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The Parliament of the Commonwealth of Australia

# Advisory Report

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

House of Representatives  
Standing Committee on Social Policy and Legal Affairs

May 2013  
Canberra

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## Membership of the Committee

Chair	Mr Graham Perrett MP
Deputy Chair	The Hon. Judi Moylan MP
Members	The Hon. Laurie Ferguson MP (From 22 April 2013) The Hon. Shayne Neumann MP (To 22 April 2013) Ms Michelle Rowland MP The Hon. Dr Sharman Stone MP Ms Laura Smyth MP Mr Ross Vasta MP

## Committee Secretariat

Secretary                      Dr Anna Dacre

Senior Researcher            Dr John White



## Terms of reference

On 21 March 2013 the Selection Committee of the House of Representatives referred the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 for inquiry and report.



## List of abbreviations

HRAD	Human Rights and Anti-Discrimination
SDA	<i>Sex Discrimination Act 1984</i>
the Bill	The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013
the Committee	The House of Representatives Standing Committee on Social Policy and Legal Affairs





# List of recommendations

## Recommendation 1

The Committee recommends that the House of Representatives pass the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.



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

- 1.1 The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill) was introduced into the House of Representatives by the Attorney General, the Hon Mark Dreyfus, on 21 March 2013.
- 1.2 The Attorney General said that the amendments proposed by the Bill will:
  - provide that discrimination on these new grounds is unlawful in the same areas of life as for other grounds already covered by the Sex Discrimination Act. These include: areas of work, education, goods, services and facilities, accommodation, land, clubs and administration of Commonwealth laws and programs.<sup>1</sup>
- 1.3 The Bill amends the *Sex Discrimination Act 1984* (SDA) to:
  - extend the protection from discrimination to the new grounds of sexual orientation, gender identity, and intersex status; and
  - extend the existing ground of 'marital status' to 'marital or relationship status' to provide protection from discrimination for same-sex de facto couples.<sup>2</sup>
- 1.4 The key amendments made by this Bill will:
  - insert definitions for 'sexual orientation', 'gender identity' and 'intersex status', replace the definition for 'marital status' with 'marital or relationship status', and make related changes to other definitions

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1 House of Representatives, *Hansard*, Thursday, 21 March 2013, p. 2894.

2 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill), *Explanatory Memorandum*, p. 2.

- provide that discrimination on these new grounds is unlawful in the same circumstances as for other grounds already covered by the SDA [*Sex Discrimination Act 1984*], and
- amend existing exemptions as appropriate to include the new grounds, and introduce three new exemptions, for conduct in compliance with the *Marriage Act 1961*, for conduct in compliance with prescribed Commonwealth, State or Territory laws, and for requests for information and keeping of records in relation to sex and/or gender, and extend the functions of the Australian Human Rights Commission to include the new grounds, and
- extend the functions of the Australian Human Rights Commission to include the new grounds.<sup>3</sup>

1.5 The Explanatory Memorandum states that the 'Bill also contains minor amendments to address drafting anomalies in relation to family responsibilities discrimination and will make a minor consequential amendment to the *Migration Act 1958*.'<sup>4</sup>

## Referral of the Bill

- 1.6 On 21 March 2013 the Selection Committee referred the Bill to the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) for inquiry and report.
- 1.7 The Selection Committee provided the following reasons for referral/principal issues for consideration:
- the adequacy of coverage of antidiscrimination protection, and
  - whether the terminology is appropriate.

## Conduct of the inquiry

- 1.8 The Committee did not call for submissions for its inquiry into the Bill, noting that the measures proposed in the Bill were part of the broader consultations conducted by the Senate on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 and the proposed measures were addressed in the Senate Committee's report as discussed below.
- 1.9 The Committee also notes that the Senate Legal and Constitutional Affairs Committee is concurrently undertaking an inquiry into the Bill. That

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3 *Explanatory Memorandum*, p. 2.

4 *Explanatory Memorandum*, p. 2.

Senate Committee has called for submissions and is expected to report on 17 June 2013. Given this duplication, and the consultations which have already taken place by that same Senate Committee, this Committee has chosen to contain its scrutiny to ensuring that the provisions and terminology proposed are consistent with measures recommended in other fora.

## Previous consultation

- 1.10 The measures proposed in this Bill have already recently undergone significant stakeholder consultation by the Senate Legal and Constitutional Affairs Committee inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination (HRAD) Bill 2012. The HRAD Bill included the measures proposed by this Bill.<sup>5</sup>
- 1.11 The Draft HRAD Bill 2012 proposed consolidating the five existing Commonwealth Acts dealing with human rights and anti-discrimination laws into a single Act. These Acts are:
- the *Racial Discrimination Act 1975*
  - the *Sex Discrimination Act 1984*
  - the *Disability Discrimination Act 1992*
  - the *Age Discrimination Act 2004*, and
  - the *Australian Human Rights Commission Act 1986*.
- 1.12 On 21 November 2012 the Senate referred the Exposure Draft of the HRAD Bill 2012 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. That Committee undertook extensive consultation, receiving over 3 000 submissions and form letters and conducting three hearings with key stakeholders.
- 1.13 The Senate Committee found substantial opposition to many of the measures proposed in the draft HRAD Bill, which is reflected in the report's twelve recommendations and dissenting reports.<sup>6</sup>

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5 Senate Legal and Constitutional Affairs Legislation Committee, Report, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, February 2013, pp.19-24.

6 Senate Legal and Constitutional Affairs Legislation Committee, Report, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, February 2013, accessed 19 March 2013, <[aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/completed\\_inquiries/2010-13/anti\\_discrimination\\_2012/report/index.htm](http://aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/index.htm)>.

- 1.14 Nonetheless, there was unanimous agreement that the SDA be amended to extend protection from discrimination on the grounds of sexual orientation, gender identity and intersex status.
- 1.15 Subsequently, the Draft HRAD Bill 2013 was withdrawn from consideration on the grounds that unanimous agreement could not be raised. However the Attorney General, recognising the unanimous agreement on the proposed amendments to the SDA, moved to ensure that this reform took place without delay.<sup>7</sup>
- 1.16 In addition to receiving over 3 000 written submissions from a range of stakeholders, the Senate Committee took significant evidence from a wide range of groups with views relevant to this issue including:
- Liberty Victoria
  - Victorian Gay and Lesbian Rights Lobby
  - Human Rights Council of Australia
  - Office of the Anti-Discrimination Commissioner (Tasmania)
  - Australian Council of Human Rights Agencies
  - Organisation Intersex International Australia
  - NSW Gay and Lesbian Rights Lobby
  - Australian Human Rights Commission, and
  - Commonwealth Attorney General's Department.
- 1.17 In response to issues raised by submitters, the Senate Committee made the following recommendations:
- Recommendation 1
- The committee recommends that the definition of 'gender identity' in clause 6 of the Draft Bill be amended to read:
- gender identity* means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.
- Recommendation 2
- The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'intersex status' as a protected attribute.
- 'Intersex' should be defined in clause 6 of the Draft Bill as follows:

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7 Hon Mark Dreyfus MP, Attorney General, *Transcript of Press Conference*, Canberra, 20 March 2013, accessed on 19 April 2013, <[attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx](http://attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx)>.

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

- neither wholly female nor wholly male; or
- a combination of female and male; or
- neither female nor male.

1.18 The Committee notes that the wording recommended by the Senate Committee is also used in the Anti-Discrimination Amendment Bill 2012 currently being debated by the Tasmanian Parliament. This wording has received widespread support from stakeholders.<sup>8</sup>

## Key considerations

### Adequacy of coverage

- 1.19 The Bill seeks to extend the protections from discrimination already covered by the SDA to include the grounds of sexual orientation, gender identity and intersex status. If the Bill is passed these protections, in conjunction with the existing provisions of the *Australian Human Rights Commission Act 1986*, will provide a complaints mechanism for people who consider they have been discriminated against on these grounds.
- 1.20 The provisions contained in the Bill place sexual orientation, gender identity and intersex status on the same footing as other grounds for discrimination that the Australian Human Rights Commission can investigate and resolve.
- 1.21 The SDA provides some exception to allow for differential treatment in certain circumstances. The Bill proposes similar treatment to apply to the new grounds of discrimination. These exceptions are for:
- voluntary bodies (whereby the right to equality and non-discrimination is limited by the right to freedom of association)
  - competitive sporting activity (which may involve differentiation based on biological differences between men and women), and
  - religious organisations (whereby the right to equality and non-discrimination is limited by the right to freedom of thought, conscience, and religion or belief).
- 1.22 In addition the Bill proposes two new exceptions:

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<sup>8</sup> Senate Legal and Constitutional Affairs Legislation Committee, Report, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, February 2013, p. 85.

- ‘protections against discrimination on the basis of sexual orientation does not affect the current policy position regarding same-sex marriage’, and
  - ‘requests of information and keeping of records that do not allow for identification as neither male nor female’ in order to reduce the regulatory impact on organisations.<sup>9</sup>
- 1.23 The Explanatory Memorandum notes that guidelines are being developed on gender recognition for department and agencies meaning that in time government agencies will no longer require this latter exception.<sup>10</sup>
- 1.24 The Bill will not extend the exception for religious organisations to cover the new ground of intersex status. The Statement of Compatibility with Human Rights accompanying the Bill states that:
- 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’.<sup>11</sup>

## Terminology

- 1.25 The terminology used to define ‘sexual orientation’, ‘gender identity’ and ‘intersex status’ in the Bill are 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.
  - **intersex status** means the status of having physical, hormonal or genetic features that are:
    - (a) neither wholly female nor wholly male; or
    - (b) a combination of female and male; or
    - (c) neither female nor male.
  - **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.<sup>12</sup>

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9 *Explanatory Memorandum*, p. 6.

10 *Explanatory Memorandum*, p. 7.

11 *Explanatory Memorandum*, p. 9.

12 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Subsection 4(1).



- 1.26 These definitions are consistent with the terminology recommended by the Senate Legal and Constitutional Affairs Committee and consistent with the terminology used in the Tasmanian Anti-Discrimination Bill.
- 1.27 The Bill also seeks to extend the existing ground of 'marital status' to 'marital or relationship status' to provide protection from discrimination for same-sex de facto couples.
- 1.28 The Committee notes that the measures contained in the Bill have undergone extensive consultation with stakeholder and drafting experts to ensure a robust terminology that provides clarity in the scope of protections offered.

## **Committee comment**

- 1.29 The Committee views the protection of citizens from discrimination as a core matter of social justice. The Committee considers that the proposed legislative change will address gaps in the current anti-discrimination legal framework.
- 1.30 The Committee notes that the right to equality and non-discrimination may be, in certain circumstances, deemed by existing legislation to be limited by the right to freedom of association, and the right to freedom of thought, conscience, and religion or belief. Consequently, the Committee recognises the existing exemptions included in the *Sex Discrimination Act 1986* and the supplementary provisions included in this Bill.
- 1.31 The Committee is satisfied that broad and thorough consultation has already been conducted on the measures proposed by this Bill, and that there is significant support and consensus on these measures across a broad range of stakeholders, including cross-party support.
- 1.32 Therefore, the Committee recommends that the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 be passed by the House of Representatives.
- 1.33 In addition, given the extensive consultation that has taken place regarding the measures contained in this Bill, and the expectation that the final sitting day of the 43<sup>rd</sup> Parliament will be 27 June 2013, this Committee urges the Senate Legal and Constitutional Affairs Committee to conclude its deliberations into this Bill as a matter of urgency so that the Bill may be considered by both Houses prior to the Parliament rising for the election.

**Recommendation 1**

**The Committee recommends that the House of Representatives pass the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.**

**Mr Graham Perrett MP  
Chair**