

**SEX DISCRIMINATION AMENDMENT (SEXUAL ORIENTATION, GENDER IDENTITY
AND INTERSEX STATUS BILL 2013 – INNER CITY LEGAL CENTRE SUBMISSION TO
THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

1 SUBMISSION OVERVIEW

The Inner City Legal Centre (“ICLC”) makes this submission. ICLC is a community legal centre providing a range of free legal services to disadvantaged people in the inner city of Sydney, with a unique, specialised legal service to anyone in New South Wales who identifies as lesbian, gay, bisexual, transgender and intersex (“LGBTI”). ICLC provides a wide range of legal advice, representation and education to LGBTI communities in areas such as family law, domestic violence, homophobic vilification, discrimination and employment.

ICLC commends the introduction of sexual orientation, gender identity and intersex status as new grounds for discrimination in the *Sex Discrimination Act 1984* (“SDA”). ICLC further commends the broadening of ‘marital status’ to ‘marital or relationship status’. The Amendment Bill is a timely first step to address the lack of federal protection for LGBTI people from discrimination.

Our recommendations are as follows:

1. **‘Attraction to a different sex’ should not be included in the protected attribute ‘sexual orientation’.**
2. **‘Relationship status’ should be broadened to include relationships that are different to marriage and de facto relationships.**
3. **Remove exemptions that allow faith based organisations, service providers and schools to discriminate on the basis of sexual orientation, gender identity and intersex status.**
4. **Remove the exemption relating to requests for information and keeping records or insert a sunset clause within the exemption.**
5. **Remove the exemption for the *Marriage Act 1961*.**
6. **Exemptions to allow Commonwealth, state or territory laws to override prohibitions on discrimination for LGBTI communities should be removed or should be significantly limited by the Amendment Bill itself.**

7. A sexual orientation, gender identity and intersex status Commissioner should be appointed to monitor the Bill's implementation and consult with LGBTI communities.

2 DEFINITIONS

Part 2 of the Amendment Bill proposes replacing references to 'marital status' in the *Migration Act 1958* with 'marital or relationship status', to bring it into line with the amendments to the SDA. Similarly, language in the *Fair Work Act 2009*, the *Australian Human Rights Commission Act 1986* and other federal legislation containing provisions for preventing discrimination against lesbian, gay, bisexual, transgender and intersex people should be consistent with the terms used in the Bill. For instance, the reference to 'sexual preference' in the *Fair Work Act 2009* should be replaced with 'sexual orientation, gender identity and intersex status.'

Sexual orientation for the purposes of the SDA ought to be defined to include marginalised sexual orientations, including identifying as, or imputed to identify as, 'lesbian, gay, bisexual or queer'. It is contrary to the objects of the SDA to include heterosexuality as a protected attribute. As the protections provided by the SDA ought to provide protections from homophobia.

Similarly, 'gender identity' should be defined to include identifying as, or imputed to identify as, 'transgender, transsexual, gender queer or gender non conforming'. It is contrary to the objects of the SDA to include cis-gendered¹ as a protected attribute. As the protections provided by the SDA ought to provide protections from transphobia.

Similarly, intersex for the purposes of the SDA ought to be defined as:

A range of natural biological traits or variations that lie between "male" and "female". An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex.

It is contrary to the objects of the SDA to include non-intersex as a protected attribute. As the protections provided by the SDA ought to provide protections from intersexphobia.

The intersectional nature of discrimination is an important element to consider when defining sexual orientation, gender identity and intersex status. If, for example, a transgender woman

¹ *Cisgender* is commonly defined as a label for 'individuals who have a match between the gender they were assigned at birth, their bodies, and their personal identity': Kirsten Schilt; Laurel Westbrook, Laurel, *Doing Gender, Doing Heteronormativity: 'Gender Normals,' Transgender People, and the Social Maintenance of Heterosexuality* (2009) 23(4) *Gender & Society* 440–464, [461].

in a heterosexual relationship is treated unfairly, both because her relationship was erroneously seen as a same sex relationship and because she is transgender, the SDA needs to be able to provide adequate protections. Based on the above definitions, this woman would still be protected under the definition of 'sexual orientation' as her relationship was erroneously imputed to be a same sex relationship. Removing 'attraction to a different sex' from the definition of sexual orientation would not disadvantage the woman in this scenario. Similarly, the unfair treatment based on her gender identity would also be covered by the definition of gender identity.

RECOMMENDATION:

That 'attraction to a different sex' should not be included in the protected attribute 'sexual orientation'.

3 AMENDMENT 9 AND FAMILY

We commend the Amendment Bill introducing 'relationship status' in amendment 9. However, in our experience, discrimination against lesbian, gay, bisexual, transgender and intersex people may also occur on the basis of relationships that are different to marriage and de facto relationships. These relationships include Australian Aboriginal kinships, dating, intimate personal relationships and carers.

RECOMMENDATION:

That 'relationship status' should be broadened to include relationships that are different to marriage and de facto relationships.

4 FAITH BASED EXEMPTIONS

States shall [...] take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.²

ICLC advocates for a *no faith based exemptions or exceptions* approach to discrimination law. The Amendment Bill needs to tackle, rather than tacitly approve, the specific circumstances in which fundamental human rights, such as equality and non-discrimination, are limited under law. This requires a balancing exercise, not a blanket exemption, and is crucial to the elimination of entrenched prejudicial or discriminatory attitudes and behaviours toward the LGBTI communities. Specifying the exemptions in this manner is crucial to

² International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, Principle 2, F.

Australia developing more constructive, inclusive and meaningful human rights jurisprudence for the LGBTI communities.

If the general limitations clauses in sections 37 and 38 are adopted by the Amendment Bill - which, in our submission, it should not - they ought to be compliant with international human rights standards. These standards require the party seeking to limit a person's human rights to justify the limitation and that limitation must be reasonable and proportionate in the circumstances.³ Such limitations are included in section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and was proposed in the 'justifiable conduct' clause in the *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*.

The present Committee recently recommended:

The law should not provide broad statutory exceptions allowing disproportionate or unreasonable discrimination on religious grounds. The committee considers that the potential impact of any discriminatory conduct on the individual concerned is a crucial issue when determining the reasonableness of such action.

In this regard, the committee notes comments from the Parliamentary Joint Committee on Human Rights that, without further explanation from the government about how the broad religious exceptions in the Draft Bill are consistent with other human rights, 'these provisions are likely to be incompatible with the right to non-discrimination'.⁴

We take this recommendation as our starting point. We urge the Committee to do the same for this inquiry.

Faith based organisations and service providers

The Amendment Bill does not amend the very broad exemption in section 37(d) for religious bodies providing services to the public. This is despite the Australian Human Rights Commission recording prevalent discrimination in service provision.⁵ As noted above, particular religious beliefs ought not to limit other fundamental human rights where that limitation is disproportionate and unreasonable in the circumstances.

A significant proportion of community services are run by faith based organisations. In 2007, for example, religious organisations accounted for 21.4% (8786) of recorded not-for-profit

³ See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, E/CN.4/1984/4 (1984).

⁴ Legal and Constitutional Affairs Legislation Committee, Senate, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 7.65-7.66.

⁵ Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination*, Consultation Report (2011), 5.2.

organisations.⁶ In our view, these organisations are likely to *increase* as government attempts to outsource community services and invest in the not-for-profit sector. This is already apparent from the recent establishment, to oversee the sector, of both the Office for the Not-for-Profit Sector and the Australian Charities and Not-For-Profits Commission.

Faith based organisations provide crisis accommodation, disability support services, domestic violence services, drug and alcohol programs and youth programs. Service users of such programs number among the most disadvantaged members of society. It is contrary to the intention of this Amendment Bill to further entrench systemic disadvantage. This faith based exemption will continue to disproportionately affect a large proportion of the LGBTI communities over their lifespan.

If we consider potential employees and service users, providing faith based exemptions for 21.4% of not-for-profit organisations will leave a percentage of the most vulnerable members of LGBTI communities without legal protection from discrimination.

In our submission, if faith based organisations are providing services in the public sphere, they ought to meet the standards of any other body or organisation. Further to this, if organisations are receiving public funding, there ought to be an obligation for the organisation to adhere to public values. This is increasingly important as all levels of government seek to have various large charities deliver crucial community services at the local levels. As it would be inappropriate for government to discriminate against someone on the basis of sexual orientation, gender identity and intersex status, we assert that contracting out such services by government should not narrow the rights of vulnerable service recipients.

In our submission, an amendment included in the Amendment Bill to either remove section 37 or significantly and clearly limit such exemption in line with human rights standards would resolve these issues. We note that this submission accords with recommendations made recently the Legal and Constitutional Affairs Legislation Committee:

[The committee] can see no reason why individuals should automatically lose their right to non-discrimination in the provision of services because a particular service is being provided by a religious organisation. The committee is of the view that no organisation should enjoy a blanket exception from anti-discrimination law when they are involved in service delivery to the general community.⁷

Intersex status

⁶ Australian Bureau of Statistics (ABS) (12 June 2009), *Not-for-profit Organisations, Australia, 2006-2007* Cat. No. 8106.0.

⁷ Legal and Constitutional Affairs Legislation Committee, *Ibid*, 7.70-7.72.

It not being amended, section 37 still applies to intersex status. This is despite the present Bill's Explanatory Memorandum noting that religious bodies do not raise any doctrinal concerns with intersex status.⁸

Aged-care

Discrimination towards the LGBTI communities in aged-care, especially Commonwealth-funded aged-care, is a significant issue that must be addressed. This issue was considered during the *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* consultation process in light of clause 33(3) of that Bill. No such limitation exists in the present Bill.

RECOMMENDATION:

Remove exemptions that allow faith based organisations and service providers to discriminate on the basis of sexual orientation, gender identity and intersex status.

Faith-based schools

Under clause 38, the Amendment Bill proposes to allow religious schools to discriminate on the basis of sexual orientation and gender identity. However, in our view, this limitation is so broad that the LGBTI communities' right to non-discrimination in education is *automatically and arbitrarily* lost, without further explanation, to religious belief. It does not meet the international human rights standard for limiting fundamental human rights noted above.

We commend the Amendment Bill excluding intersex status from this exemption and, therefore, in this part, we refer only to the Lesbian, Gay, Bisexual and Transgender (LGBT) communities.

In our view, the Australian educational landscape has changed significantly in recent years. These changes increase the exemption's disproportionate affect on LGBT students, parents and teachers. This affect is *increasing* as a significant proportion of schools are run by religious authorities and these schools are gradually increasing in student numbers – just like faith based community services.

In 2012, for example, the majority of Australia's 9,427 schools were in the government sector (71%). The Catholic and Independent sectors accounted for 18.2% and 10.8% respectively of Australia's schools. The Gonski Report found that Catholic and Independent schools had the largest proportional increase in students over the past five years.⁹

⁸ Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 9.

⁹ Department of Education, Employment and Workplace Relations, *Review of Funding For Schooling*, Final Report (December 2011) 4. In 2012, the Independent schools sector had the largest proportional increase in student numbers in Australian schools, 1.8%, while students attending Catholic schools rose by 1.7%: ABS (19 March 2013), *Commentary on Student Numbers* Cat. No. 4221.0.

We briefly examine how these changes affect LGBT students in circumstances where the exemption operate to:

- undermine an overriding public purpose, that being the international obligation to outlaw all forms of discrimination in Australia
- permit discrimination in a nationally significant socio-economic sphere
- permit discrimination in a social space where homophobic and transphobic attitudes and behaviours are nationally pervasive
- significantly undermine children's' human rights – whether it be to quality education, health, privacy, gender recognition or freedom from discrimination.

The following three changes in Australia's educational landscape question the importance and necessity of the exemption's intended purpose, that is, to protect religious belief.

Religious belief and Australian education

It is generally accepted that education in private schools has of a higher quality than in most government schools. The Gonski report actually questioned the capacity of some government schools to provide quality education at all.¹⁰ The blanket exemption has the effect of automatically excluding LGBT children from accessing this quality education. This exclusion is disproportionate to the exemption's intended purpose because evidence shows that religious belief is merely incidental to contemporary education. How parents make decisions about their children's education further demonstrates this.

The increasing disconnection between religious belief and education is evident from statistics and how inconsistently this exemption is applied (see below). Student and school numbers in the Catholic and Independent education systems are consistently rising, despite religious affiliation among Australians apparently declining. For example:

- In the past decade, the proportion of the population reporting an affiliation to a Christian religion decreased from 68% in 2001 to 61% in 2011. This trend was also seen for the two most commonly reported denominations¹¹
- Young adults (aged 18-34 years) were more than twice as likely as those in 1976 to have no religion (29% compared with 12%), while children (aged 0-18 years) were almost three times as likely (27% compared with 9%)¹²

¹⁰ Department of Education, Employment and Workplace Relations, *Ibid*, 12.

¹¹ ABS (21 June 2012), *Reflecting a Nation: Stories from the 2011 Census* Cat. No. 2071.0.

¹² ABS (10 April 2013), *Young adults: Then and now* Cat. No. 4102.0.

- In 2011, 70.1% of all marriages were performed by civil celebrants. Civil marriages have outnumbered religious ceremonies since 1999¹³

It is reported that religious and non-religious parents choose their children's education primarily by reference to whether the school offers quality teaching and a safe environment.¹⁴ 'Social factors' (including religion and values) ranked fifth.¹⁵ This shows how religious belief increasingly plays a limited role in education selection. It also shows how artificial 'choice' is in education when the determining factor in that choice is almost always education quality and children's safety.

The way private schools market themselves responds to this demand. In a recent empirical report, The Australia Institute found that many private schools market their education according to its superior academic and sporting facilities – that is, the opportunities it provides to its students - and less toward its religious teaching.¹⁶

The Amendment Bill needs to engage with and develop this exemption; otherwise the Amendment Bill risks further entrenching socio-economic disadvantage for LGBT students.

The emerging new structure of Australian education

The structure of Australia's education system is changing – right now - to ensure that education quality is at the system's centre. That 79% of all students from disadvantaged backgrounds were in public schools in 2010 demonstrates that changes to the system may in fact be inevitable.¹⁷

The Commonwealth Government's National Plan for School Improvement, released on 14 April 2013, aims to inject public values, quality, transparency, accessibility and national consistency into education.¹⁸ It will invest \$14.5 billion in education over the next six years to achieve these goals, which the NSW Government recently accepted.¹⁹ These reforms reinforce the need to ensure private schools are accountable to public values, including non-discrimination, which is at the heart of the present Bill.

The exemption is inconsistently applied

¹³ ABS (29 November 2012), *Marriage Celebrants* Cat. No. 3310.0.

¹⁴ Department of Education, Science & Training, *Parents' and Community Members' Attitudes to Schooling*, Commonwealth of Australia, Canberra (2003) 9. Parents of children in public and private schools rated this factor almost the same (78.7% compared to 80.5%).

¹⁵ *Ibid*, 9.

¹⁶ The Australia Institute, 'The Accountability of Private Schools to Public Values', Discussion Paper Number 71 (2004) 10 -11.

¹⁷ Department of Education, Employment and Workplace Relations, *Ibid*, 10, Figure 2.

¹⁸ Department of Education, Employment and Workplace Relations, 'PM sets out her plan for the future resourcing of our schools' Media Release (17 April 2013), accessed 23 April 2013 at: <http://deewr.gov.au/news/pm-sets-out-her-plan-future-resourcing-our-schools>. It is expected that the Australian Education Bill 2012, currently before Parliament, will secure this plan.

¹⁹ The Conversation, *NSW backs Gillard's Gonski schools plan* (23 April 2013).

LGBT students *are* admitted into religious schools and often share their school's religious beliefs. This shows further disconnection between religious belief and education. The extent to which Christian schools exercise the exemption, for example, varies considerably, depending on the degree of intensity with which the school adheres to the denomination's practice.²⁰ *Writing Themselves in 3* found that 21% of the same sex attracted and gender questioning young people surveyed were attending religious secondary schools.²¹

These findings are significant. They show how the connection between religion and homosexuality and/or gender identity is not fixed, absolute or even necessary.

LGBT students *within* religious schools are exposed to discriminatory attitudes and behaviour in a legal and policy vacuum. This discrimination is very real, and its impact on LGBT children is crucial to determining whether the exemption remains reasonable.

It is generally accepted, both in Australia and internationally, that schools are the most homophobic social spaces in contemporary society.²² From the children surveyed in *Writing Themselves in 3*, for example, 80% of the homophobic abuse these children experienced occurred at school.²³ It has elsewhere been noted that all-boys' schools have a particularly prevalent homophobic culture.²⁴

Children enrolled in religious schools that experience Gender Identity Disorder face difficulties with uniforms, toilet facilities and bullying. As there are no protections, policies or procedures in place for these children, they must either:

- resort to protections under the *Disability Discrimination Act 1992* (CTH) by arguing that their gender identity is a medical disorder in line with the DSM-IV²⁵ and ICD-10²⁶, which has occurred in the United States²⁷ and Canada.²⁸ Gender identity, however, does not necessarily involve a psychiatric or psychological disorder. Resorting to

²⁰ Marion Maddox, 'The church, the state and the classroom: questions posed by an overlooked sector in Australia's education market' (2011) 34 *UNSW Law Journal* 300, 308.

²¹ L Hillier; T Jones; M Monagle; N Overton; L Gahan; J Blackman; A Mitchell, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010), 15.

²² UNESCO, *Review of Homophobic Bullying in Educational Institutions* (12 March 2012) 13; ILGA-Europe and IGLYO, *Social Exclusion of young lesbian, gay, bisexual and transgender (LGBT) people in Europe* (April 2006); Egale Canada Human Rights Trust; C Taylor; T Peter, *Every class in every school: Final report on the first national climate survey on homophobia, biphobia and transphobia in Canadian schools* (2011).

²³ Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010), 44.

²⁴ L Hillier et al, *Ibid*, 34.

²⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders – DSM IV* (4th ed., 2000).

²⁶ World Health Organization, *International Classification of Diseases and Related Health Problems* (10th ed., 2010) F64.2.

²⁷ *Pat Doe v John Yunits*, 2001 15 Mass. L. Rptr. 279; *Jean Doe v Bell*, 2002 (Supreme Court of the State of New York).

²⁸ *Kavanagh v Canada (Attorney General)*, 2001 CanLII 8496 (CHRT), 135.

disability discrimination as a protective remedy is inappropriate and is not available to all gender variant children. No other protections are available, or

- change to a government school and forfeit the benefits of quality education and the safe environment afforded by their non-government school, or
- stay at their school in conflict with their gender identity.

The Bill is an important opportunity to respond to the lack of federal protections for LGBT students already enrolled in religious schools.

RECOMMENDATION:

Remove exemptions that allow faith based schools to discriminate on the basis of sexual orientation and gender identity or clearly limit them by what is proportionate and reasonable in the circumstances.

5 EXEMPTION FOR KEEPING RECORDS

It will take time for governments and the private sector to adopt procedures that enable individuals to identify as neither male nor female. To ensure that such changes are actually implemented, clause 43A(2) of the Amendment Bill should be made transitional by introducing a sunset clause. This is consistent with the Commonwealth Attorney-General's Department's *Draft Australian Government Guidelines on the Recognition of Sex and Gender*, which proposes a 3 year implementation timeline.

RECOMMENDATION:

ICLC recommends that this exemption be removed or remain with a sunset clause.

6 EXEMPTION FOR THE MARRIAGE ACT

We strongly oppose the inclusion of clause 40(2A) in the Amendment Bill. ICLC has consistently argued that marriage equality must be realised in Australia.²⁹ These arguments now carry more weight with France and New Zealand joining 12 other countries that recognise same-sex marriage.³⁰

Inserting (2A) significantly undermines the progressive realisation of the LGBTI communities' right to non-discrimination in marriage.

RECOMMENDATION:

²⁹ Inner City Legal Centre, *Submission to Senate Committee on Legal and Constitutional Affairs - Marriage Equality Amendment Bill 2010*, 2 April 2012; Inner City Legal Centre, *Submission to NSW Standing Committee on Social Issues – State Marriage Equality Bill 2013*, 5 March 2013.

³⁰ Those countries are: Argentina, Belgium, Sweden, Spain, Canada, Denmark, Iceland, Norway, Portugal, South Africa, The Netherlands and Uruguay.

Remove the exemption for the *Marriage Act 1961*.

7 EXEMPTION FOR 'ANYTHING DONE' UNDER PRESCRIBED LAWS

The Amendment Bill proposes to provide an exemption under clause 40(2B) to 'anything done in compliance with a law of the Commonwealth, or of a State or Territory, that is prescribed by the regulations'. Although this prescribing process will be subject to parliamentary scrutiny, including the *Human Rights (Parliamentary Scrutiny) Act 2011*, that Act only proscribes scrutiny by reference to 'human rights', as defined by that Act in section 3(1). It does not require scrutiny by reference to the self-contained definitions and protections in the Amendment Bill itself. The Amendment Bill is broader and contains richer content than section 3(1). Parliament itself is also not bound by the SDA.

The Amendment Bill must therefore be the starting and end point for determining whether existing or emerging law is exempt from the Bill. This is important to ensure not only national consistency, but also transparency and accountability. Without these necessary safeguards, clause 40(2B) is open to misuse. Discriminatory state and territory laws will become exempt without public consultation, which may expose LGBTI communities to discrimination contrary to the purposes of the Bill. If the prohibitions on discrimination will not apply when a person is acting in direct compliance with Commonwealth or State and Territory laws, then the voracity of the Act will be weakened considerably.

RECOMMENDATION:

Exemptions to allow Commonwealth, state or territory laws to override prohibitions on discrimination for LGBTI communities should be removed or should be significantly limited by the Amendment Bill itself.

8 COMMISSIONER RESPONSIBLE FOR SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS

ICLC strongly supports the appointment of a new Commissioner being appointed with responsibility for human rights matters relating to sexual orientation, gender identity and intersex status. This area of discrimination presents complex and challenging issues that warrant a new Commissioner being empowered to monitor and raise awareness about the new protections. This is especially important in a field where different human rights often compete for protection, which is why this new Commissioner should also undertake periodic reviews about the various exemptions and how they are being applied, if those exemptions remain at all.

A new Commissioner would consult with LGBTI communities, which would also provide opportunity for the Commonwealth Government to demonstrate its leadership and commitment to these complex and challenging issues.

RECOMMENDATION:

A sexual orientation, gender identity and intersex status Commissioner should be appointed to monitor the Bill's implementation and consult with LGBTI communities.