



The Equal Rights Trust

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

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

April 2013

About the Equal Rights Trust

The Equal Rights Trust (ERT) is an independent international human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre, and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status)
Bill 2013: Submission of the Equal Rights Trust to the Senate Legal and Constitutional
Affairs Committee

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1. Introduction

The Equal Rights Trust (ERT) is an independent international human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre, and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. In the exercise of this mission, we make submissions to governments and parliaments concerning the implementation and enforcement of these rights.

ERT welcomes the opportunity to comment on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill). In analysing the Bill, ERT has applied the standards contained in the Declaration of Principles on Equality.¹ The Declaration of Principles on Equality was drafted and signed by 128 human rights and equality experts from over 40 different nations and reflected a moral and professional consensus on the right to equality. The 27 principles of the Declaration take their starting point from the United Nations Declaration on Human Rights providing that “all human beings are born free and equal in dignity and rights.”²

The principles are based on concepts and jurisprudence developed in international, regional and national contexts and are intended to assist the efforts of legislators, the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality. The Declaration has been described as “the current international understanding of Principles on Equality”³ and has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁴ It has also informed the development of anti-discrimination legislation in countries as diverse as Albania, the Czech Republic and Kenya, as well as the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 in Australia.

ERT shares the disappointment of equality advocates in and outside of Australia at the recent announcement of the Attorney General of Australia that the Government would not be tabling the Human Rights and Anti-Discrimination Bill in Parliament before the federal election, scheduled for September 2013.⁵ The adoption of comprehensive anti-discrimination law is a necessary step for all states in order to comply with their obligations under international human rights law. Enacting the Human Rights and Anti-Discrimination Bill would have provided Australia with a comprehensive anti-discrimination Acts in compliance with international

¹ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

² Article 1 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

³ *Naz Foundation v. Government of NCT of Delhi and Others* 160 Delhi Law Times 277 (2009), Para 93.

⁴ Parliamentary Assembly of the Council of Europe, Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe, REC 1986 (2011), 25 November 2011.

⁵ Karvelas, P., and Rout, M., *Discrimination Reforms Dumped*, The Australian, 20 March 2013, available at: <http://www.theaustralian.com.au/national-affairs/discrimination-reforms-dumped/story-fn59niix-1226601065130>.

human rights law.. While the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 proposed in its place is necessary to fill a gap in the protection of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Australia, ERT believes it to be a poor substitute to the original Bill. We therefore will continue to call for Australia to enact comprehensive anti-discrimination legislation.

We note that “[i]n light of its recent broad-ranging inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, the committee will not be focussing on issues which go beyond the scope of the Bill”.⁶ We have therefore restricted our comments in this submission to the scope of the Bill which is currently under consideration. With the aforementioned caveat, ERT supports the purpose of the Bill and believes that in general it is satisfactorily worded. As such, ERT’s comments and recommendations in this submission relate only to those provisions of the Bill which ERT believes can be improved.

⁶ Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013: Information about the Inquiry*, available at: http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/sex_discrim_sexual_orientation/info.htm.

2. Amendments to the Sex Discrimination Act 1984: Schedule 1, Part 1

2.1. The Definition of Discrimination: Item 17

Item 17 would insert definitions of discrimination on grounds of sexual orientation (new Section 5A), gender identity (new Section 5B) and intersex status (new Section 5C) in the Sex Discrimination Act 1984. ERT welcomes the fact that Sections 5A, 5B and 5C all encompass direct discrimination and indirect discrimination. However, we note with concern that while each definition includes discrimination on the basis of perception, they do not include discrimination by association. We also note that the definitions do not include harassment, but as this is dealt with in a limited way elsewhere in the Bill, our comments on this issue are presented in section 2.2 of this submission.

Principle 5 of the Declaration of Principles on Equality prohibits discrimination by association. This prohibition reflects the current understanding of international human rights law, and as such has been reflected in General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, where the Committee stated that “[m]embership [of a protected group] also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability)”.⁷

We note that clause 19(4) of the Draft Exposure Human Rights and Anti-Discrimination Bill 2012 provided for the prohibition of discrimination by association:

A reference (...) to a person having a particular protected attribute (whether alone, or as part of a combination of 2 or more protected attributes) is taken also to include a reference to each of the following: (a) an associate of the person having the protected attribute; (b) the person, or an associate of the person, having in the past had the protected attribute; (c) the possibility that the person, or an associate of the person, may in the future have the protected attribute; (d) the first person (...) assuming that the person, or an associate of the person: (i) has the protected attribute; or ii) has in the past had the protected attribute; or (iii) may in the future have the protected attribute.

“Associate of the person” was defined in clause 6 as including “(a) a member of the person’s immediate family, or another relative of the person; and (b) another person with whom the person has a care, business or social relationship.”

ERT has previously supported clause 19(4) of the Draft Exposure Human Rights and Anti-Discrimination Bill 2012 and now urges the Committee to include an equivalent provision in the present Bill. Without such a provision, a significant number of people are at risk of discrimination without any remedy, including friends and family members of LGBTI people, and heterosexual people who support and work with the LGBTI community. For example, a heterosexual employee who is treated less favourably by her employer because of her known support for LGBTI rights would not receive protection, nor would the friends of a same-sex

⁷ Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 16.

couple who, as a group, are asked to leave a restaurant because the owner objects to same-sex relationships, nor would the family of a same-sex couple who holiday together but who are all refused accommodation at a hotel which does not permit same-sex couples to occupy a double room. In all such instances it is the association of the person with LGBTI people that results in their being discriminated against, and the Bill should include a provision equivalent to clause 19(4) of the Draft Exposure Bill in order to ensure effective access to justice.

Recommendation 1: The Bill should be amended to include discrimination by association as a form of prohibited conduct.

2.2. Harassment: Item 46

Item 46 would amend paragraph 28A(1A)(a) of the Sex Discrimination Act 1984 to provide that consideration of the person's sexual orientation, gender identity, intersex status, and marital or relationship status be taken into consideration whether that person has been sexually harassed or not for the purposes of Division 3 of Part II of that Act.

Principle 5 of Declaration of Principles on Equality prohibits harassment as follows:

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

This definition of harassment is substantially broader than that provided for in the Sex Discrimination Act (both before and after the proposed amendment) in two important respects. First, it prohibits discrimination on *all* relevant grounds, not just on the ground of sex. Secondly, the definition – in keeping with international best practice – defines harassment as any conduct related to a ground which is both unwanted and has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Thus, the definition goes beyond the definition of sexual harassment – conduct which is inherently sexual in nature – to cover a much wider range of actions.

The effect of item 46 is not to prohibit harassment on grounds of sexual orientation, gender identity, intersex status, and marital or relationship status. Rather, its effect is to maintain the prohibition of sexual harassment, albeit with a requirement that these additional characteristics be taken into account when determining whether sexual harassment has taken place. ERT believes that this is unnecessarily confusing, will be difficult to interpret, and is inconsistent with international best practice.

Paragraph 28A(1)(a) requires there to be an unwelcome sexual advance, an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature. Such a requirement may be appropriate for sexual harassment; however, it is inappropriate in relation to harassment of LGBTI persons. It is arguable that those forms of verbal and physical harassment which make reference to the sexual acts of a person because of their sexual orientation or gender identity

may be covered under amended paragraph 28A(1A)(a).⁸ Yet all those forms of verbal and physical harassment which have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment but which *do not* make reference to sexual acts will not.⁹ In such cases, the victim would be left without redress. This is an unnecessary division between harassment of LGBTI persons which is sexual in nature and harassment of LGBTI people which is not. As a consequence, victims of harassment based on their sexual orientation, gender identity, intersex status, or marital or relationship status will be forced to frame their claim of harassment within the scope of sexual harassment in order to try and obtain redress, when this does not appropriately reflect the form of harassment they have suffered.

ERT urges the Committee to recommend the insertion of a new offence of harassment, applying to both the new prohibited characteristics of sexual orientation, gender identity, intersex status, and marital or relationship status and the existing characteristic of sex, which reflects the definition provided in Principle 5 of the Declaration of Principles on Equality. This provision should be in addition to and distinct from the prohibition of sexual harassment in Division 3 of Part II of the Sex Discrimination Act 1984.

Recommendation 2: The Bill should be amended so as to insert a new offence of harassment, applying to both the new prohibited characteristics of sexual orientation, gender identity, intersex status, and marital or relationship status and the existing characteristic of sex, which reflects the definition of harassment provided in Principle 5 of the Declaration of Principles on Equality.

2.3. Existing Exceptions: Item 50

Item 50 would extend the existing exception for educational institutions established for religious purposes in Section 38 of the Sex Discrimination Act 1984 to the new grounds of sexual orientation and gender identity (but not intersex status). ERT has significant concerns about Item 50 and believes that it would permit unfair discrimination which has no justification under international human rights and equality law. Section 38, as amended by item 50, would permit such acts as:

- Discriminating against gay students in the provision of personal, social, health, and sex education by teaching that same-sex sexual activity was sinful and wrong; and
- Refusing to hire, or dismissing, members of staff – including administrative and clerical staff – because they were lesbian, gay, bisexual or transgendered.

ERT does not believe that such acts constitute justifiable discrimination and that, consequently, item 50 should be deleted from the Bill.

⁸ For example, slurs which refer to the sexual acts of LGBT people, or physical conduct or gestures which makes reference to such sexual acts.

⁹ For example, slurs which are simply insulting in their nature such as “faggot” or “dyke”.

Recommendation 3: The Bill should be amended as follows:

Delete item 50 of Part 1 of Schedule 1.

2.4. New Exceptions: Item 52

It is a well-established principle that not every act of less favourable treatment constitutes discrimination. There are occasions when what would otherwise be unlawful discrimination can be justified. This is recognised by international human rights law and by Principle 5 of the Declaration of Principles on Equality which provides that “direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria”.¹⁰ For indirect discrimination, a general justification is applied: an act will not be indirect discrimination where it is “objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”¹¹

In relation to the right to equality under the International Covenant on Civil and Political Rights, the Human Rights Committee has stated in its General Comment No. 18 that:

*(...) not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are **reasonable and objective** and if the aim is to achieve a purpose which is legitimate under the Covenant.*¹²

The Committee on Economic, Social and Cultural Rights has also adopted this “reasonable and objective test”, and elaborated on its practical meaning in its General Comment No. 20:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is **reasonable and objective**. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*¹³

The Committee on the Elimination of Racial Discrimination uses a slightly different test, as set out in its General Recommendation No. 14:

¹⁰ See above, note 1, Principle 5, p. 6.

¹¹ Ibid.

¹² Human Rights Committee, *General Comment No. 18: Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para. 13.

¹³ See above, note 6, Para 13.

*(...) [A] differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are **legitimate** or fall within the scope of article 1, paragraph 4, of the Convention.*¹⁴

Item 52 would provide for two new exceptions to the right to non-discrimination where the discrimination was on grounds of sexual orientation, gender identity, intersex status, or marital or relationship status only: the first where the act was “done by a person in direct compliance with the Marriage Act 1961”; the second where the act was done “by a person in direct compliance with a law of the Commonwealth, or of a State or Territory, that is prescribed by the regulations for the purpose of this subsection”.

With regards to the first exception, which inserts a new subsection 40(2A) into the Sex Discrimination Act 1984, this is explained in the Explanatory Memorandum as necessary “to make clear that introducing protections against discrimination on these grounds does not affect current Government policy on same-sex marriage.”¹⁵ The Explanatory Memorandum provides no assessment of whether the prohibition on same-sex couples accessing marriage is legitimate under international human rights law. Nor does it assess whether the prohibition is reasonable or objective or whether it seeks to achieve an aim which is appropriate, necessary or proportionate. In the absence of any such assessment – and it is the opinion of ERT that any such assessment would conclude that such a prohibition could not be justified – the exception cannot be accepted as consistent with international human rights law and should be removed from the Bill.

With regards to the second exception, which inserts a new subsection 40(2B) in the Sex Discrimination Act 1984, this is explained in the Explanatory Memorandum as reflecting “an existing exemption in the Disability Discrimination Act 1992 [and the fact] that there may be laws which appropriately make distinctions on these grounds.”¹⁶ ERT does not accept that a blanket power such as that contained within new subsection 40(2B) can be an appropriate means of creating exceptions to the right to non-discrimination. New subsection 40(2B) provides an excessively wide power to the Federal Government to designate any Commonwealth, State or Territory law as exempt from the provisions of the Sex Discrimination Act 1984. The risks of such a wide power are obvious. A future Government may choose to use subsection 40(2B) extensively to exempt significant numbers of laws from Sex Discrimination Act 1984 so as to effectively block the protections the Act offers. Alternatively, a court judgment that a particular piece of legislation is discriminatory could lead to a future Government simply using subsection 40(2B) to exempt that legislation rather than amending it to ensure its compatibility with the right to equality.

¹⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Racial Discrimination*, U.N. Doc. A/48/18 at 114, 1994, Para 2.

¹⁵ The Parliament of the Commonwealth of Australia, House of Representatives, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2012, Explanatory Memorandum*, p. 21.

¹⁶ *Ibid.*

International human rights law is clear that discriminatory legislation cannot be justified merely by the fact that the Government has designated that legislation as exempt from protection. Section 40 of the Sex Discrimination Act 1984 appears to recognise this in part by providing no such exemption in relation to the grounds of sex, marital status, pregnancy, potential pregnancy, breastfeeding or family responsibilities. ERT takes the view that there should be no hierarchy of protected attributes in respect of the level of protection provided on different grounds, once they have been recognised as “prohibited grounds”. While the different prohibited grounds require different and ground-specific exceptions, the principle that discriminatory legislation should be amended must apply equally whether the discrimination in question arises on grounds of sex, marital status, pregnancy, potential pregnancy, breastfeeding or family responsibilities or on grounds of sexual orientation, gender identity, intersex status, and marital or relationship.

Item 52 represents a significant weakness within the Bill, giving excessively broad powers to the Federal Government to exempt legislation which is otherwise discriminatory from the protection offered by the Sex Discrimination Act 1984.

Recommendation 4: The Bill should be amended as follows:

Delete item 52 of Part 1 of Schedule 1.