



VICTORIAN GAY & LESBIAN
RIGHTS LOBBY

One step closer: Introducing national freedom from discrimination
for the LGBTI community

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

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Equality and social justice for the LGBTIQ community

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About the Victorian Gay & Lesbian Rights Lobby

The Victorian Gay & Lesbian Rights Lobby is an independent, non-profit, non-government organisation which works to end discrimination and achieve equality and social justice for lesbian, gay, bisexual, transgender and intersex people.

We are a membership based organisation and work with and for the community, along with non-profit, justice, health and government agencies, to create positive change in the area of human rights and policy development.

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1. Introduction

- 1.1 The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) welcomes the opportunity to provide a submission on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) (**SDA Bill**) to the Senate Standing Committee on Legal and Constitutional Affairs (the **Committee**).
- 1.2 The VGLRL commends the Federal Government's efforts to provide long overdue legal protections for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people at the federal level through the SDA Bill.
- 1.3 While the SDA Bill is a positive development for LGBTI people, the VGLRL is extremely disappointed that the Federal Government appears to have deferred the introduction of a revised Human Rights and Anti-Discrimination Bill 2012 (Cth) (**HRAD Bill**), which would have provided stronger and more comprehensive protection to LGBTI people than that available under the current limitations contained within the existing SDA Bill. The HRAD Bill will be discussed further below.
- 1.4 The VGLRL strongly supports the passage of the SDA Bill. The VGLRL also urges the Government to proceed with the introduction of a revised HRAD Bill prior to the federal election.

Scope of submission

- 1.5 This submission does not seek to duplicate or repeat the comprehensive and detailed submission made by the VGLRL to the Committee's inquiry into the draft HRAD Bill 'Achieving Freedom from Discrimination for LGBTI People'.¹ Instead, this submission aims to provide targeted feedback on the SDA Bill.
- 1.6 The submission is based on our expertise and the community feedback we received in the time available. The VGLRL recognises the importance of respecting and encouraging the autonomous voices of bisexual, transgender and intersex people. Given this, the VGLRL's primary representative mandate relates to lesbians and gay men. However, the VGLRL submission addresses issues relating to all LGBTI population groups, as we believe it is important to support bisexual, transgender and intersex organisations and individuals, including members of the VGLRL, who identify as bisexual, transgender and intersex.

¹ VGLRL, 'Achieving freedom from discrimination for LGBTI people: Submission to the inquiry of the Senate Legal & Constitutional Affairs Committee into the Exposure Draft of the Human Rights & Anti-Discrimination Bill 2012', 4 January 2013 (available at <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=9aa2ca99-dd33-4182-ba3b-06d5da11785b>).

There also exists some parallels and overlap between aspects of the SDA Bill that relate to the various population groups.

- 1.7 We encourage the Committee to give primacy to the input of organisations representing sex and gender diverse individuals on issues relating to intersex, gender identity and gender expression and any other matters affecting transgender, intersex and sex and gender diverse people.

Language and terminology

- 1.8 In this submission we employ the terms lesbian, gay, bisexual, transgender, and intersex (**LGBTI**) to describe commonly accepted and identified sexual and gender minorities. We recognise that these terms alone do not capture the variety and multiplicity of variations in sex and/or gender related orientation, behaviours, identity and/or status within the Australian community. For example, the Committee should note that terms such as queer, gender queer, androgynous, transsexual, asexual and pansexual are used by individuals to describe their sexual orientation, sex and/or gender identities.
- 1.9 As will be discussed below, same sex attracted or gender questioning individuals or those engaged in same sex sexual activity may not explicitly identify as lesbian, gay, bisexual, transgender or intersex but this should be no barrier to protection from discrimination.

2. Key recommendations

The VGLRL recommends that the SDA Bill be passed with the following key recommendations:

Recommendation 1

The SDA Bill be passed without delay.

A revised HRAD Bill be introduced and passed in the current parliamentary term.

The operation of the SDA be monitored to ensure it effectively protects LGBTI people from discrimination.

Recommendation 2

The objects clause should refer to the object of promoting substantive equality.

Recommendation 3

In accordance with Australia's international human rights obligations, the objects of the SDA should be amended so that goal of eliminating discrimination is not qualified by the words 'as far as possible'.

Recommendation 4

Specific references to the international instruments relevant to LGBTI people and the Yogyakarta Principles should be included in the Explanatory Memorandum of the SDA Bill.

Recommendation 5

The definition of the 'sexual orientation' protected attribute should be retained with minor modifications to clarify that the term encompasses identity, behaviour and sexual, emotional and affectional attraction either in the SDA Bill or accompanying Explanatory Memorandum.

Recommendation 6

The definition of the 'gender identity' protected attribute should be retained.

Recommendation 7

The definition of the 'intersex status' protected attribute should be retained.

Recommendation 8

The definition of the 'marital or relationship status' protected attribute should be retained.

Recommendation 9

Provisions should be introduced to ensure that the definition of discrimination is inclusive of the basis that a person:

- (i) associates with another person with a protected attribute,
- (ii) previously possessed a protected attribute or
- (iii) is incorrectly assumed to possess a protected attribute.

Recommendation 10

The SDA Bill should include consequential amendments to the Fair Work Act to replace the term 'sexual preference' with 'sexual orientation' and to insert the Bill's definition of the latter term.

Recommendation 11

The Bill should include consequential amendments to the Fair Work Act to replace the term 'marital status' with 'marital or relationship status' and to insert the Bill's definition of the latter term.

Recommendation 12

The SDA Bill should include consequential amendments to the Fair Work Act to include in that Act the additional protected attributes of 'gender identity' and 'intersex status'.

Recommendation 13

A review be conducted of all other legislation and government policies to ensure the consistent use of the terms 'sexual orientation', 'gender identity' and 'intersex' or 'intersex status'.

Recommendation 14

The SDA Bill be amended to provide for 'intersectional discrimination', that is, the ability to make a legal claim of discrimination based on two or more protected attributes under the SDA and any of the other federal anti-discrimination statutes.

Recommendation 15

Section 37 of the SDA should be amended to remove 'intersex status' from the operation of the exemption for religious bodies.

Recommendation 16

The exemptions for religious bodies and schools in sections 37 and 38 of the SDA should be either be removed and replaced with a general justification defence, or general limitations clause, narrowed significantly.

Recommendation 17

The SDA Bill should be amended to limit discrimination by government-funded aged care service providers, for example, in the same terms as clause 33(3) of the draft HRAD Bill.

Recommendation 18

Religious organisations and schools intending to rely on the religious exceptions (in sections 37 or 38 of the SDA) should be required to publish a notice on their websites and in literature provided to potential applicants/customers/patients/students or others potentially affected by their intended discrimination and register a notice with the Commission.

Recommendation 19

The SDA Bill should be amended to prohibit discrimination by publicly funded service providers, including religious organisations and schools.

Alternatively the SDA Bill should be amended to prohibit discrimination by publicly funded service providers delivering services to vulnerable groups, such as the homeless, children and young people, older people, people experiencing mental illness, people with disabilities, refugees and/or people experiencing poverty or other disadvantage.

Recommendation 20

The permanent sport exemption in section 42 of the SDA be repealed in its entirety.

If the permanent sport exemption in the SDA is retained, it should be narrowed to only permit discrimination in circumstances where it is 'rational and necessary to protect the integrity of the sport' or a similar test. The test should be objective rather than based on the subjective views of the sporting organisation in question.

Recommendation 21

The provision allowing exemptions for federal, state and territory laws that do not comply with the SDA should be removed.

Recommendation 22

The provision in the SDA Bill allowing exemptions for anything done in direct compliance with the Marriage Act be removed.

Recommendation 23

The record keeping exemption in the SDA Bill should sunset after three years.

Recommendation 24

The exemption under sub-section 40(5) of the SDA allowing State and Territory statutory authorities 'to refuse to make, issue or alter an official record of a person's sex...because the person is married should be repealed.

Recommendation 25

The SDA Bill should establish an LGBTI or SOGII Rights Commissioner to work to improve protection and respect for the human rights of LGBTI Australians.

Should this recommendation not be adopted, a clear statement should be included in the SDA Bill that responsibility for the new protected attributes may be someone other than the Sex Discrimination Commissioner.

3. The case for reform

Case Study: Unpublished interview with a young Victorian lesbian about her experiences at school

'I got "outed" when I was in Year Twelve and the whole school knew I was gay...and in classes people would make comments, throw stuff at me. The teachers wouldn't do anything. I had one teacher actually join in. So that was disgusting...I had my head slammed into locker doors. I had my school bus...people yelling out comments non-stop, just generally: "It's disgusting!", "You fucking lesbian!", "Fucking dyke!" And generally it'd be in big groups. 'Cause I was known for beating up school bullies at my school, so no one would take me on one-on-one.

My sister, little sister, went to the same school and she was picked on...So she was bullied right the way through her schooling, of course. And none of the teachers, apart from the psychology one, actually actively took steps to stop it. The Vice-Principal was gay but he, he could not tell anyone. And I remember, like, he pulled me into his office after I finished and told me that he wished he could have done more, but he would have lost his job. And that his partner died while he was teaching there and he wasn't able to tell anyone.

I was sent to a school counsellor to try and work out why I was gay and to stop me being gay. And my parents were called to tell them that I was gay'

- 3.1 The depth and scale of the harm caused by homophobic, biphobic and transphobic discrimination and harassment has been extensively documented. Research and consultations undertaken by the Australian Human Rights Commission and previous inquiries have examined the gaps in legal protections for LGBTI people and the need for federal laws in order to address discrimination faced by the LGBTI community.²
- 3.2 The VGLRL provided a number of case studies and research evidencing the need to address discrimination in its previous submission to the Committee on the draft HRAD Bill.

² AHRC, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011) available at: <http://www.humanrights.gov.au/publications/addressing-sexual-orientation-and-sex-and-or-gender-identity-discrimination-consultati-0>

We do not seek to replicate this evidence but simply refer the Committee to pages 8-12 of our previous submission.³

- 3.3 We note that the Committee's inquiry into the draft HRAD Bill itself elicited a number of submissions that reflected derogatory and damaging attitudes about LGBTI people. For example:⁴

Part of submission 35 (Nick and Natalie Blismas) says:

We note with great concern the addition of the protected attribute of gender Identity proposed by this Bill. It may seem harmless enough, until one considers the real effects that such recognition in law can produce.

It was reported recently (<http://www.adfmedia.org/News/PRDetail/7770>) that a school in America has upheld the 'rights' of a male transvestite to use the girl's changing rooms because he 'identifies as a woman'. The reason given for not arresting this pervert, but continuing to let him use the changing rooms was because of non-discrimination! It is foolish to think that passing legislation of this sort won't produce a whole host of similar cases in Australia. It is the girls and women who need protecting from these perverts, but this legislation will remove that protection. In light of the many types of abuses which will be sanctioned by this Bill, we therefore call on the committee to recommend it be rejected completely.

Part of Submission 5 (Name Withheld) says:

Basically we are against any tightening or increase of anti discrimination or vilification laws, indeed we would like them loosened & decreased... We believe Aged Care Facilities should not be forced to have homosexual residents. This could be embarrassing & awkward for other existing residents - what about their rights?? ...

Part of Submission 10 (Dr Arthur Hartwig) says:

Chosen lifestyles carry certain probable consequences. It seems none have a natural immunity to the HIV; but specific behaviours greatly increase the probability of infection. Similarly anyone can be eaten alive by piranha fish; but the possibility is negligible unless one swims in South American fresh water.

Part of Submission 27 (Australian Family Association - WA) says:

Along with categories in which discrimination is still sometimes found: age, sex, race, etc, protected status is to be conferred, by this Bill, on new groups perceived

³ VGLRL, Submission No 534 to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Exposure Draft of Human Rights and Anti-Discrimination Bill 2012, 4 January 2013 ('Achieving freedom from discrimination for LGBTI people').

⁴ Various submissions to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Exposure Draft of Human Rights and Anti-Discrimination Bill 2012, 4 January 2013, accessible at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/submissions.htm.

as subjects of discrimination. Among these will be two new categories: 'gender identity' and 'sexual orientation'. Needless to say these are code for the GLBIT lobby which will, under the provisions of this Bill, impose its homosexual agenda on the rest of society.

All schools will be compelled to provide Gay- Straight (GS) clubs, supposedly to break down prejudice against students with homosexual tendencies. In addition parents, wishing to remove their children from classes where homosexuality is taught as the equivalent of heterosexual relationships, will run the risk of being charged with hate 'crime'... There is abundant evidence, around the world to show that where the GLBIT lobby is accorded special rights, reverse discrimination is applied to the rights of others in relation to freedom of speech, conscience and religion.

Part of Submission 32 (Hendrik and Belinda Terpstra) says:

...the Bible makes clear that God has given only one legitimate sexual orientation to mankind – towards our spouses. In all that we do, we must discriminate between this legitimate orientation, and all others, such as adultery, paedophilia, fornication, and homosexuality.

Similarly, God has assigned each person only one of two genders: male and female. To suggest there are other genders such as transgender, transsexual or androgynous and that a person may identify with a gender not his own is not only foolish but sinful.

This Bill will make criminals of many Christians and others with a functioning moral conscience who simply seek to uphold basic Biblical teaching in all of their lives, including when they are at work or in public. The implications for this law on Australian society are dire.

- 3.4 These comments underscore the importance and urgency of taking steps to tackle homophobic attitudes and behaviour through education and social marketing campaigns but also legislative reform. The law is an important educative tool that itself can assist in driving cultural change. However, its most important function is to provide access to remedies for those suffering from discrimination and/or harassment.

4. The draft HRAD Bill and SDA Bill

4.1 The VGLRL agrees with the Government that protections for LGBTI people are ‘long overdue and too important to be delayed further’.⁵ The SDA Bill represents a significant advance for the LGBTI community and brings Australia closer to fulfilling its international human rights obligations in relation to the human rights of LGBTI people.

4.2 The SDA Bill replaced the HRAD Bill as the vehicle to introduce protections against discrimination for LGBTI people. A number of issues flow from this change.

Specific protections benefitting LGBTI people omitted from SDA Bill

4.3 The draft HRAD Bill also proposed to deal with a number of other matters that would have more effectively protected LGBTI people from discrimination. Most significantly, the limitation on discrimination in Commonwealth funded aged care services (s 33(3) of the HRAD Bill) which would have prevented faith based organisations from discriminating against LGBTI people in the provision of government funded aged care services.

4.4 In addition, the religious exceptions in the HRAD Bill did not apply to intersex people, albeit due to the absence of specific protections for intersex people. The inquiry by this Committee into the draft HRAD Bill did not reveal evidence or support for religious based discrimination against intersex people. We note from the Explanatory Memorandum to the SDA Bill that this remains the government policy.⁶ However, the structure of exemptions in the SDA do not permit this to occur.

4.5 In addition, the characteristics extensions and protections against intersectional discrimination in the draft HRAD Bill are of particular benefit to LGBTI people.

4.6 These issues are discussed in further detail below.⁷

⁵ Attorney-General and Minister for Finance and Deregulation, ‘New anti-discrimination laws to cover sexual orientation, gender identity and intersex status’, Media Release, 20 March 2013, accessed at: <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/First%20quarter/20March2013-Newantidiscriminationlawstocoversexualorientationgenderidentityandintersexstatus.aspx>.

⁶ Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) (‘Explanatory Memorandum’), at page 9.

⁷ See [7.1]-[7.34] (Religious exemptions); [6.19] – [6.23] (Characteristics extension) and [6.33]-[6.34] (Intersectional discrimination).

Reform to general legal framework

- 4.7 The draft HRAD Bill contained a number of key protections that would have strengthened and simplified discrimination laws to the benefit of all affected groups.
- 4.8 Anti-discrimination laws should offer access to an effective remedy for victims of discrimination and promote equality. The HRAD Bill would have rectified many of the substantial failings of the federal anti-discrimination regime. Instead, the new protections for LGBTI people are being added to the existing SDA, the limitations of which have been the subject of an extensive inquiry by the Committee in 2008.⁸
- 4.9 Specifically, the VGLRL welcomed the introductions of simplified definitions of discrimination (that did not rely on a comparator test), a shared burden of proof, replacing specific spheres with protection across all areas of public life, and the introduction of a no-costs jurisdiction. While not meeting international best practice in the promotion of substantive equality and addressing systemic discrimination, these changes in the HRAD Bill represented significant advances in rectifying the current failings of Australia's anti-discrimination laws. The harmonisation and simplification of federal anti-discrimination law would have benefitted complainants and duty holders alike.
- 4.10 Given that the significant investment that has been dedicated to the drafting and development of a harmonised, simplified and enhanced consolidated Bill over a number of years, the VGLRL strongly supports the introduction of the SDA Bill as an interim measure and that the HRAD Bill be introduced in a revised form and passed in the current term of parliament.
- 4.11 The VGLRL refers to its submission to the draft HRAD Bill for a more detailed analysis of our position on further improvements required in federal anti-discrimination law.

⁸ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality (2008) accessed at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/report/index.htm.

Ambiguity and uncertainty arising from structural differences

- 4.12 The SDA was introduced to implement Australia's obligations under the Convention of Elimination of Discrimination Against Women (**CEDAW**) and to promote equality for women.
- 4.13 In addition to the general limitations discussed above, the utilisation of the SDA as the vehicle for introducing protections for LGBTI people may raise further issues that have not been anticipated by the drafters or identified in the consultation process.
- 4.14 The VGLRL suggests that the new provisions be continuously reviewed to ensure that the SDA effectively protects LGBTI people from discrimination and any issues that do arise be addressed through a future revised HRAD Bill or further amendments to the SDA.

Recommendation 1

The SDA Bill be passed without delay.

A revised HRAD Bill be introduced and passed in the current parliamentary term.

The operation of the SDA be monitored to ensure it effectively protects LGBTI people from discrimination.

5. Objects clause

- 5.1 The VGLRL supports the recommendations made by the Human Rights Law Centre and others that propose that the objects clause be amended to include reference to substantive equality and remove the words 'as far as possible'. In addition, we support the recommendation made by the Human Rights Law Centre that the Explanatory Memorandum to the SDA Bill be amended to include specific reference to the international law relevant to the protection of LGBTI rights.

Recommendation 2

The objects clause should refer to the object of promoting substantive equality.

Recommendation 3

In accordance with Australia's international human rights obligations, the objects of the SDA should be amended so that goal of eliminating discrimination is not qualified by the words 'as far as possible'.

Recommendation 4

Specific reference to the international instruments relevant to LGBTI people and the Yogyakarta Principles should be included in the Explanatory Memorandum of the SDA Bill.

6. Protected attributes

- 6.1 The VGLRL strongly supports the SDA Bill's inclusion of the new attributes of 'sexual orientation', 'gender identity', 'intersex', and 'relationship status' to federal anti-discrimination law. These attributes have long been a part of State and Territory anti-discrimination legislation in some form but are new to federal anti-discrimination law.
- 6.2 We note that coverage of these attributes was an election commitment of the Australian Labor Party, Liberal National Coalition and the Australian Greens in 2010.

Sexual orientation

- 6.3 The VGLRL strongly supports the inclusion of 'sexual orientation' as a new protected attribute and the definition of this term in the SDA Bill, with one minor qualification.
- 6.4 The definition of 'sexual orientation' in the SDA Bill largely replicates the definition used in the HRAD Bill. The use of 'different sex' in sub-paragraphs (b) and (c) is appropriately inclusive and a welcome improvement on the HRAD Bill definition.
- 6.5 As was the case for the draft HRAD Bill, the VGLRL recommends that improvements be made to the definition to enhance its clarity and consistency with international human rights principles and the commitment made at the 2011 National Conference of the Australia Labor party to align its policy with these international principles.
- 6.6 Sexual orientation encompasses a range of concepts. The Yogyakarta Principles propose a definition that takes into account these personal differences:
- Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.⁹
- 6.7 The VGLRL recommends that it be clarified in the Explanatory Notes to the SDA Bill that the definition of 'sexual orientation' is inclusive of a person's behaviour, identity, feelings and attractions towards another person of the same sex and/or a different sex, and that attraction extends to emotional and affectional attraction as well as sexual attraction.

⁹ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), adopted by 29 human rights experts at Gadjah Mada University, Yogyakarta, Indonesia on 6–9 November 2006, available at: <http://www.refworld.org/docid/48244e602.html>.

Recommendation 5

The definition of the 'sexual orientation' attribute should be retained with minor modifications to clarify that the term encompasses identity, behaviour and sexual, emotional and affectional attraction either in the SDA Bill or accompanying Explanatory Memorandum.

Gender identity

- 6.8 The VGLRL strongly supports the definition of 'gender identity' adopted in the SDA Bill, which adopts the position we advocated for in our submission to the inquiry into the HRAD Bill. The definition adopts best practice as represented in the Anti-Discrimination Amendment Bill 2012 (Tas).
- 6.9 This definition will deliver comprehensive and consistent protection for transgender and other sex and gender diverse people, supplementing the patchwork of existing protections at the State and Territory level. There are a number of significant gaps in the protections offered at a State and Territory level and many jurisdictions use terminology and definitions that are problematic or less than ideal.

Recommendation 6

The definition of the 'gender identity' attribute should be retained.

Intersex status

- 6.10 The VGLRL particularly welcomes the separate inclusion of intersex people through the additional protected attribute of 'Intersex status', in keeping with the recommendations of the Committee following its inquiry into the draft HRAD Bill.
- 6.11 The treatment of the proposed new protected attribute largely reflects the VGLRL's recommendation to the Committee's inquiry into the HRAD Bill and the views of many other LGBTI organisations, including, importantly, intersex organisations.
- 6.12 The inclusion of intersex status as a protected attribute recognises intersex as a biological fact as opposed to incorrectly characterising intersex as a matter of identity. The definition more accurately and respectfully recognises and protects intersex people from discrimination.
- 6.13 The proposed reflects the definition employed in the Anti-Discrimination Amendment Bill 2012 (Tas) and is consistent with current international best practice. Further, specific inclusion and protection for intersex people is consistent with existing Federal Government policy, such as the National LGBTI Ageing and Aged care Strategy and the

newly proposed draft Australian Government Guidelines on the Recognition of Sex and Gender. State practice also recognises the specific needs of intersex people, particularly in areas of health and, for example, prison populations.

Recommendation 7

The definition of the 'intersex status' protected attribute should be retained.

Marital or relationship status

- 6.14 The VGLRL welcomes the new definition of 'marital or relationship status' and recommends it be retained in its proposed form.
- 6.15 This new protected attribute provides important and welcome coverage for de-facto same sex couples. Under the current regime, as LGBTI people are unable to marry, or have their marriage from another jurisdiction recognised under Australian law, they have no protection from discrimination on the basis of their relationship status. In this regard, the proposal to include protection on the basis of relationship status supplements the prohibition of sexual orientation discrimination in the Bill.

Recommendation 8

The definition of the 'marital or relationship status' protected attribute should be retained.

Characteristics extension

- 6.16 The VGLRL supports a more inclusive approach to the coverage of attributes and characteristics to ensure that the LGBTI community is adequately protected from discrimination, in line with international human rights law standards.
- 6.17 Unlike clause 19(4) of the HRAD Bill, the SDA Bill does not adequately protect individuals against discrimination in the following circumstances:
- a. where the person associates with a person who has a protected attribute;
 - b. where a person previously possessed a particular attribute; and
 - c. where a person is incorrectly assumed to have a protected attribute.

- 6.18 These extensions are particularly important for the attributes of sexual orientation, intersex status and gender identity. LGBTI people are often discriminated against because of perceptions, mistaken or otherwise, or because their appearance or mannerisms do not accord with some individuals' ideas regarding men and women and their respective gender roles.
- 6.19 Such amendments would also ensure that, for example, the children of same sex couples are protected from discrimination on the basis of their parents' sexual orientation.

The VGLRL recommends introducing an additional clause to clarify that discrimination in the above circumstances is also unlawful, in line with best practice.

Recommendation 9

Provisions should be introduced to ensure that the definition of discrimination is inclusive of the basis that a person:

- (i) associates with another person with a protected attribute,
- (ii) previously possessed a protected attribute or
- (iii) is incorrectly assumed to possess a protected attribute.

Consequential amendments to the *Fair Work Act*

Replace sexual preference with sexual orientation

- 6.20 The SDA Bill should be amended to also provide for consequential amendments to the *Fair Work Act 2009* (Cth) (**Fair Work Act**) in order to align the definitions in all relevant Commonwealth discrimination laws. Currently, the Fair Work Act employs the term 'sexual preference'.
- 6.21 The term 'sexual orientation' is generally accepted as broad and inclusive and reflects international human rights principles and, for those reasons, should be preferred to the term 'sexual preference', which focuses on choice.
- 6.22 The use of one uniformly defined protected attribute across all Commonwealth laws is also highly desirable from the perspective of reducing regulatory burden. Increasing uniformity between industrial relations laws and discrimination laws of general application will achieve a lowering of regulatory burden for employers.
- 6.23 We recommend that the term 'sexual preference' in the general protections and other provisions of the Fair Work Act be replaced with 'sexual orientation' to ensure consistency of protection from discrimination across each of these federal regimes.

Replace martial status with ‘marital or relationship’ status

- 6.24 Similarly, we recommend that the term ‘marital status’ in the Fair Work Act be replaced with ‘marital or relationship status’ and that the SDA Bill’s proposed definition of the latter term also be included in the Fair Work Act.

Add new attributes of ‘gender identity’ and ‘intersex status’

- 6.25 More significantly, we note the Fair Work Act does not include provisions to prohibit discrimination or adverse action on the basis of gender identity or intersex status. This should be remedied through amendments to the SDA Bill, given the prevalence of discrimination as an issue in the arena of employment. The high vulnerability of transgender and intersex people should also be a consideration that supports the need for amendment.
- 6.26 In addition, it is highly desirable to achieve consistency and uniformity across federal laws. Currently, there appears to be no explanation or policy basis offered for the exclusion of transgender people and intersex people from protection under the Fair Work Act.
- 6.27 Importantly, the Fair Work Act also provides a fast and accessible jurisdiction for the resolution of disputes, which is of particular benefit to vulnerable complainants. Transgender and other sex and gender diverse people should not be denied the benefits of the Fair Work Act currently available to lesbian, gay, bisexual people and others.

Across all these amendments, we propose the Government enact as part of its business as usual functions a review of all other legislation and government policies to ensure this change/update amends existing policies to use this consistently.

Recommendation 10

The SDA Bill should include consequential amendments to the Fair Work Act to replace the term ‘sexual preference’ with ‘sexual orientation’ and to insert the SDA Bill’s definition of the latter term.

Recommendation 11

The SDA Bill should include consequential amendments to the Fair Work Act to replace the term ‘marital status’ with ‘marital or relationship status’ and to insert the SDA Bill’s definition of the latter term.

Recommendation 12

The SDA Bill should include consequential amendments to the Fair Work Act to include in the Act the additional protected attributes of ‘gender identity’ and ‘intersex status’.

Recommendation 13

A review be conducted of all other legislation and government policies to ensure the consistent use of the terms 'sexual orientation', 'gender identity' and 'intersex' or 'intersex status'.

Intersectional discrimination

- 6.28 One of the key objectives of the HRAD Bill was to enable federal discrimination laws to encompass the whole person when considering if discrimination had occurred. That is to say recognition that a gay intersex woman with a disability should be able to lodge one claim of discrimination for assessment, rather than multiple claims for each protected attribute of "sexual orientation, "intersex status", "sex" or "disability".
- 6.29 While recognising that the more appropriate solution to address this process is the consolidation of legislation, we feel that it is entirely appropriate for the Committee to consider the ability for amendments to the Sex Discrimination Act (and consequential amendments to the remaining legislations) to achieve this objective.

Recommendation 14

The SDA Bill be amended to provide for 'intersectional discrimination', that is, the ability to make a legal claim of discrimination based on two or more protected attributes under the SDA and any of the other federal anti-discrimination statutes.

7. Exceptions and exemptions

Exemptions for religious bodies and schools

Case Study: employment by a religious organisation

Kathy is a teacher in a Catholic school and identifies as a lesbian. However, Kathy lives in fear that her sexual orientation will be discovered by her employer because she is aware that the Catholic church does not accept homosexuality and understand there is a policy in place to only employ teachers who subscribe to certain values. Kathy does not talk about her personal life with her colleagues or students and avoids social settings which are known to be frequented by same sex attracted patrons. Kathy had heard of lesbian teachers being discovered holding hands with other women on the street and being sacked.

Kathy's relationships have broken down in the past because her partners do not accept her closeted lifestyle and wish to be able to hold hands in public.

Kathy felt very lucky to secure a teaching role at the school given the difficult employment market for teachers and the long waiting list for jobs in the public school system. She intends to continue to sacrifice her personal life in favour of employment.

*Kathy's name has been changed to protect her privacy.

- 7.1 The SDA Bill extends the application of the current permanent exemption for religious bodies under section 37 of the SDA to the new protected attributes. The permanent exemption for religious schools under section 38 is also extended to allow discrimination against a person on the grounds of the person's sexual orientation, gender identity, marital or relationship status (but not intersex status).
- 7.2 The VGLRL is extremely disappointed that the broad religious exceptions are to be retained and applied to the new protected attributes, despite the strong recommendations of the Committee following its inquiry into the draft HRAD Bill.¹⁰

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (2013) Recommendations 11 and 12 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/index.htm.

- 7.3 Moreover, the SDA Bill proposes to extend the exemption for religious bodies to apply to intersex people, despite the absence of evidence presented of any need or desire by faith-based organisations to discriminate against intersex people.
- 7.4 These ‘permanent exceptions’ set religious groups apart from other groups, who need to justify that any differential treatment is fair and reasonable. As stated by the Human Rights Law Centre, on their face these exceptions are ‘manifestly inappropriate and inconsistent with Australia’s human rights obligations’.¹¹
- 7.5 It is incongruous for the Government to take the positive step of introducing protections on the basis of sexual orientation and gender identity, yet entrench discrimination against these groups through broad permanent exceptions.
- 7.6 We also note that the proposed provisions for religious exemptions would ‘lower the bar’ in some states, notably Tasmania where no religious exemptions exist and in Queensland where a limited exemption is available for inherent requirements of a particular job. We are deeply concerned that LGBTI people living in these states may face increased discrimination as a result of the Commonwealth reforms.
- 7.7 The VGLRL reiterates its position from its submission to the HRAD Bill that broad permanent exemptions for educational institutions and religious bodies should not be permitted and sections 37 and 38 should either be removed and replaced with a general justification defence or general limitations clause, or narrowed significantly. Such an approach would, for example, most likely permit discrimination in circumstances specifically enumerated in s 37 such as the ordination of priests.¹²
- 7.8 If such an approach was adopted, religious organisations would also retain the ability to apply for temporary exemptions under s 52 of the SDA.

¹¹ Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, p 46.

¹² Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, p 47.

Recommendation 15

Section 37 of the SDA should be amended to remove 'intersex status' from the operation of the exemption for religious bodies.

Recommendation 16

The exemptions for religious bodies and schools in sections 37 and 38 of the SDA should be either be removed and replaced with a general justification defence or general limitations clause, or narrowed significantly.

Alternatives to removing sections 37 and 38

- 7.9 If the Committee does not decide to recommend that sections 37 and 38 should be removed, the VGLRL recommends a number of alternatives for consideration by the Committee. These options could be adopted in whole or part by the Committee.
- 7.10 Before the alternative proposals are outlined, we first detail a number of important issues for consideration when considering policy formulation in this area.

Choice is not always an option

- 7.11 One policy justification for the religious exceptions may be premised on the ability of individuals to choose from available services, including both religious and non-religious providers. However, the luxury of choice is simply not available in many areas and in many settings.
- 7.12 LGBTI people living in regional, remote or rural areas may have access to limited service delivery options. For example, specialist services such as Cancer treatment may only be available from faith based hospitals in particular geographical areas.
- 7.13 Vulnerable people accessing crisis, emergency or other vital social services do not often find themselves with a field of potential providers to choose from. Often the market for these services is extremely scarce and those individuals accessing services are extremely vulnerable. It is grossly inappropriate for individuals experiencing mental illness or those with an intellectual or other disability to be subjected to the prospect of discrimination on the basis of their sexual orientation or gender identity.

Case Study: employment services

David* was a young university graduate in receipt of Newstart allowance. He had grown up in a Baptist family and following negative experiences relating to his sexual orientation he now feels uncomfortable in this type of religious settings.

David was referred by Centrelink to an employment service run by a Christian organisation with similar beliefs to the Baptist church. He did not feel comfortable utilising this service given his negative experiences relating to his upbringing. He spoke of his discomfort with the Centrelink officer and was told that he had no choice

David was young and not very confident so he was not open about his life and circumstances with the Christian service provider because he feared discrimination. This inhibition meant that David didn't receive the help that he needed.

*David's name has been changed to protect his privacy.

Faith base service providers do not necessarily want to discriminate – do they?

- 7.14 The VGLRL recognises that many religious organisations do not discriminate in practice and a number have publicly stated their intention not to take advantage of the broad exceptions available under anti-discrimination law. Indeed, some religious organisations resent the existence of exemptions, seeing the exclusion of one particular group as inconsistent with their faith.¹³
- 7.15 Unfortunately the fear and apprehension of discrimination due to historical experiences is very real in the minds of LGBTI people, regardless of whether the provider in question intends to discriminate or not. Removing the ability of religious organisations to discriminate against LGBTI people as of right (that is, without justification) will go some way to increase the comfort levels of LGBTI people in dealing with religious service providers.

¹³ See, for example, public statements made by the Salvation Army in response to criticisms regarding their policy on homosexuality. See Siobhan Duck, 'Angry Response to Salvation Army's Gay Stance', *The Herald Sun*, 18 June 2012 (accessed at <http://www.heraldsun.com.au/news/victoria/angry-response-to-salvation-armys-gay-stance/story-fn7x8me2-1226398031984>). The VGLRL otherwise directs the Committee to submissions received from faith based service providers in the course of its inquiry into the HRAD Bill.

Proposal 1: Limiting discrimination in aged care

- 7.16 The VGLRL is particularly disturbed by omission in the SDA Bill to include a limitation on discrimination in Commonwealth funded aged care services. The VGLRL strongly supports further amendments to the SDA Bill to replicate s 33(3) of the draft HRAD Bill.
- 7.17 The HRAD Bill contained a specific provision that prohibited discrimination by aged care providers in receipt of government funding. The Committee supported this approach based on extensive evidence of the discriminatory effects of current practices in aged care and the fundamental importance of ‘all older Australians maintain[ing] the right to access aged care services on an equal basis.’¹⁴
- 7.18 The SDA Bill does not replicate this limitation, despite the Attorney-General confirming in recent public comments that this limitation remains government policy.¹⁵
- 7.19 Older LGBTI people remain a significant population group with specific needs. The position in the draft HRAD Bill is consistent with the growing body of evidence that stigma and discrimination on the basis of sexual orientation and gender identity are widespread within the community and residential aged care, resulting in unmet needs for LGBTI seniors.¹⁶
- 7.20 Older LGBTI people with a lived experience of stigma and harassment often have to closet themselves when seeking residential care for fear of further discrimination.¹⁷
- 7.21 A common reaction, in some aged care facilities, when sexual expression occurred ‘was often a response aimed at eradication’:

¹⁴ Senate Committee HRAD Report, above n 10, at [7.69].

¹⁵ The Hon Mark Dreyfus QC MP, Transcript of Press Conference, Canberra, 20 March 2013, available at <http://www.attorneygeneral.gov.au/transcripts/>.

¹⁶ (GRAI) GLBTI Retirement Association Inc (2010) *We don't have any of those people here: Retirement accommodation and aged care issues for non-heterosexual population* GRAI: WA at <http://grai.org.au/>; Matrix Guild (Vic) Inc and Vintage Men Inc (2009) *Permission to Speak: Determining strategies towards the development of gay, lesbian, bisexual, transgender and intersex friendly aged care services in Victoria*, Matrix Guild (Vic) Inc and Vintage Men Inc: Melbourne; Matrix Guild (Vic) Inc and Vintage Men Inc (2008) *My People: A Project Exploring the Experience of Gay, Lesbian, Bisexual, transgender and Intersex Seniors in Aged-Care Services*, Matrix Guild (Vic) Inc: Melbourne; Harrison, J., (2004) *Towards the Recognition of GLBTI Aged Care in Australian Gerontology*, Unpublished Health Sciences PhD thesis, University of South Australia: Adelaide; Hughes, M., (2004) *Privacy, Sexual Identity and Aged Care*, *Australian Journal of Social Issues*, 39(4):381-392.

¹⁷ Hillier, L., T. Jones, M. Monagle, N.Overton, L. Gahan, J. Blackman and A. Mitchell, *Writing Themselves In 3: The third national study on the sexual health & well-being of same-sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health & Society, (ARCSHS), La Trobe University, 2010, p ix.p. 43.

Geriatricians are not good at acknowledging sexuality. There is increased awareness when there are issues but it is addressed from a medical rather than psycho-social perspective. Some geriatricians are positive about sexuality; others struggle and are homophobic ('Aviva', geriatrician, hospital/community care and education).¹⁸

- 7.22 In the Matrix Guild research, staff would not touch a gay resident because he had HIV/AIDS, nor help a transgender person to cross-dress.¹⁹ It is essential, therefore, for the health and wellbeing of this group, that this discrimination be addressed.
- 7.23 In working to achieve compliance with the provisions of the SDA Bill, religious organisations will be encouraged to educate their workforce and address the cultural attitudes and lack of understanding evidenced above.
- 7.24 We note and commend the Federal Government on the recent launch of a National LGBTI Ageing and Aged Care Strategy. During the latter half of 2012 a draft of this strategy was consulted upon around the country and the feedback provided was that the issue of religious exemptions was raised at most of these consultations as an issue of key concern for older LGBTI people. In particular in rural areas and areas with high occupancy and or low service availability resulting in the lack of choice available to select a non-religious provider.²⁰
- 7.25 The VGLRL strongly recommends the amendment of the SDA Bill to reflect existing Government policy.

Recommendation 17

The SDA Bill should be amended to limit discrimination by government-funded aged care service providers, for example, in the same terms as clause 33(3) of the draft HRAD Bill.

¹⁸ Matrix Guild (Vic) Inc and Vintage Men Inc (2009) *Permission to Speak: Determining strategies towards the development of gay, lesbian, bisexual, transgender and intersex friendly aged care services in Victoria*, Matrix Guild (Vic) Inc and Vintage Men Inc: Melbourne, p 38.

¹⁹ Above, n 16.

²⁰ Private communication with Corey Irlam, Convener of the Ageing and Aged Care Working Group of the National LGBTI Health Alliance.

Proposal 2: Transparency and accountability

- 7.26 The VGLRL also supports the Committee's views discussed in its Report into the draft HRAD Bill that in the interests of transparency, religious organisations intending to discriminate in employment should be required to notify prospective employees.
- 7.27 If religious organisations are to be granted permanent exceptions from discrimination laws, members of the community are entitled to be informed of risk of discrimination before they make a decision to purchase goods and services or apply for a job. Imposing such a notice requirement would also enable those organisations that do not discriminate to be free from any suspicion of discriminatory conduct or intent.
- 7.28 The SDA Bill should include a requirement that religious organisations publish statements on their websites, position descriptions for job advertisements and brochures or other promotional or informational material relating to the provision of goods or services, education or accommodation.
- 7.29 Religious organisations should also be required to register a notice of their intention to discriminate with the Australian Human Rights Commission (**Commission**) and a searchable public record should be maintained of these notices. This would not only serve to forewarn potential victims of discrimination but ensure accountability to the wider community.
- 7.30 The VGLRL encourages the Committee to adopt its Recommendation 12 in relation to the HRAD Bill requiring educational institutions and religious bodies to publicly document when and why they intend to rely on these exemptions.

Recommendation 18

Religious organisations and schools intending to rely on the religious exceptions (sections 37 or 38 of the SDA) be required to publish a notice on their websites and in literature provided to potential applicants/customers/patients/students or others potentially affected by their intended discrimination and register a notice with the Commission.

Proposal 3: Limiting discrimination in other publicly funded service delivery, particularly to vulnerable groups

7.31 In addition to the area of aged care, it is particularly objectionable that public funding be provided to organisations that are given broad licence to discriminate against LGBTI people and other vulnerable groups such as LGBTI children in schools, or users of welfare agencies, or homeless people, or people in insecure housing, or agencies for people with disabilities.

Case Study: Crisis assistance for young people*

Lee was a young university student who had just come out to his family and was kicked out of home. He approached Centrelink and was referred to the Salvation Army for assistance. The problem was that Lee was from a Salvation Army family and the Salvation Army religious beliefs were the reason he was asked to leave home and the church. He was too embarrassed to tell anyone at Centrelink and was unaware that there were other options available to him.

* Lee's name has been changed to protect his privacy.

7.32 The VGLRL strongly supports a limitation on discrimination in publicly funded services including:

- mental health services;
- homelessness and housing services;
- disability services;
- health services;
- youth services;
- schools; and/or
- social, community and welfare services.

7.33 If the religious exceptions are to be maintained, they should be restricted to prevent any organisations in receipt of government funding from relying on the exceptions. This would ensure that public funding is not utilised to perpetuate discrimination and disadvantage. It is particularly offensive for LGBTI taxpayers to find themselves faced with public service delivery options that they may be unable to access or that may be delivered in a manner inappropriate for their needs.

7.34 These settings deal with minors and potentially other people lacking legal capacity due to mental illness or intellectual disability, further evidencing their vulnerability. Considering the adverse mental and physical health impacts of discrimination, the Federal Government has a particular moral duty to ensure the delivery of these services is regulated so as to prevent or limit discrimination.

Recommendation 19

The SDA Bill should be amended to prohibit discrimination by publicly funded service providers, including religious organisations and schools.

Alternatively the SDA Bill should be amended to prohibit discrimination by publicly funded service providers delivering services to vulnerable groups, such as the homeless, children and young people, older people, people experiencing mental illness, people with disabilities, refugees and/or people experiencing poverty or other disadvantage.

Proposed exemptions in sport

- 7.35 There is currently a permanent sport exemption under section 42 of the SDA that permits discrimination by exclusion of people ‘from competitive sporting activity’ based on their ‘sex’ attribute ‘in which the strength, stamina or physique is relevant’. The Bill extends the application of this exemption to allow discrimination by exclusion of people based on the proposed new attributes of ‘gender identity’ and ‘intersex status’. The proposed extension of the sports exemption continues a problematic tendency in law to treat transgender and intersex people as fraudulent or not genuine, even as transgender and intersex people are gaining more legal protection in other respects through the SDA Bill.
- 7.36 In relation to transgender people, we stress that the process of transitioning from one sex/gender to a different sex/gender, whether by way medical intervention or not, is not something that transgender people undertake lightly or dishonestly. Transgender people do not transition to gain a competitive edge in sport.
- 7.37 In relation to intersex people, we point out that intersex status is a matter of biological fact, such as being blue-eyed, left-handed or of Asian descent, and not a matter of identity. Therefore, it is unfair that intersex people can be discriminated against merely because of their biological differences.
- 7.38 Further, as pointed out by the ANU College of Law Equality Project in their 2011 submission to the Discussion Paper on the Consolidation of Federal Anti-Discrimination Laws, ‘types of sporting activity vary considerably and the degree to which the strength, stamina and physique of a competitor is relevant is overly subjective’.²¹ Thus, the

²¹ ANU College of Law Equality Project in their 2011 submission to the Discussion Paper on the Consolidation of Federal Anti-Discrimination Laws, page 11 accessed at: <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx>.

retention of an indiscriminate permanent sport exemption in the SDA Bill disproportionate and not adequately justified.

- 7.39 If the Committee seeks to retain a permanent sport exception in the SDA it should be narrowed to ensure that a greater rigour is applied to the decisions made to exclude transgender and intersex people from sporting activities.
- 7.40 The VGLRL suggests that section 42 be amended to provide that the proposed exemption can only be relied upon where it is 'rational and necessary to protect the integrity of the sport' or similar wording that achieves the objective of narrowing the scope of this exemption and ensuring that decisions are made on a case by case basis. The test should not be based on the club or association's subjective beliefs.

Recommendation 20

The permanent sport exemption in section 42 of the SDA be repealed in its entirety.

If the permanent sport exemption in the SDA is retained, it should be narrowed to only permit discrimination in circumstances where it is 'rational and necessary to protect the integrity of the sport' or a similar test. The test should be objective rather than based on the subjective views of the sporting organisation in question.

Exemptions for Commonwealth and State laws

- 7.41 As well as a number of existing exemptions for Commonwealth laws already contained within the SDA, the SDA Bill proposes an additional exemption for anything done in compliance with a Commonwealth, State or Territory law, that is prescribed by regulation (section 40(2B)).
- 7.42 The VGLRL recommends removing this provision as it would otherwise allow potentially discriminatory laws of States and Territories to prevail over federal anti-discrimination law, with no consultation with the LGBTI community or assessment of whether such a law is justifiable.
- 7.43 This provision fails to provide sufficient accountability to the Australian Parliament and, ultimately, the Australian people. The sheer volume of regulations made by the Federal Government are not able to be subject to sufficient scrutiny by civil society. Such an exception is open to unintended misuse by successive governments and their Ministers, without an appropriate level of Parliamentary scrutiny.

Recommendation 21

The provision allowing exemptions for federal, state and territory laws that do not comply with the SDA should be removed.

Things done in compliance with the Marriage Act

7.44 The SDA Bill proposes to add a new additional exemption in sub-section 40(2A) of the SDA for anything done in direct compliance with the *Marriage Act 1961* (Cth) (**Marriage Act**). The Explanatory Memorandum for the SDA Bill notes that:

‘[this] new exception makes clear that introducing protections against discrimination on the basis of sexual orientation does not affect the current policy position regarding same-sex marriage.’²²

7.45 While the VGLRL recognises that the issue of the definition of marriage is not strictly the subject of inquiry under the SDA Bill, we urge the Federal Government to reconsider its current policy position against the legalising of marriage equality. We note that the terms of the Marriage Act perpetuate discrimination against LGBTI people, in its failure to recognise the relationships of same-sex and other LGBTI couples. Marriage equality is necessary to realise the human rights of LGBTI people and has the support of the majority of Australians with polls consistently indicating upwards of 60 percent of Australians expressing support. Legalising marriage equality is the broader solution required to avoid absurd situations like the forced divorce of married transgender people.

Recommendation 22

The provision in the SDA Bill allowing exemptions for anything done in direct compliance with the Marriage Act be removed.

²² Explanatory Memorandum, above n 6, at [12].

Discrimination in record keeping

- 7.46 Many sex and gender diverse people encounter daily difficulties when applying for employment, housing, bank credit or social security benefits because official forms require applicants to identify as male or female.
- 7.47 The SDA Bill recognises that transgender and intersex people should not be subject to discrimination. However, it also exempts government and private organisations from complying with the prohibition against discrimination in their record keeping. The explanation proffered in the Explanatory Memorandum to the SDA Bill is to reduce the burden of the ‘potentially onerous exercise for organisations’ to change their policies and procedures to remove discrimination.²³
- 7.48 The Federal Government has recently released [draft National Guidelines on the Recognition of Sex and Gender \(Guidelines\)](#) to develop a nationally consistent approach to recognising sex and gender diversity in government records.²⁴ These draft guidelines will aim to ensure that transgender and intersex people are be treated respectfully and sensitively by federal government departments and agencies.
- 7.49 Having regard to the current stage of development of the Guidelines, the strong imperative to protect intersex and transgender people against discrimination and the adjustment period while organisations adapt to the guidelines and provisions of the SDA Bill, the VGLRL recommends a three year sunset clause be applied to this exemption.
- 7.50 This time frame would give government departments, agencies and businesses an opportunity to consult and amend their policies, procedures and forms. As the legislation is prospective, organisations would not face an onerous burden of amending past records.
- 7.51 If it is considered necessary, a mechanism could be introduced to allow businesses that cannot reasonably comply with the requirement within three years to apply to the Australian Human Rights Commission for an exemption for up to five years, giving them a further opportunity to take steps to improve their processes over that period.

²³ Explanatory Memorandum, above n 6, at [84]

²⁴ Attorney-General’s Department, Australian Government Guidelines of the Recognition of Sex and Gender, available at: <http://www.ag.gov.au/Consultations/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>

Recommendation 23

The record keeping exemption in the SDA Bill should sunset after three years.

Forced transgender divorce

- 7.52 The exemption under sub-section 40(5) of the SDA allows State and Territory statutory authorities 'to refuse to make, issue or alter an official record of a person's sex...because the person is married.' An 'official record of a person's sex' is defined in section 4 to mean either:
- a. a record of a person's sex in a register of births, deaths and marriages (however described); or
 - b. a document (however described), issued under a law of a State or Territory, the purpose of which is to identify or acknowledge a person's sex.
- 7.53 The VGLRL is concerned that this exemption opens up the possibility that married transgender people who transition into their new sex after a prior 'opposite-sex' marriage will be effectively forced to make the difficult choice of either choosing to stay married or to have their new sex legally recognised because of this exemption.
- 7.54 This is inconsistent with the Federal Government's recent effort to promote the dignity and respect of transgender people through the proposed Guidelines.
- 7.55 The VGLRL also considers it absurd and detrimental to the family life of married transgender people that this exemption can operate to force those who are in happy marriages to make a choice as to keep one of either their married status or new legal sex status for fear of creating a subset of unintended 'same-sex' marriages.
- 7.56 Even if the Government's policy position is reflected in the current terms of the Marriage Act, the Marriage Act governs marriages at the time of solemnization. This policy position should not extend to the situation of a married transgender person seeking to legally change their sex.

Recommendation 24

The exemption under sub-section 40(5) of the SDA allowing State and Territory statutory authorities 'to refuse to make, issue or alter an official record of a person's sex...because the person is married should be repealed.

8. Commissioner for Sexual Orientation, Gender Identity and Intersex Status

- 8.1 There are currently six special purpose commissioners focusing on Aboriginal and Torres Strait Islander social justice, age, children's rights, disability, race and sex. These commissioners carry out a number of important functions, including research and public education. As the SDA Bill currently stands, it is assumed that the Sex Discrimination Commissioner will carry out these functions in relation to the new protected attributes introduced by the SDA Bill.
- 8.2 Instead, a similar special purpose commissioner should be created to promote LGBTI rights in Australia, including developing strategies to tackle homophobia, biphobia and transphobia.
- 8.3 While the VGLRL acknowledges the resource and other constraints the Commission is operating within, the omission of a special purpose commissioner in the SDA Bill creates an unfortunate hierarchy of attributes and entrenches inequality between the attributes.
- 8.4 The Commission has a time honoured history of sharing portfolios. In the VGLRL's view it is only fair and appropriate that a LGBTI Commissioner be created.
- 8.5 Alternatively, if it is intended that portfolio responsibility rest with someone other than the Sex Discrimination Commissioner, for example the President, or the currently vacant position of the Human Rights Commissioner, the legislation should be amended to clearly provide for this allocation of responsibility. To do otherwise creates the risk that sexual orientation, gender identity and intersex issues may be de-prioritised by the Commission in the future, given the absence of a formal mandate.

Recommendation 25

The SDA Bill should establish an LGBTI or SOGII Rights Commissioner to work to improve protection and respect for the human rights of LGBTI Australians.

Should this recommendation not be adopted, a clear statement should be included in the SDA Bill that responsibility for the new protected attributes may be someone other than the Sex Discrimination Commissioner.