

Senate Standing Committee on Legal and Constitutional Affairs

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

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION

Introduction

The Attorney-General's Department is pleased to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to its inquiry into the provisions of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill).

The Department notes the Committee has indicated that:

In light of its recent broad-ranging inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (the HRAD Bill), the Committee will not be focussing on issues which go beyond the scope of the Bill.

The Government is considering the Committee's recommendations and the submissions provided to its inquiry into the HRAD Bill, with this Bill proceeding in the interim to introduce protections against discrimination on the basis of sexual orientation, gender identity and intersex status.

The Department notes that many submissions have referred to the HRAD Bill. In light of the Attorney-General's announcement and the Committee's position above, this submission does not address any of those issues. It also does not address any issues relating to broader reform of the *Sex Discrimination Act 1984* (SDA).

This submission seeks to address the main issues raised about the Bill in submissions made to the Committee (as published on the Committee's website by 26 April 2013). The Department appreciates the short extension granted by the Committee to enable this to occur. This submission addresses the following issues:

- harassment on the basis of sexual orientation, gender identity and intersex status
- religious exemptions (item 50 of Schedule 1 to the Bill; current sections 37 and 38 of the SDA)
- the exemption for conduct in direct compliance with other laws (item 52)
- the exemption for data collection (item 60), and
- a Commissioner responsible for sexual orientation, gender identity and intersex status.

Harassment on the grounds of sexual orientation, gender identity and intersex status

Some submissions have called for explicit protections for harassment on the grounds of the new attributes of sexual orientation, gender identity and intersex status. The SDA explicitly prohibits sexual harassment (Division 3 of Part II) but does not explicitly refer to harassment

on the basis of any of the attributes protected by the Act (sex, marital status, pregnancy or potential pregnancy, breastfeeding or family responsibilities).

Case law has found that harassing conduct can constitute discrimination.¹ The absence of explicit clarification in the Bill is not intended to mean that the harassment on these attributes amounting to discrimination is not prohibited. To include such clarification in the SDA but not in the other existing anti-discrimination Acts could create further inconsistencies between the Acts.

Religious exemptions

Section 37 of the SDA provides an exemption for religious bodies for conduct related to the appointment or training of priests or other religious office holders or members. It also exempts other conduct done in accordance with the doctrines of that religion or to avoid injury to the religious susceptibilities of adherents of that religion.

Section 37 applies to all attributes in the SDA. Accordingly, while section 37 of the SDA is not amended by the Bill, it will, by its operation, apply to the new attributes of sexual orientation, gender identity and intersex status. It already applies to the attribute of marital relationship and will equally apply to the extended attribute of marital or relationship status.

Section 38 of the SDA provides exemptions for employment, engagement of contract workers and provision of education or training by religious educational institutions. It only applies to the attributes listed in the exemptions, as follows:

- the exemptions for employment and engagement of contract workers apply to sex, marital status and pregnancy (subsections 38(1) and (2)), and
- the exemption for the provision of education and training applies to marital status or pregnancy (subsection 38(3)).

Item 50 of Schedule 1 to the Bill amends section 38 of the SDA to apply all exemptions for religious educational institutions to sexual orientation and gender identity and preserve the exemptions for marital or relationship status. It does not apply the exemptions to intersex status.

Application to intersex status

A number of submissions queried why the exemption in section 37 applies to intersex status, given its exclusion from section 38. As noted in the Explanatory Memorandum to the Bill, intersex status is not included in section 38 because ‘the Government has not been informed of any religious doctrines which require discrimination on the ground of intersex status’.

The Bill does not seek to amend section 37. This is a result of the structure of section 37, which is an exemption of general application applying to all attributes covered by the SDA. This can be contrasted with section 38, which required specific consideration of which of the new attributes it should apply to.

¹ For further information, see Rees, Lindsay and Rice, *Australian anti-discrimination law* (2008), pp277-8 and 524-5.

The general exception in paragraph 37(d) only applies to conduct which ‘conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion’. It is, by its terms, limited in application to attributes to which there are doctrinal reasons or religious susceptibilities justifying the conduct. As noted above, the Government has not been informed of any religious doctrines which require discrimination on the ground of intersex status, which would have the effect that the exemption, in practical terms, would not excuse otherwise discriminatory conduct.

Commonwealth-funded aged care services

The HRAD Bill contained a qualification on the general religious exemption, providing that it did not apply to the provision of Commonwealth-funded aged care services (clause 33(3) of the HRAD Bill).

The intention of this Bill is to introduce protections for sexual orientation and gender identity as a first stage of reforms, but to otherwise maintain the existing overall structure of the SDA, including the exemptions. For this reason, the aged care qualification was not introduced into the SDA. The Government is considering whether and how such a qualification could be introduced into existing anti-discrimination law as part of this Bill, or whether this issue is best considered as part of the broader HRAD Bill.

The issue of how the existing exemptions for religious bodies should be formulated requires finding the right balance between freedom of religion and freedom from discrimination. Any changes to the structure of the religious exemptions will be considered carefully as one of the broader issues in finalising the HRAD Bill.

Exemption for data collection

Item 60 of Schedule 1 to the Bill inserts a new exemption for requests for information and keeping of records that do not allow for identification as being neither male nor female. The exemption provides that it is not unlawful discrimination to request information, or make or keep records, in a way that does not allow for a person to be identified as being neither male nor female.

This ensures that the new protections for gender identity and intersex status do not require a person or organisation to provide an alternative to male and female in any data collection or personal record. This will ensure there is no requirement to amend forms, records or data collection practices as part of the new protections as to do so would impose a regulatory burden on organisations.

Some submissions have argued that this exemption should be covered by a sunset clause. The inclusion of a sunset clause on the exemption would have the effect of requiring such changes to be made, while providing a grace period in which to do so. The Government has not yet assessed any potential regulatory impact of such a change, even with a grace period. Accordingly, it has made a policy decision to include the exemption to ensure that the Bill does not have this effect.

Some submissions have suggested that the inclusion, in the draft Australian Government Guidelines on the Recognition of Sex and Gender (the draft Guidelines), of a timeline which would seek to have all government agencies comply with the draft Guidelines by 1 July 2016, supports a similar sunset clause being attached to proposed new section 43A. However, the draft Guidelines, if adopted, will only to Commonwealth Government agencies, not State or

Territory agencies or the private sector, and do not include an enforceable complaints mechanism if the draft Guidelines are not complied with. Including a sunset clause in the Bill could have a significantly greater regulatory impact.

The need for this exemption may be able to be reconsidered in the future. Providing the consultation process on the draft Guidelines results in them being adopted, the Government's experiences on implementation of the draft Guidelines will be useful in determining what the regulatory impact of such a requirement might be.

Exemptions for conduct in direct compliance with other laws

Conduct done in compliance with the Marriage Act

The Bill does not seek to alter the current law on same-sex marriage. Proposed new subsection 40(2A) ensures this is the case.

Regulation-making power

Item 52 of Schedule 1 to the Bill also proposes to insert a new exemption for conduct done in direct compliance with a prescribed law of the Commonwealth, or a State or Territory. The exemption will only apply to discrimination on basis of the new grounds of sexual orientation, gender identity and intersex status.

This exemption recognises that there may be laws which appropriately make distinctions on these grounds, while also recognising there is insufficient time to identify all such laws in the development of this Bill. The mechanism of providing a regulation-making power to identify such laws reflects an existing exemption in the *Disability Discrimination Act 1992* (subsection 47(2)) and the approach taken in the HRAD Bill (clause 30).

Any laws to utilise this exemption will be prescribed by regulation and will therefore be subject to Parliamentary scrutiny, including the requirement for a Statement of Compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Government considers this approach strikes the right balance between the flexibility to protect the operation of laws which appropriately make distinctions on these grounds, or which might be matters which are the responsibility of the States and Territories, and accountability to the Commonwealth Parliament.

The Government has not made any decisions regarding the prescription of laws under this provision. Initial consideration of laws will be done prior to commencement in consultation with State and Territory governments.

State and Territory laws relating to change of sex

Some submissions have raised that the Bill does not amend the existing exemption in subsection 40(5) of the SDA, which provides that:

- (5) Nothing in Division 2 renders it unlawful to refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married.

The Government considers the legal recognition of sex is the responsibility of the States and Territories. It does not intend to remove subsection 40(5) from the SDA at this time.

It has been specifically raised that this exemption was not replicated in the draft HRAD Bill. While it was not included on the face of that Bill, clause 30 provided a regulation-making power to ensure conduct necessary to comply with prescribed State and Territory laws would not be unlawful. This approach was taken in order to keep the HRAD Bill itself as simple as possible. It would have been open to the Government, under this clause, to prescribe State and Territory births, deaths and marriage laws, to preserve the effect of subsection 40(5) of the SDA. It is therefore not correct to necessarily conclude that the effect of subsection 40(5) would not have been preserved under the HRAD Bill.

The Australian Government recognises that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or an indeterminate sex and/or gender. To the extent this is a matter for the Australian Government, it is taking steps to ensure that this should be recognised and reflected in personal records held by Australian Government departments and agencies, by consulting on the draft Australian Government Guidelines on the Recognition of Sex and Gender.

Commissioner responsible for sexual orientation, gender identity and intersex status

The Bill does not establish a new Commissioner for the new protected attributes of sexual orientation, gender identity or intersex status. This Bill does not include a Budget proposal for any new resources for a new Commissioner.

The Bill provides the Commission with functions relating to the new attributes. As with all of its responsibilities, how it apportions responsibility for these functions is a matter for the Commission. There is no legal requirement that the Sex Discrimination Commissioner have responsibility for all of the attributes covered by the SDA.

The Government does not propose to interfere with the Commission's independence in this regard by requiring a particular Commissioner, whether the President or anyone else, to take responsibility for sexual orientation, gender identity and intersex status matters.