

CHAPTER 2

KEY PROVISIONS OF THE BILL

2.1 The Bill contains one Schedule, consisting of three Parts. Part 1 of Schedule 1 of the Bill deals with amendments to the SDA.

Definitions of key terms

2.2 Items 4, 6, 7, 9, 12 and 13 of Schedule 1 would insert new definitions in subsection 4(1) of the SDA, including definitions of the new protected grounds introduced in the Bill.

Gender identity

2.3 Item 6 of Schedule 1 provides for a definition of 'gender identity' for the purposes of the SDA, as follows:

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.

2.4 The EM notes that the definition adopted in the Bill is based on the definition use in the Tasmanian Anti-Discrimination Amendment Bill 2012:

This definition provides maximum protection for gender diverse people. It includes the way a person expresses or presents their gender and recognises that a person may not identify as either male or female. This acknowledges that it is often the discord between a person's gender presentation and their identity which is the cause of the discrimination.¹

Intersex status

2.5 Item 7 of Schedule 1 provides for a definition of 'intersex status':

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

- (i) neither wholly female nor wholly male; or
- (ii) a combination of female and male; or
- (iii) neither female nor male.

2.6 This definition is also based on the definition used in the Tasmanian Anti-Discrimination Bill 2012.² According to the EM:

The definition recognises that being intersex is a biological condition, not a gender identity. It does not require a person who is intersex to identify as either male or female in order to access protections under the SDA. The

1 EM, p. 12.

2 EM, p. 12.

definition is not intended to create a third sex in any sense. It does, however, recognise that sex is not a binary concept and that an intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be defined as one or other sex.³

Marital or relationship status

2.7 Items 9-10 of Schedule 1 would repeal the current definition of 'marital status' and replace it with a new definition of 'marital or relationship status'. This definition incorporates the previous components of the definition of 'marital status'; and includes new additional paragraphs covering de facto partners, to include both same-sex and opposite-sex de facto couples.⁴

Sexual orientation

2.8 Item 12 of Schedule 1 provides for a definition of the term 'sexual orientation' as follows:

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.

2.9 The EM states:

The definition does not use labels, such as homosexuality, lesbianism, bisexuality or heterosexuality, which some people find offensive and can be inaccurate. However, it is intended that the definition covers each of these sexual orientations. The definition, along with other provisions in the Bill, uses the terminology 'different sex', instead of 'opposite sex' as is currently used in the SDA. This is consistent with the protection of gender identity and intersex status, which recognises that a person may be, or identify as, neither male nor female.⁵

2.10 The EM also notes that, while the Bill introduces discrimination protection on the basis of 'sexual orientation' for the first time in Commonwealth law, 'sexual orientation' is already protected in all other Australian state and territory anti-discrimination legislation.⁶

3 EM, p. 12.

4 EM, p. 13.

5 EM, p. 14.

6 EM, p. 13.

Definition of discrimination for the proposed new grounds

2.11 Rather than provide a unified definition of discriminatory behaviour, the SDA sets out separate provisions detailing what constitutes discrimination for each of the protected grounds. There are also separate provisions prohibiting sexual harassment.⁷

2.12 Item 17 of Schedule 1 would insert three new tests for discrimination into the SDA, for the new protected grounds of 'sexual orientation' (proposed new section 5A), 'gender identity' (proposed new section 5B) and 'intersex status' (proposed new section 5C) respectively. Each of these proposed new sections is framed in identical terms, modelled on existing section 6 of the SDA (which provides the definition of discrimination on the ground of marital status).⁸

2.13 Each of these proposed new sections contains tests both for 'direct' and 'indirect' discrimination. The provisions relating to direct discrimination provide that a person (the discriminator) discriminates against another person (the aggrieved person) if, on the basis of the aggrieved person's protected characteristic, they treat that person less favourably than they would treat someone without that protected ground in the same circumstances.⁹ The EM gives possible examples of this kind of discrimination, including that it would likely constitute discrimination if:

- a hotel refused accommodation to a person on the basis of their sexual orientation;
- an employer refused to employ a transgender man on the basis of his gender identity; or
- a bank teller refused to serve an intersex person because the person's biological characteristics made the bank teller uncomfortable.¹⁰

2.14 The proposed new tests for 'indirect' discrimination provide that the discriminator commits unlawful discrimination against an aggrieved person if the discriminator imposes a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons with the particular protected characteristic.¹¹

7 *Sex Discrimination Act 1984*, sections 28A-28L.

8 EM, pp 14, 15 and 16.

9 These are: proposed new subsection 5A(1) in relation to sexual orientation; proposed new subsection 5B(1) in relation to gender identity; and proposed new subsection 5C(1) in relation to intersex status. This construction is used throughout the Sex Discrimination Act, and is known as the 'comparator test' because it involves comparing the treatment of the aggrieved person with that of others who lack their protected attribute. See: Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, p. 10.

10 EM, pp 14, 15 and 16.

11 See: proposed new subsection 5A(2) in relation to sexual orientation; proposed new subsection 5B(2) in relation to gender identity; and proposed new subsection 5C(2) in relation to intersex status.

Areas of public life covered

2.15 The SDA prohibits discrimination and sexual harassment in specified areas of public life.¹² The Bill proposes to make discrimination on the grounds of 'sexual orientation', 'gender identity', 'intersex status' and 'marital or relationship status' unlawful in each of the areas of public life currently covered under the SDA in relation to the existing protected grounds.

2.16 Items 27 and 29-34 of Schedule 1 seek to amend sections 14-20 of the SDA in order to make discrimination on the new protected grounds unlawful in work-related areas.¹³ Discrimination on the basis of the new protected grounds would also be made unlawful in the areas of: education;¹⁴ the provision of goods, services and facilities;¹⁵ accommodation;¹⁶ land;¹⁷ clubs;¹⁸ and the administration of Commonwealth laws and programs.¹⁹

Exemptions to discrimination prohibitions

2.17 The SDA contains several exemptions from discrimination prohibitions. The Bill would extend several of these exemptions to cover some or all of the new protected grounds included in the Bill. The Bill also seeks to introduce two new exemptions in relation to the interaction between the SDA and other Commonwealth, and state and territory laws.

Religious organisations

2.18 Sections 37-38 of the SDA deal with exemptions for religious organisations.

2.19 Section 37 provides that certain activities conducted by religious bodies do not constitute unlawful discrimination for the purposes of the SDA. These activities include: the ordination or appointment of ministers; the selection or appointment of persons to perform religious duties or functions; and any other act or practice of a religious body 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'.²⁰

12 *Sex Discrimination Act 1984*, sections 14-26 and 28B-28L.

13 These areas include: employment and superannuation; commission agents; contract workers; partnerships; qualifying bodies; registered organisations under the *Fair Work Act 2009*; and employment agencies.

14 Item 35 of Schedule 1 (proposed new subsections 21(1)-(2)).

15 Item 37 of Schedule 1 (proposed new subsection 22(1)).

16 Items 38-39 of Schedule 1 (proposed new subsections 23(1)-(2) and proposed new paragraph 23(3)(c)).

17 Item 40 of Schedule 1 (proposed new subsection 24(1)).

18 Item 41 of Schedule 1 (proposed new subsections 25(1)-(2)).

19 Item 43 of Schedule 1 (proposed new subsection 26(1)).

20 SDA, paragraph 37(d).

2.20 The exemption in section 37 currently applies to all grounds protected under the SDA, and will encompass the new grounds introduced by the Bill.²¹

2.21 Section 38 of the SDA contains an exemption for religious educational institutions, which provides that it is not unlawful for such institutions to discriminate in matters of employment (subsections 38(1)-(2)), or the provision of education and training (subsection 38(3)), if the discrimination is undertaken 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

2.22 The exemption in section 38 currently applies to the protected grounds of sex, marital status or pregnancy in relation to employment, and sex or marital status in relation to the provision of education or training. Under item 50 of Schedule 1 of the Bill (proposed new subsections 38(1)-(3)), the current exemption in section 38 will also apply to the new grounds of 'sexual orientation', 'gender identity' and 'marital or relationship status'. It will not apply to the new attribute of 'intersex status'. The EM notes:

During consultation, religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents.²²

Voluntary bodies

2.23 Item 51 of Schedule 1 (proposed new section 39) extends the current exemption in relation to voluntary bodies to the new protected grounds introduced by the Bill. Section 39 of the SDA exempts voluntary bodies from discrimination prohibitions in relation to admission into membership and the provision of benefits, facilities or services to members of such bodies.

Acts done under statutory authority

2.24 Section 40 of the SDA provides for exemptions for acts done in accordance with specified statutory authority, Commonwealth Acts and other statutory schemes. Item 52 of Schedule 1 (proposed new subsections 40(2A) and 40(2B)) would introduce two new exemptions into this section of the SDA.

2.25 The first new exemption (proposed new subsection 40(2A)) provides that prohibitions against discrimination on the basis of sexual orientation, gender identity and intersex status do not apply to anything done by a person in direct compliance with the *Marriage Act 1961* (Cth). The EM states:

The purpose of this provision is to make clear that introducing protections against discrimination on these grounds does not affect current Government policy on same-sex marriage. It will apply to persons such as

21 EM, p. 8.

22 EM, p. 9.

Commonwealth-registered marriage celebrants, as well as statutory bodies such as the registers of births, deaths and marriages.²³

2.26 The second new exemption (proposed new subsection 40(2B)) provides that prohibitions against discrimination on the basis of sexual orientation, gender identity and intersex status do not apply to any acts done by a person in direct compliance with a Commonwealth, or state or territory law prescribed by regulations. According to the EM, this provision reflects an existing exemption in the *Disability Discrimination Act 1992* (Cth), and 'recognises that there may be laws which appropriately make distinctions on [the grounds of sexual orientation, gender identity or intersex status]'.²⁴ Further, the EM states that initial consideration of laws which may be prescribed under this exemption will occur prior to the commencement of the Bill, in consultation with state and territory governments.²⁵

Competitive sport

2.27 Section 42 of the SDA provides that it is not unlawful discrimination to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of the competitors is relevant. Item 59 of Schedule 1 (proposed new subsection 42(1)) would extend this exemption to the protected grounds of gender identity and intersex status. The EM states:

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...

This amendment is necessary to preserve existing policy in relation to this exemption, restricting competitive sporting events to people who can effectively compete.²⁶

Exemption relating to data collection

2.28 Item 60 of Schedule 1 introduces a new exemption relating to requests for information. This exemption provides that it is lawful to request information, or keep records, that do not allow for identification of individuals as being neither male nor female (that is, allowing individuals only to be identified as 'male' or 'female'). The EM states:

The intention of these exemptions 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 protections for gender identity and intersex status, which may be an onerous exercise for organisations.

23 EM, p. 21.

24 EM, p. 21.

25 EM, p. 21.

26 EM, pp 6 and 22.

The need for these exemptions may be reconsidered in the future, if organisations (both government and private sector) have revised their data collection and record keeping practices to allow for a person to identify as neither male nor female.²⁷

Amendments to other Acts

2.29 Part 2 of Schedule 1 of the Bill provides for two minor amendments to the *Migration Act 1958* (Cth) (Migration Act), in order to update references to 'marital status' in section 507 of the Migration Act to 'marital or relationship status', consistent with the re-naming of this ground in the Bill.²⁸

Proposed government amendments

2.30 On 30 May 2013 the Attorney-General, the Hon Mark Dreyfus QC MP, announced that the government had circulated proposed amendments to the Bill, to be introduced in the Senate.²⁹ The proposed amendments would provide for a limitation on religious exemptions in the SDA in relation to Commonwealth-funded aged care provisions, and would also update terminology in several other Commonwealth Acts to bring them into line with the language used in the Bill.

Limitation on religious exemptions for Commonwealth-funded aged care services

2.31 The proposed amendments would insert new items 3A and 39A into Schedule 1 of the Bill, in order to introduce a limitation on the exemption in section 37 of the SDA in respect of religious organisations providing Commonwealth-funded aged care services.³⁰ This means that faith-based aged care providers would not be able to discriminate on any grounds protected by the SDA in the provision of aged care services, except in matters relating to employment by those organisations. In relation to these proposed amendments, the Minister for Ageing, the Hon Mark Butler MP, stated:

While most aged care service providers are accepting of residents regardless of sexual orientation, gender identity or intersex status, we think there should be legal protection that ensures such discrimination cannot occur...When such services are provided with tax payer dollars, it is not appropriate for providers to discriminate in the provision of those services.³¹

27 EM, p. 22.

28 EM, p. 22.

29 *House of Representatives Hansard*, 30 May 2013, pp 85-86.

30 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Proposed Government Amendments [Sheet AG264], 23 May 2013, pp 1-2, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5026 (accessed 31 May 2013).

31 The Hon Mark Dreyfus QC MP and The Hon Mark Butler MP, 'New protections for sexual orientation, gender identity and intersex people pass the house', Media Release, 30 May 2013.

2.32 This measure was previously included in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.³²

Updating terminology in other Commonwealth legislation

2.33 The proposed government amendments also seek to insert new items into Part 2 of Schedule 1 of the Bill, in order to replace references to 'sexual preference' in the *Broadcasting Services Act 1992*, the *Fair Work Act 2009*, and the *Fair Work (Registered Organisations) Act 2009* with the term 'sexual orientation'.³³ This would make the terminology relating to sexual orientation consistent across the SDA and these other Commonwealth Acts; it would not, however, include 'gender identity' or 'intersex status' in those other Acts.

32 Exposure Draft Human Rights and Anti-Discrimination Bill 2012, subclause 33(3).

33 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Proposed Government Amendments [Sheet AG264], 23 May 2013, pp 2-3, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5026 (accessed 31 May 2013)