



3 May 2013

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

**Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013**

1. Women's Legal Services NSW (WLS NSW) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill ('the Bill') 2013.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. While welcoming and supporting protection from discrimination on the grounds of sexual orientation, gender identity and intersex status, we express our disappointment at the delay in passing the Human Rights and Anti-Discrimination Bill ('HRAD Bill'). The HRAD Bill simplifies discrimination law for the benefit of all with a unified definition of discrimination. It improves access to justice with the sharing of the burden of proof such that the person making the complaint has to show that the conduct took place and provide some evidence it happened for an unlawful reason and it then falls to the person or organisation said to be doing the discriminating to show the conduct was not unlawful. This sharing of burden is fairer as the respondent is the one holding the evidence that their conduct was not unlawful. The HRAD Bill also brings discrimination law into line with the Fair Work jurisdiction with each party covering their own costs. It also recognises intersectional discrimination.
4. We have read and endorse the Equality Rights Alliance (ERA) submission to this inquiry which, while strongly supporting extending discrimination law to provide protection



## WOMEN'S LEGAL SERVICES NSW

against discrimination for LGBTIQ people, also notes 'that the inclusion of these grounds in the *Sex Discrimination Act* must not be permitted to reduce protection against discrimination on the grounds of sex'. While expressing the view, which we agree with, that 'the current Bill does not decrease that protection', ERA 'urges the Committee to be wary of recommended amendments which impact on either the definition or function of the sex discrimination provisions or which conflate sex discrimination with the new grounds of discrimination'.

5. In summary, we recommend:

1. The passage of the Bill through Parliament with the amendments outlined below without delay as an important interim step prior to the passage of the HRAD Bill.
2. That the preamble and objects of the *Sex Discrimination Act 1984 (Cth)* ('*SDA*') be amended by deleting the phrase 'so far as is possible'.
3. That the objects and scope of the *SDA* should include the promotion of substantive equality.
4. That the objects of the *SDA* include reference to international human rights instruments relevant to LGBTIQ people, including: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the Yogyakarta Principles.
5. That the Bill includes no religious exemptions. In the alternative and at a minimum, religious exemptions should not apply to the provision of services as recommended by the Senate Legal and Constitutional Affairs Committee report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill.
6. Consistent with stated Government policy, that there be no religious exemptions in the provision of Commonwealth Government funded aged-care services.
7. That the *Fair Work Act* is amended so the term 'sexual preference' is replaced with 'sexual orientation'.
8. That the *Fair Work Act* is amended so the term 'marital status' is replaced with 'marital or relationship status'.
9. That the *Fair Work Act* is amended to include additional protected attributes of 'gender identity' and 'intersex status'.
10. That the collection of sex-disaggregated data continues with a clear and consistent way of providing more inclusive options beyond male and female.
11. The passage of a revised Human Rights and Anti-Discrimination Bill ('HRAD Bill') through Parliament in the 2013 winter session with the inclusion of recommendations made by the Senate Legal and Constitutional Affairs Committee in their report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill.

## Sexual orientation, gender identity and intersex status

6. This Bill will provide important practical benefits for LGBTIQ people and is consistent with the Government's commitment to new protections against discrimination on the basis of sexual orientation and gender identity.<sup>1</sup> We recommend the passage of the Bill with the important enhancements outlined below.

**Recommendation 1:** The passage of the Bill through Parliament with the amendments outlined below without delay as an important interim step prior to the passage of the HRAD Bill.

### Objects of the Act

#### **Removal of 'so far as is possible'**

7. We refer to the 2008 Senate Standing Committee on Legal and Constitutional Affairs report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality ('SDA Inquiry Report'). The committee recommended the preamble to the Act and subsections 3(b), (ba) and (c) of the Act be amended by deleting the phrase 'so far as is possible'.<sup>2</sup>
8. As the then Human Rights and Equal Opportunity Commission stated in their submission to the 2008 SDA Inquiry:

*The term 'so far as is possible' limits the object of the SDA in a way that is not provided under CEDAW. CEDAW provides that state parties are under a general obligation to eliminate discrimination against women. The term 'so far as is possible' reflects that the substantive provisions of the SDA do not go as far as this obligation under CEDAW.*<sup>3</sup>

#### **Substantive equality and positive duties**

9. The SDA currently focuses on the elimination of discrimination<sup>4</sup> without also including positive obligations which are required to prevent discrimination from happening in the first place.
10. The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* is drafted in a model of substantive equality.<sup>5</sup>
11. Australia has also ratified other international instruments that require gender inequality to be redressed. Article 26 of the *International Covenant on Civil and Political Rights*

<sup>1</sup> Australia's Formal Response to the Universal Periodic Review recommendations, 8 June 2011, accessed on 2 May 2013 at <http://www.ag.gov.au/RightsAndProtections/HumanRights/UniversalPeriodicReview/Documents/AustraliasformalresponsetotheUPRrecommendations.pdf> at 3.

<sup>2</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008 at 19, 146.

<sup>3</sup> HREOC cited in Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008 at 19.

<sup>4</sup> Sex Discrimination Act 1984, Article 3

<sup>5</sup> *Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)* ratified by Australia on 28 July 1983, see, for example, Articles 1-3.

(ICCPR) provides that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. Thus, Australia is required to prohibit discrimination and provide effective protection against it. Article 2 of the ICCPR also requires Australia to ensure the equal rights of women and men to the enjoyment of the rights set out in the Covenant, to adopt legislative or other measures necessary to give effect to those rights and to ensure that there are effective remedies for violation of those rights. Similarly, Article 3 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) requires Australia to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights set forth in the Covenant.

12. The joint National Association of Community Legal Centres (NACLC) and Combined Community Legal Centres Group (NSW) submission to the 2008 SDA Inquiry to which WLS NSW contributed states:

*The SDA prohibits direct discrimination, which is structured around formal equality. That is, women are required to be treated the same as men. However, in order to achieve substantive equality, women's specific needs and experiences must be taken into account. While the prohibition of indirect discrimination can go some way to addressing substantive inequality, the significant obstacles in succeeding in an indirect discrimination claim prevent these provisions from being used to achieve substantive inequality.*<sup>6</sup>

13. Equally, in order to achieve substantive equality for LGBTIQ people, their specific needs and experiences must be taken into account.
14. We refer to the National Association of Community Legal Centres' (NACLC) submission in response to Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper to which WLS NSW contributed. In that submission it was recommended to include 'achieving substantive equality' in the objects of the Act<sup>7</sup> and positive duties.<sup>8</sup>
15. Similarly, in the joint NACLC and Combined Community Legal Centres Group (NSW) submission to the 2008 SDA Inquiry the inclusion of the promotion of substantive equality, as well as a scheme of positive duties, was also recommended.<sup>9</sup>
16. We further note achieving substantive equality was included in the objects of the HRAD Bill.

### ***International human rights instruments***

17. We refer to the submissions by Kingsford Legal Centre and the Human Rights Law Centre to this inquiry and endorse their arguments for including specific reference to international human rights instruments relevant to LGBTIQ people in the objects of the SDA.

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<sup>6</sup> NACLC and CCLCG NSW, *Submission to the Senate Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, August 2008 at 6-7, 10.

<sup>7</sup> NACLC, *Response to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012 at 4, 13.

<sup>8</sup> *Ibid* at 5, 6, 20-21, 22-23.

<sup>9</sup> NACLC and CCLCG NSW, *Submission to the Senate Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, August 2008 at 6-7, 24, 27-29;

**Recommendation 2:** That the preamble and objects of the *SDA* be amended by deleting the phrase 'so far as is possible'.

**Recommendation 3:** That the objects and scope of the *SDA* should include the promotion of substantive equality.

**Recommendation 4:** That the objects of the *SDA* include reference to international human rights instruments relevant to LGBTIQ people, including: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child* and the Yogyakarta Principles.

### Exemptions

18. WLS NSW believes that it is a fundamental human right that all Australians are equal before the law. As such we submit that there is no logical reason to discriminate against any Australian because of their sexual orientation or their sex and/or gender identity.
19. We are particularly concerned that many religious organisations that receive public funding to provide services such as family relationships services, counselling services, adoption services and housing services are then able to discriminate against LGBTIQ people in employment and service provision.
20. WLS NSW submits that the objective of any anti-discrimination legislation should be the elimination of all forms of discrimination against members of the minority groups to be protected. We believe that allowing people to lawfully discriminate under exemptions or exceptions would undermine the ability of the legislation to fulfil this purpose.
21. In the alternative and at a minimum, religious exemptions should not apply to the provision of services as recommended by the Senate Legal and Constitutional Affairs Committee report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill.<sup>10</sup>
22. We note the Explanatory Notes to the Exposure Draft Human Rights and Anti-Discrimination Bill state 'the Government does not consider that discrimination in the provision of [aged-care] services is appropriate. .... [which] is also consistent with the Government's broader aged care reforms.'<sup>11</sup>

**Recommendation 5:** That the Bill includes no religious exemptions. In the alternative and at a minimum, religious exemptions should not apply to the provision of services as recommended by the Senate Legal and Constitutional Affairs Committee report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill.

**Recommendation 6:** Consistent with stated Government policy, that there be no religious exemptions in the provision of Commonwealth Government funded aged-care services.

### Consistency of protection in federal laws

<sup>10</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill*, 21 February 2013, Recommendation 11.

<sup>11</sup> Human Rights and Anti-Discrimination Bill 2013 Explanatory Notes at paragraph 190.

23. The *Fair Work Act 2009(Cth)* (*'Fair Work Act'*) provides protection from discrimination on the basis of 'sexual preference'.<sup>12</sup> To ensure consistency of protection from discrimination in federal laws we recommend that the term 'sexual preference' be replaced with 'sexual orientation'.
24. Similarly, we recommend that the term 'marital status' in the *Fair Work Act* be replaced with 'marital or relationship status'.
25. Discrimination on the basis of gender identity or intersex status is not currently included in the *Fair Work Act*. To ensure consistency of protection in federal laws 'gender identity' and 'intersex status' should also be included in the *Fair Work Act*.

**Recommendation 7:** That the *Fair Work Act* is amended so the term 'sexual preference' is replaced with 'sexual orientation'.

**Recommendation 8:** That the *Fair Work Act* is amended so the term 'marital status' is replaced with 'marital or relationship status'.

**Recommendation 9:** That the *Fair Work Act* is amended to include additional protected attributes of 'gender identity' and 'intersex status'.

#### **Sex-disaggregated data**

26. We believe it is essential to have sex-disaggregated data to allow gender analysis with the goal of achieving gender equality. CEDAW Committee recommendations frequently call on the Government for the collection of such data.<sup>13</sup>
27. We recognise that the current choices of 'male' and 'female' are not inclusive. While we do not have the expertise to recommend a solution, we support a clear and consistent way of providing more inclusive options which would enable the continued collection of sex-disaggregated data.

**Recommendation 10:** That the collection of sex-disaggregated data continues with a clear and consistent way of providing more inclusive options beyond male and female.

#### **Human Rights and Anti-Discrimination Bill**

28. We refer to our submission to the Senate Inquiry on the Exposure Draft of the Human Rights and Anti-Discrimination Bill. Our submission endorsed the joint NACLC and Kingsford Legal Centre submission to that inquiry as well as specifically discussing the important reasons why the status of being a victim/survivor of domestic violence should be included as a protected attribute in the HRAD Bill.
29. We note the Senate Legal and Constitutional Affairs Committee in their report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill recommended the

<sup>12</sup> *Fair Work Act 2009 (Cth)*, Sections 153(1), 195(1), 351(1), 578(c), 772(1)(f)

<sup>13</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women – Australia, 30 July 2010, CEDAW/C/AUL/CO/7 at paragraph 37; Concluding observations of the Committee on the Elimination of Discrimination against Women – Australia, 3 February 2006, CEDAW/C/AUL/CO/5 at paragraphs 15, 31.

inclusion of domestic violence as a protected attribute.<sup>14</sup>

**Recommendation 11:** The passage of a revised HRAD Bill through Parliament in the 2013 winter session with the inclusion of the recommendations made by the Senate Legal and Constitutional Affairs Committee in their report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill.

30. If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator or Mari Vagg, Solicitor on

Yours sincerely,

Women's Legal Services NSW

Liz Snell  
Law Reform and Policy Coordinator

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<sup>14</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill*, 21 February 2013, Recommendation 3.