

26 April 2013

Ms Julie Dennett
Committee Secretary
Legal and Constitutional Affairs Standing Committee
Australian Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dennett

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

We refer to the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (**SDA Bill**) and its proposed amendments to the *Sex Discrimination Act* 1984 (Cth) (**SDA**).

The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the long overdue protection from discrimination for lesbian, gay, bisexual, transgender and intersex (**LGBTI**) members of our community that the SDA Bill aims to deliver.

The SDA Bill's prohibition of discrimination on the grounds of sexual orientation, gender identity and intersex status, and against same-sex de facto couples, is a critical step in addressing the current levels of discrimination faced by LGBTI people in public life, including work, accommodation and the provision of goods and services.

PILCH is disappointed that the exemptions for religious bodies and educational institutions will be extended by the SDA Bill to apply to the new protections. This decision significantly dilutes the benefits of the SDA Bill and should be revisited.

PILCH reiterates our view that the SDA Bill is only a small step toward achieving effective protection from discrimination in Australia. Further legislative reform is needed to strengthen fairness and equality in our country and we strongly encourage the Government to prioritise the introduction of the Human Rights and Anti-Discrimination Bill (**HRAD Bill**).

PILCH and our commitment to effective protection against discrimination

PILCH is the main facilitator of pro bono legal services in Victoria. We also carry out law reform, policy work and legal education with a view to furthering the public interest, improving access to justice and addressing disadvantage and marginalisation in the community.

PILCH's clients include a diverse range of people and organisations: older people, people experiencing or at risk of homelessness, people with a disability, LGBTI people, asylum seekers and refugees, and Victoria's not-for-profit organisations. More information about PILCH and our work is annexed to this submission.

Like many private, public and community organisations, both large and small, PILCH has been (and continues to be) committed to contributing to the development of an improved regime for protecting people from discrimination in Australia. Informed by the evidence and expertise gained from our work, PILCH has contributed to the extensive consultation regarding the consolidation of Australia's anti-discrimination laws. We made detailed submissions and recommendations to the:

- Attorney-General's Department on the consolidation of Commonwealth anti-discrimination laws (1 February 2012) (**PILCH Consolidation Submission**); and
- Senate Legal and Constitutional Affairs Legislation Committee (**Senate Committee**) on the Exposure Draft of the Human Rights and Anti-Discrimination Bill (**HRAD Bill**) (21 December 2012) (**PILCH Exposure Draft Submission**).

PILCH also provided evidence to the Senate Committee on 23 January 2013.

This submission reiterates a number of the points made in the PILCH Consolidation Submission and the PILCH Exposure Draft Submission.

We note our disappointment that the Government has not yet supported the HRAD Bill and, instead, has introduced interim measures that go only some of the way to addressing discrimination effectively. PILCH urges the Government to prioritise the HRAD Bill's introduction.

Support for the SDA Bill

PILCH strongly supports the SDA Bill. Through our work, we see directly the unacceptably high levels of discrimination faced by members of the LGBTI community and the lack of legal avenues available to address this. The current absence of federal law prohibiting discrimination on the grounds of a person's sexual orientation, gender identity, intersex status or same-sex relationship sends a worrying message to the LGBTI community and to Australian employers, educators, service providers and individuals.

The SDA Bill will send a clear message that (in the absence of an exemption, which we discuss below) discrimination on these grounds is unlawful. In addition to creating a legal avenue for redress, legislative change has the potential to slowly generate systemic and attitudinal change.

In light of the very clear evidence of discrimination against LGBTI people and the damage this inflicts on health and wellbeing,¹ the need for this change is undeniable.

In particular, PILCH welcomes the following aspects of the SDA Bill:

- The definitions of 'gender identity' and 'intersex status', which are based on the Anti-Discrimination Amendment Bill 2012 (Tas) and are consistent with the recommendations of the Senate Committee in relation to the HRAD Bill;²
- The use of 'different sex' rather than 'opposite sex' in the definition of 'sexual orientation' and throughout the SDA;
- The replacement of the ground of 'marital status' with 'marital or relationship status', which extends protection against relationship discrimination to same-sex de facto couples;

¹ See, eg, Australian Human Rights Commission, *Sexual Orientation and Sex and/or Gender Identity: Consultation Report* (April 2011).

² See Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013), recommendations 1 and 2.

- The removal of the definitions of ‘man’ and ‘woman’ with a view to preventing the exclusionary effect of these definitions; and
- The exclusion of intersex status from the exemption for religious educational institutions in s 38 of the SDA in recognition of the fact that the Government ‘has not been informed of any religious doctrines which require discrimination on the ground of intersex status’³ (subject to our comments below in relation to the general exemption for religious bodies).

PILCH commends the Government for its work on the SDA Bill and supports the Bill’s prompt passage into legislation.

Exemptions for religious bodies and religious educational institutions

PILCH is disappointed that the exemptions for religious bodies and education institutions will be extended by the SDA Bill to apply to the new protections against discrimination on the basis of sexual orientation, gender identity, intersex status and relationship status.

Scope of the exemptions

The SDA Bill proposes to extend existing exemptions for religious educational institutions and religious bodies in the following way:

- **Educational institutions** – under the SDA Bill (cl 50), s 38 of the SDA would be amended so that educational institutions that are ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’ can discriminate on the basis of a person’s sexual orientation, gender identity or relationship status (as well as their sex or pregnancy) when hiring and dismissing staff, if the educational institution ‘discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’. As noted above, welcomingly, this exemption does not extend to the ground of intersex status because ‘no religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents’.⁴
- **Religious bodies** – the exemption for religious bodies under s 37(d) of the SDA is already extremely broad and under the SDA Bill this exemption will apply to the new grounds. This means that religious bodies will be permitted to discriminate against people on the basis of their sexual orientation, gender identity, intersex status or relationship status in relation to any ‘act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion’.

The Explanatory Memorandum for the SDA Bill explains that these exemptions recognise that ‘rights may be limited by other rights, with the right to equality and non-discrimination limited by the right to freedom of thought, conscience and religious or belief’.⁵

Practical impact

In practice, the exemptions for religious bodies and educational institutions mean that a religious hospital can refuse to employ a gay doctor, a religious school can refuse to enrol a bisexual student or

³ Explanatory Memorandum: Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (2013) 20.

⁴ Ibid 9.

⁵ Ibid 6.

hire a lesbian administrator and a faith-based homelessness shelter can refuse to accept a transgender resident.

The PILCH Consolidation Submission and the PILCH Exposure Draft Submission cited an example, which provides context to our objection. The example was the case of a five year old girl who was lawfully refused admission to a religious primary school that received government funding on the basis of her parents' same-sex relationship.⁶ This example demonstrates the broad reach of the religious bodies exemption (i.e. to education of children in schools that receive government funding). Under the current drafting of the SDA Bill, this discrimination would not be unlawful.

In addition, the PILCH Homeless Persons' Legal Clinic (**HPLC**) knows from our clients that emergency accommodation and rooming houses can be undesirable and unsafe places generally and particularly for LGBTI people experiencing homelessness.⁷ Where this accommodation is run by faith-based organisations, in addition to discrimination by other residents, there is a risk that the person will be turned away on the basis of their sexual orientation, gender identity or intersex status.

This broad loophole has the potential to exacerbate the disadvantage of already struggling members of the community. In practice, a huge number of social and homelessness services are provided by faith-based organisations and the HPLC rarely sees these organisations providing services in a discriminatory manner in reliance on the exemption. In many cases, it is antithetical to the inclusive, compassionate, supportive services that these organisations aim to provide.

In light of the above, PILCH suggests that the blanket exemption for religious bodies – and the permission to discriminate that it brings with it – is both inappropriate and unnecessary.

Recommendations

PILCH recommends:

1. That the SDA Bill is used to narrow the exemptions for religious bodies and educational institutions under the SDA rather than extend them. We refer the Committee to the model for exemptions in the *Anti-Discrimination Act 1998* (Tas), which contains exemptions for these bodies only in relation to the grounds of 'religious belief and affiliation' and 'religious activity', not in relation to other grounds such as sexual orientation, gender identity, intersex status or relationship status. As we were reminded by Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner: '[Tasmania is] proof that you can do it; you can have very constrained exceptions, and that can work for the faith based organisations'.⁸
2. If recommendation 1 is not adopted, the exemption under s 37(d) of the SDA should not be available to religious bodies in respect of functions of a public nature and in particular functions that are wholly or partially funded by Government or undertaken pursuant to a contract with Government.
3. If recommendations 1 and 2 are not adopted, at the very least, the SDA Bill should be amended to include a section analogous to cl 33(2) HRAD Bill, which provides that Commonwealth-funded aged care services are not able to rely on exemptions for religious bodies in service provision. This carve out from s 37(d) of the SDA would recognise the barriers that older same sex couples face in

⁶ See 'School forced to take same-sex couple's daughter' *The Age* (14 December 2011) (available at <http://www.theage.com.au/national/school-forced-to-take-samesex-couples-daughter-20111214-1ou92.html>). This case related to NSW legislation but this discrimination would also be permitted if the SDA Bill extends the exemptions for religious bodies to sexual orientation, gender identity and intersex status.

⁷ See also Australian Human Rights Commission, above n 1, 16–17.

⁸ Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner, Senate Legal and Constitutional Affairs Legislation Committee public hearings (23 January 2013) 47 cited in Senate Legal and Constitutional Affairs Legislation Committee, above n 2, 68.

accessing aged care services run by religious organisations. PILCH encourages the Government to act consistently with its recognition in relation to the HRAD Bill that: '[w]hen such services are provided with Commonwealth funding, the Government does not consider the discrimination in the provision of these services is appropriate'.⁹

4. Together with recommendation 1, 2 or 3 (or if none of these recommendations is adopted), religious bodies and educational institutions wishing to rely on the exemptions should be required to be transparent about the extent of, and the justification for, the discrimination.¹⁰ The SDA Bill should require religious organisations to publish a written statement of their reliance on the exemption, the extent of the exemption (for instance, whether it applies to the body's educational facilities and welfare services and whether it applies to all staff or only some) and the particular 'religious susceptibilities of adherents of that religion' that are at risk of being injured if the discrimination does not occur. Religious bodies and educational institutions wishing to discriminate should be required to publish statements in position descriptions, on their website and in brochures about their service, informing people about the risk of discrimination before they make a decision to purchase or access goods or services or apply for a job. Such requirements would require a level of accountability and would properly inform community members about the risk of discrimination.

Improved protection against discrimination in Australia – a small step

The HRAD Bill contains a number of provisions that have the potential to simplify and improve protections against discrimination in Australia. The SDA Bill does not have these features. Essentially, the laudable and long awaited protections for LGBTI people are being incorporated into an imperfect legislative framework and the level of protection they will provide is limited by this.

Key features of the HRAD Bill that have the potential to make anti-discrimination protections more effective and efficient that are absent from the SDA are:

- It is a clear, coherent regime that applies across various grounds of discrimination and reduces the inconsistency and complexity that currently make it difficult for both individuals and duty holders to understand their rights and obligations;
- The simplified definition of discrimination removes the unwieldy comparator test and the distinction between direct and indirect discrimination;
- The shared burden of proof is a sensible approach to evidence that recognises respondents are best placed to know the reasons for their conduct; and
- The approach to costs supports improved access to justice (i.e. each party to proceedings in the Federal Court or the Federal Magistrates' Court generally bears their own costs).

An opportunity to significantly improve the clarity, efficiency, fairness and accessibility of anti-discrimination protections in Australia has been put on hold. We urge the Government to treat these commendable amendments to the SDA as a first step in delivering a simpler, stronger anti-discrimination regime and to continue to prioritise the introduction of the HRAD Bill. This opportunity has been delayed but not yet missed entirely.

⁹ Australian Government Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes* (November 2012) [190].

¹⁰ See Senate Legal and Constitutional Affairs Legislation Committee, above n 2, recommendation 12.



We would welcome the opportunity to discuss our submission with you.

Yours sincerely

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Annexure – About PILCH

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- address disadvantage and marginalisation in the community;
- effect structural change to address injustice;
- foster a strong pro bono culture in Victoria; and
- increase the pro bono capacity of the legal profession.

The Referral Services Program provides a pro bono referral service to persons seeking free legal assistance where they cannot afford to pay for such assistance. Clients who are eligible for assistance are referred to a solicitor at a member firm or a barrister who will advise them and/or represent them on a pro bono basis. The Referral Services Program also undertakes law reform and delivers legal education to further the public interest, improve access to justice and protect human rights.

The Homeless Persons' Legal Clinic (HPLC) provides free legal information, advice and representation to people who are homeless or at risk of homelessness. Legal assistance is provided by pro bono lawyers at homelessness assistance services to facilitate direct access by clients. The HPLC also undertakes significant law reform, public policy, legal education and community development activities to promote and protect the human rights of people experiencing homelessness. The HPLC has assisted over 5000 clients since it was established in 2001.

The Seniors Rights Legal Clinic (SRLC) provides free legal services to older persons at pro bono clinics located at hospitals and health centres. The SRLC undertakes law reform and advocacy in relation to laws that adversely impact the interests of older people and their access to justice and to advocate for the reform of those laws. The SRLC also undertakes a range of community and legal education to raise awareness of elder abuse and legal issues associated with aging. The SRLC is administered by PILCH as part of Seniors Rights Victoria.

PilchConnect provides legal help to Victorian, not-for-profit (**NFP**) community organisations. It has a range of legal services, including a legal information web portal, a low-cost legal seminar series for NFPs and it refers eligible organisations for pro bono legal assistance. It also does law reform and advocacy work in relation to the regulation of NFPs.