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

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Law and Bills Digest Section

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

Date introduced: 21 March 2013

House: House of Representatives

Portfolio: Attorney-General

Commencement: Section 1 to 3 on Royal Assent. Schedule 1 on a single day to be fixed by proclamation. However, if the provision(s) do not commence within six months from the day of Royal Assent, then they commence the day after that period.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The aim of the Bill is to amend the Sex Discrimination Act 1984 (the SDA) so as to:

• prohibit discrimination on the grounds of sexual orientation, gender identity and intersex status in the same areas of life as for other grounds already covered by the SDA, including employment, education and the provision of goods and services

• extend the prohibition of discrimination on the existing ground of ‘marital status’ to ‘marital or relationship status’, so as to provide protection from discrimination to same-sex de facto couples

• introduce new exemptions which provide that the prohibitions on discrimination under the SDA will:
  – not apply to anything done by a person in compliance with the Marriage Act 1961 (Cth) or other prescribed law and
  – will not be contravened merely because requests for information, or the keeping of records, do not provide for a person to be identified as being neither male nor female.

The SDA permits some exemptions to its operations such that ‘discrimination’ will not be against the law in certain circumstances, thereby permitting differential treatment. Most of the current exemptions from the prohibition on unlawful discrimination for voluntary bodies, religious organisations and competitive sporting activities will also apply to the proposed new protected

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1. Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, p. 2, viewed 19 June 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5026_ems_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b%22
grounds. However, the Bill does not extend the exemption for religious organisations to cover the new ground of intersex status.

- address drafting anomalies in relation to family responsibilities discrimination, and makes minor consequential amendments to the *Migration Act 1958*. 2

**Background**

The amendments proposed by the Bill seem to derive from the culmination of:

- consideration and recommendations arising out of an inquiry into proposed reforms to the SDA by the Senate Legal and Constitutional Affairs Committee in 2008 3
- recommendations made by the Australian Human Rights Commission in its 2010 report on discrimination experienced within the lesbian, gay, bisexual, transgender and intersex community 4 and
- consultations undertaken by the Senate Legal and Constitutional Affairs Committee as part of its inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (the Exposure Draft of the HRAD Bill). 5

The Exposure Draft of the HRAD Bill 2012 aimed to consolidate Commonwealth Acts 6 dealing with human rights and discrimination as part of the Australian Government’s Human Rights Framework and giving effect to a 2010 election commitment. 7 The Exposure Draft of the HRAD Bill 2012 also

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2. Ibid.
included the measures proposed by this Bill. The HRAD Bill generated an avalanche of submissions (over 3000) and a storm of debate as reflected in the Senate Committee’s recommendations and dissenting reports. A failure to reach consensus about a way forward with the Exposure Draft of the HRAD Bill 2012 resulted in it being withdrawn while recommendations arising out of the Committee process underwent further reflection and consideration.  

However, there was unanimous agreement about the need to amend the SDA so as to deal with the lacunae in the existing legislation and properly afford protection from discrimination on the grounds of sexual orientation, gender identity and intersex status.

### Committee consideration

#### House Standing Committee on Social Policy and Legal Affairs


The House Standing Committee did not call for public submissions as it was aware that the proposed amendments were informed by the wider consultation around the Exposure Draft of the HRAD Bill 2012. In addition, the Senate Legal and Constitutional Affairs Legislation Committee was also undertaking an inquiry and calling for submissions. The House Standing Committee stated it:

‘... views the protection of citizens from discrimination as a core matter of social justice’, and it ‘considers that the proposed legislative change will address gaps in the current anti-discrimination legal framework.’

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9. Senate Committee recommendation 1 dealing with ‘gender identity’ and recommendation 2 dealing with intersex status.


11. Ibid., p. 7.

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The House Standing Committee thus recommended the passage of this Bill by the House of Representatives.

**Senate Legal and Constitutional Affairs Legislation Committee**


The Senate Committee recommended further amendments to the Bill as follows:

1. **Recommendation 1**: religious exemptions in section 37 of the SDA should not apply in respect of sexual orientation, gender identity and intersex status in connection with the provision of Commonwealth-funded aged care services.

2. **Recommendation 2**: 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’.

3. **Recommendation 3**: 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’.

4. **Recommendation 4**: Subject to Recommendation 1, and after due consideration of Recommendations 2 and 3, the committee recommends that the Senate pass the Bill.

**Coalition dissenting report**

The Coalition made a Minority Report stating that it was broadly supportive of the provisions of the Bill and acknowledging that ‘discrimination on the grounds of sexuality or sexual orientation runs counter to the essential tolerance and inclusiveness which characterise Australian society.’ However, the Coalition does not support Recommendation 1 because the removal of such an exemption is thought to have the potential to interfere with the capacity of some religious organisations to operate aged care facilities in accordance with principles which underpin and define their existence. However, it was acknowledged that Commonwealth-funded religious organisations did not have a unified position on the issue of this exemption.

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The Coalition Senators recommended that the Bill stand as presented and continue to provide that religious exemptions in section 37 of the SDA apply in respect of sexual orientation, gender identity and intersex status in connection with the provision of Commonwealth-funded aged care services.\(^{15}\)

**Additional comments by the Greens**

In the Additional Comments which attached to the Senate Committee report, the Greens stated that:

> Australian Greens believe in equality for all. Equality means treating all people with dignity and respect and not distinguishing or treating people unfavourably because of their background or personal characteristics such as sex, race, age, sexual orientation, disability, religion, housing or social status.\(^{16}\)

The Greens welcomed protection from discrimination on the basis of a person's sexual orientation, gender identity and intersex status, as well as protections against discrimination for same-sex de facto couples.\(^{17}\)

However, the Greens consider that the Bill did not go far enough in its provision of protection of the aforementioned ground because the Bill did not abolish the provisions of the SDA which exempt religious bodies from anti-discrimination law. They recommended that the Bill should remove the exemptions in the SDA from anti-discrimination law for religious bodies, and religious educational institutions.\(^{18}\)

The Australian Greens oppose item 60 of Schedule 1, which permits a request for information, or the keeping of records, requiring that a person be identified as either male or female. They noted the challenges faced by people in obtaining housing, employment and so forth, because the record keeping does not accommodate their sexual identity. The Greens therefore proposed a sunset clause ending 30 June 2016 for the operation of the proposed exemption.\(^{19}\)

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills has commented on the Bill and the issue it raises in relation to the amendment proposed by item 52 is discussed in the ‘key issues and provisions’ section of this Digest.\(^{20}\)

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15. Ibid., p. 36.
16. Ibid., Additional Comments by the Greens, p. 37.
17. Ibid.
18. Ibid.
19. Ibid., Additional Comments by the Greens, p. 38.
Financial implications

The Explanatory Memorandum states that the amendments proposed by this Bill are expected to have negligible financial implications. It is expected that a small number of complaints to the Australian Human Rights Commission are likely to occur, though the cost of handling these can be absorbed within existing resources.  

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found on pages 4–9 of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that:

... the Bill is compatible with human rights because it advances the protection of human rights, particularly the right to equality and non-discrimination. To the extent that it may limit rights, those limitations are reasonable, necessary and proportionate.  

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights seemed less sanguine about the compatibility of the Bill with particular human rights.

The Committee stated that while it:

agrees that the bill will advance the right to equality and non-discrimination and welcomes the inclusion of these additional grounds of prohibited discrimination in the SDA as it better reflects the standards under international human rights law. The committee considers that reforms proposed by the exposure draft Human Rights and Anti-Discrimination Bill 2012, with some necessary revisions, would have gone further to meet these standards.

However, the Committee

noted that the protection of religious freedom in article 18 of the ICCPR does not extend to an automatic entitlement for religious organisations to be exempted from acting consistently with the right to non-discrimination. Accordingly, any differential treatment arising from these exemptions must meet the test for legitimate differential treatment to be consistent with the right to non-discrimination. In other words, the differential treatment must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

21. Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, op. cit., p. 3.
22. Ibid., p. 9.
In its submission to the Senate Legal and Constitutional Affairs Committee, the committee expressed its disappointment that the government had not provided any proper justification for the provision of similarly broad exemptions for religious organisations in the exposure draft bill. Nor does the statement of compatibility for this bill justify extending the equally broad religious exemptions in the SDA to the new grounds introduced in the bill.24

Moreover the Committee raised the concern that:

The statement of compatibility does not address the question as to how [the existing exemption in the SDA for competitive sporting activity]... might be justifiably applied to each of these new attributes (e.g. sexual orientation), consistent with the right to equality and non-discrimination or assess its impact on the right to culture in article 15(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which encompasses sporting activity and article 10(g) of CEDAW, which relates to eliminating discrimination on the ground of sex in relation to participation in sport.25

In terms of the new exemption proposed by the Bill for requests for information and keeping of records where existing processes do not provide for a person to be identified as being neither male nor female, the Committee states that before forming a view about the compatibility of these provisions with human rights, it would require information from the Attorney-General regarding the nature of the impact of these provisions on person who identify as neither male or female. The Committee indicated that it did not consider administrative inconvenience, by and of itself, a legitimate reason to interfere with an individual’s rights.26

Key issues and provisions

Part 1—Amendments of the Sex Discrimination Act (SDA)

The long title of the SDA is an ‘Act relating to discrimination on the ground of sex, marital status, pregnancy, potential pregnancy, breastfeeding or family responsibilities or involving sexual harassment’.27

Item 1 removes the current reference to ‘marital status’ in the long title of the SDA and replaces it with the new and additional terms and thus grounds of discrimination which are to be covered by the Act: ‘sexual orientation, gender identity, intersex status, marital or relationship status’. Item 2 amends the preamble to correspondingly insert reference to the new grounds of protection against discrimination and the extension of the ground ‘marital status’ to ‘marital or relationship status’ so as to offer protection from discrimination for same-sex defacto couples.

Item 3 amends paragraph 3(b) the objects of the SDA as a consequence of the proposed insertion of new and additional terms and thus grounds of discrimination mentioned in items 1 and 2. This means that the objects of the Act will include so far as is possible, the elimination of discrimination against persons on the ground of ‘sexual orientation, gender identity, intersex status, marital or

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24. Ibid., p. 61.
25. Ibid., p. 63.
26. Ibid., p. 64.
relationship status’ in the areas of work, accommodation, education, and the provision of goods and facilities.

Items 4–5, 11 and 15 repeal the definition of ‘de facto spouse’ in subsection 4(1), which is the interpretation section of the SDA containing definitions, and also reference to ‘defacto partner’ in subparagraph 4(1)(b), and subsection 4A(2) dealing with the concept of family responsibilities. Consistent with the proposed amendment to replace ‘marital status’ with ‘marital or relationship status’, it is proposed that ‘de facto spouse’ be replaced with de facto partner. The meaning of de facto partner is the same as that given by section 2D of the Acts Interpretation Act 1901.

Item 6 proposes to insert into subsection 4(1), which is the interpretation section of the SDA, a definition of gender identity to mean: ‘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’. This definition was based on a definition recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the Exposure Draft of the HRAD Bill 2012, and is also based on the proposed definition of ‘gender-related identity’ in the Tasmanian Anti-Discrimination Amendment Bill 2012.

The definition of gender identity is very broad in its capture and is deliberately so according to the Explanatory Memorandum, so as to afford protection to a diverse group of persons as possible.

Item 7 proposes to insert into subsection 4(1), which is the interpretation section of the SDA, a definition of ‘intersex status’ to mean: the status of having physical, hormonal or genetic features that are:

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

Items 8 and 14 repeal the definitions of ‘man’ and ‘woman’ in subsection 4(1) of the SDA. The Explanatory Memorandum states that:

To the extent these terms appear in the Act, they will take their ordinary meaning. These definitions are repealed in order to ensure that ‘man’ and ‘woman’ are not interpreted so narrowly as to exclude, for example, a transgender woman from accessing protections from discrimination on the basis of other attributes contained in the SDA.

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28. A person is the de facto partner of another person (whether of the same sex or a different sex) if: (a) the person is in a registered relationship with the other person under section 2E [which provides a mechanism to recognise relationships registered under prescribed state and territory registered relationship laws] or (b) the person is in a de facto relationship with the other person under section 2F [which list a range of factors to consider in determining whether two people are in a de facto relationship].


30. Ibid., p. 13.

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Item 9 inserts the definition of ‘martial or relationship status’ in subsection 4(1) of the SDA and item 10 correspondingly repeals the definition of ‘marital status’. This extends the protection against relationship discrimination to same sex couples. Marital or relationship status means a person’s status as being any of the following:

- single
- married
- married, but living separately and apart from his or her spouse
- divorced
- the de facto partner of another person
- the de facto partner of another person, but living separately and apart from that other person
- the former de facto partner of another person or
- the surviving spouse or de facto partner of a person who has died.

Item 12 inserts into subsection 4(1) of the SDA a definition of sexual orientation to mean: ‘a person’s orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex’.

Item 16 replaces reference to the ‘opposite sex’ in subsection 5(1) of the SDA with ‘a different sex’. The Explanatory Memorandum states that this is intended to provide consistency with the introduction of protections for gender identity and intersex status, which recognise that a person may be, or identify as, neither male nor female. 32

Sex discrimination

Section 5 of the SDA deals with sex discrimination.

Discrimination on the ground of sexual orientation

Item 17 proposes the introduction of section 5A which provides a definition/test of discrimination on the ground of sexual orientation.

Direct discrimination

Proposed subsection 5A(1) provides that a person (discriminator) directly discriminates against another (aggrieved person) if because of:

- the aggrieved person’s sexual orientation

31. Item 13 inserts into subsection 4(1) a definition of ‘surviving or defacto spouse partner’ to replace the concept of a ‘widow’ which is used in the existing definition of ‘marital status’.


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• a characteristic that relates to or is associated with person’s having the sexual orientation of the aggrieved person’s sexual orientation or
• a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person

the discriminator treats the aggrieved person less favourably than a person who has a different sexual orientation, in circumstances that are the same or are not materially different.

Indirect discrimination

Proposed subsection 5A(2) provides that a person (discriminator) indirectly discriminates against another (aggrieved person) if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.

However, proposed subsection 5A(3) makes the prohibition of indirect discrimination (proposed subsection 5A(2)) subject to section 7B and 7D of the SDA.

Section 7B of the SDA provides a reasonableness test for indirect discrimination. Basically, a person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect if the condition, requirement or practice is reasonable in the circumstances.

Section 7D of the SDA deals with special measures designed to achieve equality and basically provides that a person may take special measures for the purpose of achieving substantive equality between the categories of persons listed under subsection 7D(1). Proposed section 5A is also subject to section 7D of the SDA.

Discrimination on the ground of gender identity

Item 17 proposes the introduction of section 5B which provides a definition/test of discrimination on the ground of gender identity. This definition mirrors that for the proposed definition of discrimination on the ground of sexual orientation and covers both direct and indirect discrimination. Once again, this proposed definition has the effect subject to sections 7B and 7D of the SDA.

Discrimination on the ground of intersex status

Item 17 proposes the introduction of section 5C which provides a definition/test of discrimination on the ground of intersex status. This definition mirrors that for the proposed definition of discrimination on the ground of sexual orientation and covers both direct and indirect discrimination. Once again, this proposed definition has the effect subject to sections 7B and 7D of the SDA.

Items 22–23 make consequential amendments ‘to ensure that special measures can be taken to address the particular needs of people who have different sexual orientations, people who have
different gender identities and people who are of intersex status, without producing claims of unlawful discrimination under the new sections 5A, 5B and 5C.\(^\text{33}\)

**Item 24** amends section 8 which will mean that where a discriminator has two or more reasons for doing a discriminatory act, it is sufficient that discrimination be one reason for the act, even if not the dominant reason.

**The effect of state and territory laws**

**Items 25–26** make amendments which preserve the operation of state and territory laws so long as they are capable of operating concurrently with the SDA.

**Prohibiting discrimination in the areas of work covered by the SDA**

**Items 27 and 29–34** provide amendments designed to ensure that discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status are prohibited in the following areas of work:

- employment and superannuation (section 14: SDA, **item 27**)
- commission agents (section 15, SDA: **item 29**)
- contract workers (section 16, SDA: **item 30**)
- partnerships (section 17, SDA: **item 31**)
- qualifying bodies (section 18, SDA: **item 32**)
- registered organisations under the *Fair Work (Registered Organisations) Act 2009* (section 19, SDA: **item 33**) and
- employment agencies (section 20, SDA: **item 34**).

**Prohibiting discrimination in the areas of public life by the SDA**

**Items 35 and 37–41 and 43** provide amendments designed to ensure that discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status are prohibited in the following areas of public life:

- education (section 21, SDA: **item 35**)
- goods, services and facilities (section 22, SDA: **item 37**)
- accommodation (section 23, SDA, **items 38–39**)
- land (section 24, SDA: **item 40**)
- clubs (section 25, SDA: **item 41**) and

\(^{33}\) Explanatory Memorandum, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, op. cit., p. 17.
• administration of Commonwealth laws and programs (section 26, SDA: item 43).

The provision of information enabling discrimination

Items 44–45 amend section 27 as a consequence of the introduction of new grounds of discrimination. The effect of the proposed amendment is to make it illegal to request or require a person to provide information if that information would enable the requester to unlawfully discriminate.

However, this is subject to the amendment proposed by item 60 which provides an exemption to the effect that the making a request for information and keeping records under Division 1 and 2 of Part II of the SDA is not unlawful merely because the request or record keeping does not allow for a person to identify as being neither male or female (proposed subsection 43A(1) and (2) respectively). According to the Explanatory Memorandum, this will mean that organisations do not face the task of have to provide an alternative to male and female in any data keeping. However, these exemptions may be reconsidered in the future if organisations revise their record keeping so as to accommodate these changes.34

Exemption – educational institutions established for religious purposes

Division 4 of Part II of the SDA deals with exemptions to the prohibition of discrimination. Section 38 relates to the parameters of the exemption provided to educational institutions established for religious purposes.

Item 50 amends the exemption to the prohibition of discrimination provided to educational institutions established for religious purposes to include the new grounds of ‘sexual orientation’ and ‘gender identity’, and to replace the ground of ‘marital status’ with ‘marital or relationship status’. The exemption will only apply if a person ‘discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’ (subsection 38(1)-(3)).

The exemption does not extend to the new ground of ‘intersex status’ because according to the Explanatory Memorandum ‘the Government has not been informed of any religious doctrines which require discrimination on the ground of intersex status’.35

Exemption – voluntary bodies

Item 51 amends the exemption to the prohibition of discrimination provided to voluntary bodies (under section 39 of the SDA) to include the new grounds of ‘sexual orientation’ and ‘gender identity’, ‘intersex status’ or relationship status’. Thus it will not be unlawful for a voluntary body (as defined at subsection 4(1) of the SDA) to discriminate against a person on these new grounds in connection with:

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34. Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, op. cit., p. 22.
35. Ibid., p. 20.
• the admission of persons as members of the body or
• the provision of benefits, facilities or services to members of the body.

Exemption – Acts done under Statutory Authority

Item 52 adds two new exemptions into section 40 of the SDA.

The effect of proposed subsection 40(2A) means that the prohibitions on discrimination on the basis of sexual orientation, gender identity, intersex status or relationship status in Divisions 1 and 2 of Part II of the SDA (which deal with discrimination at work and in other areas respectively) will not have application to anything done by a person in direct compliance with the Marriage Act 1961.

The effect of proposed subsection 40(2B) means that the prohibitions on discrimination on the basis of sexual orientation, gender identity or intersex status in Divisions 1 and 2 of Part II of the SDA (which deal with discrimination at work and in other areas respectively) will not have application to anything done by a person in direct compliance with a law of the Commonwealth, or state or territory, that is prescribed by the regulations for the purposes of this subsection.

The Coalition have proposed an amendment to item 52 such that part of the sentence ‘in direct compliance with a law of the Commonwealth, or of a state or territory, that is prescribed by the regulations for the purpose of this subsection’, is substituted with the sentence ‘in accordance with or necessary to comply with a law of the Commonwealth, or of a state or territory’.36

The Scrutiny of Bills Committee raised concern about the issue of the delegation of legislative power in these circumstances. Its report stated that while:

... there may be laws which appropriately make distinctions on the basis of sexual orientation, gender identity and intersex status, it is not clear what circumstances are likely to fall into this category and whether there is a need to provide for such exceptions by way of a regulation making power rather than through the legislative processes of the parliament. However, in light of the explanation provided, and the existence of a similar exception in the Disability Discrimination Act 1992, the committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.37

Exemption – new superannuation fund and existing superannuation fund conditions

Section 41A and section 41B of the SDA deal with discrimination in relation to new superannuation funds and existing superannuation funds respectively. They basically provide that nothing in Division 1 or 2 of Part II of the SDA (which deal with discrimination at work and in other areas respectively) makes discrimination in relation to a superannuation fund by one person (the discriminator) against another person (in section 41A ‘the aggrieved person’ and in section 41B ‘the


37. Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 5 of 2013, op. cit., p. 84.
member’) unlawful if the discrimination against the aggrieved person or member is on a ground covered by section 41A and the discrimination arises only because of one or more of the reasons provided for by section 41A. These reasons generally have to do with superannuation fund conditions which were based on for example, on actuarial or statistical data from a source on which it may be considered reasonable for the discriminator to rely. It may also reflect in some circumstances, the age of the schemes and the terms on which they were provided to members.

**Items 53–55 and 58** amend the abovementioned exemptions as a consequence of extending protection against discrimination to same-sex defacto couples. The Explanatory Memorandum states that these exemptions are necessary to preserve existing policy in relation to superannuation fund conditions.\(^38\)

**Exemption – Sport**

Subsection 42(1) of the SDA provides that nothing in Division 1 or 2 of Part II of the Act renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

**Item 59** amends subsection 42(1) to extend the coverage of the exemption for sporting activity to include ‘gender identity’ and ‘intersex status’. Thus, it will be not unlawful to discriminate on the grounds of sex, gender identity or intersex status by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

The Explanatory Memorandum states that this exemption is necessary to restrict competitive sporting events to people who can effectively compete.\(^39\)

**Other provisions**

**Part 2—Amendments of other Acts**

**Migration Act 1958**

Section 507 of the Migration Act\(^40\) deals with the operative impact of the SDA and the issue of ‘marital status’ on the regulations or making of regulations in relation to a visa application, where those regulations specify:

- the nature and incidents of the relationship between a person and another person or
- the period for which a relationship of a specified kind must have existed between a person and another person

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\(^38\). Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, op. cit., p. 21.

\(^39\). Ibid., p. 22.

before the person is taken to be the de facto partner of the other person.

The SDA to the extent that it applies to the status or condition of being the spouse or de facto partner of another person, does not operate in relation to the abovementioned regulations or the performance of any function, the exercise of any power or the fulfilment of any responsibility, in connection with the administration of any such regulation.

**Items 62–63** amend section 507 of the Migration Act to replace references to ‘marital status’ with ‘marital or relationship status’, so as to be consistent with the renaming of this ground under the SDA.