

CHAPTER 3

KEY ISSUES

3.1 Submitters to the inquiry raised various issues in relation to the scope and proposed operation of the discrimination protections included in the Bill. In particular, the exemptions from discrimination protection maintained or introduced by the Bill received much attention.

Support for the Bill

3.2 Many submitters expressed support for the Bill and its objective of introducing anti-discrimination protections for the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in Australia.¹ The Victorian Gay and Lesbian Rights Lobby stated that the Bill 'represents a significant advance for the LGBTI community and brings Australia closer to fulfilling its international human rights obligations in relation to the human rights of LGBTI people'.² The National Association of Community Legal Centres commended the Bill as 'an imperative preliminary measure to address the significant gap in protection for [LGBTI] people from discrimination'.³

Key definitions in the Bill

3.3 Submitters offered strong support for the formulation of the key definitions of 'sexual orientation', 'gender identity' and 'intersex status' used in the Bill.⁴ The Australian Human Rights Commission (AHRC) noted that these definitions 'are best practice in Australia and are consistent with the most recently considered proposed discrimination legislation'.⁵

1 See, for example: Law Council of Australia, *Submission 17*, p. 4; Australian Human Rights Commission (AHRC), *Submission 9*, p. 3; Organisation Intersex International Australia, *Submission 8*, p. 3; NSW Gay and Lesbian Rights Lobby, *Submission 29*, p. 2; Equality Rights Alliance, *Submission 21*, p. 1; Australian Council of Trade Unions, *Submission 28*, p. 2; Anti-Discrimination Board of NSW, *Submission 81*, p. 1.

2 *Submission 83*, p. 10.

3 *Submission 82*, p. 3.

4 See, for example: Dr Tiffany Jones, *Submission 1*, p. 8; ACT Human Rights Commission, *Submission 10*, p. 2; Castan Centre for Human Rights Law, *Submission 12*, p. 6; ACON, *Submission 18*, p. 1; Public Interest Law Clearing House (PILCH), *Submission 25*, p. 2; Public Interest Advocacy Centre (PIAC), *Submission 50*, p. 10; Transgender Victoria, *Submission 27*, p. 1; National LGBTI Health Alliance, *Submission 76*, p. 1.

5 *Submission 9*, p. 5.

3.4 In relation to the definition of 'gender identity', the NSW Gay and Lesbian Rights Lobby stated that this definition will ensure that the 'full spectrum' of peoples' gender identities can be respected.⁶

3.5 Regarding the definition of 'intersex status', Organisation Intersex International Australia (OII Australia) commented:

[T]he Bill will introduce a new ground of discrimination on the basis of intersex status, recognising that intersex is a biological characteristic. We agree that this is the correct approach to recognising intersex. The approach positions intersex as distinct from gender identity, as intersex is an innate biological phenomenon. It also positions intersex as distinct from sex, as intersex is not an arbitrary third sex.⁷

Definition of unlawful discrimination for the proposed new grounds

3.6 Some submitters provided commentary on the way discrimination is defined for the proposed new grounds in the Bill. Submitters put forward a variety of suggested changes in relation to the way unlawful discrimination is defined, including suggestions to:

- remove the 'comparator test' in the definitions of direct discrimination for the new protected grounds in the Bill;⁸
- include discrimination protection for someone who associates with a person covered by a protected ground;⁹
- include discrimination protection for people who previously possessed a protected attribute or are incorrectly assumed to possess a protected attribute;¹⁰ and
- extend the application of protection on the basis of 'family responsibilities' to indirect discrimination, and broaden the definition of this term to include caring responsibilities.¹¹

6 *Submission 29*, p. 5.

7 *Submission 8*, p. 3.

8 See, for example: Equal Rights Trust, *Submission 7*, p. 6; ACT Human Rights Commission, *Submission 10*, p. 5; Anti-Discrimination Commissioner of Tasmania, *Submission 49*, pp 7-8.

9 See, for example: Equal Rights Trust, *Submission 7*, pp 6-7; Victorian Gay and Lesbian Rights Lobby, *Submission 83*, pp 16-17.

10 Human Rights Law Centre, *Submission 70*, p. 15.

11 See, for example: Australian Human Rights Commission, *Submission 9*, p. 10; Australian Council of Trade Unions, *Submission 28*, p. 3, NSW Gay and Lesbian Rights Lobby, *Submission 29*, p. 9.

3.7 The Explanatory Memorandum to the Bill notes that the definitions contained in the Bill are modelled on existing section 6 of the SDA.¹² In relation to the 'comparator test', the Department explained further:

The purpose of this Bill is to fulfil the Government's election commitment to introduce protections on the basis of sexual orientation, gender identity and intersex status. It is not a general reform of the SDA or anti-discrimination law more broadly.

Accordingly, this Bill does not include any broader policy changes beyond introducing the new grounds of protection...Broader reforms to discrimination law, including changes to the 'comparator test', are more appropriately implemented through the [consolidated Human Rights and Anti-Discrimination] Bill, to ensure they apply to the entirety of Commonwealth anti-discrimination law.¹³

3.8 The Department gave similar explanations in relation to the introduction of protection against 'associate discrimination', and the possibility of broadening coverage of protection on the basis of family responsibilities.¹⁴

Exemptions

3.9 Submitters commented extensively on how various exemptions in the SDA would apply to the new protected grounds of sexual orientation, gender identity and intersex status included in the Bill. Submitters also discussed the two new exemptions to be introduced into the SDA by the Bill.

Exemptions for religious organisations

3.10 Submitters to the inquiry put forward a range of views regarding the proposed amendments to the current religious exemptions in the SDA. Some submitters argued that the current exemptions for religious organisations in the SDA should not apply at all in relation to the new protected grounds to be introduced by the Bill, or should be significantly narrowed in respect of the new protected grounds.¹⁵

12 EM, pp 14, 15 and 16.

13 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 2.

14 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, pp 2 and 3.

15 See, for example: Professor Margaret Thornton, *Submission 6*, pp 1-2; Equal Rights Trust, *Submission 7*, p. 8; ACT Human Rights Commission, *Submission 10*, p. 3; Castan Centre for Human Rights Law, *Submission 12*, pp 7-8; Rainbow Families Council, *Submission 14*, pp 5-6; ACON, *Submission 18*, pp 1-2; Kingsford Legal Centre, *Submission 19*, [p. 6]; The AIDS Council of South Australia, *Submission 23*, pp 9 and 11; PILCH, *Submission 25*, pp 3-4; National Association of Community Legal Centres, *Submission 82*, p. 8; Human Rights Law Centre, *Submission 70*, pp 19-21; Job Watch, *Submission 34*, pp 7-8.

3.11 For example, the Castan Centre for Human Rights Law argued:

[T]he Government is directly supporting practices which it admits would be discriminatory but for exceptions, such as that in [section] 38 of the SDA. This goes beyond 'striking a balance' between the right to freedom of religion and freedom from discrimination. It is unacceptable in a secular society governed on the basis of respect for human rights.¹⁶

3.12 These submitters proposed several possible amendments designed to narrow the religious exemptions in sections 37-38 of the SDA, or increase transparency in the operation of those exemptions.¹⁷

3.13 Other submitters expressed support for the retention of exemptions for religious organisations, or proposed changes to further strengthen religious exemptions in the SDA.¹⁸

Treatment of intersex status in the religious exemptions

3.14 As noted in Chapter 1, the general exemption for religious organisations in section 37 of the SDA will apply to each of the new protected grounds to be introduced by the Bill, while the exemptions for religious educational institutions in section 38 of the SDA will apply to the grounds of sexual orientation and gender identity, but not intersex status.

3.15 Several submitters expressed support for the exclusion of 'intersex status' from the exemptions for religious educational institutions in section 38 of the SDA.¹⁹ Some argued, however, that the broader religious exemption in paragraph 37(d) should also not apply to 'intersex status'. For example, the AHRC observed:

The omission of intersex status from the exemption in [section] 38 is welcomed and contributes towards a better balancing of the rights of non-discrimination and freedom of religion.

However, the application of [paragraph] 37(d) to intersex status is contrary to this. [Paragraph] 37(d) provides a broad exemption for religious bodies

16 *Submission 12*, p. 8.

17 These proposed changes included: limiting the exemptions for organisations delivering services to the public; adopting more limited religious exemptions in line with those found in some state anti-discrimination laws; and introducing a requirement for religious organisations to provide public notification of their intention to utilise religious exemptions. See, for example: Ms Anne Hewitt and Dr Laura Grenfell, Adelaide Law School, *Submission 4*, p. 4; ACON, *Submission 18*, pp 1-2; National LGBTI Health Alliance, *Submission 76*, p. 2.

18 These proposed changes included introducing a broader protection for individuals undertaking activities in accordance with their religious beliefs or principles. See, for example: Freedom 4 Faith, *Submission 16*, pp 3-5; Australian Christian Lobby, *Submission 26*, pp 2 and 3-5; Catholic Women's League Australia, *Submission 15*, [pp 3-4].

19 See, for example: Law Council of Australia, *Submission 17*, pp 29-30; Organisation Intersex International Australia, *Submission 8*, pp 9-10.

and arguably encompasses any act referred to in [section] 38. If intersex is not excluded from the operation of [paragraph] 37(d) then the policy intent of the Government will potentially be undermined.²⁰

3.16 The Department responded to this argument, as follows:

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... [T]he 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.²¹

Exemptions for religious aged care providers

3.17 As noted in Chapter 1, recently announced proposed government amendments to the Bill would introduce a limitation on the religious exemption in section 37 of the SDA in respect of the provision of Commonwealth-funded aged care services, a measure that was previously included in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Exposure Draft).

3.18 Prior to the announcement of the proposed government amendments, some submitters argued for the inclusion of this limitation in the Bill, in order to provide protection for LGBTI individuals receiving aged care services.²² For example, COTA Australia contended:

Older LGBTI people have suffered a lifetime of social and legal discrimination. Many LGBTI people of senior age have lived for most of their life with homosexuality being illegal, with social norms ostracizing LGBTI people, and with physical and verbal abuse much more common occurrences compared with today. It is therefore appropriate that the Government introduces these protections with a careful consideration of the proposed impact on older cohorts of LGBTI Australians...COTA's very strong preference is that the legislation does not allow religious organisations to be able to claim justification for discrimination against people because of sexual orientation, gender identity or intersex status.²³

20 Submission 9, p. 7.

21 Submission 75, p. 3.

22 See, for example: Professor Margaret Thornton, *Submission 6*, p. 2; AHRC, *Submission 9*, pp 5-6; ACT Human Rights Commission, *Submission 10*, p. 3; PIAC, *Submission 50*, pp 21-22; Law Council of Australia, *Submission 17*, pp 40-41; Northern Territory Anti-Discrimination Commission, *Submission 20*, pp 1-2; Combined Pensioners and Superannuants Association of NSW, *Submission 52*, pp 3-4.

23 Submission 71, pp 1-2.

3.19 Some submitters also noted public statements from several major faith-based aged care providers, clarifying that those organisations do not currently discriminate on the basis of sexual orientation, gender identity or intersex status in the provision of aged care services.²⁴

3.20 Conversely, several religious groups that submitted to the inquiry argued that aged care providers should be able to offer services in accordance with their religious values, and that the exemptions for religious aged care providers should be maintained.²⁵

Exemption for competitive sport

3.21 A number of submitters raised concerns about the extension of the current exemption in the SDA relating to competitive sport to the new protected grounds of gender identity and intersex status provided for in the Bill. This exemption would make it lawful to exclude intersex or transgender people from competitive sporting activities where the strength, stamina or physique of competitors is relevant.

3.22 The Anti-Discrimination Board of NSW argued that intersex people should not be included in this exemption:

[T]he 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...[T]here 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.²⁶

3.23 Transgender Victoria also contended that the exemption is too broad in its application, arguing that transgender individuals may not necessarily carry a competitive advantage in sporting competitions. Transgender Victoria suggested that the exemption should allow for assessment of athletes on a case-by-case basis.²⁷

24 See, for example: COTA Australia, *Submission 71*, p. 2; Liberty Victoria, *Submission 32*, pp 3-4; National LGBTI Health Alliance, *Submission 76*, pp 3-4.

25 See, for example: Freedom 4 Faith, *Submission 16*, pp 2-3; Australian Christian Lobby, *Submission 26*, p. 3; Catholic Women's League Australia, *Submission 15*, [p. 4].

26 *Submission 81*, p. 2.

27 *Submission 27*, pp 1-2.

3.24 OII Australia argued that the SDA should allow intersex people to compete according to their legal sex:

A blanket exemption applying to intersex people is disproportionate, and might broadly limit our access to sporting activities, with adverse consequences for our health and well-being.

Intersex people at all levels of sporting activity should be encouraged through access to sporting activities. Exemptions should not be used to justify excluding intersex people from sporting activities...It is far more appropriate to enable people to compete on the basis of their legal sex. An exemption on grounds of intersex status or gender identity is not needed to achieve this.²⁸

3.25 OII Australia noted that excluding competitors on the basis of intersex status or gender identity is inconsistent with frameworks developed by the International Olympic Committee (IOC) and the International Association of Athletic Federations (IAAF) for the participation of transgender and intersex people in competitive sport. These frameworks are not based on strength, stamina or physique, but are currently determined by the testosterone levels of competitors.²⁹

Departmental response

3.26 The Department clarified that sporting organisers will still have the ability to assess individuals on a case-by-case basis when deciding the eligibility of competitors:

The Bill amends the existing exemption for competitive sport in the SDA to include gender identity and intersex status. The Government considers this is necessary to preserve existing policy in relation to this exemption, ensuring fair competition in competitive sporting events. The drafting mirrors the approach taken in...the [Exposure Draft] Bill and State and Territory anti-discrimination laws.

The Department understands the operation of the exemption in State and Territory law will often involve a case-by-case assessment of individual circumstances. That is, the exemption is not intended to operate to require sporting competitions to have policies which automatically exclude people who are intersex, or people with a gender identity which does not match their birth sex. Instead, it is to provide reassurance that organisers are able to make decisions to guarantee fair competition in sporting events.³⁰

28 *Submission 8*, p. 7. See also: Kingsford Legal Centre, *Submission 19*, [p. 8]; National LGBTI Health Alliance, *Submission 76*, p. 6; National Association of Community Legal Centres, *Submission 82*, pp 8-9.

29 *Submission 8*, p. 4.

30 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 4.

Exemption for data collection

3.27 The exemption allowing individuals and organisations 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, attracted some commentary from submitters.

3.28 It was noted that the government has recently released guidelines on the recognition of sex and gender in Commonwealth records, which allow for the identification of individuals as neither male nor female. These guidelines, entitled 'Australian Government Guidelines on the Recognition of Sex and Gender', will be fully implemented for Commonwealth agencies by July 2016.³¹ Several submitters argued that the exemption in the Bill should be subject to some form of time limitation, either in the form of a sunset clause or through a statutory requirement for the exemption to be reviewed within three years.³²

3.29 The Public Interest Advocacy Centre also argued that the Australian Government, through the AHRC or the Office of the Australian Information Commissioner, should assist organisations in updating practices for data collection and record keeping, allowing over time for the identification of individuals as being neither male nor female.³³

Departmental response

3.30 In relation to including a sunset clause on the exemption for data collection, including one to coincide with the implementation of the proposed Australian Government Guidelines on the Recognition of Sex and Gender, the Department stated:

The inclusion of a sunset clause on the exemption would have the effect of requiring...changes to be made [to data collection practices], 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...

[The] Guidelines...will only [apply] to Commonwealth Government agencies, not State or Territory agencies or the private sector, and do not include an enforceable complaints mechanism if the...Guidelines are not

31 Attorney-General's Department, 'Australian Government Guidelines on the Recognition of Sex and Gender', <http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx> (accessed 14 June 2013). See also: OII Australia, *Submission 8*, pp 8-9.

32 See, for example: PIAC, *Submission 50*, p. 12; Human Rights Law Centre, *Submission 70*, pp 24-25; National Association of Community Legal Centres, *Submission 82*, p. 9; OII Australia, *Submission 8*, p. 9; AHRC, *Submission 9*, pp 8-9; Law Council of Australia, *Submission 17*, p. 39; Anti-Discrimination Commission Queensland, *Submission 85*, p. 5.

33 *Submission 50*, p. 12.

complied with. Including a sunset clause in the Bill could have a significantly greater regulatory impact.³⁴

3.31 Regarding a statutory review period for this exemption, the Department commented:

The need for this exemption could be reconsidered in the future...It is not clear when the best time to reconsider this exemption would be. Requiring a statutory review at a particular time may lead to this exemption being reconsidered prematurely, without the benefit of the Government's experiences in relation to the...Australian Government Guidelines on Sex and Gender.³⁵

Exemptions for conduct in direct compliance with prescribed laws

3.32 Some submitters expressed concern at the proposed new exemption for acts done in direct compliance with a Commonwealth, or a state or territory law prescribed by regulations. For example, the Human Rights Law Centre recommended that this exemption be removed:

[T]his provision...does not require any consideration of whether the relevant discriminatory provisions in inconsistent laws are reasonable and justified in accordance with Australia's international human rights obligations. If there are inconsistent laws that are proposed to be exempted, it is more appropriate that this be done by legislative amendment and consequent parliamentary scrutiny, rather than by regulation.³⁶

3.33 The Law Council questioned why such an exemption is necessary in relation to the new protected grounds of sexual orientation, gender identity and intersex status, when no similar exemption currently exists for the other protected grounds in the SDA.³⁷

Departmental response

3.34 The Department explained the reasons for the inclusion of this exemption as follows:

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*.

34 *Submission 75*, pp 3-4.

35 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 6.

36 *Submission 70*, p. 23. See also: The Equal Rights Trust, *Submission 7*, p. 11; AHRC, *Submission 9*, pp 9-10; PIAC, *Submission 50*, pp 12-16.

37 *Submission 17*, pp 36-37.

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.³⁸

3.35 In relation to why this exemption will not cover the other protected grounds currently in the SDA, the Department commented:

This Bill does not include any broader policy changes beyond introducing the new grounds of protection and therefore does not include a similar exemption for the existing protected grounds in the SDA.³⁹

Operation of exemptions for single-sex clubs and educational institutions

3.36 Items 36 and 42 of Schedule 1 of the Bill would replace the phrase 'opposite sex' with 'different sex', in relation to exemptions for single-sex educational institutions and clubs. Some submitters contended that this wording would mean that people who are intersex could be legitimately excluded from admission to such an institution or club, and that, similarly, people could be excluded on the basis of their gender identity.⁴⁰

Departmental response

3.37 The Department explained how this exemption is intended to operate:

These amendments are not intended to exclude intersex people from protections under the Bill. The intention of the exemptions in subsections 21(3) and 25(3) is that educational institutions or clubs established for people of a particular sex can lawfully exclude people who are not of that sex. This may include people who are intersex and do not identify as the relevant sex or identify as neither sex.

However, exclusion of an intersex child who identifies as male from a boys school could constitute intersex status discrimination. Similarly, exclusion of a trans woman from a female only club could constitute gender identity discrimination. The Department considers the current drafting will achieve this intention.⁴¹

38 *Submission 75*, p. 4.

39 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 6.

40 See, for example: Anti-Discrimination Commissioner of Tasmania, *Submission 49*, p. 15; Law Council of Australia, *Submission 17*, p. 44; Anti-Discrimination Commission Queensland, *Submission 85*, pp 3-4.

41 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 5.

Other issues

3.38 Submitters raised several other issues in relation to the Bill and its implementation, including: recognition in the SDA for international instruments relating to LGBTI issues; the interaction between the Bill and state and territory laws; possible consequential amendments to other Commonwealth Acts; and broader reforms to the SDA.

International instruments recognised in the Sex Discrimination Act

3.39 Paragraph 3(a) of the SDA provides that one of the objects of the SDA is to give effect to provisions of 'relevant international instruments'. These instruments are listed in subsection 4(1).⁴²

3.40 Several submitters called for the Bill to recognise international instruments relevant to the rights of LGBTI people, either through their inclusion in the list of 'relevant international instruments' in subsection 4(1) of the SDA, or through recognition in the Explanatory Memorandum to the Bill.⁴³ More specifically, submitters called for the 'Yogyakarta Principles' to be referenced. For example, the Human Rights Law Centre argued:

The Yogyakarta Principles, developed by a group of academic and UN human rights experts in 2006, provide important guidance on the application of international human rights obligations to sexual orientation and gender identity. The principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity and 'affirm binding international legal standards with which all States must comply.' The Yogyakarta Principles have been referred to in Australian jurisprudence...[T]hey develop inclusive, internationally accepted definitions of sexual orientation and gender identity and establish recommended actions to address the ongoing challenge of achieving human rights protection for [LGBTI] individuals worldwide.⁴⁴

42 The instruments listed are: the Convention on the Elimination of All Forms of Discrimination Against Women; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; and four ILO Convention (Nos. 100, 111, 156 and 158) relating to relevant employment matters.

43 See, for example: Law Council of Australia, *Submission 17*, pp 33 and 49; PIAC, *Submission 50*, pp 7-10; Women's Legal Services NSW, *Submission 78*, pp 4-5; Victorian Gay and Lesbian Rights Lobby, *Submission 83*, p. 13.

44 *Submission 70*, pp 8-9.

Departmental response

3.41 The Department noted that the treaties currently listed in subsection 4(1) of the SDA are United Nations and International Labour Organization treaties which impose legal obligations on Australia; however:

...[T]he Yogyakarta Principles have no legal force either internationally or within Australia. They were developed by a group of human rights experts, rather than being an agreement between States.⁴⁵

Resourcing of the AHRC

3.42 The AHRC submitted that it may require additional resources in order to deal with the additional workload it expects to carry as a result of the introduction of the Bill:

The proposed new grounds in the SDA will almost certainly lead to new, and a higher volume of, enquiries and complaints. In addition, the [AHRC]'s other functions in relation to research, education and awareness raising will also be enlivened by the inclusion of these new attributes. There will also be a higher expectation from the community that the [AHRC] will seek to proactively address systemic issues facing LGBTI communities, as opposed to purely relying upon its complaints processes to remedy situations of discrimination and breaches of human rights. Consideration should be given to the resourcing impact of these new provisions. To more effectively perform these functions the [AHRC] would be aided by appropriate additional resources.⁴⁶

3.43 Several other submitters went further, arguing for the appointment of a permanent Commissioner within the AHRC to deal specifically with LGBTI issues. For example, the NSW Gay and Lesbian Rights Lobby argued:

[S]ignificant issues of homophobia, bi-phobia, transphobia and anti-intersex prejudice exist in Australian society and would be usefully served by having a dedicated [C]ommissioner to deal with complaints on these grounds. A specific...Commissioner would also enable the AHRC to more effectively discharge its education and compliance-related roles and reduce the workload of existing Commissioners...[I]t would send a strong message to the broader Australian community of the importance of non-discrimination concerning sexual orientation or gender identity.⁴⁷

45 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 8.

46 *Submission 9*, p. 7.

47 *Submission 29*, pp 9-10. See also: National Association of Community Legal Centres, *Submission 82*, p. 9; Victorian Gay and Lesbian Rights Lobby, *Submission 83*, p. 36; Law Council of Australia, *Submission 17*, p. 46.

Departmental response

3.44 The Department commented on the issue of resourcing for the AHRC:

The [AHRC] already performs some advocacy work in relation to these new grounds, through its general human rights functions. The Government believes that in the current fiscal climate, it is appropriate that the [AHRC] absorb these new responsibilities within current resources.

The [AHRC] was provided with additional funding under Australia's Human Rights Framework, which included funding associated with reforms to anti-discrimination law.⁴⁸

3.45 In relation to the proposal for a specific Commissioner to deal with LGBTI issues, the Department responded:

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 [AHRC] 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 [AHRC]...The Government does not propose to interfere with the [AHRC]'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.⁴⁹

Interaction with state and territory laws

3.46 Submissions from state and territory bodies raised issues relating to the interaction between the Bill and state and territory laws.

3.47 The New South Wales Government expressed concern that certain conduct in relation to the new protected grounds to be introduced by the Bill, which is lawful in New South Wales under exemptions in the *Anti-Discrimination Act 1977* (NSW), will not be lawful under the new exemptions in the SDA proposed by the Bill.⁵⁰ It recommended that the Bill be amended to provide an exemption for 'action that is not unlawful under any anti-discrimination law in force in the place where the action is taken'.⁵¹

48 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 8.

49 *Submission 75*, p. 5.

50 *Submission 87*, p. 2.

51 *Submission 87*, p. 3 (see also discussion on p. 4).

3.48 Conversely, the Anti-Discrimination Commissioner of Tasmania expressed concern that activity which is currently unlawful under the *Anti-Discrimination Act 1998* (Tas), would be lawful under the proposed new exemptions in the SDA, creating broader exemptions in Commonwealth law which effectively override Tasmanian law. The Commissioner recommended that the Bill 'clearly state that any broader exemptions in the legislation are not intended to interfere with protections against discrimination under state or territory anti-discrimination laws'.⁵²

Departmental response

3.49 The Department provided the following observations in relation to the interaction between exemptions in the SDA and state and territory anti-discrimination laws:

There are already inconsistencies between the exemptions in existing Commonwealth, State and Territory anti-discrimination laws. This Bill does not alter this position. There is no evidence that such inconsistencies prohibit these anti-discrimination laws from operating concurrently, particularly given the Commonwealth Acts explicitly preserve such concurrent operation.

The effect of inconsistent exemptions is that conduct which is covered by an exemption under one law but not the other law would not be unlawful under the former law but would be under the latter. This means a person could not sustain a complaint under the former law, but may be able to under the latter law. The same principle applies whether it is the Commonwealth or State law which has the narrower exemption.⁵³

Consequential amendments to other Commonwealth legislation

3.50 Submitters expressed support for the suggestion, now incorporated in the government's proposed amendments to the Bill, which would update terminology in other Commonwealth laws, including the *Fair Work Act 2009* (Fair Work Act), to replace references to 'sexual preference' with 'sexual orientation'.⁵⁴ These submitters recommended that 'gender identity' and 'intersex status' should also be included in the list of attributes covered in section 351 of the Fair Work Act.⁵⁵

52 *Submission 49*, pp 16-17.

53 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 11.

54 See, for example: Law Council of Australia, *Submission 17*, p. 45; Kingsford Legal Centre, *Submission 19*, [p. 6]; NSW Gay and lesbian Rights Lobby, *Submission 29*, pp 10-11; Human Rights Law Centre, *Submission 70*, pp 18-19; National Association of Community Legal Centres, *Submission 82*, p. 6.

55 Section 351 of the Fair Work Act provides protection against discrimination in matters relating to employment, on the basis of a range of protected attributes.

3.51 Some submitters recommended that the term 'marital status' should also be updated to 'marital or relationship status' throughout the Fair Work Act.⁵⁶ In addition, the Law Council recommended that the terms 'sexual preference' and 'marital status' in the Australian Human Rights Commission Regulations 1989 also be updated to reflect the terminology used in the Bill.⁵⁷

3.52 In relation to changes in the Fair Work Act other than updating 'sexual preference' to 'sexual orientation', the Department stated:

While the Government is considering whether achieving consistency of terminology is achievable as part of this Bill, any broader amendments for consistency between anti-discrimination law and the Fair Work Act are outside the scope of this Bill and more appropriately considered in conjunction with the broader [Human Rights and Anti-Discrimination] Bill.⁵⁸

Committee view

3.53 The committee welcomes the introduction of legislative protection against discrimination for individuals on the basis of sexual orientation, gender identity and intersex status through the Bill. This is the first time such protection has been afforded at a Commonwealth level, and the committee considers that this is an historic reform that is long overdue. Accordingly, the committee expresses its strong support for this legislation.

3.54 The committee recently considered a broad range of issues relating to anti-discrimination protection for LGBTI individuals, as part of its inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Exposure Draft). The committee notes that many submitters to the current inquiry expressed disappointment at the government's decision not to proceed immediately with the finalised form of the legislation to consolidate the Commonwealth's five existing Acts that deal with anti-discrimination matters.

3.55 The committee remains of the view that a single consolidated anti-discrimination Act is preferable to the current regime of Commonwealth anti-discrimination laws, which are inconsistent and in need of simplification and clarification. The committee notes the government's commitment to this broader consolidation project, and accepts that the Bill under consideration in this inquiry is designed to introduce discrimination protection for LGBTI Australians as a matter of high priority, while work on the broader consolidation project continues.

56 See, for example: Human Rights Law Centre, *Submission 70*, pp 18-19; Women's Legal Services NSW, *Submission 78*, p. 2.

57 *Submission 17*, p. 45.

58 Responses to questions on notice provided by the Attorney-General's Department on 21 May 2013, p. 9.

3.56 Turning to the Bill at hand, the committee has comments in relation to the key definitions used in the Bill, the exemptions introduced or broadened in the Bill, and some of the other issues raised by submitters to the inquiry.

Key definitions

3.57 In its report on the Exposure Draft, the committee made two recommendations in relation to the proposed definition of 'gender identity'. The committee is pleased that these recommendations, including introducing 'intersex status' as a standalone protected ground, have been incorporated into the Bill. The committee notes the strong support from submitters for the key definitions of 'sexual orientation', 'gender identity' and 'intersex status' in the Bill.

3.58 Some submitters to the inquiry commented that the definition of discrimination introduced for the new protected grounds in the Bill is out-dated and should be improved, including by removing the 'comparator test'. The committee has consistently recognised the need to remove the comparator test from the SDA;⁵⁹ however, the committee also recognises that it is important for the definitions incorporated in the Bill for the new protected grounds to be consistent with the existing definitions for the other protected grounds in the SDA. For this reason, the committee accepts the Department's rationale that the Bill will introduce protections for the new protected grounds on the same terms as the other protected grounds in the SDA, and welcomes the fact that further changes will be made as part of the broader project to consolidate the Commonwealth's anti-discrimination laws.

Religious exemptions

3.59 In its recent report into the Exposure Draft the committee recommended that religious organisations should not be allowed to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee also recommended that religious organisations seeking to rely on exemptions in providing services should be required to provide public notice of that intention.⁶⁰ The committee has not changed its view that this is the optimal arrangement for the operation of religious exemptions in Commonwealth anti-discrimination law.

3.60 As already noted, the committee understands that the government is still committed to bringing forward finalised consolidation legislation to unify Commonwealth anti-discrimination law into a single statute. The committee stands by its recommendations in the inquiry into the Exposure Draft in relation to religious

59 See: Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, p. xxiii (Recommendation 5).

60 Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, February 2013, p. 97.

exemptions, and urges the government to implement those recommendations in the final form of the consolidation legislation.

3.61 Having said this, the committee recognises that the Bill at hand does not deal comprehensively with the issue of religious exemptions across all Commonwealth anti-discrimination law; rather, it is concerned with exemptions applying to a limited number of protected grounds under the SDA. The government has clearly stated that the Bill is designed as an interim measure to introduce discrimination protection for LGBTI individuals immediately while the broader anti-discrimination consolidation project is being finalised, and that larger changes to the overall structure of the SDA are being considered as part of the consolidation project.

3.62 The committee also recognises the need for the Bill to be passed as quickly as possible, in order to ensure that discrimination protection for LGBTI individuals can be enacted without further delay.

3.63 With these factors in mind, the committee is not recommending extensive changes to the religious exemptions in the SDA.

Commonwealth-funded aged care services

3.64 While not recommending major changes to the religious exemptions proposed in the SDA, the committee strongly considers that it is prudent to make some minor adjustments to the religious exemptions in one area as proposed in the Bill, in relation to aged care services. The introduction of a limitation on religious exemptions in respect of Commonwealth-funded aged care services has broad stakeholder support and would provide important legislative protection for older LGBTI Australians. This measure was previously included in the Exposure Draft, and is now included in proposed government amendments to the Bill. It is also consistent with the current practice of several of the major religious aged care providers, which have stated publicly that they already provide services on a non-discriminatory basis.

3.65 In light of this, the committee is recommending that the Bill be amended to introduce this limitation into the SDA. This amendment will ensure that discrimination protections for older LGBTI Australians are not less than was proposed in the Exposure Draft. Further, the previous detailed examination by the committee of this specific proposal, through its inclusion in the Exposure Draft, will ensure that it can be considered by the parliament in a timely manner, allowing for the Bill to be debated and passed as soon as possible.

Recommendation 1

3.66 The committee recommends that the Bill be amended to provide that religious exemptions in section 37 of the *Sex Discrimination Act 1984* do not apply in respect of sexual orientation, gender identity and intersex status in connection with the provision of Commonwealth-funded aged care services.

Other exemptions

3.67 On the whole, the committee agrees with the balance struck by the other exemptions to be amended or introduced into the SDA by the Bill.

Data collection

3.68 The committee accepts the government's rationale that the exemption relating to data collection and record keeping is required at the present time, and that it may be open to review in the future. While the committee is not recommending a specific timeframe for any such review, it is important that in the first instance the government promote awareness of this issue in order to encourage organisations to make necessary changes to data collection systems over time.

Conduct in compliance with other prescribed laws

3.69 The committee notes concerns from submitters that this exemption may result in laws being prescribed which inappropriately limit the discrimination protections afforded to LGBTI people under the Bill. The committee notes that any legislation prescribed under the exemption will still be subject to parliamentary scrutiny, and considers that additional certainty could be provided by the government consulting with representatives of the LGBTI community in Australia prior to any laws being prescribed under this exemption.

Competitive sport

3.70 In relation to the exemption for competitive sporting activities, the committee notes the Department's response that similar exemptions in state and territory laws allow for competitors to be considered on a case-by-case basis. The committee considers that this exemption should be reviewed if it becomes apparent that intersex individuals or persons with a particular gender identity are being subject to blanket exclusion from particular competitive sporting activities, rather than the merits of each competitor being assessed on an individual basis.

Updating terminology in other Commonwealth legislation

3.71 On the issue of updating other Commonwealth legislation to reflect the terminology used in the Bill, the committee notes that the Bill already seeks to amend the *Migration Act 1958* to implement an updated definition of 'marital or relationship status'. Submitters argued that the term 'sexual preference', where found in other Commonwealth Acts and regulations (including the *Fair Work Act 2009* and the Australian Human Rights Commission Regulations 1989), should be replaced with the term 'sexual orientation', and that the terms 'gender identity' and 'intersex status' should be included in the relevant provisions of these laws, to bring them in line with the terminology used in the Bill. The committee considers that these changes can easily be implemented and would provide welcome consistency across Commonwealth legislation in this regard.

Recommendation 2

3.72 The committee recommends that the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009* and the *Broadcasting Services Act 1992* be amended to replace references to 'sexual preference' with 'sexual orientation', and to include the new protected grounds of 'gender identity' and 'intersex status'.

Recommendation 3

3.73 The committee recommends that the Australian Human Rights Commission Regulations 1989 be amended to replace references to 'sexual preference' with 'sexual orientation', and to include the new protected grounds of 'gender identity' and 'intersex status'.

Recommendation 4

3.74 Subject to Recommendation 1, and after due consideration of Recommendations 2 and 3, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin
Chair