

# *A Gender Agenda*

## **Submission on Relationship Recognition**

18<sup>th</sup> August 2005

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## **INTRODUCTION**

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This letter is a submission in response to the Discussion Paper “The Recognition of Same Sex Relationships in the ACT”, and has been prepared by a Canberra based lobby group “A Gender Agenda”.

A Gender Agenda is an inclusive group of Canberra citizens who are committed to achieving legal and social recognition and protection of human rights for all people regardless of their legal or biological sex, or their gender identity or presentation.

We have worked closely with Good Process and support the detail of their submission.

We can be contacted via Peter Hyndal on 0419 471 756 if you require any further information and we consent to any part of this submission being made public.

## LACK OF CLARITY IN LEGAL RECOGNITION OF SEX

The lack of clarity surrounding the legal recognition of sex creates a series of gaps in current legislation.

In its commonly accepted social usage, “sex” refers to biological differences between male and female including:

- Visual appearance of genitals
- Hormone levels
- Chromosomes
- Brain Sex
- Reproductive function

In its commonly accepted social usage, “gender” refers to social differences between male and female including an individual’s:

- identity or self perception
- appearance including dress style and body language

### *Current Legislative Definitions in the ACT*

Currently in the ACT, under the *Births, Deaths and Marriages Registration Act 1997* at birth, every child must have their sex registered as either male or female. This determination is made solely on the visible appearance of external genitalia.

It is this record of sex, as recorded on the birth certificate, which determines the legally recognised sex for an individual for the rest of their life.

This presents no practical problem where the external genitalia identified at birth correspond to all other biological determinants, and the gender identity that the individual develops.

But where this is not the case, issues of profound inequality emerge, as there is no provision to separately recognise contradictory biological information, or to separately recognise the gender identity of an individual.

Further, under the current provisions in the *Birth Deaths and Marriages Act 1997* specifically onerous conditions must be met before allowing an application to alter the sex recorded on the Birth Certificate.

The *Births Deaths and Marriages Act 1997* specifies that:

**24 Application to alter register to record change of sex**

- (1) A person may apply to the registrar-general for alteration of the record of the person’s sex in the registration of the person’s birth if—
- (a) the person is at least 18 years old; and
  - (b) the person’s birth is registered in the ACT; and
  - (c) the person has undergone sexual reassignment surgery; and
  - (d) the person is not married.

### *Recent Case Law - Legal Definition of Sex in Re: Kevin*

On 12 October 2001 Justice Chisholm of the Family Court of Australia handed down his decision in *Re: Kevin (validity of marriage of transsexual)* [2001] FamCA 1074. In determining this case, Justice Chisholm ruled that there were many relevant factors to be considered in determining someone’s legal sex, and that “...a person’s biological and

*physical characteristics at birth was only one of these*'. According to this precedent-setting ruling, other important factors included:

- a person's self-perception as a man or woman, (*their gender identity*); and
- the extent to which the person has functioned and is accepted in society as a man or a woman (*their gender expression*)<sup>1</sup>.
- Visual appearance of genitals (at birth and currently)
- Hormone levels (at birth and currently)
- Chromosomes
- Brain Sex
- Reproductive function

In other words, at a Commonwealth case law level, a person's legal sex does not equate to the appearance of their genitals at birth, but must also consider not only other biological determinants of sex, but also social determinants (or gender). It is important to note that the issues raised by *Re: Kevin* relate to determining the legal sex of any person, and not just those who are transgendered.

Based on the definition arising from *Re: Kevin*, the remainder of this submission will refer to sex/gender to indicate this broader and more inclusive legal definition of "Sex".

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<sup>1</sup> Victorian Gay and Lesbian Rights Lobby and Law Institute of Victoria 2002 website [http://over-the-rainbow.org/digest/re\\_kevin.htm](http://over-the-rainbow.org/digest/re_kevin.htm)

## RECOGNISING THE RELATIONSHIPS OF ALL PEOPLE

### Registration and/or Civil Union Model

The defining of any ACT-based scheme related to 'same sex relationships' or 'opposite sex relationships' requires that the sex of each party to the relationship be legally determined.

It is critically important that the name, and operation of any ACT relationship scheme is not a 'same sex' scheme, but rather recognises relationships regardless of sex and/or gender.

Specifically this is important to reduce the risk of excluding transgender, intersex or people whose gender identity or expression is legally unclear and who therefore may have difficulty fitting the definition of either a 'same sex' or 'opposite sex' relationship.

### ACT Marriage Model

Under the ACT Marriage model outlined in the discussion paper, it has been argued that the changes to exclude same-sex marriages from Commonwealth jurisdiction in 2004 has created the situation where responsibility for these relationships now falling to States and Territories.

It is possible for different jurisdictions to have different definitions of "sex" and hence also, a different understanding of "same sex" and "opposite sex". Rather than specify that an ACT marriage-based scheme is only open to same sex couples, it would be more legally prudent to say that it was open to "any couple explicitly excluded from recognition under the Commonwealth Marriage Act".

#### Recommendation

Ensure that an ACT Relationship Scheme is open to people regardless of their sex, not on the basis of them meeting the criteria of being "same sex" or "opposite sex".

## LEGALLY RECOGNISING THE GENDER EXPRESSION AND IDENTITY OF ALL PEOPLE

### Legislative references to Sex/Gender

Legally there is no consistent definition of sex, yet there are legislative references to “sex”, “*the same sex*”, and “*the opposite sex*”.

Any legislation that requires an individual to be “*male*”, “*female*”, “*the same sex*” or “*the opposite sex*” relies on making an identification of the individual’s, or their partner’s sex, according to a binary definition, to determine how the legislation will operate.

Although many people take these terms to be self explanatory, for some people, including transsexuals and intersex people, there are conflicting definitions of their sex that allow for their categorisation as “male” and “female”, “the same” and “the opposite” by different people for different purposes at the same time. This means that transsexual and intersex persons are currently offered no protection under *any* legislation that relies upon such categorisations.

For example;

- a person’s legally recognised sex differs from their self-identified gender or socially recognised gender (regardless of whether they consider themselves transgendered or intersex); or
- a person’s legally recognised sex differs in whole or in part from the biological sex of their body (regardless of whether they consider themselves transgendered or intersex); or
- a person’s legally recognised sex varies depending on which State or Territory they reside in or were born in; or
- a person does not identify as being either exclusively male or female.

Any legislation that relies on a binary legal determination of sex (as opposed to a self-determination) to resolve how the legislation will operate, is unnecessarily complicated, and unclear for many individuals.

#### Recommendation

Ensure that all future legislation adopted by the ACT Assembly applies to people regardless of their sex, not because of it.

#### Recommendation

Remove unnecessarily gendered terms from legislation and other government documents.

## Birth Certificates

Following the decision of the Family Court of Australia handed down his decision in *Re: Kevin (validity of marriage of transsexual)* [2001] FamCA 1074 the 'sex' recorded on a birth certificate is arguably not the legal 'sex' of the individual at all.

It is not necessarily indicative of, nor should it be relied upon by anyone, in determining the legal sex of any individual and could more accurately be described not as the sex of the child but the "indicative sex based only on outwardly visible genitals at birth".

### **Recommendation One: Registration of Sex/Gender at Birth**

Amend the *Births Deaths and Marriages Act 1997* to:

- a) allow the registration of births in the ACT without requiring a specification of sex.
- b) specify that sex should be recorded in the register as 'male' 'female' or 'undisclosed'
- c) specify that sex should only be printed on the birth certificate if expressly requested by the parents (as per the current printing of sibling details).

It may be necessary to note that a sex/gender specified as undisclosed may not be recognised in other jurisdictions.

## Legally Recognising a Change of Sex/Gender

In the ACT, provision is made under the *Births, Deaths and Marriages Registration Act 1997* for a person who was born in the ACT to have their birth certificate amended so that the recorded sex corresponds to their self-identified gender. Changing one's birth certificate has the legal effect of being conclusive evidence of one's sex for the purposes of any ACT law.

The existence of the provision to change the registered sex of an individual under the *Births, Deaths and Marriages Registration Act 1997* on one hand recognises that the assigning of legal sex based only on the appearance of external genitalia at birth is neither accurate nor definitive.

But despite the fact that ACT legislation defines an intersex person with reference to conflicting biological determinant of sex, and a transsexual, or transgendered person with reference to their identity, the provisions included in the *Births, Deaths and Marriages Registration Act* do not allow for the legal sex to be changed either on the basis of conflicting biological determinants, nor on the basis of the gender identity of the individual.

In the ACT the only way to have a change of sex legally recognised is (after also meeting other requirements) to undergo sexual reassignment surgery<sup>2</sup>, which is defined

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<sup>2</sup> *Births Deaths and Marriages Act 1997* specifies that:

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  - (b) the person's birth is registered in the ACT; and
  - (c) the person has undergone sexual reassignment surgery; and
  - (d) the person is not married.

as surgical alteration to the reproductive organs. In practical terms any such surgical alteration of reproductive organs will result in permanent infertility.

For a person's self-identified gender to be legally recognised in the ACT, a person must undergo sexual reassignment surgery (requiring permanent removal or mutilation of reproductive capacity). The performing of this surgery would ordinarily be considered a criminal offence in the ACT however the *Crimes Act 1900* provides a specific exception for genital mutilation in this instance.

The profound inequity that results is that:

- The ACT government legally recognises the gender identity of all its citizens so long as that identity corresponds to the appearance of their external genitalia at birth.
- The ACT government will legally recognise the gender identity of transsexuals and (some) intersex people ONLY where they submit to surgery that makes them incapable of reproducing, even if (as is mostly the case) there is no medical reason to perform such surgery.

This appears to constitute a direct conflict with a number of provisions in the *Human Rights Act 2004*.

The current requirements for legal recognition of change of sex discriminate against those ACT citizens who:

- choose not to subject their bodies to genital mutilation and/or wish to maintain their fertility/ability to reproduce;
- choose not to subject their bodies to invasive and medically unnecessary surgery;
- cannot afford sexual reassignment surgery (which is not available in the ACT);
- have health problems which prevent them from undergoing surgery;
- were not born in the ACT;
- were born in a jurisdiction which does not allow for amending the sex recorded on an individual's birth certificate;
- are married and do not wish to divorce their spouse;

Many of these requirements also appear to conflict with the *Human Rights Act 2004*.

Many individuals at various times in their life do not feel as though their gender identity exactly corresponds to their sex assigned at birth. These individuals should be entitled to declare their legal sex under ACT law as undisclosed, without having to first establish that they meet the criteria of 'intersex' or 'transsexual'.

***Recommendation Two:***  
**Amendment of Registered Sex/Gender**

Amend the *Births Deaths and Marriages Act 1997* to remove the current requirement that transgendered and (some) intersex people (unlike any other ACT citizen) must undergo irreversible and unnecessary genital surgery, in order to achieve legal recognition of their self identified gender, and allow a change of sex to be registered in exactly the same way that a change of name currently is registered:

- a) Remove entirely from the Act "Part 4 – Change of Sex" and amend "Part 3 – Change of Name" so that any reference to 'name' in the section becomes a reference to 'name or sex'.
- b) specify that sex (as assigned at birth, or at any later date via Deed Poll) is to be recorded in the register as 'male' 'female' or 'undisclosed'
- c) specify that sex should be printed on any certificate issued under the Act, only if expressly requested by the parents or individual as applicable.

It may be necessary to note that any sex/gender specified in this way may not be recognised in other jurisdictions.



## **Sex Reassignment Surgery and Genital Mutilation Surgery**

There is no difference between genital mutilation surgery (which is explicitly outlawed under the *Crimes Act 1900*) and the surgery currently imposed in the ACT on any person wishing to alter the sex assigned to them at birth.

All that stops sexual reassignment surgery from being a criminal act with a penalty of up to 15 years imprisonment is an explicit additional clause in the *Crimes Act 1900*. However even this clause does not necessarily protect doctors who perform sexual reassignment surgery.

It would appear to be possible for a court to determine that consent to these medical procedures can not be given freely, when the surgery is undertaken at the demand of a government that will otherwise refuse to recognise the individual as the sex consistent with the way they live and are perceived by others.

Protection for doctors performing sex reassignment surgery on 'fully consenting' adults can only be guaranteed if the ACT stops requiring such surgery before legally recognising the persons' sex.

### ***Genital surgery performed on Intersex Children***

Issues of consent become even more problematic when considered in relation to the irreversible and medically unnecessary surgery that is still performed on children without their consent. Consenting intersex adults who choose to undergo surgery usually do not consider such surgery as "re-assignment".

#### ***Recommendation Three:***

##### ***Requirements for Genital Surgery on infants and consenting adults***

Amend the *Crimes Act 1900* to:

- a) Alter Part 4 so it applies to all "Genital mutilation" and not just "female genital mutilation"
- b) State that "Surgery to 'normalise' or change in any way the appearance or function of a child's genitals is prohibited in all cases except where such an operation is necessary for the relief of painful or otherwise physically harmful symptoms of the child."
- c) Amend the definition of sexual reassignment procedure in Part 4, Section 77 (2) of the *Crimes Act 1900* to: "Sexual Assignment Procedure" meaning "a surgical procedure performed by a medical practitioner to give a fully consenting adult person the genital appearance of a particular sex".

## PROTECTING THE RIGHT TO SELF IDENTIFY AND EXPRESS GENDER

### Legal Protection of Gender Identity and Expression

Currently the ACT offers no legislative protection or acknowledgement of any individual's right to express and identify their gender as they choose.

There are many people both inside and outside the GLBTI community who choose to express their gender differently and who experience discrimination and violence based on their gender presentation.

### Administrative references to Sex/Gender

People are regularly asked to state their sex in an administrative context when completing forms. In most instances this is unnecessary. For people whose legally recognised sex does not correspond to their presentation or identity, it is difficult to determine the most appropriate answer to these inquiries.

It is not appropriate to request this information without good reason, when disclosure of a gender that does not align to the legally recognised sex often places the individual's personal safety at risk or may be considered misleading or 'fraudulent'.

#### Recommendation

Remove requests for a person's sex on all ACT government forms except where a case has been made about why it is required. Where it is considered necessary to request this information, the form should specify why the information is being sought (as this may change someone's answer) and should accept "male" female" or "undisclosed".

### *Protection under the Discrimination Act 1991*

Discrimination legislation currently offers some protection to people who are treated unfairly as a direct result of their self identified or socially identified gender, but only if they meet the definition of 'transsexual' under the *Discrimination Act 1991*. This definition may not provide adequate protection to a person who has legally altered their birth certificate.

Many people who choose to express their gender differently experience discrimination as a result, but could not, or would not want to, meet the criteria of transsexual under the *Discrimination Act 1991*. Intersex people, who may or may not express their gender differently, are offered no direct protection under the *Discrimination Act 1991*.

The introduction of new grounds for discrimination on the basis of "Biological Sex Characteristics, Gender Identity, and/or Gender Expression" would assist in protecting all people (ie not just those who identify as transsexual) from discrimination based on the way they choose to portray their gender.

Models for broad based inclusions appear in many other jurisdictions, for example the *New York City Human Rights Law (amended 2002)*<sup>3</sup>.

<sup>3</sup> Title 8 of the Administrative Code of the City of New York

The *New York City Human Rights Law (amended 2002)* defines “gender” as including: *“actual or perceived sex and... also...a person’s gender identity, self image, appearance, behaviour or expression, **whether or not** that gender identity, self image, appearance, behaviour or expression is different from that traditionally associated with the legal sex assigned to that person at birth.”*<sup>4</sup>

Broadening the protection from discrimination may help in situation such as;

- A woman who is denied employment because her boss doesn’t think she ‘looks enough like a woman’.
- A boy who is bashed at school because he is assumed to be gay because of the way he portrays his masculinity.
- A man who is harassed by other colleagues because he’s not ‘aggressive enough’.
- A person who is denied services because someone ‘finds out’ that they cross dress.

While these people may be able to utilise the existing provisions of the *Discrimination Act 1991*, their ability to argue that they were discriminated against because they were a man or a woman is far more difficult to prove than to argue that they were discriminated against *because of the way they portrayed being* a man or a woman.

Gender Identity and Gender Expression based protection correctly names the real motivation for these discriminatory and sometimes violent actions and therefore protects to a far greater degree.

#### **Recommendation**

Include protection in the Discrimination Act 1991 for “gender presentation” as a separate and additional category to “transsexual” and “transgender”

#### **Recommendation**

Include protection in the Discrimination Act 1991 for “biological sex characteristics” as a separate and additional category to “transsexual” and “transgender”

#### **Recommendation**

If the definitions of “transsexual” and “transgender” are still required in legislation, the definitions should be broadened to acknowledge a broad legal definition of “Sex” (as provided in re Kevin), and should be made consistent across all ACT legislation.

#### **Recommendation**

Specifically include reference in the Human Rights Act to the rights of all ACT citizens to identify and express their gender as they see fit.

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<sup>4</sup> Subdivision 23, Section 8-102 of chapter one of title eight of the administrative code of the City of New York (Added by amendment 30<sup>th</sup> April 2002)

## *Participation in Sport (Discrimination)*

One of the few situations where it is lawful to discriminate is in relation to sport, where participation can be legally denied on the basis of the sex shown on a birth certificate. Where this is not the person's self identified gender, it becomes difficult for many people to participate even in social or amateur sporting activities.

It is still lawful to discriminate in relation to single sex sport, even at an amateur level.

There is no legal protection for the female-to male transsexual who is refused a place on the man's team because his birth certificate says he is a woman, and who is also refused a place on the women's team because "he looks like and lives as a man".

Feedback provided indicated that transsexuals, intersex and gender diverse people do not feel that they are able to participate in any sporting activities for this reason.

### **Recommendation**

Remove (or update) the exclusion for social and amateur sports from *Discrimination Act 1991*.

## *Other Discrimination Issues*

Discrimination provisions only protect people from discrimination in certain limited circumstances. People who choose to express their gender differently experience a far greater range of discrimination (and violence) based on their gender presentation than that which is currently covered by the *Discrimination Act 1991*.

Discrimination law currently provides inadequate protection for transsexuals (and arguable no protection at all for intersex people) due to the inadequate definitions of transsexuality as grounds for discrimination.

Particular discriminatory actions are never reported due to the mediated outcomes model of the *Discrimination Act 1991*.

Feedback outlined one particular case where a transsexual had surgery delayed because an anaesthetist refused treatment. That transsexual did not wish to make a complaint when the expected mediated outcome would have been to make the anaesthetist provide the treatment.

Transsexuals experience many levels of 'discrimination' that are not covered by *Discrimination Act 1991*.

The *Discrimination Act 1991* already uses a very broad definition of discrimination<sup>5</sup>. However, in order for the Act to offer protection, a potential complainant must firstly substantiate that they meet the criteria of ‘transsexual’ as specified in the Act, and then must also substantiate that the unfavourable treatment was suffered **because** of their status as transsexual. In many cases where the ‘everyday person’ would identify acts as discriminatory, it is not possible to substantiate the link between the discriminatory action and the complainants status.

For example:

- It has been reported to us that an educational institution has refused to provide a certificate of attainment in a transsexual’s new name (thereby forcing the transsexual to ‘out themselves’ in order to prove their educational qualifications). Clearly, the treatment is unfavourable because of the complainants status, yet the complainant is offered no protection because the educational institution has not *treated the individual any less favourably because they were transsexual*.
- It has been reported to us that a GP has refused to provide a referral to a particular specialist because they “wouldn’t be OK with you being transsexual”. Although the potential complainant has clearly been treated differently on the basis that they were transsexual, they are offered no protection because it is arguably not ‘unfavourable’ treatment for the GP to refuse to make a referral to a specialist who will not provide the required treatment.

There are more examples of behaviour that most people would class as discrimination but that may not be recognised as such under the current provisions of the *Discrimination Act 1991*.

### Recommendation

Recognise a wider range of acts as discriminatory and reduce the onus of proving a *direct causal* link between the status and the treatment or condition.

## Impact of Prior Reforms

The reforms undertaken in the *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* have legally recognised domestic partnerships *regardless of gender*, have replaced many references to “opposite sex” with “a different sex”, and have allowed ‘transgender’ and ‘intersex’ people to self-identify their gender in relation to specific strip search provisions. The reforms do not legally recognise any other person’s self identified gender, nor do they legally recognise a ‘transgender’ or ‘intersex’ person’s self identified gender for any purpose not related to specific strip searches.

The government has not yet indicated whether it will consider amending the *Births, Deaths and Marriages Registration Act 1997* to allow for the legal recognition of all people’s self identified gender. Nor has the government undertaken to review the

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<sup>5</sup> **Part 2, Section 8 - What constitutes discrimination**

- (1) For this Act, a person **discriminates** against another person if—
  - (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or
  - (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.

*Discrimination Act 1991* to allow the opportunity for all people to participate in social sporting activities or to offer protection to people from discrimination on the basis of their gender presentation.

### *Strip Search Criteria*

The recent changes to strip search provisions aimed to protect the interests of “intersex” and “transgendered” people in relation to specific strip searches. The legislation does not specify how or who makes an assessment that an individual meets or does not meet these criteria, and it also raises issues for anyone who ‘does their gender’ in a non conventional way, but who does not meet the criteria.

### *Removing “Transphobic Panic” Defence?*

The recent amendments to the *Crimes Act 1900* to stop a person charged with murder from using provocation as a defence to the charge where the alleged provocation was a non violent sexual advance by someone of the same sex, does not preclude the use of exactly this defence where the accused maintains they were provoked on the basis that they were ‘unaware’ that their potential sexual partner was transsexual.

#### **Recommendation**

Review all legislation, including recent reforms, with reference to its protection of the rights of ALL ACT citizens to self determine their Sex/Gender presentation and identity.

## **PRIORITISING SERVICES FOR THOSE MOST “AT RISK”**

### **Defining and Mapping “At Risk” Communities**

Studies done in NSW (there have been none done in the ACT) show that transsexuals have rates of unemployment in excess of 50%, very high levels of homelessness, poor health and low participation in education and training<sup>6</sup>. Yet there are no funded community organisations in the ACT who lobby or provide support services to transsexuals.

Further, because under the law these people may not be offered any legal protection, or perceive they will not be offered any legal protection, due to narrow and inflexible legal definitions, a cycle of exclusion from society often increases.

#### **Recommendation**

Allocate funds for an initial research project to identify the demographics of at risk communities.

#### **Recommendation**

Commence collecting statistical information on the basis of “male”, “female” and “undisclosed”.

### **Access to Health and Community Services**

Transsexuals necessarily come into contact with health professionals regarding *transsexual specific* health issues.

However health professionals are not just unaware of the social context for transsexual patients, but are also unaware of the medical issues. These issues were highlighted at a public forum hosted by the Aids Action Council and attended by the ACT Health Minister in November 2003 at the National Museum of Australia in Canberra ACT.

- A transsexual man undergoing a hysterectomy was placed in a ward with pregnant women.
- A transsexual had their date for surgery pushed back because the anaesthetist was not okay with treating them.
- IVF services refused on the basis that one member of the couple identified as being transsexual.
- Letters of referral written from a general practitioner unnecessarily disclosing patient’s status as transsexual.
- Transsexual patient failing to attend Accident and Emergency because they were concerned that their transsexual status would be discovered and not dealt with well.
- General practitioner refused to provide a pap smear to a female to male transsexual.
- Transsexual patient had to advise their treating doctor of risk factors in medications, because the treating doctor did not know.

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<sup>6</sup> Gender Centre, assorted reports and publications. Contact point: Elizabeth Riley (02)9569 2366.

- Hormone level, dosage monitoring and subsequent risks were not explained to transsexual patient when they were undergoing Hormone replacement therapy, this was not the case for non-transsexual patient.

### **Recommendation**

Allocate funds for an initial research project to focus on the basic health needs of people with different gender identities and/or expressions

## **Education Programs**

While a range of education campaigns in relation to bullying and homophobia have been introduced into ACT schools, programmes or modules on transsexuality and transphobia are not adequate. US statistics indicate that transphobic violence (including murders) is increasing, while the incidence of homophobic violence reduces<sup>7</sup>.

Statistics show that approximately 1 in 200 people are born with an intersex condition of some form – more than a high enough incidence to warrant discussion in a context of sex education<sup>8</sup>.

In addition, more broadly targeted public education strategies also need to be adopted.

### **Recommendation**

Add gender identity as a required element in all funded public education and health promotion campaigns/activities (much like the SunSmart focus in recent years).

### **Recommendation**

Establish a Ministerial Advisory Committee to advise on issues related to gender identity, gender expression and sexuality.

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<sup>7</sup> 1999 Study conducted by International Foundation for Gender and published in (Page 5, Polare Ed 34 2000) shows that in the US between 1997 and 1998:

- “anti-gay incidents” overall decreased 4%
- Transgender victims of hate crimes increased by 49%

<sup>8</sup> Four Corners 27<sup>th</sup> July 2005 “The Gender Puzzle” stated that “one in 500 boys are born with a double XX as well as a Y” and this constitutes only a proportion of the possible variations in sex chromosomes. Transcript available at: [www.abc.net.au/4corners/content/2005/s1422174.htm](http://www.abc.net.au/4corners/content/2005/s1422174.htm)



## KEY RECOMMENDATIONS

### *Legal recognition of Sex/Gender identity and expression by all people*

#### **Recommendation One:**

##### **Registration of Sex/Gender at Birth**

Amend the *Births Deaths and Marriages Act 1997* to:

- a) allow the registration of births in the ACT without requiring a specification of sex.
- b) specify that sex should be recorded in the register as 'male' 'female' or 'undisclosed'
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#### **Recommendation Two:**

##### **Amendment of Registered Sex/Gender**

Amend the *Births Deaths and Marriages Act 1997* to remove the current requirement that transgendered and (some) intersex people (unlike any other ACT citizen) must undergo irreversible and unnecessary genital surgery, in order to achieve legal recognition of their self identified gender, and allow a change of sex to be registered in exactly the same way that a change of name currently is registered:

- a) Remove entirely from the Act "Part 4 – Change of Sex" and amend "Part 3 – Change of Name" so that any reference to 'name' in the section becomes a reference to 'name or sex'.
- b) specify that sex (as assigned at birth, or at any later date via Deed Poll) is to be recorded in the register as 'male' 'female' or 'undisclosed'
- c) specify that sex should be printed on any certificate issued under the Act, only if expressly requested by the parents or individual as applicable.

It may be necessary to note that any sex/gender specified in this way may not be recognised in other jurisdictions.

#### **Recommendation Three:**

##### **Requirements for Genital Surgery on infants and consenting adults**

Amend the *Crimes Act 1900* to:

- d) Alter Part 4 so it applies to all "Genital mutilation" and not just "female genital mutilation"
- e) State that "Surgery to 'normalise' or change in any way the appearance or function of a child's genitals is prohibited in all cases except where such an operation is necessary for the relief of painful or otherwise physically harmful symptoms of the child."
- f) Amend the definition of sexual reassignment procedure in Part 4, Section 77 (2) of the Crimes Act 1900 to: "Sexual Assignment Procedure" meaning "a surgical procedure performed by a medical practitioner to give a fully consenting adult person the genital appearance of a particular sex".

## SECONDARY RECOMMENDATIONS

### *Legal recognition of gender identity and expression by all people*

4. Ensure that an ACT Relationship Scheme is open to people regardless of their sex, not on the basis of them meeting the criteria of being “same sex” or “opposite sex”.
5. Ensure that all future legislation adopted by the ACT Assembly applies to people regardless of their sex, not because of it.
6. Remove unnecessarily gendered terms from legislation and other government documents.
7. Review all legislation, including recent reforms, with reference to its protection of the rights of ALL ACT citizens to self determine their Sex/Gender presentation and identity.
8. Remove requests for a person’s sex on all ACT government forms except where a case has been made about why it is required. Where it is considered necessary to request this information, the form should specify why the information is being sought (as this may change someone’s answer) and should accept “male” female” or “undisclosed”.

### *Legal protection of the right to self identify and express gender*

9. Include protection in the Discrimination Act 1991 for “gender presentation” as a separate and additional category to “transsexual” and “transgender”
10. If the definitions of “transsexual” and “transgender” are still required in legislation, the definitions should be broadened to acknowledge a broad legal definition of “Sex” (as provided in re Kevin), and should be made consistent across all ACT legislation.
11. Include protection in the Discrimination Act 1991 for “biological sex characteristics” as a separate and additional category to “transsexual” and “transgender”
12. Recognise a wider range of acts as discriminatory, and reduce the onus of proving a *direct causal link* between the status and the treatment or condition.
13. Remove (or update) the exclusion for social and amateur sports from *Discrimination Act 1991*.
14. Specifically include reference in the Human Rights Act to the rights of all ACT citizens to identify and express their gender as they see fit.

### *Prioritising Services for “Most at Risk”*

15. Allocate funds for an initial research project to identify the demographics of at risk communities.
16. Commence collecting statistical information on the basis of “male”, “female” and “undisclosed”.
17. Allocate funds for an initial research project to focus on the basic health needs of people with different gender identities and/or expressions
18. Add gender identity as a required element in all funded public education and health promotion campaigns/activities (much like the SunSmart focus in recent years).
19. Establish a Ministerial Advisory Committee to advise on issues related to gender identity, gender expression and sexuality.

## **GLOSSARY OF DEFINED TERMS**

### **Intersex**

"is a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female"

*Legislation (Gay, Lesbian and Transgender) Amendment Act 2003*

### **Recognised transgender**

"a person the record of whose sex is altered under the *Births, Deaths and Marriages Registration Act 1997, part 4* or the corresponding provisions of a law of a State or another Territory"

*Legislation (Gay, Lesbian and Transgender) Amendment Act 2003*

### **Sexual reassignment surgery**

"a surgical procedure involving the alteration of a person's reproductive organs that is carried out:

- a) for the purpose of assisting a person to be considered to be a member of the opposite sex; or
- b) to correct or eliminate an ambiguity relating to the sex of that person"

*Births, Deaths and Marriages Registration Act 1997*

### **Sexual reassignment procedure**

"means a surgical procedure performed by a medical practitioner to give a female person, or a person whose sex is ambivalent, the genital appearance of a person of the opposite sex or of a particular sex (whether male or female).

*Crimes Act 1900*

### **Transgender**

"a person who - (a) identifies as a member of a different sex by living, or seeking to live, as a member of that sex; or (b) has identified as a member of a different sex by living as a member of that sex; whether or not the person is a recognised transgender person."

The term also "includes a person who is thought of as a transgender person, whether or not the person is a recognised transgender person"

*Legislation (Gay, Lesbian and Transgender) Amendment Act 2003*

### **Transsexual**

"a person of one sex who - (a) assumes the bodily characteristics of the other sex, whether by means of medical intervention or otherwise; or (b) identifies himself or herself as a member of the other sex or lives, or seeks to live, as a member of that other sex"

*Discrimination Act 1991*