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A Gender Agenda

Submission

to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Human Rights and Anti-Discrimination Bill 2012 Exposure Draft Legislation

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Introduction

A Gender Agenda welcomes the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs regarding the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

A Gender Agenda works with the sex and gender diverse community which includes transsexuals, transgender people, intersex people, cross-dressers and other sex or gender variant or gender non-conforming people as well as their partners and other family members. We provide 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' organisations on both a local and national level.

If you require any further information, we can be contacted via Peter Hyndal by email on . We consent to any part of this submission being made public.

Summary of Recommendations

Recommendation One
The definition of the protected attribute should be kept as broad as possible in order to avoid further marginalising those people who are in the most need of protection from discrimination. In particular, it should not make specific reference to culturally constructed binary notions of sex or gender.

Recommendation Two
The definition of the protected attribute should include reference not only to a person's gender identity but also to their gender presentation or expression.

Recommendation Three
The term 'on a genuine basis' is inappropriate and should be removed from the definition of 'gender identity'.

Recommendation Four
Protection for intersex people should be defined by referencing only their biological sex characteristics. This is what makes a person intersex and what makes them the subject of discrimination.

Recommendation Five
References to people 'of indeterminate sex' should be removed from the definition of the protected attribute and replaced with a definition that provides more clarity.

Recommendation Six
The need for broadly inclusive terms that provide clarity is of particular importance in relation to the definition of 'gender identity' because of

- an overwhelmingly low level of understanding about the issue; and
- a lack of existing case law to clarify the position; and
- a very small number of complaints which make the generation of further case law in the near future unlikely.

Recommendation Seven
The Tasmanian Anti-Discrimination Amendment Bill 2012 provides "the highest current standard in State and Territory Discrimination law" and these definitions of protected attributes should be adopted within the Commonwealth Act in preference to out-dated and ineffective provisions from other Australian jurisdictions.

Recommendation Eight
New religious exemptions should not be established with relation to discrimination of the grounds of intersex status or gender identity. There is no evidence of any religious grounding that would warrant lawful discrimination in this area.

Recommendation Nine
A review of the effectiveness of the definition of 'gender identity' as a protected attribute should be undertaken three years after the implementation of the Act.

Defining Key Terminology

Biological Sex refers to the biological indicators of sex that people are born with including chromosomes, hormones, genitals, and reproductive organs/capacity. Everyone has a biological sex. It is commonly assumed that all people have a biological sex that is either 'male' or 'female'. This assumption does not accurately reflect the naturally occurring variation in biological sex characteristics that exist both in humans and in all other species.

Gender Identity refers to how a person identifies themselves in gendered terms. Everyone has a gender identity. Most commonly, there is congruence between a person's biological sex and their gender identity, however this is not always the case. Across cultures and throughout history, people have developed gender identities independently of their biological sex characteristics.

Gender Presentation refers to how a person portrays their gender to other people. This is most commonly done through clothing, hairstyle, voice and mannerisms. Everyone has a gender presentation. Social norms about 'appropriate' gender presentations are culturally determined and change over time. For example the social norms regarding what clothing was appropriate for women to wear in Australia in the 1950's were far more constraining than our current social conventions.

Sex and gender diversity is an "umbrella term" that describes two different groups of people – intersex people and gender diverse people.

Being intersex means that you are born with biological characteristics such as chromosomes, hormones, genitalia and/or reproductive organs that are not completely female, not completely male, or are partially male and partially female. Being intersex is about the biological reality of a person's body. It has nothing to do with a person's gender identity or their sexuality. It is estimated that up to 4% of the population are intersex[1].

Being gender diverse means that you identify or present yourself in ways that do not fall neatly within traditional assumptions about the alignment of biological sex and gender. Some gender diverse people are **transsexual or transgender** which means that their gender identity is different from their biological sex (for example someone who was born female, but who identifies and lives as a man or vice versa). Other people are gender diverse because their gender identity or presentation does not always fit neatly within the category of 'female' or 'male'. This may be for any number of reasons - including that they are in the early stages of transitioning, or that they are too fearful to present in their preferred gender because of fear of discrimination and stigma. Being gender diverse has nothing to do with a person's sexuality. It is estimated that up to 8% of the population experience gender identity issues that are significant enough to require professional assistance at some point during their lifetime.[2]

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[1] Professor Peter Koopman cited in *Intersex –a challenge to conventional binary gender – construction, de-construction or re-construction?* Ann Stewart, University of QLD, 2004.

[2] *Transgender Lifestyles and HIV-AIDS Risk* (1994), Roberta Perkins, School of Sociology University of NSW, p 19.

The Context for Discussions

1. General lack of knowledge about sex and gender diversity

1.1. There is a huge lack of knowledge about issues of sex and gender diversity. This lack of knowledge exists not only in the general community but also amongst legislators and policy makers at all levels of government.

1.2. This lack of knowledge is generally not caused by any malicious intent, but rather is the result of the extremely high rates of social isolation and marginalisation experienced by sex and gender diverse people, combined with an almost uniform lack of funding for community education work in this area.

1.3. The existing lack of knowledge about issues of sex and gender often results in the drafting of legislative protections that are ineffective in delivering the intended outcome.

1.4. The existing lack of knowledge also feeds misunderstandings, assumptions and prejudice that contribute to the extremely high rates of discrimination experienced by sex and gender diverse people.

2. Growing awareness of the magnitude of issues facing sex and gender diverse people

2.1. Despite this lack of knowledge, there is growing awareness from all levels of government that issues of sex and gender diversity are legitimate areas requiring urgent attention. At a Commonwealth level this has been evidenced by policy changes and new guidelines by a number of different departments,[3] as well as public statements by members of all three major parties regarding the need for urgent attention to issues of sex and gender diversity.[4]

3. Urgent need for effective protection from discrimination

3.1. 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 the Tranznation Report. Perhaps more alarmingly, 37% of transgender people experience discrimination on at least a weekly basis and "not only does it seem that everyone practices discrimination against transgender people, but also this discrimination occurs just about everywhere."[5]

3.2. In 2009 the ACT Human Rights Commission conducted a survey in relation to an unrelated topic where 80% of respondents (from the general population)

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[3] Including but not limited to Department of Foreign Affairs and Trade and Commonwealth Attorney-General's Department.

[4] Including comments made at launch of *Diversity in Health* report on 27th November 2012 and also as recorded in *House of Representatives Hansard* 10th September 2012.

[5] *Transgender Lifestyles and HIV-AIDS Risk* (1994), Roberta Perkins, School of Sociology University of NSW, p 58.

identified transsexuality as the attribute that was most likely to result in discrimination.

3.3. A Sydney study that looked at employability, pre- and post- transition, across a wide range of professions found that "in nearly every type of occupation there is a decline from before to after the gender crossing by between 25% and 50% reduction in work experiences."[6] The report *Gender Diversity in the ACT*, released in 2011, shows unemployment rates within the sex and gender diverse community are six times higher than the general population.[7] These statistics are indicative of the prevalence of discrimination experienced by transgender, intersex and other gender diverse people.

3.4. The link between discrimination, depression and suicide is well documented. The *Tranznation* report confirmed a direct causal link between the experience of discrimination and the extremely high incidence of depression and suicidal ideation. A recent Suicide Prevention Australia position statement shows that somewhere between 16 and 47% of transgender people have attempted suicide at least once.[8] Evidence clearly links these health outcomes to experiences of discrimination and social exclusion.

4. Legislation must protect particularly vulnerable sub-population groups

4.1. The people who experience the most discrimination are those who are identifiable to others as being 'different'. Of those people who are able to 'pass', many choose to be invisible simply to avoid discrimination and harassment. The negative effects of this invisibility and social isolation are well documented.[9]

4.2. To be effective, anti-discrimination legislation needs to provide protection to those people who are the most vulnerable to experiencing discrimination. In this case, people are most vulnerable to discrimination when they are perceived to be presenting in a way that is different from binary assumptions.

4.3. The wording of the exposure draft limits protection only to those people who identify as either male or female, and who evidence this identification in stereotypical ways. This narrow definition of the protected attribute ignores those people who are arguably in greater need of protection and creates an arbitrary and unnecessary hierarchy within this already marginalised population group.

The definition of the protected attribute should be kept as broad as possible in order to avoid further marginalising those people who are in the most need of protection from discrimination. In particular, it should not make specific reference to culturally constructed binary notions of sex or gender.

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[6] *Transgender Lifestyles and HIV-AIDS Risk* (1994), Roberta Perkins, School of Sociology University of NSW, p 24.

[7] *Gender Diversity in the ACT: A survey of Trans Experiences (2011*), Fiona David, Lesley Hyndal, Peter Hyndal, Judith Ion, Jennie Yates, p 7.

[8] *Suicide and self-harm among Gay, Lesbian,Bisexual and Transgender communities,* Suicide Prevention Australia, August 2009

[9] *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.

Combatting Common Myths and Misconceptions

There is a great deal of misunderstanding about intersex and gender identity issues. We have reviewed some of the submissions that have already been made as part of this inquiry process and note that many of them – even those that are supportive of transgender, intersex and other gender diverse people – contain factual misunderstandings about even the most basic definitions. Much of the discussion around issues of sex and gender diversity is still driven by a lack of information and incorrect assumptions, which makes real engagement with the issues impossible.

5. Being Intersex is not a 'gender identity'.

5.1. Being intersex refers to biological characteristics which someone is born with and which are either not completely male, not completely female, or are partially both male and female. Being intersex is defined by this biological reality. It has nothing to do with how a person identifies or presents their gender.

6. Protecting intersex people will not create a 'third sex'.

6.1. No piece of legislation can 'create' new biological realities. These biological realities exist. They always have. This Act is only concerned with protecting people from discrimination. Any concern about creating "a third sex" can be most effectively addressed by framing the protection around "biological sex characteristics" rather than around a "particular class of person".

7. Discrimination protection will not create issues regarding toilets and change rooms

7.1. There are no laws that govern who can and can't use specific toilet or change room facilities. Sex and gender diverse people currently use the toilet and change room facilities in which they feel most comfortable. There is nothing in the Exposure Draft that places any burden on businesses to provide additional facilities.

8. Discrimination protection will not require costly upgrades to computing systems

8.1. The only legitimate purpose for inclusion of sex in human resource and other computing systems is for demographic reporting. There is nothing about the introduction of discrimination protection that will require changes to these systems. Section 23 of the Exposure Draft sets out 'exceptions for justifiable conduct' which include 'the cost and feasibility' of providing alternative systems.

9. Discrimination protection will not result in frivolous and vexatious claims

9.1. The most common response to any move towards protection or recognition for transgender, intersex and other gender diverse people is the notion that it will encourage fraudulent or frivolous claims. There is no evidence for this fear. The high degree of stigma and marginalisation experienced by transgender and intersex people makes it highly unlikely that anyone would 'pretend' to be transgender or intersex in order to make a false discrimination claim. Even if this did occur, section 117(2)(c) of the exposure draft adequately deals with this situation.

Protected Attribute of "Gender Identity"

Inclusion of protection for transgender, intersex and other sex and gender diverse Australians is welcome. However, the proposed definition of the protected attribute is highly problematic for a range of reasons as outlined below.

10. Proposed definition of gender identity is too narrow

10.1. The sole reliance on a person's 'identification' to define the protected attribute is highly problematic. Identity based protection is problematic because it does not always correspond to the attributes that form the basis of discrimination.

10.2. The attributes that are likely to cause discrimination are a person's gender identity, gender presentation and/or biological sex characteristics including any perceived 'discord' between these things and the individual's sex as recorded at birth. For discrimination protection to be effective, the definition of the protected attribute must be framed to correspond to the basis of the discrimination we seek to redress.

10.3. Part (i) of the definition of gender identity does reference 'style of dressing', but it does so in the context of acquiring evidence of a person's identity, rather than as an integral component of the protected attribute.

10.4. Protection on the basis of gender presentation can most neatly be achieved by including it within the definition of 'gender identity'. One example can be found in the Tasmanian Anti-Discrimination Amendment Bill 2012 which uses the following definition:

> ***Gender Identity*** means the gender-related identity, appearance or mannerisms or other gender related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth.

10.5. Models for broad-based anti-discrimination provisions also appear in other international jurisdictions, for example the New York City Human Rights Law (amended 2002).[10]

The definition of the protected attribute should include reference not only to a person's gender identity but also to their gender presentation or expression.

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[10] 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."

Subdivision 23, Section 8-102 of Chapter One. of Title Eight of the *Administrative Code of the City of New York* (Added by amendment 30th April 2002).

11. Use of term 'on a genuine basis' is highly problematic

11.1. The inclusion of the term 'on a genuine basis' within the definition of gender identity is problematic because there is no clarity about how or on what basis a determination of 'genuineness' would be made, and who would make such a determination. To this degree, the inclusion of 'on a genuine basis' brings unnecessary uncertainty to the provision.

11.2. The requirement that the identification be held 'on a genuine basis' is contradictory to the provision at Section 19(4)d which makes it unlawful to discriminate if the attribute is assumed, even if it is not genuinely held by the person at all.

11.3. None of the other protected attributes in the Exposure Draft have a requirement of 'genuineness' built into their definition. There is no evidence to suggest that a higher standard of proof should be included within the definition of gender identity. The inclusion of this clause brings unnecessary uncertainty with regard to business compliance requirements. It also places an unwarranted higher burden of proof on sex and gender diverse people than on any other protected group.

11.4. It appears that the intent of this clause may be to ensure that frivolous claims are not made. This is a commonly held fear which has no factual basis. In Australian jurisdictions that have not had an "on a genuine basis" requirement there has never been a complaint made by a "man pretending to be a woman" or vice versa.

11.5. It is important to note that the Exposure Draft has provision at Section 117(2)(c) for the Australian Human Rights Commission to close a complaint if "the complaint is frivolous, vexatious, misconceived or lacking in substance".

The term 'on a genuine basis' is inappropriate and should be removed from the definition of 'gender identity'.

12. Intersex protection should be based on biological characteristics, not on identity

12.1. Being intersex means that you are born with biological characteristics such as chromosomes, hormones, genitalia and/or reproductive organs that are not completely female, not completely male, or are partially male and partially female.

12.2. Being intersex has nothing to do with the way a person identifies or presents. The reliance of the definition on identification is highly problematic.

Protection for intersex people should be defined by referencing only their biological sex characteristics. This is what makes a person intersex and what makes them the subject of discrimination.

13. Use of term 'of indeterminate sex' is highly problematic

13.1. Some intersex people undergo 'normalising' medical interventions (either by choice, or without their consent as infants). All State and Territory provisions require that a child's birth is registered as either male or female.

13.2. The reliance on the term 'a person of indeterminate sex' is unsatisfactory because it provides no clarity about who might be protected given it is currently impossible to register a birth as an 'indeterminate sex'.

13.3. In jurisdictions where similar terminology is already in use, there is no history of any successful complaints having been made. We have anecdotal evidence of complaints being made by intersex people, under existing State and Territory legislation, which have not been pursued because the complainant has been unable to successfully argue that their sex meets the requirement of being "indeterminate".

13.4. A good example of a definition of intersex that provides more clarity can be found in the Tasmanian Anti-Discrimination Amendment Bill 2012 which uses the following definition:

> ***Intersex*** means the status of having physical, hormonal or genetic features that are:
> *(a) neither wholly female nor wholly male; or*
> *(b) a combination of female and male; or*
> *(c) neither female nor male*

References to people 'of indeterminate sex' should be removed from the definition of the protected attribute and replaced with a definition that provides more clarity.

14. Necessity for greater clarity in legislative definitions

14.1. Despite the very high rates of discrimination reported by transgender, intersex and other sex and gender diverse Australians, very few complaints are made. For example, in the ACT there were only twelve complaints made on these grounds between 2006 and now. None of these complaints went to a hearing.

14.2. Case law can often provide clarity if legislation is unclear, but where the number of complaints is relatively small, the opportunity for case law to provide clarity is greatly diminished. This increases the need for the definitions within the original legislation to be as clear as possible.

The need for broadly inclusive terms that provide clarity is of particular importance in relation to the definition of 'gender identity' because of
- **an overwhelmingly low level of understanding about the issue; and**
- **a lack of existing case law to clarify the position; and**
- **a very small number of complaints which make the generation of further case law in the near future unlikely.**

Existing legislation does not provide a satisfactory model for discrimination protection

14.3. The explanatory notes indicate the intent of matching "the highest current standards in State and Territory discrimination law". In relation to coverage for transgender, intersex and other sex and gender diverse people, the highest existing standards do not provide an adequate benchmark.

14.4. Existing State and Territory legislation has proven to be ineffective in providing adequate coverage. Many people who express their gender differently experience discrimination as a result of their gender presentation, but do not meet the criteria under existing State or Territory law.

14.5. In addition, intersex people, who may or may not express their gender differently, are offered no certainty of protection under any existing discrimination laws.

14.6. The current lack of any comprehensive or effective protection accounts for the huge disparity between excessively high levels of discrimination, and the scarcity of complaints actually being made.

14.7. Tasmania is in the process of rectifying these issues via the Anti-Discrimination Amendment Bill 2012. This bill has already passed the Tasmanian House of Assembly and is expected to be passed by the Tasmanian Upper House in early 2013. Once passed, this legislation will represent "the highest current standards in State and Territory discrimination law". The Tasmanian bill has tri-partisan support, and the fact that it will almost certainly be passed prior to the implementation of any Commonwealth Act should be taken into account in assessing the proposed provisions of the Exposure Draft.

14.8. Regardless, given the lack of existing effective discrimination protection in any State or Territory jurisdiction, the opportunity should be taken to provide anti-discrimination legislation that is in harmony with Australia's human rights treaty obligations in relation to people of diverse sex and gender, as articulated by the Yogyakarta Principles.

14.9. 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). To be effective, Commonwealth 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 Tasmanian Anti-Discrimination Amendment Bill 2012 provides "the highest current standard in State and Territory Discrimination law" and these definitions of protected attributes should be adopted within the Commonwealth Act in preference to out-dated and ineffective provisions from other Australian jurisdictions.

Other Issues related to the Exposure Draft Legislation

15. Exemptions

15.1. New religious exemptions should not be established in relation to discrimination on the grounds of intersex status or gender identity.

15.2. Most religions are showing a willingness to become more inclusive and legislation should not discourage that trend.

15.3. Religions should be required to demonstrate substantial grounds for exemption on a case-by-case basis.

15.4. If compelling evidence is produced to support religious exemptions, it should be assessed separately in the regard to how it applies to transgender, intersex and other gender diverse individuals.

15.5. Given the natural occurrence of biological variation in all living creatures, it is particularly difficult to understand on what basis religious exemptions are justifiable in relation to intersex people.

15.6. To whatever extent religious exemptions apply to discrimination on the basis of gender identity, no exemption should apply where services are provided to the public with government funding. We regard it as especially crucial that exemptions are limited in this area because the highly marginalised status of transgender, intersex and other gender diverse people mean that they are often the very people most in need of these services.

New religious exemptions should not be established with relation to discrimination of the grounds of intersex status or gender identity. There is no evidence of any religious grounding that would warrant lawful discrimination in this area.

16. Review of the effectiveness of definitions of protected attributes

16.1. We note that Section 47 provides for a three year review of exemptions. We are supportive of this review being undertaken.

16.2. Given our concerns about the proposed definition of the ‘gender identity’ attribute, a three year review should also be undertaken to assess the effectiveness of the definition of the protected attribute for transgender, intersex and other gender diverse people. This review should include a comparison of the prevalence of discrimination experienced against the number of successful complaints.

A review of the effectiveness of the definition of ‘gender identity’ as a protected attribute should be undertaken three years after the implementation of the Act.

Case Studies

The following case studies are a sample of some of the particular issues that people have brought to our attention. Discrimination issues are one of the most common reasons why people contact our service and we are able to provide further case studies if this is useful.

Case Study A: *C is a transgender woman in the early stages of transition. Although she presents as a woman for most of the time, she is still attending work presenting as a man because she is concerned about the reaction of her work colleagues. A work colleague sees her dressed as a woman on the weekend and tells everyone in the work-place. On Monday morning, C is told that her lifestyle is incompatible with the culture of the workplace and that her services are no longer required.*

It is unclear whether any protection would be offered to C under the existing proposed definition. The discrimination occurred not because of C's identity, but because of her gender presentation – the fact that she wore a dress on the weekend.

Additionally, it is unclear whether C would meet the requirement of identifying 'on a genuine basis…as a member of the other sex'. Even though she identifies as a woman, her circumstances mean that she still presents as male some of the time. It is unclear how this may affect her claim. This lack of clarity is unhelpful for C, as well as for her employer – both of whom need clarity around these issues.

Case Study B: *J is an intersex woman. Her birth was registered as female and she identifies as female. Within an hour of having told a work colleague that she was intersex she lost her job.*

It is unclear whether J would meet the criteria for being 'of indeterminate sex'. Her birth record, identity and presentation are not indeterminate. Although it is clear that she lost her job because she was intersex, the current wording of the Exposure Draft does not guarantee her any protection.

Case Study C: *D is a transman who was recently admitted as a public patient to a publicly funded hospital with religious affiliations in Canberra. His admission was unrelated to his transgender status. He was admitted for a period of close to two months and during this time, the hospital refused to provide, administer, or allow him to self-administer his regular hormone treatment. The hospital staff also talked of D's transgender status in public areas where other patients and visitors were present. D's hormone treatment had been prescribed by a registered GP under supervision from an endocrinologist for the prior 12 years. Denial of hormone treatment adversely affected D's general mental health and recovery.*

The existence of religious exemptions would not prevent this situation from occurring again in the future. This is one of many examples where religious exemptions produce an unjustifiably adverse effect on the quality of services delivered using government funds.

Other Action Required

17. Making discrimination protection effective in practical terms

17.1. 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.

17.2. Mechanisms to ensure that not only the letter but also the principles and spirit of anti-discrimination 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.

17.3. 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 State and Territory.

17.4. The AHRC should have a designated commissioner for sex and gender identity issues. There should be a well-resourced supporting unit, with dedicated staff capacity.