



26 April 2013

Ms Julie Dennett
Committee Secretary
The Senate Standing Committee on Legal and Constitutional Affairs
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Dear Ms Dennett

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

Thank you for the opportunity to provide a submission to the parliamentary inquiry in relation to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*.

The Commission notes that the terms of reference for this inquiry are confined to the provisions of the Bill, and this submission is confined accordingly.

The Commission strongly supports the objectives of the Bill of:

- extending the protection from discrimination to the new grounds of sexual orientation, gender identity and intersex status; and
- extending the existing ground of 'marital status' to 'marital or relationship status' to provide protection from discrimination for same-sex couples.

Definitions

The Bill provides the following definitions in relation to the new and extended grounds:

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

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

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

sexual orientation means a person's sexual orientation towards:

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.

marital or relationship status means a person's status of being any of the following:

- (a) single;
- (b) married
- (c) married, but living separately and apart from his or her spouse;
- (d) divorced;
- (e) the de facto partner of another person;
- (f) the de facto partner of another person, but living separately and apart from that other person;
- (g) the former de facto partner of another person;
- (h) the surviving spouse or de facto partner of a person who has died.

surviving spouse or de facto partner of a person who has died means a person who was the person's spouse or de facto partner immediately before the person died.

The Commission welcomes the inclusion of intersex status as a separate attribute, defined so that it is not limited to intersex people who elect to live as male or female, as recommended by the Australian Council of Human Rights Agencies (ACHRA) in the joint submission on the Exposure Draft of the consolidation Bill.

Whilst acknowledging there are differing views as to how gender identity and sexual orientation should be expressed and defined, the Commission supports the definitions of gender identity, sexual orientation and marital or relationship status as provided in the Bill. The definitions in the Bill recognise that a person may be, or identify as, neither male nor female.

The three new definitions of discrimination, on the new grounds of sexual orientation, gender identity and intersex status, are modelled on the existing definition of discrimination on the ground of marital status. (The definitions for all the grounds are essentially the same, except for the ground of family responsibilities which is limited to 'direct' discrimination only.)

For 'direct' discrimination, this means there is still a comparator test. It also means that whilst the definition includes a characteristic that generally appertains or is imputed to a person with the attribute, the extensions contemplated by the draft consolidated Bill have not been included. In Queensland, the extended meaning of a protected attribute also includes an attribute a person is presumed to have had at any time and an attribute had previously.¹

The Commission supports removal of the comparator element from the definition of direct discrimination on the grounds of the protected attributes, and extending the meaning of a protected attribute to include a presumed attribute and past attribute.

Areas

The Bill provides that the three new grounds are protected in all the areas of work as well as all other areas currently covered by the Act.

For superannuation however, only the new ground of sexual orientation is added to the current protection. This means that the protection from discrimination in superannuation is limited to the grounds of sex, marital or relationship status and sexual orientation.

The Explanatory Memorandum states that this amendment is to ensure there is no discrimination between same-sex de facto couples and opposite-sex de facto couples in relation to the payment of a superannuation benefit, consistent with the same-sex reforms in 2008.

In relation to the areas of education and club membership, the amendments in the Bill would allow discrimination:

- in admission as a student at an educational institution conducted solely for students of a different sex from the sex of the applicant; and
- on the ground of sex if membership of a club is available to persons of a different sex only.

Generally schools and clubs that have the benefit of the current exceptions are conducted for either males or females. Therefore these schools would be conducted for students, and the clubs available to people, of a 'different sex' from people who are of indeterminate sex.

This would allow people who are, or identify as, neither male nor female, to be excluded from admission as a student at single sex educational institutions and membership of single sex clubs, even if they identify as having the sex of the school or club.

¹ See *Anti-Discrimination Act 1991* (Qld), section 8

It is also foreseeable that a school or club might argue that a trans-gender person, or a person with the attribute of gender identity, is not of the same sex as, or is of a 'different sex' to, the sex for which the school is conducted or to which membership of the club is available.

It is not clear whether this was the intention of the Bill. The Explanatory Memorandum states that the amendments to the exceptions for single sex education and club membership 'will ensure these provisions are consistent with the introduction of protections for gender identity and intersex status, which recognise that a person may be, or identify as, neither male nor female'.

The Commission considers that, at a minimum, people who identify as either male or female should be protected from exclusion from admission to an educational institution conducted for students, or a club available to persons, of the sex or gender with which the person with the attribute identifies. Consideration should be given to clarifying policy in relation to whether people who do not identify as either male or female should be protected from exclusion from single sex clubs or schools.

The Commission recommends the protection of people with the attributes of gender identity or intersex status be clarified by changing the proposed amendments to sections 21(3) (education) and 25(3) (clubs). The problems seem to stem from use of the word 'sex' without a reference to gender. Further consideration should be given to referring to 'different sex' in these and other paragraphs of the Bill.

Exemptions

The Bill extends existing exemptions:

- for religious schools – to the new grounds of sexual orientation and gender identity, and the amended ground of marital or relationship status;
- for voluntary bodies – to the new grounds of sexual orientation, gender identity and intersex status, and the amended ground of marital or relationship status;
- for new and existing superannuation fund conditions – to same-sex de facto couples, through the amended ground of marital or relationship status; and
- for sport – to allow discrimination on the ground of sex and the new grounds of gender identity and intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

Two new exemptions apply for the three new grounds of sexual orientation, gender identity and intersex status, to acts done in direct compliance with:

- the *Marriage Act 1961*; and
- a law of the Commonwealth, State or Territory prescribed by the regulations for the purpose of the section.

The Commission urges the Government to improve substantive equality for everyone regardless of their sexual orientation by amending the *Marriage Act* to allow for marriage between people of the same sex.

However, without amendment of the *Marriage Act* this new exemption is arguably necessary to protect marriage celebrants and registers of births, deaths and marriages.

Record keeping and requests for information

The Bill provides for new exemptions for requesting information and keeping records. It will not be unlawful to request information that does not allow for a person to identify as being neither male nor female, and it will not be unlawful to keep records in a way that does not provide for a person to be identified as being neither male nor female.

According to the Explanatory Memorandum the rationale for these new exemptions is to ensure there is no requirement to amend forms, because this might be onerous for organisations. It also states that the need for these exemptions may be reconsidered in the future if organisations have revised their data collection and record keeping practices.

It is noted that the Government is currently developing guidelines on gender recognition for departments and agencies. The consultation draft of the Australian Government Guidelines on the Recognition of Gender released for comment in March 2013 provides, at paragraph 17:

Where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).

This classification is consistent with the passport policy for sex and gender diverse applicants announced in 2011.

The Commission acknowledges that an exemption of this nature may be necessary to minimise the regulatory impact of the new protections in the Bill. However, the Commission considers the proposed exemption should apply for a limited time only so as to allow both the public and the private sector to introduce changes to record keeping and information request over a period of time. The Commission recommends the proposed exemption provide that it applies for a specific period of time, such as one or two years from commencement.

Conclusion

The Commission recommends:

1. Changing the proposed amendments to sections 21(3) (education) and 25(3) (clubs);
2. Reviewing the expression 'different sex' where it is proposed in the Bill; and
3. Limiting the new exemption for record keeping and requests for information for a specified period from commencement.

The Commission strongly supports extending protections from discrimination to the new grounds of sexual orientation, gender identity and intersex status, and the amended ground of marital and relationship status.

Yours sincerely

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Anti-Discrimination Commissioner