



Anti-Discrimination (Right to Use Gender-Specific Language) Amendment Bill 2018

**Submission
to
Legal Affairs and Community Safety Committee**

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Introduction

1. The Anti-Discrimination Commission is a statutory authority established under the *Anti-Discrimination Act 1991* (the Act). The functions of the Commission include dealing with complaints of discrimination and certain other unlawful conduct, providing information and education services, and raising awareness and public discussion of human rights in Queensland.
2. The Anti-Discrimination (Right to Use Gender-Specific Language) Amendment Bill 2018 (the Bill) would amend the Act to add new grounds and types of unlawful discrimination. The Bill would therefore impact the work of the Commission.

Objectives of the Bill and of the Act

3. The Explanatory Notes state that the policy objectives of the Bill are:
 - to protect an *individual's* right to use traditional gender-based language; and
 - to protect *businesses and other organisations* from disadvantage in the provision of facilities and services that exclusively recognise gender as either male or female.
4. The objectives of the *Anti-Discrimination Act 1991* are expressed in the Preamble and in the main purpose set out in section 6. The Preamble refers to various International Human Rights Instruments to which Australia is a party, to Commonwealth legislation enacted in respect of obligations under the instruments, to the need to extend the Commonwealth legislation, and to the intention of Parliament to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and other objectionable conduct.
5. Only individuals have human rights, and although the expression 'person' is used in the Act, it is individuals who are protected under the Act.
6. The policy objective of providing protection for businesses and other organisations is inconsistent with the scheme, framework, and intention of the *Anti-Discrimination Act 1991*. The only 'protections' for businesses and organisations under the Act are by way of exemptions that allow certain types of discrimination, for example, schools for students of a particular sex or religion, and acts or programs for the welfare of groups or to promote equality of opportunity.

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Necessity for the Bill

7. The Explanatory Notes state there is a need to respond to an increasingly intolerant and hostile social environment resulting in limitations on the use of language that reflects Queensland's traditional shared values.
8. These issues have not been brought to the attention of the Commission in any of its information, complaint handling and community engagement services.
9. The Introductory Speech sets out eight examples of the necessity for the Bill, namely:
 - (1) A call for compulsory dedicated gender-neutral bathrooms to be part of the Building Code;
 - (2) Commonwealth Games volunteers were told to use gender-neutral language to avoid causing offence;
 - (3) Awareness and education in schools around gender-neutral and transgender identities;
 - (4) Queensland driver licences no longer include the person's sex or gender;
 - (5) Universities marking down students for using gendered language;
 - (6) The Qantas 'Words at Work' policy suggesting a range of language that excludes gender-specific language;
 - (7) An Australian Defence Force guide that encourages use of certain language and the potential for bullying in not using sensitive language; and
 - (8) 'They Day' celebrated in the Victorian Public Service.
10. The Building Code currently incorporates the Access to Premises Disability Standards under the *Disability Discrimination Act 1992* (Cth). The Standards and the Building Code currently require certain premises to provide toilet facilities that are accessible for people with disabilities. This is often achieved by providing unisex accessible toilets.
11. The provisions of the Bill would not apply to the Australian Defence Force and would not apply to the Victorian Public Service.
12. Respect and dignity are fundamental components of a modern multicultural and inclusive society. That some people may not be either male or female

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has been recognised in courts, including the High Court of Australia.¹ There is discussion in society about the continued use of titles that distinguish between married and unmarried for women and not men, and addresses such as sir and madam. Traditionally law firms were addressed as Messrs, a nod to the presumption that all the partners were men. A person's name does not necessarily indicate whether they identify as male, female, or other, and likewise a person's appearance does not necessarily indicate how they identify in terms of gender. Transgender people are often insulted and humiliated by being misgendered, for example, a trans-woman being called 'he' and 'him'.

13. It is from respect for these types of considerations that some organisations, particularly those involving customer service, encourage the use of non-gendered language where appropriate.

Existing protections relating to sex and gender

14. The *Anti-Discrimination Act 1991* prohibits discrimination on the basis of sex and gender identity in certain areas of activity, for example, work, education, and the provision of goods or services.
15. 'Gender identity' is defined, for the purposes of the Act, as a person who identifies as a member of the opposite sex, or for a person who is of indeterminate sex, the person identifies as male or female. The definition is binary in nature.
16. 'Sex' is not defined in the Act, so it takes its ordinary meaning. Dictionary meanings of sex are generally male, female, and indeterminate. The dictionary meanings are physiological in nature. Whether the attribute of sex for the purposes of the Act includes a non-binary person has not been tested or decided in a tribunal or court.²
17. The protections from discrimination on the basis of sex or gender identity do not extend to requiring the use of gender-neutral language. On the other hand, the Act does not prevent an employer or educational institution from encouraging or requiring the use of gender-neutral language by workers or students.

¹ *AB v Western Australia* (2011) 244 CLR 390, [2011] HCA 42; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

² In *Wright v Bishop* [2018] QIRC 7, the Queensland Industrial Relations Commission considered that the ordinary meaning of 'sex' is 'The character of being either male or female ... the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences ... men collectively or women collectively'.

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18. A transgender person may complain of discrimination if misgendered language is used towards or about them in the areas of activity under the Act (for example, at work, as a student, or receiving goods or services).
19. The *Sex Discrimination Act 1994* (Cth) also prohibits discrimination on the basis of sex and gender identity in certain areas of activity, for example, work, education, and the provision of goods or services.
20. In the Commonwealth *Sex Discrimination Act 1994*, 'gender identity' is defined more broadly and includes people who identify as neither male nor female.³ This means there is greater scope for people to complain about the use of gender-specific language. For example, people who identify as neither male nor female might be disadvantaged by being referred to in gender-specific terms. Such a person may make a complaint of indirect discrimination to the Australian Human Rights Commission.
21. If conduct is unlawful under the *Sex Discrimination Act 1994*, the provisions of the Bill cannot make that conduct lawful.

Provisions of the Bill

Discrimination prohibited

22. Clause 3 would insert a new section 8A that prohibits direct and indirect discrimination on the basis of the use of gender-specific language. Direct discrimination and indirect discrimination do not take their dictionary meanings, and instead have different meanings for discrimination on the basis of the use of gender-specific language. The use of gender-specific language that amounts to sexual harassment or unlawful discrimination, and that is used to offend, humiliate, or intimidate another person, are excluded from the prohibition.

Meaning of direct discrimination

23. Clause 4 would amend the meaning of direct discrimination in section 10 of the Act. It adopts the existing meaning of direct discrimination as if the use of gender-specific language was an attribute in section 7 of the Act. The definition includes two examples. An example of the operation of a provision is part of the Act.⁴ The second example shows that it is unlawful for a manager to discipline a worker who refers to a group of customers as 'guys'. The Commission considers that this is an inappropriate example of direct discrimination. Many people might prefer not to be referred to as

³ In the *Sex Discrimination Act 1984*, **gender identity** means 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.

⁴ *Acts Interpretation Act 1954*, section 14(3).

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guys, particularly having regard to the type of business and to the clientele of the business. For example, the customers might consider the term is too casual or unprofessional. The business should be free to set standards of communication by staff to customers.

24. Direct discrimination involves comparing how a person without the attribute – or for present purposes, who does not use gender-specific language – would be treated in the same or similar circumstances. For a business that expected customers to be addressed less casually, a worker who used casual language unrelated to gender is likely to also be disciplined.
25. Example 2 to the proposed amended definition of direct discrimination extends unlawful conduct too far.

Meaning of indirect discrimination

26. Clause 5 would amend the meaning of indirect discrimination in section 11 of the Act. The definition of indirect discrimination for the use of gender-specific language departs from the current definition of indirect discrimination on the basis of the attributes in section 7 of the Act. It is a much broader definition than the Commission considers appropriate.
27. The current definition of indirect discrimination involves the following elements:
- imposing, or proposing to impose a condition, requirement, or practice (whether written or unwritten);
 - a person with the attribute is unable to comply;
 - a higher proportion of people without the attribute can comply; and
 - the condition, requirement, or practice is unreasonable.
28. The third and fourth elements above are referred to as the proportionality test and the reasonableness test, respectively. These two elements are not included in the proposed meaning of indirect discrimination on the basis of the use of gender-specific language.
29. The proportionality test has been removed in some jurisdictions.⁵ The reasonableness test however is an important component for balancing rights and responsibilities. The test is crucial and lies at the heart of the concept of indirect discrimination.⁶ It gives effect to the accepted limitation of objective justification. In the Act, the onus of proving that a condition,

⁵ For example, indirect discrimination in the *Sex Discrimination Act 1984* (Cth).

⁶ Titia Loenen, 'Indirect discrimination as a vehicle for change' (2000) 6 (2) *Australian Journal of Human Rights* 77.

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requirement, or practice is reasonable, rests with the person imposing the term.

30. Without the reasonableness component in the proposed definition of indirect discrimination on the basis of the use of gender-specific language, the prohibition is too broad. The example in the proposed definition is an employer requiring its employees to stop using the words 'husband' and 'wife'. There is no consideration given as to whether the requirement is reasonable. For example, traditionally the words husband and wife suggest marriage. The requirement not to use the words might be appropriate where the context is not confined to marriage. The absence of the reasonableness test does not allow for consideration of the context and surrounding circumstances.

Protection of businesses and organisations

31. Clause 6 would insert a new part 5, section 124B, headed 'Provision of facilities or services that do not accommodate particular persons'. It would make it unlawful to discriminate against a provider of facilities or services that does not specifically accommodate persons who are not male or female or do not identify as male or female.
32. The provision is framed in the nature of direct discrimination as if the attribute is 'not specifically accommodating people who are, or do not identify as, male or female'. There are two examples of the prohibition. The first is an advocacy group running a targeted advertising campaign against particular businesses that do not provide gender-neutral bathrooms, and the second is a tender for a contract being unsuccessful because the business does not provide gender-neutral bathrooms.
33. The *Anti-Discrimination Act 1991* protects certain human rights that are recognised in various international human rights instruments. The proposed provision purports to give a human rights protection to businesses and organisations. This is inconsistent with the objects and purposes of the Act.
34. The prohibition would also impinge on the right to freedom of expression (in the first example), and on commercial freedom in the engagement of contractors (in the second example). These freedoms are not absolute and are subject to various restrictions, including the prohibition on vilification and discrimination on grounds such as race and religion. The attributes in section 7 of the Act, which include race and religion, are recognised in the international human rights instruments as the grounds on which discrimination is to be prohibited. The non-provision of gender-neutral

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facilities or services is not recognised as a ground on which discrimination should be prohibited.

Conclusion

35. The Commission considers the proposed amendments to the Act are either not necessary or are misconceived and inconsistent with the purposes of the Act. Generally there should be an evidence-based need for legislation, and legislation should not be made pre-emptively.

Recommendations

36. The Commission recommends that:

- (1) The Bill should not be passed.
- (2) In the alternative, the following amendments should be made to the Bill:
 - (a) In clause 4, delete the second example to the proposed section 10(1A);
 - (b) In clause 5, incorporate the proportionality test and the reasonableness test in conformity with existing section 11 of the *Anti-Discrimination Act 1991* and delete the example; and
 - (c) Delete clause 6.