

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

Via email: legcon.sen@aph.gov.au

Dear Senator Crossin,

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

Thank you for the opportunity to provide a submission in relation to the Committee's inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 ('the Bill'). I strongly support the Government's commitment to introduce new protections against discrimination on the basis of sexual orientation, gender identity and intersex status.

As highlighted in the Bill's Explanatory Memorandum, lack of comprehensive discrimination coverage at a Federal level has had a detrimental impact on Lesbian, Gay, Bisexual, Transgender and Intersex Australians for many years. As ACT Human Rights and Discrimination Commissioner, I have been particularly aware of the difficulties this gap has caused for ACT employees and clients of Federal Government Departments and Agencies. Overall, I strongly support the Bill's purpose: 'to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia'.¹

I note that discrimination protections relating to sexual orientation, gender identity and intersex status were originally included in the exposure draft of the Human Rights and Anti-Discrimination (HRAD) Bill. The HRAD Bill followed an extensive community consultation process and represented comprehensive, practical reform of Federal discrimination laws. As I noted in my submission to the Committee's HRAD Bill inquiry, having a single piece of anti-discrimination legislation at the Commonwealth level would benefit both complainants and respondents by clearly outlining streamlined and consistent obligations.

In my view, it would be preferable for discrimination protections relating to sexual orientation, gender identity and intersex status to be introduced, as originally intended,

¹ Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, p4.

through the HRAD Bill. In particular, the HRAD Bill offered anti-discrimination protection in 'all areas of public life', limited by fewer exceptions than those proposed to apply under the *Sex Discrimination Act 1984* (SDA).

However, given the Government's decision to delay the HRAD Bill, I recognise the need for Federal LGBTI discrimination protections to be introduced urgently through another mechanism. On this basis, I support their inclusion within the SDA. I view this as a temporary measure, and await timely re-introduction of the HRAD Bill or other legislation to achieve much-needed comprehensive reform of Federal anti-discrimination laws.

I wish to provide the following comments on certain aspects of the Bill. I make these comments in my role as ACT Human Rights & Discrimination Commissioner, a position I have held since 2004. I have also made submissions in December 2012 to the Committee's inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, and in February 2012 regarding the Commonwealth Attorney-General's Department *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*.

Definitions

Through my work as ACT Commissioner, and as a member of the ACT Law Reform Advisory Council, I have heard from people in the ACT community who experience regular discrimination, but do not have access to Federal legal protection. As noted in my earlier submissions, I strongly support the inclusion of 'intersex status' as an independent attribute. I also support the proposed definition of 'gender identity' that reflects improvements recommended by the Senate Committee following their inquiry into the HRAD Bill.

I also support the repeal of the specific definitions of 'man' and 'woman' at subsection 4(1) of the Bill. In my experience, it is appropriate for these terms to be given their ordinary meaning, and essential that the terms are not defined in a narrow way to exclude transgender persons. This issue was brought to my attention by ACT community members when I was actively engaged as a Council member in the 2011-2012 ACT Law Reform Advisory Council inquiry into the human rights of transgender and intersex persons.

I further support the definition of 'sexual orientation', particularly the reference to persons of the 'same' sex or persons of a 'different' sex. I note that the term 'different' is preferred to 'opposite' here, as it is more inclusive than traditional use of the terms 'same' and 'opposite', which rely on the binary of 'male' and 'female'.

Exceptions

As noted in my submission to the Committee in HRAD Bill inquiry, I am concerned that any mechanisms that allow a departure from prohibitions on unlawful discrimination are both carefully limited and thoroughly justified. I am not confident that all of the exceptions in this Bill are appropriate, as detailed below.

i. Religious Exceptions

The Bill provides that the SDA's existing 'blanket' exception for religious bodies (section 37) and exception for educational institutions established for religious purposes (section 38) will apply to protection on the grounds of sexual orientation, gender identity and intersex status. In my view, religious institutions should not enjoy blanket exceptions from anti-discrimination law. This is *particularly* important where those institutions are involved in government-funded service delivery.

I note recommendation 11 at paragraph 7.80 of the Senate Committee's report from the HRAD Bill Inquiry:

The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful...

I also recommend that this Bill be amended to prohibit religious organisations from discriminating against individuals in the provision of services.

I understand that an area where this exception is of particular concern to the ACT LGBTI community is in the aged care sector. Attorney-General Dreyfus has repeatedly confirmed the Government's commitment to ensuring that religious exceptions relating to sexual orientation, gender identity and intersex status will not apply in relation to Commonwealth Funded Aged Care Providers.² I was surprised, and disappointed, to see that this policy position is not reflected in the text of the Bill. I hope that this inquiry may be an opportunity to remedy this.

ii. Marriage

I note proposed subsection 40(2A), which ensures that the Bill's new protections against discrimination for LGBTI persons, do not extend to the *Marriage Act 1961*. My views on discrimination in the context of marriage reflect those of an increasing number of Australians,³ and countries around the globe,⁴ who do not believe that individuals should be excluded from the civil institution of marriage because of their sexual orientation, gender identity or intersex status. Our colleagues in New Zealand are the most recent legislature to endorse marriage equality, and I hope similar developments in Australia will not be far behind.

²For example, see the transcript of the Attorney's press conference in Canberra regarding anti-discrimination law reform on 20 March 2013, available at:

<http://www.attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx>

³ A February 2012 Galaxy Poll indicated that 62% of Australians, and 81 per cent of respondents aged 18-24, support same-sex marriage. See: <http://www.smh.com.au/national/new-poll-backs-samesex-marriage-20120213-1t1h4.html>

⁴ The following nations, and multiple states within the United States of America, have legislated marriage equality: Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay.

In 2009, the ACT Human Rights Commission was a signatory to the Australian Council of Human Rights Agencies' statement on Civil marriage for same-sex couples. As noted in that statement, it is my view that the principle of equality requires that any formal relationship recognition available under federal law to opposite-sex couples should be available to all couples, regardless of gender. This includes civil marriage.

Accordingly, I recommend that subsection 40(2A) be removed from the Bill. I also take this opportunity to call on the Federal Government to amend their policy position to allow all persons, regardless of their sexual orientation, gender identity or intersex status, the right to marry.

iii. Inclusion of 'alternative category' other than male or female on forms.

I note that the exception in section 43A explicitly prevents persons or organisations from having to provide an alternative to 'male' and 'female' in data collection or personal records. I can appreciate the Government's concerns regarding the regulatory impact of such a requirement. I also note paragraph 85 of the Bill's Explanatory Memorandum that states:

The need for these exemptions may be reconsidered in the future, if organisations (both government and private sector) have revised their data collection and record keeping practices to allow for a person to identify as neither male or female.

I am concerned that inclusion of this exception, without a sunset clause or clear timeframe for review, will be counterproductive to the Bill's purpose to foster a more inclusive society and promote attitudinal change regarding LGBTI Australians. In this regard, I draw on my experience of implementing ACT anti-discrimination law.

The ACT *Discrimination Act 1991* contains a range of exceptions. Some, like the statutory authority defence in section 30 of that Act, were intended to be temporary, but are still in existence over twenty years later. This is an example of the danger of including exceptions such as the proposed section 43A in an Act of this nature. In my view, it is essential that any stand alone exceptions are reviewed regularly and rigorously, in order to determine whether they should be retained, amended or repealed.

In relation to work currently being undertaken on the issue of information collection, I have recently provided comment to the Attorney-General's Department on the consultation draft of the Australian Government Guidelines on the Recognition of Gender. I strongly support the introduction of a consistent sex and gender classification system for Australian Government records. In particular, a system that allows individuals to identify outside the binary of 'male/female' and provides a consistent standard of evidence for people who are changing their sex or gender on records across Australian Government departments and agencies.

Paragraph 36 of the draft Guidelines states:

These Guidelines will come into force on 1 July 2013. Australian Government departments and agencies will progressively align their existing and future business practices with these Guidelines by 1 July 2016.

In light of the draft Guidelines and the intention that they will be implemented by all Federal departments and agencies by mid-2016, I recommend that the exception in section 43A contain a sunset clause, expiring on 1 July 2016. This will provide an opportunity for the Government to review data collection practices and determine whether this exception is still necessary in three years' time.

Removing the comparator

I note that this Bill fails to address many of the key recommendations highlighted by the 2008 Committee inquiry into the effectiveness of the SDA. I am disappointed that over the last five years, steps have not yet been taken to implement these recommendations. Whilst this Bill may not be the appropriate forum to explore each recommendation in detail, I take this opportunity to recommend that this Bill specifically implement a key recommendation from that inquiry, namely, the removal of a 'comparator' in the test relating to direct discrimination.

The Bill clearly maintains the use of a comparator. For example, the proposed section 5A(1) states:

'the discriminator treats the aggrieved person less favourably than, **in circumstances that are the same or are not materially different**, the discriminator treats or would treat a person who has a different sexual orientation.

Recommendation 5 from the Committee's 2008 inquiry on the 'Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality' states:

The committee recommends that the definitions of direct discrimination in sections 5 to 7A of the Act be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.

The reasons behind this recommendation are noted at paragraph 11.12 of the inquiry report:

... the requirement for complainants to show that they were treated less favourably than a comparator seems to add unnecessary complexity to consideration of whether the treatment of the complainant was discriminatory. It appears both simpler and more in keeping with the purpose of the Act to use a definition of direct discrimination similar to that under paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)* which simply requires the applicant to show that he or she has been treated unfavourably because of a protected attribute (such as sex,

marital status or pregnancy). The committee has accordingly recommended amendment of the definitions of direct discrimination in sections 5 to 7A of the Act to replace the comparator test with a test of unfavourable treatment. (para 11.12)

I believe that this Bill presents a sound opportunity to remove the use of a comparator and increase the simplicity and accessibility of SDA protections. It is particularly important that the protections available in the Bill are as effective and streamlined as possible, to ensure that members of the LGBTI community who have been without Federal protection for so long can readily enjoy the protections of the Bill.

In summary, I believe this Bill provides long-awaited protection for LGBTI Australians at a Federal level. Nonetheless, I recommend that all parties prioritise ongoing work towards comprehensive review of Federal discrimination law, ideally through re-introduction of the HRAD Bill.

Yours sincerely

Dr Helen Watchirs
Human Rights and Discrimination Commissioner
23 April 2013