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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**SEX DISCRIMINATION AND OTHER LEGISLATION AMENDMENT (SAVE
WOMEN'S SPORT) BILL 2022**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Claire Chandler)

SEX DISCRIMINATION AND OTHER LEGISLATION AMENDMENT (SAVE WOMEN'S SPORT) BILL 2022

OUTLINE

The purpose of the Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022 is to clarify that the operation of single-sex sport is not a breach of the *Sex Discrimination Act 1984* (the Act), and to confirm that supporting the operation of single-sex sport for women is a fundamental objective of the Australian Sports Commission.

The Bill is necessary to correct current interpretations of the Act which suggest that excluding males from women's sport will in many cases be a breach of the Act, and which place the onus of proving that it is reasonable to exclude a male from a women's sporting activity on the person or organisation who is subject to a complaint under the Act.

The main provisions of the Bill amend section 42 of the Act to clarify that nothing in Division 1 or 2 of the Act renders it unlawful to exclude persons of one sex from participation in any sporting activity intended or designated for the opposite sex. This provision is intended to make clear that sporting activity described as "women's", "girls" or "female" can exclude males, and sporting activity described as "men's", "boys" or "male" can exclude women.

For the avoidance of any doubt, references to 'sex' refer to biological sex and the intention of this clause is to provide certainty that operating single-sex sport – sporting activity exclusively for either females or males – is not a breach of the Act. A person's gender/gender identity/gender expression has no bearing on their sex. This provision is intended to protect sporting organisations and persons involved in the administration and organisation of single-sex sporting activity from claims that excluding a person on the basis of sex, for the purpose of operating single-sex sporting activity or enforcing the rules of mixed-sex sport as to the number of required/permitted players of both sexes, amounts to unlawful discrimination on the basis of gender identity or sex.

The new subsection 42(1) removes the reference to "strength, stamina or physique" in the current exemption which limits the application of the exemption and prevents sporting activities having an upfront rule that persons of the opposite sex can be excluded. There are a range of reasons why a sporting organisation, organiser or administrator may choose to operate a sporting activity on a single-sex basis, particularly in relation to ensuring fairness and safety for women and girls. This Bill seeks to ensure that organisers are not limited in their ability to operate single-sex sport by the threat of complaints of unlawful discrimination.

This provision is not intended to compel sporting organisers or administrators to limit any competition or activity to persons of one sex. This acknowledges that many sports and sporting organisations will offer a range of categories including single-sex sport, 'Open' categories, and mixed-sex competitions and events.

The primary policy intent of the Bill is to acknowledge that categorisation by sex is a necessary and important mechanism to provide sporting participation and competitive opportunities for females. It seeks to ensure that women's single-sex sport is protected and

encouraged, and that a male person is not entitled to demand inclusion into women's sport on the basis of gender identity. The Bill also acknowledges that while females competing in men's sport does not attract the same concerns of unfairness and competitive advantage that males competing in women's sport does, there are still legitimate reasons – including safety considerations – where men's sporting activity may need to exclude female competitors.

NOTES ON CLAUSES

Clause 1: Short title

Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

The Bill will commence the day after this Act receives Royal Assent.

Clause 3 – Schedules

Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1— Amendments

Australian Sports Commission Act 1989

Item 1 – After paragraph 6(1)(b)

This item inserts a new object of promoting participation in women’s sport, with specific reference to supporting single-sex sport for women and girls, into the objects of the Australian Sports Commission as listed in section 6 of the *Australian Sports Commission Act 1989*. The purpose of this clause is to ensure that the Australian Sports Commission is an organisation which supports single-sex sport for women and girls.

Item 2 – After paragraph 7(1)(c)

This item inserts a new function of the Australian Sports Commission requiring it to support and promote single-sex sport for women.

Sex Discrimination Act 1984

Item 3 – Paragraph 3(b)

This item is inserted to make clear that the provision of single-sex sports, services and facilities for women and girls, which promotes the welfare or safety or participation of women, is consistent with the objects of the *Sex Discrimination Act 1984* (the Act).

Item 4 – Subsection 4(1)

This item re-inserts the sex-based definitions of “man” and “woman” which were deleted from the Act in 2013. The removal of these clauses has created a situation where references to “women” can be read to mean either persons of the female sex, or persons of the male sex based on their self-identified gender identity. The re-insertion of these definitions makes clear that “man” and “woman” have specific sex-based meanings.

Item 5 – Subsection 42(1)

This item clarifies the sport exemption in section 42 of the Act by providing that it is not a breach of the Act to operate single-sex sporting activity by excluding persons of one sex from participation in any sporting activity intended for persons of a different sex. This clause provides sporting organisations and administrators with certainty by making clear that it is not unlawful under the Act to operate sporting activity on the basis of sex.

The note in this section makes clear that sex in this Act has its ordinary meaning relating to biological sex. This means that for the purpose of section 42, a person who is male cannot use a birth certificate or other form of identification showing an alternative gender marker as evidence that they should not be excluded from a sporting activity intended for the opposite sex.

“Intended for persons of a different sex” in this item means that the activity has some form of rule, practice or stated intention establishing that the activity is operated for persons of a

particular sex. This limitation prevents a person or organisation using this exemption to exclude an individual from a competition or event in which persons of their sex are usually permitted to participate.

A “sporting activity” which a person can be lawfully excluded from on the basis of sex may include a specific role within a mixed-sex sporting competition which is intended to be filled by a member of the opposite sex. For example, this exemption may be used to ensure that a mixed-doubles tennis team cannot consist of two males.

Where subsection 42(1) provides that it is not *unlawful* to operate single-sex sport, subsection 42(1A) makes clear that a person or organisation offering single-sex sport in accordance with subsection 42(1) is acting in accordance with the objects of the Act (set out in paragraph 3(b) as amended by this Bill).

Item 6 – Paragraph 42(2)(c)

This item updates punctuation in section 42 following the deletion of paragraphs 42(2)(d) and (e) by item 7.

Item 7 – Paragraphs 42(2)(d) and (e)

This item deletes two clauses which are no longer necessary given the Bill’s aim of allowing single-sex sport to be operated on the basis of sex with broad application, in regard to participants playing or competing in that activity.

- The deletion of paragraph (42)(2)(d) removes the ability for the regulations to prescribe a sporting activity to which subsection (42)(1) does not apply. The prescribing of activities to which the sport exemption does not apply would undermine the Bill’s intent of ensuring single-sex sport is lawful under the Act.

- The deletion of paragraph (42)(2)(e) removes the restriction on the sports exemption at subsection (42)(1) applying to sporting activities by children who are under the age of 12. This reflects the intent of the Bill that single-sex sport, particularly for women and girls, is to be encouraged.

Statement of Compatibility with Human Rights

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

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

Overview of the Bill

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The Bill is necessary to correct current interpretations of the Act which suggest that excluding males from women's sport will in many cases be a breach of the Act, and which places the onus of proving that is reasonable to exclude a male from a women's sporting activity on the person or organisation who is subject to a complaint under the Act.

Human rights implications

This Bill engages the rights of women under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Part III, Article 10 of CEDAW requires States Parties to take all appropriate measures to eliminate discrimination against women through measures including – at section (g) – “The same opportunities to participate actively in sports and physical education”.

The provision of single-sex women's sport is a fundamental component of the opportunity to participate actively in sports and physical education. Without categorisation of sport by sex, the physical advantages enjoyed by males would mean that female athletes would be unable to reach the top echelons of many sports, a fact acknowledged by the establishment of separate women's categories by all major sporting codes and organisations.

This Bill positively impacts on the rights of women to be provided the same opportunities as men to participate actively in sports and physical education. While the Act currently contains an acknowledgement that sport can be segregated on the basis of sex, primarily to enable the safe and fair participation of women in sport, the circumstances in which this can occur are unnecessarily limited and restrictive. This Bill ensures that Australian women and girls will have greater access to single-sex sport, a vital component in ensuring the active participation of women in sport. Additionally, it ensures that there will be legal mechanisms in place to

enable sporting codes and administrators to prevent males taking sporting opportunities intended for women.

Conclusion

The Bill is compatible with human rights because it advances the rights of women to participate actively in sports and physical education, in line with Australia's obligations as a signatory to CEDAW.

Senator Claire Chandler