

LAW SCHOOL
FACULTY OF THE PROFESSIONS

Dr Laura Grenfell
Senior Lecturer

Anne Hewitt
Senior Lecturer

Ligertwood Building
THE UNIVERSITY OF ADELAIDE
SA 5005
AUSTRALIA
CRICOS Provider Number 00123M

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

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

We would like to express our strong support for the objects of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill). The current gaps in protection against discrimination on the basis of sexual orientation, gender identity and intersex status at the Commonwealth level require immediate legislative intervention, and we are delighted this Bill has been proposed.

We would like to make the following two specific comments regarding aspects of the Bill.

(i) Scope of prohibitions of discrimination

We support the extension of the protections against both direct and indirect discrimination to the new attributes of sexual orientation, gender identity and intersex status.

However, we believe that an additional prohibition may be required. We are concerned that the amendments in that Bill, in combination with the existing protections in the *Sex Discrimination Act 1984* (Cth) (SDA) may still fail to offer adequate protection to individuals who are subject to discrimination *because of their change of sex and/or gender*.

It is unclear if the proposed prohibitions in the Bill against discrimination on the basis of:

- gender identity
- intersex status
- sexual orientation

will apply to discrimination *because of a change of sex and/or gender identity*.

We believe it is unwise to assume that courts and tribunals will read the term 'gender identity' sufficiently liberally to cover *change of sex and/or gender identity*. Our concern is based on a discrimination case where a tribunal was reluctant to employ a liberal interpretation of the term 'sex'. In *Opinion re: Australian Transgender Support Association of Queensland*, Member Holmes of the Queensland Anti-Discrimination Tribunal considered this issue and stated that the prohibition against sex discrimination under the Queensland anti-discrimination legislation did not cover discrimination against a transgendered person per se: that is, 'where discrimination occurs because of the very change from sex to sex itself.'¹ Member Holmes did not interpret the ground of 'sex' as being sufficiently broad to provide adequate protection against discrimination based on change of sex and hence the transgendered person was left unprotected.

In order to avoid the possibility that courts and tribunals might read the ground of 'gender identity' narrowly, we encourage the Committee to consider proposing the inclusion of an additional prohibition in the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* and in the *Human Rights and Anti-Discrimination Bill 2012* if and when it is reintroduced. The additional protection should apply to individuals who are subject to discrimination (direct or indirect) because:

- they choose to live as a sex or gender other than their legal sex or gender, or
- they change their sex and/or gender identity or are in the process of changing their sex and/or gender identity.

¹ *Opinion re: Australian Transgender Support Association of Queensland* [1996] QADT 8 (17 May 1996) [9]4. Whether the *Sex Discrimination Act 1984* (Cth) prohibition against discrimination on the basis of sex extends to a change of sex has not been explored in case law.

(ii) Exceptions

We have reservations regarding three exceptions which are proposed in the Bill. These exceptions are considered below.

- **Compliance with the *Marriage Act 1961***

Insertion of section 40(2)(2A) into the *Sex Discrimination Act 1984* (Cth) would permit discriminatory treatment by a person if this occurs in direct compliance with the *Marriage Act 1961* (Cth).

We strongly oppose the inclusion of this exception in the Bill. The Bill is part of a continuing and important process of ensuring and protecting substantive equality of rights of partners in same-sex relationships to taxation, social security, employment, superannuation and worker's compensation benefits equivalent to the benefits of heterosexual couples. In light of these initiatives, we believe that the continuing formal discrimination against same-sex couples in the definition of marriage is both paradoxical and incoherent. We submit this exception should be removed.

- **Requests for information and keeping of records**

We are troubled by the proposed insertion of section 43A into the *Sex Discrimination Act 1984* (Cth) which provides an exception relating to requests for information and keeping of records. Section 43A appears to be designed to ensure that organisations do not have to make significant changes to their record keeping procedures in order to provide for a person to be identified as neither male nor female. However, we note that this is inconsistent with the Australian Government Guidelines on the Recognition of Gender Consultation Draft which was released for comment by the Attorney-General's Department in March 2013 (the Guidelines). Paragraph 17 of the Guidelines provides that "Where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified)." While we recognise that the introduction of the Guidelines may require some administrative changes to the way data is currently collected and stored, we believe that the exemption in section 43A is too broad. We would recommend that the exemption be amended to that it operates to cover:

- Data entered within 12 months from the date the Guidelines come into operation, and;
- Historical data entered prior to when the Guidelines come into force.

We believe that allowing 12 months for the change of data collection/storage should be adequate. However, if that is insufficient, we would recommend that another period be chosen and the exception amended to include a sunset clause in those terms.

- **Educational institutions established for religious purposes**

We would also encourage that the Committee take this opportunity to reconsider Section 38 of the *Sex Discrimination Act 1984* (Cth). That section provides an exemption for educational institutions established for religious purposes to discriminate on the basis of (if the amendments in the Bill are passed): “sexual orientation, gender identity, marital or relationship status”. We believe that exception is excessively broad, and should properly be limited in a manner similar to that in *Equal Opportunity Act 1984* (SA). Section 34(3) of that Act provides a limited exception for discrimination on specific groups by an educational institution where:

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and
- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - a. to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and
 - b. to students, prospective students and parents and guardians of students and prospective students of the institution; and
 - c. to other members of the public.

Limiting the exemption in this way would ensure that religious organisations are required to publically declare their intention to discriminate; in effect to ‘pin their colours to the mast’. This would require organisations to have a frank discussion with the individuals associated with them, and allow dissenting voices regarding such discriminatory practices to be heard, rather than the culture of religious discrimination to continue privately.

Finally, we strongly support the project to consolidate federal anti-discrimination laws. While we support this Bill (subject to the reservations discussed above) we would also urge Parliament to continue the consolidation and reform project, and to consider introducing an amended version of the Human Rights and Anti-Discrimination Bill 2012.

Yours sincerely,

ANNE HEWITT
Senior Lecturer, Adelaide Law School

DR LAURA GRENFELL
Senior Lecturer, Adelaide Law School