



Australian  
Human Rights  
Commission

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# Australian Government

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## Guidelines on the Recognition of

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### Gender: Consultation Draft

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April 2013

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE  
ATTORNEY-GENERAL'S DEPARTMENT**

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## Table of Contents

<b>1</b>	<b><i>Introduction</i></b> .....	<b>3</b>
<b>2</b>	<b>Summary</b> .....	<b>3</b>
<b>3</b>	<b>Recommendations</b> .....	<b>4</b>
<b>4</b>	<b>The Sex Files Report</b> .....	<b>4</b>
<b>5</b>	<b>Human rights and the recognition of intersex and gender identity</b> .....	<b>5</b>
<b>6</b>	<b>The Guidelines</b> .....	<b>6</b>
<b>6.1</b>	<b><i>Sex and Gender Classification</i></b> .....	<b>6</b>
<b>6.2</b>	<b><i>Proof of Sex and Gender</i></b> .....	<b>7</b>
<b>6.3</b>	<b><i>Collecting Sex and Gender Information</i></b> .....	<b>7</b>
<b>6.4</b>	<b><i>Queries and complaints</i></b> .....	<b>8</b>
<b>6.5</b>	<b><i>Implementation</i></b> .....	<b>8</b>

## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Attorney-General's Department consultation on the *Australian Government Guidelines on the Recognition of Sex and Gender Consultation Draft* (Guidelines).
2. The Guidelines are a response to the Commission's *Sex Files* concluding paper. The Commission commends the Australian Government for introducing a reform which will make it easier for individuals to have their sex and/or gender recognised by the Government. In conjunction with the introduction of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) (SDA Bill), the Guidelines represent an important step forward for people discriminated against on the basis of their gender identity or because they are intersex.

## 2 Summary

3. In 2009 the Commission consulted on the legal recognition of sex and gender in official documents and government records. The consultation revealed that there are significant limitations in the way that official documents and government records record sex and gender. The result of the consultation was the *Sex Files* concluding paper which included 15 recommendations.
4. These recommendations included that the 'federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals'.<sup>1</sup> The Commission is encouraged to see the Government develop the Guidelines in response to this recommendation. The Commission supports the adoption of the Guidelines.
5. The Commission also considers that the federal government should take a strong leadership role in ensuring the processes and criteria throughout Australia are consistent, streamlined and fair for people who wish to change their legal sex or gender. The implementation of the Commonwealth's approach in the Guidelines will assist in this process.
6. The Commission strongly supports the Guidelines. In particular the Commission is encouraged to see that the Guidelines:
  - provide for individuals to be recognised as neither male nor female
  - do not require surgery as a criterion for being recognised as a particular gender
  - do not include marital status as a criterion for changing gender information on government records
  - provide for consistency across the Australian Government.

7. The Commission encourages the Government to consider some further options to strengthen the effectiveness and accessibility of the Guidelines.

### 3 Recommendations

8. The Australian Human Rights Commission recommends that:
  - The Australian Government Guidelines on the Recognition of Gender be adopted and enter into force by 1 July 2013 **[Recommendation 1]**.
  - The Government use the Guidelines as a platform for developing a nationally consistent approach to the legal recognition of sex and/or gender with state and territory governments **[Recommendation 2]**.
  - Individuals not be required to select a personal title which is inconsistent with their sex or gender **[Recommendation 3]**.
  - Evidence from Registered Psychologists certifying an individual's sex or gender should satisfy the requirements of the Guidelines **[Recommendation 4]**.
  - The Guidelines be more explicit on the legitimate reasons why individuals may have conflicting records of gender **[Recommendation 5]**.
  - The Guidelines refer to the collection of sex and gender-disaggregated data in paragraph 24 and clarify that this data should continue to be collected where it is necessary for the ongoing monitoring of equality between men and women **[Recommendation 6]**.
  - The Guidelines reference the Commission as a mechanism for enquiries and complaints about gender identity and intersex discrimination, subject to the passage of the SDA Bill **[Recommendation 7]**.
  - The Guidelines include a requirement for departments and agencies to provide an implementation report after 18 months **[Recommendation 8]**.
  - The Guidelines include a requirement that departments and agencies provide clear and accessible information on their website about how sex and/or gender can be amended in government records and documents **[Recommendation 9]**.

### 4 The Sex Files Report

9. In 2009 the Commission consulted on the legal recognition of sex and gender in official documents and government records. The consultation

revealed that there are significant limitations in the way that official documents and government records record sex and gender. The result of the consultation was the *Sex Files* concluding paper which included 15 recommendations.

10. These recommendations included that the 'federal government should consider the development of national guidelines concerning the collection of sex and gender information from individuals'.<sup>2</sup> The Commission is encouraged to see the Government develop the Guidelines in response to this recommendation. The Commission supports their adoption.
11. **The Commission recommends that the Australian Government Guidelines on the Recognition of Gender be adopted and enter into force by 1 July 2013 [Recommendation 1].**
12. The Guidelines are consistent with the Government's commitment in the *National Human Rights Action Plan 2012 (Action Plan)*.<sup>3</sup> In the Action Plan the Government also committed to 'work with the states and territories to develop a nationally consistent approach to legally changing sex'.<sup>4</sup> This is also in response to the *Sex Files* recommendations.<sup>5</sup> The Commission considers that the federal government should take a strong leadership role in ensuring the processes and criteria throughout Australia are consistent, streamlined and fair for people who wish to change their legal sex. A national approach is necessary given the complexities and inconsistencies across, and between, federal and state and territory governments. The implementation of the Guidelines will assist in this process.
13. **The Commission recommends that the Government use the Guidelines as a platform for developing a nationally consistent approach to the legal recognition of sex and/or gender with state and territory governments [Recommendation 2].**

## **5 Human rights and the recognition of intersex and gender identity**

14. There is no separate international human rights agreement that deals specifically with gender identity and intersex, however all people have the same human rights regardless of their gender identity or because they are intersex. The Commission outlines relevant human rights standards in the *Sex Files* concluding paper.<sup>6</sup>
15. The Yogyakarta Principles provide specific guidance on how these standards should be interpreted in relation to the protection of gender identity.<sup>7</sup> While not legally binding they are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.
16. In particular, Yogyakarta Principle 3 outlines the right to recognition before the law for all people regardless of gender identity:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

17. In addition, Yogyakarta Principle 3 details actions that countries such as Australia should undertake to ensure they are not in breach of their human rights obligations. These include taking all necessary legislative, administrative and other measures to ensure that procedures exist whereby all government-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity. The Commission is encouraged to see the Government's steps in this regard.

## **6 The Guidelines**

18. The Commission strongly supports the development of the Guidelines. The Commission is particularly encouraged to see that the Guidelines:
  - provide for individuals to be recognised as neither male nor female
  - do not require surgery as a criterion for being recognised as a particular gender
  - do not include marital status as a criterion for changing gender information on government records
  - provide for consistency across the Australian Government.
19. The Commission encourages the Government to consider some further options to strengthen the effectiveness and accessibility of the Guidelines.

### **6.1 Sex and Gender Classification**

20. Most personal titles, such as Mr and Mrs, are gendered to correspond with either 'male' or 'female'. Given the option within the Guidelines to be recognised as X (Intersex/Indeterminate/Unspecified), and that the collection of sex/gender data is not always required, the Guidelines could be amended to include guidance for departments and agencies that it may not be appropriate to require individuals to select from a list of possible titles which may be inconsistent with their sex or gender. Instead, individuals could self-nominate a title or remain silent. This is

particularly important in electronic forms which often includes 'title' as a mandatory field.

21. **The Commission recommends that individuals not be required to select a personal title which is inconsistent with their sex or gender [Recommendation 3].**

## **6.2 Proof of Sex and Gender**

22. In addition to registered medical practitioners, the Government should give consideration to broadening the category of medical professionals who are able to provide evidence certifying the sex and/or gender of an applicant to include Registered Psychologists. This is because psychological counselling concerning sex or gender identity should satisfy the criteria for sex affirmation.<sup>8</sup>
23. **Evidence from Registered Psychologists certifying an individual's sex or gender should satisfy the requirements of the Guidelines [Recommendation 4].**
24. As identified in the footnote to paragraph 21 of the Guidelines, there may be legitimate reasons why people may hold a passport in a gender which is different to that on other government records. This may be because of safety reasons or because of difficulties posed with travelling across borders.<sup>9</sup> Particularly during the implementation phase of the Guidelines it may be helpful to also include this point in the body of the Guidelines as an education tool for public servants.
25. **The Commission recommends that the Guidelines be more explicit on the legitimate reasons why individuals may have conflicting records of gender [Recommendation 5].**

## **6.3 Collecting Sex and Gender Information**

26. The Commission welcomes the specific recognition in the Guidelines that collecting and maintaining gender-disaggregated data is crucial to the ongoing monitoring of equality between men and women. This is consistent with Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). However the Guidelines should clarify that the data to be collected for CEDAW purposes should be 'sex and gender-disaggregated data'. Further, as an educative tool for public servants the Guidelines should clarify that departments and agencies should continue to collect this data where it is necessary for the ongoing monitoring of equality between men and women.
27. **The Commission recommends that the Guidelines refer to the collection of sex and gender-disaggregated data in paragraph 24 and clarify that this data should continue to be collected where it is necessary for the ongoing monitoring of equality between men and women [Recommendation 6].**

## 6.4 Queries and complaints

28. Subject to the passage of the SDA Bill the Guidelines could be amended to refer to the Commission as a mechanism to accept enquiries or complaints about alleged discrimination on the basis of gender identity or intersex status under the SDA.
29. **The Commission recommends that the Guidelines reference the Commission as a mechanism for enquiries and complaints about gender identity and intersex discrimination under the SDA, subject to the passage of the SDA Bill [Recommendation 7].**

## 6.5 Implementation

30. The Commission acknowledges that a certain period of time is necessary for government departments and agencies to update policies and systems to reflect the Guidelines. To ensure ongoing implementation within departments and agencies, an implementation report to the Attorney-General's Department after 18 months may be beneficial.
31. **The Commission recommends the Guidelines include a requirement for departments and agencies to provide an implementation report to the Attorney-General's Department after 18 months [Recommendation 8].**
32. The Commission supports the Guidelines as a tool for standardising the collection and recognition of sex and gender across government departments and agencies, and as a tool for educating public servants. In addition to this the Commission recommends that paragraph 40 be expanded to specifically require these departments and agencies to provide clear and accessible information to the public about how individuals can amend their gender in government documents.<sup>10</sup>
33. **The Commission recommends the Guidelines include a requirement that departments and agencies provide clear and accessible information on their website about how sex and/or gender can be amended in government records and documents [Recommendation 9].**

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<sup>1</sup> Australian Human Rights Commission, *The sex and gender diversity project: Concluding paper* (2009), rec 10. At <http://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009> (viewed 18 April 2013).

<sup>2</sup> Australian Human Rights Commission, above.

<sup>3</sup> Australian Government, *National Human Rights Action Plan* (2012), item 209. At <http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx> (viewed 8 April 2013).

<sup>4</sup> Australian Government, *National Human Rights Action Plan*, above, item 208.

<sup>5</sup> Australian Human Rights Commission, note 1, rec 11.



<sup>6</sup> Australian Human Rights Commission, above, pp 11-12. Also see Australian Human Rights Commission, *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity* (2011), pp 7-8. At

<http://www.humanrights.gov.au/publications/consultation-protection-discrimination-basis-sexual-orientation-and-sex-and-or-gender> (viewed 18 April 2013).

<sup>7</sup> *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007). At <http://www.ypinaction.org/> (viewed 22 April 2013).

<sup>8</sup> See Australian Government, *Australian Government Guidelines on the Recognition of Gender (Consultation Draft)* (2013), para 20. Also see Australian Human Rights Commission, note 1, p 31.

<sup>9</sup> See for example Australian Human Rights Commission, above, s 8.2.

<sup>10</sup> Also see Australian Government, *The sex and gender diversity project: Concluding paper* (2009), rec 15. At

<http://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009> (viewed 18 April 2013).