



**Gay & Lesbian  
Rights Lobby**

TOWARDS ANTI-DISCRIMINATION PROTECTIONS FOR LGBTI PEOPLE IN  
COMMONWEALTH LAW

SUBMISSION TO THE SENATE STANDING COMMITTEES ON LEGAL AND  
CONSTITUTIONAL AFFAIRS INQUIRY INTO THE SEX DISCRIMINATION  
AMENDMENT (SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX  
STATUS) BILL 2013 (CTH)

**APRIL 2013**

## ABOUT THE GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the leading organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families. The GLRL has a strong history in legislative reform.

In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and subsequent amendments. The GLRL was also successful in campaigning for an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report, *And Then ... The Bride Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000* (NSW).

## 1. INTRODUCTION

The New South Wales Gay and Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide a written submission to this inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth). We note that protections from discrimination on the basis of sexual orientation, gender identity and intersex status have historically been lacking under Commonwealth law. We commend the Government for the introduction of this Bill and the federal opposition for placing on record its commitment to amending the *Sex Discrimination Act 1984* (Cth) to introduce protections for lesbian, gay, bisexual, transgender and intersex (LGBTI) people.<sup>1</sup>

The GLRL does, however, note with disappointment the decision by the Attorney-General and the Commonwealth Government to defer the introduction of the Human Rights and Anti-Discrimination Bill 2012 (Cth) to a later date. In particular, we are concerned that aspects of the Human Rights and Anti-Discrimination Bill 2012 (Cth) that promised to address the multidimensional nature of discrimination, as well as barriers to redress, through recognising intersectionality as well as mandating a shared burden of proof respectively, have been effectively abandoned.<sup>2</sup> Accordingly, in supporting this Bill, we are mindful of the need for broader reforms to streamline anti-discrimination law at a Commonwealth level, a task that remains salient.

This submission is structured as follows. Section one provides an introduction. In section two, we discuss the need for protections based on sexual orientation, gender identity and intersex status and commend the current definitions contained in the Bill, insofar as they are

<sup>1</sup> Senate Legal and Constitutional Affairs Legislation Committee (2013). *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*. Canberra: Commonwealth of Australia.

<sup>2</sup> The shared burden of proof provisions contained in the Human Rights and Anti-Discrimination Bill (2012) were consistent with the 'administration of justice' requirements outlined by the Committee on the Elimination of Racial Discrimination, in General Recommendation No. 30 (CERD/C/64/Misc.11/rev.3), para. 24.

inclusive and address gaps in existing State-based legislation. In section three, we draw attention to the need to address the scope of the exceptions maintained through this Bill, arguing for a limitation on exceptions, particularly in the context of service provision. In section four, we call for the establishment of the position of sexual orientation and gender identity commissioner. Section five advocates for amendments to the *Sex Discrimination Act 1984* (Cth) that expressly prohibit both direct and indirect discrimination. Finally, in section six, we address the consequential amendment(s) to the *Migration Act 1958* (Cth) and call for an amendment to the *Fair Work Act 2009* (Cth), to ensure legislative consistency with respect to discrimination on the basis of sexual orientation, gender identity and intersex status.

As an organisation that advocates on behalf of gay men, lesbians and their families, our remit is quite specific. However, while this submission focuses on reform for gay and lesbian people, we also note the important parallels, particularly with the sex and gender diverse communities. Therefore, in addressing the issues affecting gay and lesbian people, this submission also highlights overlapping issues affecting bisexual, transgender and intersex (LGBTI) communities, where appropriate.

## 2. INCLUSION OF NEW ATTRIBUTES (SCHEDULE ONE)

The GLRL welcomes the object of this Bill, that is to include the new protected attributes, or grounds, of sexual orientation, gender identity and intersex status, in the *Sex Discrimination Act 1984* (Cth). We wish to comment specifically in relation to each of these attributes and the importance of their inclusion.

### ***Sexual orientation***

We consider the definition of sexual orientation contained in Part 1 of the Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Amendment Bill 2013 (Cth) (**the Bill**) to be consistent with international best practice, as articulated in the Yogyakarta Principles, which defines sexual orientation as:

[E]ach person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."<sup>3</sup>

Moreover, the definition adopted in the Bill is consistent with the provisions of other international conventions to which Australia is a party that provide protection on the basis of 'other status,' recognised as including sexual orientation and gender identity.<sup>4</sup>

The importance of ensuring that inclusive terminology is adopted in the Bill is underscored by the diverse nature of experiences of discrimination faced by people who identify as lesbian, gay, bisexual, transgender and intersex (LGBTI).

Successive Australian studies have demonstrated the corrosive effects of discrimination directed at LGBTI people, including on the basis of their sexual orientation, across education,

<sup>3</sup> International Commission of Jurists (2007). *The Yogyakarta Principles: Principles On the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity*. [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)

<sup>4</sup> United Nations Committee on Economic Social and Cultural Rights, General comment No. 14 (E/C.12/2000/4), para. 18. See also: *Toonen Vs. Australia* 87CCPR/C/50/d/499/1992, at para. 8.7.

healthcare, employment and in other areas of public life.<sup>5,6,7</sup> For example, one respondent in the *Writing Themselves in 3* report, a nationally representative survey of same-sex attracted young people, commented:

I have had multiple thoughts of suicide. I have acted and failed on those thoughts a few times. I am never able to actively harm myself (i.e cut myself) but I've wanted to many times. I would say any gay person who says that they have never even thought about suicide is lying. Not being able to act on any of your desires, having to actively hide your true self, often having to pretend to hate the very thing you are. All of these things equates to a deep feeling that you don't deserve to live, or failing that, a deep desire to end the suffering. (Christopher, 20 years)<sup>8</sup>

We note that in adopting the definition of sexual orientation, as proposed in the Bill, this Bill engenders the potential to provide protections from discrimination for bisexual people in areas of life covered by the *Sex Discrimination Act 1984* (Cth). Currently, in New South Wales, bisexual people are not protected under state anti-discrimination legislation, namely the *Anti-Discrimination Act 1977* (NSW).<sup>9,10</sup>

The findings of a survey the NSW GLRL conducted, in collaboration with *All Out*, indicated that bisexual respondents were the least likely out of all those who identify as lesbian, gay, bisexual, transgender and intersex to take action in relation to an act of discrimination they experienced.<sup>11</sup> One respondent to the survey, recounting her experiences with the federal agency Centrelink, commented:

When my parents kicked me out of home for being bisexual Centrelink's counsellor told me that I should just try to move back in with them as I had a boyfriend and could say I was straight. (20 year-old bisexual female)

Another referred to being discriminated against in a public setting, whilst attempting to donate blood:

I was forced out of a blood donation van because people who aren't straight can't give blood. While this was happening, I got comments like "filthy faggot", "tramp", etc. Someone spat on me as I left. (19 year old bisexual female).

Experiences of bullying and discrimination in educational settings also resonate strongly for bisexual people, as one respondent reported:

I was subjected to extreme bullying that was homophobic in nature from about age 9 to age 17. School authorities did nothing to stop this and teachers either turned a blind eye or enabled this behaviour. My experiences have left me emotionally scarred for life and welfare

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<sup>5</sup> Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., Mitchell, A. (2010). *Writing Themselves in 3: The Third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*. Melbourne: LaTrobe University.

<sup>6</sup> Inner City Legal Centre (2011). *Outing Injustice: Understanding the legal needs of LGBTI communities in NSW*. Sydney: Inner City Legal Centre.

<sup>7</sup> Australian Human Rights Commission (2011). *Addressing sexual orientation and/or gender identity discrimination: Consultation report*. Sydney: Australian Human Rights Commission.

<sup>8</sup> Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., Mitchell, A. (2010). *Writing Themselves in 3: The Third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*. Melbourne: LaTrobe University, p.50.

<sup>9</sup> *Anti-Discrimination Act 1977* (NSW).

<sup>10</sup> Vassallo, G. (2003) 'Bisexual Perspective on NSW Anti-Discrimination Legislation', Accessed 21<sup>st</sup> April 2013, from: [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_mardigras\\_bisexual](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_mardigras_bisexual)

<sup>11</sup> Horner, J. & Roberts, N. 'Self-reported experiences of discrimination on the basis of sexual orientation, gender identity and intersex status amongst a cohort of self-identified LGBTI people in Australia', Presentation to the *Health in Difference* Conference, 18<sup>th</sup> – 20<sup>th</sup> April, 2013, Melbourne, Australia.

dependent and have shattered my self confidence. As a result I will never reach my full potential as a human being. (34 year old bisexual male).

These individuals reported taking no action in relation to these experiences and indeed, as residents of NSW, had no recourse to redress under existing anti-discrimination legislation, at either a state or Commonwealth level. We argue that this highlights the fundamental imperative of adopting inclusive terminology in anti-discrimination legislation. Moreover, it underscores the importance of employing best practice, which can be gleaned from international jurisprudence, and should be informed by the gaps in protection in existing state-based anti-discrimination legislation for groups within the LGBTI community.

We argue that this lends credence to the task of introducing anti-discrimination protections at a Commonwealth level on the basis of sexual orientation, to not only improve the protections available for lesbian, gay and trans\* Australians, but also for bisexual and intersex Australians.

### ***Gender Identity***

The definition of gender identity in the Bill should be retained. By including the terminology 'gender-related identity, appearance or mannerisms', the Bill effectively ensures that the full spectrum of trans\* peoples' identities can be respected and their potential to be exposed to acts of discrimination on that basis reflected in the law. Our survey on experiences of discrimination, conducted alongside All Out, revealed that trans\* people are often subjected to acts of discrimination, as well as physical violence.

Sadly, many of these acts of exclusion and discrimination occur in settings away from the public eye. For instance, one respondent to our survey commented:

Pre transition I was regarded as a gay male by a church and was put through what is now called the Regenerous Programme (pray the gay away). This has caused a split in my direct family (I have been disowned due to their religious beliefs) (trans\* woman)

Another respondent recounted having his employment terminated, following a transition:

I transitioned on the job, I had been working there for 10 years, been give promotions and been considered an asset to the organisation, as soon as I explained what I was going through and that I would be transitioning on the job my performance was scrutinised and I went from having no formal warnings to a 3rd warning, within a year they created a case on lies and insignificant things and fired me. (32 year old trans\* man)

For these reasons, we argue that the provision of protections on the basis of gender identity, using the current definition contained in the Bill, which provides coverage for trans\* people, whether they have undergone a gender reassignment surgery or not, is overdue, welcome and engenders the potential to improve existing protections for trans\* people in areas of public life.

### ***Intersex Status***

The GLRL supports the inclusion of the definition of intersex status contained in the Bill. We note that it provides protections for people who are intersex and addresses a major deficiency in existing State and Territory laws, all of which fail to provide protections for

intersex people at the present point in time. We defer to the submission of OII Australia to this Inquiry in relation to this matter.

**Recommendation One:** That the Committee recommend passage of this Bill.

**Recommendation Two:** That the definitions of ‘sexual orientation’, ‘gender identity’ and ‘intersex status’ contained in the Bill be retained.

### 3. SCOPE OF EXCEPTIONS

The GLRL notes with concern the effective continuation of religious exceptions through this Bill, as well as the introduction of specific new exceptions for the new attributes. For instance, section 37 of the *Sex Discrimination Act 1984* (Cth) which remains unaffected by this Bill, exempts any act or practice of a body established for religious purposes that conforms to the religious beliefs of that body. Moreover, we are concerned that the Bill fails to limit the availability of religious exceptions in the context of aged-care services, something that the Human Rights and Anti-Discrimination Bill 2012 proposed and which remains government policy. We remain opposed to the existence and operation of such religious exceptions, particularly in the context of the provision of publicly funded services. The impact of these exceptions, particularly in the contexts of education (involving service provision) and employment, is well documented.

#### **Education**

In the context of education, exceptions work to legitimate the exclusion of LGBTI people in an area where they already experience widespread discrimination. The *Writing Themselves In 3* report, a nationally representative survey of same-sex attracted and gender questioning young people, documented a rise in discrimination against LGBTI young people, represented by an increase in the proportion of young people reporting verbal and physical abuse. The 2010 report found that 61% of respondents reported verbal abuse, and 18% reported physical abuse.<sup>12</sup> This represents an increase from the 2005 *Writing Themselves In* report, where 38% of participants reported unfair treatment on the basis of their sexuality, while 44% reported verbal abuse and 16% physical abuse.<sup>13</sup> The *Writing Themselves In* reports have documented, over a number of years, how schools continue to be the site of significant exposure to verbal and physical abuse for same-sex attracted and gender questioning young people. These acts are manifestations of the way in which homophobia, bi-phobia and transphobia operate concurrently to produce environments that are not conducive to health and wellbeing and which work to promote the exclusion of LGBTI young people and a denial of their right to education.

A number of participants in the *Writing Themselves in 3* study recounted their experiences of discrimination on the basis of sexual orientation and gender identity. Some of these were exacerbated by school environments that encouraged non-disclosure of sexuality and where exclusion on the basis of sexual orientation or gender identity was permissible by law, owing to the existence of exceptions.

<sup>12</sup> Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., Mitchell, A. (2010). *Writing Themselves in 3: The Third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*. Melbourne: LaTrobe University.

<sup>13</sup> Hillier, L. Turner, A., Mitchell, A. (2005). *Writing Themselves in Again: 6 Years On – The 2<sup>nd</sup> national report on the sexuality, health & well-being of same sex attracted young people in Australia*. Monograph no.50. Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University.

Thalia (17 years) commented:

Due to my mother's homophobia I was sent to a strict Catholic boarding school where I was forced to scrub floors and walls on my hands and knees and pray multiple times a day. I am not religious and it was an extremely homophobic environment. Within a month I was on antidepressants and expelled after attempting suicide because 'Suicide is a sin and so it was not acceptable to take part in the school.'<sup>14</sup>

Reagan (17 years) commented:

Homophobia, once again, didn't affect me as much as transphobia. I left school/let my grades slip because I truly believed I couldn't live in this world, and that I wouldn't need an education because I'd kill myself before it mattered. I suffered severe clinical depression (which still affects me, to a lesser extent) and self-harmed constantly and to a physically dangerous extent - I stopped it a year and several months ago and I still have large, visible scars.<sup>15</sup>

Similarly, in a recent report prepared for the West Australian Equal Opportunity Commission on discrimination and bullying on the grounds of sexual orientation and gender identity, which drew on data from the *Writing Themselves in 3* report, the story of a 17 year old West Australian trans student expelled for kissing his girlfriend was highlighted:

Jo was once suspended for 3 days for kissing his girlfriend. He has suffered verbal abuse and rejection from teachers, school counselling staff and students and was once cornered, beaten up and raped at his government school. Jo says 'I suffer from trauma related depression, that has a lot to do with homophobic acts that have happened to me.' He tried moving schools and avoiding using female bathroom facilities, but the situation got so bad he dropped out.<sup>16</sup>

The GLRL submits that the existence and use of exceptions in the area of service provision legitimates, and often exacerbates, forms of discrimination on the basis of sexual orientation, gender identity or intersex status. The existence of exceptions in areas such as education, for instance, sends a powerful, but negative, message that discrimination against a person on the basis of their sexual orientation, gender identity or intersex status is acceptable.

### **Employment**

Employment continues to be an area of life where LGBTI people experience discrimination, often without recourse to legal remedy. A number of national studies and consultations on anti-discrimination law have documented the discrimination faced by LGBTI people in employment.

In a 2010 consultation report prepared by the Australian Human Rights Commission, one respondent was reportedly vilified and harassed by her employer:

Tania was employed by a church run disability service. After working for 18 months Tania attended work and found that the homepage on her work computer displayed a bible quote that said negative things about gay people. Tania assumed that this was a mistake and drew her team leader's attention to the quote. The next day the quote remained. Tania wrote a letter to the management explaining that she felt upset and unsafe having to look at that quote everyday and asked that it be replaced with a bible quote that did not vilify gay people.

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<sup>14</sup> Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., Mitchell, A. (2010). *Writing Themselves in 3: The Third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*. Melbourne: LaTrobe University, p. 52.

<sup>15</sup> Ibid., p. 53.

<sup>16</sup> Jones, T. (2012). *A report about discrimination on the grounds of sexual orientation and gender identity in West Australian education*. Perth: West Australian Equal Opportunity Commission.

Three of Tania's colleagues also signed the letter. Tania was singled out and told that her gay agenda had no place in a Christian workplace. Tania's professional reputation was then attacked, she was accused of poor work performance. Tania was also assigned shifts that she had previously indicated she would be unable to take or were inappropriate. Tania contacted the [Anti-Discrimination Board] to see if she could lodge a complaint and was told that her employer may be able to rely on the religious exception in the Act. Tania left her job due to ongoing harassment.<sup>17</sup>

This not only serves to illustrate the pernicious nature of workplace discrimination against LGBTI people, but also the way in which religious exceptions work to legitimate such discrimination, providing employers with the ability to dismiss employees who may be victims of discrimination themselves. This is not a generational issue. A recent survey on workplace diversity by Pride in Diversity found that young workers (or those between 16-24 years of age) were the least likely to be 'out' in the workplace, suggesting a reticence to identify as gay, lesbian or bisexual in the so-called 'post-closet' age and reminding us that the fear of discrimination against LGBTI people in employment, including in the workplace environment, remains pervasive.<sup>18</sup>

### ***Exception for keeping records and requesting information***

The Bill proposes the introduction of an exemption concerning record keeping and requesting information in clause 43A. This is ostensibly to reduce the potential regulatory burden on the private sector and governments in relation to the new attribute of intersex status, in particular.

The NSW GLRL acknowledges that a reasonable amount of time may be required for those in the private sector, as well as governments, to make changes to existing systems, in order to ensure that individuals can identify as neither male nor female. However, we consider the exception proposed for this purpose to be unreasonable. Instead, we submit that this should be a transitional provision and be reviewed within the next three years.

### ***Transparency with regard to exceptions***

The NSW GLRL is of the view that should a decision be taken to preserve specific permanent exceptions within the *Sex Discrimination Act 1984* (Cth), where individuals or organisations seek to rely on specific exceptions, there should be a requirement for full disclosure with respect to such reliance. We propose that bodies taking advantage of exceptions be required to lodge these with the Australian Human Rights Commission prior to exercising any decision-making powers under these exceptions. The GLRL also supports the publication of such reliance on exceptions in other public forums including, for example, job advertisements, in order to improve transparency and accountability.

***Recommendation Three:*** That the Committee recommend the removal of religious exceptions in the *Sex Discrimination Act 1984* (Cth) that pertain to service-provision, notably including in the aged-care sector.

***Recommendation Four:*** That the Committee recommend that the proposed exception in relation to keeping records and requesting information be included as a transitional provision in the *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Amendment Bill 2013* (Cth) and be reviewed within three years.

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<sup>17</sup> Australian Human Rights Commission (2011). *Addressing sexual orientation and/or gender identity discrimination: Consultation report*. Sydney: Australian Human Rights Commission, p.9.

<sup>18</sup> Pride in Diversity. (2012). *Top Employers 2012: The Australian Workplace Equality Index*. Sydney: Pride in Diversity, p. 16.



**Recommendation Five:** That transparency provisions be introduced within the *Sex Discrimination Act 1984* (Cth).

## 5. FAMILY RESPONSIBILITIES

Currently, under the *Sex Discrimination Act 1984* (Cth), discrimination on the ground of family responsibilities is limited to direct discrimination, and does not encompass indirect discrimination, which would have been provided by the Human Rights and Anti-Discrimination Bill 2012. In terms of the protections available within the *Sex Discrimination Act 1984* (Cth), this appears to result in a situation whereby men are not covered if an employer establishes and maintains policies that are found to amount to indirect discrimination towards them on the basis of family responsibilities.

This is a critical lacuna for members of the LGBTI community, particularly given the diversity evident within rainbow families and the challenges facing members of these families. In a recent study of gay and bisexual fathers, for instance, one respondent commented on this diversity, asserting:

Myself and my ex-partner, who is heterosexual, share parenting 50/50... My current partner does not live with me but has a role in support and in interaction with children.<sup>19</sup>

There is also a long legacy of discrimination, both enshrined in the law and manifest in public settings, for parents who identify as lesbian, gay, bisexual, transgender or intersex. For instance, another respondent in the same study cited above, observed:

I came out post being married to a woman. Both families thought I was selfish to put a child through this. (Gay father, aged 34)<sup>20</sup>

In light of the unique issues that arise for LGBTI parents, particularly gay and bisexual fathers, we submit that there is a need to consider amendments to the *Sex Discrimination Act 1984* (Cth) to expand the definition of discrimination to include direct and indirect discrimination and expressly recognise carer responsibilities. This would provide certainty under the law to gay and bisexual fathers who are active parents, by ensuring that they are not disadvantaged in terms of their ongoing carer responsibilities.

**Recommendation Six:** That the Committee recommend amending the *Sex Discrimination Act 1984* (Cth) to prohibit both direct and indirect discrimination on the ground of family responsibilities, having particular regard to carer responsibilities.

## 5. COMMISSIONER

The GLRL is mindful of the fact that the Bill contains no proposals to create new positions in respect of the new protected attributes of sexual orientation, gender identity and intersex status. Accordingly, we call for the creation of a new funded position of 'Sexual Orientation and Gender Identity Commissioner' within the Australian Human Rights Commission (AHRC).

In our view, this is necessary to give effect to the provisions contained in the Bill pertaining to sexual orientation, gender identity and intersex status. As we have outlined, significant

<sup>19</sup> Power, J., Perlesz, A., McNair, R., Schofield, M., Pitts, M., Brown, R., Bickerdike, A.J. Gay and bisexual dads and diversity: Fathers in the 'Work, Love, Play' study. *Journal of Family Studies* 18(2-3): 143-154, at p. 148.

<sup>20</sup> *Ibid.*, p. 150.

issues of homophobia, bi-phobia, transphobia and anti-intersex prejudice exist in Australian society and would be usefully served by having a dedicated commissioner to deal with complaints on these grounds. A specific Sexual Orientation and Gender Identity Commissioner would also enable the AHRC to more effectively discharge its education and compliance-related roles and reduce the workload of existing Commissioners. Finally, it would send a strong message to the broader Australian community of the importance of non-discrimination concerning sexual orientation or gender identity.

In the event that the call for a dedicated Sexual Orientation and Gender Identity Commissioner is not adopted, the GLRL calls for the continuation of the general Human Rights Commissioner position to effectively enable these issues to be considered independently of the existing commissioners for Race, Sex and Disability, who already experience significant workloads and should be allowed to focus on their issues without the additional burden of dealing with issues relating to sexual orientation and gender identity.

**Recommendation Seven:** The GLRL recommends that a full-time funded position of Sexual Orientation and Gender Identity Commissioner, within the Australian Human Rights Commission, be established to give effect to the new protected attributes in the Bill.

## 6. AMENDMENTS TO OTHER ACTS (SCHEDULE TWO)

### ***Migration Act 1958 (Cth)***

The GLRL welcomes the consequential amendment(s) to the *Migration Act 1958 (Cth)* contained within Part 2 the Bill, to include 'relationship status', alongside 'marital status'. We argue that this ensures consistency across the legislative framework.

However, we note that given the existing exceptions contained in the *Migration Act 1958 (Cth)* these amendments will not be highly consequential for the people the Department of Immigration and Citizenship most regularly comes into contact with, owing to the fact that anything done under the *Migration Act 1958 (Cth)*, and specifically its attendant regulations, is already granted exceptions.

### ***Fair Work Act 2009 (Cth)***

Currently, within the *Fair Work Act 2009 (Cth)*, general protections are available, including in relation to what is termed 'sexual preference'. Whilst this terminology has enabled the Australian Human Rights Commission, for instance, to inquire into complaints on the basis of sexual preference in relation to employment, it is considerably removed from current understandings of what constitutes best practice and is at variance with the inclusive definition of sexual orientation proposed in this Bill. Accordingly, the NSW GLRL calls for an amendment to the provisions under the *Fair Work Act 2009 (Cth)* which use the term 'sexual preference' to replace this with 'sexual orientation, gender identity and intersex status', as defined within the Bill. This would include, for example, ss 153, 195 and 351.

This would, in our view, achieve an alignment of the intentions of existing legislation with the current Bill and international best practice, as affirmed in the Yogyakarta Principles and other jurisprudence, and extend existing protections in terms of workplace rights.

**Recommendation Eight:** That the Committee supports the proposed amendment to the *Migration Act 1958 (Cth)* as outlined in Part 2 of the Bill.

**Recommendation Nine:** That the Committee recommend amending ss 153, 195 and 351 of the *Fair Work Act 2009* (Cth) to replace the term “sexual preference” with “sexual orientation, gender identity and intersex status.”

## 7. CONCLUSION

There is strong and compelling evidence that the burden of discrimination on the basis of sexual orientation, gender identity and intersex status is associated with poor health and social wellbeing outcomes for LGBTI people in Australia. Moreover, such discrimination represents a direct contravention of the rights of LGBTI people as provided under international human rights law, including many covenants and international agreements to which Australia is a party.

For this reason, we urge the Committee to recommend the enactment of the Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Amendment Bill 2013. Whilst the NSW GLRL continues to advocate for a narrowing of existing exceptions, including within the *Sex Discrimination Act 1984* (Cth), we are of the view that the passage of this legislation, with its adoption of inclusive terminology for the new protected attributes of sexual orientation, gender identity and intersex status, engenders the potential to expand the suite of protections from discrimination available for LGBTI people in Australia, and with reference to New South Wales in particular, address existing deficiencies in the law for bisexual and intersex people.

We call upon the Committee to narrow existing exceptions contained in the *Sex Discrimination Act 1984* (Cth), provided they are not incongruent with the Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW). We further request that the Committee recommend consequential amendments to the *Fair Work Act 2009* (Cth), the *Migration Act 1958* (Cth) and consider further amendments to the *Sex Discrimination Act 1984* (Cth), to prohibit both direct and indirect discrimination in relation to family responsibilities in particular.

## CONTACT

For further information, please contact Jed Horner, Policy & Project Officer for the NSW Gay & Lesbian Rights Lobby