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

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the
Attorney-General, the Hon Mark Dreyfus QC MP)
SEX DISCRIMINATION AMENDMENT (SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS) BILL 2013

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GENERAL OUTLINE

1. The amendments address two issues raised in submissions to the Senate Legal and Constitutional Affairs Committee’s inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the Bill).

2. The first set of amendments insert a qualification on the religious exemptions for the provision of Commonwealth-funded aged care services.

3. The second set of amendments update terminology in other Commonwealth Acts from ‘sexual preference’ to ‘sexual orientation’.

FINANCIAL IMPACT STATEMENT

4. The amendments have no financial impact.
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

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The Amendments are 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 Amendments

The first set of Amendments insert a qualification on the religious exemptions provided in the Sex Discrimination Act 1984 (SDA) for the provision of Commonwealth-funded aged care services.

The second set of Amendments update terminology in other Commonwealth Acts from ‘sexual preference’ to ‘sexual orientation’.

Human rights implications

By qualifying the religious exemptions for the provision of Commonwealth-funded aged care services, the first set of Amendments primarily engage:

- the right to equality and non-discrimination 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 right to freedom of thought, conscience and religion or belief in article 18(1) of the ICCPR, and
- the right to health in article 12(1) of the ICESCR.

The second set of Amendments are minor amendments to update terminology and do not engage human rights.

Rights to equality and non-discrimination

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, articles 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 religious exemption in paragraph 37(d) provides that acts or practices of religious bodies that conform to the doctrines, tenets or beliefs of that religion or are necessary to avoid injury to the religious susceptibilities of adherents to that religion are exempt from the operation of the prohibition of discrimination provisions of the SDA.

The first set of Amendments inserts a qualification to this exemption so that the provision of Commonwealth-funded aged care services run by religious organisations will no longer be exempt from the prohibition of discrimination. The Amendments will only apply in the context of service provision. That is, an aged-care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion.

The inclusion of this qualification will protect against discrimination in the provision of aged care services and therefore promote the rights to equality and non-discrimination.

**Right to health**

Article 12(1) of the ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to health includes aged care services.

The entitlements under the right to health include the right to a system of health protection which provides equality of opportunity. By prohibiting discrimination in the provision of Commonwealth-funded-aged care services, the Amendments will promote equal access to the right to health.

**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 individual or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

These freedoms are expressly recognised in the exemption in section 37 of the SDA. The exemption applies to all grounds protected in the SDA, which encompass the new grounds introduced in the Bill.

Article 18 is not an absolute right and consequently may be subjected to permissible limitations. Those limitations must be provided by law, pursue a legitimate objective and be necessary and proportionate to achieving that objective.
The Amendments will qualify the exemption in paragraph 37(d) so that it does not apply in the provision of Commonwealth-funded aged care services. The Amendments pursue the legitimate objective of ensuring the ability of older people to access aged care services without discrimination.

The Amendments are necessary as there was significant feedback during the development of the Human Rights and Anti-Discrimination Bill 2012 of the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple.

The Government considers the Amendments are proportionate as the qualification is limited to the provision of aged care services and does not extend to employment decisions by religious organisations.

While the exemption recognises rights may be limited by other rights, with the right to equality and non-discrimination limited by the right to freedom of religion, the Government does not consider that discrimination in the provision of Commonwealth-funded aged care services is appropriate.

**Conclusion**

The Amendments are compatible with human rights because they advance the protection of human rights, particularly the rights to equality and non-discrimination and the right to health and to the extent that they limit the right to freedom of thought, conscience and religion or beliefs, those limitations are reasonable, necessary and proportionate to promoting other rights.

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

Amendment (1) – new item 3A

1. This amendment inserts a definition of ‘Commonwealth-funded aged care’ into section 4 of the Sex Discrimination Act 1984 (SDA), for the purposes of the inclusion of a qualification on religious exemptions for the provision of Commonwealth-funded aged care services to be inserted by amendments 2 and 3.

2. The definition is the same as included in Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill). It is defined as one of three matters:

- The first is ‘aged care’, within the meaning of the Aged Care Act 1997, that is provided by an approved provider (that is, a provider approved under that Act) and in relation to which the provider has responsibilities under that Act (paragraph (a) of the definition). ‘Aged care’ under the Aged Care Act refers to residential, community or flexible care, the three primary types of care which the Commonwealth funds. The reference to ‘responsibilities under that Act’ utilises the concept under, for example, subsection 54-1(2) of that Act, which provides that a provider has responsibilities to a person if either:
  - the Commonwealth has paid subsidy under the Aged Care Act for the provision of the care to the person, or
  - the provider is approved to provide that type of care, and the person is approved to receive the care.

This ensures that any organisation which receives funding to provide aged care services generally is not able to discriminate in the provision of those services, even if Commonwealth funding is not available in relation to a specific individual.

There are two reasons why such funding might not be provided. First, if a couple enters care where one partner is in need of a high level of care, but the other partner has no such need but wishes to continue living with his or her partner. In that case, the funding will be provided for the high needs partner but not the other partner, but this provision will ensure neither partner can be discriminated against.

The second situation is that a facility may have been built to accommodate 120 people but only receives Commonwealth funding for 90 people. The operator of the facility can still be approved to provide services to 30 additional people, but without receiving funding for those people. Once again, this clause will ensure people receiving those services cannot be the subject of discrimination.

- The second component of the definition of ‘Commonwealth-funded aged care’ (paragraph (b) of the definition) is any care or service in relation to which a grant has been paid under the Aged Care Act. Chapter 5 of that Act sets out the grants that are payable as follows:
  - residential care grants (see Part 5.1)
  - community care grants (see Part 5.2)
  - flexible care grants (see Part 5.2A)
  - assessment grants (see Part 5.3)
- accreditation grants (see Part 5.4)
- advocacy grants (see Part 5.5)
- community visitors grants (see Part 5.6), and
- other grants (see Part 5.7).

Care or services provided under any of these grants, all of which are connected to the aged care system (for example, advocacy grants can be paid to ‘encourage understanding of, and knowledge about, the rights of recipients and potential recipients of aged care services’ (section 81-1 of the Aged Care Act)), cannot be provided in a discriminatory manner, whether provided by a religious organisation or not.

- The final component of the definition (paragraph (c) of the definition) enables the regulations to prescribe other care or services. This provides flexibility in the system, recognising the range of aged care services which are Commonwealth-funded, including that not all programs are established under statute. Any care or service prescribed for the purpose of this paragraph must be related to the provision of aged care and must be provided with Commonwealth funding.

Amendment (2) – New item 39A

3. This amendment inserts a qualification on the exemption from discrimination for the provision of accommodation by a religious organisation in paragraph 23(3)(b) of the SDA, with the effect that the exemption will not apply to the provision of Commonwealth-funded aged care services.

4. This is consistent with the policy underpinning the qualification on the general exemption for religious organisations, to be inserted by Amendment (3).

Amendment (3) – New items 49A and 49B

5. This amendment inserts the main qualification on the general exemption for religious organisations for the provision of Commonwealth-funded aged care services. It inserts a new subsection 37(2) to provide that current paragraph 37(d) of the SDA (to be renumbered as paragraph 37(1)(d) by new item 49A) does not apply to conduct connected with the provision of Commonwealth-funded aged care services.

6. The qualification was included in the HRAD Bill as there was significant feedback during the development of the HRAD Bill of the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). This position is also consistent with the Government’s broader aged care reforms.

7. This qualification was not included in this Bill at the time of introduction as the Government was in the process of examining the Senate Legal and Constitutional Affairs
Committee’s inquiry report on the HRAD Bill. While this examination is still underway, the Government considers that the aged-care qualification should be included in this Bill as a matter of priority.

8. Proposed new paragraph 37(2)(b) makes it clear that this qualification only applies in the context of service provision. That is, an aged-care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion. This recognises that organisations should be able to engage staff who share their values and organisational ethos.

9. The qualification does not impose any new obligations on aged care providers—only those religious organisations which had previously chosen to discriminate will be affected. Equally, this simply ensures that religious providers of aged care services are in the same situation as non-religious providers of the same services, who have always been prohibited from discrimination by anti-discrimination legislation.

**Amendments (4) and (5) – New Division 2 of Part 2 of Schedule 1**

10. New Division 2 of Part 2 of Schedule 1 will amend the Broadcasting Services Act 1992, the Fair Work Act 2009 and the Fair Work (Registered Organisations) Act 2009 to replace references to ‘sexual preference’ with ‘sexual orientation’.

11. The Bill uses the term ‘sexual orientation’. This is the preferred and updated term as it is generally accepted as a broad and inclusive term whereas ‘sexual preference’ focuses on choice.

12. This Division will amend all references to ‘sexual preference’ in Commonwealth legislation to the preferred term ‘sexual orientation’ to ensure consistent terminology across the Acts.