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Sex Discrimination Act amended to cover sexual orientation, gender identity, intersex status and relationship status

The [Sex Discrimination Amendment \(Sexual Orientation, Gender Identity and Intersex Status\) Act 2013](#) (the Amendment Act) was passed by Parliament on 25 June 2013 and received royal assent on 28 June 2013. The Amendment Act amends the *Sex Discrimination Act 1984* (the Sex Discrimination Act) to cover discrimination on a range of new grounds, namely sexual orientation, gender identity, intersex status and relationship status.

The amendments commence on a date to be fixed by royal proclamation or six months after the date of royal assent, whichever is earlier.

Extending the prohibited grounds of discrimination

The Amendment Act broadens the grounds of discrimination covered by the Sex Discrimination Act to include discrimination based on a person's:

- sexual orientation (whether sexual orientation is towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex) (new s 5A)
- gender identity (the gender-related characteristics of a person, regardless of their sex at birth) (new s 5B)
- intersex status (the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, a combination of female and male or neither female nor male) (new s 5C)
- marital or relationship status (s 6). The Amendment Act extends the current 'marital status' ground of discrimination to include discrimination based on 'marital or relationship status', which would also create protections for same-sex de facto couples.

Discrimination on these grounds is prohibited in the same areas previously covered by the Sex Discrimination Act, including in employment and superannuation (s 14); education (s 21); the provision of goods, services and facilities (s 22); and the administration of Commonwealth laws and programs (s 26).

Other protections in the Sex Discrimination Act are also extended to include these expanded grounds. The definition of 'sexual harassment' has been amended so that a person's gender identity, intersex status and relationship status are now listed among the circumstances that can be considered in determining whether sexual harassment has occurred (s 28(1A) as amended by the Amendment Act).

The Amendment Act also ensures that the functions of the Australian Human Rights Commission under the Sex Discrimination Act apply to the new grounds of discrimination. This includes reporting to the Attorney-General on laws that should be made or action that should be taken by the Commonwealth on matters relating to discrimination on relevant grounds and preparing guidelines to avoid discrimination on relevant grounds (s 48).

Exemptions from prohibited discrimination

The existing exemptions in the Sex Discrimination Act have generally also been extended to cover the new grounds of discrimination (for example, exemptions for voluntary bodies (s 39) and for competitive sporting activities (s 42)). However, the existing exemption for religious organisations in relation to discrimination on the basis of sexual orientation has been qualified: it no longer applies to the provision of Commonwealth-funded aged care services by religious organisations (new ss 23(3A) and 37(2)). This was designed to address discrimination faced by same-sex couples in accessing aged care services.

The Amendment Act also creates new exemptions. The new prohibited grounds of discrimination do not apply to:

- restrictions on same-sex marriage under the *Marriage Act 1961* (Cth) (new s 40(2A))
- actions done in direct compliance with a law of the Commonwealth or a State or Territory that is prescribed in the regulations. The Explanatory Memorandum notes that the government has not yet made any decisions in relation to laws that might be exempted under this provision (new s 40(2B))
- record-keeping or forms that do not provide a way for a person to be identified as neither male nor female (new s 43A)). This exemption was intended to recognise that amending forms may be an onerous exercise for organisations. Therefore, agencies do not need to update their forms or records in order to comply with the amendments.

However, the Explanatory Memorandum notes that the government is currently developing guidelines on sex and gender recognition for Australian Government departments and agencies. The [Australian Government guidelines on the recognition of sex and gender](#), which came into force on 1 July 2013, standardise sex and gender classification in Australian Government records and evidence to establish or change sex and gender. All departments and agencies have until 1 July 2016 progressively to align their existing and future business practices with the guidelines.

What the Amendment Act means for agencies

Agencies should review their policies and administration of Commonwealth laws and programs to ensure that they do not discriminate against people on the basis of sexual orientation, gender identity, intersex status or relationship status (including same-sex relationships). Agencies should also review their policies and record-keeping practices in accordance with the guidelines.

Recent cases

Recent cases at State level have also shown the potential for these issues to give rise to legal proceedings. In *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145, the New South Wales Court of Appeal considered the word 'sex' in the *Births, Deaths and Marriages Registration Act 1995* (NSW). It held that, in line with developing medical and social ideas about gender, the term 'sex' in that Act was not a binary term that means either 'male' or 'female'; a person's sex could also be recorded as 'not specific'. While this case relates to particular New South Wales legislation, it underlines the need for

Commonwealth agencies to be sensitive to these issues, even outside of the discrimination context.

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