Australian Human Rights Commission

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

April 2013

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Committee regarding the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (SDA Bill).

2. The Commission commends the Australian Government for proceeding with the introduction of these new protections for sexual orientation, gender identity and intersex as an interim measure while it considers the Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill) further. The Commission strongly supports the passage of the SDA Bill and also strongly encourages the Government to introduce the revised HRAD Bill in the Winter sittings of the federal parliament.

2 Summary

3. The SDA Bill will introduce essential protections for sexual orientation, gender identity and intersex status in federal discrimination laws. The Commission agrees with the Government that these protections are 'long overdue and too important to be delayed further'[1]. The Commission strongly supports the passage of this Bill as an interim measure prior to the introduction of a revised Human Rights and Anti-Discrimination Bill.

4. These positive developments are a major step forward for the Australian Government fulfilling its international human rights obligations towards lesbian, gay, bisexual, transgender and intersex (LGBTI) people. However, there are other issues that were proposed to be addressed through the HRAD Bill or were raised during the consultation process that would provide more effective protection against discrimination on the basis of sexual orientation, gender identity and intersex. A number of these provisions do not appear to have been incorporated into the proposed SDA Bill.

5. In the consultation process held by this committee on the exposure draft of the HRAD bill, a number of these issues were either broadly supported or did not attract opposition. These include the exclusion of Commonwealth-funded aged care services and intersex status from the operation of the exemptions for religious bodies. These should be addressed through the SDA Bill.

6. The Commission notes that the SDA was introduced to implement Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and to promote substantive gender equality. The proposed amendments do not amend the existing SDA objects pertaining to gender equality or pertaining to discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy or breastfeeding, family responsibilities and sexual harassment.

7. The SDA Bill seeks to prohibit discrimination on three additional grounds of sexual orientation, gender identity and intersex under the SDA. However, there are some complexities and ambiguities that result from seeking to use the SDA as the vehicle for providing protection against discrimination on the grounds of sexual orientation, gender identity and intersex status, rather than the HRAD Bill.

8. We acknowledge that the Attorney-General has described the passage of the SDA Bill as an interim step towards a revised HRAD Bill. Any inconsistencies that are unable to be addressed through this process could be addressed through the HRAD Bill or through subsequent amendments to the SDA.

3 Recommendations

9. The Australian Human Rights Commission recommends that:

- The Committee support passage of the Bill as an interim measure to the introduction of the Human Rights and Anti-Discrimination Bill 2012 **[Recommendation 1].**

- The Committee recommend that the Australian Government introduce the revised Human Rights and Anti-Discrimination Bill 2012 in the Winter sittings of federal parliament **[Recommendation 2].**

- The Committee recommend that:
  - Commonwealth-funded aged care services and
  - Intersex status

  be excluded from the operation of s 37(d) of the SDA [**Recommendation 3].**

- The Committee recommend that the exemption in clause 43A include a requirement that it be reviewed in three years **[Recommendation 4].**

- The Committee recommend that the Australian Government consider removing clause 40(2B) from the SDA Bill **[Recommendation 5].**

- The Committee give consideration to options for aligning the protections for sexual orientation, gender identity and intersex in the SDA with those in the HRAD Bill **[Recommendation 6].**

4 Improved protections for sexual orientation, gender identity and intersex status

10. The SDA Bill will introduce essential protections for sexual orientation, gender identity and intersex status in federal discrimination laws. The Commission agrees with the Government that these protections are 'long overdue and too important to be delayed further'.[2] The Commission

strongly supports the passage of this Bill as an interim measure prior to the introduction of a revised Human Rights and Anti-Discrimination Bill.

11. **The Commission supports passage of the SDA Bill as an interim measure to the introduction of the Human Rights and Anti-Discrimination Bill 2012 [Recommendation 1].**

12. **The Commission recommends that the Australian Government introduce the revised Human Rights and Anti-Discrimination Bill 2012 in the Winter sittings of federal parliament [Recommendation 2].**

13. The proposed definitions of sexual orientation, gender identity and intersex are best practice in Australia and are consistent with the most recently considered proposed discrimination legislation, the Anti-Discrimination Amendment Bill 2012 (Tas). Further, marital status has been amended to include 'marital or relationship status' which includes same-sex de facto couples.

14. These positive developments are a major step forward for the Australian Government fulfilling its international human rights obligations towards lesbian, gay, bisexual, transgender and intersex (LGBTI) people. However, there are other issues that were proposed to be addressed through the HRAD Bill or were raised during the consultation process that would provide more effective protection against discrimination on the basis of sexual orientation, gender identity and intersex. In the consultation process held by this committee on the exposure draft of that bill, a number of these issues were either broadly supported or did not attract opposition.

15. A number of these provisions do not appear to have been incorporated into the proposed SDA Bill. The Commission contends that in order to guarantee more effective protection on the basis of sexual orientation, gender identity and intersex and to clarify any inconsistency, the Government should consider certain amendments to the SDA Bill as follows.

4.1 Commonwealth-funded aged care and exemptions for religious bodies

16. The Commission notes with concern that the SDA Bill has not retained the provision in the HRAD Bill which excludes the provision of Commonwealth-funded aged care from the operation of the exemptions for religious bodies. Older LGBTI people should be able to access aged-care services without the fear of discrimination.

17. This provision enjoyed broad support in the consultation process. When providing reasons for the 'aged-care' qualification in the HRAD Bill the Government said '[t]here was significant feedback during consultations of the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to

be recognised as a couple'.[3] The report of this committee agreed: 'it is fundamentally important that all older Australians maintain the right to access aged care services on an equal basis'.[4]

18. In addition, many religious aged-care providers who engaged with the consultation process confirmed that they do not discriminate in who they provide care to, and were supportive of protection from discrimination for LGBTI people seeking to access their aged care services. UnitingCare Community (which runs an Older Persons Program funded by the Queensland Government) stated in its submission that it 'strongly supports the prohibition of discrimination against LGBTI people receiving aged care services including those provided by federal funding and administered by religious aged care services.'[5] Hammondcare, a non-denominational Christian aged-care services provider, gave evidence before the Senate Committee that it:

> does not discriminate in provision of care on any basis, whether race, religion, gender or sexual orientation. HammondCare is currently and will continue to be an employer and a carer of people of all backgrounds, including people of the gay community.[6]

19. In its submission Catholic Health Australia stated that:

> Catholic hospitals and aged care services do not discriminate against those who seek admission to hospital or aged care services; Catholic hospitals and aged care services will offer care to any person, regardless of 'gender identity, marital or relationship status, potential pregnancy, pregnancy, religion or sexual orientation,' where such person seeks care to be provided to them in a way that is consistent with Catholic teaching.[7]

20. Further, the Government said that when 'such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate'.[8] The Government has also recognised older LGBTI people as a special needs group as part of its *Living Longer, Living Better* Strategy.[9] Section 37(d) of the *Sex Discrimination Act 1984* (Cth) (SDA) provides a broad exemption for acts for religious bodies. The Commission recommends that Commonwealth-funded aged care services are excluded from the operation of s 37(d) of the SDA.

21. While such limitations contribute towards better balancing of the rights to non-discrimination and freedom of religion, the Commission is of the view that ongoing consideration remains needed regarding means for achieving appropriate balancing.

4.2 Intersex status and religious exemptions

22. The Commission welcomes the introduction of intersex as a separate ground for protection against discrimination. The Government stated it 'has not been informed of any religious doctrines which require discrimination on the ground of intersex status'.[10] As a result intersex

status has not been included in the exemption for religious education institutions (s 38). The omission of intersex status from the exemption in s 38 is welcomed and contributes towards a better balancing of the rights of non-discrimination and freedom of religion.

23. However, the application of s 37(d) to intersex status is contrary to this. Section 37(d) provides a broad exemption for religious bodies and arguably encompasses any act referred to in s 38. If intersex is not excluded from the operation of s 37(d) then the policy intent of the Government will potentially be undermined.

24. The application of section 37 to intersex people arises in the SDA because s 37 has effect in relation to any matter in Division 1 or 2 of the SDA. Accordingly, this exemption automatically applies to all attributes covered by the SDA, whether they are necessary or not. This includes existing grounds such as breastfeeding and family responsibilities, where it is not clear what doctrinal reasons could require discrimination on these grounds.

25. This is something that could be more easily addressed in the HRAD Bill, but on which the SDA presents structural issues. A new subsection could be introduced which provides that the exemption in subsection 37(d) does not apply to discrimination on the ground of intersex status. To be consistent with this approach, any additional grounds under the SDA which do not have a doctrinal basis could also be included in such an amendment.

26. **The Commission recommends that:**

    a. Commonwealth-funded aged care services and
    b. Intersex status

    be excluded from the operation of s 37(d) of the SDA [Recommendation 3].

4.3 Appropriate resourcing

27. The proposed new grounds in the SDA will almost certainly lead to new, and a higher volume of, enquiries and complaints. In addition, the Commission's other functions in relation to research, education and awareness raising will also be enlivened by the inclusion of these new attributes. There will also be a higher expectation from the community that the Commission will seek to proactively address systemic issues facing LGBTI communities, as opposed to purely relying upon its complaints processes to remedy situations of discrimination and breaches of human rights. Consideration should be given to the resourcing impact of these new provisions. To more effectively perform these functions the Commission would be aided by appropriate additional resources.

5 The SDA and sexual orientation, gender identity and intersex

28. The Commission notes that the SDA was introduced to implement Australia's obligations under the CEDAW and to promote substantive gender equality. The proposed amendments do not amend the existing SDA objects pertaining to gender equality or pertaining to discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy or breastfeeding, family responsibilities and sexual harassment.

29. The SDA Bill seeks to prohibit discrimination on three additional grounds of sexual orientation, gender identity and intersex under the SDA. However, there are some complexities and ambiguities that result from seeking to use the SDA as the vehicle for providing protection against discrimination on the grounds of sexual orientation, gender identity and intersex status, rather than the HRAD Bill.

30. We acknowledge that the Attorney-General has described the passage of the SDA Bill as an interim step towards a revised HRAD Bill. The Commission considers that the proposed new provisions be kept under review to identify any inconsistencies or ambiguities that arise from providing this protection through the SDA, rather than through a more cohesive mechanism such as a revised HRAD Bill. The Commission notes that issues that are not able to be addressed through the SDA Bill could be addressed through the HRAD Bill or through subsequent amendments to the SDA.

5.1 Additional exemptions for sexual orientation, gender identity and intersex

31. One of the ambiguities is that the SDA Bill introduces additional exemptions which will only apply to the new grounds. The Commission suggests that further consideration of these additional provisions could help facilitate a more appropriate result.

(a) Exemption for keeping records and requesting information

32. The Commission acknowledges that a certain period of time is necessary for governments and the private sector to consider system changes in order for individuals to identify as neither male nor female. The exemption in s 43A is designed to facilitate this however a permanent exemption is not required. As the Explanatory Memorandum notes, this exemption may not be necessary in the future 'if organisations (both government and private sector) have revised their data collection and record keeping practices'.[11] The Commission is of the view that such a provision should be a transitional measure. Consistent with the implementation timeframe of the draft Australian Government Guidelines on the Recognition of Sex and Gender[12] the Commission recommends this exemption be reviewed in three years.

33. **The Commission recommends that the exemption in clause 43A include a requirement that it be reviewed in three years [Recommendation 4].**

(b) Exemption of acts under prescribed laws

34. The Commission notes that clause 40(2B) partly codifies the common law position that a discriminatory act will not be unlawful if it is required by a Commonwealth law to be taken, that is, it is done in direct compliance with the law. It is only acts that are within the discretion of the Commonwealth, its officers or agents that may be unlawful.[13] However the Commission is concerned that this provision could also facilitate the 'exemption' of acts under discriminatory state and territory laws. To ensure the greatest transparency and accountability, clause 40(2B) could be removed. Further if any laws are identified as legitimately requiring exemption from the operation of the SDA, these laws should be included by amendments to the main provisions of the SDA and only after consultation with LGBTI stakeholders.

35. **The Commission recommends that the Australian Government consider removing clause 40(2B) from the SDA Bill [Recommendation 5].**

5.2 Structural differences to the HRAD Bill

36. Because of the holistic way the HRAD Bill is drafted there are a number of improvements for the protection of LGBTI people against discrimination that are not available under the SDA. These omissions arise because of the way the SDA is structured. Given the purpose of the SDA Bill is to 'foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia'[14] the Commission suggests that consideration be given to options to align the protections for LGBTI people under the SDA with those under the HRAD Bill.

(a) Exemption for state and territory laws regarding amending official records

37. The SDA contains a statutory exemption which provides that it is not unlawful to refuse to issue or amend an official record of a person's sex, such as a birth certificate, if a state or territory law requires the refusal because the person is married.[15] The effect of these state laws is that a person who has legally married under the *Marriage Act 1961* (Cth) cannot subsequently change their sex unless they first divorce their partner. These laws particularly impact on trans and intersex people.

38. The rationale for the discriminatory treatment under these state laws appears to be the need to avoid a potential conflict with the requirement under the Commonwealth Marriage Act that a marriage must be between a man and a woman.[16] That is, it could appear to be a 'same-sex marriage'.[17] Whether this would affect the validity of the marriage under the Commonwealth Marriage Act has not been squarely considered by

the courts however in *Re Kevin (Validity of Marriage of Transsexual)* the Court held that '[f]or the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage'.[18]

39. The HRAD Bill did not retain this exception. The Commission contends that the state and territory laws are discriminatory and the SDA provision exempting the operation of these laws could be removed.

(b) Family responsibilities

40. In the HRAD Bill the definition of discrimination is inclusive of the concepts of direct and indirect discrimination. The ground of family responsibilities would be subject to this definition. However, in the SDA discrimination on the ground of family responsibilities is restricted to direct discrimination. The SDA Bill could extend the application of family responsibilities to indirect as well as direct discrimination to ensure consistency with the HRAD Bill.

41. Case law has found that an employer's conduct in not accommodating an employee's family responsibilities though providing flexible work practices can also amount to indirect sex discrimination under the SDA where a condition may disadvantage women because of their disproportionate responsibility for the care of children.[19] However this application is restricted to women and would not appear to be available to a man who may be raising a child whether they are single, married, divorced, de facto, separated or in a same-sex couple.

42. Further, there may also be people in certain forms of LGBTI families who are not covered in the definition of family responsibilities in the SDA, including those in multi-parent families. The SDA Bill could be amended by prohibiting direct and indirect discrimination on the ground of family responsibilities and expressly including carer responsibilities.

(c) State instrumentalities

43. Under the SDA, the prohibition against discrimination and sexual harassment in employment does not apply in relation to employment by an instrumentality of a State.[20] This is because of the combined effect of ss 12 and 13 of the SDA. This limitation applies to the existing grounds and will extend to the new grounds of sexual orientation, gender identity and intersex. This means that LGBTI employees of state bodies could not make a complaint of discrimination under the SDA in relation to their employment. This limitation does not exist in the other federal discrimination laws and would not have applied in the HRAD Bill. While sexual orientation and gender identity are protected attributes, to varying extents, in most state and territory laws, intersex is not. To fulfil the protections afforded in the HRAD Bill, the SDA Bill could repeal s 13 of the SDA.

(d) Sexual preference in the AHRC Act

44. The Commission currently has limited jurisdiction regarding complaints of discrimination in employment on the basis of sexual preference under the *Australian Human Rights Commission Act 1986* (Cth). To ensure consistency of terminology across the federal discrimination laws the *Australian Human Rights Commission Regulations 1989* (Cth) could be amended to include sexual orientation instead of sexual preference.

45. **The Commission recommends that consideration is given to options for aligning the protections for sexual orientation, gender identity and intersex in the SDA with those in the HRAD Bill [Recommendation 6].**

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[1] Attorney-General and Minister for Finance and Deregulation, 'New anti-discrimination laws to cover sexual orientation, gender identity and intersex status', (Media Release, 20 March 2013). At http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/First%20quarter/20March2013-Newantidiscriminationlawstocoversexualorientationgenderidentityandintersexstatus.aspx (viewed 16 April 2013).
[2] Attorney-General and Minister for Finance and Deregulation, 'New anti-discrimination laws to cover sexual orientation, gender identity and intersex status', (Media Release, 20 March 2013). At http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/First%20quarter/20March2013-Newantidiscriminationlawstocoversexualorientationgenderidentityandintersexstatus.aspx (viewed 16 April 2013).
[3] Explanatory Memorandum, Human Rights and Anti-Discrimination Bill 2012 (Cth), para 190.
[4] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report of the Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), para 7.69.
[5] UnitingCare Community, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (20 December 2012), pp 1 - 2.
[6] Evidence to the Parliamentary Joint Committee on Human Rights, Sydney, 24 January 2013, p 34 (David Martin, General Manager, People, Learning and Culture, HammondCare).
[7] Catholic Health Australia, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (21 December 2012), p1.
[8] Explanatory Memorandum, Human Rights and Anti-Discrimination Bill 2012 (Cth), para 190.
[9] Australian Government, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2013), goal 3.
[10] Explanatory Memorandum, Human Rights and Anti-Discrimination Bill 2012 (Cth), para 71.
[11] Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), para 85.
[12] See Australian Government, *Australian Government Guidelines on the Recognition of Gender Consultation Draft* (March 2013), para 36. At http://www.ag.gov.au/Consultations/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx (viewed 15 April 2013).
[13] See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
[14] Statement of Compatibility with Human Rights, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), p 4.
[15] *Sex Discrimination Act 1984* (Cth), s 40(5).
[16] For an example of these concerns in Victoria see *Hansard,* Legislative Assembly, Robert Hulls, 11 May 2004, p 1107, quoted in *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; [2007] FCAFC 14 at [69] (Kenny J).
[17] For further discussion see Australian Human Rights Commission, *The sex and gender diversity project Concluding paper* (2009), s 10.3. At: http://humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 11 March 2013).

[18] *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, [330].
[19] See for example *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122 [33], [37] and *Hickie v Hunt & Hunt* [1998] HREOCA 8.
[20] For further see Human Rights and Equal Opportunity Commission, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (2008), paras 302-311.