

Further submissions and response to Questions on Notice to the Select Committee
on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

The Anti-Discrimination Board of NSW (Board) thanks the Senate Committee for the opportunity to appear at the Sydney public hearing into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (the Bill).

In response to the Committee's questions on notice and its offer to provide further written submissions, the Board makes the following comments:

ICCPR anti-discrimination provisions

In relation to the Committee's question about the UN Human Rights Committee's (HRC) *General Comment 18*,¹, we note that the context in which the HRC refers to "*discrimination solely on the ground of...*" is in relation to Article 4 of the International Covenant on Civil and Political Rights (ICCPR)², which permits States parties to derogate from the Covenant's obligations in times of public emergency. Article 4 provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".³

General Comment 18 explains:

"Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the

¹ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html> [accessed 25 January 2017]

² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 25 January 2017]

³ ICCPR 16 December 1966, *ibid*

same article requires, inter alia, that those measures should not involve discrimination **solely** on the ground of race, colour, sex, language, religion or social origin. (...)⁴” (emphasis added).

Both Commonwealth and State anti-discrimination legislation contain provisions to the effect that, where an act is done for 2 or more reasons, and one of the those reasons consists of unlawful discrimination, then the act is taken to be done for that reason, whether or not it is the dominant or a substantial reason⁵. The Board does not perceive any conflict between these provisions and the UN HRC’s *General Comment 18*.

Further, the Board considers that any proposed legislation requiring unlawful discrimination to be based *solely* on any protected attribute would have the effect of severely reducing existing anti-discrimination protections. In discrimination complaints, proving what motivated discriminatory conduct is frequently challenging, as few people are willing to admit their actions were motivated by race, age, gender, pregnancy etc. Proving that it was their sole motivation would be still harder, and would be likely to place an insurmountable evidentiary barrier in the path of any complainant.

Terminology

The Board supports amending the definition of marriage in the *Marriage Act 1961* to refer to “2 people” instead of “a man and a woman”.

As was evidenced during the hearing, issues of sex, sexuality and gender identity are complex, and terminology in this area is often strongly contested, even within the LGBTI community. Laws governing the legal recognition and protection of these characteristics also vary across jurisdictions.

In 2013 the Commonwealth Government broadened the protections in the *Sex Discrimination Act 1984* (SDA) to cover sexual orientation (whether towards persons of the same and/or a different sex), gender identity (gender-related characteristics, regardless of a person’s sex at birth), intersex status (people born with physical sex characteristics that do not fit medical and social norms for female or male bodies)⁶, and marital or relationship status. The 2013 amendments changed the terminology of the SDA to refer to people of a ‘different sex’, rather than of ‘opposite sex’ in order to provide consistency with the, “*protection of gender identity and intersex status, which recognises that a person may be, or identify as, neither male nor female*”⁷.

⁴ UN HRC, CCPR General Comment 18, *ibid*

⁵ See for example: *Racial Discrimination Act 1975* (Cth), s. 18B; *Sex Discrimination Act 1975* (Cth), s. 8; *Anti-Discrimination Act 1977* (NSW), s. 4A

⁶ *What is intersex?*, Organisation Intersex International Australia Limited, at: <https://oii.org.au/18106/what-is-intersex/>

⁷ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Explanatory memorandum, at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5026_ems_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b%22

In *AB v Western Australia* [2011] HCA 42⁸ the High Court held that, (for the purposes of the *Gender Reassignment Act 2000* (WA)) the physical characteristics by which a person is identified as male or female are confined to physical characteristics that are socially recognisable⁹. The Court considered that any conclusion about a person's gender is reached by reference to the person's appearance and behaviour, amongst other things, and does not require detailed knowledge of their bodily state¹⁰.

Another High Court decision, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, held that the *Births, Deaths and Marriages Registration Act 1995* (NSW) already recognised that "a person may be other than male or female" and permitted the registration of Norrie's sex as "non-specific"¹¹.

In *Norrie*¹² the Court also discussed whether other legislation might require that a person be classified as male or female for the purpose of legal relations. Their Honours observed "for the most part, the sex of the individuals concerned is irrelevant to legal relations as the *Interpretation Act 1987* (NSW) provides that "a word or expression that indicates one or more particular genders shall be taken to indicate every other gender". The judgment pointed out that the current provisions of the *Marriage Act 1961* were the "chief, perhaps the only, case where the sex of the parties to the relationship is legally significant"¹³.

Balancing Rights

Articles 2 and 26 of the ICCPR provide that all persons are equal before the law and entitled, without any discrimination, to the equal protection of the law. As a result, laws shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'.

In *Toonen v Australia*¹⁴, the HRC held the view that the references to 'sex' in ICCPR articles 2 and 26 included sexual orientation.

⁸ *AB v Western Australia* [2011] HCA 42, 244 CLR 390, .

⁹ *Ibid*, 244 CLR 390, 405 [35].

¹⁰ *Ibid*, 244 CLR 390, 405 [34].

¹¹ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 [46], 250 CLR 490

¹² *Ibid*, [2014] HCA 11 [42]

¹³ *Ibid*, [2014] HCA 11[42]

¹⁴ *Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, No. 488/1992, Nicholas Toonen v. Australia, <http://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf>, [accessed 25 January 2017]

The human rights of freedom of thought and conscience, religion and belief are also well established, but the ICCPR establishes that they are not absolute rights and may be limited where they impinge upon the fundamental rights and freedoms of others. Article 18.3 provides:

*“Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.*¹⁵

The Board considers that any proposed amendment to the *Marriage Act 1961* should ensure that religious manifestation, expression and beliefs do not interfere with the rights of others to equality before the law and freedom from discrimination.

Proposed amendments: Sections 47, 47A and 47B

As foreshadowed in our evidence, the Board would like to expand upon its original submissions in this area.

In relation to s. 47, the Board does not consider that amendment is necessary, as the current exemption for ministers of religion is sufficient and already permits a minister to refuse to solemnise any marriage on the basis of conscientious or religious belief.

Further, the Board opposes s. 47A of the Bill. Civil marriage celebrants should not be permitted to refuse to solemnise same-sex marriages, as they are performing a government service on behalf of the state.

We also oppose s. 47B. In our view no discrimination should be permitted in the provision of goods and services, save for acts and practices of recognised religious bodies in conformity with the doctrines of that religion. We consider that the *Religious bodies* exception in s. 56 of the ADA is a useful precedent for how such an exception might work.

The Board again thanks the Committee for the opportunity to contribute to this important debate, and will not hesitate to provide further information or clarification should the Committee require it.

Elizabeth Wing
Acting President
Anti-Discrimination Board of NSW

27 January 2017

¹⁵ ICCPR 16 December 1966, *ibid*