



A Gender Agenda  
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## **A Gender Agenda**

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# **Submission**

to the Australian Human Rights Commission's

**Consultation: Protection from discrimination on  
the basis of sex and/or gender identity**

26<sup>th</sup> November 2010

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## **Introduction**

A Gender Agenda welcomes the opportunity to provide this submission in response to the Australian Human Rights Commission (AHRC) discussion paper.

A Gender Agenda is an ACT based organisation providing information, community education, support and advocacy services in relation to issues affecting transgender and intersex communities.

A Gender Agenda is 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 expression.

We work collaboratively and inclusively with other organisations on a local, national and international basis.

In preparing this submission we have consulted widely within our own membership, the broader sex and gender diverse communities within the ACT, interstate and national transgender and intersex organisations, as well as a number of 'mainstream' community organisations within the ACT.

If you require any further information, we can be contacted via Peter Hyndal by email on [peter@genderrights.org.au](mailto:peter@genderrights.org.au) or on 0419 471 756. We consent to any part of this submission being made public.

## **Key Recommendations**

- 1) That Commonwealth discrimination protection is required to provide consistent protection from discrimination for intersex, transgendered and other sex and gender diverse people.
- 2) That protection should be provided on the basis of biological sex characteristics, gender identity and/or gender expression.
- 3) That no general exclusions to this protection should exist, but that it should be possible for people to apply for limited term exemptions via a process where they are required to justify why the exclusion is required.
- 4) That the Commonwealth demonstrate, through its new legislation, that any requirement for surgical intervention as a prerequisite for changing the sex shown on a birth certificate contravenes the best interests of its citizens.
- 5) We are supportive of other submissions which call for Commonwealth protection from discrimination on the basis of sexuality.

## **Conceptual Framework:**

The most productive framework, within which the Federal Government could work, to remove discrimination on the basis of sex and/or gender identity, is one, which eschews the binary notion of male and female based on anatomy.

In its place, a continuum of sex and/or gender identity would reflect more accurately the natural order of the human condition (at least 4%<sup>1</sup> of the population are born with an intersex condition).

A continuum framework, immediately removes the pressure for surgery, a potentially life threatening and expensive requirement, that should remain as a choice not a necessity. It also allows already marginalised citizens to fully express themselves, without further trauma through the imposition of arbitrary constructs.

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<sup>1</sup> *Kooperman, P: University of Queensland News July 2004, p.6*

## Why we need federal protection

### 1. *Benefits of federal anti-discrimination laws prohibiting discrimination on the basis of sex and/or gender identity.*

- 1.1. **There are many people who experience discrimination and violence based on their gender presentation or the fact that they are intersex.** Currently the Commonwealth offers no legislative protection or acknowledgement of the existence of an individual's right to express and identify their gender as they choose. There is also no legislative protection or acknowledgement of the biological truth that many people have biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or other sex.
- 1.2. This is despite the fact that evidence shows that sex and gender diverse individuals experience **extremely high rates of discrimination**. Beyond Blue states that 90% of transgender people experience discrimination, which is consistent with the findings of Tranznation. A Sydney based study tells us that 37% of transgender people experience discrimination on at least a weekly basis and found that "not only does it seem that everyone practices discrimination against transgender people, but also this discrimination occurs just about everywhere"<sup>2</sup>.

In 2009 the **ACT Human Rights Commission conducted a survey** in relation to an unrelated topic where 80% of respondents identified transsexuality as the attribute most likely to result in unfavourable treatment. We understand that some research reports unemployment rates as high as 50% in the sex and gender diverse population<sup>3</sup>. The recent Tranznation report on the health and wellbeing of transgender people states that, although the sex and gender diverse respondents were more highly educated than the general population (35% with university degrees compared to only 18% of the general population), only 15% of respondents earned more than \$60,000 and 35% earned less than \$20,000<sup>4</sup>.

- 1.3. While the **link between discrimination, depression and suicide** is well documented in psychological literature, the invisibility of transgender and intersex members of the community means that specific data is not widely available. The Tranznation report showed exceptionally high levels of discrimination against transgender people, and also confirmed a direct casual link between the experience of discrimination and the incidence of depression. Tranznation also shows that the level of suicidal ideation among transgender populations is very high, with 20 per cent of Australia's transgender population reporting current feelings of suicidal ideation.

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<sup>2</sup> *Transgender Lifestyles and HIV-AIDS Risk (1994), Roberta Perkins, School of Sociology University of NSW*

<sup>3</sup> *Gender Centre, assorted reports and publications. Contact point: Elizabeth Riley (02) 9569 2366.*

<sup>4</sup> *Tranznation – a report on the health and wellbeing of transgender people in Australia and New Zealand Australian Research Centre in Sex, Health and Society, Melbourne, 2007. Page 19 Table 4.*

A recent Suicide Prevention Australia position statement cites a range of studies conducted over last decade showing that the prevalence of attempted suicides among transgender people ranges between 16 and 47 per cent of that population. The paper concluded that it was indisputably clear that younger transgender people are at an elevated risk of suicide and self-harm. Evidence clearly links these health outcomes to experience of discrimination and social exclusion.

- 1.4. **State and Territory anti-discrimination laws are inconsistent in terms of the definition of who is protected.** Existing protection at a state and territory-based level is based on different terminologies related to identities or a person's legally recognised transsexual status. People who are protected from a certain act in one jurisdiction are not protected elsewhere.

Jurisdictional issues are particularly complicated for ACT residents where they are employed by or receiving services from a Federal Government Department. Or, for example, if they are living just over the border in Queanbeyan, NSW and suffer discriminatory treatment in both the ACT and NSW, and are required to make complaints in two different legal forums. Federal laws would give the opportunity to have comprehensive anti-discrimination legislation in harmony with Australia's human rights treaty obligations in relation to people of diverse sexual orientations and sex and/or gender identities, as articulated by the Yogyakarta Principles.

- 1.5. **Existing Federal, State and Territory discrimination laws only protect people from discrimination in limited circumstances.** Namely, a potential sex and gender diverse complainant must firstly substantiate that they meet the criteria of 'transsexual' as specified in a particular Act, before substantiating that the unfavourable treatment was suffered because of their status as transsexual. In many cases where an 'everyday person' would identify acts as discriminatory, it is not possible to substantiate the link between the discriminatory action and the complainant's status. In order to ensure that all persons in the sex and gender diverse community have ready access to an appropriate complaints mechanism, we submit that Federal anti-discrimination laws should:
- a) provide equal protection under the law for all Australians, regardless of their state or territory of residence; and
  - b) protect people employed by, or receiving goods and services from, the Federal government.

- 1.6. **The enactment of federal anti-discrimination laws would have a strong symbolic value,** facilitating a national discussion and education campaign, and sending a clear message at a national level that discrimination against people on the basis of sexual orientation, and/or sex and/or gender identity is unacceptable.

2. *Benefits of federal law prohibiting vilification and harassment on the basis of sex and/or gender identity.*

2.1. **Vilification is a serious contributing factor to discrimination.** Public discourse that incites others to hate, have serious contempt for, or severely ridicule people due to their real or perceived intersex status and/or gender identity helps to create a climate that fosters transphobia. These phobias further isolate members of the sex and gender diverse community, and increase the likelihood that they will suffer discriminatory treatment in their schools, workplaces and communities.

2.2. **Legislation prohibiting harassment on the basis of a person's gender identity is particularly important,** given that much of the day-to-day ill-treatment suffered by the sex and gender diverse community—such as verbal slurs or bullying in school or workplaces – falls more easily under the category of 'harassment' than discrimination or incitement. In this sense, including protection from harassment would increase the 'useability' and effectiveness of federal legislation when it comes to addressing the hardship suffered by sex and gender diverse persons.

3. *Examples of situations where federal protections from discrimination on the basis of sex and/or gender identity are needed because state and territory laws do not provide adequate protections.*

3.1. **There is currently little or no protection from discrimination related to gender identity in the states and territories, let alone protection for intersex individuals.**

3.2. **Where protection does exist, it is framed using a wide (and confusing) variety of different terminologies which seek to define a person's identity** as 'transsexual'. Accordingly, the complainant must first prove that they are 'transsexual' before they can proceed with their complaint. Fulfilling narrow definitions of 'transsexual' often causes unnecessary hardship to the applicant and becomes the target of ridicule and intrusive examination by the respondent. Many complainants choose not to make complaints because they feel like their own identity is "on trial" rather than the discriminatory behaviour of the respondent.

3.3. **Genital surgery on intersex infants is perhaps the most extreme form of 'unfavourable treatment' inflicted upon newborn children and young children.** These infants and children should be protected from medical and surgical treatments that are not required to prevent or treat specific, anatomically based, health problems. Any medical/surgical intervention in the life of an individual, before they are able to make choices for themselves, only serves to reinforce the gender binary, potentially creating an inaccurate anatomical representation of self for that child, which could cause trauma and possibly require additional surgery to amend. Furthermore, these actions continue to render the natural order of the human condition invisible.

Without medical justification, such interventions amount to abuse and should be viewed with the same abhorrence as genital mutilation - a practice imposing unnecessary surgery, due to the belief system of one with more power, on one with less power.

- 3.4. **The current requirement that transgender people must be surgically sterilised before their identity will be consistently recognised by the law is highly discriminatory and also an extreme violation of their human rights.** Surgical intervention should *not* be a pre-requisite for recognition of any individual's identity. Sexual affirmation surgery is medically unnecessary, invasive and complicated surgery that is prone to unpleasant complications. Further, such surgery often requires a number of separate surgical procedures. Sexual affirmation surgery is not available in most jurisdictions and, to our knowledge, female to male sex reassignment surgery is not available anywhere in Australia. Most surgery is performed overseas, is very expensive and is rarely subsidised by Medicare. For these reasons, many transgender people cannot or choose not to undergo sexual reassignment surgery. Further, we argue that:
- a) the decision for particular medical procedures to be undertaken by particular citizens does not appropriately fall within the role or expertise of government;
  - b) requiring the reproductive organs of particular individuals to be surgically destroyed before the granting of legal recognition is not an appropriate role for government;
  - c) requiring that an individual present documentary medical evidence from multiple practitioners of particular surgical interventions and their effect is an invasion of the individual's privacy with no parallel; and
  - d) the surgery currently required by government which results in the destruction of the individual's reproductive capacity does not in any way aid an individual's ability to be recognised and accepted in line with their gender identity.



## **“Lived experiences” of discrimination**

### *4. Examples of discrimination based on sex and/or gender identity for which there is no consistent legal protection.*

In preparing this submission, A Gender Agenda consulted broadly with transgender and intersex people. We have included some of the personal stories we received as part of our submission in order to illustrate the breadth and magnitude of discriminatory treatment experienced by the transgender and intersex population.

### **Summary of ‘lived experiences’ of discrimination:**

1. Legal recognition of change of sex
2. Onerous requirements to prove identity due to inconsistent identity documentation
3. Lack of choice due to inconsistent identity documentation
4. Increased cost of accessing medical treatment
5. Denial of access to gender appropriate emergency housing or other crisis services
6. Denial of life insurance (or being charged more for it)
7. Onus of proof is on the complainant to prove a direct causal link between their relevant attribute/s and the unfavourable treatment they experience
8. Reduced access to medical treatment/script filling due to prejudiced judgements
9. Inappropriate, voyeuristic treatment by medical professionals
10. Provision of incorrect medical information with an apparent view to deterring transition
11. Denial of reproductive services and access to adoption options
12. Inability to have qualifications re-issued in current name, because it is not deemed to be ‘provision of a service’
13. ‘Different’ treatment of gender variant people by doctors is not deemed ‘unfavourable’ under current legislation
14. Refusal of access to appropriate toilets and change rooms
15. Unnecessary insistence of disclosure
16. Participation in social and amateur sport severely restricted due to identity documentation issues
17. Entrenched transphobia in education by systemic frameworks, teachers and peers
18. Denial of respectful treatment in aged care facilities

#### **4.1. Legal recognition of change of sex**

All State and Territory legislation concerning the change of sex on birth or adoption registration requires that people must first have sexual reassignment surgery. Surgery is not a requirement for any other group of people to be recognised before the law as the sex with which they identify.

*I saw a medical specialist just last week and he asked me when I was going to have a hysterectomy. When I asked him why I should have one he said "so that you can get a male passport and change your birth certificate". When I asked him if there were any medical reasons for me to have a hysterectomy he said "no".*

#### **4.2. Onerous requirements to prove identity due to inconsistent identity documentation**

Because the legal requirements relating to change of sex are unachievable for most members of the sex/gender diverse community, individuals often carry inconsistent identity documents, leading to confusion and unfavourable treatment when individuals are required to identify themselves.

*I have tried so many times to have the deeds of my home changed to my new name and they just keep refusing to do it. So I still get my rates notice issued in my previous (male) name. Who knows what will happen if I ever try to sell – I probably won't be able to prove that I ever owned it!*

#### **4.3. Lack of choice due to inconsistent identity documentation**

Lack of consistent ID documents often impedes a person's ability to access particular services, or complete basic administrative tasks that require confirmation of identity.

*I changed my name 10 years ago, but I have some documents that I have not been able to change over (such as title deeds to property). I also avoid wherever possible showing my birth certificate or change of name certificate because both these documents show my sex incorrectly. I was with one bank when I changed my name and now I cannot open a bank account with any other bank because I do not have enough points of ID to do so.*

#### **4.4. Increased cost of accessing medical treatment**

Members of the sex/gender diverse community often experience unfavourable treatment whilst seeking medical support and treatment. Often, this is due to the practitioner's, at best, inability or, frequently, unwillingness, to provide appropriate medical treatment.

As a result, individuals are forced to seek out distant practitioners who will provide necessary treatment. Accessing such treatment often involves significant additional costs relating to travel and accommodation. Given the high proportion of the sex/gender diverse community who live below the poverty line, many individuals simply cannot afford to access crucial medical assistance. We note that according to the Tranznation report, 59%

of the Australian sex/gender diverse community earn less than \$40,000 per annum and 35% earn less than \$20,000 per annum.<sup>5</sup>

*“I have to travel from Canberra to Sydney to see any specialist because my GP has told me that no specialist in Canberra is willing to see me. This means that every time I have hormone levels reviewed for example, I have to take one day off work and pay airline and taxi costs as well as the actual cost of the doctor. The doctors fee is claimable on Medicare, but the other costs I incur aren’t – all up my last trip to Sydney cost about \$650 and I got \$38 back from Medicare”.*

#### **4.5. Denied access to emergency housing or other crisis services**

Discrimination frequently occurs based on gender identity in accessing appropriate emergency accommodation; for example a trans person must disclose their operative status (‘pre-’, ‘post-’ or ‘non-operative’) in order to access gendered emergency housing.

#### **4.6. Denial of insurance (or charged more for it)**

Many transgender people have given up trying to access life insurance in order to provide for their families, as the process appeared futile despite their best efforts.

*When I tried to get life insurance for the first time I was really up front with the broker about the fact that I was trans. The broker spent a long time investigating options for me – but in the end there was only one company who was prepared to insure me. The premium was higher than normal because I was “suffering from a mental illness” and although they agreed to insure me “as a man”, they insisted on charging me the higher female premium. Despite the fact that I fully declared my trans status, they refused to transpose any of this information into the actual policy they issued. When I queried this, they said that they would send a letter reassuring me that I was properly covered – but two years later I still haven’t received anything. I am very uncertain about whether I am properly insured or not.*

#### **4.7. Onus of proof is on the complainant to prove a direct causal link between their relevant attribute/s and the unfavourable treatment they experience, especially but not exclusively, with regard to employment.**

In these situations, already marginalised, frequently poorly paid, and often harassed and vilified individuals must argue against the ‘might’ of an employer, to prove unfavourable treatment on the basis of their sex/gender identity. The power imbalance speaks for itself in terms of why so many such cases are walked away from.

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<sup>5</sup> *Tranznation – a report on the health and wellbeing of transgender people in Australia and New Zealand Australian Research Centre in Sex, Health and Society, Melbourne, 2007. Page 19 Table 4.*

*I was working in a local retailer when I first began my social transition from female to male. I cut my hair very short, and started using my current name. The general manager of the company sent a photograph of me, and my new name in an email to all the managers in the group. I wasn't comfortable with this, but he said that the rest of the group needed to know who they were talking to over the phone and email. I had been hired for an assistant manager position, so that made sense. I was horrified a few weeks later when I was told that I was not only being demoted from the position I was hired for, but being made a casual staff member (with no rostered shifts) because I wasn't 'fit for full time work'. I protested, and he said: "face it, you aren't the girl we hired".*

#### **4.8. Reduced access to medical treatment /script filling due to prejudice**

Sex and gender diverse individuals are frequently treated unfavourably by medical staff, whose professional behaviour is influenced by their personal prejudices.

*I went to my GP and asked for a nurse to give me an injection of hormones and the receptionist asked what I wanted injected. When I showed it to her she said in the middle of the waiting room 'that's not for you! Do you know what that will do to you?' She demanded that I give her my medication (which I refused to do) and she said that the nurse would not give me the injection and that I had to see a doctor instead. She said that the first appointment I could get was two weeks away and not with my regular doctor. I rang back later and got another receptionist who booked me in for an appointment with my regular doctor within a few days. It is bizarre to think that this is the response I get when it was that very GP at that very surgery who authorised the script that I was wanting injected in the first place!.*

#### **4.9. Inappropriate, voyeuristic treatment by medical professionals**

*I went to my endocrinologist and he said that I should take all my clothes off for a physical exam and so I stripped and got up on the bed thing and then he just kind of looked at me and poked my tummy a bit and said OK, you can get dressed. Afterwards I thought about it and thought that that was so unlike me – normally I would have wanted to know why I needed to get undressed and exactly what the examination would involve and why I had to have it. And I thought – the only reason that I was so compliant was cause I wanted the script.*

#### **4.10. Provision of incorrect medical information with an apparent view to deterring transition**

This unprofessional deterrence is at best based in ignorance and at worst is a product of transphobia and discriminatory behaviour that leaves a client unfavourably treated through inadequate service provision.

*I decided not to commence hormone therapy because my GP had told me that I would need to take a full day off work every fortnight to go to Sydney so that the hormones could be administered to me. A year or so later I*

*found out from a friend that any nurse can administer the hormones, and that heaps of people actually inject themselves.*

#### **4.11. Denial of reproductive services and access to adoption options**

When trans and intersex people 'compare notes', they regularly find that they have received varied responses to similar requests. These differences, at times, reflect a chronic inability to challenge prejudice; adequately prepare staff for servicing *all* consumers of their service; and develop comprehensive protocols for service provision to sex and gender diverse people. Inconsistent treatment is unfavourable treatment.

*When we first approached the IVF clinic, we were told that they would not provide services to us because I was trans (FTM). When the doctor told us that they treated lots of lesbian couples, I pointed out that legally I was still female because I was unable to change my birth certificate. The doctor then said that he would treat us "so long as we presented as lesbians". We had the standard session with a counsellor to discuss all the issues – and she gave us a written report, which recommended that IVF treatment should proceed. Then, the evening before we were scheduled to start treatment, we got a phone call saying that the appointment had been cancelled because the nursing and reception staff had concerns "about the welfare of the child" and were not prepared to treat us. The doctor also told me that he had cancelled the appointment because he "was worried about what other people in the waiting room would think". When we complained, the clinic defended itself by producing a "counsellors report" which was completely different from the one we had previously been provided with.*

#### **4.12. Inability to have qualifications re-issued in current name, because it is not deemed 'provision of a service'.**

*I changed my name more than ten years ago, but the trade certificate that I obtained was in my previous (female) name. I contacted the institution and asked that they re-issue the document in my new (male) name but they refused to do so. When I contacted the NSW Anti Discrimination Board I was advised that because the provision of a certificate was not the provision of a service, that there was nothing I could do. This has meant that the only way that I can verify that I've got any qualifications for a new job is to 'out' myself at the interview.*

#### **4.13. 'Different' treatment of sex and gender variant people by the medical profession is not deemed 'unfavourable' under current legislation**

It does however result in an 'unfavourable' outcome for the person as indicated below:

*A GP refused to provide a referral to a particular specialist because the GP assumed that the specialist "wouldn't be OK with you being transsexual". Although I had clearly been treated differently on the basis of my transgender status, I was 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.*

#### **4.14. Refusal of access to appropriate toilets and change rooms**

Many transgender people are forced to limit their public social interactions to places they know will enable them to toilet/change without incurring discriminatory behaviour, harassment or violence. This has serious consequences for all travel and, in particular, limits one's ability to respond to unexpected events in a 'regular' way. One of our members had to use toilets on a different floor while transitioning as peers on his floor were uncomfortable about him using either one.

*I brought a dress from a shop in the Canberra Centre last week. The shop only had a women's fitting room and they refused me permission to try the dress on even though I explained that I was Intersexed... I brought the dress anyway and went home to try it on. It did not fit. So I went back to the shop to ask for a refund. They flatly refused, saying their store policy was no refunds. So I checked with ACT fair trading only to discover their policy was that you can't get a refund if you choose the wrong size.*

#### **4.15. Unnecessary insistence on disclosure**

For a range of reasons, sex and gender variant people are regularly pressured, by those in positions of power, to disclose their 'status'. The power imbalance often means that individuals don't feel able to challenge that pressure even when it is not justified. We have been approached by a trans\* woman seeking legal advice because:

*I have been told that I can't work as a beauty therapist without disclosing my (pre-op) trans status to clients."*

#### **4.16. Participation in social and amateur sport severely restricted due to identity documentation issues**

In several jurisdictions, an individual can be legally denied the right to participate in their chosen sport on the basis of the sex shown on their birth certificate. Where the sex on an individual's birth certificate is not the person's self-identified gender, it becomes extremely difficult for them to participate in even social or amateur sporting activities.

For example, there is no legal protection for the female-to male transsexual who is refused a place on the men'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 we have received indicates that transsexuals, intersex and gender diverse people often feel that they are unable to participate in sporting activities due to the difficulties involved.

#### **4.17. Entrenched transphobia in schools by systemic frameworks, teachers and peers**

Examples abound to demonstrate 'unfavourable' treatment at school based on a person's sex or gender diversity. While 'bullying' is currently receiving significant attention, it appears that educational leaders are yet to add 'transphobia' to the discriminatory behaviours that need to be addressed through student welfare policies, by both staff members and students. The issues need to be 'spoken into existence' before they become visible in a school setting and can be dealt with.

*"I was regularly discriminated against all through my High School years by not only fellow students but teachers as well. I am only 21 now so it is also very fresh in my memory... it started when I was in year 8...from this time on my life was made to be hell. It was never typical school yard bullying in the traditional sense like name calling but subtle things like being asked if I found particular guys hot, having tampons and pads being left in my locker which apparently were for me to use and other stupid attempts at being funny. The most annoying and humiliating was everyday being asked by all the boys if I was wearing a g-string and a bra under my uniform. There were just a lot of little things that added up to a lot. I used the girls toilets whenever I could but it was always dependent on how many people and who was around at the time. The girls actually encouraged me to use their toilets so I could get away from the boys.*

*A lot of it was done in the guise of being well intentioned, but anyone could see that it wasn't. Regularly getting all the boys together (myself included, though i really don't like thinking of myself as one) and telling them that no one should be picked on for being different (then rattling off all the ways I was different eg. saying don't pick on "him" for wanting to be a girl, don't pick on him for acting like a girl, don't pick on him because he is going to get aids) giving them even more ammunition to have a go at me. There were times when the teachers would have a direct go at me calling me a fag, homo etc but most of it wasn't so direct.... I even had my year coordinator (who we had all the way through high school) come up to me on occasions and ask what I was wearing under my shirt."*

#### **4.18. Denial of respectful and appropriate treatment of sex and gender diverse people in Aged care facilities**

The 2006 AHRC Commission National Inquiry into discrimination against people in same-sex relationships also heard that transgender and intersex people are particularly vulnerable to discrimination in aged care settings, to the point where they may avoid seeking assistance altogether. There is anecdotal evidence of denial of services, forcibly preventing cross-dressing and deliberate physical violence when people are revealed to be transgender. Transgender people may also have medical issues related to their original gender that emerge with ageing, such as osteoporosis or prostate cancer."

Dementia may mean that a post operative transgender woman may forget that her external gender aspects have been changed and may be confused and distressed about how to go to the toilet. As with any other confusion

based on memory loss, care workers need to reassure and assist her.<sup>6</sup>

*Judy had lived as a woman for 30 years before she was admitted to aged care. She had taken great care over her appearance. Sometimes staff did not have time to assist with applying her make up. One day a care worker's ring caught in her wig and it slipped, showing her balding head. Some of the other residents saw this happen and requested not to sit at the dining table with 'that man'.<sup>7</sup>*

5. *Examples of vilification or harassment based on sex and/or gender identity for which there is no legal protection.*

**Summary of 'lived experiences' of discrimination:**

- |  |
|--|
| <ol style="list-style-type: none"><li>1. Harassment in public venues</li><li>2. Inaccurate and stereotyped media representations</li></ol> |
|--|

**5.1. Harassment in public venues**

Ongoing harassment in public venues leads to self imposed exclusion from social interaction due to the fear of being treated disrespectfully and/or violently. (In a recent study, it was found that 38% of Queensland trans\* women have been assaulted with a weapon, 46% have been assaulted<sup>8</sup>.)

*We travelled to an HRC focus group on this issue, with an intersex person (Sam). [Sam does not consistently identify as either male or female- lived as male (0-5 years), female (6-12 years), and male (13+ years).] Currently, she dresses according to the way she feels on the day, she has breasts and she shaves. On the way to the focus group, Sam was dressed in an 'androgynous' manner. We stopped at a fast food outlet and went inside to buy coffee - all was good. On the way home the next day Sam, was dressed in a skirt and pink top. When we stopped to buy coffee at the same place, she refused to come in with us. Despite numerous pleas, she consistently refused to get out of the car, saying that she did not have it in her to face harassment that day for a number of reasons, but particularly because last time she had entered that store dressed as a woman she had been harassed and vilified by others, in the presence of friends.*

*A recent member of A Gender Agenda indicated that since she joined the group, she had had more social interaction in three months than she had had in the preceding 10 years.*

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<sup>6</sup> Cited in *Dementia, Lesbians and Gay Men Alzheimer's Australia Paper 15 October 2009* Heather Birch

<sup>7</sup> cited in *Dementia, Lesbians and Gay Men Alzheimer's Australia Paper 15 October 2009* Heather Birch

<sup>8</sup> cited by participant at AHRC roundtable regarding federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity; 28 October 2010, in process of being sourced.



## 5.2. Inaccurate and Stereotyped Media Representations

### Limitations of ‘incitement’ in vilification protections

Sex and gender diverse people already suffer high levels of prejudice and stigmatisation in the community, and are at disproportionate risk of suicide and depression. In our view, it is irresponsible of the national media to endorse any program that furthers this stigmatisation and discrimination against a minority in our community. But despite how damaging such portrayals are, the existing ‘incitement’ provisions at a State and Territory level are so hard to establish that they are rarely applied successfully.

Some recent examples of inappropriate media content include:

- a) Crunchy Nut TV Ad  
The recent *Crunchy Nut* TV advertisement evoked justifiable criticism as being vilifying and demeaning to cross dressing/transsexual/transgender (transgender) people, while implying that transgender people are mentally ill and unattractive. In response to a formal complaint, the Advertising Standards Board found that this advertisement did not breach Section 2.1 of the Advertiser Code of Ethics.
- b) Moving Wallpaper (ABC March 2010)  
This episode presented an almost entirely negative portrayal of a trans\* woman in the workplace who was harassed, abused and ostracised by the other characters (who were laying bets on which toilet she'd use etc) and who was finally fired, patently because she was trans. A huge percentage of the script consisted of transphobic 'jokes' and jibes at the transwoman's character. The ABC responded to a complaint by saying:  
*“...we do acknowledge that the treatment of Georgina by the other characters disparaged and discriminated against Georgina on the basis of her transgender identity, reinforced stereotypes about transgender people, and conveyed prejudice towards transgender people. However, in our view, the disparaging, discriminatory and prejudicial comments were presented within the legitimate context of a humorous, satirical work, and were justified within this context. Accordingly, we are satisfied that the program was consistent with the requirements of section 2.7 of the Code of Practice.*
- c) “Captain Bridget” story  
In the recent ‘Sunday’ program, Prime TV covered the story of Bridget a transgender ‘Army’ woman and her partner (wife) and two daughters. Despite the courage evident in the couple’s story, at the end of the show, the program polled the public on “whether or not the government should foot the bill for Bridget’s surgery?”. This was a major misdirection of the public, by the media, away from the true focus of the story, a misdirection that resulted in significant transphobic backlash discussion in my workplace the following day.

## Basis of Protection

### 6. *Appropriate terminology for federal anti-discrimination legislation to protect from discrimination on the basis of sex and/or gender identity.*

- 6.1. As a guiding principle **terminology in the acts should be kept as broad as possible with reference to the attribute that is being discriminated against rather than identities** (which are always contested and exclusionary). State/Territory based 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 specific, narrow definitions of 'transsexual'. Problematic legislation across a broad range of areas also distinguishes between transsexuals who have had sexual affirmation surgery and those that have not – whereby those who have had surgery are accorded more rights and protections than those who have not.

Many people who choose to express their gender differently experience discrimination as a result of this gender presentation, but do not meet the criteria of "transsexual" or "recognised transsexual" under State or Territory Law. In addition, Intersex people, who may or may not express their gender differently, are offered no direct protection under any existing discrimination laws.

- 6.2. **Models for broad-based anti-discrimination provisions appear in other international jurisdictions**, for example the New York City Human Rights Law (amended 2002)<sup>9</sup>. Prohibiting discrimination on this basis would provide much-needed legal protection in situations such as the following:

- A woman is denied employment because her boss doesn't think she 'looks enough like a woman'.
- A man is harassed by other colleagues because he's not 'aggressive/assertive enough'.
- A person is denied services because someone 'finds out' that they cross dress.

The people in these examples may be able to utilise the provisions in existing legislation that prohibit discrimination on the basis of 'sex' or 'sexual orientation'. However, it would be far more straightforward if they could argue that they had been discriminated against because of their gender identity, or *because of the way they portrayed themselves* as a man or a woman.

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<sup>9</sup> *The New York City Human Rights Law (amended 2002) prohibits discrimination on the basis of gender, and 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."*

*Title 8 of the Administrative Code of the City of New York. 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)*

- 6.3. Federal discrimination legislation should provide **protection from discrimination on the basis of a person’s biological sex characteristics, gender identity and/or gender expression**, including whether or not the person’s biological sex characteristics, gender identity and/or gender expression is/are different from that traditionally associated with the legal sex assigned to that person at birth.

The protected attributes should be defined as follows:

**a) Biological Sex Characteristics**

This refers to all biological indicators of sex - for example chromosomal sex, endocrine activity, genitals and reproductive organs/capacity, menstruation, breasts, facial and body hair, depth of voice etc.

**b) Gender Identity**

This refers to how an individual identifies their own gender - for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary.

**c) Gender Expression**

This refers to how the individuals gender is identified by others – for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary.

- 6.4. This wording has been deliberately chosen to ensure that people are protected from discrimination on the basis of:

- a) being intersex
- b) being transsexual, transgender
- c) being gender fluid or genderqueer (includes being androgynous or cross-dressing)
- d) expressing a non-traditional gender (eg: a feminine man who is not trans)
- e) being perceived as any of the above (even if this is not an accurate perception)

It may be useful for these specific inclusions to appear in the explanatory notes.

- 6.5. This wording has been deliberately chosen to ensure that people are protected from discrimination without reference to:

- a) a binary construct of gender which only protects individuals who identify and present consistently as either male or female
- b) a binary construct of biological sex characteristics which fails to protect intersex individuals
- c) the legal sex currently recorded on a person’s birth certificate (which some people are unable to change, and some people do not wish to change)

It may be useful for these specific inclusions to appear in the explanatory notes.

- 6.6. Federal discrimination legislation should include protection for
    - a) individuals who fail to disclose their sex in a situation where there is no reasonable justification for requiring such a disclosure
    - b) people discriminated against on the basis of their association with people whose biological sex characteristics, gender identity and/or gender expressions are different from that traditionally associated with the legal sex assigned to that person at birth (for example partners, children, friends, work colleagues)
  - 6.7. Federal discrimination legislation should offer protection that over-arches existing state and territory protection. Existing best practice should provide the starting point for federal protection.
  - 6.8. The issue of costs associated with the process of exercising rights must be addressed to ensure that the risk and burden on complainants is not prohibitive – for example a tribunal system where costs are not awarded against complainants.
7. *Disadvantages of the terms currently used in state and territory laws, including: gender identity; chosen gender; gender history; a gender reassigned person; or a recognised transgender person; or transsexuality.*
- 7.1. Terms currently in use in state and territory laws refer to identities rather than attributes. They are problematic because identity based terminology changes over time, is always contested and excludes many individuals who should be entitled to protection. Identity based protection is also problematic because it often does not correspond to the attributes that are being discriminated against. The attributes that are discriminated against are a person's gender identity, gender expression and/or biological sex characteristics including any perceived 'discord' between these things and the individuals sex at birth.
  - 7.2. Some specific terms from existing state and territory based laws which is problematic includes:
    - a) 'Chosen gender' implies a choice, which many gender diverse people do not feel they have, believing their condition to be innate.
    - b) 'Gender history' is problematic for those at the beginning of transition, and those who are not seeking medical or surgical treatment.
    - c) 'A gender reassigned person' is particularly problematic for those who for various reasons (such as cost, personal choice, or pre-existing medical conditions) do not seek medical or surgical treatment. Gender diverse people require protection whether or not they pursue reassignment treatments.
    - d) 'Recognised transgender person' – recognised by whom? This also does not cover sex and/or gender diverse people who do not identify with terms such as transgender.
    - e) 'Transsexuality' is a term referring to only one group of people, and not embraced by all sex and/or gender diverse people.

## Exclusions

8. *What special measures designed to benefit specific groups based on sex and/or gender identity should be allowed by federal anti-discrimination law?*

- 8.1. Federal anti-discrimination laws **should limit use of exemptions to special measures to empower marginalised groups**. We note that the Tasmanian Anti-Discrimination Act has no specific exemptions for faith-based organisations in regard to sexual orientation. The same standard should be applied at a national level, and also in regard to intersex, and sex and/or gender diverse individuals.
- 8.2. **If exemptions are deemed to be necessary, they should be on the basis of case-by-case applications**. These must be minimal, temporary (with a requirement to reapply), reviewable, public and transparent (eg a requirement to proactively declare them). They should be limited to cases where discrimination arises in relation to employment. They should be limited to cases where the employer has imposed a genuine occupational qualification for a position.
- 8.3. **Where services are provided to the ‘public’ with government funding (the state contracting out its responsibility to NGOs)**, we regard it as especially crucial that exemptions must be limited to ‘special measures’ to empower and target marginalised groups such as transgender and intersex people who are often the very people most in need of these services.
- 8.4. Religious preaching and teaching, including in places of worship, religious schools, in public places, in publicly distributed religious literature, in various forms of mass media (especially radio and television), and online, which condemns and vilifies forms of sexual expression and/or various forms of sex and/or gender identity is commonplace and should not be exempt from existing anti-discrimination legislation.

## Other Action Required

### *9. Other actions we would like to see the Australian Government take to better protect and promote the rights of sex and gender diverse people in Australia*

- 9.1. Implementation of the recommendations of the AHRC 'Sex Files: The Legal Recognition of Sex in Documents and Government Records' report, at both state and federal levels.
- 9.2. Comprehensive and equitable Medicare and PBS coverage for the medical and surgical treatments required by intersex and sex and/or gender diverse people.
- 9.3. A national framework of informed consent which would allow:
  - a) A cessation of non-therapeutic medical interventions on non-consenting intersex children
  - b) Access to medical and surgical treatments for fully consenting transgender young people with parental consent.
- 9.4. Funding for organisations to provide direct support for intersex, trans and other sex and gender diverse individuals and their partners, children, families and work colleagues. At a minimum there should be one fully funded Gender Centre to provide services to sex and gender diverse people in each capital city.
- 9.5. Legislation must be accompanied by a government funded national action program to combat transphobia and discrimination against intersex people and to empower sex and gender diverse people to assert their rights and respond effectively to discrimination. A range of educational projects should be funded, to be carried out by sex and gender diverse community organisations.
- 9.6. Mechanisms to ensure that not only the letter but also the principles and spirit of antidiscrimination law are included in all government policy and programs (mainstreaming sex and gender diverse inclusion). This must include mechanisms to work in partnership with the sex and gender diverse community sector.
- 9.7. The AHRC should have designated commissioner in regard to sex and gender identity. There should be a well-resourced supporting unit, with dedicated staff capacity.