Proposed section 7E sets out *one way* in which a practice will be considered reasonable: a practice will be reasonable if the practice is consistent with a published policy.

The requirement for a publicly available policy is a welcome initiative. Religious schools that wish to inflict detriment on students should be honest and upfront about that.

However, proposed section 7E does not make the requirement to have a published policy mandatory. A condition, requirement or practice said to be discriminatory that does not comply with proposed section 7E is not necessarily unreasonable. There is still the possibility that it will pass the reasonableness test in section 7B(2). In other words, in some cases religious schools may be able pass the reasonableness test without having a publicly available policy. The provision should be amended to prevent this outcome.

Proposed section 7E should be amended to provide:

(1) For the purposes of section 7B, a condition, requirement or practice imposed, or proposed to be imposed, in relation to a student by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed is ~~reasonable~~ if **not reasonable unless**:

- (a) 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
- (b) 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 that complies with subsection (2);
- (c) if the student is ~~a child~~ **under the age of 18 years**—in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the ~~child~~ **student**.

(2) A policy of an educational institution complies with this subsection if the policy:

- (a) is in writing; and
- (b) is publicly available; and
- (c) sets out the educational institution's policy in relation to adherence to its doctrines, tenets, beliefs or teachings; and
- (d) complies with any other requirements prescribed by the regulations for the purposes of this paragraph.

Proposed section 7E (amended as suggested) should be supported because it has the effect of narrowing the circumstances in which a school may lawfully discriminate against a student.

#### Proposed section 7F

The Government's proposed new section 7F is incredibly broad: it exempts 'teaching activities' at religious schools from the need to comply with the *Sex Discrimination Act* provided the teaching activity accords with the religion's beliefs.

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 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).

Proposed section 7F appears to be poorly thought out. Proposed section 7F should be rejected.

I trust this submission is of assistance.

Yours sincerely

**Luke Beck**