

Submission to the Senate Legal
and Constitutional Affairs Committee

On the

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

From

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About Salt Shakers

Salt Shakers is a national Christian ethics organization, with thousands of readers, in all states of Australia, and our submission represents their views of our readers.

Summary and Recommendation

Salt Shakers opposes the introduction of anti-discrimination laws based on sexual orientation and gender identity.

Discrimination laws restrict freedom of speech, freedom of conscience and freedom of religion. Discrimination laws means that employers cannot choose who they employ on moral grounds, that landlords cannot make specifications about tenants and people cannot treat people differently according to their own conscience.

We oppose the Bill as proposed and recommend that the Committee does not support the proposal Bill which adds sexual orientation and gender identity as protected attributes in the Sex Discrimination Act.

The following submission will address the issue of sexual orientation and gender identity in more detail, consider the role of the Commonwealth in legislating in this area and address the specific legislation.

1. Sexual orientation and gender identity

1.1 Sexual orientation and gender identity are NOT innate or fixed attributes.

There is no evidence that sexual orientation is genetic.

In our submission related to the Human Rights proposals in 2012, we made the following observations concerning the inclusion of sexual orientation and gender identity:

The proposed legislation gives all the protected 'attributes' equal status. That means one's sex or race, which are inherent qualities, are given the same status as 'political opinion', a conduct that is limited in scope and place.

Attributes such as religion and political opinion are behaviours and beliefs rather than inherent characteristics over which someone has no control. When such attributes are 'protected' it removes the right for people to decide how they act and speak in matters of conscience.

The addition of the attributes of sexual orientation and gender identity further restrict freedom of speech. Both of these areas are political in nature. They are not inherent characteristics. There is no evidence that sexual orientation is genetic or that 'people are born homosexual'. Research that has been done, by people such as Simon Le Vey and Dean Hamer, has not been replicated. No research has established any genetic cause.

Research by Pillard and Bailey, done on twins in Australia in 2000, shows that if one twin is homosexual then there was a 25% chance of the identical twin being homosexual also. Of course, if it was genetic, then the percentage should be 100%. For fraternal twins the percentage drops to 10%.

See the research at <http://faculty.wcas.northwestern.edu/JMichael-Bailey/Publications/Bailey%20et%20al.%20twins,2000.pdf>

Dr Neil Whitehead from New Zealand has analysed all the research and concludes that homosexuality is not genetic, but rather, is overwhelmingly a result of environmental factors.

His website is at <http://www.mygenes.co.nz/>

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There have been several high profile cases in the UK, under their expanded Equality Act, where Christian owners of B&Bs have been accused of, and found guilty of, discrimination, when they refused to allow a same-sex couple to have a double room at their B&B. This was even in cases of the B&B being run in the couple's own private home – and applying similar prohibitions to non-married couples, namely those in de facto relationships.

Christian Institute in the UK has reported extensively on these cases and the subsequent court action and appeals.

One case involved Peter and Hazelmary Bull in Cornwall.

Full details at <http://www.christian.org.uk/news/judge-rules-against-christians-in-bb-case-but-allows-appeal/>

Another case involved Susanne and Michael Wilkinson and the B&B run in the home. See details at <http://www.christian.org.uk/news/christian-bb-loses-court-case-brought-by-gay-couple/>

These are made much worse by the fact that the previous ‘limited grounds’ - such as “Commonwealth body or agency; employment and occupation” - have been vastly expanded to refer to ‘unfavourable treatment’ which includes any conduct that offends or insults – more on that in the following sections.

Since there is no evidence that sexual orientation is ‘genetic’, we contend that sexual orientation should be a part of this Act which covers ‘sex’ - which, in contrast, is a biologically determined attribute.

1.2. Bisexuality

If the legislation covers all sexual ‘orientations’, where does that stop?

Bisexuality, being a state of engaging in both heterosexual and homosexual relationships, certainly affirms the notion that sexual orientation is not genetic, since people can choose which ‘orientation’ or ‘behaviour’ they prefer at any given time.

The inclusion of bisexuality as a protected attribute under the term ‘sexual orientation’ creates additional problems. In essence, bisexuality is all about the sexual preference of the person. As such, this is certainly not something that discrimination law should protect.

In the case of the sexual harassment section, it would be even more difficult to pre-determine what might be a reasonable – or unreasonable – statement since one would have to think about what might ‘offend’ a person! More on that later.

1.3 What about other ‘sexual orientations’?

In addition to homosexuality and heterosexuality, and bisexuality, there are other ‘sexual orientations’.

Are these all protected by the legislation?

In Canada, there is a growing body of literature and research that discusses whether pedophilia is a ‘sexual orientation’.

A recent article in a medical Journal discussed the social and legal implications of this:

[Arch Sex Behav.](https://doi.org/10.1007/s10508-011-9882-6) 2012 Feb;41(1):231-6. doi: 10.1007/s10508-011-9882-6.

Is pedophilia a sexual orientation?

In this article, I address the question of whether pedophilia in men can be construed as a male sexual orientation, and the implications for thinking of it in this way for scientific research, clinical practice, and public policy. I begin by defining pedophilia and sexual orientation, and then compare pedophilia (as a potential sexual orientation with regard to age) to sexual orientations with regard to gender (heterosexuality, bisexuality, and homosexuality), on the bases of age of onset, correlations with sexual and romantic behavior, and stability over time. I conclude with comments about the potential social and legal implications of conceptualizing pedophilia as a type of sexual orientation in males.

In January this year, an article in the Guardian looked at some of the causes of pedophilia in light of recent child sexual abuse cases. The writers say that many say that pedophilia is a psychological distortion and not a ‘sexual orientation’. However, he highlighted the discussion in Canada about pedophilia being considered a ‘sexual orientation’:

Paedophilia: bringing dark desires to light,

[The Guardian](#), Thursday 3 January 2013

<http://www.guardian.co.uk/society/2013/jan/03/paedophilia-bringing-dark-desires-light>

The article states, "This is radical stuff. But there is a growing conviction, notably in Canada, that paedophilia should probably be classified as a distinct sexual orientation, like heterosexuality or homosexuality. [Two eminent researchers testified to that effect to a Canadian parliamentary commission last year](#), and [the Harvard Mental Health Letter of July 2010 stated baldly](#) that paedophilia "is a sexual orientation" and therefore "unlikely to change".

The question for this Inquiry is thus, 'Is pedophilia a protected attribute under the proposed legislation?'

Even if one says that sex with a minor is a criminal offence, there still remains the notion of a person expressing a desire to have sex with minors or the claiming of that orientation, even if one doesn't act on it.

Should these statements/actions be protected by the law?

4. Homosexual sexual 'orientation' is not fixed

In addition to the notion that homosexuality is not genetically determined, we contend that homosexuality is not fixed. Sexual orientation can be changed.

There are a huge number of organisations that provide support to people who experience same-sex attractions and express a desire to change. These organisations operate in Australia and around the world.

We personally know many people who once experienced same-sex attractions but who are now happily married to a person of the opposite sex and have children

Some significant studies have been done concerning sexual orientation and change in young people.

One such analysis is the ADD-Health survey in the USA, which interviewed very large numbers of teens on a number of subjects including sexual attraction and behaviour, and the results have been published in many papers already...

Dr Neil Whitehead analyses the study, in a report titled:

Adolescent Sexual Orientation: Surprising amounts of change

Dr NE Whitehead

October 2009

His summary says,

"The idea that adolescent same-sex attraction will always become adult same sex attraction is quite incorrect. Data from the large USA ADD-Health survey (Savin-Williams and Ream, 2007) confirm that adolescent homosexuality/bisexuality both in attraction and behaviour undergoes extraordinary change from year to year. Much of this could be experimentation. The changes are overwhelmingly in the direction of heterosexuality, which even at age 16-17 is at least 25 times as stable as bisexuality or homosexuality, whether for men and women. That is, 16 year olds saying they have an SSA or Bi- orientation are 25 times more likely to change towards heterosexuality at the age of 17 than those with a heterosexual orientation are likely to change towards bi-sexuality or homosexuality. Under the most extreme conservative assumptions heterosexuality is still 3x more stable for men and 4x for women."

His report is at <http://www.mygenes.co.nz/Change.htm>

Dr Whitehead also notes that there has been “New Zealand longitudinal work on ages 22-26” which shows a great deal of ‘change’ in sexual orientation in young people in New Zealand.

1.5 Gender Identity

There is no evidence that ‘gender identity’ or transsexuality is fixed or biological. Rather, it is a psychological condition.

Despite the fact that various states have changed their laws to allow transsexuals to change their sex on their birth certificates, this is not because of the truth of the issue but rather because of political correctness.

Even though the person can do this, it does not change the biological sex of the person.

This was affirmed by the Registrar of Marriages in Hong Kong, who recently gave evidence in a case where a transsexual wanted to marry in Hong Kong. The Registrar noted that the person still retains their biological sex.

See article at <http://www.scmp.com/news/hong-kong/article/1215490/transsexual-top-court-bid-marry-her-boyfriend>

Including gender identity in the discrimination law forces people to acknowledge and affirm that someone really has changed their sex and become the opposite sex – often without even having sex re-assignment surgery.

This infringes personal freedoms and beliefs – and certainly impinges on religious beliefs which say that God created man and woman and that we cannot change that.

There is evidence that some people who underwent re-assignment surgery have regretted their decision once they realised they really were their ORIGINAL gender. We personally know some of these people.

Other high profile cases include Alan Finch in Victoria, and Robert John in America.

1.6 Intersex

It is important to note that intersex is a medical condition. It is not psychological and there are various medical versions of this – eg Tourette’s Syndrome. Most have nothing at all to do with homosexuality.

Often it relates to poorly formed or missing genitalia.

There is some debate about when doctors should operate on children who are intersex. Some say that a chromosome test when the child is quite young is a reasonable test of whether the person is male or female. However, some say that it is best not to surgically operate until the child is older and can have some say in the decision.

Over the past few years intersex groups have been concerned at being swept into the homosexual GLBTQI community. But the lobby has persisted, knowing that having a condition that is ‘medical’ associated with their cause helps to blur the boundaries over what is medical and what is not.

Although we recognise that intersex is a genuine medical condition, we believe that putting it in this Bill along with ‘sexual orientation and ‘gender identity’ continues to blur the boundaries in an unacceptable way.

1.7 Homosexuality not accepted by the community

The general community is not accepting of homosexuality or bisexuality. Some studies done by homosexual groups to gain support for homosexuality and for same-sex marriage have focused their questions on human rights and led people to support homosexuality more. However, most people have an inbuilt understanding that it is not right. As Christians, we believe that sexual relationships are between a man and a woman in marriage.

2. Commonwealth powers

The Commonwealth has no power to make such laws regarding sexual orientation and gender identity.

Since they are not specified in the Australian Constitution, the government must rely on the 'external powers' clause in the Constitution.

The current *Sex Discrimination Act* states (Section 3 (a) that one object of the Act is "to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of **other relevant international instruments**".

The Act defines the phrase "*relevant international instrument*" in section 4 to mean a listed number of international treaties.

NONE of these international treaties mentions sexual orientation OR gender identity as attributes to be protected. The International Covenant on Civil and Political Rights does NOT include either of these attributes.

Thus the Commonwealth does not have the power to legislate on the attributes of sexual orientation or gender identity.

3. The legislation

Discrimination laws might aim at protecting ONE group of people - but they inevitably restrict the freedom of conscience, religion, thought and association of OTHER PEOPLE.

Sexual orientation and gender identity are issues that are of concern to Christian groups. Including these attributes in the Sex Discrimination Act will restrict freedom of religion.

3.1 Proposal for 'unfavourable treatment

The proposed Bill says that:

Discrimination on the ground of sexual orientation

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if, by reason of:

- (a) the aggrieved person's sexual orientation; or
- (b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or
- (c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.

(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if the discriminator 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.

This is an incredibly broad statement about the treatment of someone based on sexual orientation.

This is not the same as the SEX of a person. You can't just add in other attributes as though they were equivalent.

We note that the government has removed the phrase from this section that talked of unfavourable treatment including 'insulting' or 'offending' a person.

However, the law should not be passed at all as it will further divide the community and is invalid.

Adding sexual orientation to this will be extremely problematic, as has been found in the UK with the Equality Act, with a wide range of discrimination cases being launched on the attributes of 'sexual orientation'. See some cases listed above.

We recommend that sexual orientation and gender identity NOT be added to the Sex Discrimination Act as protected attributes.

3.2 Sexual Harassment

The proposed Bill also adds sexual orientation and gender identity to the 'Sexual Harassment' section of the *Sex Discrimination Act* (Section 28)

This section actually includes the notion of being 'offended' or 'insulted' – a person can claim that someone is sexually harassing them on the basis of their sexual orientation or gender identity because they are 'offended' or 'insulted' by the treatment.

It is then up to the person complained about to defend their actions, often at great personal and financial cost.

The proposed law says that sexual harassment is an unwelcome sexual advance that

"in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated."

As mentioned in the previous section, the previous proposals extended the 'unfavourable treatment clause' in the discrimination section to include 'offend or insult'. Fortunately, that has been done away with - but the words 'offended' and 'insulted' still appear in this section of the proposed Bill because they were already in the sexual harassment section of the *Sex Discrimination Act*.

We recommend that the attributes of sexual orientation and gender identity NOT be added to the Sexual Harassment section of the Bill.