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

Written questions on notice – Attorney-General's Department

Coverage of discrimination protection for the new protected grounds

Protection on the basis of changes in gender and/or sex

The Law Council of Australia raised concerns in its submission (pp 32-33) that the Bill may not protect certain individuals who are undergoing a change of sex and/or gender from discrimination.

1. Is the Bill intended to protect individuals on the basis of a *change* in gender and/or sex? If so, does this need to be explicitly clarified in the Bill?

AGD Response:

Yes. The purpose of this amendment is to protect individuals who have changed or are in the process of changing their gender and/or sex from discrimination. The definition of 'gender identity' in the Bill is intentionally broad enough to cover these individuals and has been adopted after consultation with the intersex, transgender and/or gender diverse community and on the recommendation of the Committee in its inquiry on the draft Human Rights and Anti-Discrimination Bill (HRAD Bill).

The Department understands the Law Council of Australia's concerns are based on a Queensland anti-discrimination case which concerned the definition of 'sex' rather than 'gender identity'.

Retention of the 'comparator test'

The Senate Standing Committee on Legal and Constitutional Affairs recommended in its 2008 report into the effectiveness of the *Sex Discrimination Act 1984* (SDA) that the 'comparator test' be removed throughout the SDA. This recommendation was taken up in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill), which used a 'detriment test' to define the meaning of discrimination. Several submitters to this inquiry have recommended that the 'comparator test' retained for the new protected grounds in the Bill should be removed, due to the existing criticism of the use of the comparator test in the SDA.

2. Why was the 'comparator test' retained for the new grounds of sexual orientation, gender identity and intersex status in the Bill? Should a different test be used instead?

AGD Response:

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 (sexual orientation, gender identity and intersex status).

Broader reforms to discrimination law, including changes to the 'comparator test', are more appropriately implemented through the HRAD Bill, to ensure they apply to the entirety of Commonwealth anti-discrimination law.

Associate discrimination

Several submitters have called for the Bill to include protection against discrimination on the basis of association with a person on the basis of their sexual orientation, gender identity or intersex status.

3. Why has protection against 'associate discrimination' not been included for the new grounds in the Bill? Should discrimination by association be prohibited by the Bill?

AGD Response:

As noted above, this Bill 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. Any further changes, including protection against 'associate discrimination', are more appropriately implemented through the HRAD Bill.

Indirect discrimination on the basis of family responsibilities

The AHRC argued in its submission (p. 10) that while in some cases women can be protected from indirect discrimination on the basis of family responsibilities, this protection would not extend to men with family responsibilities, including in same-sex couples.

4. Should indirect discrimination on the basis of family responsibilities be protected more fully in the SDA, including for same-sex couples?

AGD Response:

As noted above, this Bill is not a general reform of the SDA or anti-discrimination law more broadly.

The amendments to the family responsibility provisions of the SDA in this Bill are minor changes to correct drafting anomalies. Any broader policy changes to the SDA, such as to prohibit indirect discrimination on the basis of family responsibilities, are more appropriately implemented through the HRAD Bill.

Discrimination in relation to superannuation (item 28 of Schedule 1 of the Bill)

Item 28 of Schedule 1 of the Bill would introduce 'sexual orientation' and 'marital or relationship status' as protected grounds to ensure that same-sex couples cannot be discriminated against in relation to the payment of superannuation benefits.

5. Does the current wording of item 28 mean that couples may be excluded from discrimination protection in relation to superannuation on the basis of the gender identity or intersex status of one or both members?
6. Should 'gender identity' and 'intersex status' be explicitly included in this item of the Bill?

AGD Response (questions 5 and 6):

Item 27 of the Bill will amend subsections 14(1) and (2) of the SDA to make discrimination on the basis of gender identity and intersex status unlawful in employment, including the terms and conditions on which employment is offered. This will cover eligibility for superannuation.

Subsection 14(4) of the SDA currently only expressly covers discrimination on the grounds of sex or marital status and not the other attributes protected by the SDA, such as breastfeeding and pregnancy.

Item 28 of the Bill will amend subsection 14(4) of the SDA to expressly include sexual orientation in this subsection. This is for consistency with the 2009 same-sex reforms and on the basis that discrimination on the ground of sexual orientation in the area of superannuation has historically been an issue. As with breastfeeding and pregnancy, the Government is not aware of evidence that discrimination on the basis of gender identity or intersex status occurs in this area and therefore requires explicit prohibition.

Exemptions

Exemption for competitive sport (item 59 of Schedule 1 of the Bill)

Organisation Intersex International Australia (OII) argued in their submission (p. 4) that an exemption in relation to competitive sport based on 'the strength, stamina or physique of competitors' is inconsistent with the frameworks developed by the International Olympic Committee (IOC) and International Association of Athletic Federations (IAAF) for the participation of transgender and intersex people in competitive sport.

7. Should any exemption for competitive sport be based on the models used by international sports bodies such as the IOC and IAAF, rather than the model proposed under the Bill?

OII contended that it is more appropriate to allow individuals to compete in sporting events on the basis of their legal sex (p. 7). This recommendation was supported by several other submitters.

8. Would this arrangement be more appropriate than the model proposed in the Bill? Are there any reasons why would it be inappropriate for individuals to compete according to their legal sex?

Transgender Victoria argued in their submission (p. 2) that the exemption for competitive sport should be amended to allow the eligibility of individuals to be considered on a case-by-case basis, rather than allowing a blanket exemption for discrimination on the basis of intersex status and gender identity.

9. What is your response to this suggestion? Should individuals' ability to participate in competitive sport be assessed on a case-by-case basis?

The Anti-Discrimination Board of NSW argued in their submission (p. 2) that intersex status should not be included in the exemption for competitive sporting activity, 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'.

10. What is your response to this argument?

AGD Response (questions 7-10):

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 in the HRAD 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.

Religious exemptions in relation to aged care services

The Exposure Draft HRAD Bill included a limitation on religious exemptions in relation to aged care services.

11. Is it still government policy to implement protection against discrimination for recipients of aged care services on the basis of sexual orientation, gender identity and intersex status, as proposed in the Exposure Draft HRAD Bill?
12. If so, why is this policy not reflected in the Bill? How does the government intend to implement this policy measure?

AGD Response (questions 11 and 12):

The inclusion of this limitation remains Government policy to be brought forward in the HRAD Bill.

Operation of exemptions for single-sex clubs and educational institutions

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. Several submitters contended that this wording would mean that people who are intersex could be legitimately excluded from admission to such an institution or club.

13. Is this the intended outcome of this proposed exemption? If not, does the wording of these proposed exemptions need to be amended to make it clear that individuals cannot be excluded from such institutions on the basis of intersex status or gender identity?

AGD Response:

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.

Exemption for keeping records and requesting information (item 60 of Schedule 1 of the Bill)

The AHRC recommended in its submission (pp 8-9) that the exemption in proposed new section 43A (item 60 of the Bill) should include a requirement that the exemption be reviewed after three years.

14. Would a formal requirement for a review in three years ensure that the exemption does not continue to operate unnecessarily? Is there any reason not to include a mechanism for a formal review of this exemption in the Bill?

AGD Response:

The need for this exemption could be reconsidered in the future, if organisations have revised their data collection and record keeping practices to allow for a person to identify as neither male nor female.

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 draft Australian Government Guidelines on Sex and Gender.

Exemption for compliance with acts done under prescribed laws (proposed new subsection 40(2B))

Item 52 of Schedule 1 of the Bill (proposed new subsection 40(2B)) introduces a new exemption which provides that the prohibitions on 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 a prescribed law of the Commonwealth, or of a State or Territory.

15. Why is this exemption necessary for these three new protected attributes, when no similar exemption is in place for the other attributes protected under the Act (such as sex, breastfeeding and family responsibilities)? If such an exemption is to be introduced in the Bill, should it apply to all the protected grounds in the SDA?

AGD Response:

The new exemption will only apply to discrimination on basis of the new grounds of sexual orientation, gender identity and intersex status. This exemption recognises that there may be laws which appropriately make distinctions on these grounds, while also recognising there is insufficient time to identify all such laws in the development of this Bill. This reflects an existing exemption in the *Disability Discrimination Act 1992* (DDA) and the approach taken in the HRAD Bill.

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.

16. What kinds of laws are expected to be prescribed under this exemption? Are there particular areas in which other laws are likely to conflict with the new protection against discrimination on the grounds of sexual orientation, gender identity or intersex status?

AGD Response:

The Government has not made any decisions regarding the prescription of laws under this provision. However, it will consult with State and Territory governments before reaching any decision.

17. Will LGBTI groups be consulted prior to any laws or regulations being prescribed under proposed new subsection 40(2B) of the Bill?

AGD Response:

The Government has not made any decisions regarding the process for prescribing laws under this provision, including consultation processes beyond that with State and Territory governments.

PIAC argued in its submission (pp 14-16) that subsection 47(2) of the *Disability Discrimination Act 1992* (DDA), on which this proposed new subsection is based, has led to uncertainty and inconsistency in relation to the interaction between the DDA and other prescribed Acts and Regulations.

18. Will proposed new subsection 40(2B) lead to similar uncertainty in relation to the interaction between the SDA and any prescribed laws? How can this be avoided?

AGD Response:

The Department is not aware of any uncertainty and inconsistency associated with the prescription mechanism in the DDA. The Department considers the mechanism provides adequate protection, through Parliamentary scrutiny and disallowance processes, including the *Human Rights (Parliamentary Scrutiny) Act 2011*. It also ensures appropriate flexibility to prescribe laws by regulation, recognising there is insufficient time to identify all such laws for inclusion in the Bill itself.

Other issues

Relevant international instruments

Several submitters to the inquiry have recommended that the Yogyakarta Principles should be added to the list of 'relevant international instruments' in subsection 4(1) of the SDA, in order to include an instrument that specifically recognises the human rights of LGBTI community.

19. What is your response to this suggestion? Do any international instruments recognising the rights of LGBTI people need to be added to the list of relevant international instruments in the SDA?

AGD Response:

'Relevant international instruments' is defined in section 4 of the SDA (unaffected by the Bill) to include a range of United Nations and International Labour Organization treaties. The list includes subject-specific treaties such as the *Convention on the Elimination of All Forms of Discrimination Against Women* as well as treaties of general application such as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and *ILO Convention (No 111) concerning Discrimination in Respect of Employment and Occupation*. Each of these treaties imposes obligations on Australia.

In contrast, the 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.

Resourcing for the Australian Human Rights Commission (AHRC)

The AHRC argues in its submission (p. 7) that the inclusion of the new proposed grounds in the Bill will lead to a higher workload for the AHRC in relation to complaints, enquiries, education and research tasks in relation to sexual orientation, gender identity and intersex status. The AHRC highlights that additional resourcing may be necessary to deal with this increased workload.

20. Are there any plans to increase resourcing to the AHRC to accommodate a greater workload resulting from the changes in the Bill?

AGD Response:

The Commission 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 Commission absorb these new responsibilities within current resources.

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

Discrimination protection on the basis of domestic violence

In its report on the Exposure Draft of the HRAD Bill, the committee recommended that individuals who have experienced domestic violence be protected against discrimination because of that experience.

21. Does the government plan to introduce discrimination protection on the basis of domestic violence?

22. Could protection against discrimination on the basis of domestic violence be introduced into the SDA as part of the Bill?

AGD Response (questions 21 and 22):

The Government has chosen not to include any broader policy changes in this Bill beyond introducing the new grounds of protection (sexual orientation, gender identity and intersex status). Any further changes are more appropriately considered as part of the broader HRAD Bill.

Consequential amendments to bring consistency to other Commonwealth laws

Some submitters have called for the provisions relating to discrimination in employment in the *Fair Work Act 2009* to be updated, to bring them into line with the terminology used in the Bill. This would include replacing references to the term 'sexual preference' with 'sexual orientation', and 'marital status' with 'marital or relationship status'. Submitters have also argued that similar terms in the *Australian Human Rights Commission Act 1986* (AHRC Act) and relevant regulations should be updated to make them consistent with the Bill.

23. Do the Fair Work Act and the AHRC Act need to be amended to create consistency of terminology with the SDA in relation to sexual orientation, gender identity and intersex status?

24. Do the new protected grounds of 'gender identity' and 'intersex status' also need to be included in the relevant provisions of the Fair Work Act, to bring this into line with the new protections introduced into the SDA?

AGD Response (questions 23 and 24):

The Government is not aware of there being any legal difference between the terms ‘sexual preference’ and ‘sexual orientation’. As the latter term more accurately reflects that a person’s sexual orientation is not a matter of choice, it has been used in the Bill. The Government is considering whether and how amendments to other Commonwealth laws which use the terminology ‘sexual preference’ could be made as part of this Bill, or whether this issue is best considered as part of the broader HRAD Bill.

The term ‘sexual preference’ does not appear in the AHRC Act, although it is used in regulations made under that Act. The Government is considering amending these regulations to use the term ‘sexual orientation’.

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 HRAD Bill.

Implementation of outstanding recommendations from the committee's 2008 inquiry

Several submitters have called for the outstanding recommendations from the Senate Standing Committee on Legal and Constitutional Affairs 2008 inquiry into the effectiveness of the SDA, which were to be addressed through the recent exposure draft consolidation legislation, to be implemented through this Bill instead.

25. What consideration has been given to addressing the outstanding recommendations from the committee's 2008 report in this Bill?

AGD Response:

Many of these recommendations related to changes to the broader operation of discrimination law and were picked up by the HRAD Bill. This Bill does not include any broader policy changes beyond introducing the new grounds of protection (sexual orientation, gender identity and intersex status). Broader reforms to discrimination law, including implementation of these recommendations, are more appropriately implemented through the HRAD Bill.

Additional questions on notice

Interaction between proposed new exemptions and exemptions in state and territory anti-discrimination laws

The New South Wales Government expressed concern in its submission that conduct in relation to the new protected grounds introduced in the Bill, which is lawful under exemptions in the *Anti-Discrimination Act 1977* (NSW), will not be lawful under the new exemptions in the SDA proposed by the Bill.

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.

26. What is your response to the concerns raised in these submissions? How would conflicts between the proposed exemptions in the SDA and exemptions in state and territory anti-discrimination law be resolved?

AGD Response:

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.

The NSW Government suggested including an additional exemption in the Bill that exempts any action that 'is not unlawful under any anti-discrimination law in force in the place where the action is taken', noting that a similar exemption is in place in the Fair Work Act.

27. What is your response to this suggestion? Would such an exemption help to clarify the interaction between the SDA and state and territory anti-discrimination law?

AGD Response:

The Bill does not incorporate State exceptions by reference. This would be a significant departure from the approach in existing anti-discrimination law and is therefore outside the scope of this Bill. To do so for the new attributes only, or even

for the entirety of the SDA, would introduce further inconsistency between the existing anti-discrimination Acts.

Further, such an approach would result in inconsistent federal regulation of discrimination across Australia, which would likely cause significant confusion for duty holders and would be difficult for the Australian Human Rights Commission to administer.

It would also result in a diminution of protections in those jurisdictions where anti-discrimination law includes very broad exemptions.