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**SUBMISSION**

**to**

**AUSTRALIAN HUMAN RIGHTS COMMISSION**

**on**

**PROTECTION FROM DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION & SEX AND/OR GENDER IDENTITY: DISCUSSION PAPER**

1. **INTRODUCTION**

The Australian Human Rights Commission (AHRC) is conducting a targeted consultation regarding federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity. The Discussion Paper contains a list of questions about how protections from discrimination might be included in federal law.

This submission responds to some of the issues identified in the Discussion Paper and the Discussion Questions.

The functions of the Anti-Discrimination Commission Queensland (ADCQ) include promoting an understanding, acceptance and public discussion of human rights in Queensland, undertaking research to promote the purposes of the Act, and consulting with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act.

The ADCQ also deals with complaints of discrimination and other contraventions of the *Anti-Discrimination Act 1991*. In Queensland, the prohibited grounds of discrimination include sex, sexuality and gender identity. Vilification on the grounds of sexuality and gender identity is also prohibited, and vilification that includes the threat or incitement of physical harm to a person or property is a criminal offence.

The ADCQ has established and interacts with a number of advisory committees in order to keep in close contact with immediate issues affecting the various groups represented by the advisory committees. One of the ADCQ’s Advisory Committees consists of people representing the lesbian, gay, bisexual, transgender and intersex community.

A number of the issues addressed in this submission are based on feedback from people in attendance at the October 2010 meeting of the ADCQ’s Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Advisory Committee.

* 1. **Need for Federal Legislation to specifically protect the human rights of LGBTI persons**

The ADCQ submits that international human rights instruments agreed to by the Australian government place an obligation on it to protect the human rights of all people within Australia[[1]](#footnote-1). Such protection must include the protection of the human rights of particular groups of people who are more vulnerable to human rights violations, or who do not fully enjoy their fundamental rights both at the level of legal guarantees, and that of everyday life. One such group is the LGBTI community in Australia.

It is well documented that a significant issue for the LGBTI community is being subjected to harassment because of sexual orientation and gender identity, perceived or actual, and the consequences of such harassment, which include isolation, fear, substance abuse, mental ill-health and even suicide.[[2]](#footnote-2) Harassment ranges from isolating the person, name calling and verbal comments, through to violence against both the person and property.

The existing federal human rights legislation does not adequately protect the rights of the LGBTI community from discrimination, vilification, victimisation and harassment on the basis of their sexuality, or on the basis of their gender identity.

For these reasons alone, there is pressing need for federal anti-discrimination laws to be passed to explicitly prohibit discrimination, vilification and harassment of a person on the basis of their sexual orientation and sex and/or gender identity.

* 1. **Benefits of federal protections from discrimination and vilification on the basis of sexual orientations and sex and/or gender identity**

There is a patchwork of protections for LGBTI people in the various State and Territory laws. Although State and Territory legislation provide protection from discrimination on the basis of sexual orientation and gender identity in areas of public life, only Queensland, New South Wales, the Australian Capital Territory and Tasmania provide protection against vilification on the basis of sexual orientation and gender identity.

This patchwork protection of rights is another justification for the need for a more comprehensive protection of the rights of LGBTI persons at the Federal level.

In addition, the various anti-discrimination laws passed by the State and Territories across Australia which contain provisions protecting the LGBTI community, do not have application in relation to the Commonwealth or Commonwealth agencies.

Explicit protections from discrimination, vilification on the basis of sexual orientation and gender identity in federal legislation would extend protections to the Commonwealth and Commonwealth agencies such as Centrelink and Medicare.

* 1. **Need for federal legislation to protect LGBTI persons from harassment**

Where harassment associated with a protected attribute occurs in the areas of public life covered in the State and Territory anti-discrimination legislation, the harassment will usually be considered as discrimination, and is thus protected by the relevant legislation.[[3]](#footnote-3)

If the harassment is by a public act, it may be protected by the vilification provisions of the anti-discrimination legislation in Queensland, New South Wales, the Australian Capital Territory and Tasmania. However, the harassment must be capable of *inciting* hatred towards, serious contempt for or severe ridicule of the person or group.

However, harassment (other than assault and other behaviours covered by criminal law) that occurs outside the recognised areas of public life, or that occurs in public but does not incite, is not protected by the State and Territory anti-discrimination legislation. Examples include verbal abuse and behaviours such as throwing stones on the person's roof and rubbish in the person's yard.

Federal legislation should provide protection from harassment on the basis of sexual orientation and gender identity. This protection should not be limited to harassment that occurs in the recognised areas of public life, and should be protected broadly, wherever it occurs, as is the case with sexual harassment in Queensland.[[4]](#footnote-4)

The ADCQ endorses and supports the recommendations for legislative reform made in the *With respect* report[[5]](#footnote-5), and suggests such provisions should be incorporated into federal legislation. Those recommendations were to:

1. Amend the legislation to make it unlawful to harass a person or group on the basis of the sexual orientation or gender identity of the person or group, whether perceived or actual;
2. Define harassment as 'conduct that offends, humiliates, insults or ridicules the person or group' and that it includes a single act;
3. Limit exceptions to provide for:
4. the fair reporting of harassing conduct;
5. circumstances that would be subject to absolute privilege in proceedings for defamation; and
6. statements made in good faith for academic, artistic, scientific or research purposes, or in the public interest.
7. **OTHER ACTIONS FOR THE AUSTRALIAN GOVERNMENT TO TAKE TO BETTER PROTECT THE RIGHTS OF LGBTI PEOPLE IN AUSTRALIA**
   1. **Protection of the human rights of Transgender persons**

While the Discussion Paper does not address issues that specifically impact upon transgender persons, members of the ADCQ’s LGBTI committee identified a number of matters that substantially impacted upon their ability to fully enjoy their fundamental human rights. The ADCQ briefly sets out the issues of specific concern, and recommends the Australian government take steps to address these concerns.

* 1. **Recognition of gender change in formal documentation**

The main issues of concern relating to the recognition of change of sex in formal documentation as identified by some representatives on the ADCQ's LGBTI Advisory Committee are:

1. the Surgery requirement;
2. the Forced Divorce / Unmarried status requirement; and
3. the extent of the Bureaucratic and Administrative burden.

These and other issues are identified and discussed in the 2009 concluding paper of the sex and gender diversity project of the Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*.

Surgery is not always medically appropriate or possible because of other health issues and conditions, and even though it may be possible, it is not always available and affordable. The requirement also ignores the fact that it is not necessarily desired by the person seeking recognition of their gender identity for any number of reasons, and the downtime in the duration of the procedures and the recovery, can be too much of a burden both financially and emotionally on the person.

This consultation has stated it is not directly concerned with the question of whether same-sex marriage should be permitted in Australia. However, the divorce requirement of all states and territories in order to obtain an amended birth certificate means that this issue must be addressed at a federal level. Although the Australian Human Rights Commission has recommended that marital status should not be a relevant consideration as to whether or not a person can request a change in legal sex[[6]](#footnote-6), the reality is that States and Territories to date have been unwilling to change their legislation to remove the requirement while the constitutionality of doing so remains in issue.[[7]](#footnote-7) The requirement has effectively been endorsed by the proposed amendment of the *Sex Discrimination Act 1984* to provide, by the inclusion of subsection 40(5)[[8]](#footnote-8):

Nothing in Division 2 renders it unlawful to refuse to make issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married.

The federal government must fulfil its responsibilities under the ICCPR[[9]](#footnote-9) to LGBTI persons by amending the *Marriage Act 1961* to allow for same sex marriage. There would then be no basis for the argument by the States and Territories to continue with the requirement that a person be divorced or single at the time they seek to amend their birth certificate. This would be a substantial step towards eliminating discrimination on the basis of sexual orientation and gender identity.

Those who are able to achieve some recognition in formal documents also report that there is an overwhelming need to complete forms and submit to various bodies and agencies to effect the recording of any change. Eliminating the entire administrative burden might not be possible, however it is recommended that the federal government also investigate whether there are any measures for reducing the bureaucratic and administrative burden, whether by federal legislation, harmonisation of laws, or administrative measures such as a portal for government agencies.

1. **TERMINOLOGY**

There are arguments for and against, and preferences for the various forms of terminology.

Representatives of the ADCQ's LGBTI Advisory Committee were adamant that the human rights of all persons should be recognised and protected no matter how they identify as a person. They observed that while some people may clearly identify as male or female, others may not wish to be identified as a specific gender. Regardless of the diversity of how persons identify themselves in relation to sex/gender, all persons are entitled to be protected from discrimination, vilification and harassment, and to be able to fully enjoy their fundamental human rights.

1. **SUMMARY**
   1. Federal anti-discrimination legislation should extend the protection from discrimination and vilification to the attributes of sexual orientation and gender identity.
   2. Federal anti-discrimination legislation should provide broad protection from harassment on the basis of sexual orientation and gender identity.
   3. The *Marriage Act 1961* should be amended to allow for same sex marriage.
   4. Federal government should investigate means for regulating the requirements for recognition in formal documents, and for reducing the bureaucratic and administrative burden of recording changes in formal documents.

1. Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) [↑](#footnote-ref-1)
2. See for example the discussion paper *With respect: A strategy for reducing homophobic harassment in Victoria*; the June 2010 report *With Respect Awareness Project*; and the sources referenced in both. [↑](#footnote-ref-2)
3. For the sexual harassment employment area as sex discrimination, *see R v Equal Opportunity Board and Another; Ex parte Burns and Another* [1985] VR 317, 323 (per Nathan J – 3, 4 May 1984); for harassment in the goods and services area see *M v U & A* [2007} QADT 8 (16 March 2007) [↑](#footnote-ref-3)
4. *Anti-Discrimination Act 1991* (Qld), section 118 [↑](#footnote-ref-4)
5. *With respect: A strategy for reducing homophobic harassment in Victoria* [↑](#footnote-ref-5)
6. Recommendation 1 of *Sex Files: the legal recognition of sex in documents and government records* [↑](#footnote-ref-6)
7. See eg *Hansard*, Legislative Assembly, Robert Hulls, 11 May 2004, p1107, quoted in *AB v Registrar of Births, Deaths and Marriages*(2007) 162 FCR 528; [2007]FCAFC 14 at[69](Kenny J.) [↑](#footnote-ref-7)
8. *Sex and Age Discrimination Legislation Amendment Bill 2010*, Schedule 1 item 61 [↑](#footnote-ref-8)
9. *International Covenant on Civil and Political Rights,* 1966, articles 2 & 26 [↑](#footnote-ref-9)