

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

Introduction

Kingsford Legal Centre (**KLC**) is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides specialist legal advice in discrimination law

Section 3, 'Objects' of the SDA should be amended to include the specific United Nations international human rights instruments relied upon to insert the grounds of 'sexual orientation, gender identity, and intersex status'. KLC submits that this will increase the constitutionality of the amended SDA. It will also fit with other international references within the SDA such as CEDAW and clarify the purpose of the law. The human rights agreements that enshrine these protective rights are numerous. The United Nations Human Rights Committee has found that that the International Covenant on Civil and Political Rights (ICCPR) in Article 2 and 26 provides protections for sexual orientation. It has also issued a joint statement on Sexual Orientation and Gender Identity which was supported by 85 countries. In *Toonen v Australia* and *Young v Australia* the Human Rights Commission agreed with this interpretation and held that sexual orientation is supported by the ICCPR. The Law Council of Australia have commented that it is likely that the ICCPR's use of 'other grounds' is likely to extend to protect gender identity. The Committee on Economic, Social and Cultural rights has specifically held that gender identity is a recognised prohibited ground. The Committee on the Rights of the Child has also discussed the rights of young people who are transsexual in calling for the United Kingdom to ensure support for these young persons. Other principles comment and expand on these United Nations instruments. The Yogyakarta Principles developed by a group of human rights experts discuss sexual orientation, gender identity, and intersex status in language that supports equality for all people.

Recommendation:

That section 3, Objects of the SDA be amended to include the specific United Nations Human Rights instruments relied upon for the insertion of the grounds of sexual orientation, gender identity, and intersex status.

These include:

The International Covenant on Civil and Political Rights

The International Covenant on Economic, Social and Cultural Rights

The Convention on the Rights of the Child

The Yogyakarta Principles

2. Amendment of the *Fair Work Act 2009* (Cth)

KLC recommends that the *Fair Work Act* should be amended so that it is consistent with the proposed bill. The *Fair Work Act* uses the terminology of 'sexual preference' within ss 153(1); 195(1); 351(1); 772. These sections refer to discriminatory terms in enterprise agreements and awards, protections from discrimination in employment, and termination of employment. It is important that there is consistency and that 'sexual preference' is amended to include 'gender identity, sexual orientation and intersex status' as protected attributes in employment. The repeal of the terminology of 'sexual preference' will avoid confusion as to the application of the *Fair Work Act* to particular claimants in the employment context.

Recommendation:

That the *Fair Work Act* is amended so that the term 'sexual preference' includes 'gender identity, sexual orientation and intersex status'. This will ensure that the SDA and *Fair Work Act* provide individuals with the same grounds of protection in employment.

3. Religious Exemptions

KLC opposes broad permanent exemptions from anti discrimination law for religious institutions. This position was made clear in KLC and the National Association of Community legal centres' submissions for the HRAD. KLC recognises the importance of all being able to practise their religions. It is also important that the SOGIS bill foster a society based on the equal and full participation of all. KLC submits that there should be no permanent exemptions for religious institutions in education, employment (other than Ministers of religion) or service provision. However, as an interim measure KLC agrees with the recommendations made by the Senate Inquiry, that as a minimum, there should be no exemptions within service delivery.

The Federal Government's stated position on religious aged care providers was to minimise the exemptions available to these organisations thus providing wider protections to individuals. This commitment has not been realised in the proposed amendment. KLC submits that the amendment should not exempt religious aged care providers in line with government policy and as appeared in HRAD.

Recommendations:

1. That religious exemptions should be removed from the SOGIS amendments to the SDA.

2. That religious aged care providers not be exempt from anti discrimination law protections, in line with the Federal Government's stated position.

4. Information and Record Keeping Exemption

Section 43A of the proposed bill currently provides an indefinite exemption to agencies keeping records or providing information to individuals. The provision renders the SDA inapplicable to agencies that deny individuals access to information or, making or keeping records on the basis of them not identifying as either male or female. Section 43A as it stands contradicts the scheme of the amendment which is to eliminate discrimination on the ground of intersex status. The Attorney-General has described this exemption as proportionate to the number of individuals that would identify as neither sex, when compared to the 'regulatory impact on organisations'.¹ The language of proportionality is unfortunate when applied in this context. Whilst a regulatory impact on organisations is likely, KLC submits that its impact on intersex claimants should not be guided only by assessments of proportionality. KLC also submits that to eliminate discrimination for intersex persons, organisations should comply with the law, rather than be exempted indefinitely. KLC submits that organisations should include the option of using an 'X' instead of a male or female preference. This would have a similar effect to current government documents that allow individuals to select 'prefer not to answer'.

Recommendations:

1. Organisations should include the option of using an 'X' instead of male or female preference in their documents.

2. Section 43A should be amended to include a sunset clause, ending three years after it receives royal assent. This would allow sufficient time for regulatory practices to shift so as to reduce the burden upon organisations.

¹ Explanatory memorandum

5. Sport Exemption

KLC supports the Organisation of Intersex International in their submissions on the participation of intersex people in sport and the inclusion within anti discrimination legislation.

Recommendation:

1. That the Government adopt the recommendations of the Organisation of Intersex International on the participation of intersex people in sport.

6. Intersex and Transgender Persons forced to divorce

The proposed amendment repeals the definition of marital status and inserts 'marital and relationship status' as defined within the amended s 4(1). The proposed amendment opens the grounds of discrimination to protect intersex and transgendered persons. A potential inconsistency arises in the application of s 4(1) and the definition of marriage under s 5 of *Marriage Act 1961* (Cth). The definition only applies to a 'man' or 'woman' thus excluding intersex and transgendered persons. KLC submits that transgendered people and intersex people should not be forced to divorce.

Recommendation:

That the *Marriage Act* and *SDA* should ensure that transgendered people and intersex people are not forced to divorce.