



You, me, us: Protecting LGBTI Australians from discrimination

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

April 2013

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Executive summary

- 1.1. Australia has been slow in recognising and protecting the rights of LGBTI Australians.
- 1.2. The failure to establish federal law protections against discrimination based on sexual orientation, gender identity and intersex status is contrary to Australia's obligations under international human rights law.
- 1.3. The Human Rights Law Centre (**HRLC**) commends the Government for introducing protections to eliminate discrimination on the grounds of sexual orientation, gender identity and intersex status in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (**Bill**).
- 1.4. The HRLC strongly supports the Bill and makes the following recommendations to enhance the protection of the human rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) Australians under the Bill:

Recommendation 1:

Subject to the recommended amendments, the Bill should be passed without delay.

Recommendation 2:

The Federal Government should continue to progress the consolidation of federal anti-discrimination laws and introduce a revised Human Rights and Anti-Discrimination Bill 2012 before the federal election.

Recommendation 3:

Specific reference to the international instruments relevant to LGBTI people and the Yogyakarta Principles should be included in the Explanatory Memorandum to the Bill.

Recommendation 4:

In accordance with Australia's international human rights obligations, the objects of the SDA should be amended so that the goal of eliminating discrimination is not qualified by the words 'as far as possible'.

Recommendation 5:

The objects clause should refer to the object of promoting substantive equality.

Recommendation 6:

The Bill should establish an LGBTI Rights Commissioner to work to improve protection and respect for the human rights of LGBTI Australians.

Recommendation 7:

The prohibition against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status should be retained.

Recommendation 8:

Discrimination on the basis that a person (i) associates with another person with a protected attribute, (ii) previously possessed a protected attribute or (iii) is incorrectly assumed to possess a protected attribute should also be prohibited.

Recommendation 9:

The definitions of 'intersex' and 'marital or relationship status' should be retained.

Recommendation 10:

The definition of 'sexual orientation' should be retained with minor modifications to clarify that the term encompasses identity, behaviour and sexual, emotional and affectional attraction.

Recommendation 11:

The definition of 'gender identity' should be retained, with the addition of a legislative note in the following terms: 'for the avoidance of doubt, gender identity includes transgenderism and transexualism'.

Recommendation 12:

The Bill should include consequential amendments to the *Fair Work Act* to replace the term 'sexual preference' with 'sexual orientation' and to insert the Bill's definition of the latter term.

Recommendation 13:

The Bill should include consequential amendments to the *Fair Work Act* to replace the term 'marital status' with 'marital or relationship status' and to insert the Bill's definition of the latter term.

Recommendation 14:

The Bill should include consequential amendments to the *Fair Work Act* to include in that Act the additional protected attributes of 'gender identity' and 'intersex status'.

Recommendation 15:

Section 37 of the SDA should be amended to remove 'intersex status' from the operation of the exemption for religious bodies.

Recommendation 16:

The exemptions for religious bodies and schools in sections 37 and 38 of the SDA should be either be removed and replaced with a general justification defence, or narrowed significantly.

Recommendation 17:

Religious bodies or schools wishing to rely on an exemption should be required to make publicly available a document outlining their intention to utilise that exemption and provide a copy of that document to the AHRC.

Recommendation 18:

The Bill should be amended to include a limitation on discrimination by government-funded aged care providers in the same terms as clause 33(3) of the HRAD Bill.

Recommendation 19:

The provision allowing exemptions for federal, state and territory laws that do not comply with the SDA should be removed.

Recommendation 20:

The record keeping exemption in the Bill should sunset after three years.

2. Introduction

- 2.1. This submission to the Senate Committee on Constitutional and Legal Affairs (**Senate Committee**) addresses key features of the Bill.
- 2.2. The key features of the Bill will amend the *Sex Discrimination Act 1984 (Cth)* (**SDA**) to:
 - (a) extend protection from discrimination to new grounds of sexual orientation, gender identity and intersex status as defined in the Bill;
 - (b) extend the existing protected ground of 'marital status' to include 'marital or relationship status'; and
 - (c) amend existing exemptions under the SDA for voluntary bodies, competitive sporting activities, religious organisations and schools and educational institutions established on the basis of religion so that these organisations are also permitted to discriminate against a person on the basis of the new protected attributes.

- 2.3. This submission does not seek to replicate previous submissions made by the HRLC to preceding inquiries into the SDA and the consolidation of federal anti-discrimination law.¹ We refer the Senate Committee to these submissions for a detailed discussion of the HRLC's position on the numerous improvements that should be made to federal anti-discrimination laws.
- 2.4. This submission focuses on a number of key issues raised by the Bill and does not seek to address all aspects, such as existing or proposed exceptions for sporting clubs and voluntary organisations. The views of LGBTI Australians facing discrimination in these specific areas should guide the Committee in its recommendations. The HRLC encourages the Committee to give primacy to the concerns voiced by affected communities and their representative bodies.

3. Background

- 3.1. In 2008, the Senate Committee undertook a review of gender equality under the existing SDA. It called on the Federal Government to immediately expand the existing protection against discrimination on the ground of marital status to cover de facto same-sex relationships.² At the same time, the Federal Government commendably amended or repealed numerous federal laws that discriminated against same-sex couples in a wide range of areas of daily life including health, social security and family entitlements.³ However, no changes were made to the SDA or other federal anti-discrimination laws to protect LGBTI Australians from discrimination.
- 3.2. Following the National Human Rights Consultation in 2009, which found that existing laws failed to adequately protect the rights of all Australians,⁴ the Federal Government committed to introducing new protections against discrimination based on sexual orientation and gender identity as part of its commitment to consolidate federal anti-discrimination law into a single

¹ HRLRC, Submission No 20 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, August 2008; HRLC, Submission to the Attorney-General's Department's Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws, January 2012 ('*Realising the Right to Equality*'); HRLC, Submission No 402 to the Senate Standing Committee on Legal and Constitutional Affairs, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, December 2012 ('*A Simpler Fairer Law for All*').

² Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) [11.15].

³ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth).

⁴ Attorney-General's Department, Commonwealth of Australia, *National Human Rights Consultation Report* (2009) 127–8.

- Act.⁵ These new protections were included in the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) (**HRAD Bill**).
- 3.3. Beyond the protection against discrimination based on sexual orientation and gender identity, the HRAD Bill contained much needed reforms to improve the effectiveness of federal anti-discrimination laws.
- 3.4. The current Bill was introduced following the Federal Government's announcement on 20 March 2013 that it would delay the consolidation process.⁶ The HRLC is disappointed that many of the reforms that would have been achieved in the consolidation process have not been pursued and are absent from the Bill. The position of the HRLC is that with the removal or amendment of the controversial clause 19(2)(b), the HRAD Bill would have substantially improved federal anti-discrimination laws and should be introduced in its final form and passed before the upcoming federal election.⁷
- 3.5. Nevertheless, the HRLC welcomes the decision to take immediate steps to improve protection for LGBTI Australians.
- 3.6. The HRLC strongly supports the aims of the present Bill but considers that some aspects of the Bill could be improved to enhance protection from discrimination. Subject to the recommendations set out in this submission, the HRLC recommends the Bill be adopted.
- 3.7. The HRLC notes the comments of the Coalition Senators in their Dissenting Report on the HRAD Bill that they support the introduction of federal anti-discrimination protections for LGBTI Australians,⁸ which indicate that this Bill is likely to pass.
- 3.8. The HRLC reiterates its strong support for the consolidation process and the HRAD Bill as outlined in our submission to the Senate Committee Inquiry into the HRAD Bill.⁹ We urge the Government to continue this process, taking into account the recommendations of the Senate Committee.

⁵ The Hon Robert McClelland MP and the Hon Lindsay Tanner MP, 'Reform of Anti-Discrimination Legislation' (Joint Media Release, 21 April 2010). During the 2010 election campaign, the Government had committed to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity.

⁶ See the Hon Mark Dreyfus QC MP and the Hon Penny Wong MP, 'New Anti-Discrimination Laws to Cover Sexual Orientation, Gender Identity and Intersex Status' (Joint Media Release, 20 March 2013).

⁷ See further HRLC, 'Delay on Stronger Anti-Discrimination Laws Met with Extreme Disappointment' (Media Release, 20 March 2013), available at <http://www.hrlc.org.au/delay-on-stronger-anti-discrimination-laws-met-with-extreme-disappointment>.

⁸ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (2013) 109 ('HRAD Review').

⁹ HRLC, *A Simpler Fairer Law for All*, above n 1.

Recommendation 1:

Subject to the recommended amendments, the Bill should be passed without delay.

Recommendation 2:

The Federal Government should continue to progress the consolidation of federal anti-discrimination laws and introduce a revised Human Rights and Anti-Discrimination Bill 2012 before the federal election.

4. International human rights law obligations

- 4.1. All Australians, including LGBTI Australians, are entitled to equal respect, dignity and protection from discrimination. Australia's current federal anti-discrimination regime is incompatible with Australia's international human rights obligations due to its failure to protect LGBTI Australians from discrimination.¹⁰
- 4.2. The *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Cultural, Economic and Social Rights (ICESCR)* both expressly protect the right to equality before the law and non-discrimination on a number of identified attributes including sex and any 'other status'.¹¹
- 4.3. The UN Human Rights Committee has, through its jurisprudence, indicated that 'other status' includes a person's sexual orientation and article 26 protects LGBTI individuals against laws that impose a distinction on the grounds of sexual preference that is not 'reasonable or objective'.¹² Previous Australian laws that prohibited homosexual activity and that

¹⁰ In 2009, the UN Human Rights Committee noted that 'the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law' and recommended Australia 'adopt Federal legislation, covering all grounds of discrimination': *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee — Australia*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) [12].

¹¹ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26; *ICESCR*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 2.

¹² See, eg, Human Rights Committee, *Views: Communication No 488/1992*, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*') [8.7]; Human Rights Committee, *Views: Communication No 941/2000*, 78th sess, UN Doc CCPR/C/78/D/941/2000 (6 August 2003) [10.4] ('*Young v Australia*'), where the Committee noted it had entered a default judgment on the question of whether Mr Young could bring a claim under Article 26 since '[Australia] provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective'; Human Rights Committee, *Views: Communication No 1361/2005*, 89th

discriminated against same-sex couples seeking veterans' entitlements have both been found to have breached Australia's obligations under the ICCPR.¹³

- 4.4. The Committee on Economic, Social and Cultural Rights, in its authoritative General Comment on the right to non-discrimination, confirmed that because the nature of discrimination 'varies according to context and evolves overtime', a 'flexible approach' to the concept of 'other status' is needed.¹⁴ It stated that 'other status' should capture:

'other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in Article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation.'¹⁵

- 4.5. The Committee called on States parties including Australia to 'ensure that a person's sexual orientation is not a barrier to realising Covenant rights' and recognised that 'persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace' and require protection under the ICESCR.¹⁶
- 4.6. The Yogyakarta Principles, developed by a group of academic and UN human rights experts in 2006, provide important guidance on the application of international human rights obligations to sexual orientation and gender identity.¹⁷ The principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity and 'affirm binding international legal standards with which all States must comply.'¹⁸
- 4.7. The Yogyakarta Principles have been referred to in Australian jurisprudence. For example, Chief Justice Bryant of the Family Court of Australia noted in 2009:

sess, UN Doc CCPR/C/89/D/1361/2005 (30 March 2007) ('*X v Colombia*') [7.2]. See also the Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 41.

¹³ *Toonen v Australia* [8.6]; *Young v Australia* [11].

¹⁴ *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2)*, 42nd sess, UN Doc E/C.12/GC/20 (25 May 2009) [27].

¹⁵ *Ibid.*

¹⁶ *Ibid* [32].

¹⁷ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), adopted by 29 human rights experts at Gadjah Mada University, Yogyakarta, Indonesia on 6–9 November 2006, available at: <http://www.refworld.org/docid/48244e602.html>.

¹⁸ *Ibid* 7.

'In essence, the Yogyakarta Principles confirm that all international human rights laws apply to people who are sex and gender diverse and affirm the primary obligation of States to implement human rights.'¹⁹

- 4.8. The Yogyakarta Principles develop inclusive, internationally accepted definitions of sexual orientation and gender identity and establish recommended actions to address the ongoing challenge of achieving human rights protection for LGBT individuals worldwide. We note that while the principles are inclusive of intersex people, intersex organisations have identified limitations in the approach taken.²⁰
- 4.9. Principle 2 recalls that everyone is entitled to enjoy all human rights, including the right to equality without discrimination on the basis of sexual orientation or gender identity. It calls on all states, amongst other things, to adopt appropriate legislative and other measures to prohibit and eliminate discrimination on the basis of sexual orientation and gender identity in the public and private sphere.²¹
- 4.10. Since 2007, numerous international bodies have called for greater recognition and legal protection of LGBTI rights worldwide.²² In 2011, the UN Human Rights Council adopted a resolution²³ recording its 'grave concern' at the ongoing abuse of LGBTI rights and issued a groundbreaking statement on human rights protection for sexual orientation and gender identity.²⁴
- 4.11. During the Universal Periodic Review of Australia's compliance with international human rights obligations in 2009, New Zealand and Switzerland called on Australia to progress the

¹⁹ *Re Alex* (2009) 248 FLR 312, 355.

²⁰ Organisation Intersex International Australia, *Why Intersex is not a Gender Identity, and the Implications for Legislation* (21 March 2012), available at <http://oii.org.au/17680/intersex-sex-not-gender-identity>.

²¹ The UN High Commissioner for Human Rights also recommended that states enact comprehensive anti-discrimination legislation to combat discrimination on the grounds of sexual orientation and gender identity in her 2011 report to the UN Human Rights Council: *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights*, 19th sess, UN Doc A/HRC/19/41 (17 November 2011) [84(e)] ('2011 UNHCHR Report').

²² See, eg, *ibid*; Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012).

²³ UN Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, Res 17/19, 17th sess, 34th mtg, UN Doc A/HRC/RES/17/19 (17 June 2011).

²⁴ UN Human Rights Council, *Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity* (22 March 2011).

consolidation of federal anti-discrimination laws and protect LGBTI Australians against discrimination as a matter of priority.²⁵

- 4.12. The Bill's inclusion of LGBTI people in Australia's federal anti-discrimination law framework takes Australia closer to fulfilling its obligations under international human rights law. However, we note that more comprehensive and robust domestic legislation is required in order for Australia to be considered compliant with its obligation to protect LGBTI people from discrimination and to promote equality.

5. Objects clause

A Referring to relevant international law

- 5.1. We note that the objects clause of the SDA refers to giving 'effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁶ and to provisions of other relevant international instruments'.²⁷ The text of the CEDAW is currently annexed to the SDA, recognising the fundamental importance of Australia complying with its international obligations to eliminate discrimination against women. The CEDAW codifies women's right to non-discrimination and equality with men.²⁸
- 5.2. The HRLC's view is that it would be appropriate for the Bill to specifically refer to the international instruments relevant to LGBTI people and the Yogyakarta Principles, discussed above in section 4, in the objects clause or the Explanatory Memorandum to the Bill. This would assist in guiding the interpretation of the Bill by the courts in line with international human rights law.

Recommendation 3:

Specific reference to the international instruments relevant to LGBTI people and the Yogyakarta Principles should be included in the Explanatory Memorandum to the Bill.

²⁵ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, UN Doc A/HRC/17/10 (2011) [86.67]–[86.68].

²⁶ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

²⁷ *Sexual Discrimination Act 1984* (Cth) s 3(a).

²⁸ These principles are also reflected in the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the ICCPR, the ICESCR and all other major international human rights instruments.

B The qualification ‘as far as possible’

- 5.3. The HRLC also recommends amending s 3 of the SDA to align the objects of the Act with Australia’s international human rights obligations.
- 5.4. The objects of the existing SDA (and the proposed amendments) are to eliminate discrimination only ‘as far as possible’.
- 5.5. Committing only to eliminating discrimination as far as possible is inconsistent with Australia’s international legal obligations. The Senate Committee highlighted this inconsistency in its 2008 inquiry into the SDA, calling for immediate change to the objects of the Act:
- ‘The qualification of the commitment to eliminate discrimination in the preamble to the Act and the objects in section 3 by the phrase ‘as far as is possible’ is unhelpful at best. At worst, it suggests only a half-hearted conviction that eliminating discrimination is desirable and achievable.’²⁹
- 5.6. The objects of the HRAD Bill included ‘eliminat[ing] discrimination, sexual harassment and racial vilification, consistently with Australia’s obligations under international human rights instruments.’
- 5.7. The stated objects of the SDA should be amended so they are consistent with Australia’s international obligations to eliminate discrimination for the benefit of all Australians.

Recommendation 4:

In accordance with Australia’s international human rights obligations, the objects of the SDA should be amended so that the goal of eliminating discrimination is not qualified by the words ‘as far as possible’.

C Additional improvements

- 5.8. The objects clause in the SDA could be further improved by incorporating a reference to substantive equality similar to the clause proposed in the HRAD Bill.

²⁹ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) [11.5].

- 5.9. As the Committee on Economic, Social and Cultural Rights explains, substantive equality is concerned ‘with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.’³⁰
- 5.10. For example, the CEDAW Committee has described obligations central to State parties’ efforts to eliminate discrimination as including ‘to improve the de facto position of women through concrete and effective policies and programmes’ and ‘to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.’³¹

Recommendation 5:

The objects clause should refer to the object of promoting substantive equality.

6. LGBTI Commissioner

- 6.1. This Bill is a positive step towards recognising that LGBTI people should be protected from discrimination, however further efforts are needed to combat the discrimination faced by LGBTI people and homophobia, transphobia and biphobia.
- 6.2. There is alarming evidence of discrimination against LGBTI people in Australia.³² For example, a 2003 survey of 600 lesbians and gay men conducted by the NSW Attorney-General’s Department found that 85% reported experiencing some form of homophobic abuse, intimidation or violence, 56% having occurred in the previous 12 months.³³ Similarly, an

³⁰ *General Comment No 16: Substantive Issues Arising in the Implementation of the ICESCR*, 34th sess, UN Doc E/C.12/2005/4 (11 August 2005) [7].

³¹ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, 30th sess (2004) [7].

³² In addition to the sources discussed in the text, see, eg, Australian Centre for Lesbian and Gay Research, *The Pink Ceiling is Too Low — Workplace Experiences of Lesbians, Gay Men and Transgendered People* (1999) 6, which found that nearly 60% of LGBT respondents reported being discriminated against at work because of their sexuality; Lynne Hillier et al, *Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People* (2010) ix, which found that 61% of the 3134 same-sex attracted and gender questioning young people who participated in the study reported verbal abuse and 18% reported physical abuse; Gay and Lesbian Rights Lobby, *Uncloseting Discrimination: Consultation Report on the Intersections of Discrimination* (2012).

³³ NSW Attorney-General’s Department, *You Shouldn’t Have to Hide to Be Safe — A Report on Homophobic Hostilities and Violence against Gay Men and Lesbians in NSW* (2003) 2. See also Inner City Legal Centre, *Outing Injustice: Understanding the Legal Needs of the Lesbian, Gay, Bisexual, Transgender and Intersex*

Australian Human Rights Commission (**AHRC**) report from 2011³⁴ revealed ‘numerous distressing personal stories of violence, harassment and discrimination motivated by homophobia and transphobia.’³⁵

- 6.3. Like racial and other forms of vilification, vilification of LGBTI Australians harms individuals, groups and society as a whole.³⁶
- 6.4. Principle 2 of the Yogyakarta Principles requires states to:
- ‘Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.’
- 6.5. Prohibiting discrimination is one of a number of recommendations the UN High Commissioner for Human Rights has made to ensure LGBTI people enjoy the same rights as others.³⁷ Relevantly, the High Commissioner has also called on states to:
- (a) ‘[i]mplement appropriate sensitization and training programmes for police, prison officers, border guards, immigration officers and other law enforcement personnel, and support public information campaigns to counter homophobia and transphobia among the general public and targeted anti-homophobia campaigns in schools’;³⁸ and
- (b) ‘[e]nsure that combating discrimination on grounds of sexual orientation and gender identity is included in the mandates of national human rights institutions’.³⁹
- 6.6. There are currently six special purpose commissioners focusing on Aboriginal and Torres Strait Islander social justice, age, children’s rights, disability, race and sex. These commissioners carry out a number of important functions, including research, public

Communities in New South Wales (2012), which found that 58.4% of respondents had experienced vilification from someone they did not know in a public space, with 10% experiencing physical violence.

³⁴ AHRC, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination: Consultation Report* (2011) (*‘Consultation Report’*).

³⁵ AHRC, ‘Time to Take a Stand against Homophobia and Transphobia’ (Media Release, 17 May 2011). See also Human Rights and Equal Opportunity Commission, *Stories of Discrimination Experienced by the Gay, Lesbian, Bisexual, Transgender and Intersex Community* (2007).

³⁶ For a discussion of the harm to society in the context of racial vilification, see Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2002) 193–5.

³⁷ See n 21 above.

³⁸ UN Human Rights Council, *2011 UNHCHR Report*, above n 21, [84(g)].

³⁹ *Ibid* [84(e)].

education, review of legislation for consistency with human rights, and processing of applications for exemptions from anti-discrimination provisions.⁴⁰

- 6.7. As the Bill currently stands, it is assumed that the Sex Discrimination Commissioner will carry out these functions in relation to the new protected attributes introduced by the Bill.⁴¹
- 6.8. Instead, the HRLC recommends that the Bill be amended to establish a Commissioner with dedicated responsibility over human rights issues affecting the LGBTI community. Having a dedicated LGBTI Rights Commissioner would recognise the importance of human rights issues facing LGBTI Australians and would assist in reducing anti-LGBTI sentiment in the community.

Recommendation 6:

The Bill should establish an LGBTI Rights Commissioner to work to improve protection and respect for the human rights of LGBTI Australians.

7. Protected attributes

- 7.1. The HRLC strongly supports the Bill's proposed prohibition of discrimination on the grounds of 'gender identity', 'sexual orientation', 'intersex status' and 'relationship status'. These prohibitions are an essential step towards achieving freedom from discrimination for LGBTI Australians.
- 7.2. We particularly welcome including intersex status as a separate protected attribute. As stated in the Explanatory Memorandum to the Bill, this recognises that intersex differences are grounded in physical characteristics, rather than identity.
- 7.3. We also commend the Bill for extending protection to discriminatory acts taken because of 'characteristics' that are often imputed to people based on their gender identity, sexual orientation or intersex status.⁴²

⁴⁰ *Australian Human Rights Commission Act 1986* (Cth) s 11. While the functions are conferred on the AHRC itself, the AHRC may, and in practice does, delegate certain of its powers to particular Commissioners: see *Australian Human Rights Commission Act 1986* (Cth) s 19; *Sex Discrimination Act 1984* (Cth) s 104; *Racial Discrimination Act 1975* (Cth) s 40; *Age Discrimination Act 2004* (Cth) s 55; *Disability Discrimination Act 1992* (Cth) s 121.

⁴¹ Ibid.

⁴² Proposed sections 5A(1)(c), 5B(1)(c), 5C(1)(c) and 6(1)(c).

Recommendation 7:

The prohibition against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status should be retained.

A Characteristics extension

7.4. However, unlike clause 19(4) of the HRAD Bill, this Bill does not adequately protect individuals against discrimination in the following circumstances:

- (a) where the person associates with a person who has a protected attribute;
- (b) where a person previously possessed a particular attribute; and
- (c) where a person is incorrectly assumed to have a protected attribute.

7.5. Unfortunately, due to entrenched prejudices, there is significant potential for discrimination in these circumstances and these omissions represent a significant gap in protections. Such provisions are particularly important for LGBTI people given the lack of understanding of sexual orientation and gender identity issues within some sections of the broader community.

7.6. The HRLC recommends introducing an additional clause to clarify that discrimination in the above circumstances is also unlawful.

Recommendation 8:

Discrimination on the basis that a person (i) associates with another person with a protected attribute, (ii) previously possessed a protected attribute or (iii) is incorrectly assumed to possess a protected attribute should also be prohibited.

B Definitions of new protected attributes

7.7. The HRLC warmly welcomes the definitions of the new protected attributes in the Bill, which adopt the recommendations of the Senate Committee Report into the HRAD Bill⁴³ and the views of the HRLC and many other groups, including LGBTI community organisations.

⁴³ Senate Standing Committee on Legal and Constitutional Affairs, *HRAD Review*, above n 8, [7.20]–[7.21] (Recommendations 1 and 2).

Intersex status and relationship status

- 7.8. The HRLC particularly welcomes and supports the definition of ‘intersex status’ in the Bill. The proposed definition⁴⁴ is consistent with the international best practice definition, reflecting the definition employed in the Anti-Discrimination Amendment Bill 2012 (Tas).⁴⁵
- 7.9. The HRLC also welcomes the new definition of ‘marital or relationship status’ and recommends it be retained in its proposed form.⁴⁶ This new protected attribute provides important and welcome coverage for de-facto same sex couples.

Recommendation 9:

The definitions of ‘intersex’ and ‘marital or relationship status’ should be retained.

Sexual orientation

- 7.10. The definition of ‘sexual orientation’ in the Bill largely replicates the definition used in the HRAD Bill with some minor enhancements.
- 7.11. Under the Bill, sexual orientation is defined as:
- ‘[A] person’s sexual orientation towards:
- (a) persons of the same sex; or
 - (b) persons of a different sex; or
 - (c) persons of the same sex and persons of a different sex.’
- 7.12. The use of ‘different sex’ in sub-paragraphs (b) and (c) is appropriately inclusive and a welcome improvement on the HRAD Bill definition.
- 7.13. The HRLC supports the use of the term ‘sexual orientation’ as a broad, inclusive definition, encompassing concepts such as homosexuality, heterosexuality, lesbianism and bisexuality.⁴⁷

⁴⁴ Intersex status is defined in sch 1 item 7 of the Bill as:

‘the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male.’

⁴⁵ Clause 4.

⁴⁶ Relationship status is defined in sch 1 item 9 to include a person’s status of being the de facto partner of another person without distinction based on gender.

⁴⁷ For more information, see HRLC, *A Simpler Fairer Law for All*, above n 1, 26; Victorian Gay and Lesbian Rights Lobby, Submission No 534 to the Senate Standing Committee on Legal and Constitutional Affairs,

- 7.14. We suggest that the definition could be improved with some minor modifications to clarify that sexual orientation extends to behaviour and identity as well as feelings or attraction, and that the concept of attraction extends to emotional or affectional attraction as well as sexual attraction.
- 7.15. The Yogyakarta Principles propose a definition that takes into account these personal differences:
- ‘Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’⁴⁸
- 7.16. In this context, we build on the submissions of the Discrimination Law Experts Group to the Senate Committee Inquiry into the HRAD Bill⁴⁹ and recommend that ‘orientation’ should be defined more broadly to include a person’s behaviour, identity, feelings or attractions towards another person of the same sex and/or a different sex.

Recommendation 10:

The definition of ‘sexual orientation’ should be retained with minor modifications to clarify that the term encompasses identity, behaviour and sexual, emotional and affectional attraction.

Gender identity

- 7.17. The HRLC strongly supports the definition of ‘gender identity’ adopted in the Bill. This definition will deliver comprehensive and consistent protection for transgender and other sex and gender diverse people, supplementing the patchwork of existing protections at the State and Territory level. This definition is a significant improvement on most State and Territory definitions and reflects the approach taken in the Anti-Discrimination Amendment Bill 2012 (Tas).
- 7.18. The proposed definition of gender identity is consistent with the Senate Committee’s recommended definition of gender identity under the HRAD Bill, with one minor exception. The definition proposed by the Senate Committee under the HRAD Bill was:

Exposure Draft of Human Rights and Anti-Discrimination Bill 2012, 4 January 2013, noting that this definition ‘reflects international and Australian best practice and is a practical, workable definition that will provide clarity for users of anti-discrimination legislation’: at [4.4].

⁴⁸ *The Yogyakarta Principles*, above n 17, 6.

⁴⁹ The Discrimination Law Experts Group recommended the term ‘sexuality’ be adopted as a more inclusive term that is not confined to having a particular orientation and should include ‘sexual attraction, sexual identity and sexual behaviour’: see Submission No 207 to the Senate Standing Committee on Legal and Constitutional Affairs, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, 18 December 2012, [5.1], cited in the Senate Committee’s Report, above n 8, [3.4].

‘**gender identity** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual’s designated sex at birth, and includes transsexualism and transgenderism.’⁵⁰

- 7.19. The Bill removes the final statement clarifying that the definition includes transsexualism and transgenderism. According to the Explanatory Memorandum, the definition ‘is still intended to apply to transsexual and transgender persons, but the definition does not use these descriptions to ensure the definition is not unnecessarily limited in its application’.⁵¹
- 7.20. In the HRLC’s view, it would be helpful for this explanation to be contained in the Bill itself, if not in the terms of the definition, then as a legislative note. This would promote greater understanding of the practical consequences of the provision.

Recommendation 11:

The definition of ‘gender identity’ should be retained, with the addition of a legislative note in the following terms: ‘for the avoidance of doubt, gender identity includes transgenderism and transsexualism’.

C Consequential amendments to the *Fair Work Act*

- 7.21. In line with other members of the LGBTI community making recommendations to this Inquiry, we recommend that the term ‘sexual preference’ in the general protections and other provisions of the *Fair Work Act 2009* (Cth) (**Fair Work Act**)⁵² be replaced with ‘sexual orientation’ to ensure consistency of protection from discrimination across each of these federal regimes.
- 7.22. Similarly, we recommend that the term ‘marital status’ in the *Fair Work Act* be replaced with ‘marital or relationship status’ and that the Bill’s proposed definition of the latter term also be included in the *Fair Work Act*.
- 7.23. More significantly, we note the *Fair Work Act* does not include provisions to prohibit discrimination or adverse action on the basis of gender identity or intersex status. This should be remedied through amendments to the Bill, given the prevalence of discrimination as an

⁵⁰ Senate Standing Committee on Legal and Constitutional Affairs, *HRAD Review*, above n 8, [7.20] (Recommendation 1).

⁵¹ Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), [12].

⁵² Sections 153, 186(4), 194, 195, 342, 351, 772(1)(f), as noted in AHRC, *Consultation Report*, above n 34, 21 n 112.

issue in the arena of employment. The high vulnerability of transgender and intersex people should also be a consideration that supports the need for amendment.

- 7.24. In addition, it is highly desirable to achieve consistency and uniformity across federal laws. Currently, there appears to be no explanation or policy basis offered for the exclusion of transgender people and intersex people from protection under the *Fair Work Act*.
- 7.25. Importantly, the *Fair Work Act* also provides a fast and accessible jurisdiction for the resolution of disputes, which is of particular benefit to vulnerable complainants. Transgender and other sex and gender diverse people should not be denied the benefits of the *Fair Work Act* currently available to lesbian, gay, bisexual people and others.

Recommendation 12:

The Bill should include consequential amendments to the *Fair Work Act* to replace the term 'sexual preference' with 'sexual orientation' and to insert the Bill's definition of the latter term.

Recommendation 13:

The Bill should include consequential amendments to the *Fair Work Act* to replace the term 'marital status' with 'marital or relationship status' and to insert the Bill's definition of the latter term.

Recommendation 14:

The Bill should include consequential amendments to the *Fair Work Act* to include in that Act the additional protected attributes of 'gender identity' and 'intersex status'.

8. Exceptions and exemptions

A Exemptions for religious bodies and schools

- 8.1. The Bill extends the application of the current permanent exemption for religious bodies under section 37 of the SDA to the new protected attributes. The permanent exemption for religious schools under section 38 is also extended to allow discrimination against a person on the grounds of the person's sexual orientation, gender identity, marital or relationship status (but not intersex status).
- 8.2. These broad exemptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question. Under the current proposed exemptions, a school may lawfully refuse to enrol a child whose parents are in same-sex relationship or may lawfully

expel a student who is same-sex attracted or gender questioning. A religious accommodation service may lawfully refuse services to a lesbian.

- 8.3. The HRLC is extremely disappointed that the Bill does not adopt recommendations 11 and 12 of the Senate Committee Report into the HRAD Bill. Moreover, the Bill proposes to extend the exemption for religious bodies to apply to intersex people, despite the absence of evidence presented of any need or desire by faith-based organisations to discriminate against intersex people.
- 8.4. The HRLC reiterates its position in relation to the HRAD Bill that broad permanent exemptions for educational institutions and religious bodies should not be permitted and sections 37 and 38 should either be removed and replaced with a general justification defence, or narrowed significantly.
- 8.5. The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights. However, it is not an absolute right, meaning that freedom of religion can be limited in certain circumstances. When rights conflict, competing interests must be considered and balanced. For example, freedom of religion must be balanced against the right to equality. The HRLC believes the current proposed exemptions do not strike the right balance.
- 8.6. In previous submissions, the HRLC has recommended the adoption of a 'general limitations clause',⁵³ which could be relied upon by religious organisations in circumstances where discrimination is reasonable and justifiable. For example, paragraphs (a) to (c) of section 37 are likely to be permissible under a human rights-based limitations analysis as the limitation on the right to equality is a reasonable and proportionate measure to achieve a legitimate aim, being the protection of religious freedom. However, the exemptions in paragraph (d) of section 37 and in section 38 are overly broad.
- 8.7. If the Senate Committee considers that the exemptions should be retained, the HRLC strongly supports narrow, targeted exemptions that limit the potential harm to LGBTI individuals. As the Senate Committee concluded in the HRAD review:

'[t]he law should not provide broad statutory exceptions allowing disproportionate or unreasonable discrimination on religious grounds. The committee considers that the potential impact of any discriminatory conduct on the individual concerned is a crucial issue when determining the reasonableness of such action.'⁵⁴

⁵³ See, eg, HRLC, *A Simpler Fairer Law for All*, above n 1, 41, 44.

⁵⁴ Senate Standing Committee on Legal and Constitutional Affairs, *HRAD Review*, above n 8, [7.65]

- 8.8. The HRLC endorses the Senate Committee’s decision during its review of the HRAD Bill to ‘strongly support’ the model for religious exceptions adopted in the *Anti-Discrimination Act 1998* (Tas), which does not provide an exemption for religious organisations in relation to the delivery of services to the public.⁵⁵

Recommendation 15:

Section 37 of the SDA should be amended to remove ‘intersex status’ from the operation of the exemption for religious bodies.

Recommendation 16:

The exemptions for religious bodies and schools in sections 37 and 38 of the SDA should be either be removed and replaced with a general justification defence, or narrowed significantly.

Transparency and accountability

- 8.9. The HRLC also supports the Senate Committee’s views discussed in its Report into the HRAD Bill that in the interests of transparency, religious organisations intending to discriminate in employment should be required to notify prospective employees.⁵⁶ The HRLC has discussed the strong rationale for such a policy position at length in submissions to previous inquiries.⁵⁷
- 8.10. The HRLC encourages the Committee to adopt its Recommendation 12 in relation to the HRAD Bill requiring educational institutions and religious bodies to publicly document when and why they intend to rely on these exemptions.

Recommendation 17:

Religious bodies or schools wishing to rely on an exemption should be required to make publicly available a document outlining their intention to utilise that exemption and provide a copy of that document to the AHRC.

Discrimination in aged care

- 8.11. The HRLC strongly supports further amendments to the Bill to introduce a limitation on discrimination in aged care by faith based service providers.

⁵⁵ Ibid [7.72], [7.80].

⁵⁶ Ibid [7.81].

⁵⁷ HRLC, *Realising the Right to Equality*, above n 1, 41; HRLC, *A Simpler Fairer Law for All*, above n 1, 49–51.

- 8.12. The HRAD Bill contained a specific provision that prohibited discrimination by aged care providers in receipt of government funding.⁵⁸ The Senate Committee supported this approach based on extensive evidence of the discriminatory effects of current practices in aged care⁵⁹ and the fundamental importance of ‘all older Australians maintain[ing] the right to access aged care services on an equal basis.’⁶⁰
- 8.13. The Bill does not replicate this limitation, despite the Attorney-General confirming in recent public comments that this limitation remains government policy.⁶¹
- 8.14. Older LGBTI people remain a significant population group with specific needs. The position in the HRAD Bill is consistent with the growing body of evidence that stigma and discrimination on the basis of sexual orientation and gender identity are widespread within the community and residential aged care, resulting in unmet needs for LGBTI seniors.⁶²
- 8.15. The HRLC repeats its previous recommendation that religious organisations providing aged care and other services should not be allowed to discriminate under the SDA.

Recommendation 18:

The Bill should be amended to include a limitation on discrimination by government-funded aged care providers in the same terms as clause 33(3) of the HRAD Bill.

B Exemptions for Commonwealth and state laws

- 8.16. As a federal nation, Australia has an obligation under international law to eliminate discrimination across all parts of the federation including states and territories, without limitation or exception.⁶³

⁵⁸ Clause 33(3).

⁵⁹ For instance, the Committee noted the oral evidence of Associate Professor Mark Hughes that discriminatory conduct against older LGBTI individuals is a significant problem and includes ‘physical abuse by residential care staff, hospital staff failing to involve same-sex partners in decision-making and counsellors and social workers making inappropriate assumptions about people’s lifestyle: *HRAD Review*, above n 8, [5.41].

⁶⁰ *Ibid* [7.69].

⁶¹ The Hon Mark Dreyfus QC MP, Transcript of Press Conference, Canberra, 20 March 2013, available at <http://www.attorneygeneral.gov.au/transcripts/>.

⁶² See Victorian Gay and Lesbian Rights Lobby, above n 47, [5.6] and references contained therein.

⁶³ ICCPR art 50; UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [4]. See also art 27 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), which provides that a state party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.

- 8.17. However, as well as a number of existing exemptions for Commonwealth laws already contained within the SDA, the Bill proposes an additional exemption for anything done in compliance with a Commonwealth, State or Territory law, that is prescribed by regulation (section 40(2B)).
- 8.18. The HRLC recommends removing this provision as it does not require any consideration of whether the relevant discriminatory provisions in inconsistent laws are reasonable and justified in accordance with Australia's international human rights obligations.
- 8.19. If there are inconsistent laws that are proposed to be exempted, it is more appropriate that this be done by legislative amendment and consequent parliamentary scrutiny, rather than by regulation.
- 8.20. The Bill specifically exempts anything done by a person in compliance with the *Marriage Act 1961* (Cth) (***Marriage Act***) (section 40(2A)). This is clearly inconsistent with the aim of eliminating discrimination against LGBTI Australians. By defining marriage as between a man and a woman, the *Marriage Act* excludes intersex people and same-sex couples from its operation. It is incongruous that the Bill purports to ensure the equal treatment of such people in public life while carving out the entrenched discrimination in the *Marriage Act*.

Recommendation 19:

The provision allowing exemptions for federal, state and territory laws that do not comply with the SDA should be removed.

C Discrimination in record keeping

- 8.21. The UN High Commissioner for Human Rights has noted that many transgender people encounter daily difficulties when applying for employment, housing, bank credit or social security benefits because official forms require applicants to identify as male or female.⁶⁴
- 8.22. The Bill does not approach the question of record keeping consistently. On the one hand, the Bill recognises that transgender and intersex people should not be subject to discrimination and, on the other, it exempts government and private organisations from complying with the prohibition against discrimination when it comes to record keeping.
- 8.23. Under proposed section 43A, it will not be discriminatory for employers, government agencies or other people who 'request information' about a person to require that person to identify as either male or female.

⁶⁴ UN Human Rights Council, *2011 UNHCHR Report*, above n 21, [71].

- 8.24. The Bill's statement of compatibility recognises that prohibiting discrimination against LGBTI people is an opportunity to 'promote attitudinal change in Australia'. Conversely, the Explanatory Memorandum to the Bill claims the potentially 'onerous exercise for organisations' to change their policies and procedures to remove discrimination justifies this exemption.⁶⁵
- 8.25. This is contrary to the UN High Commissioner for Human Rights' recommendation that all states '[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.'⁶⁶ For many intersex people, having to falsely identify as male or female is one of the most public and obvious signs of discrimination.
- 8.26. The HRLC understands that the Attorney-General's Department has recently developed draft guidelines for consultation on the recognition of gender in data collection⁶⁷ and the model proposed is generally supported by Organisation Intersex International Australia, the primary representative body of intersex Australians.⁶⁸ While this is a positive step that will help reduce discrimination in practice, the explanatory memorandum does not provide any comfort that these guidelines will have any binding force in the foreseeable future.
- 8.27. Having regard to the current stage of development of the guidelines and the need to protect intersex and transgender people against discrimination and to change community attitudes, the HRLC recommends a three year sunset clause be applied to this exemption.
- 8.28. This would give government departments, agencies and businesses an opportunity to consult and amend their policies, procedures and forms. As the legislation is prospective, organisations would not face an onerous burden of amending past records.
- 8.29. If it is considered necessary, a mechanism could be introduced to allow businesses that cannot reasonably comply with the requirement within three years to apply to the Australian Human Rights Commission for an exemption for up to five years, giving them a further opportunity to take steps to improve their processes over that period.

⁶⁵ Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), [84].

⁶⁶ UN Human Rights Council, *2011 UNHCHR Report*, above n 21, [84(h)].

⁶⁷ Attorney-General's Department, *Australian Government Guidelines on the Recognition of Gender: Consultation Draft* (March 2013), available at: <http://www.ag.gov.au/Consultations/Documents/AusGovGuidelinesontheRecognitionofSexandGender/DraftAustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>.

⁶⁸ Submission No 8 to this Inquiry, 8–9.

Recommendation 20:

The record keeping exemption in the Bill should sunset after three years.