



National Association of Community Legal Centres

**Submission to the Standing Committee on Legal and
Constitutional Affairs**

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

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1. Overview of this submission

This submission is made by the National Association of Community Legal Centres (NACLC) to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (the Amendment Bill).

NACLC commends the Government for introducing sexual orientation, gender identity and intersex status as new grounds for discrimination. It also welcomes the extension of the existing ground of 'marital status' to 'marital or relationship status'. Given the Government's commitment to consolidating Commonwealth anti-discrimination laws, NACLC supports the adoption of the Amendment Bill as an imperative preliminary measure to address the significant gap in protection for lesbian, gay, bisexual, transgender and intersex (LGBTI) people from discrimination.

This submission makes a number of recommendations that aim to strengthen the Amendment Bill including the removal of exemptions that would allow religious organisations, schools, age care facilities and other service providers to discriminate on the basis of sexual orientation and gender identity and the creation of a Commissioner with specific responsibility for sexual orientation and gender identity discrimination.

NACLC is the peak national organisation representing community legal centres (CLCs) in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to disadvantaged members of society and those with special needs. This submission draws on CLCs' many years of practical experience assisting clients to navigate both the Commonwealth and state or territory systems. CLCs bring particular expertise and understanding of what the barriers are to accessing justice for people who have experienced discrimination as we work every day with clients to overcome these barriers.

The submission has been coordinated in partnership with the Lesbian, Gay, Bisexual, Transgender & Intersex Network of the National Association of Community Legal Centres. The network undertakes social justice campaigns and advocates for the human rights of lesbian, gay, bisexual, transgender and intersex both in Australia and internationally.

2. Summary of Recommendations

1. The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012*, should be amended to incorporate the recommendations made by the Senate Legal and Constitutional Affairs Legislation Committee, and should be passed through Parliament by the end of June this year.
2. Exemptions which would allow State and Territory laws to override prohibitions on discrimination on the basis of sexual orientation, gender identity and intersex status should be removed.
3. Amend terminology in relevant federal legislation to be consistent with the language 'sexual orientation, gender identity and intersex status' used in the *Sex Discrimination Amendment Bill 2013*.
4. 'Attraction to a different sex' should not be included in the protected area 'sexual orientation'.
5. Remove the exemptions that would allow religious bodies, schools, aged care facilities and other service providers to discriminate on the basis of sexual orientation, gender identity and intersex status.
6. Athletes should be able to participate in competitive sporting activity on the basis of their legal sex.
7. Instead of a permanent exception for requests for the keeping of records that identify sex, there should be a sunset clause providing for a 3 year transition period.
8. Appoint a national Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.
9. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights should be referenced in section 3, Objects of the *Sex Discrimination Act 1984*.

3. Recommendations to strengthen the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*

3.1 *Human Rights and Anti-Discrimination Bill 2012*

Although NACLC welcomes the addition of sexual orientation, gender identity and intersex status as grounds for discrimination, the Amendment Bill does not cover other proposed measures set out in the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* which would significantly improve fairness and access to justice. These measures include the shared burden of proof and the general rule that each party should bear their own costs. The *Human Rights and Anti-Discrimination Bill 2012* would also have introduced a new unified definition of discrimination, combining direct and indirect discrimination and recognising complex and compound forms of discrimination on multiple grounds. NACLC welcomed the recommendations made by the Senate Legal and Constitutional Affairs Legislation Committee in particular the recommendations for the additional protected attributes of irrelevant criminal record and domestic violence, and for the removal of religious exemptions. NACLC recommends that consolidation should still occur before the end of June this year.

RECOMMENDATION:

The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012*, should be amended to incorporate the recommendations made by the Senate Legal and Constitutional Affairs Legislation Committee, and should be passed through Parliament by the end of June this year.

3.2 Exemptions for Commonwealth, State and Territory Laws

Clause 52 of the *Sex Discrimination Amendment Bill 2013*, proposes that prohibitions on discrimination on the basis of sexual orientation, gender identity and intersex status will not apply when a person is acting in direct compliance with Commonwealth or State and Territory laws. NACLC is concerned that this exemption is open to misuse, especially given that regulations are easily changed without parliamentary scrutiny. This exemption goes further than any other Commonwealth anti-discrimination legislation.

RECOMMENDATION:

Exemptions which would allow Commonwealth, State and Territory laws to override prohibitions on discrimination on the basis of sexual orientation,

gender identity and intersex status should be removed.

3.3 Consistency in other federal legislation

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* should be consistent with the terms used in the bill. The reference to 'sexual preference' in the *Fair Work Act 2009* should be replaced with 'sexual orientation, gender identity and intersex status.'

RECOMMENDATION:

Amend terminology in the *Fair Work Act 1958* to be consistent with the language 'sexual orientation, gender identity and intersex status' used in the *Sex Discrimination Amendment Bill 2013*.

3.4 Definitions

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 conformity'. It is contrary to the objects of the SDA to include cis-gendered* as a protected attribute. As the protections provided by the SDA ought to provide protections from transphobia.

Similarly intersex for the purposes of the act ought to be recognised 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.

Melanie is a transgender woman who works in a management role. After Melanie's male partner visited the office, Melanie overheard her director make derogatory comments about Melanie not being a real woman and gay relationships to a group of people including members of Melanie's team. This

was at a time when Melanie was being considered for promotion. It was clear to Melanie that she had been passed up for promotion because of these discriminatory attitudes. Melanie was embarrassed and it became clear that after the incident she had lost the respect of her team. She felt forced to resign from her role.

The intersectional nature of discrimination is an important element to consider when defining sexual orientation, gender identity and intersex status. In the case of Melanie who is a transgender woman in a heterosexual relationship, she was 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, Melanie 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 people in similar scenarios. Similarly the unfair treatment based on her gender identity would also be covered by the definition of gender identity.

* *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."¹

RECOMMENDATION:

'Attraction to a different sex' should not be included in the protected area 'sexual orientation'.

3.5 Religious exemptions

Toni is a transgender woman living in the inner city. Toni needed to attend a residential drug rehabilitation centre as she had been struggling with alcohol and opiate dependency. Her support worker called the local clinic, this clinic happened to be run by a religious based charity. The clinic informed Toni's support person that there was an opening for Toni and that they would hold a place for her. When Toni presented at the clinic she was refused service. When asking why she was told there was no spot for her. Toni was sure that

¹ Schilt, Kristen; Westbrook, Laurel (August 2009). "Doing Gender, Doing Heteronormativity: 'Gender Normals,' Transgender People, and the Social Maintenance of Heterosexuality". *Gender & Society* 23 (4): 440–464 [461].

this refusal was based on the fact that she is a transgender woman.

NACLC is concerned about the retention in the SDA of permanent exemptions in sections 37 and 38 of the Act, which would allow religious bodies to engage in discriminatory conduct in education, employment and service delivery. NACLC submits that the new protections on the grounds of sexual orientation, gender identity and intersex status will be severely compromised by the application of religious exemptions.

The Senate Committee Report on the *Exposure Draft of the Human Rights and Anti-Discrimination Bill* recommended the removal of religious exemptions in the provision of services.² NACLC is disappointed that this recommendation has not been adopted in the Amendment Bill. In the Exposure Draft Bill the Government expressed that it does not consider discrimination in the provision of aged care services to be appropriate. However section 23 and section 37 would enable aged care providers to discriminate against LGBTI residents in aged care facilities. The Explanatory Memorandum states the Government's position that intersex status not be included in religious exemptions, we note with concern that intersex status is included in the operation of the section 37 exemption for religious bodies.

RECOMMENDATION:

Remove the exemptions that would allow religious bodies, schools, aged care facilities and other service providers to discriminate on the basis of sexual orientation, gender identity and intersex status.

3.6 Sport exemptions

Clause 59 of the Amendment Bill amends subsection 42(1) of the SDA to render it unlawful to “discriminate on the ground of sex, gender identity or intersex persons by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.” This section may prevent intersex athletes from competing or forced them to undertake hormonal or surgical intervention to be able to compete. NACLC recommends that subsection 42(1) be amended to enable athletes to compete in their legal sex.

² The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee considers that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the Tasmanian Anti-Discrimination Act 1998 as a model.

RECOMMENDATION:

Athletes should be able to participate in competitive sporting activity on the basis of their legal sex.

3.7 Data Collection

Clause 60 of the Amendment Bill proposes amending section 43 of the SDA to include a provision that it is not unlawful to request information or keep records that do not allow for a person to identify as being neither male nor female. NACLC recognises that sex-disaggregated data collection is important to support the goal of achieving gender equality and supports the continued collection of sex-disaggregated data. NACLC supports the adoption of more inclusive sex categories in data-collection, devised through consultation with transgender and intersex people and organisations. Recognising that it will take time for the government and private sectors to comply with new regulations, NACLC submits that section 43A should be a transitory measure for 3 years rather than a permanent exception.

RECOMMENDATION:

Instead of a permanent exception for requests for the keeping of records that identify sex, there should be a sunset clause providing for a 3 year transition period.

3.8 Sexual Orientation, Gender Identity and Intersex Commissioner

Part V of the SDA sets out the role of Sex Discrimination Commissioner. NACLC recommends that the *Sex Discrimination Amendment Bill 2013* creates the position of a Sexual Orientation, Gender Identity and Intersex Status Discrimination Commissioner. NACLC proposes that a Commissioner be appointed specifically to take a broad advocacy role to promote public awareness of sexual orientation, gender identity and intersex status issues, conduct research and education programs, consult directly with the LGBTI community and representative organisations as well as monitor Commonwealth legislation, policies and programs that relate to LGBTI rights.

RECOMMENDATION:

Appoint a national Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.

3.9 Protection for sexual orientation, gender identity and intersex status in international law

Clause 3 of the SDA states that the objects of the act are to give effect to the Convention on the Elimination of all Forms of Discrimination Against Women, and the full text of the convention is included as a Schedule to the SDA. The UN Human Rights Committee³ and UN Committee on Economic, Social and Cultural Rights⁴ have affirmed that protections for sexual orientation, gender identity and intersex status are covered in international conventions that Australia is party to. With the inclusion of sexual orientation, gender identity and intersex status in the SDA, NACLC recommends references to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights be included in the SDA at section 3.

RECOMMENDATION:

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights should be referenced in section 3, Objects of the *Sex Discrimination Act 1984*.

³ The International Covenant on Civil and Political Rights (ICCPR) at Article 26 states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In *Toonen v Commonwealth of Australia* (1994) the Human Rights Committee held that the reference to “sex” in Articles 26 of the ICCPR is to be taken as including sexual orientation.

⁴ The International Covenant on Economic, Social and Cultural Rights (ICESCR) at Article 2, paragraph 2 states that ‘States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ General Comment 20 of the Committee on Economic, Social and Cultural Rights states that “‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights.’