

PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS

REGULATION IMPACT STATEMENT

SECTION ONE: BACKGROUND

Government policy has long recognised that anti-discrimination protections are crucial to enable all Australians to participate fully in public life, address historical disadvantage, and promote social cohesion. Since 1975, this policy has been supported by four separate pieces of legislation, each of which deals with different grounds of discrimination:

- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984* (SDA)
- *Disability Discrimination Act 1992*, and
- *Age Discrimination Act 2004*.

Generally, these laws:

- cover both ‘direct’ and ‘indirect’ discrimination¹
- prohibit discrimination on certain grounds or ‘attributes’ (for example, race, sex, disability, age)² in key areas of public life (such as work, education, access to goods and services, accommodation and administration of laws and government programs), and
- provide for a range of exemptions to ensure that the legislation strikes the right balance between preventing inappropriate discrimination on the one hand while making allowances for legitimate distinctions on the other hand (for example, the inherent requirements of a particular job).

A fifth Act, the *Australian Human Rights Commission Act 1986* (AHRC Act), establishes the Australian Human Rights Commission (the Commission) and regulates the processes for making and resolving complaints under the other four Acts.

There are also provisions relating to discrimination in employment in the *Fair Work Act 2009* (FW Act) on taking adverse action (such as restricting promotions) in or termination of employment based on specified protected attributes. These attributes are not consistent with those protected under other Commonwealth legislation.

¹ Direct discrimination occurs where a person is treated less favourably than another person in the same circumstances on the ground of their protected attribute. Indirect discrimination occurs where an apparently neutral condition or requirement is imposed which has the effect of disadvantaging a group with a particular protected attribute and which is not reasonable in the circumstances. For example, a shop imposing a ‘no headwear’ policy would *indirectly* discriminate against members of religions that require its adherents to wear head coverings.

² The term ‘protected attribute’ is used to refer to a characteristic or attitude which is protected, ie discrimination on the basis of that attribute is prohibited.

During the 2010 election campaign, the Government committed to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity.

Structure of Regulation Impact Statement

This regulation impact statement (RIS) is structured as follows in accordance with Office for Best Practice Regulation guidelines:

- Section Two: Problem
- Section Three: Government's objectives
- Section Four: Options
- Section Five: Analysis of options
- Section Six: Summary and Conclusion
- Section Seven: Consultation
- Section Eight: Implementation and Review

SECTION TWO: PROBLEM

The high levels of discrimination facing the lesbian, gay, bisexual, transsexual and intersex³ (LGBTI) community is well documented.⁴

Currently there is limited protection in federal law from discrimination on the basis of sexual orientation and gender identity. There is no protection against discrimination on the basis of gender identity in Commonwealth legislation, and protection against discrimination based on sexual orientation is only available in relation to 'adverse action' in employment under the FW Act. This means there is no protection from discrimination based on sexual orientation in other areas of Commonwealth activity, which may not be covered by State and Territory anti-discrimination legislation, such as the delivery of services.

All State and Territory anti-discrimination laws provide protection against discrimination based on sexual orientation and gender identity. However, the coverage of these protections is inconsistent, as the scope of the definitions vary between jurisdictions.⁵

³ The Tasmanian Anti-Discrimination Amendment Bill defines 'intersex' as meaning 'the status of having physical, hormonal or genetic features that are (a) neither wholly female nor wholly male; (b) a combination of female and male; or (c) neither female nor male'.

⁴ See, for example:

- Inner City Legal Centre, *Outing Injustice: Understanding the legal needs of LGBTI communities in NSW*, (2011), available at: <http://www.iclc.org.au/outinginjustice/>, access 13 March 2013.
- Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination - Consultation report* (2011), available at: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/index.html, accessed 13 March 2013.
- Gay & Lesbian Health Victoria and Australian Research Centre in Sex, Health & Society, *Private lives: A report on the health and wellbeing of GLBT Australians* (2006), available at: <http://www.glhv.org.au/report/private-lives-report>, accessed 14 June 2012, p. 51.
- Working It Out, *Homophobia in the Workplace*, available at: http://workingitout.org.au/homophobia_workplace.html, accessed 14 June 2012.
- Suicide Prevention Australia, *Position Statement: Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities* (2009), available at: <http://suicidepreventionaust.org/wp-content/uploads/2012/01/SPA-GayLesbian-PositionStatement.pdf>, accessed 14 June 2012, p. 3.

⁵ For example, the New South Wales *Anti-Discrimination Act 1977* only prohibits discrimination on the basis of 'homosexuality'.

Introducing protections against sexual orientation and gender identity discrimination at the Commonwealth level is an opportunity to provide greater consistency in coverage of these attributes. In addition, none of the State and Territory anti-discrimination Acts⁶ currently provide adequate protection for people who are intersex.⁷

In October 2010, the Australian Human Rights Commission commenced a public consultation process to canvass the experiences and views of people who may have been discriminated against on the basis of their sexual orientation or sex and/or gender identity.⁸

The Commission's consultation report identified that discrimination against people based on their sexual orientation and gender identity was prevalent, particularly in the areas of employment and the provision of goods and services. Statistics reveal that 10.3% of LGBTI people have been refused employment or denied a promotion based on their sexuality.⁹ Another study found that 52% of gay and lesbian people suffered discrimination in their current employment because of their sexual orientation.¹⁰ Discrimination on the basis of sexual orientation and gender identity also has a significant impact on the mental health and wellbeing of LGBTI people – it is estimated that suicide attempts by gay, lesbian and bisexual people are between 3.5 to 14 times higher than that of the heterosexual population.¹¹

A large number of participants in the Commission consultation argued that the introduction of protection at the Commonwealth level would lead to cultural change in Australia by sending a powerful message regarding equality. Participants commented on a number of other practical benefits from this legislation, including that it would provide a wider range of remedies for discrimination and lead to greater national consistency in anti-discrimination protections.

Many participants observed that there is gap in protection from discrimination as there is uncertainty about the extent to which Commonwealth agencies are bound by State and Territory anti-discrimination laws. The Law Council of Australia provided some examples of potential everyday situations in which unfair discrimination might occur against individuals who are in contact with Commonwealth agencies. For example, an employee in a Commonwealth department who is discouraged by the Senior Executive from applying for promotion due to his transgender status.¹²

⁶ The Tasmanian Anti-Discrimination Amendment Bill 2012, which is currently before the Tasmanian Parliament, will introduce 'intersex' as a separate attribute.

⁷ According to evidence provided by Organisation Intersex International Australia to the Senate Standing Committee on Legal and Constitutional Affairs inquiry, there have been no successful discrimination cases run by an intersex person under existing State and Territory anti-discrimination laws (Senate Committee Report, Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013) p 22).

⁸ Australian Human Rights Commission, op cit, n4.

⁹ Gay & Lesbian Health Victoria, et al, op cit n4, p 51.

¹⁰ Working It Out, op cit n4.

¹¹ Suicide Prevention Australia, op cit n 4, p 3.

¹² Australian Human Rights Commission, op cit, n4, pp 17-20.

Current anti-discrimination law

As noted above, there are four Commonwealth anti-discrimination laws which prohibit discrimination on a number of grounds. There is no protection from discrimination on the grounds of sexual orientation, gender identity or intersex status. The SDA prohibits marital status discrimination, although this does not provide protection for same-sex de facto couples.

The AHRC Act also contains a separate discrimination complaints stream that gives effect to Australia's obligations under International Labour Organization (ILO) Convention No 111. The Commission has the function of seeking to conciliate complaints of discrimination in employment. This process does not include the option of proceeding to the federal courts. If the Commission cannot conciliate the matter and considers that a discriminatory act has occurred, it must report to the Attorney-General who must table the report in Parliament. 'Sexual preference' is one of the additional grounds covered under this scheme.

In addition, the FW Act also provides that it is unlawful to take 'adverse action' against a person based on certain attributes. 'Sexual preference' is one of the grounds on which adverse action is prohibited under the FW Act.

Finally, there is also anti-discrimination legislation at the State and Territory level. This legislation operates concurrently, which means that an employer can have certain obligations under both the relevant Commonwealth legislation and the State or Territory legislation. Each State and Territory contains some protections against sexual orientation and gender identity discrimination.

SECTION THREE: GOVERNMENT'S OBJECTIVES

The Government's objective is to prohibit discrimination against people on the basis of their sexual orientation, their marital or relationship status, their gender identity and whether they are intersex. The objective is also to provide an accessible remedy when such discrimination occurs.

SECTION FOUR: DESCRIPTION OF OPTIONS

There are two only options addressed in this RIS:

- Option 1: maintain the status quo
- Option 2: amend Commonwealth anti-discrimination law to introduce the new protected attributes of sexual orientation, gender identity and intersex status, and amend the definition of marital or relationship status to ensure it protects people in same-sex de facto relationships.

SECTION FIVE: IMPACT ANALYSIS

This section provides an analysis of the impacts of the two options identified above.

Option One: Retain the status quo

Costs

This approach would not address the current inconsistencies or lack of coverage by Commonwealth anti-discrimination law (with the exception of limited coverage under the FW Act). The law would remain fragmented, with States and Territories providing different coverage of discrimination on the basis of sexual orientation, gender identity and intersex status, and only very limited coverage at the Commonwealth level. Additionally, this would not reflect a best-practice model. Existing costs are likely to continue at current levels for businesses, with the majority of these due to compliance with State and Territory legislation, rather than any compliance costs associated with Commonwealth legislation.

Existing levels of discrimination are likely to continue, imposing costs on individuals with these attributes with the fragmented approach limited in its ability to promote attitudinal or systemic change. Some gaps in coverage (eg discrimination by Commonwealth agencies) would remain. In addition, the inconsistencies in coverage will see costs incurred by individuals in attempting to seek redress where discrimination has occurred remain at current levels. Such costs would include the need to seek legal advice to determine whether or not there is any protection from discriminatory behaviour, and under which regime (FW Act or State and Territory legislation) any action could be commenced.

At a broader level, the costs to society of not enabling full engagement with society by people based on their sexual orientation or gender identity, or being intersex, will remain.

Benefits

There would be no benefits for any stakeholders arising from this option.

Assessment against Government objectives

This Option does not meet the Government's objectives.

Option Two: introduce the new attributes into Commonwealth anti-discrimination law

The other option is to introduce the new attributes of sexual orientation, gender identity and intersex status into Commonwealth anti-discrimination law. The most appropriate vehicle would be the SDA.

Costs

There would be some costs under this approach, although it is likely to be limited, as the protections in the SDA would largely mirror existing State and Territory definitions of these attributes. Businesses which are already covered by State and Territory laws would only need to make very minimal changes to existing policies or conduct further staff training. However, Commonwealth agencies would be required to undertake some amendments to update existing policies and procedures to reflect changes to the Commonwealth legislative requirements, with associated training of staff to increase awareness of the new responsibilities, although it is expected that such costs would be minimal and could be done as part of general workplace training. As the only changes would be to add detail on the coverage of the new protected attributes (sexual orientation, gender identity and intersex

status) which are already partly covered by State and Territory legislation and the FW Act, the costs of updating policies would be expected to be quite low.

In addition, Commonwealth agencies and businesses risk incurring additional costs associated with responding to any allegations of discrimination under the Commonwealth regime, potentially including legal costs associated with defending any claims, although these could already be incurred under State and Territory regimes.

Benefits

This option would lead to greater national consistency in anti-discrimination laws, and bridge gaps in the existing legislation (eg discrimination by Commonwealth agencies). This approach would reflect a move towards a best practice model in Commonwealth anti-discrimination legislation, which will assist in moving towards later harmonisation between Federal and State/Territory anti-discrimination law.

This option would also provide a wider range of remedies for people who are discriminated against on the basis of their sexual orientation, gender identity or intersex status. Additionally, introducing these protections will send a powerful message regarding equality, and may lead to cultural change in the community.

Such change has the potential to result in some benefits for individuals with these attributes. In its consultation on *Addressing sexual orientation and sex and/or gender identity discrimination*, the Australian Human Rights Commission found that:

A large number of comments argued that the introduction of such protections would lead to cultural change in Australia by sending a powerful message regarding equality. Participants commented on a number of other practical benefits from this legislation, including that it would provide a wider range of remedies for discrimination and lead to greater national consistency in anti-discrimination protections.¹³

A particular focus is the potential benefits of cultural change, following from this symbolic statement by Government. For example, a reduction in the discrimination faced when purchasing goods and services will potentially lead to an increase in wellbeing.

[S]uch a law would provide an important federal symbolic statement about the unacceptable nature of such discrimination. This would contribute to ensuring that all persons are treated with dignity and respect regardless of their sexual orientation or sex/gender identity. This symbolism would, it is hoped, extend beyond the formal scope of the law to the community more generally and so affect the way in which lesbian, gay, bisexual, intersex and trans people are treated by other individuals on a day-to-day basis. The absence of this kind of legislation could be seen by some in the Australian community as suggesting the Commonwealth government does not take this kind of discrimination seriously, or worse, sees nothing wrong with such discrimination.¹⁴

In its submission to the Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the effectiveness of the SDA, the Australian Chamber of Commerce and

¹³ Australian Human Rights Commission, op cit n4, p 17.

¹⁴ Victorian Bar Association comment, cited in Australian Human Rights Commission, op cit n 4, p17.

Industry (ACCI) noted that '[t]here is a strong business case for diverse and inclusive workplace cultures which possess clear norms against discrimination'. ACCI acknowledged that there are benefits to employers in achieving recognition as an employer with a discrimination-free culture which can accrue in staff well being, high quality job applicants, productivity, lower absenteeism, fewer conflict issues requiring resolution and higher rates of retention. As part of the same process, Australian Women Lawyers noted the benefits of introducing flexible work measures include improved staff retention, increased productivity and reduced absenteeism.¹⁵

Assessment against Government objectives

This Option meets the Government's objectives.

SECTION SIX: SUMMARY AND CONCLUSION

The Government considers that LGBTI people are extremely vulnerable to discrimination and recognises the message that prohibiting discrimination on the basis of sexual orientation and gender identity will send to these individuals and society as a whole. For this reason, the Government made an election commitment to introduce these grounds into anti-discrimination law. On the basis that any cost impact on organisations will be limited, given the existing obligations to not discriminate on these grounds under State and Territory law, and in line with the Government's election commitment, Option Two is the preferred option.

SECTION SEVEN: CONSULTATION STATEMENT

In 2011, the Australian Human Rights Commission released its report on *Addressing sexual orientation and sex and/or gender identity discrimination*. The report is available at: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/index.html.

On 22 September 2011, the Australian Government released a discussion paper to guide public consultation on the consolidation of Commonwealth anti-discrimination laws and undertook a four month consultation process. The Department received 240 submissions as part of this process. The discussion paper and public submissions received are available at: www.ag.gov.au/antidiscrimination.

These processes informed the development of draft anti-discrimination legislation which included the attributes of sexual orientation and gender identity.

On 20 November 2012, the Australian Government released draft consolidated anti-discrimination legislation, the Exposure Draft Human Rights and Anti-Discrimination Bill 2012. A Regulation Impact Statement was prepared as part of that process. All relevant documents are available at www.ag.gov.au/antidiscrimination.

On 21 November 2012, the Senate referred the Exposure Draft Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report. The Committee received over 3400 submissions and conducted public hearings into the Exposure Draft Bill. The

¹⁵ Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating and promoting gender equality* (2008) ('SDA Report'), paragraphs 8.2 and 8.4.

Committee provided its report on 21 February 2013, recommending amendments to the definitions of sexual orientation and gender identity and the introduction of a standalone attribute of intersex status. These recommendations have formed the basis of the approach to these attributes as analysed in this RIS.

The majority of stakeholders, including LGBTI groups, human rights organisations, community legal centres, unions, academics and business, supported the introduction of protections from discrimination on the basis of sexual orientation and gender identity at the Commonwealth level. LGBTI stakeholders, human rights organisations and community legal centres strongly supported the inclusion of intersex status as a standalone attribute. In addition, these stakeholders generally objected to exemptions for religious organisations for these attributes.

Some religious organisations opposed the introduction of these protections, but most were supportive subject to the inclusion of appropriate exemptions for religious bodies.

SECTION EIGHT: IMPLEMENTATION

Draft legislation to implement the proposed approach will be introduced to Parliament in 2013. It is proposed to include a lead time of up to 6 months between passage of the legislation and the new regime commencing to provide time for businesses and other duty holders to familiarise themselves with the new regime. This will also provide the opportunity for organisations to update any policies and practices to comply with the changed arrangements.

The Government will ensure organisations are aware of the changed proposal, by working with the Commission to develop and update relevant guidance material.