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

**Senate Committee on Legal and
Constitutional Affairs**

26 April 2013

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Acknowledgement

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Executive Summary

1. The Law Council of Australia strongly supports the enactment of legislative protections against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status.
2. Numerous public consultations and extensive research suggest that lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Australia experience discrimination that can have a severe impact on their lives and wellbeing.¹ The existence of such discrimination undermines the values of equality and fairness that underpin Australian society and highlights shortcomings in the implementation of Australia's international human rights obligations.
3. Amendments to the Commonwealth anti-discrimination regime are needed to address the gaps in existing protections for discrimination on these grounds and the Law Council supports the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (the Bill) as a mechanism to address these gaps.
4. The Law Council particularly welcomes the definitions of 'sexual orientation', 'gender identity' and 'intersex status' included in the Bill; the protections against both direct and indirect discrimination on these grounds; and the grounds applying in all areas of work and public life that are currently covered under the *Sex Discrimination Act 1984* (Cth) (the SDA).
5. The Law Council is also of the view that the Bill could be enhanced by making a series of further amendments to the SDA and to other relevant legislation. This includes amending the Bill to ensure protection against discrimination for people undergoing sex changes and to more fully reflect the proposed new protections in the objects and title.
6. Other amendments should also be considered. These include either removing or reviewing each of the three new exemptions proposed in the Bill. These exemptions relate to conduct undertaken in compliance with the *Marriage Act 1961* (Cth) (the Marriage Act) or with listed Commonwealth, State or Territory laws, and record keeping. The Law Council questions whether these exemptions are necessary and appropriate in light of the protective aims of the Bill. The Law Council also suggests that further consideration be given to ensuring the protections proposed in the Bill and the terminology adopted are reflected across other relevant Commonwealth laws, such as the *Fair Work Act 2009* (Cth) (the FWA).
7. While the Law Council congratulates the Government on introducing the much needed protections in the Bill, it is disappointed that this Bill has been introduced as an alternative to immediately pursuing broader reforms to the Commonwealth anti-discrimination regime. These broader reforms, which could be based upon an improved version of the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (the Draft HRAD Bill) could introduce robust protections on the grounds of sexual orientation, gender identity and intersex status, while also consolidating the

¹ See for example, Australian Human Rights Commission *Consultation: Protection from discrimination on the basis of sexual orientation and sex and/or gender identity* (2010) further information available at <http://www.humanrights.gov.au/publications/consultation-protection-discrimination-basis-sexual-orientation-and-sex-and-or-gender>; National Human Rights Consultation (2009) further information available at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.

existing Commonwealth anti discrimination Acts and making the regime easier to access and understand for all users. For this reason, the Law Council urges this Committee to recommend that the Government take action to progress broader anti-discrimination reform and to introduce legislation based on an improved version of the Draft HRAD Bill as soon as possible.

Introduction

8. The Law Council is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affairs (the Committee) as part of its inquiry into the Bill.
9. On 21 March 2013 the Government introduced the Bill into the House of Representatives. The Bill follows a number of recommendations for reform of the SDA made by the Committee in 2008,² and follows extensive public consultation on a proposal to consolidate the existing Commonwealth anti-discrimination laws into a single Act.³ The Bill also responds to recommendations made by the Australian Human Rights Commission (the AHRC) in its 2010 report on discrimination experienced within the LGBTI community.⁴
10. The Law Council strongly supports the passage of the Bill as a critical measure to provide protection against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status. It has a history of advocating for the protection and promotion of the rights of LGBTI communities,⁵ as have many of its Constituent Bodies.⁶
11. While Australia has made advances in terms of treating LGBTI communities with greater fairness and respect, research shows that homophobia and transphobia is still widespread. This includes personal insults, verbal abuse, threats of violence or

² On 26 June 2008, the Legal and Constitutional Affairs Committee was tasked with inquiring into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality. The terms of reference for this inquiry were broad ranging. Further information about this inquiry, the Report and Recommendations, and the Government's response to the Senate Committee's recommendations, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/info.htm (the 2008 SDA Inquiry). On 15 August 2008 the Law Council and the New South Wales Bar Association made a joint submission to the Senate Inquiry into the SDA. The Law Council also gave evidence at the public hearing of the Inquiry. Further information is available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>.

³ Information about the proposed consolidation of Commonwealth anti-discrimination laws, including copies of the Draft HRAD Bill and Explanatory notes is available at <http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%20.pdf>. Information regarding the Senate Committee's inquiry into the Draft HRAD Bill is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/index.htm. The Law Council's submissions and policy statement on the proposed consolidation are available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm> (the Draft HRAD Bill Inquiry).

⁴ Australian Human Rights Commission *Consultation: Protection from discrimination on the basis of sexual orientation and sex and/or gender identity* (2010) further information available at <http://www.humanrights.gov.au/publications/consultation-protection-discrimination-basis-sexual-orientation-and-sex-and-or-gender>.

⁵ See for example, Law Council submission to the Senate Legal and Constitutional Affairs Committee inquiry into the [Marriage Equality Amendment Bill 2010](#); Law Council submission to the Submission to the House of Representatives Social Policy and Legal Affairs Committee's [Inquiry into the Marriage Amendment Bill 2012 and Marriage Equality Amendment Bill 2012](#); Law Council's submission to the Australian Human Rights Commission *Consultation: Protection from discrimination on the basis of sexual orientation and sex and/or gender identity* (2010). Copies of these submissions are available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>.

⁶ See for example Law Institute of Victoria (LIV) submission to the Victorian Department of Justice regarding the Exceptions Review of the exceptions to and exemptions from the *Equal Opportunity Act 1995* (Vic) (24 April 2008); LIV submission to the Victorian Equal Opportunity Review (13 May 2008); LIV submission to the Victorian Department of Justice regarding the draft *Equal Opportunity Bill 2009* (Vic) (4 February 2010). Copies of these submissions are available at www.liv.asn.au.

intimidation, physical violence, and harassing behaviour as well as less favourable treatment in work, education and other spheres. Such discriminatory conduct has been significantly associated with higher rates of anxiety and depression amongst LGBTI communities, as well as a greater risk of suicide and self-harm.⁷ Discrimination on these grounds has also been recognised as a serious human rights concern of many Australians, and has been identified as an issue in urgent need of attention by domestic and international human rights bodies.

12. The current Commonwealth anti-discrimination regime fails to provide adequate protection against these forms of discrimination.
13. The Law Council considers that if enacted the current Bill will provide an important starting point to address this gap. It particularly supports the definitions included in the Bill, the protections against both direct and indirect discrimination and their application in all areas of work and public life currently covered under the SDA.
14. The Law Council also considers that the Bill could be enhanced by making a series of further amendments to the SDA and other relevant legislation. In particular the Law Council recommends that the Bill be amended to include:
 - a change of the Act's title to the *Sex and Gender Discrimination Act*;
 - further changes to the objects clause;
 - protection against discrimination for people undergoing sex changes; and
 - reference to an expanded range of relevant international instruments including the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles).⁸
15. The Law Council also recommends removing or reconsidering the proposed additional exemptions in Items 52-60 of the Bill that would apply to the proposed new grounds. These exemptions relate to conduct undertaken in compliance with the Marriage Act or a listed law of the Commonwealth, States or Territories. There is also an exemption relating to record keeping. As currently drafted, these exemptions have the potential to dilute the protective aims of the Bill. The Law Council questions whether they are necessary in light of existing temporary exemption provisions in the SDA and in light of other relevant policy developments. If their need can be shown, the Law Council recommends that they be subject to review.
16. The Law Council also recommends that further consideration be given to:

⁷ See summary of research outlining discrimination and abuse in Australia in Australian Human Rights Commission, *Sexual Orientation and Sex and/or Gender Identity, Research Paper – October 2010* (the Research Paper), page 4, available at <http://www.humanrights.gov.au/publications/consultation-protection-discrimination-basis-sexual-orientation-and-sex-and-or-gender>.

⁸ The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity a set of principles relating to sexual orientation and gender identity, intended to apply international human rights law standards to address the abuse of the human rights of lesbian, gay, bisexual, and transgender people, and issues of intersexuality. The Principles were developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world at Gadjah Mada University on Java from 6 to 9 November in 2006. The Principles are available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=category&category=REFERENCE&publisher=ICJRISTS&type=&coi=&docid=48244e602&skip=O>.

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- the application of the existing SDA exemptions to the new protections;
 - the challenge of addressing binary concepts of sex and gender within the SDA;
 - extending other protections under the SDA to the proposed new grounds;
 - ensuring consistent terminology is used in other relevant Commonwealth laws, such as the FWA; and
 - the implementation of other measures to support the proposed protections.

17. Finally, the Law Council is disappointed that the Bill has been introduced as an alternative to immediately pursuing broader reforms to the Commonwealth anti-discrimination regime that would introduce robust protections on the grounds of sexual orientation, gender identity and intersex status, while also consolidating the existing Commonwealth Acts and making the anti-discrimination regime easier to access and understand for all users. It urges this Committee to recommend that the Government take action to progress broader anti-discrimination reform and to introduce legislation based on an improved version of the Draft HRAD Bill as soon as possible.

Growing Momentum for Reform

18. The introduction of the current Bill follows a number of significant inquiries and consultations into the effectiveness of the Commonwealth's anti-discrimination regime, and the SDA in particular.⁹ It also follows many years of significant inquiries and consultations into the discrimination experienced by LGBTI people in Australia and how this might be most effectively addressed.¹⁰

19. The Law Council has participated in many of these inquiries and consultations and has consistently advocated for a Commonwealth anti-discrimination regime that is clear and accessible to all users and which reflects the full range of Australia's international obligations to eliminate discrimination and promote equality.¹¹ The Law Council has also advocated for the elimination of all forms of discrimination against LGBTI people. This is consistent with its work to maintain and promote the fundamental principles which uphold the Rule of Law. These principles include that:¹²

- the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds; and
- everyone is entitled to equal protection before the law and no one should be conferred with special privileges.

20. A number of past inquiries and consultations have provided compelling evidence of acute and pervasive discrimination experienced by LGBTI people.¹³

⁹ See for example the 2008 SDA Inquiry and the Draft HRAD Bill inquiry referred to above.

¹⁰ A summary of the AHRC inquiries and consultations in this area is available at <http://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality>

¹¹ The Law Council's advocacy in this area is summarised at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>.

¹² The Law Council's Rules of Law Principles are available at <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/rule-of-law.cfm>.

¹³ For example, the AHRC has undertaken a number of major projects to identify and build community awareness around the human rights issues faced by lesbian, gay, bisexual, trans and intersex people

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21. For example, in 2009 the AHRC conducted a consultation to canvas the experiences and views of people who may have been discriminated against on the basis of their sexual orientation and sex and/or gender identity. The AHRC reported that participants shared personal stories of discrimination, violence, harassment and bullying on the basis of sexual orientation and sex and/or gender identity. Many people spoke of the negative impact this has had on their health and wellbeing.¹⁴
22. Other inquiries and consultations have also demonstrated strong community support for legislative change to address this discrimination. For example, in the Report following the 2009 National Consultation on Human Rights in Australia chaired by Father Frank Brennan AO it was noted that this issue continued to attract significant public support. The Report stated that public submissions frequently called for national legislation to be enacted.¹⁵
23. Some of the recommendations made in these reports have resulted in positive legislative and policy change. For example in the *Same-Sex: Same Entitlements* report¹⁶ the AHRC recommended that the Government amend laws which discriminated against same-sex couples and their children in the area of financial and work-related entitlements and benefits. At the end of 2008, the Government amended 84 laws which discriminated against same-sex couples in a wide range of areas including taxation, social security, employment, Medicare, veteran's affairs, superannuation, worker's compensation and family law.¹⁷
24. The AHRC's 2009 project about the legal recognition of sex in documents and government records¹⁸ has also resulted in positive policy change. This project developed from consultations with members of sex and gender diverse communities about the discrimination they experienced. The Concluding Paper of this project (the Sex Files Report) identified problems with the existing systems for recognising sex identity in documents and government records and recommended that the Commonwealth Government establish a minimum national standard in respect of legal recognition of sex in documents and government records.¹⁹
25. Following this inquiry, the Attorney-General's Department conducted a review of the collection and recording of information about sex and gender. The Department has since developed Draft National Guidelines on the Recognition of Sex and Gender (the

including: Addressing sexual orientation and sex and/or gender identity discrimination (2011); Sex Files: The legal recognition of sex in documents and government records (2009); Same-Sex: Same Entitlements Inquiry (2007).

¹⁴ See summary of research outlining discrimination and abuse in Australia in Australian Human Rights Commission, *Sexual Orientation and Sex and/or Gender Identity, Research Paper – October 2010* (the Research Paper), page 4, available at <http://www.humanrights.gov.au/publications/consultation-protection-discrimination-basis-sexual-orientation-and-sex-and-or-gender>.

¹⁵ The 2009 National Human Rights Consultation was led by a Committee comprising Father Frank Brennan AO (Chair), Mary Kostakidis, Tammy Williams and Mick Palmer AO APM. Following the consultation, the Committee prepared the *National Human Rights Consultation Report*, September 2009, available at <http://www.humanrightsconsultation.gov.au/>.

¹⁶ National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits tabled in Parliament on 21 June 2007 available at <http://www.humanrights.gov.au/same-sex-same-entitlements>.

¹⁷ An overview of the reforms can be found on the [Attorney-General's Department website](#). The [NSW Gay and Lesbian Rights Lobby](#) also has detailed information on their website. See also <http://www.humanrights.gov.au/same-sex-same-entitlements>

¹⁸ Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records: Concluding paper of the sex and gender diversity project* (March 2009). Further information is available at <http://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009> (the Sex Files Report).

¹⁹ Sex Files Report Recommendation 13.

Draft Guidelines).²⁰ These Draft Guidelines have been released for consultation by the Department, and as will be discussed later in this submission, the Law Council has provided a submission expressing general support for the Draft Guidelines and also suggesting a number of areas in need of improvement.

26. Other inquiries have highlighted the immediate need to enact the kind of special protections against discrimination embodied in this Bill. For example, a 2011 consultation undertaken by the AHRC revealed that despite the changes resulting from the recommendations made by AHRC in past inquiries such as the Sex Files Report, many transgender and intersex people continue to face substantial difficulties in obtaining legal recognition of their sex. The AHRC concluded that federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity was urgently needed and would send a powerful message to the community regarding equality.²¹

27. Similar consultations and inquiries have occurred at the State and Territory level where various recommendations to enhance the legal recognition of gender diversity and same sex relationships and to provide protection from discrimination against LGBTI people have been implemented. For example:

- The Australian Capital Territory (ACT) Government has responded to a range of recommendations for reform to ACT laws made by the ACT Law Reform Advisory Council's 2011 report, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*.²² This report considers the best ways to improve legal recognition of sex and gender diverse people and the practical options available to the ACT Government to implement these improvements. The recommendations provided in the report give the Government a valuable framework for the development of a well-informed and considered approach to strengthening the rights of sex and gender diverse people in the ACT.
- The introduction of the *Anti Discrimination Amendment Bill 2012* (Tas) which seeks to amend the Tasmanian legislation to introduce new definitions of 'gender identity', 'intersex status' and 'sexual orientation'. These definitions are reflected in the current Bill. The 2012 Bill was introduced following a 2009 review of the Tasmanian Act that identified the need to exclude transsexuality from the definition of sexual orientation and insert a new definition of 'intersex' as a stand-alone attribute.
- In 2009 the Victorian Government engaged in reform of the *Equal Opportunity Act 1995* (Vic) which was replaced with the *Equal Opportunity Act 2010* (Vic). The new Victorian legislation maintains protections against discrimination on the grounds of gender identity, lawful sexual activity, and sexual orientation, but also creates a positive duty to take reasonable and proportionate

²⁰ Attorney General's Department *Draft National Guidelines on the Recognition of Sex and Gender*, released for public consultation in April 2013. Further information is available at <http://www.ag.gov.au/Consultations/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx>.

²¹ Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* Consultation Report (2011) <http://www.humanrights.gov.au/publications/addressing-sexual-orientation-and-sex-and-or-gender-identity-discrimination-consultati-0>.

²² ACT Law Reform Advisory Council, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT* (2011) and ACT Government's response are available at <http://www.justice.act.gov.au/publication/view/2055/title/government-response-to-the-act>

measures to eliminate discrimination, sexual harassment and victimisation as much as possible.²³

28. These inquiries and consultations have occurred against the backdrop of a broader reform agenda for existing Commonwealth anti-discrimination laws, including a particular focus on the SDA.

The 2008 SDA Inquiry

29. In 2008, the Committee commenced an inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality (the 2008 SDA Inquiry).²⁴ This was a broad ranging inquiry that included consideration of: the scope of the SDA, and the manner in which key terms and concepts are defined; the extent to which the SDA implements the non-discrimination obligations of the Convention for the Elimination of Discrimination against Women (CEDAW) or other international instruments; and the consistency of the SDA with other Commonwealth and state and territory discrimination legislation, including options for harmonisation.
30. On 15 August 2008 the Law Council and the New South Wales Bar Association ('the NSW Bar') made a joint submission to the Senate Inquiry into the SDA.²⁵ The Law Council also gave evidence at the public hearing of the Inquiry.
31. The Law Council and the NSW Bar submitted that although the SDA has been an important legislative initiative to eliminate sex discrimination and sexual harassment and has shifted perceptions about the role of women in the workplace and public life,²⁶ a range of factors operate to impede the effectiveness of the SDA. These include: the use of complex concepts, including the 'comparator test' for direct discrimination; technical language, the inadequate treatment of 'multiple discriminations'; and the lack of consistency between the SDA and relevant State and Territory laws.
32. Following the inquiry, the Senate Committee made 43 recommendations for amendments to the SDA. These recommendations included: ensuring that the SDA is interpreted in accordance with the full range of relevant international conventions which Australia has ratified; amending key definitions, such as 'marital status' in order to provide protection to same-sex couples from discrimination on the basis of their relationship status; and amending the test for direct discrimination in sections 5 to 7A of the Act to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.
33. As part of its response to these recommendations, the Government introduced the *Sex and Age Discrimination Legislation Amendment Bill 2010*, which established breastfeeding as a separate ground of discrimination and provided greater protection from sexual harassment for students and workers. The Government also indicated that

²³ Further information about this reform process is available at <http://www.justice.vic.gov.au/home/your+rights/equal+opportunity/>.

²⁴ Further information about this inquiry, the Report and Recommendations, the Law Council's submission and the Government's response to the Senate Committee's recommendations, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/index.htm.

²⁵ A copy of this submission is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A23F6BD-1C23-CACD-2250-807AF545B13D&siteName=lca

²⁶ See University of New South Wales Law Journal, Forum Volume 10 No 2 - The *Sex Discrimination Act: A Twenty Year Review* 2004.

it would consider a number of other recommendations as part of its broader commitment to streamline and harmonise Commonwealth anti-discrimination laws.

Human Rights Consultation, Framework and Action Plan

34. Shortcomings, complexities and inconsistencies within the Commonwealth's anti-discrimination regime were also identified during the 2009 National Consultation on Human Rights²⁷ and have since been identified as part of a broader reform agenda to consolidate and improve Commonwealth anti-discrimination laws.

35. For example, the National Consultation Report recommended that the Commonwealth Government :

*conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a Human Rights Act is introduced. The government should then amend legislation, policies and practice as required so that they become compliant.*²⁸

36. It was further recommended that when conducting the audit, the Commonwealth Government give priority to anti-discrimination legislation, policies and practices.²⁹

37. The Government responded to the National Consultation Report by releasing *Australia's Human Rights Framework* (the Framework). One of the key initiatives arising from the Framework is the proposed consolidation of Commonwealth anti-discrimination laws. The Framework provides that:

The Government will develop exposure draft legislation harmonising and consolidating Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly.

38. The Government later confirmed that part of this review and consolidating process would include introducing legislation to protect against discrimination on the basis of a person's sexual orientation or gender status.³⁰ The Opposition has also expressed "in-principle support" for federal anti-discrimination legislation which covers sexuality and gender diversity.³¹

²⁷ National Human Rights Consultation (2009) further information available at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx> .

²⁸ National Human Rights Consultation Committee Report, (September 2009) Recommendation 4.

²⁹ National Human Rights Consultation Committee Report, (September 2009) Recommendation 4.

³⁰ Australia's Human Rights Framework (April 2010)

<http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx> This follows Labor's 2009 statement that it supported the enactment of legislation prohibiting discrimination on the basis of a person's sexual orientation or gender status: *Australian Labor National Platform and Constitution 2009*, Chapter 7, page 16, available at <http://www.alp.org.au/australian-labor/our-platform/>, accessed 18 November 2010.

³¹ Reported Star Observer, 25 March 2010 <http://www.starobserver.com.au/news/2010/03/25/abbott-supports-gay-anti-discrimination-legislation/23235>; see also Coalition response in Law Council of Australia's *Federal Election 2010 Key Issues: Responses*, in which it recognised that "amendments to Commonwealth legislation may be necessary in respect of discrimination on the basis of sexual orientation." [available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=44C4FD11-F3B6-5F75-8D74-31DE489CAADD&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=44C4FD11-F3B6-5F75-8D74-31DE489CAADD&siteName=lca).

39. This commitment was then reflected in the Government's National Action Plan on Human Rights³² and has formed an integral part of the Government's proposed consolidation of Commonwealth anti-discrimination laws, which has been pursued through the development of a Discussion Paper³³ and then the introduction of the Draft HRAN Bill.³⁴

Consolidation of Commonwealth Anti-Discrimination Laws

40. The Law Council has actively participated in each stage of this process, and has developed a policy position in favour of the proposed consolidation of Commonwealth anti-discrimination laws and recommending that the consolidated Act contain certain key features. The Law Council's support for a single Commonwealth anti-discrimination Act is prefaced on the basis that the consolidation process enhances existing protections and addresses the gaps in protection such as those relating to discrimination on the grounds of sexual orientation, gender identity and intersex status.³⁵

41. The release of the Draft HRAD Bill for public consultation in December 2012 attracted considerable controversy, largely directed at those elements of the Bill that related to the scope of the test for discrimination; the onus of proof to be applied; and the exceptions to unlawful discrimination (particularly those relating to religious organisations). Some concerns were raised regarding the scope of the attributes to be protected under the Draft HRAD Bill, however there remained strong community support for the inclusion of protections on the grounds of sexual orientation, gender identity and intersex status.

42. The Draft HRAD Bill was subsequently referred to the Committee for inquiry.³⁶ The Law Council made a submission to the Committee³⁷ and gave evidence to it.

43. The Law Council indicated to the Committee that it strongly supported the Draft HRAD Bill and in particular the enhanced protections it offered against discrimination, including on the grounds of sexual orientation, gender identity and intersex status. The Law Council also identified some areas in need of improvement, including the definition of 'direct discrimination' as unfavourable treatment, which includes conduct that 'offends, insults or intimidates' a person. Another area in need of improvement was identified as the general exception provision regarding justifiable conduct by a respondent.

³² During 2011 the Government has developed a new National Human Rights Action Plan in consultation with state and territory governments and non-government organisations, including the Law Council. The Plan aims to articulate, in detail, how the Australian Government will implement the commitments it made in 2011 during Australia's Universal Periodic Review (UPR) at the United Nations. The National Action Plan was released on Human Rights Day, 10 December 2012. A copy of the Plan is available at <http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx>.

³³ In September 2011, the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (the Discussion Paper) was released by the AGD.

³⁴ The Draft HRAD Bill was released for public consultation in December 2012. Further details, including submissions received, are available at <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx>.

³⁵ The Law Council's policy position and submissions in response to the Discussion Paper are available at: <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>.

³⁶ Further details are available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/anti_discrimination_2012/info.htm.

³⁷ A copy of this submission is available at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=13B10D23-1999-B243-6E36-AA62029C570C&siteName=lca.

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44. On 21 February 2013 the Committee issued a detailed report on the Draft HRAD Bill.³⁸ The majority of the Committee made 12 recommendations for improvements to the Draft Bill, which included the key changes recommended by the Law Council. The Committee also recommended making changes to the definition of gender identity and the inclusion of 'intersex status' as a protected attribute.
45. Dissenting reports were provided by the Opposition and the Greens Senators. The Opposition Senators acknowledged that the existing anti-discrimination laws needed improvement to include protections against discrimination on the grounds of sexual orientation and gender identity, but expressed strong opposition to the Draft Bill.
46. On 20 March 2013, the Attorney-General, Mark Dreyfus QC MP, announced the Government's decision not to proceed with the consolidation of Commonwealth anti-discrimination laws at this time, and advised that there were significant policy, definitional and technical points that required deeper consideration.
47. Following this announcement, the current Bill was introduced into the House of Representatives on 21 March 2013.
48. It is against this background that the Law Council recommends that the Committee evaluate the amendments proposed in the current Bill. It is submitted that this background underscores the urgent need for the protections proposed in the Bill to be enacted, and for the Committee to recommend that the Government take action to progress the broader anti-discrimination reforms which have also been subject to considerable public consultation and identified as in urgent need of reform.

Proposed Amendments

49. If enacted, the Bill will amend the SDA to:

- 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 certain existing exemptions to include the new grounds, and introduce three new exemptions: for conduct in compliance with the *Marriage Act 1961* (Cth) (Marriage Act); 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 AHRC to include the new grounds.

50. The Bill also contains minor amendments to address drafting anomalies in relation to family responsibilities discrimination and will make a consequential amendment to the *Migration Act 1958* (Cth).

³⁸ A copy of the Senate Committee's report is available from: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/report/index.htm.

51. Some of the more significant amendments proposed in the Bill are outlined in further detail below.

Definitions

52. If enacted, the Bill will insert new definitions into subsection 4(1) in respect of the terms 'sexual orientation', 'gender identity' and 'intersex status', and replace the definition for 'marital status' with 'marital or relationship status'.

Gender Identity

53. Pursuant to Item 6 of the Bill, 'gender identity' is defined as:

the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

54. This definition is based on that used in the *Anti-Discrimination Amendment Bill 2012* (Tas) (the Tasmanian Bill) and reflects the approach recommended by this Committee following the Draft HRAD Bill Inquiry.³⁹

55. The definition proposed in the Bill varies slightly from that contained in the Tasmanian Bill and the Draft HRAD Bill Inquiry recommendation by using 'a person' rather than 'an individual' for consistency with the rest of the SDA, and by removing the explicit references to transsexualism and transgenderism which feature at the end of the definition in the Tasmanian Bill.

56. The Explanatory Memorandum states that:

*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.*⁴⁰

Intersex Status

57. Pursuant to Item 7 of the Bill, 'intersex status' is defined as:

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

- (a) neither wholly female nor wholly male; or*
- (b) a combination of female and male; or*
- (c) neither female nor male.*

³⁹ Senate Standing Committee on Legal and Constitutional Affairs, Report on its inquiry into the exposure draft Human Rights and Anti-Discrimination Bill 2012 (21 February 2013) (the Draft HRAN Bill Inquiry Report) Recommendation 1, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/b01.htm.

⁴⁰ Explanatory Memorandum to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (the Explanatory Memorandum) p. 12 [12].

58. This definition is also based on that used in the Tasmanian Bill and that recommended by the Draft HRAD Bill Inquiry.⁴¹

59. The Explanatory Memorandum states that this 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.

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.⁴²

Sexual Orientation

60. Pursuant to Item 12 of the Bill, 'sexual orientation' is defined as:

a person's sexual orientation towards:

- (a) persons of the same sex; or*
- (b) persons of a different sex; or*
- (c) persons of the same sex and persons of a different sex.*

61. The Explanatory Memorandum to the Bill states that the definition does not include terms such as 'homosexuality', 'lesbianism', 'bisexuality' or 'heterosexuality', which some people find offensive and can be inaccurate, but is intended to cover each of these sexual orientations.⁴³

62. The definition also uses the terminology 'different sex', instead of 'opposite sex' as is currently used in the SDA. The Explanatory Memorandum provides that 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.⁴⁴

Defacto Partner

63. Item 11 of the Bill repeals the existing definition of 'de facto spouse' in subsection 4(1) of the SDA and replaces it with a definition of 'de facto partner'. The existing 'de facto spouse' definition refers to two people of the opposite sex who live together as husband or wife on a bona fide domestic basis although not legally married. The new 'de facto partner' term is given the same meaning as that contained in section 2D of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act), which provides that:

⁴¹ Draft HRAD Bill Inquiry Report Recommendation 2.

⁴² Explanatory Memorandum p. 12 [15]-[16].

⁴³ Explanatory Memorandum p. 14 [25].

⁴⁴ Explanatory Memorandum p. 14 [25].

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].

64. A similar definition of 'de facto partner' currently exists in subsection 4A(2) of the SDA however it only applies to the concept of family responsibilities. The amendment proposed in the Bill will apply generally across the SDA.

Marital or Relationship Status

65. Items 9 and 10 of the Bill repeal the existing definition of 'marital status' in subsection 4(1) of the SDA and replace it with a definition of 'marital or relationship status'. The existing definition of 'marital status' refers to the status or condition of being single, married, 'married but living separately and apart from one's spouse', divorced, widowed, or the 'de facto spouse of another person'. The new definition of 'marital or relationship status' will replace the last two categories of this definition with the following:

(e) the de facto partner of another person;

(f) the de facto partner of another person, but living separately and apart from that other person;

(g) the former de facto partner of another person;

(h) the surviving spouse or de facto partner of a person who has died.

66. These paragraphs use the concept of 'de facto partner' which, in accordance with the definition in the Acts Interpretation Act, cover both same-sex and opposite-sex couples.

Tests for Discrimination

67. Item 17 of the Bill inserts a series of new tests for discrimination based on the proposed new attributes of sexual orientation, gender identity and intersex status.

68. These new tests are based on the test for discrimination currently contained in section 6 of the SDA. This test applies to marital status includes direct discrimination (where a person treats someone less favourably than another person) and indirect discrimination (where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group).

69. Proposed section 5A would provide that

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if, by reason of:

(a) the aggrieved person's sexual orientation; or

(b) *a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or*

(c) *a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;*

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

(2) *For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.*

(3) *This section has effect subject to sections 7B and 7D.*

70. The Explanatory Memorandum also notes that the test of indirect discrimination in proposed section 5A would be subject to the 'reasonableness test' in section 7B of the SDA which provides that 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.

71. Similar tests are proposed in respect of the new attributes of gender identity and intersex status, also based on the existing tests in section 6 of the SDA. The Bill also makes amendments to section 7B of the SDA to provide that the 'reasonableness test' for indirect discrimination applies to the test for discrimination on each of the new grounds.

Coverage of New Protections

72. Part II of the SDA currently outlines the areas of life in which discrimination on the protected grounds is unlawful.

73. Items 27, 29-34 of the Bill will amend Division 1 of this Part 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;⁴⁵
- commission agents;⁴⁶
- contract workers;⁴⁷
- partnerships;⁴⁸

⁴⁵ SDA s14, Item 27 of the Bill.

⁴⁶ SDA s15, Item 29 of the Bill.

⁴⁷ SDA s16, Item 30 of the Bill.

- qualifying bodies;⁴⁹
- registered organisations under the *Fair Work (Registered Organisations) Act 2009*⁵⁰, and
- employment agencies.⁵¹

74. Items 35, 37–41 and 43 of the Bill 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;⁵²
- Goods, services and facilities⁵³
- Accommodation;⁵⁴
- Land⁵⁵
- Clubs,⁵⁶ and
- Administration of Commonwealth laws and programs.⁵⁷

75. The Explanatory Memorandum provides that 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 and public life covered by the SDA.⁵⁸

76. The Bill also includes amendments 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;⁵⁹
- references to ‘the opposite sex’ in sections 21 and 25 (relating to single sex educational institutions and single sex clubs) are replaced with the term ‘different sex’ to ensure these provisions are consistent with the introduction of protections for gender identity and intersex status;⁶⁰
- section 27 (which currently 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) is amended to include the new grounds of discrimination in relation to sexual orientation, gender identity and intersex

⁴⁸ SDA s17, Item 31 of the Bill.

⁴⁹ SDA s18, Item 32 of the Bill.

⁵⁰ SDA s19, Item 33 of the Bill.

⁵¹ SDA s20, Item 34 of the Bill.

⁵² SDA s21, Item 35 of the Bill.

⁵³ SDA s22, Item 36 of the Bill.

⁵⁴ SDA s23, Item 37 of the Bill.

⁵⁵ SDA s24, Item 40 of the Bill.

⁵⁶ SDA s25, Item 41 of the Bill.

⁵⁷ SDA s26, Item 43 of the Bill.

⁵⁸ Explanatory Memorandum p.18 [55], [57].

⁵⁹ Item 28 of the Bill.

⁶⁰ Items 36, 42 if the Bill; Explanatory Memorandum p. 19 [61].

status and the extension of the ground 'marital status' to 'marital and relationship status',⁶¹

- section 281A is amended to include sexual orientation, gender identity and intersex status on the list of circumstances to be taken into account as part of the test for sexual harassment, and to replace 'marital status' with 'marital and relationship status' in this test.⁶²

Exemptions

77. The Bill proposes to make a number of amendments to the provisions of the SDA that deal with exemptions. It also seeks to introduce a number of new exemptions that would apply to discrimination in respect of the new grounds of sexual orientation, gender identity and intersex status.

Changes to Existing Exemptions

78. In most cases, the existing exemptions from unlawful discrimination are amended and/or extended to apply to discrimination on the new grounds of sexual orientation, gender identity and intersex status.

79. For example, the Bill amends the exemptions relating to genuine occupational qualifications and residential care of children to replace references to 'the opposite sex' with 'a different sex', and references to 'marital status' with 'marital or relationship status' to ensure these provisions are consistent with the protections for gender identity, sexual orientation and intersex status.⁶³

80. Item 50 of the Bill will amend the exemption in section 38 for educational institutions established for religious purposes by inserting the new grounds of sexual orientation and gender identity, and replacing 'marital status' with 'marital or relationship status.' However, Item 50 of the Bill does not extend the exemption in section 38 to the new ground of intersex status.

81. Item 51 of the Bill will amend the current exemption for voluntary bodies contained in section 39. This provides that it is not unlawful for a voluntary body to discriminate against a person on a protected ground in connection with the membership of the voluntary body, or the provision of benefits, facilities or services to members of the body. This exemption will be extended to include discrimination on the new grounds of gender identity, sexual orientation, intersex status or marital or relationship status.

Proposed New Exemptions

82. Items 52 and 60 of the Bill introduce new exemptions into the SDA that apply to discrimination on the grounds of sexual orientation, gender identity or intersex status. Under the Bill, it will not be unlawful to discriminate against a person on these grounds, either directly or indirectly, if it is done:

- by a person in direct compliance with the Marriage Act ; or

⁶¹ Items 44-45 of the Bill, Explanatory Memorandum p. 19 [62]-[64].

⁶² Item 46 of the Bill, Explanatory Memorandum p. 20 [66]-[67].

⁶³ Items 47-49 of the Bill, Explanatory Memorandum p. 20 [68]-[69].

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- in direct compliance with a law of the Commonwealth, or of a State or Territory, that is prescribed by the regulations for the purpose of this exemption.

83. An exemption will also apply to requests for information and keeping of records that do not allow for identification as being neither male or female. Proposed section 43A would provide:

- (1) *The making of a request for information is not unlawful under Division 1 or 2 merely because the request does not allow for a person to identify as being neither male nor female.*
- (2) *Nothing in Division 1 or 2 makes it unlawful to make or keep records in a way that does not provide for a person to be identified as being neither male nor female.*

Law Council's Support for the Proposed Amendments

84. The Law Council strongly supports the enactment of protections against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status. These protections are urgently needed to fill current gaps in the Commonwealth anti-discrimination regime and to implement the full range of Australia's international human rights obligations in this area. Protections of this nature have also received bi-partisan support from the major political parties.

85. In addition to generally supporting the Bill, the Law Council particularly supports the following features of the Bill:

- the use of definitions that align with the recommendations made by this Committee during the HRAD inquiry;
- protection of direct and indirect discrimination;
- protections against discrimination that apply to the full range of areas of work and public life currently protected by the SDA; and
- appropriate limitations on the existing exemption for religious educational institutions in respect of discrimination on the grounds of intersex status.

86. The Law Council's support for the proposed amendments is outlined below.

The proposed protections are urgently needed

Current Gaps in Protection

87. The impact of discrimination on the grounds of sexual orientation and gender identity and intersex status has been comprehensively documented by the AHRC and during the National Human Rights Consultation.⁶⁴ It includes experiences of violence, marginalisation, harassment and bullying and affects numerous and varied aspects of individuals' lives, including educational experiences, employment, access to

⁶⁴ See above note 1.

fundamental public services and parenting and caring for children. The existence of this form of discrimination and its pervasive impact on the lives of individuals also has a negative impact on the Australian community as a whole and undermines strongly held Australian values of fairness and equality.

88. While sexual orientation and gender identity are grounds of discrimination in all state and territories, there is no federal law which comprehensively prohibits discrimination, harassment and vilification on these grounds. Some limited protection against discrimination may be currently provided by the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act).
89. Part II, Division 4 of the AHRC Act provides for a range of functions to be exercised by the AHRC in relation to discrimination in employment on any of the grounds protected by *International Law Organisation Convention No 111 Discrimination (Employment and Occupation)* (ILO 111), which include race, colour, sex, religion, political opinion, national extraction and social origin. ILO 111 provides that countries can add to the list of grounds on which discrimination is prohibited. In 1989, Australia added discrimination on the grounds of 'sexual preference' to that list. This means that the AHRC is empowered to make recommendations in relation to complaints of discrimination on the grounds of sexual preference. However, these recommendations are not enforceable. No similar powers exist for the AHRC in the area of discrimination on the grounds of gender identity or intersex status.
90. Limited protection against discrimination the grounds of sexual orientation may also be available under the FWA. The FWA prevents employers taking adverse action against employees on the basis of attributes including 'sexual preference', and 'sex'.⁶⁵ 'Sex' is undefined and may not extend to discrimination on the basis of sex or gender identity.
91. While the protection provided at the State and Territory level surpasses that currently available at the Commonwealth level, coverage and terminology varies and is not always comprehensive. For example, the *Anti-Discrimination Act 1977* (NSW) (NSW Act) refers to 'homosexuality' only. This means that it does not cover heterosexuality and has only limited application to bisexuality (that is, covering only the homosexual aspects of a person's life),⁶⁶ and some states refer to 'sexuality',⁶⁷ while others refer to 'sexual orientation'.⁶⁸ The exemptions provided in State and Territory anti-discrimination legislation also vary widely, resulting in uneven protection and inconsistent outcomes between jurisdictions. For instance the NSW Act includes an exemption for discrimination in employment by a small business (that does not exceed five employees),⁶⁹ while this does not exist in other State and Territory legislation.
92. The Law Council has also previously raised concerns regarding the extent to which State and Territory anti-discrimination regimes cover people who are either employed by the Commonwealth; or dealing with the Commonwealth, for example, by receiving Commonwealth services or benefits.⁷⁰ The *Commonwealth v Anti-Discrimination*

⁶⁵ *Fair Work Act 2009* (Cth) s.351.

⁶⁶ *Anti-Discrimination Act 1977* (NSW) (NSW Act) s. 4(1).

⁶⁷ *Anti-Discrimination Act 1991* (Qld) (Qld Act) s.7(n); *Equal Opportunity Act 1984* (SA) (SA Act) Part 3; *Discrimination Act 1991* (ACT) (ACT Act) s.7(1)(b); *Anti-Discrimination Act* (NT) (NT Act) s.19(1)(c).

⁶⁸ *Equal Opportunity Act 2010* (Vic) s.6(1); *Equal Opportunity Act 1984* (WA) (WA Act) pt IIB; *Anti-Discrimination Act 1998* (Tas) (Tasmanian Act) s.16(c).

⁶⁹ *Anti-Discrimination Act 1977* (NSW) (NSW Act) s.38C(3)(a), s.40(3)(b); s.49ZH(3)(b).

⁷⁰ See Law Council submission to the AHRC Consultation on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity (November 2010) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=AA4F7404-052C-0763-AA93-C57C46DADC98&siteName=lca .

*Tribunal*⁷¹ case, for example, raises questions about the extent to which the Commonwealth is bound by State and Territory anti-discrimination legislation⁷² and reveals the current gaps in protection at the Commonwealth level.

Adherence to International Human Rights Standards

93. Protecting against discrimination on the grounds of sexual orientation and gender identity and intersex status is also consistent with Australia's international human rights obligations.
94. There is no separate international human rights instrument that deals specifically with sexual orientation or gender identity. However, there are numerous international law principles and provisions that unequivocally provide that all people have the same human rights regardless of their sexual orientation or gender identity. For example, articles 2⁷³ and 26 of the *International Covenant on Civil and Political Rights* (the ICCPR),⁷⁴ require Australia to ensure that all persons are treated equally and not subjected to discrimination on the basis of status. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any 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.

95. As the AHRC explained in the *Same Sex Same Entitlements* report, article 26 is a stand alone right which forbids discrimination in any law and in any field regulated by public authorities, even if those laws do not relate to a right specifically mentioned in the ICCPR.
96. Other relevant ICCPR rights include the right to privacy (article 17) and the right to marry and found a family (article 23).
97. The ICCPR does not specifically refer to sexual orientation. However, the United Nations Human Rights Committee (the UNHRC) has found that the ICCPR includes an obligation to prevent discrimination on the basis of sexual orientation.⁷⁵ It is also likely that principles of equality in the ICCPR would extend to gender identity under its 'other

⁷¹ *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85.

⁷² See discussion in Gabrielle Appleby, "Discrimination above the Law", *Alt LJ* (2008) Vol 33:4, 235; Brendan Gogarty and Benedict Bartl, "Binding the Monolith – Can state tribunals still hold the Commonwealth to account following Nichols' case?" 260 *Alt LJ* Vol 34:1 2009; Geoffrey Kennett, "Fault Lines in the Autochthonous Expedient: The problem of State tribunals" (2009) 20 *PLR* 152; Casenote: State Anti-Discrimination Law and the Commonwealth (2009) 83 *ALJ* 8; Human Rights Commission, Federal Discrimination Law, p19, accessed at <http://www.hreoc.gov.au/legal/FDL/index.html>

⁷³ Article 2(1) of the ICCPR sets out the principle of non-discrimination: *Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

⁷⁴ *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷⁵ In *Toonen v Australia*, the HR Committee held that the reference to 'sex' (ICCPR article 2) and the right to privacy (ICCPR article 17) include sexual orientation. The HR Committee has also held in *Young v Australia* that distinctions made between same sex couples and opposite sex couples in relation to veterans entitlements were discriminatory, in breach of article 26 of the ICCPR. Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992). Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003). Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p 623.

status' grounds. For example, the HR Committee has emphasised the need to protect transgender communities from violence, torture and harassment and to recognise the right to change gender by permitting the issuing of new birth certificates.⁷⁶

98. The right to non-discrimination on the basis of sexual orientation has also been recognised under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Rights of the Child* (CRC), and the *Convention on the Elimination of Discrimination Against Women* (CEDAW). For example:

- the Committee on Economic, Social and Cultural Rights has specifically stated that gender identity is recognised as a prohibited ground of discrimination.⁷⁷
- the Committee on the Rights of the Child has also commented on the rights of young people who are 'transsexual' and recommended that State Parties provide adequate information and support to homosexual and transsexual young people;⁷⁸
- the Committee on the Elimination of Discrimination against Women has recognised that discrimination experienced by women is connected to discrimination on the basis of sexual orientation and gender identity.⁷⁹

99. As noted above, Australia has also agreed to be bound by the ILO 111 which prohibits discrimination in employment on certain listed grounds and enables additional grounds to be included for domestic purposes, such as the addition of 'sexual preference' as a ground by Australia in 1989. Article 2 of the ILO 111 requires Australia to:

... declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination in respect thereof.

100. Article 3(b) of the ILO 111 requires Australia to enact legislation which reflects this policy of non-discrimination and equal opportunity, while article 3(c) requires Australia to repeal any statutory provisions which are inconsistent with the policy.

101. When determining the content and application of these protections, important guidance can be found in the Yogyakarta Principles.⁸⁰ These principles were

⁷⁶ See, for example, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Russian Federation*, 24 November 2009, UN Doc CCPR/C/RUS/CO/6; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Colombia*, 4 August 2010, UN Doc CCPR/C/CO/6.

⁷⁷ See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 20 – Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom*, 9 October 2002, UN Doc CRC/C/15/Add.188.

⁷⁸ See, for example, Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, UN Doc CRC/GC.2003/4.

⁷⁹ See, for example, Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan*, 5 February 1999, UN Doc A/54/38.

⁸⁰ *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007) at: <http://www.yogyakartaprinciples.org/>. For further discussion see also Sheila Quinn, ARC International and International Commission of Jurists, *An Activists Guide to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2010).

developed in March 2007 by a group of human rights experts. Although not legally binding, these principles provide important guidance when determining how human rights obligations apply and relate to people of all sexual orientations and gender identities.

102. The Yogyakarta Principles reaffirm the rights of all people to equality before the law and the equal protection of the law without discrimination. They also set out the actions that countries should take to implement these rights, including:

- embodying the principles of equality and non-discrimination on the basis of sexual orientation and gender identity into national constitutions or other appropriate legislation;
- adopting appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.

103. In addition to these instruments, support for the view that international human rights standards apply to people of all sexual orientations and gender identities is found in several United Nations (UN) statements. For example, on 22 March 2011, the UN Human Rights Council issued a Joint Statement on Sexual Orientation and Gender Identity that was supported by 85 countries.⁸¹ The Statement calls on States to end human rights violations that are committed against people as a result of their sexual orientation and gender identity. It also calls for a renewed commitment by States to end all forms of discrimination against people based on their sexual orientation and gender identity. This builds on earlier statements in 2006 and in 2007, demonstrating the growing international support for recognition of the rights of all people regardless of their sexual orientation or gender identity.

104. It should also be noted that the protections against discriminatory treatment and the fundamental right to equality described encompass the principle of 'legitimate differential treatment', which enables particular groups of people to be treated differently in certain circumstances. However, under international human rights law, differential treatment must be aimed at achieving a legitimate objective, be based on reasonable and objective criteria and be proportionate to the objective to be achieved.⁸²

105. The Law Council welcomes the inclusion of a comprehensive Statement of Compatibility with Human Rights (SoC) within the Explanatory Memorandum to the Bill which also refers to many of the international obligations and statements described above.

Bipartisan support for the proposed protections

106. The Law Council is pleased that the proposed protections against discrimination on the grounds of sexual orientation, gender identity and intersex status have recently received the support of all major political parties and this Committee.

⁸¹ International Service for Human Rights, *Ground-breaking statement on sexual orientation and gender identity by record number of 85 States*, 24 March 2011.

⁸² See for example See BG Ramcharan, 'Equality and Non-discrimination', in L Henkin (ed) *The International Bill of Rights. The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981, 246; WA McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *BYIL* 178; WA McKean, *Equality and Discrimination under International Law*, Oxford, Clarendon Press, 1983, 136-52; and see the authorities cited by I Brownlie, *Principles of Public International Law*, 3rd ed, Oxford, Clarendon Press, 1979, 596-8.

107. It notes that in its recent report following its inquiry into the Draft HRAD Bill this Committee welcomed:

*... the introduction of protections for individuals on the basis of sexual orientation and gender identity for the first time in Commonwealth anti-discrimination legislation. This is an historic reform that is long overdue, and will provide significant benefits to sex and gender diverse Australians.*⁸³

108. The Law Council also notes that in their dissenting report on the Draft HRAD Bill, the Coalition members of this Committee:

*... were impressed with one part of the evidence before the inquiry – that from the GLBTI community, who pointed out that none of the Commonwealth Acts which deal with anti-discrimination law extend to sexuality-based discrimination. This is, in our view, an obvious gap, which should be addressed. People in that category are no doubt vulnerable to unfair discrimination. Discrimination against members of that community is unacceptable by modern community standards, and is reflected in the removal in 2008 – on a bipartisan basis – of all discriminatory treatment from Commonwealth legislation. It is also consistent with the policy which the Coalition took to the 2010 election. A simple amendment to the Sex Discrimination Act, which includes sexuality (or, for completeness, identity as a gay, lesbian, bisexual, transgender or intersex person) as a protected attribute, would overcome that lacuna.*⁸⁴

Definitions in line with Senate Committee Recommendations

109. The Law Council supports the definitions adopted under the Bill in respect of the terms 'sexual orientation', 'gender identity' and 'intersex status', and the replacement of the definition of 'marital status' with 'marital or relationship status'.

110. The Law Council is pleased that these definitions are:

- generally consistent with the approach adopted under the Tasmanian Bill;
- reflect the recommendations made by this Committee following the Draft HRAD Bill Inquiry;⁸⁵
- seek to provide maximum protection for LGBTI people, for example by:
 - including within the definition of 'gender identity' the way a person expresses or presents their gender;
 - recognising that a person may not identify as either male or female;
 - recognising that being intersex is a biological condition, not a gender identity; and

⁸³ Draft HRAD Bill Inquiry Report Chapter 7 [7.11].

⁸⁴ Draft HRAD Bill Inquiry Report, Dissenting Report by Coalition Senators http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/d01.htm.

⁸⁵ Senate Standing Committee on Legal and Constitutional Affairs, Report on its inquiry into the exposure draft Human Rights and Anti-Discrimination Bill 2012 (21 February 2013) (the HRAN Inquiry Report) Recommendations 1 and 2.

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- recognising 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; and
 - draw upon the definition of 'de facto partner' in section 2D of the Acts Interpretation Act which already applies in subsection 4A(2) of the SDA relating to the concept of family responsibilities.

111. The Law Council supports the adoption of an approach that promotes consistency of interpretation of terms such as 'de facto partner' across Commonwealth laws. As discussed below, it also supports the use of consistent terminology across Commonwealth regimes designed to protect against discrimination, such as the FWA.

Direct and indirect discrimination protected

112. The Law Council supports the inclusion of protections against both direct and indirect discrimination for the proposed new attributes of sexual orientation, gender identity, intersex status and relationship status.

113. Protection against both direct and indirect discrimination is vital to effectively prohibiting discrimination and promoting substantive equality. It is also necessary to ensure that the types of discrimination most frequently experienced by the LGBTI community are adequately addressed.

114. As the Explanatory Memorandum to the Bill outlines, protecting against direct and indirect discrimination means that the following examples of conduct would be likely to constitute unlawful discrimination under the amended SDA:⁸⁶

- a hotel that refuses accommodation to a person on the basis of their sexual orientation (direct discrimination on the grounds of sexual orientation);
- an employer that specifies that employees may only bring their spouse to the staff Christmas party (indirect discrimination on the grounds of sexual orientation)
- an employer who refuses to employ a transgender man on the basis of his gender identity (direct discrimination on the grounds of gender identity);
- a human resources policy of an organisation that does not permit amendments to existing records which 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 (indirect discrimination on the grounds of gender identity);
- a bank teller that refuses to serve an intersex person because the person's biological characteristics made the bank teller uncomfortable (direct discrimination on the grounds of intersex status); and
- a medical records system that fails 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 (indirect discrimination on the grounds of intersex status).

⁸⁶ Explanatory Memorandum p. 14 [29], 15-16 [33]-[40].

115. These new tests are based on the test for discrimination currently contained in section 6 of the SDA which prohibits discrimination on the basis of marital status and includes direct discrimination (where a person treats someone less favourably than another person) and indirect discrimination (where an apparently neutral condition, requirement or practice has the effect of disadvantaging a particular group).

116. The Explanatory Memorandum also notes that the test of indirect discrimination in proposed section 5A would be subject to the 'reasonableness test' in section 7B of the SDA which provides that 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. The following example is provided:

*... 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.*⁸⁷

117. The Law Council continues to hold concerns regarding the present direct discrimination test in the SDA and its reliance on a 'comparator' and the 'reasonableness test' in section 7B of the SDA.⁸⁸ However, unless or until changes are made to these provisions, it is preferable that the new provisions operate consistently with the current provisions of the SDA.

Protections apply to the full range of areas of work and public life covered by the SDA

118. The Law Council welcomes the approach adopted in the Bill that will ensure that the proposed amendments will mean that discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status are prohibited in all areas of work and public life covered by the SDA.⁸⁹

119. This includes areas such as: employment and superannuation; employment agencies; education; goods, services and facilities; accommodation; and the administration of Commonwealth laws and programs.

120. The Law Council supports an approach which provides maximum protections against unlawful discrimination in public life, and for this reason has supported the approach adopted in clause 22 the Draft HRAD Bill. This provides that it is unlawful for a person to discriminate against another person if the discrimination is connected with *any* area of 'public life'. A non exhaustive list of the areas of public life is provided in subclause 22(2), which includes:

- work and work-related areas;
- education or training;

⁸⁷ Explanatory Memorandum p. 15 [32].

⁸⁸ The Law Council's concerns in relation to these features of the SDA are outlined in the joint submission of the Law Council and the NSW Bar Association to the 2008 SDA Inquiry p 15, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AE88237E-1E4F-17FA-D247-A7DB436B110F&siteName=lca See also Law Council's submission to the Draft HRAD Bill inquiry, p. 25 available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=13B5D19D-1999-B243-6EA6-5B6E6A530D01&siteName=lca .

⁸⁹ Explanatory Memorandum p.18 [55], [57].

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- the provision of goods, services or facilities;
 - access to public places;
 - provision of accommodation;
 - dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);
 - membership and activities of clubs or member-based associations;
 - participation in sporting activities (including umpiring, coaching and administration of sporting activities); and
 - the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.

121. This provision draws upon the protections currently provided in section 9 of the *Racial Discrimination Act 1975* (Cth) (the RDA) rather than the more restrictive specified areas of public life currently referred to in the SDA, and other Commonwealth anti discrimination Acts.

122. It is noted that under the Draft HRAD Bill, clause 22 provides protection against discrimination in all areas of ‘public life’ in relation to the attributes of age; breastfeeding; disability; gender identity; immigrant status; marital or relationship status; potential pregnancy; pregnancy; race; sex; and sexual orientation. In its submission to the Draft HRAD Bill Inquiry, the Law Council recommended that further consideration be given to extending this coverage to other attributes listed under the Draft HRAD Bill in relation to which discrimination is only unlawful if connected with work or work-related areas.⁹⁰

123. As outlined below, the Law Council recommends that the Government introduce legislation based on an improved version of the HRAD Bill as soon as possible. One of the benefits of this would be to extend the scope of protection against unlawful discrimination beyond the limitations of the SDA and ensure a closer alignment between Australia’s anti-discrimination regime and its international human rights obligations.

Appropriate limitations on exceptions for intersex status

124. Section 38 of the SDA currently provides that discrimination on the ground of sex, marital status or pregnancy will not be unlawful if undertaken:

*in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*⁹¹

125. In its past submissions on Commonwealth anti-discrimination reforms the Law Council has not previously commented in detail on the existing exceptions for religious bodies, but has expressed the general view that any religious based exceptions

⁹⁰ See also Law Council’s submission to the Draft HRAD Bill Inquiry, pp. 30-31.

⁹¹ SDA s38(1).

operate as a constraint to the degree of protection afforded under the existing Acts or proposed Act. If religious exceptions are maintained, the Law Council has submitted that they should be evidence based, precise and subject to regular review.

126. For this reason, the Law Council supports the approach taken in Item 50 of the Bill which does not extend the exemption in section 38 to the new ground of intersex status. The Explanatory Memorandum explains that this is because:

[t]he Government has not been informed of any religious doctrines which require discrimination on the ground of intersex status.⁹²

127. The Law Council's position on the extension of the existing religious based exceptions in the SDA to the proposed new grounds of sexual orientation, gender identity and intersex status is discussed further below.

Recommended Improvements to the Bill

128. The Law Council emphasises its support for the Bill and urges the Committee to recommend that it is passed. However, the Law Council is also of the view that the following amendments would enhance the objects of the Bill and its ability to protect against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status. In particular the Law Council recommends that changes be made to the Bill that would:

- amend the title of the SDA to the *Sex and Gender Discrimination Act*;
- include additional amendments to the objects clause;
- ensure protection against discrimination for people undergoing sex changes; and
- expand the range of relevant international instruments referred to in the SDA to include the Yogyakarta Principles.

129. The Law Council also recommends that the Bill be amended to remove the proposed additional exemptions in Items 52-60 of the Bill relating to: conduct undertaken in compliance with the Marriage Act; conduct undertaken in compliance with listed laws of the Commonwealth, States or Territories; and record keeping arrangements. If these exemptions are not removed from the Bill, it is recommended that they be subject to review via sunset clauses to determine their continued necessity and the appropriateness of their scope.

130. The Law Council also recommends that further consideration be given to:

- the application of the existing SDA exemptions to the proposed new protections;
- extending other protections under the SDA to the proposed new grounds;
- ensuring constituent terminology is used in other relevant Commonwealth laws, such as the FWA;

⁹² Explanatory Memorandum p. 20 [71].

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- assessing the proposed new protections in light of the binary concepts of sex and gender within the SDA; and
 - implementing other measures to support the proposed protections .

131. Many of these recommendations align with the Law Council's past submissions on the SDA and the Draft HRAD Bill. However, some of these recommended changes derive from feedback received from the Law Council's constituent bodies.

Title of the SDA

132. The Human Rights Committee of the New South Wales Bar Association (the NSW Bar Committee), one of the Law Council's Constituent Bodies, has recommended that the Bill be amended to change the title of the SDA.

133. The NSW Bar Committee has noted that when the SDA was enacted in 1984, it was intended to give effect to the CEDAW and since its enactment it has focused primarily on the elimination of discrimination on the grounds of sex and promoting gender equality.

134. The protections proposed in the Bill address new attributes of sexual orientation, gender identity and intersex status and as described above, help give effect to a range of human rights obligations beyond those contained in the CEDAW. As a result, the NSW Bar Committee queries the appropriateness of retaining the title of the SDA. It suggests that a more appropriate title might be the Sex and Gender Discrimination Act.

Additional amendments to the objects clause

135. As noted above, the SDA was enacted in 1984 and implements certain provisions of the CEDAW. This is reflected in the objects of the SDA to:

- (a) give effect to certain provisions of the CEDAW and to provisions of other relevant international instruments;
- (b) eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs;
- (c) eliminate, so far as possible, discrimination on the ground of family responsibilities in the area of work;
- (d) eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- (e) promote recognition and acceptance within the community of the principle of the equality of men and women.

136. The Bill proposes to amend paragraph 3(b) to provide that one of the objects of the SDA is to:

*eliminate, so far as is possible, discrimination against persons on the ground of sex, **sexual orientation, gender identity, intersex status, marital and***

relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; (emphasis added)

137. While this is a welcome step forward, further changes could be made to section 3 of the SDA to reflect the purpose of the Bill, which is outlined in the SoC as including:

... to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia.

138. This could include amending paragraph 3(e) to include “promoting recognition and acceptance within the community of gender diversity, intersex status and diverse sexual orientation”.

139. The Law Council also supports the approach taken in the Draft HRAD Bill which describe the objects of that Bill as:

- to eliminate discrimination, sexual harassment and racial vilification, consistently with Australia’s obligations under the human rights and ILO instruments listed in the Draft HRAD Bill;
- in conjunction with other laws, to give effect to Australia’s obligations under the human rights instruments and the ILO instruments;
- to promote recognition and respect within the community for: the principle of equality (including both formal and substantive equality); and the inherent dignity of all people.

140. As noted above, the Law Council urges the Government to implement legislation based on an improved version of the Draft HRAD Bill as soon as possible.

141. In the meantime, similar objects could be incorporated into section 3 of the SDA.

Ensure protection against discrimination for people undergoing a change of sex or gender

142. The Law Council’s Equalising Opportunities in the Law Committee (the EOL Committee) has raised a particular concern that as currently drafted, the Bill may not provide protection against discrimination for certain individuals who are undergoing a change of sex and/or gender.

143. This concern arises from a discrimination case in the Queensland Anti-Discrimination Tribunal where the Tribunal was asked for an opinion on whether the Queensland anti-discrimination legislation provided protection for transgendered persons. The Queensland legislation does not refer to transsexuality unlike some other State and Territory legislation. The Tribunal considered whether the attribute of ‘sex’ could provide protection for a transgendered person. It was reluctant to employ a liberal interpretation of the term ‘sex’ and found that the Queensland anti-discrimination legislation did not “make it unlawful under the Act to discriminate against a person purely on the ground of their having changed their sexual identity from one gender to another”⁹³

⁹³ *Opinion re: Australian Transgender Support Association of Queensland* [1996] QADT 8 (17 May 1996) [9]4.

144. Adelaide University academics Ms Anne Hewitt and Dr Laura Grenfell have noted in a submission to this Committee that the question of whether the SDA prohibition against discrimination on the basis of sex extends to a change of sex has not been explored in case law. However, the EOL Committee is of the view that the current Bill may need to be amended in order to avoid the possibility that courts and tribunals might interpret the ground of 'gender identity' narrowly.

145. For this reason the Law Council suggest that consideration be given to the inclusion of an additional prohibition in the Bill that would apply to individuals who are subject to discrimination (direct or indirect) because they change their sex and/or gender identity or are in the process of changing their sex and/or gender identity.

Expand the range of relevant international instruments

146. Subsection 9(10) of the SDA currently provides that the prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II of the SDA, have effect to the extent that the provisions give effect to a 'relevant international instrument'.

147. 'Relevant international instrument' is defined in subsection 4(1) which lists a number of international human rights Conventions. This list was amended in 2011 and now includes:

- 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 of 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.

148. Notwithstanding this lengthy list of instruments, there is no instrument which specifically recognises the human rights of the LBGTI community.

149. As noted above, it is accepted that LBGTI characteristics are covered by the term "other status" in article 26 of the ICCPR. However, the NSW Bar Committee has suggested that reference could be made to the Yogyakarta Principles in the definition of 'relevant international instrument' in subsection 4(1) of the SDA. This would mean that the Yogyakarta Principles would be one of the relevant international instruments that could be considered when giving effect to the protections contained in Part II of the SDA.

Remove or review proposed new exemptions

150. The Bill proposes to make a number of amendments to the provisions of the SDA that deal with exemptions. It also seeks to introduce a number of new exemptions that would apply to discrimination in respect of the new grounds of sexual orientation, gender identity and intersex status. These new exemptions relate to action done in accordance with the Marriage Act, or in direct compliance with a law of the Commonwealth, or of a State or Territory, that is prescribed by the regulations for this purpose. An exemption will also apply to requests of information and keeping of records that do not allow for identification as being neither male nor female. The Law Council holds concerns regarding the need for and scope of these proposed new exemptions.

Marriage

151. The Marriage Act currently defines marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.⁹⁴ As a result, the Marriage Act specifically excludes same-sex couples and may also exclude people of intersex status or diverse gender identity.

152. Item 52 of the Bill provides that discrimination on the grounds of sexual orientation, gender identity or intersex status will not be unlawful if done in accordance with the Marriage Act. The Explanatory Memorandum provides that the purpose of this exemption 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.*⁹⁵

153. The Law Council queries the need for this exemption and suggests the Government's current policy on same-sex marriage should be revisited, having regard to the full range of Australia's international human rights obligations and the Government's commitment to removing all forms of discrimination against the LGBTI community.

154. The SoC to the Bill provides that, as the UNHRC has stated that it does not consider a refusal to grant marriages between people of the same sex to be a violation of the ICCPR per se, it is not contrary to the ICCPR for a State to refuse to do so, provided that this does not result in more favourable treatment for married couples compared with that of unmarried same sex couples.⁹⁶ The SoC asserts that as a result of the 2008 same sex reforms, all couples are given the same treatment by Commonwealth law.

155. The Law Council does not consider this to be a full account of Australia's international human rights obligations in this area. The Law Council considers that marriage is a human right which should be made available to all people. This right is protected under Article 23 of the ICCPR.

⁹⁴ *Marriage Act 1961* (Cth) s5.

⁹⁵ Explanatory Memorandum p. 21 [74].

⁹⁶ Statement of Compatibility with Human Rights, Explanatory Memorandum p. 6.

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156. The Law Council does not consider that discrimination against same-sex couples can be adequately addressed without changing the law in relation to marriage. Accordingly, the Law Council has supported the many legislative efforts to create marriage equality and bring an end to the discrimination currently faced by certain people in the community who would like to marry their partner, but are unable to do so simply because of their non-heterosexual status.⁹⁷
157. The Law Council also notes that Australia has a range of international human rights obligations with respect to the rights to equality and freedom from discrimination which are particularly relevant to same-sex marriage, many of which have been outlined above.
158. These articles were considered by the UNHRC in the 2002 case of *Joslin v New Zealand*.⁹⁸ In this 2002 case, the UNHRC interpreted Article 23 and its use of the phrase 'men and women' rather than 'every human being', 'everyone' and 'all persons' as its primary point of reference and found that the relevant articles meant that States were only required to recognise the union of a man and woman wishing to marry each other.
159. Some commentators have questioned the UNHRC's narrow interpretation of Article 23 in *Joslin*, particularly in relation to the implications such an interpretation has on the right of same-sex couples to found a family.⁹⁹ Despite this narrow interpretation, it has been suggested that the ICCPR would not "prohibit in any way a more expansive definition of marriage being adopted by domestic legislation."¹⁰⁰
160. At the time the UNHRC considered *Joslin*, the only country to have legalised same-sex marriage was the Netherlands. Laws have since been passed in 11 countries legalising same sex marriage, including South Africa, Spain, Canada and Norway and New Zealand. Nine US states now also permit same sex marriage, and same sex marriage has also been endorsed by the President of the United States.¹⁰¹ In addition a number of declarations have been made including by the UN Human Rights Council concerning the equality rights of LGBTI people.¹⁰² It remains to be

⁹⁷ See for example the Law Council's submission to the Senate Legal and Constitutional Affairs inquiry into the *Marriage Equality Amendment Bill 2012* (the Bandt-Wilkie Bill) and *Marriage Amendment Bill 2012* (the Jones Bill); the Law Council's submission to the Senate Legal and Constitutional Affairs Legislation Committee on its 'Inquiry into the *Marriage Equality Amendment Bill 2009*' in August 2009; the Law Council's submission to the Senate Legal and Constitutional Affairs Committee on its 'Inquiry into the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*' in September 2008.

⁹⁸ *Joslin v New Zealand* CCPR/C/75?D/902/1999 (30 July 2002). This case concerned two lesbian couples who, despite pooling financial resources and caring for each other's children from previous relationships, were refused notices of intended marriage by their local Registry offices. The couples claimed that their rights under Articles 2, 16, 17, 23 and 26 of the ICCPR had been breached and that the failure of the New Zealand Marriage Act to provide for homosexual marriage discriminated against them directly on the basis of sex and indirectly on the basis of sexual orientation. It is noted that amendments to the New Zealand Marriage Act have recently passed that remove these discriminatory features, see for example ABC Online 'NZ legalises same-sex marriage' (18 April 2013) <http://www.abc.net.au/news/2013-04-17/nz-legalises-same-sex-marriage/4635086>.

⁹⁹ Aleardo Zanhellini, "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?", *Melbourne Journal of International Law*, 9(1). Available from <http://www.austlii.edu.au/au/journals/MelbJIL/2008/4.html#fn24>

¹⁰⁰ Professor Ben Saul, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Marriage Equality Amendment Bill*, 7 March 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/marriage_equality_2012/submissions.htm.

¹⁰¹ See for example White House Blog, President Obama Supports Same-Sex Marriage (10 May 2012) available at <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>

¹⁰² For example on June 17, 2011, South Africa initiated a resolution in the United Nations Human Rights Council requesting the United Nations High Commissioner for Human Rights to draft a report detailing the

seen if the UNHRC adopts a similar interpretation if asked to again consider the issue of same-sex marriage and the ICCPR.

161. Regardless of how the findings of the UNHRC are interpreted, the Law Council believes that prohibiting same-sex marriage fails to adequately protect the rights to equality and non-discrimination for same-sex couples.
162. For these reasons, the Law Council recommends that the exemption for conduct done in accordance with the Marriage Act be removed from the Bill. If this cannot be achieved then the Law Council recommends that a sunset clause be included in the Bill that would require this exemption to be reviewed within two years to determine whether it remains necessary.

Compliance with State and Territory Laws prescribed by Regulation

163. Item 52 of the Bill also provides that conduct will not constitute unlawful discrimination on the grounds of sexual orientation, gender identity or intersex status if it is done in direct compliance with a law of the Commonwealth, or a State or Territory that is prescribed by the regulations for this purpose.

164. The Explanatory Memorandum provides that 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).

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.¹⁰³

165. The Law Council queries whether this exemption is necessary. No law of the Commonwealth, or of a State or Territory has been identified in the Explanatory Memorandum as an example of why an exemption of this nature may be required.
166. The Law Council also notes that the SDA already contains provisions that deal with State or Territory Acts that concern discrimination on the grounds protected under the SDA. These provisions will be amended by the Bill to include laws dealing with discrimination on the grounds of sexual orientation, gender identity and intersex status.¹⁰⁴ Section 40 of the SDA also provides an exemption for acts done under statutory authority which includes acts done in accordance with a court order, or in accordance with a range of listed Commonwealth Acts.
167. In addition, under the existing provisions of the SDA, the AHRC is given the power to exempt a person or class of persons from the unlawful discrimination provisions in Division 1 and 2 of the SDA on a temporary basis.

situation of LGBT citizens worldwide to follow up and implementation of the Vienna Declaration and Programme of Action. The report, which came out in December 2011, documented violations of the rights of LGBT people, including hate crime, criminalization of homosexuality, and discrimination. High Commissioner Navi Pillay called for the repeal of laws criminalizing homosexuality; equitable ages of consent; comprehensive laws against discrimination based on sexual orientation; prompt investigation and recording of hate crime incidents; and other measures to ensure the protection of LGBT rights.

Item 52 of the Bill, Explanatory Memorandum p. 21 [76].

SDA ss9-11.

168. The Law Council also queries whether it is appropriate to exclude laws prescribed by regulation from the ambit of the proposed new protections in the Bill. This approach has the potential to significantly limit the coverage of anti-discrimination protections without appropriate levels of parliamentary scrutiny. It is also confined to the prohibitions on discrimination in relation to sexual orientation, gender identity and intersex status. As the NSW Bar Committee has noted, it is unclear why there should be a power for statutory exceptions prescribed by regulation in relation to these protected attributes but not others. It is a matter of concern that the prohibition on discrimination in relation to these protected attributes will be at risk of being diminished by regulations whereas the same risk is not present in relation to the prohibitions on discrimination for other protected attributes.

169. The Law Council recommends that unless compelling evidence can be shown as to why an exemption of this nature is needed it should be removed from the Bill.

Record Keeping

170. Item 60 of the Bill would enact an exemption to discrimination on the grounds of sexual orientation, gender identity and intersex status that will apply to requests for information and keeping of records that do not allow for identification as being neither male nor female. Item 60 would introduce section 43A into the SDA.

171. Subsection 43A(1) provides that it is not unlawful discrimination to request information in a way that does not allow for a person to identify as being neither male nor female. 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.

172. The Explanatory Memorandum provides that the intention of this exemption 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.*¹⁰⁵

173. The Law Council is concerned that this exemption appears to be designed to ensure that organisations do not have to make significant changes to their record keeping procedures in order to provide for a person to be identified as neither male nor female.

174. This is inconsistent with a number of commitments made by the Government to review and reform the way that gender is recognised and recorded by Government departments and agencies to remove any features that discriminate against people who are sex or gender diverse.

175. These commitments have been made following findings by the AHRC and others that the collection and handling of sex and gender information by governments is an issue of real concern to many people who are sex and gender diverse.¹⁰⁶ Where such information is collected or handled in a discriminatory manner, the consequences can exacerbate the vulnerabilities already faced by this population. For example, the Law Council has been concerned by past reports by the New South Wales Gender Centre

Explanatory Memorandum p. 22 [84]
See for example, Sex Files Report.

that transgendered people have decided against claiming their welfare entitlements because they have previously experienced unfair or insensitive treatment by Centrelink.¹⁰⁷ This leaves people open to homelessness, poverty and violence.

176. Recently, the Government has taken important steps towards addressing some of these issues, including through the development of draft Guidelines on the Recognition of Sex and Gender (the Draft Guidelines). When finalised, the Guidelines will form a practical mechanism by which the Government can help to eliminate discrimination against people who are sex and gender diverse. As currently drafted, the Guidelines require all agencies and departments that collect sex /gender information to:

- closely examine whether such information is necessary to the performance of their specific function or for broader government statistical or administrative purposes. Where such information is not necessary, this category of information should be removed from forms or documents; and
- where they collect the information in a personal record, give the option to select M (male), F (female) or X (Indeterminate/ Intersex/ Unspecified).

177. The Law Council has recently made a submission to the Attorney-General's Department strongly supporting the objects behind the Guidelines and many of their features.¹⁰⁸ It has also highlighted a number of areas requiring further consideration, such as ensuring that appropriate limits are placed on the collection of sex and gender information and relevant privacy principles are observed.

178. The existence of the Guidelines and the Government's commitment to reform in this area suggest that businesses and Government Departments and organisations can and should adjust their data collection and record keeping practices to remove any features that may discriminate against people on the grounds of gender identity or intersex status. As a result, there should not be an ongoing need for the exemption proposed in Item 60 of the Bill. This appears to be acknowledged to some degree in the Explanatory Memorandum to the Bill which notes that:

*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.*¹⁰⁹

179. The Law Council is concerned that while the Explanatory Memorandum notes that the exemption proposed in Item 60 of the Bill may not be necessary in the future, it is nevertheless framed as a permanent exemption. With respect to Government agencies in particular, this makes it likely to undermine the Guidelines' overall effect and raises questions about the Government's commitment in practice to the principles set out in both the Guidelines and the Bill. It also fails to align closely with relevant

¹⁰⁷ The Gender Centre, *Concerns for Clients When Accessing Government Agencies or Service Providers*, available at http://www.gendercentre.org.au/concerns_for_clients_kit.htm.

¹⁰⁸ Law Council of Australia, *Submission to the Attorney General's Department consultation on the development of Draft Guidelines on the Recognition of Sex and Gender*, 23 April 2013, available at www.lawcouncil.asn.au.

¹⁰⁹ Explanatory Memorandum p. 22 [84]

international principles in this area, such as the Yogyakarta Principles, which include the rights to:

- recognition as a person before the law, based on each person's self-defined gender identity, and
- privacy, including the right to disclose or not to disclose information relating to one's gender identity (see further description below).

180. The Law Council notes that under the existing provisions of the SDA, the AHRC can exempt a person or class of persons from the unlawful discrimination provisions in Division 1 and Division 2 of Part II of the SDA.¹¹⁰ Such an exemption can be made on application to the AHRC and can be subject to certain terms and conditions. Its maximum duration is five years and applications made under these provisions are subject to review by the Administrative Appeals Tribunal.

181. The Law Council suggests that this temporary exemption process could be utilised as an alternative to a permanent exception relating to record keeping arrangements. This approach would align more closely with the objects and purpose of the Bill, as it would require consideration of the individual circumstances of each business or organisation by the AHRC before permitting discrimination to occur in the area of record keeping. It would also explicitly acknowledge that the barriers that may be faced by business and organisations in making appropriate changes to their record keeping arrangements are temporary. This approach also has the advantage of being likely to be included in any future consolidation of Commonwealth anti-discrimination laws and was a feature of the Draft HRAD Bill.

182. If this approach is considered to be unduly onerous, the Law Council recommends in the alternative that a sunset clause of four years be introduced in relation to clause 43A, with a specific obligation to conduct a review to consider removing the clause's application to Australian government agencies, in light of the obligations introduced under the Guidelines. The Attorney-General should be required to report to Parliament on the review, and on progress made by agencies in implementing the Guidelines, three years after the Bill's commencement. This would allow sufficient time for agencies to implement the Guidelines.

183. One of the Law Council's constituent bodies, the Law Society of NSW has suggested that the Guidelines should be placed on a legislative or regulatory footing.

184. It is also noted that in its *Sex Files* report, the AHRC recommended that the Government consider legislation to:

- amend the SDA to ensure that the protection against marital status discrimination applies in the context of married persons seeking to amend their birth certificates, to effectively override the existing discrimination under state and territory births registration legislation; and
- establish a minimum national standard in respect of legal recognition of sex in documents and government records in line with the recommendations in this paper.¹¹¹

¹¹⁰ SDA ss 44 – 47.

¹¹¹ Sex Files Report Recommendation 13.

185. The Law Council also notes that in a submission to this Committee on the Bill prepared by Adelaide University Academics Ms Hewitt and Dr Grenfell, it is recommended that this exemption could be amended so that it operates to cover:

- Data entered within 12 months from the date the Guidelines come into operation, and
- Historical data entered prior to when the Guidelines come into force.

Further consideration of the application of existing SDA exemptions to the proposed new grounds

186. A number of the Law Council's Constituent Bodies and the EOL Committee have raised concerns regarding the application of the exemptions in the SDA relating to religious bodies to the proposed new grounds of sexual orientation, gender identity and intersex status.

187. For example, the LIV opposes 'blanket exceptions' for religious bodies and educational institutions that allow them to discriminate in their non-religious day-to-day activities on particular grounds (as opposed to the ordination and training of priests and ministers of religion). The LIV is of the view that the balancing of freedom of religion with other important human rights, such as the right to freedom from discrimination, requires thoughtful consideration and should not be determined by the application of broadly drafted exemptions from discrimination.

188. Concerns have also been raised that the Bill fails to ensure that that amended SDA will provide protection against discrimination on the proposed new grounds in the area of the provision of aged care services, including by religious providers.¹¹² The Law Council notes that the Draft HRAD Bill included a specific provision that made it clear that the proposed exceptions to unlawful discrimination that related to religious organisations in clause 33 of the HRAD Bill did not apply in relation to the provision of aged care services.¹¹³ The Explanatory Notes to the HRAD Bill provided that this approach was due to:

... significant feedback during consultations 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.¹¹⁴

¹¹² Australian Human Rights Commission Media Release LGBTI protection in aged care is necessary (21 March 2013) <http://www.humanrights.gov.au/news/stories/lgbti-protection-aged-care-necessary-2013>

¹¹³ Draft HRAD Bill clause 6 and 33(3)

¹¹⁴ Explanatory Notes to Draft HRAD Bill para [190].

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189. The Government has since reiterated this commitment in a recent media statement in response to this Committee's recommendations in relation to the Draft HRAD Bill.¹¹⁵
190. The Law Council notes that the exceptions for unlawful discrimination by religious organisations in the SDA are narrower than those proposed under the HRAD Bill. However, it suggests that the current Bill could include specific reference to the fact that existing exceptions to unlawful discrimination that relate to religious organisations, such as subsection 37(d) of the SDA, do not apply in relation to the provision of aged care services.
191. In its advocacy in relation to the consolidation of Commonwealth anti-discrimination laws, the Law Council has not commented in detail on the existing exceptions for religious bodies, but has expressed the general view that any religious based exceptions operate as a constraint to the degree of protection afforded under the anti-discrimination regime. If religious exceptions are maintained, the Law Council has submitted that they should be precise and subject to regular review.
192. For this reason, the Law Council welcomed the review of exceptions within three years provided for in clause 47 of the HRAD and would support a similar review mechanism being included in the SDA.
193. The Law Council has recommended that any such review should consider whether there is evidence that justifies including each of the particular attributes within each of the exemptions for religious organisations and whether an alternative approach to religious bodies' exemptions should be adopted, such as the 'licence to discriminate approach'.¹¹⁶ Under this approach:
- The religious body must issue a notice of intention to discriminate that includes information such as the attribute in issue, the area of public life and the basis for asserting the exception in the doctrines, tenets or beliefs of the religion.
 - This notice would be made public and provided to the AHRC and would expire after a certain period of time, such as five years, and may be renewed or varied.
 - Members of the public could ascertain whether and to what extent a particular religious body or organisation may be seeking to rely upon an exception to the protection contained in the relevant anti-discrimination law.¹¹⁷

Further consideration of extending other protections under the SDA to the proposed new grounds

194. The Law Council recommends that consideration be given to making available other protections under the SDA to the proposed new grounds of sexual orientation, gender identity and intersex status. In particular, the Law Council suggests that consideration be given to extending the protections against sexual harassment in

¹¹⁵ Attorney General the Hon Mark Dreyfus QC MP, Press Conference , 20 March 2013 transcript available at <http://www.attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx>

¹¹⁶ Regulatory Impact Statement to the Draft HRAD Bill p. 70.

¹¹⁷ The *Equal Opportunity Act 1984* (SA) provides a limited example of this type of approach in s34(3)

section 28A of the SDA to the other grounds protected in the SDA and proposed in the Bill.

195. In State and Territory anti-discrimination laws, only the Northern Territory and Tasmanian Acts specifically prohibit harassment on the grounds of sexuality;¹¹⁸ or on the ground of a person's relationship.
196. In the other jurisdictions, a person may be able to demonstrate that conduct which involved harassment based on his or her sexual orientation or sex and/or gender identity amounted to unlawful discrimination,¹¹⁹ if he or she suffered some detriment in an area of activity governed by the legislation.¹²⁰
197. The Law Council notes that Item 46 of the Bill amends subparagraph 28A(1A)(a) of the SDA to provide that sexual orientation, gender identity, intersex status and marital or relationship status are included in the range of circumstances to be taken into account when determining whether sexual harassment has occurred under subsection 28A(1). However, this amendment would not extend the protection against harassment to cover harassment on one of the proposed new grounds that does not involve an unwelcome sexual advance or other unwelcome conduct of a sexual nature.
198. For this reason, the Law Council considers that protection against harassment on the grounds of sexual orientation, gender identity and intersex status should be introduced to specifically prohibit this conduct. It considers that such legislation has an important educative role in signalling to the community that such actions are unacceptable.
199. The Law Council also notes that it has previously advocated changes to increase the effectiveness of sexual harassment provisions of the SDA. It has proposed that harassment can be established where it occurs 'in circumstances where a reasonable person would have anticipated the possibility that the other person would have been offended, humiliated or intimidated by the conduct'. This recommendation has been adopted by this Committee during the 2008 SDA Inquiry and by the Government in its response.¹²¹ The Law Council supports a similar definition being adopted in any provisions which prohibit harassment on the basis of sexual orientation and sex and/or gender identity.
200. The Law Council also notes that a broad approach to protection against harassment was adopted in the Draft HRAD Bill which offered protection against harassment in respect of all protected attributes, but limited coverage of these protections for certain attributes to conduct occurring in work or work related areas.¹²²

¹¹⁸ NT Act s. 20(1)(b)

¹¹⁹ For example, in *Daniels v Hunter Water Board* (1994) EOC 92-626, a complaint of discrimination on the ground of homosexuality in employment was successful. The relevant conduct involved constant taunting and pranks by the complainant's workmates based on his perceived homosexuality. This was found to be a detriment in his employment which could have been prevented by his employer.

¹²⁰ This is the case in NSW for example. The Anti-Discrimination Board of NSW advises that harassing conduct on grounds other than sex would be considered under its broader discrimination provisions – advice provided 12 November 2010. As well as the possibility of making out harassment or vilification in Victoria under the definition of "discrimination" pursuant to the current Victorian Act, the Victorian Women Lawyers also draw attention to the limited availability of civil injunctive relief under the *Personal Safety Intervention Orders Act 2010* (Vic) (in limited circumstances and with limited remedies): advice provided 12 November 2010.

¹²¹ 2008 SDA Inquiry, Recommendation 15 and Government Response.

¹²² See Draft HRAD Bill clauses 19(1) and (2), 22(3). The Draft HRAD Bill also included a specific protection against sexual harassment, clause 49.

The Law Council generally supported this aspect of the Draft HRAD Bill, subject to making recommendations about removing the reference to conduct that insults or offends from subclause 19(2) of the Draft HRAD Bill.

201. The Law Council also suggests that consideration be given to including within the SDA protections against vilification. At the Commonwealth level, currently, only the RDA contains specific prohibitions on vilification.¹²³
202. The Draft HRAD Bill replicated the approach adopted in the RDA but did not extend the vilification provisions to attributes other than race. In its submissions in respect of the Draft HRAD Bill, the Law Council suggested that it may be appropriate for the Government to consider broadening the application of the vilification protections to other attributes, including sexual orientation, gender identity and intersex status, in the future.

The challenge of introducing the proposed new protections in light of binary concepts of sex and gender in the SDA

203. As noted above, the Law Council is of the view that the preferred mechanism for introducing protections against discrimination on the grounds of sexual orientation, gender identity and intersex status is via the introduction of a consolidated Commonwealth anti-discrimination Act. This would enable the protections on these grounds to avoid some of the tensions and ambiguities that arise when these concepts are interposed into a legislative regime that contains many features that assume a binary concept or paradigm of sex.
204. Some of the amendments in the Bill attempt to address the underlying binary concept or paradigm of sex in the SDA. For example, Items 8 and 14 of the Bill repeal the definitions of 'man' and 'woman' from section 4 of the SDA.¹²⁴ The Explanatory Memorandum provides that the repeal of these definitions is designed 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.*¹²⁵
205. The Explanatory Memorandum also provides that to the extent that these terms appear under the amended SDA they will take on their ordinary meaning.¹²⁶

¹²³ Section 18C of the RDA provides that: "(1) It is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. (2) For the purposes of subsection (1), an act is taken not to be done in private if it: (a) causes words, sounds, images or writing to be communicated to the public; or (b) is done in a public place; or (c) is done in the sight or hearing of people who are in a public place. (3). In this section: "*public place*" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.' Section 18D of the RDA provides that: "Section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in making or publishing: (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment."

¹²⁴ Pursuant to the current definitions, 'man' means a member of the male sex irrespective of age and 'woman' means a member of the female sex irrespective of age.

¹²⁵ Explanatory Memorandum p. 13 [18].

¹²⁶ Explanatory Memorandum p. 13 [18].

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206. These efforts should generally be supported, but may give rise to unintended complexities. As the NSW Bar Committee has noted, the question of the ordinary meaning of expressions such as ‘man’ and ‘woman’ has been controversial in a number of recent cases¹²⁷ and may give rise to uncertainty in certain provisions of the SDA. For example, section 43 of the SDA permits discrimination against a woman on the grounds of her sex with respect to performing combat duties.¹²⁸ As no amendment is proposed under the Bill for section 43, the NSW Bar Committee is concerned that an issue may arise as to the persons covered by this exception.
207. Similarly, many amendments in the Bill seek to remove the reference to ‘opposite sex’ and replace this with the term ‘different sex’, which is said to be ‘consistent with the protection of gender identity and intersex status, which recognises that a person may be, or identify as, neither male nor female.’¹²⁹ Again, these amendments are generally welcome. However when applied to certain provisions of the SDA, they have the potential to change the meaning or scope of some of the existing provisions of the SDA that rely upon a binary concept of sex.
208. For example, the Bill amends the exception to unlawful discrimination contained in subsection 21(3) of the SDA that relates to single sex educational institutions to cover the proposed new grounds, and to replace the references to students of the *opposite sex* to those of a *different sex*.
209. The NSW Bar Committee has raised concerns that this amendment is difficult to reconcile with the existing language in section 21 of the SDA which assumes a binary concept or paradigm of sex. The NSW Bar Committee has suggested that the effect of the proposed amendment would appear to be a provision that is not in keeping with the recognition of intersex status and gender identity.
210. The same comments apply to the proposed amendment to section 25(3) of the SDA which relates to single-sex clubs in Item 42 of the Bill.
211. The Law Council is of the view that these difficulties highlight the need for the Government to advance reforms to the broader anti-discrimination regime that would seek to avoid reliance on binary notions of sex. Guidance in this area may be sought from the reforms proposed in the Tasmanian Bill. As was noted by the Tasmanian Anti-Discrimination Commissioner in her submission to the Draft HRAD Bill Inquiry:

*The approach taken in the Tasmanian legislation is based on defining gender identity in a way that does not incorporate binary notions of sex as either male or female. Binary constructs of sex and/or gender promote recognition of individuals as either male or female and fail to recognise that there is a spectrum of biological sex or sexual characteristics and gender identity and sexual orientation.*¹³⁰

¹²⁷ See for example, *Kevin & Jennifer* (2001) 165 FLR 404 and on appeal (2003) 172 FLR 300; *Secretary, Department of Social Services v SRA* (1993) 43 FCR 299 at [8] [9], *R v Harris and McGuinness* (1989) 17 NSWLR 159, *Secretary, Department of Social Security and HH* (1991) 14 ALD 58, *Re Alex* (2004) Fam CA 297, *Scafe v Secretary, DFHCSIA* [2008] AATA 104, *Hurst v Star City Casino* [2009] NSWADT 65 and all of the decisions in *AH and Gender Reassignment Board of WA* [2009] WASAT 153; [2010] WASCA 172 and (2011) 244 CLR 390. See also Grenfell and Hewitt “Gender Regulation: Restrictive, Facilitative or Transformative Laws” (2012) 34(4) Sydney Law Review 761 and Bird, “When Sex Means ‘Condition’ or ‘Impairment’: Evaluating the Human Rights of Transgender and Inter-sex People” (2001) SCU Law Review 1.

¹²⁸ see also *Sex Discrimination Regulations 1984 - Reg3*.

¹²⁹ Explanatory Memorandum p. 14

¹³⁰ Tasmanian Anti-Discrimination Commissioner, submission to the Draft HRAD Bill Inquiry (December 2012) available at http://www.antidiscrimination.tas.gov.au/news_and_events/submissions

Ensuring consistent terminology under other relevant Commonwealth laws

212. The Law Council recommends that this Committee recommend that changes are made to other Commonwealth legislation to reflect the amendments proposed in the Bill.
213. Both the Law Society of NSW and the NSW Bar Committee have raised particular concerns that the Bill does not include amendments to other relevant Commonwealth laws concerning discrimination and recommends that all relevant Commonwealth laws be amended to use terminology consistent with the proposed amendments to the SDA.
214. In particular section 351(1) of the FWA should be amended to reflect the language proposed in the Bill. This section currently provides that:
- An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, **sexual preference**, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. (emphasis added)*
215. The expression “sexual preference” should be replaced with “sexual orientation”.
216. It is also recommended that gender identity and inter sex status should be included as protected grounds in section 351.
217. Amendments are also required to the *Australian Human Rights Commission Act 1986* (Cth) and the *Australian Human Rights Commission Regulation 1989* (Cth) which provide an avenue of complaint about discrimination in employment and occupation. These instruments currently include grounds described as “marital status” (Regulation 4(a)(v)) which is expressly defined to have the same meaning as “marital status” in the SDA (see Regulation 3) and “sexual preference” (Regulation 4(a)(ix)). Amendments are necessary to ensure that these terms reflect the language used in the Bill, for example by replacing ‘sexual preference’ with ‘sexual orientation’ and ‘marital status’ with ‘marital or relationship status’.

Implementation of other measures to support the proposed protections proposed

218. In addition to the above recommendations, the Law Council urges this Committee to recommend that the Government implement other legislative and non-legislative measures to support and monitor the effectiveness of the protections proposed in the Bill. Without such measures, there is a risk that the legislative reforms proposed in the Bill will not succeed in prohibiting discrimination the grounds of sexual orientation, gender identity or intersex status or in promoting a more inclusive Australian society.
219. The finalisation and adoption of the Guidelines on the Recognition of Sex and Gender and the implementation of other actions under the National Human Rights Action Plan should be considered priorities in this area.
220. Other measures should be developed in consultation with the LGBTI community and others with expertise in this field including the AHRC and the Fair Work Ombudsman and could include:

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- an education and awareness campaign to assist employers to comply and employees to understand their rights, which could include participation or coordination by the Fair Work Ombudsman as part of its education and awareness function;
 - the establishment of a new Australian Human Rights Commissioner for LGBTI issues. The Commissioner's duties under the new laws could include increasing education and awareness of these issues amongst the broader community;
 - a focus on how the Australian Public Service (APS) can improve its own compliance as it develops and implements programs affecting LGBTI Australians. This requires action to be taken at a number of levels, including specific, achievable targets. Measures to achieve this goal could include conducting APS training on LGBTI issues at all levels, both for program and policy staff and introducing support schemes for LGBTI APS employees. Several of these initiatives could be implemented as part of the broader APS human rights training and performance measures which the Law Council considers are vital if the Government is to meet its human rights commitments in response to the National Human Rights consultations¹³¹; and
 - an audit of Commonwealth laws to remove gender identity-based discrimination, similar to that undertaken in 2007 to remove discrimination against same sex couples.¹³²

Further Recommended Reforms

221. As noted above, the Law Council strongly supports the passage of the Bill, preferably with amendments in line with the above recommendations. It is of the view that the protections proposed in the Bill are urgently needed and should be enacted as soon as possible.

222. However, the Law Council considers that further reforms of the Commonwealth anti-discrimination regime are also of critical importance, particularly given the many detailed and comprehensive public inquiries and consultations that have occurred in recent years and the Government's commitment to implementing recommendations for reforms.

223. The Law Council notes that a similar view was expressed by the majority of this Committee during its recent inquiry into the Draft HRAD Bill where it concluded that:

The stated aim of this project – producing a clearer and simpler anti-discrimination law for consumers, employers and the general public – is a worthwhile one. Anti-discrimination law is a key mechanism for promoting equality and protecting vulnerable or marginalised groups in Australia, and the

¹³¹ Law Council of Australia, *Refining the Australian Public Service Values: Australian Public Service Commissioner*, 2 August 2010, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5446C54C-F0EE-4611-12DC-261193C5E464&siteName=lca

¹³² Commission, *Same Sex: Same Entitlements Inquiry Report* (2007), available at http://www.hreoc.gov.au/human_rights/samesex/index.html, accessed 18 November 2010

*parliament must do its utmost to ensure that the law in this area is fair and balanced.*¹³³

224. For this reason, the Law Council urges this Committee to recommend that the Government take steps to introduce legislation based on an improved version of the Draft HRAD Bill as soon as possible. In line with the Law Council's extensive past advocacy, such legislation should respond to the recommendations made by this Committee following its inquiry into the Draft HRAD Bill and include:¹³⁴

- a single, simplified test for discrimination (that avoids references to conduct which 'offends, insults or intimidates');
- additional protected attributes, including protections against sexual orientation and gender identity discrimination and extension of protections against relationship discrimination to same-sex couples in any area of public life;
- recognition of discrimination on the basis of a combination of attributes;
- coverage of discrimination and harassment in expanded areas of public life;
- a streamlined approach to exceptions;
- additional measures to assist and promote voluntary compliance with the Bill;
- changes to the complaints process; and
- changes to some functions of the Australian Human Rights Commission.

225. If this recommendation is not pursued, the Law Council urges the Committee to recommend that the Government introduce further changes to the SDA that would implement the recommendations made by this Committee during the 2008 SDA Inquiry.¹³⁵

226. Some of these recommendations were implemented by the *Sex and Age Discrimination Legislation Amendment Act 2010*. Other recommendations, such as those relating to providing protection to same-sex couples from discrimination on the basis of their relationship status, will be implemented by the current Bill. However, unless legislation based on the Draft HRAD Bill is introduced, important recommendations remain outstanding. These recommendations include:

- amending the test for of direct discrimination in sections 5 to 7A of the Act to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*;
- including a general equality before the law provision modelled on section 10 of the *Racial Discrimination Act 1975*;

¹³³ Draft HRAD Bill Inquiry Report Chapter 7, [7.2].

¹³⁴ The Law Council's policy position and submissions in response to the Attorney General's Department Discussion Paper on the proposed Consolidation of Anti-discrimination Laws and the Draft HRAD Bill are available at: <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm>.

¹³⁵ Further information about this inquiry, the Report and Recommendations, the Law Council's submission and the Government's response to the Senate Committee's recommendations, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/index.htm.

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- improving the complaints process where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation; and
 - expanding the powers of the Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission).

227. Without these broad reforms, the amendments proposed in this Bill will be interposed into a regime that currently suffers from complexities and inconsistencies that create barriers for all users and limit the effectiveness of the regime to remove discrimination and promote equality.

Conclusion

228. Discrimination on the grounds of sexual orientation, gender identity and intersex status, as well as the relationship status of those in same sex relationships, continues to occur within the Australian community and has devastating impacts on the lives of individuals and a corrosive effect on the inclusiveness of Australian society.

229. Current Commonwealth laws fail to provide adequate protection against discrimination on these grounds. Many recommendations for reform have been made following extensive public inquiries and consultations. The need for specific legislative provisions to protect against discrimination on the grounds of sexual orientation, gender identity and intersex status has now received bipartisan support.

230. The Law Council strongly supports the passage of the Bill, but is of the view that its protective aims could be advanced by making further amendments to the Bill and by consideration of further legislative change.

231. The inclusion of the new grounds into the SDA is welcome, but these new attributes highlight the complexities that arise from interposing new protections into a regime that itself requires substantial reform to ensure its effectiveness at prohibition discrimination and promoting equality. Some of the issues arising include:

- the need to reconsider the objects and title of the SDA;
- the tensions arising from incorporating new grounds of protection within the provisions of the SDA that assume a binary concept of sex;
- the need to ensure consistency with other relevant legislation, for example by ensuring the FWA adopts the same terminology and includes corresponding protections against discrimination on these grounds;
- the need to ensure all of the protections available under the SDA, such as protections against harassment, apply to the proposed new grounds; and
- the need to address the shortcomings in the test for discrimination under the SDA that relies upon a 'comparator' approach which has been identified as unduly complex.

232. Each of these issues could be addressed through the pursuit of broad reforms to the Commonwealth anti-discrimination regime, for example through the introduction of legislation based on an improved version of the Draft HRAD Bill.

233. The Law Council recognises that the Draft HRAD Bill attracted some controversy and was subject to numerous recommendations for reform by this Committee.

However it is confident that any issues of concern arising from the Draft HRAD Bill or the Committee's recommendations could be addressed if given priority by the Government. For this reason, the Law Council urges this Committee to recommend that the Government introduce legalisation based on an improved version of the Draft HRAD Bill as soon as possible, and offers its continued assistance to both the Committee and the Government in this area.

234. Without broader reforms of this nature, the current Bill can only be seen as an important 'gap filler' in an otherwise out-dated, complex and inconsistent anti-discrimination regime.

Summary of the Law Council's Recommendations

235. The Law Council recommends that:

- Subject to the recommendations below, the Bill be passed;
- The Bill be amended to include:
 - an amended title of the SDA to the *Sex and Gender Discrimination Act*;
 - further amendments to section 3 of the SDA, for example amending paragraph 3(e) to include "promoting recognition and acceptance within the community of gender diversity, intersex status and diverse sexual orientation";
 - protection against discrimination for people undergoing sex change, for example by including an additional prohibition in the Bill that would apply to individuals who are subject to discrimination (direct or indirect) because they choose to live as a sex or gender other than their legal sex or gender, or they change their sex and/or gender identity or are in the process of changing their sex and/or gender identity;
 - expansion of the range of relevant international instruments referred to in section 9 of the SDA to include the Yogyakarta Principles.
- The Bill be amended to remove the additional exemptions proposed in Items 52-60 of the Bill relating to: conduct undertaken in compliance with the Marriage Act; conduct undertaken in compliance with a listed law of the Commonwealth, States or Territories; and record keeping arrangements. If these exemptions are not removed from the Bill, it is recommended that they be subject to review via sunset clauses to determine their continued necessity and the appropriateness of their scope.
- Further consideration be given to:
 - the application of the existing SDA exemptions to the new protections, which could include requiring the existing SDA exemptions relating to religious organisations to be reviewed or clarifying that these exemptions do not exempt discriminatory treatment on the proposed new grounds in the provision of age care services;
 - extending other SDA protections, such as protections against sexual harassment, to the proposed new grounds

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- ensuring consistent terminology is used in other relevant Commonwealth laws, for example by amending section 351(1) of the FWA to reflect the language proposed in the Bill and to include protection against discrimination on the grounds of gender identity and intersex status;
 - the implementation of other measures to support the proposed protections proposed, including
 - an education and awareness campaign coordination by the Fair Work Ombudsman;
 - the establishment of a new Australian Human Rights Commissioner for LGBTI issues.
 - a focus on how the APS can improve its own compliance as it develops and implements programs affecting LGBTI Australians.
 - That legislation based on an improved version of the Draft HRAD Bill is introduced as a matter of priority, or alternatively, that legislation is introduced that addresses the full range of recommendations made by this Committee in its 2008 SDA Inquiry.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.