

MICHIGAN FAMILY FORUM

Sound Public Policy for Stronger Michigan Families

Michigan Civil Rights Commission – Comments on Interpretive Statement

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Michigan Family Forum strongly urges the Michigan Civil Rights Commission (“Commission”) to decline to issue an interpretive statement that includes “gender identity” and “sexual orientation” in the prohibition on sex discrimination in the Elliott-Larsen Civil Rights Act. Such a determination would be a significant departure from existing public policy, and it should be left up to the Legislature, or to the people, to establish that new public policy.

The Michigan Constitution appropriately places the Commission in Article V, as a body within the executive branch. It is widely understood that the executive branch, at all levels of government, is responsible for executing the laws created by the legislative branch or by the people. It is not charged with creating law. The Commission would essentially be creating law by issuing a definition heretofore unrecognized.

Even the proponents “recognize that a statutory amendment will remain necessary, even if the Commission issues the interpretive statement.” Nonetheless, proponents argue, “the issuance of an interpretive statement...would provide LGBT Michiganders with access to the Commission’s administrative remedies when they face discrimination.” In other words, the Commission’s actions would have the force of law to do what the legislature has declined to do.

The legislature’s inaction is not a mere oversight. Even the advocates recognize that the measure being requested was first introduced over three decades ago. Legislation was introduced in both the House and the Senate again this session, allowing either body to discuss and to vote on the measure at any time. Like all previous versions introduced, the current bills retain the word “sex” and add the phrases “sexual orientation” and “gender identity or expression” as separate protected classifications. The intent is clear, the word “sex” in current law does not include “sexual orientation” or “gender identity or expression” and it would not be understood to include those classifications under the proposed laws. It is not the role of the Civil Rights Commission to go where the legislature has chosen not to go.

Existing law reinforces the clear understanding that the word “sex” does not include the proposed interpretations, particularly in the case of the phrase “sexual orientation.” The phrase “sexual orientation” appears three times in Michigan law. In all three instances, the word “sex” or “gender” also appears as a separate and distinct classification from that of “sexual orientation.” Elsewhere, existing law interchangeably uses the words “sex” and “gender” in a way that clearly denotes the biological sexes and could not reasonably be interpreted to include sexual orientation or gender identity without the legislature explicitly redefining those terms.

Most importantly, the Elliott-Larsen Civil Rights Act clearly uses the terms “gender”, “1 sex” and “both sexes” in a way that clearly means biological sex and not “sexual orientation” or “gender identity.” Again, it would be wrong for the Commission to impose on the legislature’s words a meaning which was never intended. To do so is to co-opt the role of the legislature.

The bulk of Equality Michigan’s argument to issue an interpretive statement relies on the use of federal law and court decisions. According to Equality Michigan, “the significant body of existing federal precedent can and should be used to interpret Michigan law...” We do not agree with this position and believe that such recommended action entirely undermines Equality Michigan’s assertion that “The issuance of an interpretive statement is not a substitute for legislative action.” If the Commission does use “federal precedent...to interpret Michigan law”, there is no need for a statute. In fact, such an approach by the executive branch would render the legislative branch, and the concept of federalism for that matter, largely meaningless.

Changes in public policy come slowly, but they must have the support of the citizenry in order to enjoy respect and legitimacy. Our system allows the citizenry to make those changes either through their elected representatives or directly through the ballot process. Implementing new public policy by circumventing the voting process, whether through a government agency or by a robed judge, seldom has satisfying results. We urge the Michigan Civil Rights Commission to exercise restraint and allow the proposed changes to occur through the established democratic process.

Respectfully Submitted,

Dan Jarvis