



Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
CANBERRA ACT 2600

BY EMAIL: legcon.sen@apg.gov.au

Dear Sir / Madam,

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

The following submission is presented by the Anti-Discrimination Board of NSW (the **Board**) in response to the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the **Bill**).

The Bill seeks to amend the *Sex Discrimination Act 1984 (SDA)* to extend protection from discrimination to the new grounds of sexual orientation, gender identity and intersex status. It also seeks to extend the existing ground of 'marital status' to 'marital or relationship status' to provide discrimination protection for same-sex de-facto couples.

The Board supports the addition of these new grounds and the extension of protection to same-sex de-facto couples, and recognises that these legislative changes constitute an important step towards removing discrimination against same-sex couples and sex and gender diverse people in Australian society.

In particular, the Board welcomes the addition of intersex status as a separate protected attribute, having previously raised concerns that the proposed definitions of 'gender identity' and 'sexual orientation' in the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* maintained a binary approach to sex and gender and were inadequate to fully protect individuals who are intersex.

Intersex status – proposed exemption for competitive sporting activities

The Board is, however, concerned about the scope of the proposed amendment of the exemption for competitive sporting activity in section 42 to include both gender identity and intersex status. This will make it permissible to discriminate on the ground of sex, gender identity or intersex status by excluding persons from participating in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. The Bill's Explanatory Memorandum describes the amendment as "*necessary to preserve existing policy in relation to this exemption, restricting competitive sporting events to people who can effectively compete*".

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The Board believes that intersex status should not be included in this exemption as the effect of the exemption is too broad, and applies indiscriminately to all intersex people, whether or not their particular intersex variation is capable of affecting sporting performance.

The Board is aware that there are many different variations in intersex, which may include physical, chromosomal and/or hormonal differences. Clearly, some of these, such as unusually high levels of testosterone or muscle mass, may affect sporting performance. Other attributes, such as physical variations in reproductive organs, may have no such effect. Yet the proposed exemption would allow the exclusion of any individual known to be intersex from competitive sport.

The Board submits that the fairness or otherwise of potentially discriminatory rules governing the participation of people who are intersex in competitive sport should be considered on a case-by-case basis using the test for indirect discrimination, and not by way of a blanket exemption.

By way of example, the International Association of Athletics Federations (IAFF) announced in April 2011 that it had adopted rules governing the maximum testosterone levels allowable for a female to compete in women's athletics competitions.¹ The regulations followed an 18 month-long review by an IAAF expert working group, working with the IOC Medical Commission and a series of international experts.

Such rules, which have been devised following careful consideration of the medical and ethical issues surrounding sex and gender in competitive sport, may have the effect of excluding some intersex women from competitive athletics. However, if the rules are shown to be reasonable in the circumstances they will not amount to unlawful discrimination. By way of contrast, a rule seeking to exclude all intersex people from a competition without exception could potentially be discriminatory.

The proposed exemption is intended to ensure a level playing field for competitive sport, to ensure fairness and equality between competitors. The Board submits that the extent of any exempted conduct should be limited to differences which affect the strength, stamina or physique of competitors, and that this is best decided on a case-by-case basis.

The Board thanks the Committee for the opportunity to comment on this important ~~amendment to the Sex Discrimination Act 1984.~~

~~Stepan Kerkyashafian~~ AO
President
Anti-Discrimination Board of NSW

¹ <http://www.iaaf.org/news/iaaf-news/iaaf-to-introduce-eligibility-rules-for-femal-1>