



## **Submission to the Senate Legal and Constitutional Affairs Legislation Committee concerning the Sex Discrimination Amendment (Sexual Orientation, Gender Identity And Intersex Status) Bill 2013 (the Bill)**

The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, CCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the CCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies. CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL thanks the Senate Committee for the opportunity to present this submission. We should be happy to support it further in evidence to the Committee if it should so desire.

We made a submission to the Senate Committee concerning the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (the Exposure Draft). This submission in part reflects that one.

### **Introduction**

Both world-wide historically and in Australia in recent times there has been much discrimination and worse against LGBTI people.<sup>1</sup> Unlike, say religious or political views, people cannot change such characteristics (and if they could, they should not be expected to). Though some protection is provided by State and Territory legislation, the provisions vary between these jurisdictions, and their coverage is restricted. The bill will contribute to an improvement in LGBTI persons' situation. We urge its speedy passage--as an important measure until a revised Human Rights and Anti-Discrimination Bill is introduced.

CCL notes that the Senate Committee has already agreed that federal coverage of these attributes is desirable and urgent. We confine this submission to matters of detail.

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<sup>1</sup> The Australian Human Rights Commission reports LGBTI people experience high rates of physical and mental health problems. 'Young people who have suffered violence and abuse report poorer physical health. Violence, harassment and bullying also have an impact on mental health. There are much higher numbers of attempted suicide and self harm across the LGBTI community when compared with the general community. Amongst same-sex attracted youth, the experience of verbal abuse doubled the likelihood of self harm, and the experience of physical abuse tripled the likelihood of self harm.'

'As a result of violence, harassment or bullying, some people who identify as lesbian, gay, bisexual, transgender or intersex may not freely disclose information about their sexuality to health care providers. This could have an adverse impact on their general health and well-being, as well as limit their access to health information and services that would improve quality of life.'

-Australian Human Rights Commission, Lesbian, Gay, Bisexual, Trans and Intersex Equality, at <https://bullying.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-1>

## **1. The objects of the Sex Discrimination Act (the SDA).**

CCL welcomes the proposed changes to the objects of the SDA, and recommends that they be further amended by the adoption of a proposal that was made in the Exposure Draft: to promote recognition and respect within the community for the principle of equality (including both formal and substantive equality) and the inherent dignity of all people.

## **2. Changing gender identity.**

CCL agrees with the submission made by the Law Council of Australia that it is desirable that in addition to gender *identity* being a protected attribute, *changes* in gender should also be protected. A person should be able to change gender identity, after, for example discovering over a period of time features of their own nature, without suffering discrimination during the changes or afterwards.

## **3. The education exemption.**

We draw the Senate Committee's attention to the personal example at the end of the appendix to the submission by (Submission # 5). The experience he relates is similar to those of same-sex attracted youth in many schools.

The Bill extends the existing exemption for educational institutions established for religious purposes to include the new grounds of sexual orientation and gender identity, and to replace 'marital status' with 'marital or relationship status'. It is difficult to see that that the authorities in any religion could justify discrimination on the basis of sexual orientation--what doctrine could suppose that a person's characteristics are themselves a moral fault or a religious impiety?

CCL is aware that the more fundamentalist inclined adherents to certain religions object to sexual *practices* other than between a man and a woman united in marriage. We do not accept that this entitles them to discriminate, or that they should be permitted to, other than in determining membership, the selection of clergy and participation in religious rites. But to permit them to discriminate on the basis of a person's *nature* is much worse.

If this exemption is to continue, it should at the very least exclude services which are paid for or are partially paid for by government at local, state or federal levels. The Government has an obligation under human rights instruments not to discriminate, and it cannot absolve itself of this obligation by outsourcing its activities to others.<sup>2</sup>

A religious organisation which contracts with Government to provide services should not be able to discriminate where the Government must not.

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<sup>2</sup> For the legal inability to outsource obligations, see *Commonwealth v Introvigne* (1982) HCA 40

In its submission concerning the Exposure Draft, CCL urged the adoption of a different approach to exemptions for religious organisations. The arrangement proposed that religious bodies be able to apply for, and to receive as of right, a licence to discriminate. The licence should be time limited but renewable, and conditional only on it specifying precisely on what attributes and in what areas it is required, and on what doctrines, tenants, beliefs or teachings it is required. The limits of the licence would be clear and public; and outside such limits, the ordinary law would apply. We still recommend this option.

#### **4. New Exemptions.**

##### **i. Discrimination in accordance with the Marriage Act--Item 52.**

CCL has repeatedly supported marriage equality, most recently in a submission to the NSW Legislative Council Inquiry Into Same Sex Marriage Law in NSW. If the Commonwealth continues to restrict the definition of marriage in the Marriage Act to the union of a man and a woman, thus leaving same-sex marriage and some marriages involving intersex persons to the states, then when one or more states legislate to allow such marriages, the new subsection, ss.40(2A), like the definition of 'marriage' in the Marriage Act, will be a hurtful and pointless anomaly. The Federal Parliament should accept its obligations in respect of the rights of same-sex partners--to equality and to non-discrimination--and repeal the subsection in the Marriage Act. The first part of item 52 should be withdrawn from the Bill.

##### **ii. Discrimination in accordance with Commonwealth, State and Territory laws.**

This part of item 52 should also be omitted. It is anomalous and hurtful, in that it singles out LGBTI persons for exemption, and it permits exemptions to be introduced without automatic debate by the Commonwealth Parliament.

##### **iii. Record keeping.**

Proposed section 43A (item 60) would permit organisations to seek information which requires people to identify either as male or female, and to keep records which are similarly so limited. There is no justification for the first of these practices, and the Explanatory Memorandum does not attempt to give one. Instead it suggests that changing forms *may be* an onerous exercise for organisations. This is absurd. Changing existing records *may* take a little time, though organisations should soon be expected to do so on request. Forms, however, are changed all the time. It is not hard, in these days of computers, to add an extra box or so and a line for an explanation, and to change the record system accordingly. Item 60 should allow at most a short period of time for record systems to be changed. Further problems should be dealt with by application to the Australian Human Rights Commission for specific, time limited exemptions.

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