



Law Council  
OF AUSTRALIA

Office of the President

11 February 2019

Senator the Hon Ian Macdonald  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Senator Macdonald,

**Question on Notice - Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018**

Thank you for the opportunity to respond further to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to its inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (**the Bill**).

During the Committee hearing of 7 February 2019 regarding the Bill (**the Hearing**), the Law Council was asked, as a question on notice, to consider those recommendations made by Anglican Church Diocese of Sydney (**the Diocese**) in its submission which had been discussed earlier during the Hearing.

The Most Reverend Dr Glenn Davies, Archbishop of Sydney, appearing on behalf of the Diocese, emphasised its support for three recommendations from its submission in particular during the Hearing. These are as follows.

New paragraph 7B(2)(d)

As the Committee is aware, subsection 7B of the *Sex Discrimination Act 1984* (Cth) (**the SDA**) sets out the reasonableness test which applies to any consideration of indirect discrimination across the SDA, in any relevant area. It provides that a person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or has likely to have, the disadvantaging effect mentioned in, those provisions which define indirect discrimination<sup>1</sup> if the condition, requirement or practice is reasonable in the circumstances.<sup>2</sup>

The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition of the condition, requirement or practice; and

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<sup>1</sup> SDA, ss 5(2); 5A(2); 5B(2); 5C(2); 6(2); 7(2); 7AA(2).

<sup>2</sup> SDA, s 7B(1).

- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.<sup>3</sup>

This is a non-exhaustive list and other matters may be taken into account.

The Diocese's submission proposes the addition of paragraph 7B(2)(d) to this list as follows:

- (d) *whether the condition, requirement or practice of a body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed is imposed, or proposed to be imposed, in good faith in accordance with those doctrines, tenets, beliefs or teachings or for a religious purpose.*<sup>4</sup>

The submission notes that currently, there is nothing in section 7B that indicates explicitly that practices which uphold the doctrines, tenets and beliefs of a religious education institution are 'reasonable'. It notes that the Bill's Explanatory Memorandum indicates that the Bill will not prevent a faith-based education institution from imposing reasonable conditions, requirements or practices on students in accordance with the doctrines etc of a particular religion or creed. It suggests that this should be made explicit.

The Law Council does not support this proposed amendment. As noted in its submission, the following passage from *Secretary, Department of Foreign Affairs & Trade v Styles*<sup>5</sup> has been described as 'the starting point'<sup>6</sup> in determining reasonableness:

*The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, **against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.***<sup>7</sup> [emphasis added]

On this basis, and as noted in its submission,<sup>8</sup> the Law Council considers that the existing reasonableness test enables consideration of the reasons why a religious educational institution seeks to impose a condition, requirement or practice which engages section 21 of the SDA, and may, according to its definitions, otherwise constitute indirect discrimination. Reasons which a faith-based institution may wish to advance in this regard include the need to:

- impose the condition, requirement or practice in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion; and/or

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<sup>3</sup> SDA, s 7B(2).

<sup>4</sup> The Diocese's submission recommended the introduction of new section 7E (under Amendment KQ148), and recommended new paragraph 7B(2)(d) above in the alternative. However, Archbishop Davies emphasised support for the latter, rather than section 7E, in his evidence to the Committee.

<sup>5</sup> (1989) 23 FCR 251

<sup>6</sup> *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J).

<sup>7</sup> *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 387 (Brennan J) 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed).

<sup>8</sup> For example, at Law Council of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, Submission to the Senate Legal and Constitutional Affairs Committee*, 21 January 2019, pp 32-33, and 37.

- uphold the purposes for which it was established, including to uphold the rights of individuals to manifest their religion in worship, observance, practice or teaching, and the rights of parents or guardians to ensure the religious and moral education of their conformity with their own convictions.

The Law Council considers that these reasons would not be lightly considered by courts as of any weighing-up exercise under the reasonableness test.

Further, it is concerned that proposed paragraph 7B(2)(d) inserts specific matters concerning religious bodies into general definition provisions – that is, into SDA’s general test of reasonableness with respect to the definition of indirect discrimination. This test applies to a wide range of scenarios which may constitute indirect discrimination, well beyond those which involve religious bodies. The Law Council considers that it is inappropriate that the general test should place specific emphasis on this one issue. It is concerned that over time, this insertion may lead to an expanded list of specific criteria under subsection 7B(2), which are similarly unnecessary and add to existing complexity in this area of law.

Amended new section 7F

The Australian Government currently proposes an amendment to the Bill which would insert new section 7F (KQ 149). There are a number of concerns with this proposal.

First, the proposed section 7F is not confined to indirect discrimination in the sense that it is intended to be an element or factor to be taken into account when determining how the definition of indirect discrimination operates.

Secondly, the language ‘*Nothing in the SDA renders it unlawful to...*’ will operate as a very broad exemption or carve out from the SDA any unlawful conduct in teaching activity that satisfies (i) and (ii). This means section 7F will be a broader exemption than section 37 because it will apply to the whole of Part II, Divisions 1, 2 and 3 and Part IV. The proposed section 7F is not limited to section 21 of the SDA. This means for example, it would permit discrimination in the provision of ‘services’ if the teaching activity could be characterised as a ‘service’. It would permit sexual harassment effectively overriding section 28F of the SDA if the sexual harassment occurred in the context of a teaching activity. It would also permit victimisation effectively overriding section 94 of the SDA if victimisation occurred in during a teaching activity.

Under KQ 149, proposed subsection 7F(1) would provide that:

***7F Educational institutions established for religious purpose***

*Nothing in the SDA renders it unlawful to engage in teaching activity if that activity:*

- (i) is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and*
- (ii) is done by, or with the authority of, an educational institution that is conducted with those doctrines, tenets, beliefs or teachings.*

‘Teaching activity’ is defined in proposed subsection 7F(2) as ‘any kind of instruction of a student by a person employed or otherwise engaged by an educational institution’.

The Diocese's submission proposes instead that new section 7F would read as follows:

**7F Educational institutions established for religious purpose**

- (1) *For the avoidance of doubt, it is no detriment to a student, nor does it amount to less favourable or disadvantageous treatment of a student, for a teaching authority to engage in teaching activity if that activity:*
  - (i) *is in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and*
  - (ii) *is done by, or with the authority of, an educational institution that is conducted with those doctrines, tenets, beliefs or teachings.*

The same definition of 'teaching activity' would apply as under KQ 149.

The Diocese states that faith-based schools are concerned that, without the protection of subsection 38(3), the act of teaching from religious texts might expose a school to accusations of discrimination. For example, it notes that 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. It considers that clarity is needed on the ability to teach in accordance with religious doctrine.

The Law Council considers that this amendment is unnecessary.

As outlined in its submission with respect to KQ149, it considers that if the Bill were passed, a faith-based educational institution would not be precluded from conducting reasonable teachings of the doctrines, tenets, beliefs or teachings of its particular religion or creed under the SDA's provisions. If otherwise, this would significantly frustrate the purposes behind the school's establishment and impede the rights of individuals to manifest their religion.

As noted in its submission, there are significant hurdles which would need to be overcome before such teaching activity could be considered to fall within the SDA's prohibitions. These include engaging section 21 in the first instance, and meeting relevant indirect discrimination definitions in Part I. As noted in the Law Council's submission,<sup>9</sup> under the SDA indirect discrimination provisions, the focus is on whether a group of people with the same attributes as the complainant would be disadvantaged by the condition, requirement, or practice. It is not simply that an individual suffered harm or 'objected' to material being taught. Further, relevant caselaw under the *Disability Discrimination Act* 1992 suggests that the requirement of a 'disadvantageous effect' would be a difficult threshold for a complainant to establish.

As further discussed,<sup>10</sup> the Law Council considers that in the unlikely event that these hurdles were overcome, a school may, at most, be required to accommodate the needs of a vulnerable and distressed student having regard to the existing reasonableness test. This might involve making arrangements for the student to elect not to attend a particular class or classes. In the Law Council's view, this would reflect a reasonable outcome, which a school would be capable of managing without undermining its purposes.

The Law Council is further concerned about the Diocese's amended section 7F for several reasons. These are similar to those concerns raised in its submission regarding KQ 149.

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<sup>9</sup> Law Council of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, Submission to the Senate Legal and Constitutional Affairs Committee*, 21 January 2019, p 31.

<sup>10</sup> *Ibid*, pp 36-38.

It notes that it would remove teaching activity from the prohibition on discrimination in education under paragraph 21(2)(c), concerning 'subjecting the student to any other detriment', provided that its requirements are met.

The effect of this proposal is to effectively repeal paragraph 21(2)(c) or give it limited or no operation.

The Law Council notes that the proposal refers to 'disadvantageous treatment' which is not consistent with the language of the SDA or a concept used in the SDA.

It would also remove this activity from the definitions of both direct and indirect discrimination under the SDA. This would extend to instances in which individual students were treated less favourably as part of the 'teaching activity'. For example, this might involve:

- providing inferior tuition to a student on the basis of, for example, their gender, sexual orientation or gender identity. For example, transgender students may be segregated from the class and taught in another room;
- imposing more onerous requirements on certain students because of their attributes, such as requirements to attend individual classes with a priest or rabbi to 'overcome' their sexual orientation;
- excluding girls from parts of a biology class, because sex education is considered unsuitable for girls according to religious doctrine; or
- requiring a same-sex oriented student to pay penance for their sins, as part of a class on sexuality.

The Law Council fully accepts that many religious educational institutions currently adopt a pastoral and caring approach to students and would further consider that such actions would fall outside religious doctrine, precluding them from being taken or falling within the terms of the exemption. However, proposed section 7F leaves open these possibilities for other institutions which may take a different approach which may have harsh consequences for students which impact upon their health and wellbeing. Laws must be enacted in order to guard against individuals who may act in a manner which harms children.

The Law Council further notes that proposed section 7F contains a very broad definition of 'teaching activity' which:

- is not restricted to activities undertaken by a teacher, but 'any person employed or engaged by the educational institution', such as a sports coach;
- means 'any kind of instruction of a student'; and
- could encompass activity outside, as well as inside, a classroom, such as on the sports ground.

Proposed section 7F also 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'.<sup>11</sup> This may, for example, include teaching activities which are conducted offsite by contracted camp staff. This contrasts with existing subsection 38(3),

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<sup>11</sup> Proposed subsection 7F(2).

which requires that the discrimination be 'in connection with the provision of education or training by the educational institution' (emphasis added).

Proposed section 7F also provides an exemption for discrimination against a person on any ground covered by the SDA. Currently, subsection 38(3) provides an exemption only with respect to particular grounds.<sup>12</sup> Section 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. This would be a backward step.

Finally, proposed section 7F would only require that the discrimination in question be 'in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed', and that it is done by, or with the authority of, an educational institution conducted in accordance with these doctrines, etc. Unlike existing subsection 38(3), it does not require that the discrimination also be 'in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

For the above reasons, the Law Council does not support proposed section 7F, including as amended by the Diocese.

#### New subsection 37(3)

The Diocese supports Professor Patrick Parkinson's proposed amendment to section 37 with a new subsection 37(3) in the following terms:

(3) Paragraph (1)(d) does not apply to an act or practice of **an educational institution for children under 18 that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed (being a body established for religious purposes)** if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(a) the act or practice is connected with the provision, by the body, of education **or training in that institution**; and

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

The Law Council proposed an amendment to the proposed subsection 37(3) that confined the operation of the subsection to **an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed**.

The Law Council notes that this amendment would further confine the operation to school aged children. It further notes that some students may attend secondary school who are over the age of 18 years.

Subject to that clarification, the proposal is not materially different to the Law Council's proposal at paragraph 82 of its submission.

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<sup>12</sup> A person's sexual orientation, gender identity, marital or relationship status, or pregnancy: SDA, s 38(3).

Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at [leonie.campbell@lawcouncil.asn.au](mailto:leonie.campbell@lawcouncil.asn.au) in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

**Arthur Moses SC**  
**President**