6 April 2013 Submission to Senate Inquiry: Sex Discriminate Act Daniel Black

Dear Committee,

Thanks for the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 and seeking public submissions on it.

The adding of protections for sexual orientation, gender identity and intersex status are important aspects of the sexual discrimination that need to be enacted into law to prevent discrimination.

Having experienced at least two counts of discrimination that are proposed to be outlawed I'm personally aware of the hurt it causes. The text of marital or relationship status is also a very appropriate change to include in the bill.

I am particularly appreciative of the inclusion of all forms on discrimination prohibition in education with the amendments of section 21 and the provision of goods services and facilities in section 22.

Looking at the sections of the bill in more details I suspect some of the wordings and concepts could be improved as follows:

- The operation of 21(3)(a & b) could prevent an intersex person from attending a single sex education facility and I suspect this injustice could be remedied by adding:

  (3a) Section 3 does not apply for person of intersex status who can be reasonably accommodated by the education institution.

- Consideration of the above provision in 25(3) should also be considered.

- 25(4)(a) should replace “both men and women” with “a person of any gender”. 24(4)(b)(i & ii) and 24(5)(d) should replace “men and women” with “all genders”.

- Though not directly related to the bill, in section 35(2) the care employment of couples in the residential care of children seems very outdated and its continued existence as an allowed discrimination against the employment of single employment seems inconsistent with modern standards. The accommodation considerations for employment of residential care for two non-related persons seems a fairly small burden. If this section could be repealed rather than amended that would be preferable.

- The amendment to section 38 notable excludes “intersex status” based on the lack of religious sensibilities around intersex people . This makes me wonder if the sex discrimination exemptions in 38 are valid and whether they can be removed.

- The justification for the religious exemptions in section 38 of the Sex Discrimination Act in the explanatory memoranda references the ICCPR article 18 however rather than conforming to the ICCPR, section 38 actually violates it.

  The ICCPR (http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf) article 18(1) allows for the freedom to choose religion in particular “the right ... to adopt a religion of his choice ... and in a community with others ... [participate] in teaching”. The Sex Discrimination Act in section 38 effectively denies the participation to teach in 38(1 and 2) and the right to be taught in section 38(3) to the prescribed groups of

people.

- Article 18(2) of the ICCPR says “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”. SDA section 38(3) does grant a religious organisation the permission to impair the adoption of a religion by those in the prescribed groups and therefore is in contravention of the ICCPR article 18(2).

- Article 18(3) of the ICCPR describes the only limit that a State may prescribe from the freedom of religion. This limitation is not mentioned in the explanatory memoranda because the limitations allows by law require the SDA section 38 apply “limit[s] [..that] are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others”.

  A diversity of “sexual orientation, gender identity, marital or relationship status or pregnancy” in an education facility is unlikely to cause a classroom riot (public safety), disagreements in option in a classroom (public order) are unlikely when competent teaching staff are engaged and any such expression of opinion is a protected right according to article 19 of ICCPR. Health cannot reasonably be considered an issue.

  The moral objection to sharing an education with a diverse group of people is not a moral that currently exists in the diverse multicultural Australian society. The gender based education facilities that exist as per of section 21 is about the extent of allowed socially accepted discrimination. Religious education (excluding exemptions in section 37) has hardly had a history of limiting who they choose to educate to their ideals as they have forced their ideals on Aborigines and Torres Straight Islanders, orphans and anyone they had the ability to control over the last few hundred years. Any extending of the exemption of section 38 cannot be considered on the basis of conforming to old doctorine.

  The existence of religious teachers and administrators who would rather see a classroom of heterosexual individuals, non-pregnant students with a gender identity equal to their birth sex cannot be denied however for the most part, a much more tolerant and accepting group of religious Australians exist and this more common definition of morality precludes the exemptions of section 38. Even the current exemption of marital status or pregnancy is out of proportion with social norms.

  The text in the Sex Discrimination Act “order to avoid injury to the religious susceptibilities of adherents of that religion or creed” does not have a basis in article 18 of the ICCPR and therefore it grossly exceeds the allowed provisions of article 18(3). The expression of opinions that do disagree with the susceptibilities of religion and creed is a protected right in article 19 of the ICCPR and as the enforcement of section 38 is likely to be as a result of an expressed option, any exercise of section 38 is a likely contravention of article 19.

- Article 18(4) of the ICCPR is as follows “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”. This requires that parents/guardians have a religious education available to the children and implicitly this right is regardless of the child's gender identity, sexual orientation, relationship status, or pregnancy status. As such the section 38(3) exemption on religious education providers is not conforming to the ICCPR article 18(4) and should be repealed.

- The existence of section 38 is offensive in its current form because of the lack of moral basis and the plan to grant the right to religious educations to further discriminate in the provision of education is going too far.

  The controls of religious bodies in section 37 are sufficient to preserve established the belief and practices within a religious organisations own borders. The last part of section 37(d) “or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.” does seem to be an unjustified catch-all.

  Sections 38(2) and section 38(3) are applying to people who have a temporary engagement with the religious institution through contract employment or as a recipient of education. The term of employment contracts generally is rarely beyond a year and for education it is rarely beyond 3 years for tertiary education and 5 years for secondary education. The tight boundaries of contracts and student to facility relations mean there's really no need for this provision.

  To expect the temporary inclusion of a student or contract employee of a particular sexual orientation, gender identity, marital or relationship status, or pregnancy to cause “injury to the religious susceptibilities of adherents of that religion or creed” is to my understanding a indication of a fragile religious creed significantly out of sync with modern morals such that legislation is required to create an artificially pristine student/staff environment. The dangers of such a mono-culture are dangerous to society as a whole.

  In the case of school education, particularly secondary, the awareness of sexual orientation, gender identity or pregnancy by students is a scary enough situation without the added stress that your school could ~~fairly~~ legally expel you, disrupt your carefully selected study program (perhaps mid semester), remove you from the daily contact of your friends who you rely on for support, is unconscionable. There are significant links between youth sexuality, particularly homosexuality, gender identity and suicide that are high enough already without the legalising the removal of support networks. The additional complication is that family and perhaps extended family will become aware of your sexuality, gender identity or pregnancy as result of the schools decision to dismiss you rather than a more mature notification process.

  With the added removal of any sexuality and relationship diverse staff in sections 38(1 & 2) at these institutions a child's perspective of the diversity of relationships that exist, and of people that can really help them is also removed.

  A number of existing academic references already highlight the problem of youth sexuality related suicide including a number of these have been mentioned in the terms of reference. I encourage you to re-read these to comprehend the severe consequences of these exemptions.

  In addition to the proposed legalised discrimination by religious schools contained within this bill the exercising of this right to dismiss staff and students teaches children the ethical superiority of their religious creed and fragments the diversity of friendships perhaps including the friendships themselves. The active expulsion of students could be used by other students to bully or harass other students with sexualities and gender identities already oppressed by their own self identity uncertainty, religious teachings, diminishing trust in their friends and a school that perhaps proclaims to be an extension of family.

So, if you want to see youth suicide rise and another generation of LGBTI intolerant citizens just add eight words to section 38(3) of the Sex Discrimination Act “sexual orientation, gender identity, marital or relationship status”. Please don't.

- Section 38(2) allows religious education institutions to legally dismiss contract workers in 16(b) who don't meet their religious principles. It also allows them to apply other hardships and detriments of 16(c or d) without repercussion compared to the dismissal or non-engagements for employees in 38(1). Altering the section 38(2) to only apply to 16(a or b) would be an improvement.

  From my memory of school contract workers tend to be cleaners and grounds staff who aren't in the most socially skilled employment. This bill proposes to add another few allowed classes of discrimination to the contract staff of schools can be unfairly treated in a number of ways in addition to dismissal and that they may not be in a situation to appropriately handle. In addition these staff are in a position to provide a semi-independent support channel to students who may feel ostracised by teaching staff and fellow students.

- Section 38(1) is expanded to allow more discrimination of staff. These could be the teachers that through their diverse background, are able to relate to students with evolving emotions around sexuality and gender identity. It will be their diverse background that prevents them from being accepted into employment or dismissed. The diversity, education and repore that these teachers have with the students will be a key component of support in school education. The dismissal of these staff or the fear of dismissal will both prevent the development and support of young Australians in religious schools who may or may not have a sexuality or gender identity diversity accepted by the school but definitely need support and reassurance without fear of expulsion.

  The best thing that can be done to section 38 is to repeal it. Second best thing is to leave it as is. This proposed bill with regards to section 38 will create a worse culture for students and future Australia who have to cope with the youth educated with religious superiority.

- Section 39, exemptions for voluntary bodies, is based on ICCPR article 22 according to the explanatory memoranda. What this exemption does, and is proposed to do, is to deny the “right to freedom of association with others” to those who's “sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities” subject to the whim of a voluntary organisation. As such the current and proposed section 39 of the Sex Discriminate Act is already contravening article 22(1) of ICCPR and proposes to extend the violation of its tenets.

  Article 22(2) of the ICCPR provides the exemption “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordrepublic), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”

  As “sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities” have no implication to national security, public safety, public order, health or morals “the protection of the rights and freedoms of the

others" is the only remaining exemption criteria on which section 39 can be based.

There is no right or freedom in Australia to be isolated from persons of a "sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities" different to another person so the section 39 exemption has no legal or moral basis on the ICCPR.

- Section 39, An exemption for voluntary bodies is also offensive. The provision of a membership of a voluntary body is the same as the membership of a club in section 25 and the provision of services of a voluntary body is also the same as section 22 and perhaps section 23. A broad wide sweeping exemption from the Act is a sign that Australia tolerates discrimination. We shouldn't have this provision here currently and extending its scope under the Bill isn't appropriate.

  Voluntary bodies consist of members who are employed, deliver goods and services, accommodation as part of their other lives and daily apply the principles of the Sex Discrimination Act consciously or otherwise. There should always be a significant membership in a voluntary body that can apply the basic principles of sexual non-discrimination within the voluntary body.

- Section 42, exemptions to sport add gender identity which isn't a physical attribute this shouldn't be in the allowed exemptions for sport. Also the extent to which a competitor's intersex status affects strength, stamina or physique of competitors needs to be assessed individually rather than because its sport X only gender Y is allowed. This should be worded into subsection 2 or reword section 1.

  To word this differently the exemptions to sport in section 42 that adds gender identity but it isn't a "strength, stamina or physique" attribute and therefore its inclusion isn't warranted in this section. The inclusion of a born male with a female gender identity would legitimately preclude them from a female sports (where strength, stamina or physique matters) however exclusion is base on their born sex (already in section 42(1)) and has little to do with their gender identity. The removal of gender identity from the amendments in this section seem appropriate.

- Also regarding section 42, as the "strength, stamina or physique" of the sport is assessed intersex status people can be excluded by being of intersex status regardless of the attributes of their physicality. A more fair solution in my option is to remove intersex status from the amendments to section 42(1) and include the following subsection 42(3).

  > 42(3) Subsection (1) does not apply to intersex persons unless a medical determination has been made that the combined effect of their intersex status has varied their strength, stamina or physique in a way that unfairly favours their inclusion in a competitive sporting activity.

  As the fairness of Australian sport matters, especially the fairness to participate, can this bill be amended to make recommendations to remove gender identity the exemptions of the bill and to limit the effect of discriminating against intersex status people?

- 43A The provision of this exemption is understandable from a technical stand point however this really should have a sunset provision to ensure that newer computer systems

and business processes introduce the mechanism to adopt a non-discriminatory practices. A sunset term of 5 years would seem appropriate given technical refresh time frames of organisations and not unduly impose financial burden.

Though not mentioned by the bill, section 40(5) doesn't reduce the hardships for married intersex status persons or persons who have a record not reflecting their gender identity. This continues to present identification issues for these people. While the reasons here may introduce difficulty in recording such information in computer systems the business reasons should change to reflect that such situations exist. Like the proposed exemption in section 43A, I recommend this provision attract a sunset clause such that an active change is required of systems and laws to account for married intersex and the differing gender identity of persons.

I strongly endorse the added sexual orientation, intersex, gender identity and relationship protections proposed in this bill.

The damage that can be caused increasing discrimination of students, staff and contract staff in religious education in schools has the potential to fracture the diverse sexually and gender diverse Australian society at its roots, the children. Discrimination in employment and the provision of education is wrong always.

The religious education and voluntary organisation exemptions are a violation of articles 18 and 22 of the ICCPR steps to repeal section 38 and 39 are required to remedy this.

Even religious parables like the Parable of the Good Samaritan (https://en.wikipedia.org/wiki/Parable_of_the_Good_Samaritan Historical Context - Samaritans and Jesus) show discrimination is wrong and actions should be judged, not the origins or faith of people.

Allowing discrimination to propagate in voluntary organisations allows geckos of hate and intolerance to from. Voluntary organisation members can apply the same principles as clubs.

Thanks to the Australian Parliament for their consideration in looking after the interests of minorities for the good of all Australians. Please continue to do so without pandering to the vocal religious lobby groups. The value of freedom from discrimination doesn't need to take second place to religious creeds.

Please do the right thing and keep Australian discrimination free, repeal sections 35(2), 38 and 39.

Daniel Black