

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

*Introduced into the House of Representatives on 21 March 2013*

*Portfolio: Attorney-General*

### **Summary of committee view**

1.214 The committee seeks further information on:

- whether extending the existing exemptions in the *Sex Discrimination Act 1984* relating to membership of voluntary bodies, competitive sporting activities and religious organisations to the new grounds of prohibited discrimination is compatible with human rights; and
- the nature of the impact of the exemption for requests for information and record-keeping on individuals who do not identify as either male or female.

### **Overview**

1.215 This bill will amend the *Sex Discrimination Act 1984* (SDA) to extend the protection from discrimination to include the grounds of sexual orientation, gender identity and intersex status. It also extends the existing ground of 'marital status' to 'marital or relationship status' to provide protection against discrimination for same-sex de facto couples.

1.216 The bill will prohibit discrimination on these new grounds in all areas of life currently covered by the SDA, including areas of work; education; goods, services and facilities; accommodation; land; clubs; and administration of Commonwealth laws and programs.

1.217 The Attorney-General Mark Dreyfus QC has advised that the Australian Government will not proceed with the Human Rights and Anti-Discrimination Bill 2012 at this time. In its place, the Australian Government has introduced legislation into Parliament to expand the protection against discrimination on the grounds of 'sex' to include sexual orientation, gender identity and intersex status. The bill has been introduced in place of the wider reforms that had been proposed in the draft Human Rights and Anti-Discrimination Bill. The government has postponed the latter reforms, which would have consolidated existing anti-discrimination legislation, to enable closer consideration of the Senate Legal and Constitutional Affairs

Committee's report on the draft exposure bill.<sup>1</sup> Among other things, that report recommended that revisions to the draft exposure bill should take account of the concerns of the Parliamentary Joint Committee on Human Rights', which were set out in a submission to the Senate Legal and Constitutional Affairs Committee.<sup>2</sup>

## **Compatibility with human rights**

1.218 The bill is accompanied by a self-contained statement of compatibility which notes that the bill promotes the right to equality and non-discrimination, rights in work, and rights to an effective remedy and a fair hearing. The statement also notes that that bill engages the right to freedom of religion and the right to freedom of association.

### *Right to equality and non-discrimination*

1.219 The statement of compatibility notes that the right to equality and non-discrimination is a cross-cutting right which is contained in all seven of the human rights treaties to which Australia is a party and explains that:

The rights to equality and non-discrimination provide that all persons are equal before the law and entitled, without any discrimination, to the equal protection of the law. As a result, laws shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'.<sup>3</sup>

1.220 The statement of compatibility states that the bill promotes the right to equality and non-discrimination as it:

... introduces three new grounds of discrimination: sexual orientation, gender identity and intersex status; and strengthens the protections against discrimination on the ground of marital or relationships status. The inclusion of these new grounds will increase protection for groups that are often the target of discrimination. The Bill will therefore promote the rights to equality and non-discrimination for lesbian, gay, bisexual, transgender and intersex (LGBTI) people.<sup>4</sup>

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1 Joint Media Release by the Attorney-General and Minister for Finance and Deregulation, 'New anti-discrimination laws to cover sexual orientation, gender identity and intersex status', 20 March 2013.

2 See [submission no 595](#), Parliamentary Joint Committee on Human Right

3 Statement of compatibility, p. 5.

4 Statement of compatibility p. 5.

**1.221 The committee agrees that the bill will advance the right to equality and non-discrimination and welcomes the inclusion of these additional grounds of prohibited discrimination in the SDA as it better reflects the standards under international human rights law. The committee considers that reforms proposed by the exposure draft Human Rights and Anti-Discrimination Bill 2012, with some necessary revisions, would have gone further to meet these standards.**

**1.222 The committee agrees that the inclusion of these additional grounds of prohibited discrimination in the SDA will also enhance rights in work and the rights to an effective remedy and a fair hearing as set out in the compatibility statement.**

### ***Exemptions***

1.223 The bill will extend the existing exemptions in the SDA relating to membership of voluntary bodies, competitive sporting activities, and religious organisations to apply to the new grounds of discrimination. Conduct that falls within the scope of an exemption will not be unlawful discrimination under the *Sex Discrimination Act 1984*.

1.224 The statement of compatibility notes that a difference in treatment on prohibited grounds will not be directly or indirectly discriminatory provided that it is: (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria; and (iii) proportionate to the aim to be achieved. The extension of these exemptions to the new grounds will therefore need to be justified accordingly to be consistent with the right to equality and non-discrimination.

### ***Religious organisations***

1.225 The bill will extend the existing exemptions in the SDA for discriminatory conduct by religious organisations to the new grounds of prohibited discrimination:<sup>5</sup>

- Religious organisations will therefore be permitted to discriminate on the basis of sexual orientation, gender identity or intersex status, in connection to (among other things) any act or practice that 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.
- Educational institutions that are established for religious purposes will be permitted to discriminate on the grounds of sexual orientation and gender identity in connection with a person's employment or education provision where the conduct is undertaken in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed. The bill, however, introduces a narrow but welcome limitation to this

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5 *Sex Discrimination Act 1984*, sections 37 and 38.

exemption, namely that a religious educational institution may not discriminate on the basis of the new ground of intersex status. According to the explanatory memorandum:

The Government has not been informed of any religious doctrines which require discrimination on the ground of intersex status. Therefore, intersex status is not included in this exception.<sup>6</sup>

1.226 The right to freedom of religion is contained in article 18 of the International Covenant on Civil and Political Rights (ICCPR). In its submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the exposure draft Human Rights and Anti-Discrimination Bill, the committee noted that the protection of religious freedom in article 18 of the ICCPR does not extend to an automatic entitlement for religious organisations to be exempted from acting consistently with the right to non-discrimination. Accordingly, any differential treatment arising from these exemptions must meet the test for legitimate differential treatment to be consistent with the right to non-discrimination. In other words, the differential treatment must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

1.227 In its submission to the Senate Legal and Constitutional Affairs Committee, the committee expressed its disappointment that the government had not provided any proper justification for the provision of similarly broad exemptions for religious organisations in the exposure draft bill. Nor does the statement of compatibility for this bill justify extending the equally broad religious exemptions in the SDA to the new grounds introduced in the bill. Instead, the statement of compatibility simply describes the relevant provisions, states that the existing religious exemptions in the SDA recognise 'the importance of the right to freedom of religion', and remarks that 'prohibiting [religious educational institutions from discriminating] on the basis of intersex status will not limit [the right to freedom of religion]' because 'no religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents'.

**1.228 The committee intends to write to the Attorney-General to request an assessment of the compatibility of these provisions with the right to equality and non-discrimination. In particular, such an assessment should address whether the measures proposing to extend the religious exemptions in the SDA to these new grounds is aimed at a legitimate objective; whether there is a rational connection between the measures and the objective; and whether the measures are proportionate to that objective.**

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6 Explanatory memorandum, p. 20, para 71.

**1.229** The committee notes that the bill proposes to exclude intersex status from the exemptions granted to religious educational institutions on the basis of evidence elicited during consultations. The committee seeks clarification as to why the bill does not similarly extend the requirement for non-discrimination on the basis of intersex status to all services provided by religious organisations.

**1.230** The committee also seeks clarification as to why the proposal in the exposure draft Human Rights and Anti-Discrimination Bill to prohibit discrimination by religious organisations providing Commonwealth-funded aged care services was not included in this bill, given that the Attorney-General's Department has acknowledged that:

... the benefits to older lesbian, gay, bisexual, transgender and intersex (LGBTI) people of improved wellbeing and emotional support by living as a same-sex couple outweighed any cost to aged-care institutions. ... [T]his would better balance the rights to freedom of religion and freedom from discrimination and provide greater accountability and transparency for the use of Commonwealth funding.<sup>7</sup>

#### *Voluntary organisations*

**1.231** The bill will extend the existing exemption in the SDA which permits voluntary bodies to discriminate in connection to membership or the provision of benefits, services or facilities to members to the new grounds of prohibited discrimination.<sup>8</sup>

**1.232** The statement of compatibility states that 'this exemption recognises that rights may be limited by other rights, with the right to equality and non-discrimination limited by the right to freedom of association', although it is not apparent what this means. The statement then goes on to discuss a separate requirement under the SDA which prohibits public clubs from discriminating and concludes that this latter prohibition is consistent with the right to freedom of association in article 22 of the ICCPR because 'the limited terms of the prohibition on discrimination, namely to 'public' rather than 'private' clubs, is a proportionate means of achieving this objective exemption and is therefore permissible'. No justification is, however, provided for the exemption permitting voluntary bodies to discriminate or the impact this may have on a person's right to freedom of association.

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7 Submission No 130, Attorney-General's Department, Supplementary Submission [\[PDF 85KB\]](#) to the Senate Legal and Constitutional Affairs Committee's inquiry in the exposure draft Human Rights and Anti-Discrimination Bill.

8 *Sex Discrimination Act 1984*, section 39.

**1.233 The committee intends to write to the Attorney-General to request an assessment of whether the measures proposing to extend the exemption for voluntary bodies in the SDA to these new grounds is compatible with the right to freedom of association and the right to equality and non-discrimination.**

*Competitive sporting activity*

1.234 The bill will extend the existing exemption in the SDA for competitive sporting activity to the new grounds of prohibited discrimination.<sup>9</sup> The statement of compatibility briefly remarks that the exemption:

... ensures that the [SDA] does not make it unlawful to restrict competitive sporting events to people who can effectively compete. It is legitimate to recognise that biological differences between men and women are relevant to competitive sporting activities. Limiting this exemption to situations in which strength, stamina or physique are relevant is a proportionate means of achieving this objective.

1.235 The statement of compatibility does not address the question as to how this exemption might be justifiably applied to each of these new attributes (e.g. sexual orientation), consistent with the right to equality and non-discrimination or assess its impact on the right to culture in article 15(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which encompasses sporting activity and article 10(g) of CEDAW, which relates to eliminating discrimination on the ground of sex in relation to participation in sport.

**1.236 The committee intends to write to the Attorney-General to request an assessment of whether the measures proposing to extend the exemption for competitive sporting activity in the SDA to these new grounds is compatible with the right to equality and non-discrimination and the right to culture.**

*Provision of information and record keeping*

1.237 The bill will introduce a new exemption for requests for information and keeping of records where existing processes do not provide for a person to be identified as being neither male nor female.<sup>10</sup> The explanatory memorandum explains that the purpose of the exemption:

... is to ensure 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. It will ensure that there is no requirement to amend forms as part of the new

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9 Sex Discrimination Act 1984, section 42.

10 Item 60, Schedule 1, new section 43A.

protections for gender identity and intersex status, which may be an onerous exercise for organisations.

1.238 The statement of compatibility justifies the exemption as follows:

This seeks to achieve the legitimate objective of minimising regulatory impact on organisations. Mandating that all forms must be amended to offer an alternative category could have a significant regulatory impact for a wide range of organisations. This impact would be disproportionate to the small number of people who do identify as neither male or female. The limited nature of the exception is a proportionate means of achieving this objective.

The Government is currently developing guidelines on gender recognition for departments and agencies. Changes as a result of these guidelines may mean those departments and agencies would no longer require this exemption.<sup>11</sup>

1.239 The statement of compatibility does not provide any further information as to the basis for considering that the exemption is proportionate.

**1.240 Before forming a view on the compatibility of these provisions with human rights, the committee intends to write to the Attorney-General to seek further information with regard to:**

- the nature of the impact of the exemption on persons who do not identify as male or female; and
- noting that administrative convenience is not in and of itself a legitimate reason to limit rights, the basis for concluding that the provision of an alternative category would have a 'significant regulatory impact for a wide range of organisations'.

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11 Statement of compatibility, pp 6-7.