



Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

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## 1. Introduction

Job Watch Inc (**JobWatch**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill).

JobWatch strongly supports the proposed amendments and it is hoped the inquiry will lead to further amendments that will continue the objectives of the *Sex Discrimination Act 1984* (SDA) to redress institutional and systemic barriers to gender equality, particularly in the area of employment.

Nevertheless, JobWatch believes further amendments are required in relation to exceptions under the SDA in order for the Bill to better achieve its objectives of eliminating discrimination and promoting substantive equality for workers and other vulnerable and disadvantaged members of the community.

## 2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Commonwealth funding bodies to do the following:

- Provide information and referral to Victorian workers via a free and confidential telephone information service;
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, we have maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over **150,000** records. Each record may canvass multiple workplace problems, including, for example, discrimination, sexual harassment, bullying and underpayment of wages. Our database allows us to report on our callers' experiences, including their particular workplace issues and what remedies, if any, may be available at any given time.

JobWatch's comments on the Bill are made from the perspectives of its lawyers, their clients and callers to its telephone information service which currently receives approximately 6,000 calls per year (which is down from approximately 20,000 due to recent funding cuts).

### 3. Concerns and Recommendations

#### **Recommendation 1: There should be no blanket exceptions under anti - discrimination laws.**

##### **3. 1 - Section 37 and 38 – Religious bodies and religious schools**

Under section 37 of the SDA, a religious body may discriminate on the basis of any attribute when employing an individual in order to avoid injury to the religious susceptibilities of adherents to that religion or creed. Section 38 of the SDA extends this exception to educational institutions established for religious purposes providing the discrimination occurred in good faith. The Bill's proposed amendments, namely item 50, would expand this exception to include the new protected attributes of sexual orientation and gender identity.

JobWatch is concerned about the unnecessary breadth of sections 37 and 38 in maintaining religious exceptions that authorise what would otherwise be unlawful discriminatory conduct. Although it should be noted that JobWatch welcomes the exclusion of intersex persons from the aforementioned exception, the inclusion of sexual orientation and gender identity means that, in practice, they are not truly protected attributes at all. Consequently, JobWatch contends that religious exceptions in the Bill undermine the primary values and objectives of the Bill and the SDA being to eliminate discrimination as opposed to authorising it which is what these exceptions effectively do.

While JobWatch accepts there are circumstances in which 'legitimate differential treatment' may be appropriate, for example, a religious organisation's entitlement to be selective in regards to who it may appoint to be a minister or priest. It is, however, unnecessary for 'differential treatment' to extend beyond such confined parameters as an individual's sexual orientation or gender identity that do not bear any significance on a person's ability to carry out duties, responsibilities or inherent requirement of a particular job. For example, it would not be a necessary or inherent requirement for a person who is employed to perform cleaning duties at a church or teach mathematics at a religious school to conform to the religions doctrine or tenets as it is inconsequential to their abilities to perform the job.<sup>1</sup>

The planned extension of the religious based exceptions maintains the SDA's leniency regarding the ability of religious organisations and educational institutions to discriminate against potential employees. JobWatch maintains that the current test based on 'religious sensitivity' is far too broad and an insufficient justification to deprive a person of their right to equality and freedom from discrimination.<sup>2</sup> There is an inherent contradiction in religious organisations enjoying the protection of anti-discrimination laws while also enjoying the right to discriminate against individuals possessing otherwise protected attributes. This state of affairs does not represent an appropriate balancing of competing rights and interests.

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<sup>1</sup> JobWatch, "Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012" December 2012, p. 6.

<sup>2</sup> *Ibid*, p. 7.

### 3.2 Obligations under International Law.

The *International Covenant on Civil and Political Rights* (ICCPR) declares;

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>3</sup>

This acknowledges the principle of equality, article 2(1) of the ICCPR also acknowledges the principle of non discrimination:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>4</sup>

Whilst not expressly mentioning sexual orientation or gender identity, the mentioning of established groups does not work to the exclusion of others, hence the catch all, ‘or other status’ which the United Nations Human Rights Committee has stated should include sexual orientation and would likely include gender identity.<sup>5</sup>

It is stated specifically in the explanatory memorandum of the Bill that these articles contribute to the foundational principles of the SDA and the amendments contained in the Bill. JobWatch submits that the proposed amendments in the Bill, while commendable, do not go as far as they should in upholding and protecting these principles and promoting the objects of the SDA.

#### **Case Study – “Nicole”**

*Nicole has worked as a professional Communications Officer for over 11 years in a medium sized company. She has had a good work history, having always performed well. She had a sex change operation this year and since returning to work she has been consistently discriminated against, by way of abusive remarks and other unfavourable treatment. She has mentioned this to management, however they have only responded by reminding her that her employment may be terminated for poor performance.*

<sup>3</sup> *International Covenant on Civil and Political Rights*, article 26.

<sup>4</sup> *Ibid*, article 2(1).

<sup>5</sup> JobWatch, “*Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012*” December 2012, p.7.

### 3.3. Rights to Work

The *International Covenant on Economic, Social and Cultural Rights (ICESCR)* articles 6 and 7 recognise the right to work and the right to just and favourable working conditions.<sup>6</sup> In particular, article 6 (1) states:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.<sup>7</sup>

Furthermore, article 2 (2) also provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>8</sup>

As a State party to the ICESCR Australia recognises the right to work and is obliged to take appropriate steps to safeguard this right. As article 2 articulates, Australia is obliged to ensure that this right is exercised without discrimination.

#### **Case Study: 'Marilyn'**

*Marilyn works in a staff cafeteria for a large company. She is a Male to Female transsexual. She has worked at the company for a couple of years and believes that she has been passed over for promotion because of her gender identity.*

In recognising that the ICESCR forms part of the foundational principles of the Bill and the SDA, the religious exceptions undermine the right to work and represents a failure of the undertaking to protect this right without discrimination.

Article 6(2) details:

The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Of particular note, is the requirement of polices to achieve social and cultural development in order to achieve the full realisation of the right to work. The exclusion of religious organisations and institutions from anti-discriminatory measures does not work to achieve a productive example of social and cultural development. Instead it

<sup>6</sup> *International Covenant on Economic, Social and Cultural*, articles 6 and 7.

<sup>7</sup> *Ibid*, article 6.

<sup>8</sup> *Ibid*, article 2(2).

works to undermine the promotion of equality and alienates broad sections of the community from employment opportunities and one another.

The Human Rights Commission's consultation report, '*Addressing sexual orientation and sex and/or gender identity discrimination*' (The Consultation Report) highlights the impact that anti-discrimination legislation can make on a community. (It should be noted that the Tasmanian legislation contains no exceptions in regards to sexual orientation.<sup>9</sup>

During the bitter, decade-long debate over decriminalising homosexuality in the 1990s there was a constant stream of verbal statements and written materials that incited hatred against gay, lesbian, bisexual, transgender and intersex (GLBTI) people. This included written material published in newspapers and distributed through the mail. It also included vilifying statements by public figures. However, since the passage of the Anti-Discrimination Act in 1998, which included provisions against incitement to hatred, such written and verbal statements have virtually ceased. Tasmania's public debate on GLBTI issues continues to be vigorous but it is profoundly more mature, respectful and constructive than it was before 1998.<sup>10</sup>

Also noted in the report was the impact of education.<sup>11</sup> This may indicate a potentially damaging consequence of exceptions for religious educational institutions because, by excluding them from important social exposure, the isolationist policies that cause and allow these bodies to discriminate against same sex and gender identifying communities will likely continue.

To reiterate; it is JobWatch's contention that exceptions granted to religious organisations and educational institutions in regards to sexual orientation and gender identity undermine the foundational principles of the Bill and the SDA in general. Furthermore, the exceptions only work to isolate sections of the community allowing for the potential for hostile work environments and the prolonging of discriminatory attitudes throughout the community. There should be no blanket exception under any anti-discrimination legislation including the SDA.

### **3.4. Religious Rights**

JobWatch acknowledges religious rights to practice and the rights to freedom of thought, conscience and religion as identified under article 18(1) of the ICCPR. JobWatch supports the right of religious bodies to be granted an exemption by a relevant Court or Tribunal if the particular circumstances warrant such an exemption, e.g., where the exemption operates to protect the rights of people to freely practise their religion, in line with the United Nations *Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief*.<sup>12</sup>

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<sup>9</sup> Australia Human Rights Commission, '*Addressing sexual orientation and sex and/or gender identity discrimination*' 2011 p.34.

<sup>10</sup> *Ibid*, p. 17.

<sup>11</sup> *Ibid*, p. 18.

<sup>12</sup> JobWatch, '*Submission to Freedom of Religion and Belief in the 21<sup>st</sup> Century, Race and Discrimination Unit: Education and Partnerships Section, HREOC, February 2009, p.6*

Article 18(1) of the ICCPR provides:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.

Clearly, there is a conflict between two overlapping human rights, that is, the right to religious freedom and the right to equal opportunity in employment. This is manifest in the Bill's explanatory memorandum through the concept of "legitimate differential treatment." The potential for overlap also seems to be recognised by the ICCPR as evidenced by article 18(2) which states as follows:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The article acknowledges the need for deferral of religious freedoms in order to protect the fundamental rights and freedoms of others. In light of the above the Bill's amendments to the SDA do not provide an adequate balance between religious freedom and the right to equality in employment.<sup>13</sup>

It is stated in the explanatory memorandum that the principle of "legitimate differential treatment enables particular groups to be treated differently in certain circumstances... [provided it is]... proportionate to the objectives to be achieved". If the purpose is to protect religious rights and sensibilities, in JobWatch's opinion, the exceptions are not proportionate and are far too broad in their potential application. In other words, the exceptions do not allow religious bodies and schools to practise their religion, they allow religious bodies and schools to legally discriminate against already vulnerable and disenfranchised members of the community. This right to discriminate is not required for the practise of religion. The Bill and the SDA have failed to properly balance the competing rights to practice religion and equality before the law.

As discussed above; it is unnecessary for the exceptions within the legislation to extend beyond the confined parameters of who is appointed to a position or given certain role within a religion. An individual's sexual orientation or gender identity does not influence their ability to perform a particular job or duty .To reiterate the previous example; the sexual orientation or gender identity of the person cleaning the altar, or teaching maths does not inhibit a person's right to practise their religion nor hinder an individuals ability to perform a task.<sup>14</sup>

JobWatch is concerned about the potential for misuse of the exceptions under section 37 and 38 of the SDA.<sup>15</sup> The following example is taken from Consultation Report.

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<sup>13</sup> JobWatch, 'Submission to the Attorney- General's Department on the Consolidation of the Commonwealth Anti-Discrimination Laws' February 2012 p. 44.

<sup>14</sup> JobWatch, "Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012" December 2012.

<sup>15</sup> JobWatch, Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012, p.7.

“Tania was employed by a church run disability service. After working for 18 months Tania attended work and found that the homepage on her work computer displayed a bible quote that said negative things about gay people. Tania assumed that this was a mistake and drew her team leader’s attention to the quote. The next day the quote remained. Tania wrote a letter to the management explaining that she felt upset and unsafe having to look at that quote everyday and asked that it be replaced with a bible quote that did not vilify gay people. Three of Tania’s colleagues also signed the letter. Tania was singled out and told that her gay agenda had no place in a Christian work place. Tania’s professional reputation was then attacked, she was accused of poor work performance. Tania was also assigned shifts that she had previously indicated she would be unable to take or were inappropriate. Tania contacted the [Anti-Discrimination Board] to see if she could lodge a complaint and was told that her employer may be able to rely on the religious exception in the Act. Tania left her job due to ongoing harassment.”<sup>16</sup>

Any legislation providing exceptions protecting religious freedom must ensure that the exception is not misused so as to exclude certain groups from employment.<sup>17</sup>

Whilst JobWatch supports the exclusion and understands the political complexities of the subject, it remains a human rights issue. The inclusion of sexual orientation and gender identity in the religious exceptions seems entirely arbitrary and done for no other reason than to appease a powerful lobby group. It is our belief that equal opportunity legislation should not be used to satisfy a constituency at the expense of others’ legitimate interests or to protect the exclusionary interests of particular sectors of society.<sup>18</sup> In these circumstances, it appears that an appropriate balance between competing human rights has not been achieved.

Additionally, the physical characteristics or conceptual differences identified as the reasons for not extending the exclusions to intersex persons are insufficient to justify the continued exclusion of anti-discrimination measures towards sexual orientation and gender identity. The distinction between the physical characteristics of intersex persons implies a comparison with the apparent mental or psychological characteristics of sexual orientation and gender identity. By drawing this distinction, an unfair comparison is made with the implication that sexual orientation and gender identity are less legitimate due to their perceived lack of biological or physical elements.

The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, developed by the International Commission of Jurists and the International Service of Human Rights identify that there should be no “pressure to conceal, suppress or deny”<sup>19</sup> one’s sexual orientation or gender identity. By allowing religious bodies an exception, the consequence is that members of these communities will be pressured to conceal, suppress or deny themselves in order to find employment.

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<sup>16</sup> Australian Human Rights Commission, ‘*Addressing sexual orientation and sex and/or gender identity discrimination*’ 2011, pp.9-10.

<sup>17</sup> *Ibid*

<sup>18</sup> JobWatch, ‘*Submission to the Attorney-General’s Department on the Consolidation of the Commonwealth Anti-Discrimination Laws*’ February 2012, p.38.

<sup>19</sup> *Yogyakarta Principles: Principles on the application of International Human Rights Law in relation to sexual orientation and gender identity*, March 2007, p.12.



The ultimate consequence of the exception is the unjustified inhibition of a communities' right to employment.

### 3.5. Inherent Requirements

#### **Recommendation 2: Employers should have to apply for an exemption on the basis of the job's inherent requirements.**

JobWatch submits that there should be no blanket exceptions under the SDA and that employers should have to apply to an appropriate court or tribunal for an exemption to the SDA based on the "inherent requirements" of the job should they wish to discriminate against employees / prospective employees on the basis of a protected attribute.

Alternatively, if blanket exceptions are to remain in the SDA, JobWatch recommends the repeal of the exceptions in their current form and the inclusion of the following "inherent requirements" provision which incorporates the elements listed below.

1. A statement that discrimination in employment is prohibited, unless a person is unable to perform the inherent requirements of the particular employment.
2. A list of the factors to be considered when determining whether a particular requirement is "inherent" to a position. This list should include:
  - Whether a particular task is genuinely essential to the position.
  - The skill set and qualifications required to do the position.
  - Whether the position could be performed with modifications being made to accommodate the performance of the job by a person with an impairment.
  - Whether public standards of decency require that the position be filled by a person of a particular sex.
  - Whether reasons of artistic credibility require the position to be filled by someone with a particular attribute.
  - Whether it is a genuine occupational requirement that a person be of a particular sex, such as a necessary physical characteristics particular to people of one sex, other than strength or stamina; or the preservation of decency or privacy; for example where employment involves fitting clothing, doing body searches or entering lavatories or other areas where people are in a state of undress.
  - Whether the most effective delivery of welfare services to a particular group requires that the job be performed by a person with a specific attribute.
  - Whether adherence and commitment to the particular beliefs and tenets of a religion are required in order to carry out the fundamental requirements of a position with a religious body or religious school.<sup>20</sup>

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<sup>20</sup> JobWatch, 'The Exceptions Review: Submission to the Review of the Exceptions to and Exemptions from the Equal Opportunity Act 1995', April 2008, pp.22-23.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

For further information, please do not hesitate to contact Ian Scott of JobWatch's Legal Practice on

Yours sincerely,

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*JobWatch Inc*