

National LGBTI Health Alliance

lesbian, gay, bisexual, transgender, intersex and other
sexuality, sex and gender diverse people and communities
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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600
BY EMAIL: legcon.sen@aph.gov.au

Dear Secretary

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

The National LGBTI Health Alliance (the Alliance) appreciates the opportunity to comment on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

Our overall response is that we support the intended protections for sexual orientation, gender identity and intersex status.

The Alliance wishes to offer recommendations to further strengthen or clarify the intended protections in the Bill, but does not wish for any of these to delay the speedy passage of this important legislation.

About the National LGBTI Health Alliance

The Alliance is the national peak health organisation for a range of organisations and individuals from across Australia that work together to improve the health and well-being of lesbian, gay, bisexual, transgender, and intersex people and other sexuality and gender diverse people (LGBTI). We support measures which contribute to improved health and well-being for LGBTI Australians.

Formed in 2007, the Alliance includes the major providers of services for LGBTI people in Australia, with Members drawn from each State and Territory. The Alliance provides a representative national voice to: develop policy and to support LGBTI health issues; seek increased commitment to services for LGBTI people; develop the capacities of LGBTI organisations; and support evidence-based decision-making through improved data collection covering sexuality, sex and gender identity.

Response and Recommendations

The Alliance recommends passage of the Bill to extend anti-discrimination protections in the *Sex Discrimination Act 1984* to cover sexual orientation, gender identity and intersex status. In particular, we support:

- The recognition of intersex status as a separate protected attribute, in recognition that intersex is about physical characteristics and not synonymous with gender identity.
- The broader definition of 'gender identity' that includes appearance, mannerisms or other gender-related characteristics, as in the Tasmanian *Anti-Discrimination Amendment Bill 2012*.
- The extension of protections for 'marital status' to include 'marital or relationship status', in recognition of the need to protect same-gender de facto couples from discrimination.
- The shift from 'opposite sex' to 'a different sex'. Women and men are not 'opposites', and we support the explicit recognition in the Bill that some people may not be, or identify as, either.

Our support for the aforementioned aspects of the Bill is informed by the need for additional legal measures at the national level which enhance the health and wellbeing of LGBTI people in Australia. Research shows that stigma and discrimination contribute to adverse health outcomes for LGBTI people, notably though not solely in the areas of anxiety, depression and suicidality. Additional protections will provide further measures to minimize those adverse health outcomes.

There are a number of areas where these protected attributes could be strengthened or clarified in ways that enhance the objectives of the Bill:

Non-discrimination in Government-funded Services and Transparency

As the Alliance stated in January 2012 and reiterated in December 2012, we recommend that the Committee consider expanding the current restrictions on the exceptions/exemptions to ensure that no government-funded *services* are permitted to discriminate and that service providers will be required to register their intention to discriminate with the Australian Human Rights Commission or other such form of transparency. This transparency will ensure the right to freedom of thought, conscience, and religion or belief for individuals and institutions that do not wish to join or collaborate with religious organisations that engage in discriminatory practices. There are many religious people and institutions in Australia who support non-discriminatory approaches to LGBTI people. Transparency is needed to protect the rights of both religious and non-religious people and organisations that wish to adhere to non-discriminatory practises. We believe it is inappropriate to use taxpayer funds to support discriminatory practices. Religious exemptions should not apply in cases where there is receipt of public funding, or a body is acting as an agent of Government.

RECOMMENDATION # 1: That the Committee add a separate clause to Division 4 of the existing Act that clarifies that the exemptions in Division 4 do not apply to Government-funded *services*.

RECOMMENDATION # 2: That the Committee add a separate clause to Division 4 of the existing Act that requires service providers to register their intention to discriminate with the Australian Human Rights Commission or other such form of transparency.

Limit religious exemptions in aged care sector

The Alliance reminds the Committee of the Government's previously stated intention to ensure that all aged care funded organisations, including those associated with faith-based providers, do not discriminate in their practices. In his 20 March press conference, the Attorney-General Mark Dreyfus reaffirmed the Government's commitment to ensure discrimination did not occur to older LGBTI Australians accessing commonwealth funded aged care services¹.

¹ Transcript of 20 March 2013 Press Conference by the Attorney-General of Australia, Canberra
<http://www.attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx>

MARK DREYFUS: No. We haven't proposed a change to the exemptions that have been there for religious organisations for many years other than, and I'd stress this, the removal of the exemption for aged care services. And that's government policy. That's something that was clearly set out in the bill. We drew attention to it.

It's something I'd add that the responsible minister for aged care services, Mark Butler, has spent a lot of time consulting about. And we would be proposing to go forward with that, not least because there was very, very little criticism, very few of the hundreds of submissions to the Senate Committee raised any objection at all to the removal of the exemption for religious institutions that provide aged care services

This is an important protection for older LGBTI people who may be vulnerable at that stage of their lives, many of whom would have experienced stigma and lived during a period when same-gender relationships were cruelly stigmatized and sex between men was a criminal offence. Health service delivery in Australia is a universal good, and limiting religious exemptions in aged care services in the Bill would provide helpful relief to older LGBTI people when their overall health and well-being is beginning to decline. Admission to an aged care facility can be stressful in the best of circumstances, and thus this limit on exemptions is welcome. We recommend the Committee specifically support the inclusion of this protection in their report. We have provided an appendix with real cases of aged care discrimination against LGBTI people.

Limiting religious exemptions in aged care will provide important protection for older LGBTI Australians and assist faith-based organisations that have non-discriminatory policies to ensure that third party aged care services with which they collaborate will adhere to a similar standard of non-discrimination when providing care to older LGBTI Australians. Limiting religious exemptions in aged care services will not interfere with the operation of faith-based aged care services, as, the three largest faith-based service providers in aged care throughout Australia already have explicit non-discrimination policies:

Catholic Health Australia²

Catholic hospitals and aged care services do not discriminate in who they employ, provide care to, or accommodate as residents within their facilities. People who identify as lesbian, gay, bisexual, transgender, or people of indeterminate gender will be cared for within Catholic hospitals and aged care services with respect, compassion, and sensitivity.

Anglicare Australia³

The Anglicare Australia network seeks to engage with ALL Australians to build communities of resilience, hope and justice. Our members provide services right

² Brennan, F 2013 'Clarifying the Anti-Discrimination muddle. Eureka Street', Sydney. Available from: <http://www.eurekastreet.com.au/article.aspx?aeid=35014>

See also comments by Catholic Health Australia CEO Martin Laverty as reported by Australian Ageing Agenda from the Leading Aged Services Australia Tri-state conference February 2013 – see <http://www.australianageingagenda.com.au/2013/02/26/article/Tri-State-highlights/NSHXAXEDIL>

³ See - http://www.anglicare.asn.au/site/latest_news.php?task=detail&id=43

across Australia, and do not discriminate on the basis of culture, religion, sexuality or gender.

UnitingCare Australia and UnitingCare Network on Ageing⁴

We deliver aged care services to people regardless of their age, gender, sexuality, ability, class, race, creed or cultural origin. Our position is informed by the Uniting Church's belief that every person is entitled to live with dignity, and we support efforts that further protect these rights.

The Alliance acknowledges the Government's stated commitment to limit religious exemptions in aged care. We draw the Committee's attention to areas where greater clarity is needed to ensure that older LGBTI people are protected from discrimination by a faith-based provider. HACC services are envisaged to continue until 2015, when they become part of the Home Support program. Currently, neither of these services are listed in the definitions. We remain concerned that Home Support / HACC should be explicitly included as it currently falls outside the Aged Care Act 1997 and is a significant portion of aged care services.

RECOMMENDATION # 3: That the Committee add a separate clause to Division 4 of the existing Act to specify that:

- a) Religious exemptions do not apply to aged care services;**
- b) the lack of exemption in the aged care sector for all exemptions specified in Division 4 of the existing Act; and**
- c) that Home Support/Home and Community Care (HACC) services are not exempt from the Act.**

Limit religious exemptions for service delivery to vulnerable groups of LGBTI people

There are other vulnerable groups of LGBTI people that deserve equal treatment to that of aged care, when it comes to service delivery. This is particularly the case for people receiving similar disabilities services in their home, for those living in marginal housing and for those people who are homeless seeking refuge. The Alliance also believes that discrimination in service delivery relating to mental health and suicide, young people, and school students in general should not be permitted in the provision of Government-funded services. We are particularly concerned by the exemption of the provision of education or training in religious institutions, which is likely to increase suicide risks and decrease health and educative outcomes for LGBTI young people who attend religious schools. The research shows there is no question that permitting continued discrimination on the grounds of sexual orientation, gender identity or sex characteristics would be severely detrimental to health status and health outcomes.

RECOMMENDATION # 4: That the Committee add a separate clause to Division 4 of the existing Act that states that religious exemptions do not apply to mental health, suicide, crisis or emergency service delivery, nor for service delivery for people receiving home-based disabilities services, people living in marginal housing, people who are homeless seeking refuge or basic services, young people, or school students.

⁴ Media Release 20 November 2012 'UnitingCare Network recommit to eliminating discrimination', Canberra, see http://www.unitingcare.org.au/images/stories/media_releases/121120_mr_unitingcare_network_recommits_to_eliminating_discrimination.pdf

Limit religious exemptions for discrimination against intersex people

Intersex people are born with natural physical variations. No theological reasons for permitting discrimination on the basis of intersex status were raised during previous consultations on adding intersex status to Commonwealth non-discrimination legislation.

RECOMMENDATION # 5: That Section 37 of the existing Act be amended to clarify that religious exemptions do not apply to intersex status.

Limit religious exemption for employment discrimination

As a general principle the Alliance does not support policies or legislation which permit discrimination in employment practices, except where adherence to a particular faith or religious belief is an inherent requirement of a position. We do not support policies or legislation that would permit discrimination in employment practices against LGBTI adherents to a particular faith or religious belief solely on the grounds of their sexual orientation, gender identity or intersex status. We note that the continued discrimination of employees in aged care facilities is likely to hinder the creation of inclusive service practices and a welcoming environment.

RECOMMENDATION #6: That Section 38 of the proposed Act be amended to clarify that religious exemptions for employment discrimination do not apply to LGBTI adherents to a particular faith or religious belief solely on the grounds of their sexual orientation, gender identity or intersex status.

Clarify trans and intersex people's marriage rights

Forced trans divorce occurs when one member of a legally married mixed gender (i.e., one woman, one man) couple changes her or his legal sex. Forced trans divorce has severely detrimental effects on the health and wellbeing of trans Australians and can be devastating to their families. The proposed Section 40, clause 2A states that "Nothing in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, affects anything done by a person in direct compliance with the *Marriage Act 1961*". The proposed clause does not address the problem of forced trans divorce. In addition, the current restrictions on marriages between people with the same sex classification creates ambiguity regarding the marriage rights of intersex people.

RECOMMENDATION #7: That the Committee add a clause 2C to Section 40 of the proposed Act clarifying that:

- a) the exemptions in 2A and 2B do not apply to discrimination against pre-existing civil marriages in which one spouse has changed her or his legal sex and to state in Section 40; and
- b) in Part IV, article 16 that nothing in the proposed Act will be interpreted as permitting discrimination against civil marriages in which one spouse has changed legal sex.

Please note: This recommendation applies only to couples in pre-existing civil marriages, and thus not affect Government policy on equal marriage for same-gender couples. We acknowledge that the latter is beyond the scope of the current Inquiry.

RECOMMENDATION # 8: That Part IV of article 16 in the existing Act be amended to explicitly state and justify the Australian Government position regarding the marriage rights of intersex people, as recommended by our Member Organisation, Organisation Intersex International.

Limit exemptions for single-sex facilities to discriminate against trans people

Discriminatory lavatory policies can result in limited toilet access and excessive delays in urination, which can lead to permanent bladder damage and other negative health outcomes. Housing trans and intersex students in single-sex environments according to their legal sex rather than their gender identity violates their medical privacy and often decreases their mental health and wellbeing. Gender-diverse people who do not identify as women or men are often unable to access services and facilities in contexts where only sex-segregated services are available.

RECOMMENDATION # 9: That a separate clause be added to Section 30 of Division 4 of the existing Act to specify that:

- a) the exemptions listed in Section 30 do not apply to intersex and trans people's access to single-sex services and facilities such as lavatories, sleeping accommodations, sanitary facilities and other sex-segregated environments; and
- b) that, where only sex-segregated services and facilities are available, the exemptions also do not apply to gender diverse people who do not identify as women or men, and that such people will be given the option to select from available services or facilities.

Limit exemption for sporting activity

We are concerned that the proposed exemption for competitive sporting activity may result in intersex people being barred from athletic participation, given the sex-segregated nature of most sport. We support the suggestion by our Member Organisation, Organisation Intersex International (OII) Australia, that people should be permitted to compete in sport according to their legal sex.

RECOMMENDATION # 10: That the Committee specify in Section 42 of the proposed Act that:

- a) people will be permitted to compete in sport according to their legal sex; and
- b) exemptions for competitive sporting activity do not apply to discrimination against intersex people.

Sunset clause for requests for information and record-keeping exemption

Research has documented that people who do not identify as women or men often face discrimination in the provision of services that do not recognise their genders, and that this administrative erasure translates into discriminatory practices and poor health outcomes. Research also documents that involuntary or coerced "normalising" medical interventions on intersex people are often motivated by the need to fit into record-keeping systems that require people to identify as either female or male. As described in the *Explanatory Memorandum* on pg. 16 for the proposed Act: "...it is discrimination to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who are intersex. For example, a medical records system may fail to recognise that a person who identifies as a man could have some female sex characteristics. This may disadvantage an intersex man who requires treatment for, for example, ovarian cancer." Item 6(11) of the *Explanatory Memorandum* states the intention of providing "maximum protection for gender diverse people" and item 6(13) "recognises that a person may not identify as either male or female". The proposed exemption for requests for information and record-keeping that do not allow people to

identify as neither male nor female, nor as neither woman nor man, undermines this effort to protect gender diverse people from discrimination and is likely to perpetuate some of the most severe forms of discrimination against intersex people and gender diverse people, respectively.

The proposed Section 43A is also not consistent with the Commencement and Implementation section, item 36 of the March 2013 Consultation Draft of the *Australian Government Guidelines on the Recognition of Gender*. The *Guidelines* state the requirement for all Australian Government departments and agencies to include people who do not identify as male or female, or as women or men, in their existing and future business practices by 1 July 2016. The argument that “this impact would be disproportionate to the small number of people who do identify as neither male nor female” does not justify *permanent* discrimination against such people any more than permanent discrimination against women would be justified by the ‘onerous’ administrative efforts required to rectify the previous unequal treatment of women. This point is particularly relevant given that the under-reporting of the number of people who do not identify as women or men is perpetuated by these same discriminatory record-keeping policies.

RECOMMENDATION # 11: That the Committee amend the exemption in Section 43A of the proposed Act for requests for information and record-keeping that do not allow people to identify as being neither male or female to a sunset clause in effect until 1 July 2016 as a transitional measure.

Sections of the Bill such as Item 47, number 68, may unintentionally conflate sex and gender by describing people as “neither male nor female”. Male and female are sexes; woman and man are genders. Some people’s gender identities are not typically associated with their assigned legal sex. Although most intersex people identify as women or men, some do not. Gender diverse Australians who are not intersex may identify as neither women nor men.

RECOMMENDATION # 12: That the Committee add “or neither woman nor man” wherever “neither male nor female” appears in the proposed Act to ensure protection for gender diverse people.

The Alliance thanks the Senate Committee for the opportunity to comment on this important Bill. Feel free to contact the Alliance’s Health Policy Officer, if you would like to discuss any of the above matters with him.

Yours sincerely

Warren Talbot
GENERAL MANAGER

Appendix 1: Case studies of LGBTI aged care discrimination

The following real life examples of discrimination in aged care settings that have been brought to the attention of the National LGBTI Health Alliance. All case studies have been de-identified to respect the need for privacy by the individuals involved.

Case Study 1 – Transgender Client in Residential Care setting

A friend of an elderly transgender woman during a consultation on discrimination issues recounted a story of her transgender friend not being adequately cared for by care staff. The transgender woman was a client of a faith-based residential service and complained to her friend of:

- Overhearing care staff outside her room saying “I don’t want to wash ‘that’ “ and jokes being made around her that she felt was at her expense
- Feeling that staff took longer to respond to her calls than others, including for requests for bedpans
- Being deliberately left without being washed on some days by particular staff
- Being roughly treated during bed washes by a particular staff member

She informed her friend that she didn’t want to make a complaint because it would only make it worse and didn’t want to cause a fuss and had no other choice to accept it and shut up because “church’s have been like that for years to transgender people and they’re still allowed to discriminate against us today”.

The friend however felt this was unacceptable and spoke to the nurse in charge. She was informed that while providing care for residents, the friend need to appreciate that the organisation had a "certain philosophy and religious belief" that was often shared by its workforce. The nurse suggested her friend may be confronting to some staff and people are only human in their reactions. The Nurse in Charge stated that she never knew the staff member in question of being rough with clients and that denied it was possible that it was occurring. No investigation was known to have taken place.

Case Study 2 – Implications of coming out in a residential aged care facility

One older gentlemen living in a low care residential faith-based facility and approached an Alliance member about attending the 2011 conversations by COTA with Minister Butler on the Productivity Commission’s report. In earlier discussions he identified that he was not “out” at the aged care facility, was concerned/fearful about coming out but felt that he would have to disclose his identity as he wanted to discuss being a gay man in a residential facility while at the conversation.

He initially chose to tell select staff members received a mix of responses from supportive, indifference through to disinterest. However when approaching the facility management to arrange transportation, and explaining that he wanted to speak about life as a gay man in a residential facility – managements

response was that he should not talk “about that stuff” and refused to / “were unable” to arrange transportation for him to attend. He felt staff stopped speaking to him and those who seemed initially supportive were no longer.

Eventually transportation was organised by a local LGBTI organisation and the man attended the conversation to rapturous applause when he stood up and declared for the first time his sexual orientation and fears about aged care for older LGBTI people.

Case Study 3 – Mental health treatment of ‘gayness’

An gay man over 80 years old who was living in a rural area was admitted to a small faith-based residential facility. After a period of pleasantly being a member of the facility a long-time friend visited and in the course of their discussion with staff the resident’s sexuality was identified. The gentleman started to begin to notice he received less attention and two weeks later was visited by a social worker. Over a period of a few months various consultations related to his “mental health” were taken with a handful of professionals. He commented on a phone call to his friend that he was disturbed by the mental health professionals asking about his sexuality during each of the conversations. The gentleman was transferred from the residential facility to a psychiatric facility. To the friends knowledge he had no history of serious mental health illness and in conversations with the resident after being transferred, the resident indicated he felt his transfer was due to his sexuality and the prejudice of the management at the faith based provider.

Case Study 4: Finding a welcoming environment

A gay man was seeking a residential facility for his partner. He went to two local facilities that happened to be faith-based. During the inspection of the facility he declared his same-sex relationship and inquired if this would be a problem for the facility. He was informed the facility was faith-based and many of its residents were of X denomination and asked if his ‘friend’ would feel comfortable in such an environment. He observed staff was physically uncomfortable after the disclosure. Discussion was initiated by the facility around concerned other residents might act poorly towards his partner if they were to discover he was gay. Both facilities suggested another facility in the area who might be more suited to “your particular needs”. The partner inspected the third facility but felt the financial commitment would be challenging.

He settled on one of the faith-based facilities and his partner moved in. Over a number of months, the partner observed snide remarks, disapproving noises and comments from staff and less than supportive attitudes from the management. He also indicated that he felt he was not given the same information as a husband or wife would be and constantly had to ask probing questions to find out about what was happening with his partner. Eventually after feeling continually uncomfortable and unsupported the partner downsized their home to afford the necessary bond to secure a place in the private sector aged care facility in the area as there were no non faith-based providers in the not-for-profit aged care sector.

Case Study 5: Preaching in your home

An extroverted transgender woman in her late 70s required help to remain in her home following a hip replacement. The local homecare provider was a faith-based provider and arranged for a staff member to attend her home three times a week to help with both domestic and personal support. After the first visit being told of the transgender woman's colourful history including prostitution and working in an illegal club, the faith-based provider returned for her second visit. Towards the conclusion of her second visit, the worker produced a pamphlet on Jesus Christ and handed it to the client telling her that she had lived a life of sin and should consider finding God. The transgender woman told the worker that she did not appreciate being preached to in her own home and did not believe in God. A colourful discussion bordering on argument ensued during which the worker was asked to leave and take her pamphlet with her. She did leave, but left her pamphlet behind.

The transgender woman's carer rang the provider to complain about the action of the woman and was initially told that the woman was "just doing her job" and as a devout Christian was kindly preaching the good word. The carer sought assistance from the local aged care assessment team to transfer to a secular provider but was informed that the faith-based provider was the only one in the area with available packages. An emailed complaint to the service provider was sent by the carer requesting that another worker would be assigned and this was agreed to by the service provider.

Things appeared to go smoothly for a few weeks until one day the new worker was unavailable and was replaced by a third worker on a temporary shift. The third worker was visibly aghast at the transgender woman's life as they talked and visibly disgusted. Towards the end of the shift she also suggested the transgender woman might like to attend the local church and repent for a lifetime of sin. Following this action, the carer was unable to convince the transgender woman to allow a worker back into her home and she did not receive assistance. A few weeks later an accident occurred at home resulting in the transgender woman being placed back into hospital and finally in a nursing home until she passed away a few months later.