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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Submission to Inquiry into *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill* 2018

Dear Dr Turner;

Thank you for your correspondence of 6 December 2018, noting the establishment of an Inquiry by the Senate Legal and Constitutional Affairs Legislation Committee and inviting a submission. I note that the Senate has referred the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill* 2018 ("the Bill") (and circulated amendments thereto) to the Committee for inquiry and report by 11 February 2019. I also note the advice on the Parliamentary website that: "There are no terms of reference for a bill, because the committee is seeking comments on the bill itself."

I provide the following comments on the Bill and its associated amendments.

1. Background to the Bill and amendments

The Committee will no doubt be familiar with the background to the Bill and its associated amendments, but it may be worth briefly noting this. The impetus for the Bill was the leaking of the 20 recommendations from the final Report of the Expert Panel on Religious Freedom chaired by the Hon Philip Ruddock, before the full Report or the Government response to it had been made public. (The *Religious Freedom Review Report* was of course later released on 13 Dec 2018, along with the *Australian Government Response*.)

Behind the commissioning of the Ruddock Panel lay the debate on the change of Australian law to recognise same-sex marriage. Concerns were expressed during that debate about the limited nature of protections for religious freedom in Australia, a matter which the Panel were asked to address.

As the Panel identified, one of the ways in which religious freedom has been protected in Australia, in the absence of any overarching legislation on the topic, has been through the enactment of "exemptions" or "exceptions" to discrimination law on other topics (or, as I have called them in the past, "balancing clauses", as they are designed to balance the right not to be unjustly discriminated against, with rights of free exercise of religion.)[1]

In the course of examining such laws, the Panel noted that there were exemptions in discrimination laws which prohibited discrimination on the grounds of sex, sexual orientation, marital status, pregnancy or gender identity, applying to religious or faith-based schools. Such exemptions were necessary, as the view of many religious groups on appropriate sexual activity and identity often differ from the prevailing views on

[1] See N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430.

these matters in the community, and these exemptions protected the rights of religious schools to operate in accordance with their religious world-view.

Four of the Panel's recommendations, Recs 5, 6, 7 and 8, however, while implicitly accepting the need for the exemptions, were designed to tighten up or "narrow" the grounds on which such exemptions were available.

Unfortunately, when those recommendations were leaked to the press without their surrounding context, their wording suggested to some that the Panel had recommended some completely new form of discrimination, especially as related to same-sex attracted (SSA) students. All sides of politics condemned the idea that a student could be expelled from a religious school simply because of their internal "sexual orientation". This led to commitments that the relevant provision technically allowing this action to be taken, s 38(3) of the *Sex Discrimination Act* 1984 (Cth), would be repealed or amended in short order.

It has to be repeated, as has been said many times, that there is **no** evidence that any SSA student has been expelled by a religious school on the basis of internal orientation alone, nor do schools argue that they should be able to do so.

But while there should be no toleration for animosity towards, or bullying of, SSA students, there are serious issues around behaviour and conduct connected to this area, which religious schools have to deal with. One of the primary reasons that these schools are established, is so that a religious world-view can be presented to students. Parents send children to a Christian school, for example, assuming that the school will be both teaching and modelling Christian virtues, which include those such as self-control and abstaining from inappropriate sexual activity outside the pattern set by the Bible.

2. The Bill

The Bill, as introduced by Senator Wong, seems to have been intended to mainly deal with the spectre of SSA students being expelled, or denied entry to, schools on account of their internal orientation. But, with respect, as currently drafted it has unintended consequences far beyond that limited situation.

The Bill repeals s 38(3) of the SDA, and adds a further paragraph to s 37 of the Act:

> (3) Paragraph (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.

The purpose of the s 37 amendment seems to be to make it clear that a general balancing clause applying to a "body established for religious purposes" cannot be used as a substitute for the repealed provision of s 38. The amendment follows the pattern of s 37(2), which removes the operation of the general s 37 exemption from decisions in relation to residents accessing Commonwealth-funded aged care (although allowing the exemption to still operate in relation to staff at such aged care institutions). Similarly, the Bill here will not, as it currently stands, impact the provisions of sub-sections 38(1) and (2), which allows religious schools to take into account sexual orientation and other matters in dealings with their staff. (Amendments of that sort have been foreshadowed by the ALP but are not dealt with in this Bill.)

The Bill will ensure that religious schools cannot choose to expel students on the basis of their internal sexual orientation alone. It is interesting to note that, in the Explanatory Memorandum provided with the Bill, Senator Wong makes the following comments:

> 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 education 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 (at p 1.)

Further elaboration of this point later in the document adds:

> [T]he Bill will not amend section 7B of the SDA and so will not prevent a faith-based education institution from imposing reasonable conditions, requirements or practices on students in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed (at p 5.)

Despite the assurances offered in the Explanatory Memorandum, there is a real danger that the amendments made by this Bill will seriously impair the religious freedom of faith-based schools, and more legislative clarification is required to avoid this outcome. As noted below, it will also have an impact on other institutions.

To understand why, it is worth noting the difference in discrimination law between "direct" and "indirect" discrimination. In broad terms, a "directly" discriminatory action is one that is clearly based on a "prohibited ground". Refusing to employ someone from Sweden, because they were Swedish, would be an example of direct racial discrimination. But "indirect" discrimination is where a condition for employment is imposed which does not, on the surface, seem to be based on a prohibited ground, but on further examination invariably impacts people from one group, more than another. Imposing a "height" requirement for a job, for example, may detrimentally impact people from an ethnic group which tends to be shorter, and amount to indirect racial discrimination.

The SDA forbids both direct and indirect discrimination on various grounds. In relation to "sexual orientation", s 5A(1) forbids direct discrimination, and s 5A(2) indirect discrimination.

So, for example, suppose a school has a rule that says, "students shall not establish clubs that advocate for a world-view contrary to that of the Bible". Here it could be claimed that, even though this policy does not itself target homosexual students, that it might be an act of **indirect** discrimination under s 5A(2) SDA, as the school "imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person". Such a policy may have a differential impact on SSA students, as they are more likely to want to set up a "gay support club" than heterosexual students.

But s 5A(2) is subject to a "reasonableness defence" under s 7B (see s 5A(3)), and under s 7B the school could argue that the "condition, requirement or practice is reasonable in the circumstances"- s 7B(1). It could be argued that the condition is imposed in good faith as part of the school's religious framework (ie it is the sort of thing parents who send their children to the school would expect and is consistent with classical Christian views). However, a problem with this approach is that this will give a secular court the task of determining whether a school policy of a religious nature is "reasonable".

But there is another problem in relying on the provisions relating to "indirect" discrimination to allow schools to act in accordance with their religious beliefs. Consider another example: suppose a school rule says something like "students may not bring same-sex partners to school socials". Agree with it or not, one can imagine that a religious school based on a Christian moral framework may wish to not encourage the celebration of homosexuality at a major school social event.

While the rule seems not to be explicitly targeted at "sexual orientation" (viewed merely as internal feelings), this might still be a rule which amounts to "direct

discrimination" as legislatively defined in s 5A. Under s 5A(1)(b) one would have to say that "expressing romantic affection for a same sex partner" is "a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person", and hence this behaviour looks to be directly discriminatory. Hence s 7B's "reasonableness" analysis is not applicable (as under s 7B(1) the defence does not apply to a case of **direct** discrimination under s 5A).

Some might respond- but surely the school social rule is a rule based on "conduct", the act of *expressing* one's sexual orientation, and so any decision based on that would not be a decision based on "orientation" alone? (This type of argument was put forward in the Senate second reading debate by Senator Keneally, who suggested that another Senator seemed to "misunderstand the difference between identity and actions".)

However, while this distinction may make sense in a religious framework, it has to be said that a number of court decisions in the past have refused to accept a distinction between "orientation" and "conduct" (or between "identity" and "actions"). In a recent seminar paper, I gave some examples of court cases where courts have said: if some behaviour is "indissolubly connected" with sexual orientation, then making a decision on the basis of that behaviour, *will* be seen as making a decision on the basis of sexual orientation.[2]

While the assurances offered in the Explanatory Memorandum noted above sound reassuring, then, there will still be some doubt as to what would, and would not, amount to direct or indirect discrimination, and what would be "reasonable" conduct rules that schools could enforce. The courts have been very clear that assurances made in ancillary material provided to, or speeches made in, Parliament, do not determine the content of the law.[3]

To avoid such doubt, it would be better, rather than completely removing s 38(3), to replace it by a provision that explicitly authorises schools to apply policies as to acceptable conduct which are in accordance with their fundamental faith commitments. I suggest a possible amendment to s 38(3) which would achieve this result:

> **Suggested Amendment No 1**
> **Possible new SDA 38(3)** Nothing in s 21 renders it unlawful for an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, in connection with the provision of education or training, to set and enforce standards of dress, appearance and behaviour for students, so long as this is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[4]

There are two other problematic aspects of the current Bill.

First, the s 38(3) amendment will not simply remove protections from primary and secondary schools, but also from other types of "educational institutions" (defined in s 4 of the SDA as a "school, college, university or other institution at which education or training is provided"). As noted by the Institute for Civil Society in a comment on a previous Greens Bill (worded in the relevant part in a similar way):

> Beyond schools, the Bill removes exemptions for education by theological colleges. It also applies to any education provided by a religious institution. For example, the training services

[2] See the paper linked in my blog post, "Religious Freedom and Religious Schools" (Nov 8, 2018) https://lawandreligionaustralia.blog/2018/11/08/religious-freedom-and-religious-schools/ , where examples are given at pp 10-12.

[3] See, for example, the comments of Spigelman CJ in *Harrison v Melhem* [2008] NSWCA 67 at [14]: "a statement of intention in a Ministerial Second Reading speech will not prevail over the words of the statute".

[4] It should be noted that a provision to similar effect is already contained in the Victorian *Equal Opportunity Act 2010, s 42*. This provision also requires the views of the local school community to be considered. The equivalent in the context of the SDA would be allowing the school to operate in accordance with its religious ethos.

> provided for youth workers, chaplains, missionaries, or instructors in theological education. The only training left untouched by the Bill is for candidates seeking to become clergy in the faith, such as imams, rabbis, or priests.

The protections would also be removed from other "faith based" colleges and tertiary institutions.[5]

Secondly, the amendment to s 37 will arguably have very wide-reaching consequences beyond the context of schools. While apparently designed as an "anti-avoidance" provision to prevent religious schools avoiding the impact of the repeal of s 38(3), the drafting opens up a range of very serious outcomes. For one thing, the provisions of s 37 are not limited to "educational institutions" but apply to *every* "body established for religious purposes", which of course will include churches and a whole range of other bodies set up with religious aims. Next, the area in which the s 37(1)(d) protection is removed is simply described as "education". That word is so broad (going far beyond provision of formal education in schools and colleges) that it might cover, unless somehow other constrained, teaching the Bible in Sunday Schools, in small Bible study groups, and presumably in churches, mosques and synagogues in their public meetings.

If these outcomes are clearly not the intention of the amendments, then at the very least the s 37(3)(a) amendment should be amended to make this clear. It could be reframed, for example, in this way:

> **Suggested Amendment No 2 (if s 38(3) is repealed)**
> **Possible Revised s 37(3)** Paragraph (1)(d) does not apply to an act or practice of an educational institution providing primary or secondary education primarily to persons under the age of 18 years, 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:
> (a) the act or practice is connected with the provision, by the institution, of education or training; and
> (b) the act or practice is not connected with the employment of persons to provide that education or training.

While the above is a possible amendment to the proposed s 37(3) if the repeal of s 38(3) is to be proceeded with, my **preferred** option is for a much more limited amendment to s 38(3), as outlined above. In that way, my Suggested Amendment 1 is an alternative to Suggested Amendment 2.

The sensible reform of removing the right of religious schools to expel same sex attracted students could be dealt with by adopting my Suggested Amendment 1. That would be a preferable way to balance the important rights of religious freedom at stake here, with the right not to be discriminated against on the grounds of sexual orientation. In that case a very limited "anti-avoidance" amendment to s 37 could simply provide as follows:

> **Suggested Amendment No 3 (if Suggested Amendment No 1 is adopted)**
> **Possible revised s 37(3)** Nothing in para (1)(d) shall be read as permitting an educational institution which is a body established for religious purposes to expel, or deny enrolment to, a student or potential student, simply on the basis of their internal sexual orientation.

3. Circulated amendments

There are a number of amendments to the Bill which I would like to briefly comment on.

[5] See an article in *The Australian*: "Colleges fear fallout for Christian views" (29 Nov, 2018).

a. Greens amendments

Amendments moved on behalf of the Australian Greens by Senator Rice (designated sheet 8601) would in effect expand the scope of the amending Bill to completely remove any protections applying to religious schools in dealing with both staff and students. For reasons noted in an earlier comment on a similar Greens-sponsored Bill, these amendments would be a serious infringement of religious freedom of religious schools and should be rejected.[6]

Religious schools exist because parents want the option to see their children educated in an institution which supports their religious and moral worldview. Students do not just learn academic truths from their teachers; in many cases they admire them as people, and model themselves on the values their teachers live out. Hence someone who is committed, by their identification and activity, to opposing the moral framework of the school, is not suitable to be working as part of that school community. A fully committed member of the Conservatives would not be suitable to work in the office of the Greens. The same issues arise in relation to religious schools and same sex-oriented teachers.

It should be noted that by removing any ability of religious bodies to act in accordance with their religious beliefs in "education" in general, the amendments would have the same wide-reaching effect on churches, mosques, synagogues, youth clubs, and other activities noted above in relation to the main ALP-sponsored Bill.

b. Centre Alliance amendments

On behalf of the Centre Alliance group, Senator Patrick has tabled some amendments at sheet 8614. The effect of these amendments to the main Bill would be to limit the operation of the proposed amendment to s 37, so that it no longer applied to all "bodies established for religious purposes", but only to "educational institutions" established for religious purposes. This is a sensible amendment limiting the unintentionally over-broad reach of the s 37 amendments proposed by the main Bill. It would, however, still mean that tertiary educational institutions would no longer be able to conduct their educational operations in accordance with their faith commitments, and on that ground, I do not support it as it stands now. That said, the effect of the amendments proposed by Senator Patrick would be very similar to the revised version of s 37(3) I suggest above in Suggested Amendment No 2, if the provision was to exclude tertiary institutions.

c. Government amendments

The Government amendments to the main Bill, in my view, are mostly sensible changes, though I also see some possible problems with them.

1. Deleting proposed new s 37(3)

One amendment, numbered KQ147, deletes the part of the Bill which adds new s 37(3). As noted above, that provision is one that creates a number of unpredictable consequences, not just for religious schools but also for churches generally.

Removal of the Bill's proposed s 37(3) is supported. (I have already suggested above an alternative wording for a possible version of a s 37 "anti-avoidance" provision which would better achieve the aims of those concerned with schools avoiding the implications of the repeal of s 38(3).)

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[6] See "Greens Bill a serious attack on religious freedom" (Oct 18, 2018) https://lawandreligionaustralia.blog/2018/10/18/greens-bill-a-serious-attack-on-religious-freedom/ .

2. Adding a "reasonableness" test for "indirect discrimination"

A couple of the other proposed Government amendments seem to be aimed at achieving similar goals- they are apparently alternatives to each other rather than cumulative. In broad terms they seek to deal with the problem of religious schools not being able to "directly" discriminate, by clarifying factors that can be taken into account in dealing with a charge of "indirect" discrimination.

I think the most helpful of these is amendment KQ148. It would add a new s 7E:

> **7E Educational institutions established for religious purposes: reasonableness test**
> (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:
> (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); and
> (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.
> (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.

This new provision relates to determining whether the imposition of some requirement on students which is "indirectly discriminatory", is "reasonable". It is a specific clarification of the "reasonableness" defence which already exists under s 7B, and which as noted above was said to be operative in this context in the Explanatory Memorandum to the Bill. Its advantage is that it provides more clarity about how that defence will operate in the case of religious schools.

For example, a religious school may have a policy that students may not conduct activism campaigns which undermine the religious ethos of the school. This would prevent, for example, students setting up an "atheism" club. It may also prevent establishment of an LBGTI club. While the policy on its face does not seem to discriminate against students on the ground of their sexual orientation, it could be argued by SSA students that is "indirectly discriminatory" under s 5A(2) of the *Sex Discrimination Act* 1984 (Cth), because it imposes a requirement that "disadvantages" such students.

Using proposed new s 7E the school will be able to say: this policy is "imposed … in good faith in order to avoid injury to the religious susceptibilities of adherents of [our] religion or creed". If they have made their policy clear and in writing, that will satisfy the section, so long as they can then show that the school "has regard to the best interests of the child".

Here, however, is the **first problem** I see with this provision. How will the "best interests of the child" be established? Of course, I support, as all schools would support, decisions being made in the best interests of children. But determining *what* that means may be difficult, especially if the matter has to go to a secular court. The school may be convinced that the best interests of children at the school will be served by them not being tempted to move away from the teachings of their religion by other students

engaged in activism. But a secular psychologist may say that an SSA student should be supported and encouraged in their chosen sexual activity.

Belonging to a religious community may mean a view on human flourishing which is quite different to others in the wider community. That is what true "diversity" means, and why we allow faith-based schools in the first place. I think this "best interests" test will not be helpful, unless it is accompanied by some phrase such as "under the religious beliefs of the institution". But it would be better simply to remove it.

The **second problem** I see with this approach, however, is that providing a defence for an "indirect discrimination" claim, does not solve the problem created in the "direct discrimination" area. The defence in s 7B does not apply where there the very ground of the discrimination is the "prohibited ground" under discrimination law.

At the risk of repetition, religious schools, as indicated previously, do **not** want to "expel" or discipline students simply on the basis of their internal "sexual orientation". But the reach of the "direct discrimination" provisions as drafted go well beyond that. Courts have ruled in the past that one cannot separate "homosexual orientation" from "homosexual activity" and "support for homosexual activity". One clear example comes from the decision of the Victorian Court of Appeal in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75, where a Christian youth camp were told that their decision not to hire their premises to a group wanting to run a week-long camp for same sex attracted youth, the aim of which was celebrate and normalise homosexual attraction, amounted to discrimination on the grounds of sexual orientation. In response to their claim that the decision was not made on the basis of the *orientation* of the persons involved (that the camp was perfectly happy to host lesbian parents, for example, at an ordinary family weekend), the Court of Appeal ruled that a distinction could not be made between "orientation" and "support for homosexuality".

> To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity. (Per Maxwell P, at [57])

So, if protection against "direct discrimination" in this area is removed, what will go is not only the never-used right to expel students on the basis of their internal orientation, but also the right for schools to set out policies which relate to student behaviour and might be viewed by a court as "indissociably linked" to orientation. So, as noted previously, a school policy which said that same sex partners should not be brought to a school formal, would arguably also be under threat of a claim for direct discrimination. And it would not be protected by this new s 7B, or any other protections relating to "indirect" discrimination, because it would (whether one agrees with this or not) probably be regarded as an act of "direct" discrimination.

As noted above, what I think is needed is a clear protection against **both** direct and indirect discrimination claims, such as is present in current s 38(3). It could be refined to make it clear that it does not apply to a decision based on internal "orientation" alone, but it must cover policies of a religious school which relate to conduct and behaviour, in accordance with my Suggested Amendment No 1.

3. Exempting "teaching activity"

Finally, amendment KQ149 does something a bit different. It inserts a new, more general provision as s 7F:

> **7F Educational institutions established for religious purposes**
> (1) Nothing in this Act renders it unlawful to engage in teaching activity 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 those doctrines, tenets, beliefs or teachings.
> (2) In this section:
> *teaching activity* means any kind of instruction of a student by a person employed or otherwise engaged by an educational institution.

This amendment will over-ride both direct and indirect discrimination provisions which would otherwise be applicable. It gives protection to "teaching activity" by faith-based educational institutions which is in done in good faith in accordance with the doctrine of the faith.

This new section seems a sensible amendment. It would be particularly helpful if the widely drafted s 37(3) amendment in the current main Bill were passed. In that case it would protect the right of schools and colleges to teach in accordance with their faith commitments without being accused of direct or indirect discrimination. However, it should be noted that this clause would **not** protect other "religious bodies" such as churches, mosques or synagogues to provide education in public meetings, services, Sunday Schools or small groups. So, it if is designed to respond to the s 37(3) problems it does not, on its own, go far enough.

The other gap not covered by this new s 7F is that it does not apply to "behaviour and conduct" policies that schools may wish to implement as part of their corporate life together. Many religious schools operate as faith communities where everyone, from the principal to the religion teacher to the maths teacher and the administrative staff, is expected to model religious values in their activities and lives. So, while it seems sensible to have clear protection for the *teaching* that happens in the classroom, more is needed to protect the *community life* of the school. Section 7F, in other words, would give no protection for school policies relating to student support for the religious ethos of school outside the actual classroom.

I suggest that s 7F(1) would better reflect the requirements of religious freedom if it were redrafted as follows (with my suggestions in bold italics):

> **Suggested Amendment No 4**
> **7F Educational institutions established for religious purposes**
> (1) Nothing in this Act renders it unlawful to engage in teaching activity ***or for an educational institution to prescribe a student conduct policy*** if that activity ***or policy***:
> (a) is ***engaged in, or prescribed*****,** in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
> (b) is ***prescribed or*** done by, or with the authority of, an educational institution that is conducted in accordance with those doctrines, tenets, beliefs or teachings.

To sum up, these amendments proposed by the Government will soften the edges of the problems created by the main Bill. But they are still not sufficient to deal with all the restrictions that would result for faith-based schools to operate in accordance with their religious convictions in the whole life of the school community, unless amended as suggested.

d. An Opposition amendment to the second reading motion

It should also be noted that Senator Jacinta Collins, on behalf of the Labor Party, gave notice on Monday 3 December of a second reading amendment to the motion for a second reading (not to the Bill itself). This motion mirrored the language of the proposed 7F(1):

> At the end of the motion, add:

> "but the Senate is of the opinion that: Nothing in the Sex Discrimination Act 1984 renders it unlawful to engage in teaching activity 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 those doctrines, tenets, beliefs or teachings".

While it is not satisfactory to attempt to express views on substantive matters of legislative policy through the second reading motion, the fact that this expression of "opinion" was moved by the ALP sits oddly with some later legal advice that was referred to by the Leader of the Opposition. Before Parliament rose for 2018 the Prime Minister foreshadowed a possible form of legislation that might be used, adopting the language of the proposed s 7F in document KQ149. But then a legal opinion by Mark Gibian SC was relied on by the Opposition to say that a form of amendment of this sort would be opposed.

The full text of this opinion was released on social media. The opinion was highly unsatisfactory, for reasons set out in detail in a previous submission to the Committee (letter from Prof Patrick Parkinson, Dean of the University of Queenland's TC Beirne School of Law, entered as Submission No 45), to which I am a co-signatory and the terms of which I will not repeat here. I simply reiterate that there is no plausible reading of religious doctrine which would allow sub-standard education to be provided to SSA students, nor any actual examples of such.

e. A final issue: Constitutional validity

Finally, I think the Committee ought to be aware that there is a reasonable case to be made that the Bill may contravene the prohibition in s 116 of the Constitution against the Commonwealth Parliament making a law for "prohibiting the free exercise of any religion".

While the precise interpretation of this clause has been a matter of uncertainty, it can certainly be argued that it forbids the "undue" impairment of religious freedom.[7] The fact is that religious freedom in Australia, certainly at the Commonwealth level, is largely protected at the moment through "balancing clauses" inserted into discrimination legislation. This Bill as it presently stands, by its repeal of s 38(3), completely removes the protection currently provided to faith-based educational institutions against a claim of direct discrimination made against the institution in the area of provision of education, even where the alleged discrimination has arisen as a result of decisions made "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". It also has, in its framing of new s 37(3), a seriously detrimental impact on the ability of bodies established for religious purposes to conduct their affairs in ways that "conform to the doctrines, tenets or beliefs of that religion or [are] necessary to avoid injury to the religious susceptibilities of adherents of that religion", where decisions are made in relation to "education" in general.

The Bill has the stated aim of dealing with discrimination issues; but in doing so, it chooses to attack religious freedom. It is clearly targeted at religious schools. In the draconian changes it makes to a regime of protection of religious freedom that has broadly been in place since the SDA was first enacted in 1984, its purpose and effect is nothing less than the impairment of religious freedom. For reasons noted above, this is an "undue" impairment, as there are a number of other options to deal with the possible discrimination issues which provide a more balanced approach and preserve the religious freedom of faith-based schools. There is a clear case to be made that the Bill is invalid as in breach of s 116.

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[7] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, per Latham CJ at 128.

4. Overall recommendations

In conclusion, I would recommend to the Committee that the current Bill be amended in the following ways:

(1) My **Suggested Amendment No 1** be adopted, which would amend s 38(3) rather than repeal it, while clearly removing any argument that SSA students could be lawfully expelled or denied enrolment on the basis of their self-identification as homosexual alone.
(2) If that occurs, then my **Suggested Amendment No 3** be adopted as an "anti-avoidance" provision in s 37.
(3) If the Committee decides, contrary to my recommendation, to support the blanket repeal of s 38(3), then
    a. My **Suggested Amendment No 2**, to narrow the scope of the s 37 changes to cover the precise circumstances required, be adopted;
    b. **Government Amendment KQ148** be supported, inserting a clarified "reasonableness" provision as new s 7E, but with either the deletion of clause 7E(1)(c), or the clarification that the "best interests" test must be determined "under the religious beliefs of the institution";
    c. Government Amendment KQ149 be supported, inserting a new s s 7F, but that the form of s 7F be in accordance with my **Suggested Amendment No 4**.

I thank the Committee for the opportunity to provide these comments.

Regards

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[8] These comments, of course, are made in my private capacity and are not to be taken as representing the views of my institution.