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Commissioner Tim Wilson
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Dear Commissioner Wilson,

**Submission: Sexual Orientation Gender Identity & Intersex Rights Snapshot Report
consultation**

I thank you for the opportunity to provide comment to the consultation into *Sexual Orientation Gender Identity & Intersex Rights*.

The role of the South Australian Commissioner for Equal Opportunity is to administer the *Equal Opportunity Act 1984 (SA) (the Act)*. I am able to accept complaints of discrimination in areas such as employment, goods and services, housing, and education for grounds such as sexuality, chosen gender, marital or domestic partnership status, race, age, sex and disability. The Equal Opportunity Commission (**the Commission**) also has a role in providing equal opportunity training and education to the community.

Please find attached the Commission's submission for your consideration.

If you would like any further information regarding the Submission, please do not hesitate to contact Cecilia White, Manager Business and Community Engagement, on (08) 8207 2253 or at white.cecilia@agd.sa.gov.au.

Yours sincerely,

A handwritten signature in blue ink that reads 'Anne Gale'.

ANNE GALE
COMMISSIONER FOR EQUAL OPPORTUNITY

Submission by the Office of the Commissioner for Equal Opportunity, South Australia to the inquiry into *Equality, Capacity and Disability in Commonwealth Laws*.

The Equal Opportunity Commission (**the Commission**) acknowledges that there are a number of significant, ongoing issues related to SOGII rights including issues related to health and safety, rights to adopt children and to marry, and issues in relation to legal recognition of gender. This submission will touch on some of these, however the Commission’s responses will focus primarily on discrimination issues.

In respect to the questions for consideration, the Commission provides the following comments.

How well SOGII rights are respected and protected in Australia:

- **What legal protections currently exist, and how effective are they?**

Equal Opportunity Act 1984 (SA)

Part 3 of the *Equal Opportunity Act 1984 (SA)* prohibits discrimination on the ground of sex, chosen gender or sexuality. Chosen gender was added to the Act in 2009, along with a number of other new grounds such as caring responsibilities and mental illness. Prior to the 2009 changes to the Act, ‘transsexuality’ was covered as sexuality discrimination and defined as “a person of one sex who is assuming the characteristics of the other sex”.

Definitions of the terms ‘sexuality’ and ‘chosen gender’ are currently outlined in the Act as follows:

‘chosen gender’	‘For the purposes of this Act, a person is a person of a chosen gender if — (a) the person identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex; or (b) the person, being of indeterminate sex, identifies on a genuine basis as a member of a particular sex by assuming characteristics of the particular sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the particular sex’
‘sexuality’	‘sexuality means heterosexuality, homosexuality or bisexuality’

Despite welcoming the addition of the new ground and recognition that being transgender is not related to sexuality, the Commission considers that the legislated term ‘chosen gender’ is problematic for the following reasons:

- The term is not consistent with comparable legislation across Australia and federally.
- The use of the word ‘chosen’ is problematic as gender identity is not considered by medical professionals or by transgender persons to be ‘a choice’. Transgender is the widely accepted term used in the LGBTIQ, and wider, community and would be far more appropriate.

- The definition of the term 'chosen gender' in the Act excludes persons who do not identify as a member of a particular sex - hence a complaint made to the Commission from a person who did not identify as such would need to be referred to the Australian Human Rights Commission to avoid possible legal rulings that the complaint did not fall under the Act.

On a positive note, transgender individuals are often faced with legislation, policies, or practice that restrict recognition of their gender identity to persons who have undergone medical intervention. The Act does not do so, allowing people who have potentially been discriminated against by such policies or practice (although not legislation) to pursue a discrimination complaint.

Case study:

Enquirer from a support organisation rang for advice on transgender provisions in the Act and in the federal SDA. She is enquiring for parents of a six-year-old transgender child who plays mixed sport. The association is now saying that the parents will need to provide a medical report for the child to continue to play as their chosen gender. Advised that wording in the Act supports argument that this should not be required. Also discussed EOC complaint process and referred to AHRC to check re. SDA.

Case study:

Complainant (C) is transgender and identifies as female. She states that her telephone and internet provider (R) will not acknowledge her gender identity in her title and continue to refer to her as Mr in their correspondence despite C asking them repeatedly to refer to her as Ms. Matter resolved without a conciliation conference with R agreeing to provide an apology to C and to review and change policy and procedures to ensure this doesn't happen to anyone else again.

The Act currently contains exemptions from Part 3 for religious bodies, covering:

- ordination or appointment of priests, ministers of religion or members of a religious order
- training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order
- administration of a body established for religious purposes in accordance with the precepts of that religion
- any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Complaints and enquiries made under the Equal Opportunity Act 1984 (SA)

Typically, the South Australian Equal Opportunity Commission receives few complaints or enquiries related to discrimination on the basis of chosen gender or sexuality. The Commission notes that the low numbers of complaints and enquiries could indicate that many LGBTIQ individuals feel marginalised and, hence, do not have confidence in formal complaint processes to resolve issues they are experiencing.

Where such discrimination occurs in South Australia, people are now also generally able to make a discrimination complaint under either the *Equal Opportunity Act 1984 (SA)* or under the *Sex Discrimination Act 1984* (to the Australian Human Rights Commission). Prior to 2013, however, sexual orientation, gender identity and intersex status were not included in the Sex Discrimination Act.

Despite being small, numbers of complaints and enquiries are fairly consistent year after year and the discrimination issues raised are often serious, indicating the ongoing need for discrimination legislation. The numbers of chosen gender and sexuality complaints and enquiries made to the Commission over the past four years are below:

Complaints 2010-14

(count, as a % of all complaints lodged)

	2010-11	2011-12	2012-13	2013-14
Chosen gender	1 (0.4%)	5 (1%)	2 (1%)	2 (1%)
Sexuality	5 (2%)	8 (2%)	5 (2%)	6 (3%)

Enquiries 2010-14

(count, as a % of all enquiries)

	2010-11	2011-12	2012-13	2013-14
Chosen gender	12 (0.8%)	18 (1.2%)	22 (1.4%)	18 (1.3%)
Sexuality	28 (2%)	25 (1.6%)	27 (1.8%)	23 (1.6%)

(numbers include enquiries made by advocates, employers seeking advice, etc.)

Case study:

Enquirer and his partner were refused a rental property on account of the fact that they are two men in a homosexual relationship. The private landlord said that the property was only for a man and a woman. A complaint form was sent to the enquirer.

Case study:

Enquirer is a year 10 student at a regional school. He is unsure about his sexuality but no one at the school knows. He is upset because "almost everyday someone is homophobic and the teachers do nothing and it hurts every single time they say homophobic things" even though they are not directed at him. He has not brought up the subject with a teacher as yet but has been talking to a kids help line counsellor to ask if teachers should be doing something about this. At one point, he considered suicide but says that he is now "over it". Advised that he could consider lodging a complaint but also referred to SHine SA who have said that they can speak to the school confidentially and try to get them to take action to reduce homophobia at the school.

- **What are some specific and ongoing issues that require the protection of SOGII rights?**

Based on approaches made to the Commission, two areas that seem to be of emerging concern are accommodating transgender children at school and transgender persons in sport. We have been approached not only by transgender persons who believe that they have been discriminated against but also by organisations seeking guidance on how or if they should accommodate transgender applicants according to their gender identity.

SOGII rights issues at school

The Commission has received some recent enquiries related to accommodation of same-sex attracted and transgender children at school. Transgender students, in particular, can face significant hurdles when it comes to uniforms and recognition of their identified gender.

Case study:

Caller's 6 year-old child is transgender and identifies as male. Her child attends a private school and she has requested that the school allows her child to wear the male uniform. The school is refusing saying that she has put her child down as female on previous forms (such as when she first registered when her child was one). Previously her child hadn't had a formal diagnosis, so caller says that she felt obliged to put down female on forms viewing them as legal documents. Discussed wording in the Equal Opportunity Act and that there is no requirement for medical assessment. Will send complaint form.

Case study:

Caller's daughter is at school and has recently identified as same sex attracted. She attends a religious school and the school have advised that she is not allowed to hug other girls at school. There is no similar rule for heterosexual girls hugging other students.

Transgender people and sport

In recent years, the Commission has also had a number of enquiries related to transgender people and sport. Most of these have been from sporting organisations seeking advice.

Both the *Equal Opportunity Act 1984* (SA) and the *Sex Discrimination Act* includes exemptions for single-sex sporting competitions where strength, stamina or physique is relevant.

In the *Equal Opportunity Act 1984* (SA), the exemption contained in Section 48 (a) provides that it is not unlawful to exclude a person from competing in a sporting activity on the ground of sex where strength, stamina or physique is relevant to the outcome of the competition. That section does not cover discrimination based on a person's chosen gender. Therefore, where a person genuinely identifies as a member of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living or as a member of the opposite sex, and is treated unfavourably on this basis then that is unlawful.

The Commission is aware that some sports governing bodies require that, particularly at a professional level, each contestant seeking registration must produce a birth certificate

indicating their gender or a Recognition Certificate. It is arguable that this could amount to unlawful discrimination on the ground of chosen gender.

However, the Commission acknowledges that the issues relating to participation in sport by transgender persons are complex and there remains a need to balance the right of individuals to participate in sport as their chosen gender against the right of individuals to compete in a fair competition which aligns with their strength, stamina and physique and in which other competitors do not have an unfair advantage in that sense.

The issues are internationally addressed for example by the IOC (International Olympic Committee) in their 2003 Statement of the Stockholm Consensus on Sex Reassignment in Sports (www.olympic.org/assets/importednews/documents/en_report_905.pdf) and the IOC Regulations on Female Hyperandrogenism (www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf). These documents provide guidance for sporting administrators, but note they only govern participation in elite level sport (i.e., Olympic games).

The Commission's view is that every reasonable effort should be made to facilitate fair participation in sporting competitions of a person's chosen gender and that in practice very few individuals will undergo gender reassignment surgery (in particular those transitioning from female to male).

Case study:

Referred by the Office for Recreation and Sport, enquirer has a transgender athlete who is joining a sporting club and hence be subject to both the state and national governing bodies for the sport.

This is the first transgender athlete that the organisation has had. The enquirer was seeking advice on the do's and don'ts before the respective boards implement any rulings in this specific case.

Case study:

Caller from a state sport governing body. They have had an enquiry from a club in a remote Aboriginal community who have a transgender female who wants to play the sport for their club team in a female competition. Caller wanted to know what the EO Act says in this regard re: potential discrimination against this player and also what practical steps the club can take to prevent and address any complaints or problems that may occur with other clubs in particular.

Discuss chosen gender provisions under the EO Act in relation to sport - clubs and associations. Refer to Rec & Sport to see if have any experience/practical strategies in regard to this issue for the club.

It can be seen that this is an area which requires a great deal more focus heading into the future. Even where organisations are seeking to "do the right thing", there is a lack of clarity, appropriate guidelines, and good practice examples. The Commission also suggests that there needs to be a consistent approach across all levels from amateur to elite to allow players to progress in their sport, and be confident that they can do so.

Examples of legislation, policies and practices by government that unduly restrict SOGII rights:

- **What legal barriers exist to SOGII rights?**
- **What policy barriers exist to SOGII rights?**
- **What impact do these barriers have on the lives of LGBTI individuals?**

The Commission notes that there are a number of legal and policy barriers to SOGII rights, many of which the Commission has insufficient knowledge of to comment on. The following issues are ones that, while the *Equal Opportunity Act 1984* cannot provide any redress, are raised with the Commission from time to time by other organisations, advocates, and the public.

Adoption

The South Australian *Adoption Act 1988* does not currently allow same-sex couples to jointly adopt a child. Only a heterosexual couple, or in exceptional circumstances a single person, can legally adopt in South Australia (*Adoption Act 1988* s. 12). If an adoption occurs under the law of another Australian jurisdiction (or under the law of many other countries), the Commission understands that that adoption will be recognised in South Australian law, should the family move here.

The Commission suggests that the law should consider objectively the prospective parent's fitness, ability and commitment to provide the care and nurture required by each particular child, regardless of the prospective parent's sexuality or marital status.

South Australia's adoption laws are currently being reviewed, with a committee expected to report the findings of a public consultation to Government in June 2015.

Marriage

A high-profile SOGII rights issue is undoubtedly same-sex marriage. This includes the ability for same-sex couples to marry in Australia and also legal recognition of same-sex marriage that has taken place outside of Australia. The Commission notes that denying access to, and recognition of, marriage is treating one group of people less favourably than others based on their sexuality.

Where a transgender person is married, they are unable to obtain a recognition certificate (which identifies a person who has undergone a reassignment procedure as being of the sex to which the person has been reassigned) under South Australian sexual reassignment legislation without first divorcing. In many cases, transgender individuals wish to stay married to their spouse. Legalising same-sex marriage may negate this issue however Australian Marriage Equality national director Rodney Croome believes that the forced divorce provision in the Sexual Reassignment Act could be changed without changes to the Marriage Act which specifies only who is able to enter into a marriage and is silent on any matters around sexual reassignment (www.adelaidenow.com.au/news/south-australia/adelaid-father-of-four-who-had-a-sex-change-has-been-told-to-end-20year-marriage-to-be-recognised-as-a-female/story-fni6uo1m-1226954498187).

It is also well recognised that same-sex partners can experience issues (with schools, medical services, and care facilities, for example) despite legal recognition of same-sex (de facto) relationships in South Australia.

Case study:

Enquirer changed her last name to her same-sex partner's name through Births, Death and Marriages. Changed her name everywhere except her mortgage, because it would cost her \$1000. They are buying a house, in her partner's name. She is borrowing money for renovations. The bank has said that it is not happy with the explanation that she has given about why she changed her name.

Her loan was meant to be finalised by today. The house settles next week and they will not be able to proceed without the additional monies.

Advised that, if the decision of the bank was based on sexuality, it could be unlawful. If the bank has a different policy about name changes due to marriage then this could also be unlawful discrimination

What is currently being done, and what more could be done to promote a culture of respect for SOGII rights?

Workplace training

The Equal Opportunity Commission has a dual role, both assisting people to resolve complaints of discrimination, and providing employers with training and policy development to prevent discrimination occurring. In response to a request from a staff member of a State Government agency who was transitioning, the Equal Opportunity Commission developed a workshop in 2012 entitled '*Transgender Issues & R-E-S-P-E-C-T*' which has been delivered to three organisations to date.

Workshop objectives are as follows:

At the end of a two-hour session, participants will be able to:

- understand different terminology that is used about people who identify as transgender;
- understand their role in accommodating the transition of a staff member from **organisation name**;
- deal with all staff in a respectful way including anyone who is going through a transition;
- ask questions.

The workshops have been well received, with positive feedback from management and staff, including the staff members who are transitioning. Sessions such as this can open up dialogue, allay fears, and help promote cultural change.

The Commission also looks for other opportunities to promote a culture of respect for SOGII rights. Last year, for example, the Commission held a series of 'lunch and learn' sessions where the first guest speaker was Adelaide barrister Heather Stokes who spoke about her experience of transitioning. Some feedback from the session is below:

"Heather's courage (or stubbornness as Heather called it) was inspiring and the lessons learnt through her sharing are not limited to Heather's specific circumstances. For me,

the session provoked thought and many positive conversations subsequently amongst my friends and colleagues”.

“I found the talk really interesting. We have had a couple of employees in our organisation transition and it was beneficial to see how Heather approached the challenge of letting the workplace know”.

The Commission also uses our websites and social media to share research, news stories and resources that help promote SOGII rights.

Support for schools and school students

As mentioned, the Commission has recently received some enquiries related to transgender and same-sex attracted children at school and, while children (or their parents on their behalf) can make a discrimination complaint, the Commission is pleased to see a number of resources and support organisations emerging for schools and LGBTIQ students. These include:

- Safe Schools Coalition AUS (www.safeschoolscoalition.org.au)
- The Equal Opportunity Commission of Western Australia’s *Supporting Sexual and Gender Diversity in Schools* Guidelines (www.eoc.wa.gov.au/community-projects/safe-schools-wa)
- NSW Education bulletin - Transgender students in schools - legal rights and responsibilities (www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_55.pdf)

The Commission regularly refers enquirers, including schools, to resources such as these and believes that this often enables issues to be resolved without needing to go through a formal complaint process. The Commission has recently met with SHine SA who will be developing, with some input from the Commission, a resource for South Australia.

Other LGBTIQ resources

Other LGBTIQ resources that the Commission refers people to include:

- SHine SA - Sexual Health Information Networking & Education SA
- Play by the Rules - Homophobia in Sport Toolkit (www.playbytherules.net.au/toolkits/homophobia-in-sport-toolkit). This includes articles, videos, tools and education resources to help create awareness of LGBTI issues in sport.
- qlife.org.au. National counselling and referral service for people of diverse sex, genders and sexualities.
- allcoloursofgrey.com. This is a South Australian website that has been developed with the aim of supporting same sex attracted people in regional areas.

South Australian LGBTIQ Inclusion Strategy

On 24 August 2012, in recognition of the levels of social exclusion experienced by those in the Lesbian, Gay, Bisexual, Transgender Intersex and Queer (LGBTIQ) communities, the State Government announced that it would develop a South Australian LGBTIQ Inclusion Strategy.

The development of the *South Australian Strategy for the Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer People 2014-2016* (LGBTIQ Inclusion Strategy) was led by the Department for Communities and Social Inclusion (DCSI) in partnership with the LGBTIQ communities. The strategy can be found at:

www.sa.gov.au/_data/assets/pdf_file/0007/59470/DCSI-608-PCD-LGBTIQ-Strategy-2014-Booklet_WEB.pdf

In February 2013, the Rainbow Advisory Council was established in order to:

- inform the development of the LGBTIQ Inclusion Strategy
- provide advice to State Government agencies regarding policies, programs, services and processes, in order to assist them to create and embed LGBTIQ inclusion strategies in their business
- provide advice and recommendations to the Chief Executive of DCSI on current and emerging issues affecting LGBTIQ people.

In the Commission's view, training and education, policies and strategies, support services and resources are all key in helping to break down the barriers that still exist for LGBTIQ individuals.

The existence of legislative barriers, however, does send a message of social inequality that will be hard to overcome until these barriers are removed.