

ACTU Submission

Senate Legal and Constitutional Affairs Committee Inquiry
in to the Sex Discrimination (Sexual Orientation, Gender Identity and
Intersex Status) Bill 2013



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1. The ACTU welcomes the opportunity to comment on the Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill (Sex Discrimination Bill) 2013.
2. The ACTU supports the amendments contained in the Sex Discrimination Bill which extend protection from discrimination to the new grounds of sexual orientation, gender identity and intersex status. We also support the expansion of the existing ground of 'marital status' to 'marital or relationship status.'

Recommendation 1:

The Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 should be passed as an interim measure to the introduction of a revised HRAD Bill 2012.

3. The ACTU notes that a number of provisions contained in the Human Rights and Anti-Discrimination (HRAD) Bill 2012, which were designed to improve protection against discrimination for LGBTI people, have not been included in the proposed Sex Discrimination Bill. In particular, the provisions of the HRAD Bill which:

- exclude Commonwealth funded aged care services and intersex status from exemptions for religious bodies; and
- Include direct and indirect grounds of discrimination for those with family or caring responsibilities;

should be replicated in the Sex Discrimination Bill.

4. The Government's rationale for excluding commonwealth funded aged care service providers in the HRAD Bill from exemptions to their anti -discrimination obligations, was based on 'significant feedback during consultations of the discrimination faced by older same sex couples in accessing aged care services run by religious organisations.'¹ The Government rightly concluded that when 'such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate.'² We support the amendment contained in the HRAD and recommend that it be replicated in the Sex Discrimination Bill.

¹ Explanatory Memorandum, Human Rights and Anti-Discrimination Bill 2012 (Cth) para 190

² Explanatory Memorandum, Human Rights and Anti-Discrimination Bill 2012 (Cth) para 190

Recommendation 2:

The Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 should be amended to exclude exemptions from anti-discrimination obligations to all Commonwealth funded aged care service providers.

5. We support the Government's finding that there was no evidence of religious doctrine which required discrimination on the ground of intersex status, and the amendments in the Sex Discrimination Bill which ensure the exemptions for educational institutions established for religious purposes listed in s.38 of the Sex Discrimination Act (1984) do not apply to intersex status.
6. We note, however, that that the broad exemption for religious bodies in s.37 (d) does not exclude discrimination on the grounds of intersex status and is therefore inconsistent with s. 38 of the Act.

Recommendation 3:

Intersex status should be excluded from the operation of s.37 (d) of the Sex Discrimination Act (1984)

7. Under the current Sex Discrimination Act (1984), discrimination on the grounds of family responsibilities is limited to cases of direct discrimination only. Victims of indirect discrimination on the grounds of family responsibilities may only seek redress on the grounds of sex discrimination if they are a woman. The HRAD would rectify this by extending discrimination on the grounds of family responsibilities to both indirect and direct discrimination.
8. Further, the current Sex Discrimination Act provides protection only against discrimination on the grounds of family responsibilities. This definition does not incorporate modern relationships in which caring responsibilities may not be limited to members of a 'family' and is inconsistent with recent trends on legislation that define the ground as 'family or caring responsibilities'. This was also to be rectified in the HRAD Bill.
9. Both of these amendments contained in the HRAD Bill are of particular relevance to ensuring effective protection against discrimination on the grounds of their caring responsibilities for members of the LGBTI community.

Recommendation 4:

The Sex Discrimination Bill should be amended to include both direct and indirect discrimination on the grounds 'family and caring responsibilities'.

10. We note that the introduction of the new grounds of discrimination on the basis of sexual orientation, gender identity and intersex status will require additional resources from the Australian Human Rights Commission.

Recommendation 5:

The Australian Human Rights Commission should be appropriately resourced to address any education, implementation and complaint processes arising from the SDA Bill.

11. The Sex Discrimination Bill arises as a consequence of the Government's review and harmonisation of the Race, Disability, Sex and Age Commonwealth anti-discrimination legislation in to one consolidated Human Rights and Discrimination (HRAD) Bill 2012. The ACTU prepared a submission and appeared before the Senate Legal and Constitutional Affairs Legislation Committee Inquiry in to the HRAD Bill in January 2013.
12. We note that the terms of reference of this Inquiry are limited to the provision of the draft Sex Discrimination Bill 2013, and that the Committee will not be focussing on issues which go beyond the scope of this Bill.
13. However, we do wish to take this opportunity to express our grave disappointment that the draft Sex Discrimination Bill 2013 essentially adopts only two of the reforms of the draft HRAD Bill- the inclusion of sexual orientation, gender identity and intersex status as a ground of discrimination and the redefining of marital status to include relationship status.
14. The review of the Sex Discrimination Act (1984) commenced in 2008 and the majority of recommendations arising from that review were referred to the consolidation of anti-discrimination laws which would ultimately be reflected in the HRAD Bill. Consultation and drafting of the HRAD began in 2010. The ACTU and many stakeholders (including employers) have worked productively with the government for over 5 years on reforming the anti-discrimination legislative framework through the development of the HRAD Bill.
15. The ACTU was willing to invest time and resources into reforming the anti-discrimination legislation because:
 - Effective anti-discrimination legislation is critical to ensure the basic human right to social inclusion and full participation in public life;
 - The current Commonwealth anti-discrimination laws rely exclusively on individuals to find the time, emotional energy and financial resources to lodge complaints after they have experienced discrimination and will continue to have only a limited effect on preventing discrimination; and
 - The need to reform the anti-discrimination legal framework is born by the statistics (i.e. around 20% of pregnant women report discrimination at work: ABS data released 16 November 2012).

16. It is clear to us that the efficacy of the laws aimed at protecting individuals from discrimination need to be improved if we are to turn these sorts of statistics around.
17. Whilst we sought further substantive, systemic reform of the anti-discrimination legislation through the HRAD Bill, we noted that the Bill contained three key reforms which would set a fairer and more just foundation upon which discrimination law is based in this country:
 - Introduction of a fairer, shared burden of proof (whereby employees must establish evidence to support a prima facie case of discrimination which, if successful, employers must disprove);
 - Removal of the barrier to lower paid complainants by introducing a no cost jurisdiction (where costs cannot be awarded against a party); and
 - A simplified definition of discrimination (which removes the distinction between direct and indirect discrimination and is easier to understand).
18. Despite the failure of draft Bill to adopt a significant number of ACTU proposals, in recognition of the need to balance the competing interests and concerns of a number of stakeholders, and of the foundations the HRAD Bill laid for a fairer and more effective anti-discrimination legislation, the ACTU and Unions supported the passage of the HRAD Bill.
19. We were disappointed that the debate around the HRAD, as played out in the media, was sensationalist, shallow, short-sighted and negative. In particular:
 - There was no acknowledgement of the need to reform the current legislative framework, particularly regarding inequity, inefficiency and access to justice for victims of discrimination;
 - Employer organisations and the Coalition Party's commentary on the HRAD Bill, in particular, was inflammatory, inaccurate and did not reflect the true nature of the Bill; and
 - There was no recognition that the HRAD Bill reflected a balanced compromise position between competing interests, including employees, victims of discrimination and employers.
20. The considerable media attention on the exposure draft of the HRAD Bill focussed on two aspects of the draft HRAD in particular: the potential impact of the definition of discrimination on freedom of speech and the breadth of the proposed exemptions for religious organisations.

21. We believe that neither of these issues give rise to an argument that the Bill could not be presented to Parliament following some minor re-drafting.
22. The Senate Legislation and Constitutional Affairs Coalition Minority Report on the draft HRAD Bill opposed the Bill on the additional grounds that:
 - The scope of the Bill is 'impossibly wide and dangerously vague';
 - The Bill is inconsistent and overreaches government intrusion; and
 - Making the complaints procedure cost free and sharing the burden of proof will encourage a 'culture of complaint'.
23. We refute the assertion that the HRAD Bill is impossibly wide or vague- it is by and large a consolidation of existing laws which have been in place for many years. The inconsistency the Report refers to in relation to state/ territory inconsistencies with federal laws which was not the subject of review or consolidation. It is clear that the Coalition will not support the Bill, even if the controversial matters of freedom of speech and religious freedom are resolved to its satisfaction.
24. It is also obvious by the comments made in the third point that the Coalition is generally opposed to any reform which will remove the key barriers victims of discrimination face in pursuing redress.
25. Maintaining a legal system based on restricted access to justice for ordinary members of the community by ensuring the evidentiary and financial burden is too high, is fundamentally flawed, grossly unfair and is not a valid reason to oppose reform.
26. In our view, the HRAD Bill is a progressive step towards reform of anti-discrimination legislation and reflects a balanced approach which attempts to ensure some degree of fairness and access to justice for employees.
27. We note that the Government has described the passage of the Sex Discrimination Bill as an interim step towards a revised HRAD Bill.
28. The revised HRAD Bill should be re-introduced in the winter sittings of Federal Parliament.



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