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 (NSW wide). KLC provides general advice on a wide range of legal issues and undertakes casework for many clients who, without their assistance, would be unable to afford a lawyer. KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC is also involved in monitoring Australia's compliance with human rights mechanisms and working with other organisations to provide Non-Government Organisation (NGO) reports to United Nations Committees on the attainment of human rights in Australia. KLC does this through identifying areas where its clients have experienced human rights breaches and monitoring the operation of laws and policies in Australia.

KLC is disappointed at the decision by the Federal Government to postpone the *Human Rights and Anti-Discrimination Bill 2012* (Cth) (HRAD). This bill would have provided a streamlined approach to discrimination law that would have enhanced access to justice for all Australians.

KLC welcomes the amendments to the *Sex Discrimination Act* (SDA) as an interim measure to provide LGTBI persons with protections from discrimination under federal law.

A unified discrimination law scheme like HRAD is urgently needed and should be implemented in the near future. In acknowledging that the Federal Government's present position is to amend the SDA, KLC in this submission highlights areas of the proposed bill

that require amendment. This will ensure that the SOGIS bill provides robust protections for Sexual Orientation, Gender Identity and Intersex Status.

Recommendations

1. **KLC recommends that the SOGIS bill should include sections that would provide for a no costs jurisdiction such as in s133 of the HRAD, intersectional discrimination such as s19 of HRAD, and a shared burden of proof such as in s124 of HRAD.**

2. **KLC recommends 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

3. **KLC recommends that the *Fair Work Act 2009* (Cth) be amended to include new grounds of discrimination and repeal 'sexual preference'.**

4. **KLC recommends that religious exemptions should be removed from the SOGIS amendments to the SDA.**

5. **KLC recommends that religious aged care providers should not be exempt from anti discrimination law protections, in line with the Federal Government's stated position.**

6. **KLC recommends that organisations should include the option of using an 'X' instead of male or female preference in their documents.**

7. **In the alternative, 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.**

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

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

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

Key Protections from HRAD Should be Included

Whilst the proposed bill is a welcome step in protecting the rights of LGTBI persons it should be seen as an interim measure. HRAD provided protections across all areas of public life and would have generated more recognisable benefits to individuals affected by discrimination.

These protections included:

- **Costs –** The HRAD would have provided a no costs jurisdiction captured in s 133 of the Exposure Draft legislation. Because of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints at the Australian Human Rights Commission (AHRC), preferring state-based tribunals where parties bear their own costs. Where matters are contested at a federal level, KLC's experience is that most cases settle – even very strong discrimination complaints. As a result, courts at the federal level have not developed robust jurisprudence in this area of law. Cases which would benefit the community more broadly are not litigated. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative role within the community. The system as it presently stands, and as envisaged in the Exposure Draft Legislation, is a war of attrition, where even strong cases are settled because individual complainants cannot face the risks and pressure of litigation against well-resourced respondents.
- **Intersectional Discrimination –** KLC supported the addition of intersectional discrimination within s 19 of the Exposure Draft Legislation. This would have amended the definition of discrimination. If discrimination law in Australia is to adequately recognise and deal with the way in which individuals may experience

complex forms of discrimination, then protection against intersectional discrimination is fundamental. Current Australian discrimination law fails to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination. The failure of anti-discrimination law to address this type of discrimination has meant that the law has not been utilised by the most disadvantaged people in our community – that is, people experiencing complex forms of discrimination. The HRAD had the potential to address this.

- **Shared Burden of Proof –** Section 124 of the HRAD Exposure Draft contained provisions to establish a shared burden of proof. The current burden of proof requirements placed too great an evidentiary burden on the individual complainant. In our experience, the burden of proof is often impossible for complainants to satisfy in the absence of ready access to evidence, which is usually held by the respondent.

Not only are these protections a significant issue for KLC's clients; Australia's international responsibility under its 2011 universal periodic review recommended the creation of unified anti-discrimination laws. Thus, as an interim protection for Sexual Orientation, Gender Identity and Intersex Status the proposed bill needs to do more to integrate with the discrimination regime that is currently active to provide protections that HRAD would have envisaged for Australians.

Recommendation:

We recommend that the SOGIS bill should include sections that would provide for a no costs jurisdiction such as in s133 of the HRAD, intersectional discrimination such as s19 of HRAD, and a shared burden of proof such as in s124 of HRAD.

The submissions for the inquiry into HRAD can be found in full form at the Senate Committee for Legal and Constitutional Affairs website: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/submissions.htm>.

SDA (SOGIS) Bill

1. **Human Rights Instruments in Section 3, 'Objects'**

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.