



**Standing Committee on Legal and Constitutional
Affairs Inquiry into the Sex Discrimination
Amendment (Sexual Orientation, Gender Identity and
Intersex Status) Bill 2013**

**Submission of the Anti-Discrimination Commissioner
of Tasmania**

April 2013

Office of the Anti-Discrimination Commissioner

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Summary of recommendations

Recommendation 1

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 incorporate all remaining amendments arising from the 2008 Senate Committee on Legal and Constitutional Affairs report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality

Recommendation 2

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 include provisions to omit the phrase 'so far as possible' from the Preamble and Objects clauses of the Sex Discrimination Act 1984.

Recommendation 3

It is recommended that the Committee endorse the definition of gender identity proposed in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

Recommendation 4

It is recommended that the Committee support the inclusion of the proposed definition of 'intersex' in the draft Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, with the exception that reference to 'intersex status' be replaced with the word 'intersex' wherever it occurs.

Recommendation 5

It is recommended that references to a 'woman' in the Sex Discrimination Act 1984 be reviewed and replaced with the word 'person' to ensure that full protection is provided on the basis of gender identity and intersex, to ensure that discrimination on the basis of pregnancy, potential pregnancy and breastfeeding are also extended to capture those of diverse gender identity or who are intersex.

Recommendation 6

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) be amended to remove the requirement for a comparator test and replace with wording proposed in clause 19(1) of the Exposure Draft Human Rights and Anti-Discrimination Bill 2012, to enable the test of discrimination to be whether a person treats or proposes to treat the person unfavourably because the other person has a one or more of the protected attributes and/or characteristics of attributes identified for protection in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 and protected in the Sex Discrimination Act 1984.

Recommendation 7

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) be amended to provide protection for action that disadvantage persons on the basis of past, present, future and imputed attributes and characteristics.

Recommendation 8

It is recommended that the Amendment Bill include provision for the introduction of a separate positive duty to take all reasonable steps to eliminate discrimination and other forms of conduct prohibited under the SDA

Recommendation 9

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) include provisions to amend Part II of the SDA to ensure that persons with protected attributes are provided with protection from discrimination in any area of public life and that amendments be made to ensure other limits on protection are removed where they are inconsistent with international obligations.

Recommendation 10

It is recommended that provisions to amend the Sex Discrimination Act 1984 (Clth) to ensure that there is no discrimination between same-sex couples and opposite-sex couples include specific reference to couples where one or more of the partners are intersex. Further, where protection is provided in the Sex Discrimination Act 1984 (Clth) on the basis of sex, amendments should be made to extend the same protection to people who are intersex and on the basis of gender identity.

Recommendation 11

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) be amended to provide for a simplified and streamlined general limitations clause and all other exemptions be removed.

Recommendation 12

Should the current approach to permanent exemptions be retained, the Amendment Bill should include a sunset provision along the lines of that recommended by the Australian Human Rights Commission to the Senate Committee Inquiry into the Sex Discrimination Act 1984 to ensure that the permanent exemptions contained in the SDA remain relevant and adopt the least discriminatory approach possible in the circumstances.

Recommendation 13

That no extension of exceptions on the basis of new or existing attributes be included in the Amendment Bill unless and until they have been subject to full consultation, evaluation and review.

Recommendation 14

That entities seeking to be relieved of their duties not to discriminate on the basis of existing and new protected attributes be required to apply for a temporary exemption until a full review of the exceptions has been completed.

Recommendation 15

That exemptions that provide for single-sex activities be identified and either removed or amended to ensure that people who are intersex are not excluded from opportunities to participate, etc, and that people are not excluded from opportunities to participate, etc, on the basis of gender identity.

Recommendation 16

That the Amendment Bill clearly state that any broader exemptions in the legislation are not intended to interfere with protections against discrimination under state or territory anti-discrimination laws.

Recommendation 17

That all Commonwealth-funded services, programs and activities, including the provision of aged-care services be excluded from the scope of the exemption provided to religious and voluntary bodies.

Recommendation 18

That the Amendment Bill include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law and include 'equality before the law provisions' in the substantive body of the Bill.

Introduction

Thank you for the opportunity to make a submission to the Parliamentary Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) (the Amendment Bill).

The proposal to introduce federal protection from discrimination on the basis of sexual orientation, gender identity and intersex status represents a significant advance for many lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

The amendments will extend many of the protections available to LGBTI persons under Tasmanian legislation and will give effect to proposals to protect intersex persons in line with changes currently before the Tasmanian parliament.

Whilst my preferred approach remains the introduction of consolidated anti-discrimination legislation at the Federal level, the decision to proceed with according federal protection against discrimination and related conduct to LGBTI Australians is welcomed.

I note, however, that the Bill fails to afford LGBTI Australians a range of protections they should otherwise be expected to gain and that it subjects the protections available to LGBTI persons to the limitations inherent in the *Sex Discrimination Act 1984* (Cth). I comment on these matters below.

Detailed comments on the Bill are set out according to the item number listed in the Bill.

I welcome the opportunity to expand on this submission before the Committee should you wish me to do so.

General comments

While I am strongly supportive of improved protections against discrimination and harassment on the basis of sexual orientation, gender identity and intersex status, I consider the approach taken through the Bill to achieve this outcome is problematic.

Achieving this protection through the introduction of amendments to the *Sex Discrimination Act 1984* (Cth) (SDA) risks applying flaws in that Act to the new protections; flaws that would otherwise have been removed through the introduction of consolidated Commonwealth human rights and anti-discrimination legislation.

An important object of the draft Human Rights and Anti-Discrimination Bill 2012 was to introduce improvements to address many recommendations arising from the 2008 Senate Standing Committee on Legal and Constitutional Affairs inquiry into SDA. Failure to address these matters risks lowering the protections available to both women and to those with the protected attributes covered by the Sex Discrimination Amendment (Sexual orientation, gender identity and Intersex Status) Bill 2013. In particular the following committee recommendations remain unaddressed under the current approach:

Recommendation 5: The committee recommends that the definitions of direct discrimination in section 5 to 7A of the [*Sex Discrimination Act 1984* (Cth)] be amended to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991* (ACT)

Recommendation 6: The committee recommends that section 7B of the Act be amended to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.

Recommendation 8: The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in an area of public life equivalent to section 9 of the *Racial Discrimination Act 1975*.

Recommendation 10: The committee recommends that the Act be amended:

- (a) To provide specific coverage to volunteers and independent contractors; and
- (b) To apply to partnerships regardless of size.

Recommendation 11: The committee recommends that subsection 12(1) of the Act be amended and section 13 repealed to ensure that the Crown in the right of the states and state instrumentalities are comprehensively bound by the Act.

Recommendation 22: The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the Sex Discrimination Act 1975 (UK) so that, where the complainant proves

facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.

Recommendation 25: The committee recommends that the Act be amended to remove the exemption for voluntary organisations in section 39.

Recommendation 36: The committee recommends that further consideration be given to removing the existing permanent exemptions in section 30 and sections 34-43 of the Act and replacing these exemptions with a general limitations clause.

Recommendation 37: The committee recommends that further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.

Failure to address these matters in the Sex Discrimination Amendment (Sexual orientation, gender identity and Intersex Status) Bill 2013 or through the introduction of consolidated Commonwealth human rights and anti-discrimination legislation has the effect of providing lesser protections for those with the protected attributes the Bill is designed to cover.

The current approach retains the complexity and confusion arising from different discrimination laws and does nothing to address inconsistencies in the level of protection for different vulnerable groups within the community. It retains the patchwork approach criticised by many during the 2008 review of the SDA and limits the scope of protection required under international law.

To address these anomalies, it is recommended that the remaining recommendations arising from the 2008 review be addressed as part of the Sex Discrimination Amendment (Sexual orientation, gender identity and Intersex Status) Bill.

Recommendation 1

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 incorporate all remaining amendments arising from the 2008 Senate Committee on Legal and Constitutional Affairs report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality

Preamble and Objects provisions

The proposed amendments—clauses 2 and 3 of the Amendment Bill—to the Preamble and Objects provisions of the SDA reflect the intention to broaden the coverage of the SDA to encompass prohibition of discrimination on the basis of sexual orientation, gender identity and intersex status. I support these amendments.

However, the Preamble and subsections 3(b), 3(ba) and 3(c) of the Objects clause continue to qualify the commitment to eliminate discrimination by virtue of the inclusion of the phrase ‘as far as possible’.

The effect of this phrase is to qualify the commitment to eliminating discrimination, harassment and related conduct against those persons with attributes protected under the Act, including those who seek protection on the basis of sexual orientation, gender identity or intersex.

Removal of this phrase would send a strong message of support for the rights of those in the LGBTI communities, including a ‘no tolerance’ approach to discrimination and harassment wherever it occurs.

Recommendation 2

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 include a clause to remove the phrase ‘so far as possible’ from the Preamble and Objects provisions of the Sex Discrimination Act 1984.

Interpretation

Gender identity

Clause 6 of the Amendment Bill provides for the insertion of a definition of ‘gender identity’. The definition used is based on that contained in proposed amendments to the *Anti-Discrimination Act 1998* (Tas).

The approach taken in the Tasmanian legislation is based on defining gender identity in a way that does not incorporate binary notions of sex as either male or female. Binary constructs of sex and/or gender promote characterisation of individuals as either male or female and fail to recognise that there is a spectrum of biological sex or sexual characteristics and gender identity and sexual orientation.

The approach found in the Amendment Bill was originally adopted in the United States *Employment Non-Discrimination Bill of 2009* (US)¹, and has the advantage of not restricting gender identity to those who identify with a sex other than that assigned at birth.²

Recommendation 3

It is recommended that the Committee endorse the definition of gender identity proposed in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

Intersex status

Clause 7 of the Amendment Bill provides for the insertion of a definition of ‘intersex status’.

A person who is intersex is a person whose chromosomal, gonadal or anatomical sex is not exclusively ‘male’ or ‘female’. The Tasmanian Act will, when the amendments are enacted, separately define **intersex** as follows:

intersex means the status of having physical, hormonal or genetic features that are

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

This definition does not require consideration to be given to an intersex person’s gender identity or for an intersex person to identify as a particular sex in order for that person to be afforded protection from discrimination

Under the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, it is proposed that a definition along the lines of that included in the Tasmanian Bill be adopted. I support this approach. I note, however, that it is proposed to refer to ‘intersex status’ as distinct from ‘intersex’.

¹ *Employment Non-Discrimination Bill of 2009* (USA) cl 3(6).

² See Anna Chapman, *Protection from Discrimination on the Basis of Sexual Orientation or Sex and/or Gender Identity in Australia* (2010) 8.

Adopting its ordinary meaning, the *Macquarie Dictionary* defines 'status' to mean the following:³

1. condition, position or standing socially, professionally or otherwise.
2. the relative rank or social position of an individual or group.
3. the relative standing, position or condition of anything.
4. the state or condition of affairs.
5. the standing of a person before the law.

Use of this word has connotations of intersex being a socially determined and potentially transitory condition. This is at odds with the understanding of intersex as a description of a person's biological sexual characteristics. Just as it would be inappropriate to refer to a woman as being of or having female status or a man as being of or having male status, I am of the view that it is inappropriate to refer to someone who is intersex as being of or having 'intersex status'. A person is or is not intersex. This is how intersex people identify and how they describe themselves. As a consequence I submit it would be more appropriate to use the term 'intersex' by itself in the Amendment Bill.

Recommendation 4

It is recommended that the Committee support the inclusion of the proposed definition of 'intersex' in the draft Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, with the exception that reference to 'intersex status' be replaced with the word 'intersex' wherever it occurs.

Reference to woman

The Amendment Bill does not propose amendment to the meaning of 'potential pregnancy' in section 4B, or to section 7 (Discrimination on the grounds of pregnancy or potential pregnancy) or section 7AA (Discrimination on the ground of breastfeeding).

These sections retain reference to a 'woman' as the only category of person who can be discriminated against on the basis of the actions described therein.

However, transgender men and in some cases transsexual or intersex persons may also have the capacity to become pregnant and/or breastfeed depending on the exact nature of their biological sex characteristics and/or the extent of medical intervention.

As currently drafted, protection would not be provided to people in this situation.

To ensure discrimination on the basis of pregnancy, potential pregnancy or breastfeeding are also made unlawful in situations where a person is other than a 'woman' or are intersex, references to 'woman' should be reviewed throughout the SDA and replaced with reference to a person or persons as appropriate.

Recommendation 5

It is recommended that references to a 'woman' in the Sex Discrimination Act 1984 be reviewed and replaced with the word 'person' to ensure that full protection is provided on the basis of gender identity and intersex, to ensure that discrimination on the basis of pregnancy, potential pregnancy and breastfeeding are also extended to capture those of diverse gender identity or who are intersex.

³ *Macquarie Concise Dictionary* (3rd edition, 1998)

Meaning of discrimination

Clause 17 of the Amendment Bill proposes the insertion of provisions to make it unlawful to discriminate on the grounds of sexual orientation, gender identity and intersex.

I support this approach.

I note, however, that section 5 of the SDA retains the comparator requirement. As a consequence the test of direct discrimination on the grounds of the protected attribute is that the discriminator treats the aggrieved person less favourably than, 'in circumstances that are the same or are not materially different', the discriminator treats or would treat a person who does not possess the identified attribute. This approach is repeated in relation to the new protected attributes of sexual orientation, gender identity and intersex.

The use of a comparator has accorded the SDA undue complexity and the introduction of protection for persons of diverse sexual orientation or gender identity or who are intersex will add an additional layer of difficulty that may jeopardise the capacity of the legislation to afford comprehensive protection to all people to be covered by the Act.

To address this issue, it is recommended that the Amendment Bill be amended to remove the requirement for a comparator test and replace with wording proposed in clause 19(1) of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012. As a result the test would be whether a person treats or proposes to treat the aggrieved person unfavourably on the basis that the other person has a particular protected attribute.

The inclusion of this clearer definition of discrimination will simplify the SDA and more closely align Australia with internationally recognised definitions of discrimination.

The current drafting includes, in respect of the protection against indirect discrimination, protection against the discriminatory disadvantage that would flow from the implementation in the future of a proposed condition, requirement or practice (see, for example, proposed section 5A(2)) but does not provide protection in respect of proposed conduct that will be unfavourable to a person on the basis of a protected attribute. It is recommended that this be remedied in respect of all of the protections proposed in clause 17 (and existing protections).

It is also recommended that the definition of discrimination (in all of the proposed clauses and the existing clauses as required) be amended to ensure that it provides protection on the basis of past, future and imputed attributes and characteristics appertaining generally to attributes.

By way of example, these proposed changes would result in clause 5A being amended to read:

- 5A Discrimination on the ground of sexual orientation
- (1) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the aggrieved person's sexual orientation if, by reason of:

- (a) The aggrieved person's actual past, present or future sexual orientation; or
 - (b) The aggrieved person's imputed past, present or future sexual orientation; or
 - (c) A past, present or future characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or
 - (d) A past, present or future characteristic imputed to persons who have the same sexual orientation as the aggrieved person;
- alone or in combination with other attributes and/or characteristics of attributes, the discriminator treats or proposes to treat the aggrieved person unfavourably.

Recommendation 6

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) be amended to remove the requirement for a comparator test and replace with wording proposed in clause 19(1) of the Exposure Draft Human Rights and Anti-Discrimination Bill 2012, to enable the test of discrimination to be whether a person treats or proposes to treat the person unfavourably because the other person has a one or more of the protected attributes and/or characteristics of attributes identified for protection in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 and protected in the Sex Discrimination Act 1984.

Recommendation 7

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) be amended to provide protection for action that disadvantage persons on the basis of past, present, future and imputed attributes and characteristics.

Positive action

The Amendment Bill would be considerably strengthened by the inclusion of a requirement to promote positive action to respect of all protected attributes as a key measure to realising full and effective equality for people with those attributes.

The inclusion of positive duties to eliminate discrimination and promote equality would assist in addressing systemic discrimination and result in less reliance on addressing inequality through individuals using the complaints processes. This current reliance is a matter of ongoing concern as it places the bulk of the effort to achieve compliance on people who are often the most disadvantaged (hence their protection from discrimination).

Importantly it would also bring Commonwealth legislation into line with international best practice.

Principle 3 of the *Declaration of the Principles of Equality* provides that:⁴

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

Principle 11 similarly provides that:⁵

States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular States must

- (a) Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;
- (b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;
- (c) Promote equality in all relevant policies and programs;
- (d) Review all proposed legislation for its compatibility with the right to equality;
- (e) Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;
- (f) Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;
- (g) Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

The Tasmanian Act currently includes a provision that obliges all organisations to, *inter alia*, ‘take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct’.⁶ Organisations not complying with this requirement are liable for any contravention of the Act committed

⁴ The Equal Rights Trust, *Declaration of the Principles of Equality*, Principle 3.

⁵ The Equal Rights Trust, *Declaration of the Principles of Equality*, Principle 11.

⁶ *Anti-Discrimination Act 1998* (Tas) s 104(2).

by any of their members, officers, employees and agents.⁷ This goes some way to focus on the role of preventive action, but is not a sufficient positive duty provision to ensure proactive measures are taken as a matter of course.

The Victoria's *Equal Opportunity Act 2010* also contains a clear duty to accommodate and this represents an important shift to a more progressive policy approach.⁸ Section 15(2) of that Act provides that:

... a person must take reasonable and proportionate measures to eliminate [that] discrimination, sexual harassment or victimisation as far as possible

The inclusion of stand-alone positive duty provisions in the Amendment Bill would assist in reorienting efforts to promote the attainment of human rights from one in which duty holders have a responsibility not to discriminate, to one where there is a positive obligation to take steps to achieve equal opportunity.

Whilst the application of a positive duty provision to both public and private sectors may introduce additional requirements for some sectors, clarity around the action necessary to address discrimination in a systemic way will assist in promoting a clearer understanding of duties under anti-discrimination law and aid in a more transparent understanding of actions required across the community to promote equality.

It will also assist in shifting effort toward a more proactive and preventative approach to discrimination: one in which there is greater scrutiny of actions before they are implemented to minimise the potential for inadvertent discriminatory effects.

I note in this context that the Senate Standing Committee on Legal and Constitutional Affairs, in its report on the effectiveness of the (SDA), recommended that further consideration be given to amending the SDA to require that public sector organisations, employers, educational institutions and other service providers adopt positive measures to eliminate discrimination and promote gender equality.⁹

Recommendation 8

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) include provision for the introduction of a separate positive duty to take all reasonable steps to eliminate discrimination and other forms of conduct prohibited under the SDA.

⁷ *Anti-Discrimination Act 1998* (Tas) s 104(3).

⁸ *Equal Opportunity Act 2010* (Vic) Part 5.

⁹ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1994 in Eliminating Discrimination and Promoting Gender Equality* (2008) 164.

Application of the Act

Part II of the SDA acts to limit the scope of the protection/prohibition to particular areas of activity: accommodation; education; the provision of goods, services and facilities; the disposal of land; the activities of clubs; the administration of Commonwealth laws and programs; and requests for information.

This approach results in significant gaps in coverage under the Act and has the effect of providing a lower level of protection than provided for those with attributes protected under the *Racial Discrimination Act 1975*, which prevents discrimination on the basis of race in all areas of public life.

The introduction of an amendment to ensure that the SDA applies to all areas of public life should be drafted to ensure that it also amends provisions where coverage is currently limited, including in relation to volunteers, areas of activity covered in employment, limits placed through the definition of clubs, and the size of partnerships. Many of these restrictions are unnecessary and inconsistent with the commitments made by Australia under international law.

Recommendation 9

It is recommended that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) include provisions to amend Part II of the SDA to ensure that persons with protected attributes are provided with protection from discrimination in any area of public life and that amendments be made to ensure other limits on protection are removed where they are inconsistent with international obligations.

Intersex coverage in relationship status

Clause 28 of the Amendment Bill, for example, extends protection against discrimination in relation to the payment of a superannuation benefit. As currently drafted, the protection would be extended by inserting sexual orientation and relationship status. Protection is provided on the basis of ‘sex’ in the original Act. The failure to add gender identity and intersex as protected attributes in this context will mean that discrimination is permitted in the exercise of discretion in relation to the payment of a superannuation benefit to or in respect of a member of a superannuation fund on the basis that a person is intersex or on the basis of the gender identity of a person being either a member of the fund or another person to whom a member wants a benefit, etc, paid.

As the Act will act as a catalyst over time to recognition of intersex separately from male or female in relation to, for example, the recording of sex for administrative purposes, it is proposed that intersex be separately referred to in relation to all areas of the Bill where it is proposed to accord the same protection to either males or females and where reference is made to same sex or opposite sex marital or relationship status.

Similarly, wherever there is protection provided on the basis of sex in the SDA, protection should be afforded on the basis of gender identity.

Recommendation 10

It is recommended that provisions to amend the Sex Discrimination Act 1984 (Clth) to ensure that there is no discrimination between same-sex couples and opposite-sex couples include specific reference to couples where one or more of the partners are intersex. Further, where protection is provided in the Sex Discrimination Act 1984 (Clth) on the basis of sex, amendments should be made to extend the same protection to people who are intersex and on the basis of gender identity.

Exemptions

General limitations clause

The SDA contains a broad range of permanent exemptions (defences) that act to limit the protections provided against discrimination in a range of areas. These limitations will be extended to discrimination on the basis of the new attributes covered by the Amendment Bill.

I note in this context that the Senate Standing Committee on Legal and Constitutional Affairs, in its 2008 report on the effectiveness of the SDA, recommended that consideration be given to removing the existing permanent exemptions in section 30 and sections 34–43 of the SDA and replacing these with a general limitations clause.¹⁰

I am supportive of this approach and recommend that provisions be included in the Amendment Bill to give effect to this recommendation.

The approach adopted in the Amendment Bill to extend existing exemptions to the new attributes will ensure the continued disparity in protection against discrimination across Commonwealth anti-discrimination law. This retains a significant complicating factor and does not make transparent any coherent principle that is said to underlie all defences.

Should this approach not be favoured, I am of the view that a sunset provision be included in the SDA to ensure adequate scrutiny of all existing exemptions with a view to determining the appropriateness of their ongoing retention.

This approach would be consistent with the Australian Human Rights Commission's recommendation to the Senate Committee Inquiry into the *Sex Discrimination Act 1984* that all permanent exceptions be subject to a 3-year sunset clause.¹¹

This will ensure that exceptions remain relevant and reviewable and provision is made to enable them to be updated, amended or identified as no longer applicable as social attitudes and practices change.

It also has the advantage of ensuring that duty holders pro-actively consider whether or not their proposed actions are discriminatory and, if so, whether they are defensible in the particular circumstances.

Importantly the approach also provides the basis for assessing whether the proposed actions are the least discriminatory approach possible in the circumstances.

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1994 in Eliminating Discrimination and Promoting Gender Equality* (2008) recommendation 36.

¹¹ Australian Human Rights Commission, *Submission into the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) 151.

Recommendation 11

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) be amended to provide for a simplified and streamlined general limitations clause and all other exemptions be removed.

Recommendation 12

Should the current approach to permanent exemptions be retained, the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) should include a sunset provision along the lines of that recommended by the Australian Human Rights Commission to the Senate Committee Inquiry into the Sex Discrimination Act 1984 to ensure that the permanent exemptions contained in the SDA remain relevant and adopt the least discriminatory approach possible in the circumstances.

Specific exemptions

The application of specific exemptions to new attributes (sexual orientation, gender identity and intersex) reflects a policy decision to make some discriminatory practices defensible in some circumstances.

The inclusion of gender identity and sexual orientation within the list of attributes to the exemption in section 38 of the SDA, for example, has the capacity to provide an arguable defence for a range of discriminatory behaviours engaged in by religious bodies and educational institutions. It would provide an arguable defence to discrimination on the basis of sexual orientation in religious schools, for example.

Similarly section 37(d) of the SDA would provide an arguable defence for discrimination on the basis of sexual orientation, gender identity and/or intersex by religious bodies for any act or practice of a body established for religious purposes that conforms to the doctrines, tenets or beliefs of that religion. At the same time section 39 of the SDA would enable an arguable defence for a broad range of discrimination by voluntary bodies, including in relation to the provision of benefits, facilities or services.

Exemptions provided on the basis of sexual orientation, gender identity and/or intersex should be subject to public discussion and review prior to being included in the legislation. To include them now risks sending a clear message that discrimination on the basis of these attributes is something that will be tolerated in certain circumstances. This is at odds with the Commonwealth Government commitment to provide protection against discrimination on the basis of these characteristics and represents a substantial expansion of the change to the exemptions currently provided.

As a matter of principle, I am opposed to the Act providing industry or organisation-specific defences for discriminatory practices of whatever kind unless that protection can be fully justified. This is the benefit of a general limitations provision over the patchwork of exemptions that currently affords some organisational types and some industries a defence while others have none.

Should duty holders, including religious bodies, educational institutions or voluntary bodies wish to be exempt of the grounds of sexual orientation, gender identity or intersex, it may be more appropriate for them to rely on the temporary exemption provisions available under sections 44–46 of the SDA to do so or to show that the general limitation applies in all the circumstances.

Recommendation 13

That no extension of exceptions on the basis of new or existing attributes be included in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth).

Recommendation 14

That entities seeking to be relieved of their legal obligation not to discriminate on the basis of existing and new protected attributes be required to apply for a temporary exemption until a full review of the exceptions has been completed.

I also note that the way the exemptions are extended in the Amendment Bill does not appear to have regard for the particular circumstances and attributes. For example, clause 36 extends the defence/exemption for 'single sex' schools to schools conducted solely for students of 'a different sex' to the sex of the applicant. On the face of it, this would mean that people who are intersex could legitimately be excluded from admission to schools established for boys only and schools established for girls only, leaving them with less educational choices than others. It may also mean that people may legitimately be excluded from 'single-sex' schools on the basis of gender identity.

Similarly, clause 42 extends the defence/exemption for single-sex clubs to clubs whose membership is available to persons of a different sex only.

Recommendation 15

That exemptions that provide for single-sex activities be identified and either removed or amended to ensure that people who are intersex are not excluded from opportunities to participate, etc, and that people are not excluded from opportunities to participate, etc, on the basis of gender identity.

Validity of state and territory laws

I am concerned that the expansion of existing exemptions may threatens the validity of decisions made under the Tasmanian Act where the terms of the exception are narrower than proposed in the Amendment Bill.

Section 27(1)(a) of the Tasmanian Act provides for an exception based on gender in relation to religious institutions if it is required by the doctrines of the religion or institution and section 27(1)(b) acts to allow discrimination in education on the basis of gender if it is for the purpose of enrolment in a one-gender school or hostel. Additionally, section 42 allows for discrimination on the basis of race in relation to places of cultural or religious significance if the discrimination is in accordance with the customs of the culture or the doctrines of the religion and it is necessary to avoid offending the cultural and religious sensitivities of any person of the culture or religion. Sections 51 and 52 of the Tasmanian Act provide exceptions to unlawful discrimination on the basis of religious belief, affiliation or activity in on the following terms:

51. Employment based on religion

- (1) A person may discriminate against another person on the grounds of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.
- (2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the

tenets, beliefs, teaching, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

52. Participation in religious observance

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to –

- (a) the ordination and appointment of a priest; or
- (b) the training and education of any person seeking ordination or appointment as a priest; or
- (c) the selection or appointment of a person to participate in any religious observance or practice; or
- (d) any other act that –
 - (i) is carried out in accordance with the doctrine of a particular religion; and
 - (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.

Amendments to the Tasmanian Act were introduced into the Tasmanian Parliament in November 2012 to enable a school or school system conducted in accordance with tenets, beliefs, teachings, principles or practices of a particular religion to apply for an exemption from the provisions of the Tasmanian Act relating to protection from discrimination in education on the basis of religious belief, religious affiliation or religious activity. The amendments provided that a faith-based school facing more demand for admission places than it had places available would be able to apply for an exemption from the operation of those provisions to permit it to give preference to children of that faith. This amendment was rejected by the Tasmanian Parliament, in part because of the reluctance to introduce further exceptions to unlawful discrimination in education into the Tasmanian Act.

Importantly the proposed exemption for faith-based schools and school systems was cast to ensure that discriminatory conduct on the basis of any characteristic other than religious belief, affiliation or activity was expressly avoided. In part this was to address the concerns of the LGBTI community about discrimination on the basis of sexual orientation and gender identity.

The exceptions provided to religious bodies in Tasmania achieves an appropriate balance between the protection of freedom of religion and the right to equality and freedom from discrimination. The provision of exceptions to religious bodies that permit discrimination on bases other than religious belief or affiliation has the capacity to create a 'hierarchy of protected attributes' and a privileging of certain duty holders over others in which some sectors of society are seen to be predominantly outside the workings of anti-discrimination law. I do not believe that this approach is justified or proportionate in the circumstances and consider that the nature of the current exceptions should be fully evaluated prior to providing any further basis for exception in the Act.

Should the terms of the exception become law, a complaint based on discrimination in a faith-based school on the basis of sexual orientation which could be considered under the Tasmanian Act would be expressly excluded by virtue of the operation of section 38 of the SDA should it be amended to reflect the protected attributes covered by the Amendment Bill.

This approach is at odds with the right of states and territories to make laws where the Commonwealth does not have exclusive legislative power under the Australian

Constitution. In this regard, matters related to the regulation of religions and educational facilities remain the responsibility of state and territory governments and are not an area in which Commonwealth law should prevail.

Recommendation 16

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) clearly state that any broader exemptions in the legislation are not intended to interfere with protections against discrimination under state or territory anti-discrimination laws.

Application of the religious exception to aged care

Discrimination in the provision of Commonwealth-funded aged care is not prevented by the Amendment Bill.

Commonwealth funds are used by a range of organisations, including religious bodies, to provide an extensive range services and programs for the aged and there would appear to be little justification for not excluding these activities in the exemptions provided to religious and other voluntary bodies.

Recommendation 17

That all Commonwealth-funded services, programs and activities, including the provision of aged-care services be excluded from the scope of the exemption provided to religious and voluntary bodies.

Equality before the law

Section 10 of the *Racial Discrimination Act 1975* (Cth) (RDA) makes provision for equality before the law for peoples of all races.

There is no equivalent of section 10 of the *Racial Discrimination Act 1975* (Cth) (RDA) in any other Commonwealth, state or territory legislation. Section 10 operates by modifying any law of the Commonwealth, state or territories that denies or limits the rights of people of a particular race, colour or national or ethnic origin.

Extension of the right to equality before the law on the basis of sex, sexual orientation, gender identity or intersex would not appear to have significant ramifications and would be consistent with Australia's international human rights obligations in regard to equality.

Equality before the law is a fundamental human right under the *International Covenant on Civil and Political Rights*. And the inclusion of 'equality before the law' provisions would assist in protecting rights in this area.

As a consequence I recommend that equality before the law provisions be included to cover all protected attributes, with exemption mechanisms used as the basis where the operation of the provision would have adverse effect.

Recommendation 18

That the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Clth) include a statement that all human beings are equal before the law and have the right to equal protection and benefit of the law and include 'equality before the law provisions' in the substantive body of the Bill.