



Sex and gender diversity

Issues paper

May 2008

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1 What is this paper about?

The Human Rights and Equal Opportunity Commission (HREOC) is seeking the views of the sex and gender diverse community about the most pressing human rights issues faced by people who are transgender, transsexual or intersex. HREOC also seeks input into how it might assist in promoting and protecting the human rights of people who are sex and gender diverse.

This paper is a short analysis of some sex and gender diversity issues and their human rights implications. The paper aims to establish a dialogue between HREOC and the sex and gender diverse community. This dialogue will assist in the development of a sex and gender diversity human rights project.

2 What are the options for HREOC's sex and gender diversity project?

HREOC could conduct a general examination of the human rights issues faced by the sex and gender diverse community. However, it may be a better use of resources to focus on one specific sex and gender diversity issue such as:

- identity recognition and changing official documents or
- the medical treatment of children diagnosed with transsexualism or who are intersex or
- strengthening the legal protections relating to discrimination against people who are sex and gender diverse.

Some possible project outcomes include:

- publication of a report or paper analysing human rights issues faced by the sex and gender diverse community specific including case studies
- developing guidelines or fact sheets or
- holding a sex and gender diversity forum on human rights issues.

HREOC is interested in hearing about what outcome would be most useful to the sex and gender diverse community.

3 How you can be involved in developing HREOC's sex and gender diversity project?

To assist HREOC in developing our sex and gender diversity project, we would appreciate your feedback on the issues and questions raised in this paper. Please also respond to the following questions:

1. Do you have any case studies and stories that might be useful to our research or project?
2. What do you think is the most pressing human rights issue for people who are sex and gender diverse?
3. What do you think should be the focus and outcome of HREOC's sex and gender diversity project?

Please send us your response by 30 May 2008.

Responses can be sent by:

- email to sarah.winter@humanrights.gov.au or
- post to Sex and Gender Diversity Project, HREOC at GPO Box 5218, Sydney NSW 2001.

4 What is sex and gender diversity?

People who are sex and gender diverse have the same human rights as everyone else. Human rights are about equality and dignity for everyone. In particular, all human beings have the right to define and express their sex and gender identity.

The phrase sex and gender diversity is a celebration and recognition of variations in sex and gender.

Sex is most easily understood as whether a person is male or female. Gender is a cultural expression of sex identity (often but not always based on stereotypes of masculinity and femininity). Gender can be understood as a person looking, dressing or acting as male or female. However, some people are not born nor identify as being either exclusively male or female.

Some common terms for people who are sex and gender diverse include transgender, transsexual or intersex.

5 What is HREOC's role?

HREOC has an official role to protect and promote human rights in Australia, including the rights of people who are sex and gender diverse.

HREOC protects and promotes human rights through

- advising government on policies and laws
- promoting human rights education and public awareness
- investigating and conciliating discrimination and human rights complaints and
- encouraging human rights compliance in the Australian courts.

The Australian government has given HREOC an official role in relation to various international human rights treaties and instruments. Human rights treaties are international instruments which outline human rights. When countries ratify human rights treaties, they voluntarily agree to be bound by the terms of the treaty under international law.

In particular, the International Covenant of Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) are international human rights treaties that are relevant to people who are sex and gender diverse.

6 What specific international human rights are relevant to people who are sex and gender diverse?

People who are sex and gender diverse have the same human rights as everyone else.

There are a few key human rights in the ICCPR that may be specifically relevant to people who are transgender, transsexual or intersex, including:

- freedom of expression (article 19)
- the right to non-discrimination (article 26)
- the right to recognition before the law (article 16)
- freedom of movement and travel (article 12)
- the right to privacy (article 17) and
- the right to protection from torture, cruel, inhuman or degrading treatment or punishment (article 7).

There are also several human rights in the CRC that may be specifically relevant to people under the age of 18 who are transgender, transsexual or intersex. The CRC is broader than the ICCPR and includes civil, political, economic, social and cultural rights. Some relevant rights include:

- the best interests of children should be a primary consideration in all actions concerning them (article 3)
- the right to survival and development (article 6)
- the preservation of identity (article 8)
- the right of children to express views and have those views respected (article 12)
- the right to freedom of expression (article 13)
- the right to freedom of thought (article 14)
- the right to privacy (article 16)
- the protection from violence, injury, abuse or exploitation (article 19)
- the right of children to health (article 24) and
- the right to an adequate standard of living (article 27).

7 Is there a separate human rights treaty covering sex and gender diversity?

There is no separate human rights treaty focusing on sex and gender diversity; but it is clear that people who are sex and gender diverse have the right to enjoy all human rights available to other members of the community. In particular, the fundamental rights of non-discrimination and equality before the law applies to people who are sex and gender diverse.

These non-discrimination and equality before the law provisions are found in the International

Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In March 2007, a group of human rights experts adopted what is known as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. The Yogyakarta Principles confirm that all international human rights laws apply to people who are sex and gender diverse. For more information on the Yogyakarta Principles, please see <http://www.yogyakartaprinciples.org>.

8 HREOC's research into sex and gender diversity

In 2006, HREOC conducted a National Inquiry into discrimination against people in same-sex relationships regarding access to financial and work-related entitlements and benefits. The inquiry is known as the *Same-Sex: Same Entitlements* Inquiry (the Inquiry). The *Same-Sex: Same Entitlements* report was launched in June 2007. The *Same-Sex: Same Entitlements* report can be found at http://www.humanrights.gov.au/human_rights/samesex.

Whilst conducting the Inquiry, HREOC also heard about some of the discrimination experienced by sex and gender diverse people. In particular, HREOC heard about the difficulties in having the appropriate sex listed on official documents.

We received submissions that dealt with sex and gender diversity issues from:

- Sex and Gender Education Australia (SAGE)
- WA Gender Project

See section 17.3 of the *Same-Sex: Same Entitlements* report for more information.

Since that time HREOC has been conducting preliminary research into the human rights issues affecting people who are sex and gender diverse.

HREOC has referred to:

- *To Be Who I Am*, the report of the New Zealand Human Rights Commission's inquiry into the discrimination experienced by transgender people and
- *Tranznation*, the report of the Australian Research Centre in Sex, Health & Society at La Trobe University into the health and wellbeing of transgendered people in Australia and New Zealand.

HREOC has also spoken to individuals and organisations representing the sex and gender diverse community.

9 What are some of the human rights issues concerning sex and gender diversity?

9.1 Official and identity documents

Many documents and records identify whether a person is male or female. Official documents such as birth certificates and passports are important in proving citizenship and identity. Many forms also require people to nominate their sex. Some transgender, transsexual or intersex people have documents that state an inappropriate sex.

The main identification used as evidence of a person's sex is a birth certificate or passport. In addition to a birth certificate and passport, a 'recognition certificate' can be used as evidence by people who have undergone sexual affirmation surgery in South Australia or Western Australia. There are many other records that identify a person's sex including medical records, bank statements and employment records.

Australia does have systems that enable the sex marker on official documents to be changed. However, not all transgender, transsexual and intersex people can access those systems.

Changing the sex on some or all documents is difficult for:

- people who are married and transsexual
- people who have not undergone sex affirmation surgery and are transgender or transsexual
- people who are intersex or intergender and
- people who are born overseas and unable to change their birth certificate in their country of birth.

There are no nationally consistent procedures to assist people who are transgender, transsexual or intersex attempting to change their documents. The process may be time consuming, frustrating and inconsistent. The process is not streamlined so people may need to liaise with several government departments.

Some approaches to these issues identified by the sex and gender diverse community include:

- encouraging gender neutral forms by removing the necessity to list sex on official forms and documents where possible
- forms and official documents to provide a third option (perhaps an I for intersex or an 'other' option) and

- legislative reform based on the United Kingdom system where surgery is not a prerequisite for a person's sex to be changed on their birth certificate and is nationally consistent.¹

Questions on document identity

1. How does the issue of document identity affect the sex and gender diverse community?
2. Do you have any stories that might help describe the difficulties experienced by the sex and gender diverse community in obtaining appropriate documents?
3. Do you have any suggested approaches to addressing these issues?

9.2 Health policy and services

A number of issues relating the health of people who are sex and gender diverse may raise human rights concerns, including:

- surgery on intersex infants
- the treatment of youth who are transgender
- the eligibility of sex and gender dysphoria related treatment under the Medicare scheme
- inappropriate treatment of people who are transgender, transsexual or intersex by health workers and
- inappropriate and unsafe facilities and treatment for transgender, transsexual or intersex prisoners in detention.

Some approaches to these issues identified by the sex and gender diverse community include:

- developing of guidelines concerning surgery on intersex infants
- training for health professionals in health issues for people who are transgender, transsexual and intersex
- dialogue with surgeons and other health professionals working with people who are transgender, transsexual or intersex and
- reforming the Medicare scheme to cover sex and gender dysphoria related treatment.

Questions on health policy and services

1. How does health policy and services affect the sex and gender diverse community?
2. Do you have any stories that might help describe the issues that affect the health of the sex and gender diverse community?
3. Do you have any suggested approaches to addressing these issues?

¹ See *Gender Recognition Act 2004* (UK)

9.3 Protection from discrimination

Federal anti-discrimination regime

There is no federal law prohibiting discrimination on the ground of sex or gender diversity.

HREOC has the power to look into complaints based on:

- breaches of human rights
- sex discrimination and
- disability discrimination.

A complaint based on a breach of human rights can only be made against the Commonwealth government or one of its agencies. The action that is being complained about must breach a right recognised in relevant human rights instruments.² The ICCPR and the CRC are both relevant human rights instruments. Therefore, it may be possible for people who are sex and gender diverse to make a complaint based on a breach of human rights. See http://www.humanrights.gov.au/complaints_information/HREOCA_breaches.html for more information.

It may also be possible for a person who is transgender, transsexual or intersex to bring a complaint under the disability or sex discrimination acts:

- for some information on transsexualism and making a disability discrimination complaint see http://www.humanrights.gov.au/disability_rights/faq/Who_is_protected_/who_is_protected_.html#transsex or
- contact the Complaints team at HREOC on 1300 656 419 for more information about making a complaint under federal sex discrimination or disability discrimination legislation.

Complainants are required to show that they have been treated less favourably because of their sex or disability.

State and territory anti-discrimination regime

All states and territories have anti-discrimination laws that prohibit discrimination on the basis of transsexuality, gender identity or gender history.³

² See s 3, *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

³ *Discrimination Act 1991* (ACT), s 7; *Anti Discrimination Act 1977* (NSW), s 38A; *Anti-Discrimination Act 1996* (NT), ss 4 and 19(1)(c); *Anti-Discrimination Act 1991* (Qld), s 7; *Equal Opportunity Act 1984* (SA), ss 5 and 29; *Anti-Discrimination Act 1998* (Tas), ss 3 and 16; *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic), s 4; *Equal Opportunity Act 1984* (WA), s 35AB

For more information about complaints that arise out of state and territory anti-discrimination laws, please contact the Anti-discrimination and Equal Opportunity agencies in your state or territory.

However, state legislation does not adequately deal with prohibiting discrimination against intersex people. The New South Wales, Queensland and Victorian acts do protect intersex people who identify as either male or female. However, none of the acts protect intersex people who do not present as either male or female and are intergender.

Some approaches to discrimination protections identified by the sex and gender diverse community include:

- seeking confirmation on whether sex and gender diversity discrimination is covered under current federal anti-discrimination laws
- reforming current state and territory laws to include discrimination against people who are intersex
- encouraging the federal government to advocate for a nationally consistent anti-discrimination scheme which prohibits discrimination on the grounds of gender identity or genetic conditions.

Questions on protection from discrimination

1. How does discrimination affect the sex and gender diverse community?
2. Do you have any stories that might help describe the discrimination experienced by the sex and gender diverse community?
3. Do you have any suggested approaches for addressing these issues?

9.4 Education and awareness

People who are sex and gender diverse have experienced negative treatment from government agencies and the broader Australian community. Education and awareness about sex and gender diversity may assist in eliminating this negative treatment.

Many laws that regulate sex and gender diversity issues use language that does not acknowledge and promote sex and gender diversity. Examples include use of the phrase 'sex change operation' or grouping transgender, transsexual and intersex people under one definition.

Some approaches to these issues identified by the sex and gender diverse community include:

- encouraging all government agencies to review policies and practices to ensure these do not discriminate against, and are inclusive of, people who are sex and gender diverse

- promoting sex and gender diversity as a human rights issue and
- promoting appropriate and sensitive terminology when discussing sex and gender diversity issues.

Questions on education and awareness

1. How does general education and awareness about sex and gender diversity affect the sex and gender diverse community?
2. Do you have any stories that might help describe how education and awareness affects the sex and gender diverse community?
3. Do you have any suggested approaches for addressing these issues?

10 What will happen next?

HREOC will collate the feedback to this issues paper and determine the scope and outcome of the sex and gender diversity project.

Please send us your response by 30 May 2008.

Responses can be sent by:

- email to sarah.winter@humanrights.gov.au or
- post to Sex and Gender Diversity Project, HREOC at GPO Box 5218, Sydney NSW 2001.

HREOC will keep you updated on the sex and gender diversity project in the coming weeks.