

Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*

NSW Government Submission

May 2013

Introduction

The NSW Government is concerned about the impact of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (**SDA Bill**) on the effectiveness of NSW laws.

In particular, the NSW Government is concerned about the following issues:

- The impact of the expansion of protected attributes on the validity and practical operation of NSW anti-discrimination laws,
- There has been inadequate consultation on the proposal that intersex status be a protected attribute, and
- The impact of Commonwealth regulation in this area on the validity and practical operation of other NSW laws, particularly where an act that is authorised or permitted under NSW laws may be unlawful discrimination under Commonwealth laws.

Recommendations

The NSW Government makes the following recommendations in relation to the SDA Bill:

- A. The Bill should preserve the operation of existing exemptions that apply to the protected attributes under the NSW *Anti-Discrimination Act 1977* (**NSW ADA**),
- B. Further consultation is needed about the proposal that intersex status be a protected attribute, and
- C. The Bill should include a general exemption for State and Territory laws that require, authorise or permit discriminatory conduct on the newly prescribed grounds, including relationship status.

Impact of the SDA Bill on NSW anti-discrimination laws

Under section 109 of the Australian Constitution, where State and Commonwealth laws are inconsistent, the Commonwealth law prevails to the extent of any inconsistency, acting to invalidate part or all of the State law. Inconsistency under section 109 can occur where a Commonwealth law is intended to comprehensively regulate a particular area, where a State law removes a right conferred by a Commonwealth law, or where simultaneous compliance with a State law and a Commonwealth law is not possible.

In this way, where Commonwealth and State anti-discrimination laws protect the same or similar attributes but the State laws provide for wider or different exemptions, the State laws may be inconsistent with the Commonwealth law. This creates a risk of the relevant provisions of the State laws being constitutionally invalid. Whether inconsistency arises is a matter of statutory interpretation, although express statements of a legislative intention not to exclude or limit the concurrent operation of certain State laws will assist in the process of statutory interpretation.¹

¹ *Momcilovic v The Queen* [2011] HCA 34 at [266] – [272]

Homosexuality, transgender status and marital or domestic status are protected attributes under the NSW ADA, meaning discrimination on these grounds is already unlawful in NSW except in prescribed circumstances. The SDA Bill would increase the degree of overlap between NSW and Commonwealth anti-discrimination laws by establishing overlapping protected attributes for sexual orientation, gender identity and relationship status. This increased overlap increases the potential for section 109 inconsistency.

Of particular concern is that the SDA Bill will extend existing inconsistencies between the Commonwealth's *Sex Discrimination Act 1984* (**SDA**) and NSW anti-discrimination laws in relation to exemptions for religious bodies and educational institutions. If the Bill is passed in its current form, the SDA's existing religious exceptions will apply to the newly protected attributes of sexual orientation, gender identity, relationship status and intersex status. The SDA's existing exceptions for educational institutions established for religious purposes will not apply to the new protected attribute of intersex status but will apply to the other newly protected attributes. These exemptions are narrower than the equivalent exemptions in the NSW ADA in the following ways:

- The SDA limits the exemption for appointments by religious bodies to appointment of people to perform religious duties.² However, under the NSW ADA the exemption extends to the appointment of any person in *any* capacity by a religious body.³
- Under the SDA the exemption for religious educational institutions applies to employment of staff, contract work and provision of education training (ie. against students or potential students).⁴ However, under the NSW ADA the exemption for educational authorities applies to 'private', rather than 'religious' educational authorities, so that a wider range of organisations are exempt from the law.⁵
- The NSW ADA includes a specific exemption for provision of adoption services by faith-based organisations (which applies in relation to the attributes of transgender status and homosexuality).⁶ This exemption is not replicated in the SDA Bill.
- No exemptions apply under the NSW ADA with respect to intersex status as it is not a protected attribute.

Anomalies in the proposed amendments to the existing exemptions under the SDA are a further concern. For example, section 35(1) provides that it is not unlawful to discriminate against another person on the grounds of their sex in connection with a position as an employee or contract worker where the duties involve care of a child in that child's home. If the Bill is enacted in its current form discrimination against somebody based on sexual orientation, gender identity or intersex status in the same circumstances would be unlawful. This suggests that further examination and consultation is needed about the operation and scope of the exemptions.

In this way, the SDA Bill will, if enacted in its current form, intensify existing issues affecting potential constitutional inconsistency between NSW and Commonwealth anti-discrimination laws. This will be particularly problematic if the exemptions that apply under Commonwealth laws lead to anomalous results such as those outlined above.

² Section 37 of the *Sex Discrimination Act 1984* (Cth) (**SDA**)

³ Section 56(d) of the *Anti-Discrimination Act 1977* (NSW) (**ADA**)

⁴ Section 38 of the SDA

⁵ See for example section 49ZH(3)(d) of the ADA

⁶ Section 59A of the ADA

The differences between the exemptions will also erode the practical utility of the NSW exemptions, as if the Bill is enacted in its current form, complainants in NSW will be able to avoid the NSW exemptions by lodging their complaint under the SDA.

Existing section 10 of the SDA is unlikely to cure any direct inconsistency between the SDA and State and Territory anti-discrimination laws. A better mechanism to ensure the validity of State and Territory laws would be to insert a provision similar to section 351 of the *Fair Work Act 2009* (Cth) in the SDA. Section 351 of the Fair Work Act provides for an exemption for action that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken.' As section 54 of the NSW ADA provides an exemption for acts done under statutory authority, this would also help to address the impacts of the Bill on other NSW laws considered below.

Impact of the SDA Bill on other NSW laws and activities

The issue of constitutional inconsistency can also arise for other laws of a State. There are circumstances where State laws require discrimination in relation to attributes protected by the Bill.

A particular concern is that some requirements of the *Births, Deaths and Marriages Act 1985* (NSW) (**BDMA**) may be inconsistent with the SDA if the Bill is enacted in its current form. For example, to register a change of sex under the BDMA a person must not be married, because this is currently a requirement of the Commonwealth *Marriage Act 1961*. This could be inconsistent with the prohibition on discrimination on the basis of marital or relationship status. A further requirement is that the person has undergone a 'sex affirmation procedure' (ie a surgical procedure),⁷ which could be inconsistent with the Bill's definition of gender identity.⁸ Discrimination on the grounds of transgender status is not unlawful under the NSW ADA due to the exemption under section 54 of the NSW ADA for acts done under statutory authority.

The practical implications for the registration of births, deaths and marriage registers in each State and Territory also need to be further considered. For example replacement by the SDA Bill of the concept of 'widowed' with 'surviving spouse or de facto partner' may require changes to the system configurations for the registration systems in each State and Territory. If comprehensive exemptions are not provided, the need for transitional provisions to allow time for systems to be reconfigured should be therefore considered.

While these examples highlight some of the potential issues, it has not been possible to comprehensively identify the range of NSW laws that may legitimately require discrimination regarding the new protected attributes in the limited time provided.

In particular, insufficient time has been provided to assess the regulatory implications of the introduction of 'intersex status' as a protected attribute. It was not included as a protected attribute in the *Human Rights and Anti-Discrimination Bill 2012*. This aspect of the Bill has therefore not been subject to the same level of consultation as has occurred in relation to the other protected attributes proposed.

⁷ Section 32B of the *Births, Deaths and Marriages Act 1995* (NSW)

⁸ Discrimination on the grounds of transgender is not unlawful under the NSW ADA due to the exemption under section 54 of the NSW ADA for Acts done under statutory authority.

Addressing the impact on State and Territory laws

The SDA Bill would introduce an exemption for discrimination on the grounds of sexual orientation, gender identity and intersex status where done in 'direct compliance' with a law of a State or Territory that is prescribed by regulation. There is no corresponding ability to exempt laws by regulation with respect to relationship status.

It is crucial that the SDA Bill provides for exemptions which preserve the operation of State and Territory laws. However, there are a number of limitations to the effectiveness of the exemption proposed.

Prescribing exempt State and Territory legislation by Commonwealth regulation would require an onerous task, first to identify and then to keep up-to-date, all State laws that should be prescribed. The experience of the *Disability Discrimination Act 1992* (Cth), in which a similar provision is included, suggests that the regulation would be under-utilised and would not adequately reflect State laws that legitimately discriminate.

Relying on Commonwealth regulation to prescribe exempt NSW legislation would effectively cede to the Commonwealth the final say on the validity of NSW legislation that authorises or requires conduct that may be discriminatory under the Bill. State and Territory Parliaments are democratically elected and, as such, legitimately determine the content of their own legislation. They should be able to determine that specific kinds of discriminatory conduct are required for purposes determined by the legislature.

Additionally, in a practical sense, State and Territory governments are the primary government providers of major service sectors, including health, education and transport. Given the Commonwealth Government's more limited role in these areas, it is appropriate that, where embodied in legislation, State and Territory governments should be left to determine the appropriate policy for the delivery of such services.

In addition, providing for an exemption for acts done 'in direct compliance' with a law may have limited utility in preserving exemptions under State and Territory anti-discrimination law or other laws that legitimately permit discriminatory conduct. The phrase 'in direct compliance with' has been interpreted to mean actions that are required under law.⁹ This potentially excludes acts permitted but not required by a State or Territory law. The scope of the exemption should be such as to preserve those State and Territory laws that the legislature has determined legitimately prescribe or permit specific kinds of discriminatory conduct. Care would be needed in framing such an exemption to ensure that other laws are not captured by the exemption. In particular, it would not be appropriate for wide discretionary powers that could be exercised in an arbitrarily discriminatory way to be within the scope of any exemption.

In light of the above, it is recommended that the Bill should include a general exemption for State and Territory laws that require discriminatory conduct on the newly prescribed grounds, including relationship status. State and Territory laws that authorise or permit

⁹ In *Keech v State of Western Australia Metropolitan Health Service trading as King Edward Memorial Hospital* [2010] FCA 1332 Justice Siopis noted at paragraph 44 that the 'direct compliance' is 'conduct which is actuated by an obligation which is directly imposed upon a party by the provisions of a statute or other nominated statutory instrument.'

discriminatory conduct on legitimate grounds should also be exempt, noting that care would be needed in framing this wider class of exemption. An alternative, though less preferable approach, could be to exempt actions that accord with certain categories of State or Territory law.

Information requests and the keeping of records

The proposed new exemption for requests of information and the keeping of records is supported as it will reduce the regulatory impact of the reforms on business.

The work underway by the Commonwealth Government to develop guidelines on gender recognition for Commonwealth departments and agencies noted in the Explanatory Memorandum for the SDA Bill is also supported. Changes to current practices will be particularly important for Commonwealth agencies with a data collection and reporting role such as the Australian Bureau of Statistics. Currently, evaluation of gender issues is hampered by a lack of available data disaggregated by sexuality or sexual orientation. Women NSW has previously received representations about this issue following the publication of *Women in NSW 2012*. This report, which is intended to be an annual report on the status of women in NSW, examines more than 60 key indicators to evaluate gender equality and gender difference in NSW and aims to strengthen gender-related data collection and analysis.