SEX DISCRIMINATION AMENDMENT (SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS) BILL 2013
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GENERAL OUTLINE

The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill) contains measures to extend the protection from discrimination to the new grounds of:

- sexual orientation
- gender identity, and
- intersex status.

It also extends the existing ground of ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples.

These amendments give effect to the Government’s commitment to introduce new protections against discrimination on the basis of sexual orientation and gender identity. The Sex Discrimination Act 1984 (SDA) is the most appropriate vehicle of the existing Commonwealth anti-discrimination Acts to introduce these new protections.1

A separate ground of discrimination on the basis of intersex status is also introduced. People who are intersex may face many of the same issues that are sought to be addressed through the introduction of the ground of gender identity. However, including the separate ground of intersex status recognises that whether a person is intersex is a biological characteristic and not an identity.

The Bill also extends the existing ground of ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples, who are currently excluded from the definition of ‘marital status’.

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
- provide that discrimination on these new grounds is unlawful in the same circumstances as for other grounds already covered by the SDA
- 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.

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.

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FINANCIAL IMPACT STATEMENT

The amendments in this Bill will have negligible financial implications. While a small number of new complaints to the Australian Human Rights Commission is likely to occur, this cost can be absorbed within existing resources.

REGULATION IMPACT STATEMENT

A Regulation Impact Statement (RIS) for these proposals was previously prepared as part of the project to consolidate anti-discrimination laws into a single Act. An amended version of that RIS which extracts content relevant to this proposal is at Attachment A of this Explanatory Memorandum.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The Bill will amend the Sex Discrimination Act 1984 (SDA) to introduce new protections against discrimination on the basis of a person’s sexual orientation, gender identity and intersex status, and extend the ground of ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples.

There is substantial evidence demonstrating that discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people occurs in the community. This discrimination occurs in a range of areas of public life, including work, accommodation and the provision of goods and services. This range of conduct is highly detrimental to LGBTI people, manifesting in barriers to how they carry out their day-to-day lives.

The purpose of the Bill is to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia. It proposes to prohibit discrimination in all areas of life currently covered by the SDA, as follows:

- Areas of work, including:
  - Employment and superannuation
  - Commission agents
  - Contract workers
  - Partnerships
  - Qualifying bodies
  - Registered organisations under the Fair Work (Registered Organisations) Act 2009, and
  - Employment agencies, and
- Education
- Goods, services and facilities
- Accommodation
- Land
- Clubs, and
- Administration of Commonwealth laws and programs.
**Human rights implications**

By introducing new grounds of discrimination in a number of areas of public life, the Bill primarily engages:

- the rights to equality and non-discrimination
- the rights in work
- the right to an effective remedy
- the right to a fair hearing
- the right to freedom of thought, conscience and religion or belief, and
- the right to freedom of association.

**Rights to equality and non-discrimination**

The rights to equality and non-discrimination are contained in articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights to equality and non-discrimination are also contained in the other core human rights treaties to which Australia is a party (articles 1, 2, 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 2 of the Convention on the Rights of the Child, articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination Against Women and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities).

The rights to equality and non-discrimination provide that all persons are equal before the law and entitled, without any discrimination, to the equal protection of the law. As a result, laws shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or ‘other status’.

In particular, article 26 of the ICCPR is a ‘free-standing’ bar on discrimination, prohibiting discrimination in law or in practice in any field regulated by public authorities. The list of grounds in article 26 is not exhaustive and decisions by the United Nations Human Rights Committee suggest that a clearly definable group of people linked by their common status is likely to fall within ‘other status’. ‘Other status’ has been found by the Committee to include age, sexual orientation and marital status.

The Bill introduces three new grounds of discrimination: sexual orientation, gender identity and intersex status; and strengthens the protections against discrimination on the ground of marital or relationships status. The inclusion of these new grounds will increase protection for groups that are often the target of discrimination. The Bill will therefore promote the rights to equality and non-discrimination for LGBTI people.
**Legitimate differential treatment**

Discrimination is impermissible differential treatment between persons or groups that results in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination. However, the international human rights law principle of ‘legitimate differential treatment’ enables particular groups of people to be treated differently in certain circumstances. This differential treatment must be aimed at achieving a legitimate objective, be based on reasonable and objectivecriteria and be proportionate to the objective to be achieved.

The SDA recognises that differing treatment may be permissible in certain circumstances by providing a range of exceptions (defences) to the prohibition on unlawful discrimination. The Bill amends some of these exceptions to apply to the new grounds of discrimination and also introduces two new exceptions specifically relevant to these attributes.

Of the existing exceptions, the following have been amended to apply to the new grounds of discrimination:

- Exemption for voluntary bodies, which ensures that the Act does not apply to the membership of voluntary organisations. This exemption recognises that rights may be limited by other rights, with the right to equality and non-discrimination limited by the right to freedom of association (see further the section on this right below).

- Exemption for competitive sporting activity, which ensures that the Act does not make it unlawful to restrict competitive sporting events to people who can effectively compete. It is legitimate to recognise that biological differences between men and women are relevant to competitive sporting activities. Limiting this exemption to situations in which strength, stamina or physique are relevant is a proportionate means of achieving this objective.

- Exemptions for religious organisations. This exemption recognises rights may be limited by other rights, with the right to equality and non-discrimination limited by the right to freedom of thought, conscience and religion or belief (see further the section on this right below).

Two new exceptions are proposed.

The first new exception makes clear that introducing protections against discrimination on the basis of sexual orientation does not affect the current policy position regarding same-sex marriage. The UN Human Rights Committee has stated that it does not consider a refusal to grant marriages between people of the same sex in and of itself to be a violation of the rights under the ICCPR, including Article 26. It is not contrary to the ICCPR for a State to refuse to do so, provided that the status of marriage does not give couples treatment that is more favourable than couples who are not married and have no possibility of being married because of the restriction on the basis of sexual orientation. As a result of the 2008 same-sex reforms, all couples, whether married or de facto, opposite-sex or same-sex, are given the same treatment by Commonwealth law.

The second new exception applies to requests of information and keeping of records that do not allow for identification as being neither male nor female. This seeks to achieve the legitimate objective of minimising regulatory impact on organisations. Mandating that all forms must be
amended to offer an alternative category could have a significant regulatory impact for a wide range of organisations. This impact would be disproportionate to the small number of people who do identify as neither male or female. The limited nature of the exception is a proportionate means of achieving this objective.

The Government is currently developing guidelines on gender recognition for departments and agencies. Changes as a result of these guidelines may mean those departments and agencies would no longer require this exemption.

**Rights in work**

Articles 6 and 7 of the ICESCR provide for the right to work and rights in work, including the enjoyment of just and favourable conditions of work. The UN Committee on Economic Social and Cultural Rights in General Comment 18 has stated that the right to work includes:

the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.

Article 2(2) of ICESCR provides that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As a result, there can be no discrimination in access to and maintenance of employment on the grounds enumerated in article 2(2) of ICESCR.

Rights in work for LGBTI people are promoted by the Bill. Introducing protections against discrimination the grounds of sexual orientation, gender identity and intersex status in work will prohibit conduct that results in unfair deprivation of work or discrimination in work, such as by denying a person employment or terminating their employment on the basis of those grounds.

Exemptions for religious organisations also apply to these protections, recognising that rights may be limited by other rights (see further the section on the right to freedom of thought, conscience and religion or belief below).

**Right to an effective remedy and right to a fair hearing**

The right to an effective remedy for breaches of the ICCPR is contained in article 2(3) of the ICCPR. The right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to victims. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.
Article 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, all persons have a right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

The introduction of the grounds of sexual orientation, gender identity and intersex status into the SDA, in conjunction with the existing complaints 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 bases. The Australian Human Rights Commission may investigate and attempt to conciliate such complaints.

Where a complaint cannot be conciliated, an individual may bring their complaint to the Federal Circuit Court or Federal Court of Australia.

By providing these avenues of redress, the Bill promotes to the right to an effective remedy in instances where the rights to equality and non-discrimination are breached for an LGBTI person.

The Commission attempts to conciliate claims of discrimination as an independent body. Complaints which cannot be conciliated are considered in full by an independent court. This will afford a person who is accused of unlawful discrimination a fair hearing, as the claim against them will be objectively assessed, and they will have an opportunity to answer and respond to any claim against them.

**Right to freedom of thought, conscience and religion or belief**

Article 18(1) of the ICCPR provides:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The importance of the right to freedom of religion is recognised in sections 37 and 38 of the SDA. These sections provide exemptions for religious bodies and education institutions from the operation of the prohibition of discrimination provisions of the SDA in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

This right manifestly extends to the freedom of religious bodies to organise themselves, including the selection of religious leaders, recognition of members and other religious acts and practices. These freedoms are expressly recognised in the exemption at section 37 of the SDA. The exemption applies to all grounds protected in the SDA, which will encompass the new grounds introduced in the Bill.

The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity.
The Bill will not extend the exemption to cover the new ground of intersex status. 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’. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief.

**Right to freedom of association**

Article 22 of the ICCPR provides that everyone should have the right to freedom of association with others. No restrictions may be placed on the exercise of this right, other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Section 25 of the SDA prohibits discrimination in determining membership of a club, where ‘club’ means an association of at least 30 people who maintain facilities out of the proceeds of the club and sells or supplies liquor for consumption on its premises. This applies to all existing grounds covered by the SDA (other than family responsibilities) and will apply to the new grounds included under the Bill.

This provision limits the right to freedom of association. However, it does so to protect the rights and freedoms of others, in accordance with the right to equality and non-discrimination. It is a limitation which is recognised in the terms of Article 22 and is therefore a legitimate objective. The limited terms of the prohibition on discrimination, namely to ‘public’ rather than ‘private’ clubs, is a proportionate means of achieving this objective exemption and is therefore permissible.

**Conclusion**

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.

The Hon Mark Dreyfus QC MP
Attorney-General
NOTES ON CLAUSES

Clause 1—Short title

1. This clause provides a short title for the Act, the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex) Act 2013*.

Clause 2—Commencement

2. This clause provides that clauses 1 to 3 in the Bill will commence on the day the Act receives the Royal Assent. This clause also outlines that the amendments to the SDA set out in Schedule 1 will commence on a day to be fixed by Proclamation, or at the end of 6 months after Royal Assent if they have not commenced earlier.

3. This provides time for any necessary regulations to be made (such as prescribing State and Territory laws) and for business and other duty holders to make any necessary changes to policies.

Clause 3—Schedule(s)

4. This clause provides that each Act specified in a Schedule to the Bill will be amended or repealed as set out in the Schedules.
Schedule 1—Amendments

Part 1—Amendment of the Sex Discrimination Act 1984

Sex Discrimination Act 1984

Item 1

5. This item will amend the long title of the SDA to reflect the introduction of sexual orientation, gender identity and intersex status as separate grounds of discrimination, and the extension of the ground ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples.

Item 2

6. This item will amend the preamble to the SDA to reflect the introduction of sexual orientation, gender identity and intersex status as separate grounds of discrimination in this Bill, and the extension of the ground ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples.

Item 3

7. This item will amend the objects of the SDA as a consequence of the introduction of sexual orientation, gender identity and intersex status as separate grounds of discrimination, and the extension of ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples. This amendment will ensure that the objects of the Act include the elimination, so far as is possible, of discrimination against persons on the grounds of sexual orientation, gender identity, intersex status and marital or relationship status.

Items 4–5 and 15

8. These items will repeal the definition of ‘de facto spouse’ in subsection 4(1) and replace it with the definition of ‘de facto partner’ used in subsection 4A(2). This will ensure that same sex couples have the same level of protection under the SDA as opposite sex couples, consistent with the extension of ‘marital status’ to ‘marital or relationship status’. The meaning of ‘de facto partner’ is that given by section 2D of the Acts Interpretation Act 1901, which provides that:

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 sets out a range of factors to consider in determining whether two people are in a de facto relationship].
9. Item 15 will repeal the definition of ‘de facto partner’ from subsection 4A(2), where it applied only in relation to the concept of family responsibilities. It will now apply generally across the SDA and therefore should be located with the general definitions in subsection 4(1).

**Item 6**

10. This item will insert a definition of ‘gender identity’, which is introduced in this Bill as a protected attribute at the Commonwealth level. It is based on the definition used in the Tasmanian Anti-Discrimination Amendment Bill 2012, and was also recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the exposure draft Human Rights and Anti-Discrimination Bill 2012.

11. This definition provides maximum protection for gender diverse people. It includes the way a person expresses or presents their gender and recognises that a person may not identify as either male or female. This acknowledges that it is often the discord between a person’s gender presentation and their identity which is the cause of the discrimination.

12. The definition varies in a minor way from the definition in the Tasmanian Bill. It uses ‘a person’ rather than ‘an individual’ for consistency with the rest of the SDA, and removes the explicit reference to transsexualism and transgenderism. The definition is still intended to apply to transsexual and transgender persons, but the definition does not use these descriptions to ensure the definition is not unnecessarily limited in its application. This is also consistent with the approach taken in the definition of sexual orientation.

13. ‘Gender’ is used in this definition rather than ‘sex’ as it is a different concept, understood to be part of a person’s social identity (rather than biological characteristics). Gender refers to the way a person presents and is recognised within the community. A person’s gender might include outward social markers, including their name, outward appearance, mannerisms and dress. It also recognises that a person’s sex and gender may not necessarily be the same. Some people may identify as a different gender to their birth sex and some people may identify as neither male nor female.

**Item 7**

14. This item will insert a definition of ‘intersex status’, which is introduced in this Bill as a protected attribute at the Commonwealth level. It is also based on the definition used in the Tasmanian Anti-Discrimination Amendment Bill 2012, and was also recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the exposure draft Human Rights and Anti-Discrimination Bill 2012.

15. The definition recognises that being intersex is a biological condition, not a gender identity. It does not require a person who is intersex to identify as either male or female in order to access protections under the SDA. The definition is not intended to create a third sex in any sense. It does, however, recognise that sex is not a binary concept and that an intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be defined as one or other sex.

16. While there may be some overlap between the grounds of ‘sex’, ‘gender identity’ and ‘intersex status’, it is important that intersex status is protected as a separate ground because people who are intersex are also vulnerable to discrimination. It also recognises that discrimination on this ground manifests differently to discrimination on the grounds of sex and gender identity.
17. The definition uses the term ‘intersex status’ rather than ‘intersex’ as it is a better description of an attribute and fits in with the structure of the SDA.

*Items 8 and 14*

18. These items will repeal the definitions of ‘man’ and ‘woman’ from subsection 4(1). 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.

19. It is not intended that by repealing these definitions the SDA would be limited in its application to only adult persons, but that ‘man/men’ and ‘woman/women’ continue to refer to all males and females respectively.

*Items 9–10*

20. The protection against marital status discrimination in the SDA currently protects opposite-sex de facto couples but not same-sex couples. These items will repeal the existing definition of ‘marital status’ from subsection 4(1) and replace it with a definition of ‘marital or relationship status’. The new definition extends protections against relationship discrimination to same-sex de facto couples, ensuring equal coverage for opposite-sex and same-sex couples.

21. This new definition replaces existing paragraphs (e) and (f), which refer to being widowed or the (opposite sex) de facto spouse of a person, with four new paragraphs covering the status of being:

- 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, and
- the surviving spouse or de facto partner of a person who has died.

22. The above paragraphs use the concept of ‘de facto partner’ which, in accordance with the definition in the Acts Interpretation Act inserted by item 4, covers both same-sex and opposite-sex couples.

*Item 11*

23. This item will replace the term ‘de facto spouse’ with ‘de facto partner’ in the definition of ‘near relative’. This definition applies for the purposes of the exception from discrimination in the provision of accommodation to near relatives. It is consistent with other changes to the SDA to ensure it treats opposite-sex and same-sex couples equally (see, for example, items 4–5).

*Item 12*

24. This item will insert a definition of ‘sexual orientation’, which is introduced in this Bill as a protected attribute at the Commonwealth level. Sexual orientation is protected in all other Australian anti-discrimination laws.

25. Sexual orientation is defined to mean a person’s sexual orientation towards persons of the same sex, persons of a different sex, or both persons of the same sex and persons of a different sex.
The definition does not use labels, such as homosexuality, lesbianism, bisexuality or heterosexuality, which some people find offensive and can be inaccurate. However, it is intended that the definition covers each of these sexual orientations. The definition, along with other provisions in the Bill, uses the terminology ‘different sex’, instead of ‘opposite sex’ as is currently used in the SDA. This is consistent with the protection of gender identity and intersex status, which recognises that a person may be, or identify as, neither male nor female.

Item 13

26. This item will insert a definition of ‘surviving spouse or de facto partner’, for the purposes of the definition of ‘marital or relationship status’. It replaces the concept of ‘widowed’ used in the existing definition of ‘marital status’. It means a person who was the person’s spouse or de facto partner (whether same- or opposite-sex) immediately before the person died.

Item 14 – see above at item 8.

Item 15 – see above at item 4.

Item 16

27. This item will replace the reference to ‘the opposite sex’ in subsection 5(1) with ‘a different sex’. This amendment will ensure these provisions are consistent 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.

Item 17

28. This item will insert three new definitions of discrimination, in relation to sexual orientation (section 5A), gender identity (section 5B) and intersex status (section 5C). Each of these definitions apply to both direct discrimination (eg subsection 5A(1)) and indirect discrimination (eg subsection 5A(2)). Each ground applies subject to the reasonableness test for indirect discrimination in section 7B and the authorisation of special measures intended to achieve equality in section 7D (eg subsection 5B(3)).

Discrimination on the ground of sexual orientation

29. Subsection 5A(1) relates to direct discrimination against a person on the basis of their sexual orientation. Direct discrimination occurs where a person treats someone less favourably than another person. The subsection provides that it is discrimination to treat a person with a particular sexual orientation less favourably than someone who does not have the same sexual orientation in the same or similar circumstances. For example, it would likely be discrimination for a hotel to refuse accommodation to a person on the basis of their sexual orientation. Subsection 5A(1) is modelled on existing subsection 6(1) (direct discrimination on the ground of marital status).

30. Subsection 5A(2) relates to indirect discrimination against a person on the basis of their sexual orientation. Indirect discrimination arises where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group, in this case persons who have the same sexual orientation as the aggrieved person. This subsection provides that it is discrimination to impose, or propose 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. For example, an employer may specify that employees may only bring their
spouse along to the staff Christmas party. This may disadvantage any staff member with a same-sex partner and may likely be indirect discrimination on the ground of sexual orientation and/or marital or relationship status.

31. This prohibition of indirect discrimination has effect subject to the reasonableness test in section 7B (see subsection 5A(3)). Subsection 5A(2) is modelled on existing subsection 6(2) (indirect discrimination on the ground of marital status).

32. Subsection 5A(3) provides that section 5A has effect subject to section 7B (reasonableness test for indirect discrimination). As a result, a condition, requirement, or practice which has the effect of disadvantaging persons with the same sexual orientation as the aggrieved person is not discriminatory if the condition, requirement, or practice is reasonable in the circumstances (subsection 7B(1)). For example, a requirement that a couple acting as chaperone of a school trip be male and female may be reasonable if this is necessary to comply with guidelines that require male and female staff supervisors for coeducational groups (ie both male and female students). Subsection 5A(3) also provides that section 5A has effect subject to section 7D (special measures intended to achieve equality).

**Discrimination on the ground of gender identity**

33. Subsection 5B(1) relates to direct discrimination against a person on the basis of their gender identity. Direct discrimination occurs where a person treats someone less favourably than another person. The subsection provides that it is discrimination to treat a person with a particular gender identity less favourably than someone who does not have the same gender identity in the same or similar circumstances. For example, it would likely be discrimination for an employer to refuse to employ a transgender man on the basis of his gender identity. Subsection 5B(1) is modelled on existing subsection 6(1) (direct discrimination on the ground of marital status).

34. Subsection 5B(2) relates to indirect discrimination against a person on the basis of their gender identity. Indirect discrimination arises where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group, in this case persons who have the same gender identity as the aggrieved person. This subsection provides that it is discrimination to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person. For example, a human resources policy of an organisation that does not permit amendments to existing records. This may disadvantage a trans woman by forcing her to disclose information regarding her trans status in order to explain discrepancies in personal details of employment records.

35. This prohibition of indirect discrimination has effect subject to the reasonableness test in section 7B (see subsection 5B(3)). Subsection 5B(2) is modelled on existing subsection 6(2) (indirect discrimination on the ground of marital status).

36. Subsection 5B(3) provides that section 5B has effect subject to section 7B (reasonableness test for indirect discrimination). As a result, a condition, requirement, or practice which has the effect of disadvantaging persons with the same gender identity as the aggrieved person is not discriminatory if the condition, requirement, or practice is reasonable in the circumstances (subsection 7B(1)). For example, a policy that prohibits changes to existing identity records may be reasonable in circumstances where it is necessary to preserve the integrity of those records. Subsection 5B(3) also provides that section 5B has effect subject to section 7D (special measures intended to achieve equality).
Discrimination on the ground of intersex status

37. Subsection 5C(1) relates to direct discrimination against a person on the basis of their intersex status. Direct discrimination occurs where a person treats someone less favourably than another person. The subsection provides that it is discrimination to treat a person who is intersex less favourably than someone who is not intersex. For example, it would likely be discrimination for a bank teller to refuse to serve an intersex person because the person’s biological characteristics made the bank teller uncomfortable. Subsection 5C(1) is modelled on existing subsection 6(1) (direct discrimination on the ground of marital status).

38. Subsection 5C(2) relates to indirect discrimination against a person on the basis of their intersex status. Indirect discrimination arises where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group, in this case persons who are intersex. This subsection provides that it is discrimination to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who are intersex. For example, a medical records system may fail to recognise that a person who identifies as a man could have some female sex characteristics. This may disadvantage an intersex man who requires treatment for, for example, ovarian cancer.

39. This prohibition of indirect discrimination has effect subject to the reasonableness test in section 7B (see subsection 5C(3)). Subsection 5C(2) is modelled on existing subsection 6(2) (indirect discrimination on the ground of marital status).

40. Subsection 5C(3) provides that section 5C has effect subject to section 7B (reasonableness test for indirect discrimination). As a result, a condition, requirement, or practice which has the effect of disadvantaging persons of intersex status is not discriminatory if the condition, requirement, or practice is reasonable in the circumstances (subsection 7B(1)). For example, a requirement that strip searches be conducted by a person of the same sex, which may disadvantage an intersex person who does not identify as either male or female, may be reasonable. Subsection 5C(3) also provides that section 5C has effect subject to section 7D (special measures intended to achieve equality).

Items 18–19

41. These items will amend the definition of discrimination on the ground of marital status in section 6 to replace references to ‘marital status’ with ‘marital or relationship status’.

Item 20

42. This item will amend subsection 7B(1) as a consequence of the insertion of new grounds of indirect discrimination in relation to sexual orientation (section 5A), gender identity (section 5B) and intersex status (section 5B) by item 17. This amendment to subsection 7B(1) will ensure that indirect discrimination on the ground of sexual orientation, gender identity or intersex status cannot arise where the condition, requirement or practice complained of is reasonable in the circumstances.

Item 21

43. This item will remove the reference ‘or section 7A’ from section 7B, as it does not perform any function in the legislation. This is because section 7A does not prohibit indirect discrimination on the ground of family responsibilities, and the reasonableness test in section 7B only applies to indirect discrimination.
44. This amendment will correct an unintended drafting anomaly arising from Parliamentary amendments to the *Sex and Age Discrimination Legislation Amendment Act 2011*. Substantive amendments in the Senate removed the protection for indirect discrimination from family responsibilities, but consequential amendments, which were agreed to without specific consideration, resulted in the anomalies above.

*Items 22–23*

45. These items will amend section 7D as a consequence of the insertion of new grounds of discrimination in relation to sexual orientation, gender identity and intersex status, and the extension of the ground ‘marital status’ to ‘marital or relationship status’.

46. Section 7D authorises ‘special measures’ intended to achieve substantive equality in specific circumstances. Section 7D provides for the taking of special measures in relation to the existing grounds of discrimination in the SDA. Special measures do not constitute unlawful discrimination.

47. The amendments to section 7D in these items will 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.

*Item 24*

48. This item will amend section 8 as a consequence of the insertion of new grounds of discrimination in relation to sexual orientation, gender identity and intersex status by item 17.

49. Section 8 provides that where the discriminator had two or more reasons for doing a discriminatory act, the discriminatory reason need only be one of the reasons for the act, whether or not it is the dominant or substantial reason for the doing of the act. This test for causation applies to all of the existing grounds of discrimination in the SDA.

50. The amendment in item 24 will apply this test for causation to the grounds of discrimination of the basis of sexual orientation (section 5A), gender identity (section 5B) and intersex status (section 5C).

*Items 25–26*

51. These items will amend subsection 10(2) and subsection 11(2) as a consequence of the insertion of new grounds of discrimination in relation to sexual orientation, gender identity and intersex status by item 17, and the extension of the ground of ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples.

52. Section 10 preserves the operation of State and Territory anti-discrimination laws by clarifying that the SDA is not intended to exclude or limit the operation of an anti-discrimination law of a State or Territory that is capable of operating concurrently with the SDA (see subsection 10(3)).

53. Amendment of subsection 10(2) to include references to the new grounds of discrimination will ensure that this provision preserves the operation of State and Territory laws which also relate to the new grounds of discrimination.
54. Section 11 preserves the operation of State and Territory anti-discrimination laws by clarifying that the SDA is not intended to exclude or limit the operation of an anti-discrimination law of a State or Territory that furthers the objects of a relevant international instrument and is capable of operating concurrently with the SDA (see subsection 11(3)). In this context, the relevant international instruments are set out in the definition in subsection 4(1):

- the Convention on the Elimination of All Forms of Discrimination Against Women
- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Rights of the Child
- ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work or Equal Value
- ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation
- ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, and
- ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer.

55. Amendment of subsection 11(2) to include references to the new grounds of discrimination will ensure that this provision preserves the operation of State and Territory laws which further the objects of these international instruments and also relate to the new grounds of discrimination.

Items 27 and 29–34

56. These items will amend provisions of Division 1 of Part II of the SDA to prohibit discrimination on the grounds of sexual orientation, gender identity, intersex status and marital or relationship status in the following areas of work:

- Employment and superannuation (section 14 of the SDA, item 27 of the Bill)
- Commission agents (section 15 of the SDA, item 29 of the Bill)
- Contract workers (section 16 of the SDA, item 30 of the Bill)
- Partnerships (section 17 of the SDA, item 31 of the Bill)
- Qualifying bodies (section 18 of the SDA, item 32 of the Bill)
- Registered organisations under the Fair Work (Registered Organisations) Act 2009 (section 19 of the SDA, item 33 of the Bill), and
- Employment agencies (section 20 of the SDA, item 34 of the Bill).

57. These amendments will ensure that discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status are prohibited in all areas of work covered by the SDA.

Item 28

58. This item will amend subsection 14(4) to insert ‘sexual orientation’ and replace ‘marital status’ with ‘marital or relationship status’. This is to ensure that there is no discrimination between
same-sex de facto couples and opposite-sex de facto couples in relation to the payment of a superannuation benefit, which is consistent with the Commonwealth same-sex reforms in 2008.

*Items 35, 37–41 and 43*

59. These items will amend provisions of Division 2 of Part II of the SDA to prohibit discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status in the following areas of public life:

- Education (section 21 of the SDA, item 35 of the Bill)
- Goods, services and facilities (section 22 of the SDA, item 37 of the Bill)
- Accommodation (section 23 of the SDA, items 38–39 of the Bill)
- Land (section 24 of the SDA, item 40 of the Bill)
- Clubs (section 25 of the SDA, item 41 of the Bill), and
- Administration of Commonwealth laws and programs (section 26 of the SDA, item 43 of the Bill).

60. These amendments will ensure that discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status is prohibited in all the other areas of public life covered by the SDA.

*Items 36 and 42*

61. These items will replace references in paragraphs 21(3)(a) and (b) (which relate to admission as a student at a single sex educational institution) and subsection 25(3) (which relates to membership of single sex clubs) to ‘the opposite sex (to)’ with ‘a different sex (from)’. These amendments will ensure these provisions are consistent 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.

*Items 44–45*

62. These items will amend section 27 as a consequence of the insertion of new grounds of discrimination in relation to sexual orientation, gender identity and intersex status by item 17, and the extension of the ground ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples.

63. Section 27 makes it unlawful for a person to request or require another person to provide information if the information would enable the requester to unlawfully discriminate. For example, it would be unlawful for an employer to ask an applicant of female appearance with a masculine sounding voice for her medical history, but not to ask the same question of other applicants, in order to avoid hiring a transgender person.

64. The amendments in items 44 and 45 will ensure that requests for information in connection with discrimination on the grounds of sexual orientation, gender identity, intersex status and marital or relationship status are also unlawful.
65. Item 45 will also replace the reference to ‘the opposite sex’ with ‘a different sex’. This is consistent 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.

Item 46

66. This item will amend the list of circumstances to be taken into account in paragraph 28A(1A)(a) as part of the test for sexual harassment to replace ‘marital status’ and ‘sexual preference’ with ‘marital or relationship status’ and ‘sexual orientation’, and to insert gender identity and intersex status.

67. This amendment recognises that a person’s gender identity or intersex status may increase their vulnerability to sexual harassment.

Item 47

68. This item will amend the genuine occupational qualification exemption in section 30 to replace references to ‘the opposite sex’ with ‘a different sex’. This will ensure the section is consistent 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.

Items 48–49

69. These items will amend the exemption for residential care of children in section 35 as a consequence of protecting same-sex de facto couples against discrimination. Item 48 will replace ‘marital status’ with ‘marital or relationship status’ in subsection 35(2) and item 59 will amend paragraph 35(2)(b) to include a reference to ‘de facto partner’.

Item 50

70. This item will amend the exemption for educational institutions established for religious purposes in section 38 to insert the new grounds of sexual orientation and gender identity, and to replace ‘marital status’ with ‘marital or relationship status.’ As with other grounds covered by this exemption, it only applies if a person discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

71. The Government has not been informed of any religious doctrines which require discrimination on the ground of intersex status. Therefore, intersex status is not included in this exception.

Item 51

72. This item will amend the exemption for voluntary bodies in section 39. Consistent with other grounds in the SDA, it will not be unlawful for a voluntary body to discriminate against a person on the ground of sexual orientation, gender identity, intersex status or marital or relationship status, in connection with:

- the admission of persons as members of the body, or
- the provision of benefits, facilities, or services to members of the body.
Item 52

73. This item will introduce two new exemptions into subsection 40(2) to ensure there are no unintended consequences for Commonwealth, State and Territory laws as a result of the new protections.

74. The first exemption provides that the prohibitions on discrimination on the basis of sexual orientation, gender identity, intersex status and marital or relationship status in Division 1 and 2 do not apply to anything done by a person in direct compliance with the *Marriage Act 1961* (Cth). The purpose of this provision is to make clear that introducing protections against discrimination on these grounds does not affect current Government policy on same-sex marriage. It will apply to persons such as Commonwealth-registered marriage celebrants, as well as statutory bodies such as the registers of births, deaths and marriages.

75. The second exemption provides that the prohibitions on discrimination on the basis of sexual orientation, gender identity and intersex status in Division 1 and 2 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. Any laws to utilise this exemption will be prescribed by regulation.

76. This exemption reflects an existing exemption in the *Disability Discrimination Act 1992*. It recognises that there may be laws which appropriately make distinctions on these grounds. Once identified, regulations may be made preserving the operation of these laws (which are subject to parliamentary scrutiny, including under the *Human Rights (Parliamentary Scrutiny) Act 2011*).

77. The Government has not made any decisions regarding the prescription of laws under this provision. Initial consideration of laws will be done prior to commencement in consultation with State and Territory governments.

*Items 53–55 and 58*

78. These items will amend the exemptions in relation to superannuation fund conditions in sections 41A and 41B as a consequence of extending protection against discrimination to same-sex de facto couples. Items 53, 55 and 58 will replace ‘marital status’ with ‘marital or relationship status’ in sections 41A and 41B, and item 54 will amend paragraph 41A(1)(b)(ii) to replace ‘no spouse (whether legal or de facto)’ with ‘no spouse or de facto partner’. These amendments are necessary to preserve existing policy in relation to superannuation fund conditions.

*Items 56–57*

79. These items will amend the exemption in relation to new superannuation fund conditions in section 41A to repeal paragraph 41A(2)(c), which refers to when discrimination on the ground of family responsibilities is taken to be indirect. This paragraph will be removed because it does not perform any function in the legislation, as indirect discrimination on the basis of family responsibilities is not prohibited by the SDA.

80. As with item 21 above, this amendment also corrects an unintended drafting anomaly arising from Parliamentary amendments to the *Sex and Age Discrimination Legislation Amendment Act*.

*Item 59*

81. This item will amend the exemption for competitive sporting activity in section 42 to include gender identity and intersex status. Subsection 42(1) will provide that it is not unlawful to
discriminate on the ground 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. This amendment is necessary to preserve existing policy in relation to this exemption, restricting competitive sporting events to people who can effectively compete.

Item 60

82. This item will insert a new exemption into Division 4 applying to requests of information and keeping of records that do not allow for identification as being neither male nor female.

83. Subsection 43A(1) provides that it is not unlawful discrimination to request information in a way that does not allow for a person to identity as being neither male nor female. Similarly, subsection 43A(2) provides that it is not unlawful discrimination to make or keep records in a way that does not provide for a person to be identified as being neither male nor female.

84. The intention of these exemptions is to ensure that the new protections for gender identity and intersex status do not require a person or organisation to provide an alternative to male and female in any data collection or personal record. It will ensure that there is no requirement to amend forms as part of the new protections for gender identity and intersex status, which may be an onerous exercise for organisations.

85. The need for these exemptions may be reconsidered in the future, if organisations (both government and private sector) have revised their data collection and record keeping practices to allow for a person to identify as neither male nor female. For example, the Government is currently developing guidelines on gender recognition for departments and agencies. Changes as a result of these guidelines may mean those departments and agencies would no longer require this exemption.

Item 61

86. This item will amend paragraphs 48(1)(g), (ga) and (gb) as a consequence of the insertion of the new grounds of discrimination in relation to sexual orientation, gender identity and intersex status by item 17, and the extension of the ground ‘marital status’ to ‘marital or relationship status’.

87. The amendments will ensure that the Australian Human Rights Commission’s powers to produce reports, guidelines, and intervene in proceedings appropriately extend to the new grounds of discrimination.

Part 2—Amendments of other Acts

Migration Act 1958

Items 62–63

88. These items will amend section 507 of the Migration Act 1958 to replace references to ‘marital status’ with ‘marital or relationship status’, consistent with the re-naming of this ground.
Part 3—Application of amendments

Item 64

89. This item provides that the amendments will apply only in relation to acts or omissions occurring after the commencement of Schedule 1 of the Bill. This ensures that the amendments of the SDA made by Schedule 1 of this Bill will not have retrospective effect.
ATTACHMENT A

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

Generally, these laws:

- cover both ‘direct’ and ‘indirect’ discrimination
- prohibit discrimination on certain grounds or ‘attributes’ (for example, race, sex, disability, age) 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.

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2 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.

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

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 intersex (LGBTI) community is well documented.\(^4\)

\(^4\) 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’.

\(^5\) See, for example:

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. 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 Acts currently provide adequate protection for people who are intersex.

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.

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. Another study found that 52% of gay and lesbian people suffered discrimination in their current employment because of their sexual orientation. 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.

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.

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6 For example, the New South Wales Anti-Discrimination Act 1977 only prohibits discrimination on the basis of ‘homosexuality’.
7 The Tasmanian Anti-Discrimination Amendment Bill 2012, which is currently before the Tasmanian Parliament, will introduce ‘intersex’ as a separate attribute.
8 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).
11 Working It Out, op cit n4.
12 Suicide Prevention Australia, op cit n 4, p 3.
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.13

**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.14

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

14 Australian Human Rights Commission, op cit n4, p 17.
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.\(^{15}\)

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 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.\(^{16}\)

*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**


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](http://www.ag.gov.au/antidiscrimination).

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\(^{15}\) Victorian Bar Association comment, cited in Australian Human Rights Commission, op cit n 4, p17.

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 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 of aware of the changed proposal, by working with the Commission to develop and update relevant guidance material.