

**SUBMISSION OF THE WILBERFORCE FOUNDATION IN RELATION TO SEX DISCRIMINATION AMENDMENT (SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS) BILL 2013 (BILL).**

*INTRODUCTION*

1. The Wilberforce Foundation proffers this submission which suggests a reconsideration of, and amendments to, the Bill.
2. The reconsideration/amendments recommended are in keeping with the ethos of the Wilberforce Foundation, namely the protection and enhancement of common law values, including the right to religious liberty.

*THE CONSTITUTIONAL BASIS OF THE BILL*

3. The Bill is founded on an uncertain constitutional basis.
4. Section 3 of the *Sex Discrimination Act (SDA)* 1984 provides that:

The objects of this Act are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; and

5. None of the “relevant international instruments” defined in the SDA;<sup>1</sup> provide a basis to refer to “sexual orientation, gender identity or intersex status” as prohibited grounds of discrimination.
6. It is therefore submitted that the Committee recommend to the Attorney-General that an opinion be sought from the Solicitor-General as to whether the Bill is likely to be constitutionally valid.
7. That opinion should also consider the effect of S.116 of the Constitution on the Bill. S.116 prohibits the Commonwealth from making any law “prohibiting the free exercise of any religion”.
8. The SDA, as proposed to be amended by the Bill, while providing for exemptions in relation to religious organisations,<sup>2</sup> does not extend this exemption to individuals who act in daily life in accordance with their religious convictions. In *Judd v McKeon* Higgins J (in dissent) said “if abstention from voting were part of the elector’s religious convictions duty, as it appeared to the mind of the elector, this would be a valid and sufficient reason for his failure to vote (sec 116 of the Constitution)”.<sup>3</sup> While this is admittedly a dissenting opinion, and there are decisions of the High Court which interpret s.116 narrowly,<sup>4</sup> it is respectfully submitted that it would be prudent for the Committee to recommend that there be consideration of the effect of s.116 on the Bill.

*THE BALANCE IN FREEDOMS IN THE BILL*

9. If it is considered that the Bill is constitutionally valid then it is suggested that there be an overriding clause that the Bill is to be interpreted consistently with the rights to freedom

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<sup>1</sup> See section 4.

<sup>2</sup> SDA s.37.

<sup>3</sup> (1926) 38 CLR 380 at 387.

<sup>4</sup> *Judd and Kryger v Williams* (1912) 15 CLR 366.

thought, conscience and religion, which are guaranteed by Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Article 18(1) of the ICCPR provides: *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

10. The Explanatory memorandum says *“The importance of the right to freedom of religion is recognised in sections 37 and 38 of the SDA. These sections provide exemptions for religious bodies and education institutions from the operation of the prohibition of discrimination provisions of the SDA in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”*
11. It is respectfully submitted that in dealing with this co-equal right by means of an exemption, it necessarily subordinates it to the right to non-discrimination.
12. A clause such as, *“Nothing in this Act applies to discrimination by a person against another person on the basis of that person’s, sex, sexual orientation, lawful sexual activity, marital or relationship status parental status or gender identity if the discrimination is reasonably necessary for the first person to comply to the doctrines, beliefs or principles of their religion and the Act is to be interpreted according to this principle”* will give the Courts a direction that the freedoms are to be treated equally.

#### DIFFICULTIES IN APPLICATION

13. It is noted that the Bill does not provide an exemption in relation to religious organisations in dealings with inter-sex persons.
14. However the definition of inter sex status is: *“intersex status means the status of having physical, hormonal or 1 genetic features that are:*
  - (a) neither wholly female nor wholly male; or 3*
  - (b) a combination of female and male; or 4*
  - (c) neither female nor male.*
15. It will be impossible for any group, religious or otherwise, to discern in day to activities whether a person is an intersex person,<sup>5</sup> against whom it cannot discriminate, or a person who is a transgender person (for example), against whom it can discriminate.
16. It is recommended that the exemption be extended to intersex persons so that this impossibility of application is addressed or submissions be sought from interested stakeholders how this issues may be resolved.

#### THE DIFFERENTIATION BETWEEN GENDER AND SEX

17. The Explanatory Memorandum states *“‘Gender’ is used in this definition rather than ‘sex’ as it is a different concept, understood to be part of a person’s social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognised within the community. A person’s gender might include outward social markers, including their name, outward appearance, mannerisms and dress. It also recognises that a person’s sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female.”*
18. The difference is proffered as an accepted fact, when it is a matter subject to debate<sup>6</sup>.

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<sup>5</sup> The definition requires invasive searches or tests to prove a person is intersex.

19. Before this matter is enshrined in legislation, it is recommended that specific advice be sought from interested stakeholders as to whether the distinction is scientifically valid.

*CONCLUSION*

20. The Wilberforce Foundation thanks the Committee for the opportunity to make this submission.

Dated 26 April 2013

The Wilberforce Foundation

Per: *F.C. Brohier*

Frederick Christopher Brohier

LLB (Hons) GDLP

A Member of the Independent Bar of South Australia.

Elizabeth Mews

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<sup>6</sup> See <http://www.psychologytoday.com/blog/the-how-and-why-sex-differences/201110/sex-difference-vs-gender-difference-oh-im-so-confused> viewed 26 April 2013.