Submission

on the

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

to the

Senate Legal and Constitutional Affairs Committee

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1 Introduction

On 21 March 2013 the Senate referred the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* for inquiry and report.

The Bill would amend the *Sex Discrimination Act 1984* to include sexual orientation, gender identity and intersex status as grounds on which discrimination would be unlawful. The Bill would also replace the existing ground of "*marital status*" with "*marital or relationship status*", defined so as to cover same-sex de facto couples.

The Committee has called for submissions which are due by 26 April 2013. The Committee is due to report by 17 June 2013.

2 Constitutional basis of the Bill

The Commonwealth has no general head of power under which it can make laws dealing with discrimination, so any Commonwealth anti-discrimination law of broad application needs to derive its constitutional validity primarily from the external affairs power (Section 51 (xxix) of the *Constitution of Australia).*

For the Commonwealth law to validly apply to the proposed new protected attributes, there would need to be a relevant foundation in external affairs.

Section 3 (a) of the *Sex Discrimination Act 1984* specifies that one object of the Act is "*to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments*".

The phrase "*relevant international instrument*" is defined in section 4 of the Act to mean:

(a) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9) (a copy of the English text of which is set out in the Schedule); or

(b) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); or

(c) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); or

(d) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); or

(e) ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value done at Geneva on 29 June 1951 ([1975] ATS 45); or

(f) ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation done at Geneva on 25 June 1958 ([1974] ATS 12); or

(g) ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities done at Geneva on 23 June 1981 ([1991] ATS 7); or

(h) *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer done at Geneva on 22 June 1982 ([1994] ATS 4).*

None of the human rights or ILO instruments referred to in this definition specifically refers to sexual orientation, gender identity or intersex status as grounds on which discrimination must be prohibited by States parties. Nor do any of the instruments extend the protections due to marriage to same-sex relationships.

However, there has been a sustained attempt to read into the text of the *International Covenant on Civil and Political Rights* an implicit reference to sexual orientation as a ground on which discrimination must be prohibited. A detailed examination of this claim follows.

2.1 International Covenant on Civil and Political Rights

Nothing in the text of the *International Covenant on Civil and Political Rights* makes any explicit reference to sexual orientation or gender identity.

Some decisions of the Human Rights Committee have claimed to find implicit references in either Article 2(1) or Article 26. It is instructive that those members of the Committee who infer such references are divided over whether sexual orientation should be read into the word "*sex*" or, alternatively into the phrase "*other status*".

Neither claim is persuasive or decisive.

In *Toonen* (488/1992) the Committee confined "*itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.*" The Committee declined to comment on whether sexual orientation was included under "*other status*".

In *Joslin* (902/1999) the Committee found that the right to marry under the ICCPR only established a right for a man and woman to marry and that there was no obligation for States to provide for same-sex marriage.

In *Danning* (180/1984) the Committee upheld the right of a State party to discriminate between married couples and cohabiting couples.

In *Young* (941/2000) the State party (Australia) did not address whether denying the pension to the same-sex partners of veterans is reasonable, because it held that Mr Young was not entitled to the veteran's dependent's pension on other grounds. The individual opinion of Mrs Ruth Wedgwood and Mr Franco DePasquale is worth noting.

> *The current case of* Edward Young v Australia *poses a broader question, where various states parties may have decided views — namely, whether a state is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions — here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment — whether a state must accommodate same-sex relationships on a par with more traditional forms of civil union …*
>
> *In every real sense, this is not a contested case …*
>
> *In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other States and other complainants may offer in the future on these questions in the same or other contexts as those of Mr Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.*

In *X v Colombia* (1361/2005) a majority of the Committee adopted the view of the majority in *Young* that Article 26 prohibited discrimination between married couples and same-sex couples in regard to pension rights. However, in a dissenting opinion two members stated clearly that this view was overreaching in its interpretation of the text of the ICCPR:

> *It is not always easy to assess whether the grounds for distinction or differentiation are reasonable and objective or whether the aim is legitimate under the Covenant, and the difficulties involved are naturally of varying magnitude. This is an area where interpretation is dogged by the risk of subjectivity, particularly when — consciously or not — it is locked into a teleological approach, for the issues that arise may then be only marginal to the Covenant or even, in some cases, lie outside it, which may mean that legal discourse gives way to other types of discourse that legitimately belong in non-legal domains or at best on the boundaries of the legal domain. Thus the establishing of similarities, analogies or equivalences between the situation of heterosexual married or de facto couples and homosexual couples may well entail not only observation of facts but also interpretation, and can therefore be of no help in construing the law in a reasonable and objective manner.*
>
> *Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of "discrimination on grounds of sex or sexual orientation" cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that "the family is the natural and fundamental group unit of society" and that "the right of men and women of marriageable age to marry and found a family shall be recognized". That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.*
>
> *What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful — absent arbitrary decisions or manifest errors of assessment — and situations that depart from the norm must be shown to be lawful by those who so claim.*
>
> *Similarly, and still in the context of interpreting Covenant provisions in the light of other Covenant provisions, we would point out that article 3, on equality between men and women, must be interpreted in the light of article 26, but cannot be applied to equality between heterosexual couples and homosexual couples.*

Having examined the relevant cases from the Human Rights Committee it is clear that legal opinion on the Committee is divided as to whether the ICCPR requires States parties to prohibit discrimination on the grounds of sexual orientation or discrimination between married couples and same sex de facto couples.

In any case, decisions of the Human Rights Committee, which read into the text of the ICCPR matter which has clearly not been agreed on explicitly by the States parties who negotiated and ratified the treaty, are of no relevance in determining the matter of legislation which can be validly enacted by the Commonwealth under the external affairs head of power enunciated in Section 51 (xxix) of the Constitution.

Heydon J made this clear in Roach v Electoral Commissioner:

Another of the instruments relied on by the plaintiff is a treaty to which Australia is a party, but the plaintiff relied for its construction on comments by the United Nations Human Rights Committee. If Australian law permitted reference to materials of that kind as an aid to construing the Constitution, it might be thought that the process of assessing the significance of what the Committee did would be assisted by knowing which countries were on the Committee at the relevant times, what the names and standing of the representatives of these countries were, what influence (if any) Australia had on the Committee's deliberations, and indeed whether Australia was given any significant opportunity to be heard. The plaintiff's submissions did not deal with these points. But the fact is that our law does not permit recourse to these materials. The proposition that the legislative power of the Commonwealth is affected or limited by developments in international law since 1900 is denied by most, though not all, of the relevant authorities – that is, denied by 21 of the Justices of this Court who have considered the matter, and affirmed by only one. [1]

There is therefore no legitimate case for relying on the external affairs power to found an alleged right to protection from discrimination on the grounds of sexual orientation or gender identity or relationship status in selective decisions of the Human Rights Committee on the meaning that could be read into articles of the *International Covenant on Civil and Political Rights.*

2.2 A matter of international concern?

If the ICCPR cannot be used to give constitutional validity to this Bill, could the Bill rely on the claim that discrimination on the grounds of sexual orientation is, apart from any specific treaty ratified by Australia, a matter of international concern?

On 22 March 2011 a *Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity* was co-sponsored by 85 nations at the Human Rights Council.[2, 3]

However, 54 nations remain opposed to the *Declaration on Sexual Orientation and Gender Identity* which was put to the UN General Assembly on 18 December 2008. These nations made a counter statement which read in part:

… we are seriously concerned by the attempt to introduce into the United Nations some notions that have no legal foundation in any international human rights instrument. We are even more disturbed at the attempt to focus on certain persons on the grounds of their sexual interests and behaviour while ignoring that intolerance and discrimination regrettably exist in various parts of the world, be it on the basis of colour, race, gender or religion, to mention only a few.

Our alarm does not merely stem from concern about the lack of legal grounds or that the statement delves into matters which fall essentially within the domestic jurisdiction of States, counter to the commitment in the Charter of the United Nations to respect the sovereignty of States and the principle of non-intervention. More important, it depends on the ominous usage of two notions. The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory behaviour between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including paedophilia. The second notion is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has repeatedly been scientifically rebuffed.

We affirm that those two notions are not and should not be linked to existing international human rights instruments.[4]

There is then no clear international consensus on prohibiting discrimination on the grounds of sexual orientation, gender identity or same-sex relationships.

In any case, the idea that the Commonwealth may have the power to enact a law just because it relates to a matter of international concern is very tenuous in the light of *XYZ v The Commonwealth.*[5]

In that case Callinan and Heydon JJ noted: *"There is no case in this Court deciding that the international concern doctrine exists*"[6] and "*the elusiveness connected with attempts to define 'international concern', strongly suggest that the international concern doctrine does not exist; for if it did, it would operate antithetically to the rule of law*."[7]

2.3 Other heads of power

Other heads of power such as the corporations power (Section 51 (xx) of the *Constitution of Australia*) could be used to found a law of much more limited reach, only applying to constitutional corporations and other sectors such as banking and insurance where the Commonwealth has a direct head of power.

This would require the Bill to be withdrawn and redrafted.

For the public policy reasons given below this would be undesirable.

> ***Recommendation 1:***
>
> ***There is no constitutional basis for this Bill and on that ground alone it should be withdrawn.***

3 Including sexual orientation, gender identity and intersex identity as protected attributes

Laws that prohibit discrimination in the areas of employment, provision of goods and services and other areas of daily life necessarily impact on the general right of citizens to determine their own affairs.

In particular such laws necessarily trespass on the right to freedom of association and its co-essential corollary the right not to associate, the right to freedom of religion and belief and the right to freedom of expression.

The nature of sexual orientation and so-called gender identity are hotly contested issues in our society.

Until recent years, the virtually universal view was that sexual acts between persons of the same sex are inherently disordered. In other words, human beings are by nature male or female and the *purpose* of the sexual union of a man and a woman is procreative and unitive in the intimate, lifelong union of marriage. Many Australians continue to share this view.

Those holding this view are entitled to show their disapproval of sexual acts between persons of the same sex. They are entitled to disagree with others who hold a contrary view, especially those who actively advocate for the approval of such sexual acts or who flaunt their involvement in such activity. Laws that would prohibit Australians from expressing such views or disapproving of such behaviour are an unwarranted intrusion on freedom of belief and expression.

For example, laws that require those providing services such as accommodation in a small family-run bed and breakfast business to provide accommodation to a same-sex couple on the same terms as a married couple are an unwarranted interference in freedom of association and freedom of religion.

Similarly, many Australians reject the notions that a third sex exists, as well as male and female, or that individuals may change their sex at will. Requiring everyone who provides a service or who

employs people to accept a person as male or female regardless of their actual and even apparent sex is an exercise in social engineering and thought control. Why should a small business owner be forced to employ, against his or her best judgment as to what is good for the business, a person who while obviously male dresses and behaves as a woman?

3.1 Freedom of association

Human beings are, as Aristotle observed, "*zoon koinonikon*", social or communal animals.[8]

> *… so even when men have no need of assistance from each other they none the less desire to live together. At the same time they are also brought together by common interest, so far as each achieves a share of the good life. The good life then is the chief aim of society, both collectively for all its members and individually …*[9]

The right to freedom of association is recognised in Article 22 of the *International Covenant on Civil and Political Rights.*[10] It is ultimately derived from the recognition that human beings are by very nature associational.

Throughout human history and across cultures, humans have lived in communities. Aristotle acknowledged this in the fourth century BC. Over a millennium earlier, Abraham received a vision of his descendants becoming a great community – a nation.[11] The code of Hammurabi, from the 18th century BC, provided laws to guide living in community. In ancient China, Confucius taught the basic principles of *ren*, an obligation of altruism towards others, and *yi*, a moral disposition to do good, as the foundations of good community life.[12] Jesus Christ reminded his followers of the second greatest commandment: "Love your neighbour as yourself,"[13] – included over 1000 years earlier in the Law of Moses.[14]

Karl Josef Partsch, a German expert in international law and human rights, has explained the breadth of the right to freedom of association:

> *According to Partsch, the right to freedom of association includes the right to come together with one or more other persons for social or cultural as well as for economic or political purposes. It includes association with only one person as well as group assembly, casual as well as formal, single and temporary as well as organized and continuing association. Furthermore the freedom of association implies the right to decide whether to associate and also the freedom not to associate.*[15]

American judge and political commentator, Andrew P. Napolitana, has made a similar point in the US constitutional context from a natural law position:

> *The freedom to associate is based on mutual consent – each person must agree to associate with the other person. For example, when A and B agree to associate with one another, both A and B have that freedom. But if A wants to associate with B and B does not want to associate with A but is required to do so then B is not legally free to reject that association with A. Rather he is being forced to associate with A. This concept is called forced association. Forced association is completely counter to our natural rights as free individuals …*[16]

Deciding whom to employ, whom to offer a service to or offer goods for sale to, whom to enter into a partnership with, whom to let accommodation to, whom to admit to a club and so forth are all social activities involving an association of some kind between persons.

Article 22 of the ICCPR does not provide an absolute right to freedom of association. It says:

> *2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law* ***and*** *which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others... [emphasis added]*

The government has failed to present any evidence that prohibiting discrimination by private groups or individuals on the ground of sexual orientation or the other grounds in the Bill would be in the interests of national security or public safety or the protection of the rights and freedoms of others.

Government services such as public transport, public hospitals and public education should be and are available to all Australians without discrimination, apart from reasonable restrictions to protect other members of the public from behaviour which disturbs the peace or causes harm to others.

However owners of private services such as private transport, education and accommodation should be free to associate as they wish. If for any reason a private provider excludes a particular group or groups, those groups are free to patronise a provider that does not discriminate.

A particular Muslim school, for example, may require female staff to wear a head covering in keeping with that school's values. That requirement is in keeping with the school board's freedom of association. Some women teachers may feel that such a requirement is unfairly discriminatory – but they are free to apply for positions in non-Muslim schools, or Muslim schools that do not have this requirement.

A pub owner should be free to declare his establishment a "gay pub" where heterosexuals are excluded – and vice versa – without the need for the complex and costly processes involved in applying for an exemption from a government board or commission.

Likewise, a private women's bowls club should be free to limit its membership to women – and a private men's bowls club should be free to limit its membership to men. Women who want to join a bowls club with male members are free to join a mixed-sex club – and if none exists where they live, such women should be free to associate with other like-minded people in their area to form their own mixed club.

The law ought not to interfere without justification with the right of Australians to choose freely whom to associate with – or whom not to associate with – in various ways.

Forcing people to associate with other particular persons in specific ways against their will is a direct violation of the fundamental.freedom to associate or not to associate.

It is clear that the Sex Discrimination Act as well as the Bill – in virtually all of its proposed provisions – would violate the right to freedom of association in ways that are not reasonably justified.

3.2 Freedom of religion

It is important to recognise that religion involves both <u>belief</u> and <u>conduct</u>. This follows from the legal definition of "*religion*" determined by the High Court of Australia in its judgement on the "*Scientology case*".[17] Justices Mason and Brennan held that "*for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief…*"[18]

This judgement declares that a religion involves not merely belief but also "*conduct giving effect to that belief*". Consequently, freedom of religion involves <u>both freedom of belief and freedom of conduct giving effect to that belief.</u>

Many parts of anti-discrimination laws represent a direct assault on religious freedom by proscribing some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas anti-discrimination laws may declare conduct which gives effect to such moral distinctions to be unlawful.

Sections 37 and 38 of the *Sex Discrimination Act 1984* provide limited exemptions for religious bodies and educational bodies founded for a religious purpose.

However, these provisions have proved inadequate to protect religious believers from the costs and disruptions involved in dealing with complaints of discrimination on the grounds of sexual orientation.

3.3 Adverse decisions

The decision by the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW) against Wesley Mission in a case dealing with the application of two homosexual men to act as foster parents raised grave concerns about the interpretation of the religious exception in the NSW Anti-Discrimination Act 1977.[19]

The Tribunal's findings that (a) the "*religion*" of the Wesley Mission was "*Christianity*" and (b) that "*Christianity*" has no doctrine that "'*monogamous heterosexual partnership within marriage' is both the 'norm and ideal'*" were extraordinary.[20]

Effectively the Tribunal set itself up as an authority on religious beliefs. There was no doubt that those persons engaged in the work of the Wesley Mission had a shared religious belief that precluded accepting a homosexual couple as foster carers. The Tribunal ruthlessly trampled on the religious freedom of these believers by purporting to know better than the persons themselves (a) what their religion is and (b) what its doctrines are.

Thankfully the Tribunal's decision was overturned on appeal.

In Victoria, the Victorian Civil and Administrative Tribunal has upheld a complaint from a homosexual support group Way Out against a campsite operated by the Christian Brethren for refusing to accept a booking from the group.[21] The decision in this case shows the failure of the apparently comprehensive exceptions in Victorian law to protect religious freedom. (Note: this case is still under consideration by the Victorian Court of Appeal.)

The totalitarian nature of discrimination law is evident in these decisions. Why should a Christian group be denied the freedom to own a campsite and rent it out selectively to groups that either share their mission or at least are not seen by the group to be engaged in promoting activity at odds with its mission?

> ***Recommendation 2:***
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> ***Since any law prohibiting discrimination on the grounds of sexual orientation, gender identity or relationship status would necessarily and without justification trespass on the rights to freedom of association (including the freedom not to associate), the right to freedom of belief and conscience, and the right to freedom of expression, no such law should be proposed. The Bill should therefore be withdrawn.***

4 Endnotes

1. Heydon J, [2007] HCA 43 (26 September 2007) at 181

2. "Statement by Ambassador Eileen Chamberlain Donahoe, U.S. Representative to the Human Rights Council, on the *Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity*", United Nations Human Rights Council (22 Mar 2011): http://geneva.usmission.gov/2011/03/22/lgbtrights/

3. Colombia et al., "Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity", United Nations Human Rights Council (22 Mar 2011): http://download.ei-ie.org/Docs/WebDepot/Joint%20statement_FINAL.pdf

4. Syria et al., "Response to SOGI Human Rights Statement, read by Syria", UN General Assembly (18 Dec 2008): http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/957.html

5. *XYZ v The Commonwealth* (2006) 227 CLR 532.

6. *Ibid.*, at 217.

7. *Ibid.*, at 218.

8. Aristotle, *Eudemian Ethics*, 1242 a25

9. Aristotle, *Politics*, 1278b20

10. International Covenant of Civil and Political Righs, *Article 22 – 1. Everyone shall have the right to **freedom of association** with others, including the right to form and join trade unions for the protection of his interests.*

11. Genesis 12:2-3.

12. "Confucianism", *Wikipedia*: http://en.wikipedia.org/wiki/Confucianism

13. Matthew 22:39; Mark 12:31.

14. Leviticus 19:18.

15. Detrick, S, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999, p 261, citing Karl Joseph Partsch, "Freedom of Conscience and Expression, Political Freedoms", in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p 235.

16. Andrew P. Napolitana, *It is dangerous to be right when the government is wrong: the case for personal freedom,* Thomas Nelson, 2011, p. 52

17. *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120.

18. *Ibid*., para 17; their judgement was qualified by also holding that "though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."

19. *Anti-Discrimination Act 1977 (NSW)*, s 56.

20. *OV and anor v QZ and anor (No.2) [2008] NSWADT 115*, at 119, 126-128.

21. *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* (Anti-Discrimination) [2010] VCAT 1613 (8 October 2010); http://www.austlii.edu.au/au/cases/vic/VCAT/2010/1613.html