



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

2011

Addressing
sexual orientation
and sex and/or
gender identity
discrimination



Consultation report



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Foreword

In October 2010, the Australian Human Rights Commission commenced a public consultation to canvas the experiences and views of people who may have been discriminated against on the basis of their sexual orientation or sex and/or gender identity. The task was a listening exercise, and a lot needed to be said.

Equality and freedom from discrimination are fundamental human rights belonging to all people.

Yet the voices of those who participated in our consultation revealed that many people continue to be denied equality and freedom from discrimination based on their sexual orientation or gender identity.

Participants revealed personal stories of discrimination, vilification and harassment that provide compelling evidence of the need for change. They also presented evidence of the negative impact discrimination has had on their health and wellbeing.

The experiences of discrimination shared during the consultation were nothing new. The Commission has previously reported on the stigmatisation and discrimination faced by lesbian, gay, bisexual, trans and intersex people in the *Same-Sex: Same Entitlements* (2007) and *Sex Files: The legal recognition of sex in documents and government records* (2009).

Although the work of the Commission in this area was recognised throughout the consultation, many participants expressed disappointment that government has not yet acted upon many of the recommendations made in *Sex Files*. Many trans and intersex people continue to face substantial difficulties in obtaining legal recognition of their sex. We commend the Australian Government for the initial steps that have been taken to respond to the Commission's recommendations regarding the process for changing legal sex. Significant further changes are required in this area.

Just as heterosexual people are not a homogenous group, neither are lesbian, gay, bisexual, trans and intersex people. The consultation revealed that different challenges are faced by lesbian, gay and bisexual people on the one hand, and trans and intersex people on the other. It is important when addressing discrimination that these different experiences are acknowledged. This report aims to capture the diverse range of views expressed by participants in the consultation.



Catherine Branson QC

President
Australian Human Rights Commission

People of all sexual orientations and gender identities deserve to be treated with respect and equality. Diversity is, after all, what makes a society vibrant. The overwhelming message from this consultation has been that people who experience discrimination on the basis of sexual orientation or sex and/or gender identity simply want to enjoy the same rights as others in the community; rights that so many of us take for granted. I hope that this report will inform the on-going process of strengthening human rights protections for everyone in our community, regardless of their sexual orientation or sex and/or gender identity.

A handwritten signature in black ink, appearing to read 'Catherine Branson'.

The Hon Catherine Branson QC
President
Australian Human Rights
Commission

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Section 1: Introduction

In October 2010, the Australian Human Rights Commission (the Commission) launched a consultation regarding the human rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people in Australia. This consultation process sought views from affected individuals and organisations about the steps that they felt would provide better human rights protection for LGBTI people in Australia. The consultation focussed on the experience of discrimination on the basis of sexual orientation and sex and/or gender identity and how protection from this kind of discrimination could be included in federal law.

This report summarises the broad range of views heard during the consultation.

The majority of consultation participants identified a need for greater protection from discrimination because of the high levels of discrimination, violence, harassment and bullying faced by LGBTI people. Unlike in state and territory laws, there is little protection in federal law from discrimination on the basis of sexual orientation and gender identity.

Some of the key issues identified by participants included the:

- importance of using appropriate, inclusive and empowering terminology
- benefits of having consistent and uniform laws across Australia
- benefits of having federal discrimination laws that would bind Commonwealth agencies
- importance of including gender identity and gender expression as protected grounds of discrimination
- need for government action in other areas such as health care, education, marriage equality, as well as reform of the requirements for changing a person's legal sex.

Some participants expressed opposition to federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity or argued for exemptions from such protections in order to protect the right to freedom of religion and belief and the right to freedom of expression.

This consultation report aims to inform and assist the implementation of elements of the Human Rights Framework, announced in April 2010.¹ The Human Rights Framework includes commitments to:

- develop exposure draft legislation harmonising and consolidating Commonwealth anti-discrimination laws (discrimination law review) and
- develop a new National Action Plan on Human Rights to outline future action for the promotion and protection of human rights.

The implementation of the Human Rights Framework provides a timely opportunity to consider steps that might be taken to protect and promote the human rights of people of all sexual orientations and sex and/or gender identities.

Importantly, in 2010 both of the major political parties affirmed their support for the inclusion of protection from discrimination on the basis of sexual orientation and gender identity in federal law.² The Australian Government reaffirmed its commitment to implementing this policy in its recent appearance before the United Nations Human Rights Council's Universal Periodic Review.³

The Commission is pleased to provide this consultation report to assist the Government in its consideration of how these protections might be included in federal law, and of other steps it might take to protect and promote the human rights of people of all sexual orientations and sex and/or gender identities.

The Asia Pacific Forum of National Human Rights Institutions (APF) contributed to funding this project as part of its program to promote the implementation of the Yogyakarta Principles. The Commission thanks the APF for its financial support, which has enabled us to conduct this consultation.

Section 2: The consultation methodology

The aim of this project was to conduct a targeted consultation regarding protections from discrimination on the basis of sexual orientation and sex and/or gender identity, and in particular to consider:

- the possible inclusion of protections from discrimination on these grounds in federal discrimination law
- any other measures that should be adopted as part of the National Action Plan on Human Rights.

The consultation involved the following steps:

- commissioning and publishing a Research Paper by Anna Chapman of the University of Melbourne, including an appendix of the specific definitions contained in state and territory anti-discrimination laws⁴
- publishing a short Discussion Paper, based on the Research Paper, outlining existing legal protections from discrimination on the basis of sexual orientation and sex and/or gender identity in Australia⁵
- calling for responses to the Discussion Paper
- holding public roundtables in both Sydney and Melbourne (with participants from other locations given the opportunity to apply for funding to attend)
- preparing a consultation report summarising the views expressed by participants throughout the consultation.

2.1 Background papers

On 1 October 2010, the Commission released a Research Paper and a Discussion Paper informing participants of the current legal protections from discrimination and providing questions for response.

The Commission sought comments from interested individuals and organisations regarding experiences of discrimination, the potential benefits of protection from discrimination, and how such protections might be included in federal law.

2.2 How did people contribute to the consultation?

People were invited to contribute to the consultation by:

- attending one of the roundtables in either Sydney or Melbourne
- sending in written comments by post or email
- completing questions from an online feedback form.

The Commission received responses from people in every state and in the Australian Capital Territory.

The Commission acknowledges the considerable effort made by all individuals and organisations that provided written comments, responded to the online feedback form or attended the roundtables.

2.3 Written comments

The Commission received comments from over 150 individuals and organisations (by written comment or in response to the online feedback form) including:

- individuals and couples of a wide range of sexual orientations and sex and/or gender identities
- parents, friends or family members of people who are lesbian, gay or bisexual
- organisations representing lesbian, gay, bisexual, trans and intersex people

- human rights, advocacy and legal bodies
- non-government organisations
- women's rights organisations
- unions
- religious organisations
- state and territory government agencies or statutory office holders
- state equal opportunity commissions
- academics.

Comments received were published on the Commission's website with the author's permission. These comments were unedited except where it was necessary to:

- protect private information (for example, telephone numbers and private addresses were removed)
- protect confidentiality (for example, names of third parties and participants at the roundtables were removed)
- remove language that might be considered offensive.

2.4 How was online feedback obtained?

The online feedback form was developed from questions in the Discussion Paper. This format was designed to allow short and direct feedback from the public.

The online feedback form was accessible from the Commission's website from 1 October until 26 November 2010.

Responses were received from 51 people, but only some participants responded to every question. A summary of responses to the online feedback form is available on the Commission's website.⁶

2.5 Consultation roundtables

The Commission conducted roundtable meetings in Sydney on 28 October 2010 and in Melbourne on 9 November 2010. The President of the Commission, Catherine Branson QC, hosted these roundtables, which were facilitated by an independent consultant.

In recognition of the diverse issues affecting LGBTI people in Australia, each roundtable was divided into two sessions. In each location, one session focused on issues relating to sexual orientation and the other on issues relating to sex and/or gender identity.

Due to limitations in Commission resources, roundtables were only held in Sydney and Melbourne. However, some funding was provided to enable a number of people from other states and territories to attend.

It was important to create a safe space for participants to feel comfortable sharing their experiences and views. As a result, the Commission undertook to not identify participants who made comments at the roundtables in either roundtable summaries or in this report.

A total number of 97 people attended the roundtables. Additionally, officers of the Attorney-General's Department attended in an observer capacity.

A summary of the roundtables is available on the Commission's website.⁷

Section 3: A note on terminology

The Commission recognises that terminology can have a profound impact on a person's identity, self-worth and inherent dignity. The use of inclusive and acceptable terminology empowers individuals and enables visibility of important issues. The Commission supports the right of people to identify their sexual orientation and sex and/or gender as they choose. The Commission also recognises that terminology is strongly contested, particularly terminology to describe sex and/or gender identity. The consultation revealed that there is no clear consensus on what is appropriate terminology in this area.

Some of the terminology used in this report is explained below:

LGBTI: An internationally recognised acronym which is used to describe lesbian, gay, bisexual, trans and intersex people collectively. Many sub-groups form part of the larger LGBTI movement.

Sexual orientation: The term 'sexual orientation' refers to a person's emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

Sex: The term 'sex' refers to a person's biological characteristics. A person's sex is usually described as being male or female. Some people may not be exclusively male or female (the term 'intersex' is explained below). Some people identify as neither male nor female.

Gender: The term 'gender' refers to the way in which a person identifies or expresses their masculine or feminine characteristics. Gender is generally understood as a social and cultural construction. A person's gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.

Gender identity: The term 'gender identity' refers to a person's deeply held internal and individual sense of gender.

Gender expression: The term 'gender expression' refers to the way in which a person externally expresses their gender or how they are perceived by others.

Intersex: The term 'intersex' refers to people who have genetic, hormonal or physical characteristics that are not exclusively 'male' or 'female'. A person who is intersex may identify as male, female, intersex or as being of indeterminate sex.

Trans: The term 'trans' is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated sex with or without medical treatment.

The Commission acknowledges that some participants expressed concern about the appropriateness of some of the terms outlined above, including LGBTI as an umbrella term and 'gender identity'.

At times, this report refers to the broader LGBTI movement where it was mentioned by participants or if necessary to describe people affected by discrimination on the basis of sexual orientation or sex and/or gender identity.

This report uses the phrase 'gender identity' in two specific contexts. First, international human rights discourse often uses the phrase gender identity. Second, many state and territory laws use a variation of this phrase. As a result, the phrase 'gender identity' is used when referring to international human rights agreements or state and territory laws.

This report also frequently uses the phrase 'sex and/or gender identity'. This term is used to refer to the whole spectrum of sex and/or gender in our community. It aims to include all people regardless of whether they identify within or outside of the binary gender framework.⁸

Section 4: Human rights and discrimination on the basis of sexual orientation or gender identity

There is no separate international human rights agreement that deals specifically with sexual orientation or gender identity. However, all people have the same human rights regardless of their sexual orientation or gender identity.

Some participants in the consultation argued that one of the benefits of federal laws prohibiting discrimination on the basis of sexual orientation or gender identity would be the fulfilment of Australia's international legal obligations.⁹ For example, the Victorian Bar and the Victorian Equal Opportunity and Human Rights Commission both referred to articles 2 and 26 of the *International Covenant on Civil and Political Rights*,¹⁰ (ICCPR) which require Australia to ensure that all persons are treated equally and not subjected to discrimination on the basis of status.¹¹

Below is an outline of how international human rights agreements have been interpreted to apply to people of all sexual orientations and sex and/or gender identities.

4.1 International Covenant on Civil and Political Rights

The ICCPR enshrines the rights of all people to non-discrimination and equality before the law. Australia has committed to uphold these standards.

Article 2(1) of the ICCPR sets out the principle of non-discrimination:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR sets out the principle of equality:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Other relevant rights set out in the ICCPR include the right to privacy (article 17) and the right to marry and found a family (article 23).

The ICCPR does not specifically refer to sexual orientation. However, the United Nations Human Rights Committee has found that the treaty includes to an obligation to prevent discrimination on the basis of sexual orientation.

In *Toonen v Australia*, the Human Rights Committee held that the reference to 'sex' (ICCPR article 2) and the right to privacy (ICCPR article 17) include sexual orientation.¹² The Committee has also held (in *Young v Australia*) that distinctions made between same sex couples and opposite sex couples in relation to veterans entitlements were discriminatory, in breach of article 26 of the ICCPR.¹³

As noted by the Law Council of Australia, it is likely that the principles of the ICCPR would extend to gender identity under its 'other status' grounds.¹⁴ The Human Rights Committee has, for instance, placed emphasis on the need to protect trans communities from violence, torture and harassment¹⁵ and to recognise the right of trans people to change their gender by permitting the issuing of new birth certificates.¹⁶

4.2 Other international human rights agreements

United Nations Committees have recognised the right to non-discrimination on the basis of sexual orientation under the following international human rights agreements:

- *International Covenant on Economic, Social and Cultural Rights*¹⁷
- *Convention on the Rights of the Child*¹⁸
- *Convention on the Elimination of All Forms of Discrimination against Women*.¹⁹

As noted by the Law Council of Australia, the Committee on Economic, Social and Cultural Rights has specifically stated that gender identity is recognised as a prohibited ground of discrimination.²⁰ The Committee on the Rights of the Child has commented on the rights of young people who are ‘transsexual’ and recommended that the United Kingdom government provide adequate information and support to homosexual and transsexual young people.²¹

The Committee is concerned that homosexual and transsexual young people do not have access to the appropriate information, support, and necessary protection to enable them to live their sexual orientation.²²

The Committee on the Elimination of Discrimination against Women has recognised that discrimination experienced by women is connected to discrimination on the basis of sexual orientation and gender identity.

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health status, age, class, caste, and sexual orientation and gender identity.²³

Australia has also agreed to be bound by the *International Labour Organization Convention No. 111* (ILO 111). This international agreement prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin. Parties to this convention can include additional grounds for domestic purposes, and in 1989 Australia added several grounds including ‘sexual preference’.²⁴

4.3 UN statements on sexual orientation and gender identity

Support for the view that international human rights standards apply to people of all sexual orientations and gender identities is found in several United Nations statements.

On 22 March 2011, the UN Human Rights Council issued a Joint Statement on Sexual Orientation and Gender Identity that was supported by 85 countries.²⁵ This builds on earlier statements in 2006 (supported by 54 countries) and in 2007 (supported by 66 countries).²⁶ These statements demonstrate the growing international support for and recognition of the rights of all people regardless of their sexual orientation or gender identity.

4.4 The Yogyakarta Principles

An interpretation of international human rights agreements and how they apply to people of all sexual orientations and gender identities is found in the Yogyakarta Principles, developed in March 2007 by a group of human rights experts.²⁷

The Yogyakarta Principles are not legally binding themselves, but are persuasive in shaping our understanding of how human rights obligations apply and relate to people of all sexual orientations and gender identities.

The Yogyakarta Principles reaffirm the rights of all people to equality before the law and the equal protection of the law without discrimination.²⁸ They also set out the actions that countries should take to implement these rights, including:

- embodying the principles of equality and non-discrimination on the basis of sexual orientation and gender identity into national constitutions or other appropriate legislation
- adopting appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.²⁹

The Preamble recognises the historical human rights violations faced by people who are lesbian, gay, bisexual, trans or intersex. However, the Principles themselves do not use these terms. Instead, the Yogyakarta Principles are phrased in neutral language that aims to recognise the rights of all peoples.³⁰

Section 5: Stories of discrimination, vilification and harassment

Understanding the experiences of discrimination, vilification and harassment suffered by people of all sexual orientations and sex and/or gender identities is an important first step in considering how legal protection from discrimination on these grounds might be framed. The consultation heard personal experiences of discrimination and harassment from some participants, while others relayed the challenges faced by partners, relatives, friends, associates, members and clients.

Experiences of discrimination differed greatly depending on whether the discrimination was based on a person's sexual orientation or on a person's sex and/or gender identity.

The consultation heard about:

- discrimination in employment
- discrimination in the provision of goods and services
- vilification and harassment
- bullying and harassment experienced by young people
- the impact of discrimination, vilification or harassment on mental health and wellbeing.

5.1 Discrimination in employment

Many participants reported experiences of discrimination in employment. These reports are supported by research indicating that such discrimination is commonplace. For example, a national survey of LGBT people in 2006 found that 10.3% of participants had been refused employment or denied a promotion based on their sexuality.³¹ Another workplace study found that:

- 52% of gay and lesbian employees surveyed were the subject of discrimination in their current employment because of their sexual orientation
- more than 17% of participants felt their careers had probably been restricted because of their sexual orientation.³²

(a) Discrimination in employment on the basis of sexual orientation

Many participants in this consultation described being denied employment or promotion opportunities or being dismissed or disciplined because of their sexual orientation. For example:

Robert and Matthew alleged they were dismissed from their cleaning job ... because they were a gay couple. The couple alleged that their employer regularly brought up the topic of their sexuality in work conversations, reduced their hours, and told them they wouldn't be given older people's houses to clean because they would not be acceptable to older people.³³

I worked for seven years in the 1970s for the Australian Public Service. I felt very vulnerable to discrimination during that time and believe that my sexual orientation was the uncited reason in at least one instance of not obtaining a promotion. I understand that great improvements have been made in the culture of the APS since that time, but I believe that all federal public servants should enjoy at least the same explicit protections under the law as their state counterparts.³⁴

The Inner City Legal Centre described how a client felt vilified and harassed by the actions of her employer:

Tania was employed by a church run disability service. After working for 18 months Tania attended work and found that the homepage on her work computer displayed a bible quote that said negative things about gay people. Tania assumed that this was a mistake and drew her team leader's attention to the quote. The next day the quote remained. Tania wrote a letter to the management explaining that she felt upset and unsafe having to look at that quote everyday and asked that it be replaced with a bible quote that did not vilify gay people. Three of Tania's colleagues also signed the letter. Tania was singled out and told that her gay agenda had no place in a Christian work place. Tania's professional reputation was then attacked, she was accused of poor work performance. Tania was also assigned shifts that she had previously indicated she would be unable to take

or were inappropriate. Tania contacted the [Anti-Discrimination Board] to see if she could lodge a complaint and was told that her employer may be able to rely on the religious exception in the Act. Tania left her job due to ongoing harassment.³⁵

(b) Discrimination in employment on the basis of sex and/or gender identity

A number of trans and intersex participants explained the unique challenges they faced in the workplace, including not being recognised as their preferred gender, being forced to disclose private information and being denied employment opportunities. For example:

Many companies are not willing to employ trans people, especially those of us who do not “pass” as the gender we are transitioning to, because we’re considered too “difficult” for the workplace. Others will employ us, but force certain requirements on us - the use of a badge with a gender-specific name, gender-specific uniforms, forcing us to use the wrong toilet, etc.³⁶

While a public servant I was referred to as “the freak” by several co-workers and received ongoing harassment by one particular employee after I had mentioned that I was Intersex. As I understood it then,

“While a public servant I was referred to as “the freak” by several co-workers and received ongoing harassment by one particular employee after I had mentioned that I was Intersex. As I understood it then, there was no protection for harassment on the basis of being intersex as the sexual harassment laws only protected males and females, and not Intersex.”

Participant

there was no protection for harassment on the basis of being intersex as the sexual harassment laws only protected males and females, and not Intersex.³⁷

The WA Gender Project described a trans man who:

[H]as his trans status repeatedly disclosed to other employees in the workplace. He reports that every time a new employee starts work, they are told that he is transsexual and that he “used to be a girl”. He says that new employees will often then begin to use female pronouns to refer to him after hearing this private information.³⁸

Other participants described being told they are no longer suitable for the role after their sex and/or gender identity has been revealed. For example:

I was working in a local retailer when I first began my social transition from female to male. I cut my hair very short, and started using my current name. The general manager of the company sent a photograph of me, and my new name in an email to all the managers in the group. I wasn’t comfortable with this, but he said that the rest of the group needed to know who they were talking to over the phone and email. I had been hired for an assistant manager position, so that made sense. I was horrified a few weeks later when I was told that I was not only being demoted from the position I was hired for, but being made a casual staff member (with no rostered shifts) because I wasn’t ‘fit for full time work’. I protested, and he said: “face it, you aren’t the girl we hired”.³⁹

Organisations representing people who are intersex also reported discrimination in employment for which there is no remedy:

[A] person may be discriminated against in the workplace with impunity if their sex is Intersex. Although current legislation provides for the protection of males and females against sex discrimination it makes no provision for those who have physical anatomies that are neither.⁴⁰

5.2 Discrimination in the provision of services

Many participants provided examples of discrimination in relation to the provision of services, including in:

- aged care
- health care
- emergency housing
- appropriate toilets and change rooms
- sport.

(a) Aged care

Participants drew attention to research that shows that many older LGBTI people have significant fear of harassment, poor treatment and alienation in aged care facilities.⁴¹ For example, GRAI (GLBTI Retirement Association Incorporated) referred to the following research:⁴²

- In comparison to older heterosexuals, older LGBTI people are two and a half times more likely to live alone, twice as likely to be single and over four times as likely to not have children. As a consequence, older LGBTI individuals may experience greater isolation, loneliness, lack of traditional family support and lack of recognition of partners.⁴³
- 20% of LGBTI respondents experienced discrimination from health care providers as a result of their same-sex relationship.⁴⁴

The consultation heard examples of discrimination in aged care facilities, including:

An older transgender woman with dementia, who had lived most of her life as a woman but had never had sex reassignment surgery, was forced by staff of the religious aged care facility where she was being cared for, to live as a man.⁴⁵

Several participants stressed the importance of education about sexual orientation and sex and/or gender identity for aged care service providers.⁴⁶

(b) Health care

During the consultation, trans and intersex people raised a range of concerns about experiences of discrimination based on sex and/or gender identity in the provision of health care. Issues raised by participants included:

- difficulties in accessing and funding sex affirmation treatment in Australia, including a lack of specialists in some areas and the fact that sex affirmation procedures are not funded through the Medicare system:

When I first started testosterone treatment and my body began to change I was really excited. But after a while I began to get more and more uncomfortable with my breasts. I had always been uncomfortable with them but this was different. I started to think that if I didn't have chest surgery soon I would kill myself.

“[O]lder LGBTI individuals may experience greater isolation, loneliness, lack of traditional family support and lack of recognition of partners.”

Participant

I was so lucky that someone helped me to pay for it because I couldn't afford it on my own. And now I just wonder how all of the other trans guys out there who can't afford it cope. It is the worst feeling in the world. I wouldn't wish it on my worst enemy.⁴⁷

- not being able to claim Medicare rebates for procedures which were not aligned with a person's legal sex:

In Western Australia, a person with an ovarian cyst went to hospital and was thought to be male and treated for appendicitis. He could not get a Medicare rebate for treatment of an ovarian cyst.⁴⁸

Intersex people are often rejected for medical procedures when their official sex is seen to conflict with their anatomical structures; e.g. ovaries in an apparent male and testes in an apparent female.⁴⁹

- inappropriate treatment by the medical profession, including disclosure of irrelevant information,⁵⁰ failure to recognise preferred sex and/or gender on medical records,⁵¹ and refusal of medical services:

“When I found a lump in my breast I was referred to a breast specialist who refused to see me straight away because ‘I might scare the women in the waiting room.’ I was instead required to wait 7 days before the specialist would see me.”

Participant

Toni is a transgender woman living in the inner city. Toni needed to attend a residential drug rehabilitation centre as she had been struggling with alcohol and opiate dependency. Her support worker called the local clinic, this clinic happened to be run by a religious based charity. The clinic informed Toni’s support person that there was an opening for Toni and that they would hold a place for her. When Toni presented at the clinic she was refused service. When asking why she was told there was no spot for her. Toni was sure that this refusal was based on the fact that she is a transgender woman.⁵²

- degrading treatment by medical service providers:

When I found a lump in my breast I was referred to a breast specialist who refused to see me straight away because “I might scare the women in the waiting room”. I was instead required to wait 7 days before the specialist would see me.⁵³

A person was placed in a male ward in a local hospital. When the receptionist was asked why she was on a male ward, the receptionist replied “because that is how we see him”.⁵⁴

(c) Emergency housing

The consultation heard of discrimination occurring in access to emergency accommodation sought by trans people. For example, the Freedom! Gender Identity Association described how a trans woman who had not had gender reassignment surgery was refused access to federally funded emergency housing.⁵⁵ They also described the situation of a trans man who expressed concerns for his safety if his sex and/or gender identity was revealed whilst staying at a male boarding house.⁵⁶

The National LGBTI Health Alliance described the difficulties of a trans person attempting to find housing:

A trans man in Queensland who has had ongoing health problems, including four surgeries in the past year, has been homeless for 9 months. He has been on the Qld Housing most urgent list for that time, but has seen other people that he knows of housed before him. Requirements for documentation have been onerous in the extreme, with the same documents having to be submitted repeatedly. When discreetly living in a tent in bushland in a public park, he has been ‘moved on’ by police. Accommodation in male boarding houses is risky for him because of his trans status.⁵⁷

(d) Appropriate toilets and change rooms

Several trans and intersex participants spoke of the difficulties they face in accessing appropriate toilets and change rooms both at work and in public places. For example:

Many transgender people are forced to limit their public social interactions to places they know will enable them to toilet/change without incurring discriminatory behaviour, harassment or violence. This has serious consequences for all travel and, in particular, limits one’s ability to respond to unexpected events in a ‘regular’ way. One of our members had to use toilets on a different floor while transitioning as peers on his floor were uncomfortable about him using either one.⁵⁸

I brought a dress from a shop in the Canberra Centre last week. The shop only had a women’s fitting room and they refused me permission to try the dress on even though I explained that I was Intersexed. I brought the dress anyway and went home to try it on. It did not fit. So I went back to the shop to ask for a refund. They flatly refused, saying their store policy was no refunds. So I checked with ACT Fair Trading only to discover their policy was that you can’t get a refund if you choose the wrong size.⁵⁹

(e) Sport

The consultation heard that trans and intersex people are often restricted from participating in sporting activities. For example:

In several jurisdictions, an individual can be legally denied the right to participate in their chosen sport on the basis of the sex shown on their birth certificate. Where the sex on an individual's birth certificate is not the person's self-identified gender, it becomes extremely difficult for them to participate in even social or amateur sporting activities.⁶⁰

5.3 Vilification and harassment

Vilification and harassment includes derogatory or intimidating behaviour such as physical or verbal abuse. Participants described their frustration at the lack of legal protection from vilification and harassment in Australia. For example:

I always hear homophobic language being used as put downs etc and never see anyone being reported for vilification, however if they were [using] racist or sexist language etc they would be reported for being racist/sexist.⁶¹

It is my understanding that there are no laws against harassment based on gender identity. In the last month I have been harassed numerous times because I am visibly sex and/or gender diverse. I have been harassed by people on the street and by people working in establishments I have entered. It is really scary if there are no laws against people harassing you for being gender diverse. There is essentially nothing you can do about it. This makes the public sphere a very unsafe place for a lot of intersex, sex and gender diverse people.⁶²

Research shows that people are frequently vilified or harassed on the basis of their sexual orientation or sex and/or gender identity. For example, in 2006, the Private Lives survey found that out of all participants, 59.3% experienced personal insults or verbal abuse and 13.7% experienced physical attacks or other kind of violence.⁶³

Speaking Out (2010) found that of its survey participants:

- 92% of trans women and 55% of trans men reported verbal abuse
- 46% of trans women and 36% of trans men reported physical attacks without a weapon (punched, kicked, beaten)
- 38% of trans women and 9% of trans men reported physical attacks with a weapon (knife, bottle, stones).⁶⁴

Vilification and harassment are particularly prevalent amongst young people and has serious consequences for their mental health.

Writing Themselves In: 3 found:

Almost double the number of young people who had been verbally abused (40%), in comparison with those who had experienced no abuse, had thought of self harm (22%). Three times those who had been physically abused (62%), in comparison with those who reported no abuse, had thought of self harm. This pattern was repeated through self harm, suicidal thoughts and suicide attempts. For example, in comparison with those who reported no abuse, twice the number of young people who suffered verbal abuse, had attempted suicide and four and half times the number of young people who had been physically assaulted, had attempted suicide.⁶⁵

The consultation heard many personal stories of vilification and harassment experienced or witnessed by participants. Some of the more serious examples are described below.

“I always hear homophobic language being used as put downs etc and never see anyone being reported for vilification, however if they were [using] racist or sexist language etc they would be reported for being racist/sexist.”

Participant

(a) Vilification and harassment on the basis of sexual orientation

The Commission heard of a number of stories of vilification or harassment on the basis of sexual orientation. For example:

When walking home, a man and his boyfriend were ‘jumped’ by three teenage boys who called them ‘faggots’ and punched them in the stomachs, chests and heads.⁶⁶

I was abused and screamed at by a group of men... who called me a f**king dyke [and said] that I should be stabbed or raped.⁶⁷

ACON described an incident reported to them as part of their Lesbian and Gay Anti-Violence Project:

The victim has endured 20 years of homophobic abuse from his neighbour. He has received taunts such as, “All poofters should be killed at birth”; “Why don’t you poofters drop dead of AIDS?”, “AIDS poofters” etc. The victim has taken several AVOs against his neighbour and has had him charged with malicious damage. For the past two years the victim has been on a disability support pension and is currently on anti-depressants. He dreads venturing as far as his front yard because of the fear of abuse from his neighbour.⁶⁸

The consultation also heard that vilification of gay men is closely linked with vilification on the basis of HIV/AIDS status:

As gay men account for around 80% of all people that have been diagnosed with HIV,⁶⁹ vilification on the ground of HIV/AIDS status disproportionately affects gay men. ACON recommends that HIV/AIDS status be included as grounds where vilification is prohibited.⁷⁰

A few comments expressed concerns about the increased risk of violence for lesbian women who may be discriminated against on the basis of being female (their sex) and their sexual orientation. Participants stressed their concern that women only spaces should still be permitted under federal laws.⁷¹

(b) Vilification and harassment on the basis of sex and/or gender identity

The Commission heard some particularly disturbing examples of vilification and harassment on the basis of sex and/or gender diversity. For example:

Other stories of vilification? I don’t know where to start. Do I tell of the story I’ve heard of a person who had rocks thrown through her window in a country town? The person who had a rubbish bin thrown through the window of their car? Do I tell them my own story? I was sitting in my car minding my own business at a set of lights. Two pedestrians came across the pedestrian lights and thumped on the car. I went over the intersection and realised I was in some degree of shock at the noise before I realised what had happened – one of the pedestrians raced over to the other side of the intersection, put their fist through the driver’s side window that was closed, smashing it, punched me in the side of the head six times and just walked off. I spent the night on an emergency trolley in the Alfred hospital.⁷²

At one place I started in, when I started transitioning 13 years ago, I was attacked every day for two weeks. Every day and every night 24/7 ... My sons used to come over who were then 12 and 14 and I would be getting rocks and bolts and bits of iron, brick, wood, landing on the tin roof every five minutes. I eventually moved because the police attitude to that was unless they are actually in the house [they could not] do anything.⁷³

“The victim has endured 20 years of homophobic abuse from his neighbour. ... For the past two years the victim has been on a disability support pension and is currently on anti-depressants. He dreads venturing as far as his front yard because of the fear of abuse from his neighbour.”

Participant

“[B]eing a teen is so so soooo hard. Add discrimination, fear, anxiety, stress, depression because of your sexuality and you become a headcase and end up in hospital. That’s not how it should be.”

Participant

I was often physically attacked at school as well. I am surprised I got through those years.⁷⁶

Several participants asserted that school teachers did not respond to abuse, were unsupportive of LGBTI students or engaged in harassment themselves. For example:

During my high school years I was severely bullied (physically and emotionally) to cope I want[ed to] confide in my schools Chaplin, I’m not religious I just got good vibes from him. I told him I was gender queer and that I wasn’t straight, after that he stopped all communication and left me to deal with things on my own which lead to my first suicide attempt (Gender “undefined” female, 18).⁷⁷

Throughout my time in high school I experienced constant harassment because of my gender identity. I was frequently made fun of in class, often by teachers. Students refused to use my chosen name, instead referring to me by my birth name and using female pronouns; teachers did not punish them even though it was quite clear that the harassment was deliberate ... Food was thrown at me on a number of occasions. I was pushed, spat on and hit. A group of boys in the year above me repeatedly threatened to rape me as “proof” I was a girl. There were several threats to my life. .. None of the people who bullied me were ever punished.⁷⁸

5.4 Bullying and harassment experienced by young people

The consultation also heard a significant number of accounts of bullying and harassment on the basis of sexual orientation or sex and/or gender identity experienced by young people, largely in school environments. A recent study on young LGBTI people, *Writing Themselves In*: 3, found that school was the most likely place of abuse for young people with 80% experiencing abuse at school.⁷⁴

Young people provided the following examples of bullying or harassment:

I was bullied in highschool for looking, talking, walking and acting like a gay male. Obviously this didn’t encourage me to come out...until I was “outed” by a friend...; being a teen is so so soooo hard. Add discrimination, fear, anxiety, stress, depression because of your sexuality and you become a headcase and end up in hospital. That’s not how it should be. (Cisgendered male, 17)⁷⁵

Yes. I have been called ‘poofter’ from the early days in high school, because I was small, weak and studious. I drew into a shell and did nothing but study. The thought of talking to anyone about my feelings, let alone complaining, would have been laughable.

“The thought of talking to anyone about my feelings, let alone complaining, would have been laughable. I was often physically attacked at school as well. I am surprised I got through those years.”

Participant

“We would also like to highlight the very real links between community attitudes towards ‘normality’ in sex and gender, and the very real health impacts on sex and/or gender diverse people that result from violence, social exclusion and social isolation.”

Participant

The Youth Affairs Council of Victoria also found that more than 50% of young people surveyed said they had been treated unfairly more than 3 times because of their sexual orientation or gender identity.⁷⁹

5.5 The impact of discrimination, vilification or harassment on mental health

Australian and international research demonstrates that discrimination, harassment or vilification has a significant impact on the mental health of LGBTI people. For example, Suicide Prevention Australia estimates that suicide attempts by lesbian, gay and bisexual people are between 3.5 and 14 times higher than their heterosexual peers.⁸⁰ In the *TranZnation Report* on the health and wellbeing of trans people in Australia and New Zealand, one in four respondents reported having suicidal thoughts in the two weeks before completing the survey.⁸¹

Participants demonstrated the connection between discrimination, abuse and social exclusion with mental health issues including suicidal thoughts and attempts. For example:

We would also like to highlight the very real links between community attitudes towards “normality” in sex and gender, and the very real health impacts on sex and/or gender diverse people that result from violence, social exclusion and social isolation.⁸²

The effect of this pervasive abuse can be the development of significant mental health issues experienced by GLBT people. The impacts of discrimination, homophobia and violence were reflected in an analysis of 2007 Australian Bureau of Statistics data which shows that GLB people were more than twice as likely to experience ‘any mental disorder’. Alarmingly, homosexual and bisexual people were more than three times more likely to have had an affective disorder such as depression compared to heterosexuals.⁸³

Section 6: The potential benefit of federal laws protecting from discrimination and harassment on the basis of sexual orientation and sex and/or gender identity

The consultation invited comments on the potential benefit of federal laws protecting people from discrimination and harassment. Overwhelmingly, participants argued that introducing such protections would result in significant benefits for the Australian community as a whole. A small number of participants argued that there would be no benefit from these protections.

A large number of comments argued that the introduction of such protections would lead to cultural change in Australia by sending a powerful message regarding equality. Participants commented on a number of other practical benefits from this legislation, including that it would:

- provide a wider range of remedies for discrimination and
- lead to greater national consistency in anti-discrimination protections.

6.1 The potential for cultural change

A significant number of comments argued that federal legislation would send a powerful message that discrimination on the basis of sexual orientation or sex and/or gender is unacceptable.⁸⁴ For example the Victorian Bar stated:

[S]uch a law would provide an important federal symbolic statement about the unacceptable nature of such discrimination. This would contribute to ensuring that all persons are treated with dignity and respect regardless of their sexual orientation or sex/gender identity. This symbolism would, it is hoped, extend beyond the formal scope of the law to the community more generally and so affect the way in which lesbian, gay, bisexual, intersex and trans people are treated by other individuals on a day-to-day basis. The absence of this kind of legislation could be seen by some in the Australian community as suggesting the Commonwealth government does not take this kind of discrimination seriously, or worse, sees nothing wrong with such discrimination.⁸⁵

A participant at the Melbourne roundtables spoke of the positive changes they had seen in Tasmania since the introduction of legislation prohibiting discrimination on these grounds:

The Tasmanian experience shows quite clearly that if a government takes those steps and puts in place good anti-discrimination legislation, that it brings about a change in societal attitude which is far beyond ... simply a fear of breaching a law.⁸⁶

Participants also commented that legislation prohibiting vilification and harassment could lead to cultural change. For example, the Tasmanian Gay and Lesbian Rights Group provided a powerful account of cultural change that has occurred in Tasmania since the introduction of laws prohibiting 'incitement to hatred':

During the bitter, decade-long debate over decriminalising homosexuality in the 1990s there was a constant stream of verbal statements and written materials that incited hatred against gay, lesbian, bisexual, transgender and intersex (GLBTI) people. This included written material published in newspapers and distributed through the mail. It also included vilifying statements by public figures. However, since the passage of the Anti-Discrimination Act in 1998, which included provisions against incitement to hatred, such written and verbal statements have virtually ceased. Tasmania's public debate on GLBTI issues continues to be vigorous but it is profoundly more mature, respectful and constructive than it was before 1998.⁸⁷

Other participants made similar comments:

I believe that such legislation sends a powerful message to anyone who is inclined to discriminate against, harass or vilify LGBTI people. A great deal of harassment is suffered by LGBTI people – especially same sex attracted young people – and research has demonstrated that this results in much higher rates of depression, drug abuse, self-harm and suicide. A federal law would provide a strong foundation for education campaigns aimed at changing the bullying behaviour that leads to these negative outcomes.⁸⁸

A federal law would make it clear to all Australians that vilification, and harassment on the basis of sexual orientation and sex and/or gender identity is never acceptable. Unless there is a clear law against it, it is too easy for bigots to feel their actions are justified, when actions based on prejudice and hatred are not, and never can be, just.⁸⁹

A number of participants at the Melbourne Roundtables commented on the importance of education and leadership in this area:

- Significant leadership would be required from our federal politicians to implement federal anti-discrimination laws. This leadership can affect the national psyche and change the future of the country.

- Without specific anti-discrimination laws, sexual orientation is not given the same importance as discrimination on the basis of race, sex, age and disability.
- A significant benefit of federal anti-discrimination laws concerning sexual orientation would be the education of young people.
- Given that we are currently in the middle of developing a new national curriculum in schools, education programs could have a large effect on the future leaders of our country.⁹⁰

The members of OUTthere Rural Victorian Youth Council for Sexual Diversity provided a powerful summary of the cultural change that they hoped would occur in their communities if federal laws were introduced:

- Same sex partners could attend school events, such as formals.
- Same sex attracted couples in schools would have freedom to walk around as a couple, not having to hide who we are [our identities or relationships].
- Bullying would possibly be less, teachers and school staff would have to acknowledge and address homophobic bullying in the same way they would have to address racist or sexist bullying within the school.
- A safer school environment would mean kids would want to be at school.⁹¹

6.2 A wider range of remedies for discrimination

A number of participants observed that protection from discrimination on the basis of sexual orientation and sex and/or gender identity would provide a wider range of remedies for people who experienced discrimination. Participants argued that there should be the same avenues as there are for people who are discriminated against on the basis of their sex, race, disability or age under existing federal anti-discrimination laws.⁹²

The Commission heard that this would have a significant positive impact. For example:

People would feel more secure in their workplace because they know their rights would be protected and their job would be safe.⁹³

“I believe that such legislation sends a powerful message to anyone who is inclined to discriminate against, harass or vilify LGBTI people.”

Participant

The consultation also heard that the investigation and conciliation service provided by the Commission is an important mechanism for addressing discrimination. For example:

The strengthening of civil protections in this area would also provide those groups with less formal and more accessible means of redress through the dispute resolution services offered by the Australian Human Rights Commission. In our experience, such service can provide a quick and appropriate remedy for victims of hate conduct, but can also have a broader, educative effect on all parties involved in the dispute.⁹⁴

6.3 National consistency in anti-discrimination protection

A large number of participants observed that federal legislation might lead to greater national consistency in anti-discrimination protection.⁹⁵

Many participants observed that there is gap in protection from discrimination as Commonwealth agencies are currently not bound by state and territory anti-discrimination laws. This was a particular concern for trans and intersex participants as there are no federal protections from discrimination on the basis of gender identity.⁹⁶ One participant observed:

It is self-evident that in the absence of federal anti-discrimination protections, it is very difficult for [transgender, transsexual and intersex] people to respond to any discrimination they encounter when interacting with federal departments such as Medicare, Centrelink, the Australian Taxation Office, or the Australian Passports Office.⁹⁷

The Law Council of Australia provided some examples of potential everyday situations in which unfair discrimination might occur against individuals who are in contact with Commonwealth agencies. For example:

- An employee in a Commonwealth department who is discouraged by the Senior Executive from applying for promotion due to his transgender status.
- A person who is subjected to sustained, intrusive and intimidating questioning by the Australian Federal Police about her lesbian background, despite its lack of relevance to the crime of which she is suspected (fraud).⁹⁸

Further, a number of participants commented on the inconsistency in state and territory laws prohibiting discrimination on these grounds. For example:

Federal Laws would allow for all Australian LGBTI people to be protected and have the same rights, compared to the mismatched State-based legislation that currently exists.⁹⁹

Some participants were hopeful that federal legislation would ‘fill the gaps’ in terms of where state legislation does not adequately protect people.¹⁰⁰

[S]uch a law would close certain gaps that currently exist in relation to protection of people from discrimination on the basis of sexual orientation and sex and/or gender identity. ... not all states have the same degree of protection from discrimination; for example, under New South Wales law, only homosexuality is a prohibited ground of discrimination.¹⁰¹

For trans people and intersex people, there are currently a large number of ‘holes in the net’ for people to fall through. Federal legislation can make sure that there is one set of consistent rules that would cover all people, regardless of geography. There is currently a significant lack of legal protection for a trans person.¹⁰²

The Victorian Bar also noted that federal legislation could provide protection against discrimination that comes under the very broad exemptions in some state and territory legislation, depending on the way in which the federal law was drafted and the exemptions that it included.¹⁰³

6.4 Concerns about legal protection from discrimination on the basis of sexual orientation and sex and/or gender identity

A number of participants raised concerns about the introduction of federal laws and how these laws might impact on other human rights, including freedom of religion and belief, and freedom of expression.

Many of these submissions supported legal protection from vilification and harassment in principle, provided that it is balanced with competing rights.¹⁰⁴ Other participants simply urged caution in considering such laws.¹⁰⁵

For example, a pastor commented:

I have known many homosexuals and lesbians as friends over the course of my ministry ... The teaching of Christianity means that I am to love the person, but I have no right to hate or attack or vilify them for their behaviour ... individuals must be protected [by law] from the effects of hatred and in this case, homophobia, but at the same time, I must (in good conscience) be free to state what the Bible teaches also.¹⁰⁶

Another person noted:

Without question some people do experience unwarranted discrimination due to sexual orientation and or gender identity. Hopefully measures could be implemented to assist these people ... Yet [at] the same time, religious freedom is also an important right and one that needs to be protected.¹⁰⁷

Some participants considered that existing laws already adequately protect a person from vilification and harassment on the basis of sexual orientation and gender identity and there was no need to change the laws.¹⁰⁸ Others strongly opposed any changes to the law.¹⁰⁹

Section 7: Protection from discrimination on the basis of sexual orientation

The consultation was directly concerned with how protection from discrimination on the basis of sexual orientation might be included in federal law. Section 6 above outlines what the consultation heard about the benefits of these protections. This part outlines:

- current federal protections from discrimination on the basis of sexual orientation
- current state and territory protections from discrimination on the basis of sexual orientation
- how protection from discrimination on the basis of sexual orientation might be included in federal law.

7.1 Current federal protections from discrimination on the basis of sexual orientation

Very few protections from discrimination on the basis of sexual orientation exist in federal law.

The Commission can inquire into and attempt to conciliate complaints of discrimination on the basis of 'sexual preference' in employment and occupation.¹¹⁰ However, if a complaint is not able to be resolved through conciliation, all the Commission is able to do is to issue a report to the federal Attorney-General which is tabled in Parliament. There is no avenue to seek a tribunal or court hearing about discrimination of this kind and Commission recommendations are not enforceable. During 2009-2010, the Commission received 176 enquiries from people about sexual orientation, lawful sexual activity, trans and intersex issues, accounting for less than 1% of all enquiries received.¹¹¹

Since the 1990s, federal industrial law has included limited protection from discrimination in employment on the basis of 'sexual preference'. The *Fair Work Act 2009* (Cth) (Fair Work Act) now prohibits discrimination on the basis of an employee's 'sexual preference' in relation to all aspects of employment, from hiring, to promotion and training opportunities, and to dismissal.¹¹²

The Fair Work Act also refers to discrimination on the basis of 'marital status'¹¹³ rather than using 'relationship status' which would include people in same-sex relationships.

The *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) prohibits discrimination on the basis of 'sex'.¹¹⁴ Arguments that discrimination against lesbians and gay men on the basis of sexual orientation is a form of sex discrimination under the Sex Discrimination Act have been explicitly rejected by Australian tribunals and courts.¹¹⁵

The Sex Discrimination Act also prohibits discrimination on the basis of 'marital status', however this does not cover same-sex relationships. The Commission has recommended that this ground of discrimination should include same-sex relationships.¹¹⁶ A Senate inquiry report has also recommended that the term 'marital status' be replaced with 'marital or relationship status' which would include people in same-sex relationships.¹¹⁷

7.2 Current state and territory protections from discrimination on the basis of sexual orientation

All states and territories have laws that prohibit discrimination on the basis of sexual orientation, although these laws contain a wide range of terminology to describe the prohibited grounds of discrimination.

New South Wales uses the term ‘homosexuality’, and ‘homosexual’ is defined to mean a ‘male or female homosexual’.¹¹⁸ Therefore, in New South Wales heterosexuality is not covered by the legislation and bisexuality is only covered to the extent that the discrimination relates to ‘the homosexual aspects’ of the person’s life, or their assumed homosexuality.¹¹⁹

Other states and territories use the following terms:

- ‘sexuality’ (Queensland, South Australia, Australian Capital Territory and the Northern Territory)¹²⁰
- ‘sexual orientation’ (Victoria, Western Australia and Tasmania).¹²¹

Both ‘sexuality’ and ‘sexual orientation’ are defined to include the concepts of ‘heterosexuality’, ‘homosexuality’ and ‘bisexuality’.¹²² Three definitions (Victoria, Western Australia and the Australian Capital Territory) also name ‘lesbianism’.¹²³

All state and territory anti-discrimination laws cover situations where an employer or other respondent assumed or thought that a person had a particular sexual orientation, and on that basis discriminated against them. Federal law also protects from discrimination on the basis of imputed sexual preference in the Fair Work Act. Four state and territory laws also cover situations where discrimination is related to sexual orientation that the person had in the past (but no longer has).¹²⁴

In addition to prohibiting discrimination on the basis of sexual orientation, all state and territory anti-discrimination laws prohibit discrimination against a person where that conduct was a response to the sexual orientation of the complainant’s ‘associate’ or ‘relative’.¹²⁵

Finally, state and territory anti-discrimination laws also extend the prohibition on discrimination to conduct that is done on the basis of characteristics that are generally thought to relate to people of that sexual orientation.¹²⁶

7.3 How protection from discrimination on the basis of sexual orientation might be included in federal law

It would be ideal for legislation to encompass all human beings and the entire spectrums of both sexuality and gender, and any wording used should reflect this.¹²⁷

The Commission heard a wide range of views about how protection from discrimination on the basis of sexual orientation should be included in federal laws. Suggestions were generally informed by the laws of the state or territory where individuals or organisations were based.

(a) Terminology: sexual orientation or sexuality?

The majority of comments to the consultation supported the use of the term ‘sexual orientation’ in anti-discrimination legislation.¹²⁸ Many participants at the roundtables also preferred the use of sexual orientation.¹²⁹ In explaining their support for this terminology, participants highlighted the following:

- it is generally accepted as a broad and inclusive term¹³⁰
- it is consistent with the Yogyakarta Principles¹³¹
- ‘sexuality’ or ‘sexual preference’ focuses on choice¹³² or can be misleading.¹³³

A number of participants explained their support for the term sexual orientation as follows:

Sexual orientation is a more inclusive term, given that it incorporates protection not only for gay and lesbian sexualities, but also bisexuality.¹³⁴

It should be noted that the term sexual orientation, rather than sexual preference, should be used to describe a person's enduring pattern of emotional, romantic, and/or sexual attractions. It is a phrase that expresses the inherent part of one's sense of being, while sexual preference implies a person's sexual choice that may or may not be based on their orientation. It is important to recognise that the two terms have different connotations and for some they may interact at different points of people's lives.¹³⁵

A small number of comments preferred the use of 'sexuality' over sexual orientation.¹³⁶ One participant noted:

The term sexual orientation implies the converse of sexual 'disorientation'. There is a presumption in this terminology that everyone has a specific direction in terms of sexual attraction, and if they do not fit into a category they are lost. Not everyone identifies this way. The nature of a person's sexual attractions may be fluid or vary over time.¹³⁷

Some participants did not express a preference but were comfortable with either sexuality or sexual orientation.¹³⁸

(i) Defining 'sexual orientation'

Participants expressed diverse views about how the term 'sexual orientation' should be defined.

Many participants supported defining sexual orientation to include a broad range of terms, including 'homosexual', 'lesbian', 'bisexual', 'asexual' and 'same-sex attracted'.¹³⁹ Participants who suggested the term 'same-sex attracted' argued that many people do not identify as gay, lesbian or bisexual.¹⁴⁰ The Youth Affairs Council of Victoria found that 30.5% of the young people surveyed identified as 'same-sex attracted'.¹⁴¹

A number of participants strongly argued that lesbianism should be expressly included in the definition of sexual orientation.¹⁴² The Equal Opportunity Commission (WA) expressed concern that 'the fight for recognition and equality by the gay and lesbian community may mask the ongoing gender inequality that exists within it'.¹⁴³ Women's Legal Services NSW noted that lesbian women report being unsure whether they are protected by the homosexuality ground in NSW legislation or feeling devalued by the wording.¹⁴⁴

The main point of difference was regarding whether anti-discrimination laws should cover heterosexuality. Some participants supported the inclusion of heterosexuality in sexual orientation grounds.¹⁴⁵ Others opposed this and suggested the laws should only protect marginalised communities.¹⁴⁶

Freedom! Gender Identity Association took a different approach and supported the protection of various attributes under sexual orientation rather than specific labels.¹⁴⁷ They suggested that sexual orientation should include:

- attraction (i.e. same-sex attracted, other-sex attracted, both-sex attracted, all-sex attracted)
- identity (i.e. lesbian, gay, bisexual)
- behaviour (i.e. legal sexual activity).

(b) Lawful sexual activity and HIV/AIDS status

A number of participants suggested that 'lawful sexual activity' should be included in federal discrimination law as a protected ground of discrimination in addition to sexual orientation.¹⁴⁸ The Law Council of Australia noted that 'lawful sexual activity' could be broad enough to cover promiscuous people or legal sex workers.¹⁴⁹ Some participants, however, reported that they were offended by the reference to lawful sexual activity because they felt it has the effect 'of reducing lesbian and gay people to 'sexual acts', excluding broader notions of identity and community'.¹⁵⁰

The NSW Gay and Lesbian Rights Lobby argued that HIV/AIDS status should be included as a protected ground of discrimination.¹⁵¹

(c) Relationship status

Some participants recommended that references to ‘marital status’ in the Sex Discrimination Act and the Fair Work Act should be amended to provide protection to same-sex couples equal to that afforded to opposite-sex couples.¹⁵²

(d) Extension of protection from discrimination on the basis of sexual orientation

Many participants supported the extension of protection from discrimination on the basis of sexual orientation to:

- a person’s perceived sexual orientation¹⁵³
- associates and family members¹⁵⁴
- prior or historical sexual orientation.¹⁵⁵

For example, ACON told the Commission:

[Y]oung people may be vilified because they are perceived to be homosexual, exhibit characteristics that are generally associated with young people who are homosexual or are friends with someone who is homosexual but may not personally identify as homosexual, engage in homosexual relationships or be attracted to someone of their own gender.¹⁵⁶

In addition, the Law Council of Australia recommended that a person should not be required to disclose their sexual orientation or sex and/or gender identity where it is irrelevant or unnecessary.¹⁵⁷

Section 8: Protection from discrimination on the basis of sex and/or gender identity

The consultation was directly concerned with how protection from discrimination on the basis of sex and/or gender identity might be included in federal law. Section 6 above outlines what the consultation heard about the benefits of such protections. This part outlines:

- current federal protections from discrimination on the basis of sex and/or gender identity
- current state and territory protections from discrimination on the basis of sex and/or gender identity
- how protection from discrimination on the basis of sex and/or gender identity might be included in federal law.

8.1 Current federal protections from discrimination on the basis of sex and/or gender identity

There is no protection from discrimination on the basis of sex and/or gender identity in federal law.

The Sex Discrimination Act defines a ‘man’ as a person of the male sex and a ‘woman’ as a person of the female sex; definitions that do not appear to recognise the full spectrum of sex diversity that exists.¹⁵⁸ However, the Sex Discrimination Act may protect a person who is discriminated against on the basis of their legal sex, even if this is different from their sex at birth.¹⁵⁹

It is not clear whether a person discriminated against on the basis of their gender identity could rely on the sex discrimination provisions of the Sex Discrimination Act. Arguably, these provisions are broad enough to protect people who are discriminated against because they do not conform to the public expectations and stereotypes of their sex, including social expectations of self-presentation in terms of dress and behaviour. However, whether this applies to trans and intersex people is uncertain as it has not been tested in Australian tribunals or courts.¹⁶⁰

The Fair Work Act does not include provisions prohibiting discrimination or adverse action on the basis of gender identity.

8.2 Current state and territory protections from discrimination on the basis of sex and/or gender identity

Most state and territory laws include separate provisions prohibiting discrimination on the basis of gender identity. For example:

- Victoria, Queensland and the Australian Capital Territory prohibit discrimination on the basis of ‘gender identity’.¹⁶¹
- South Australia prohibits discrimination on the basis of a person’s ‘chosen gender’.¹⁶²
- Western Australian only prohibits discrimination on the basis of ‘gender history’ against ‘a gender reassigned person’ (a person who has received legal recognition of their preferred sex).¹⁶³
- New South Wales prohibits discrimination against a ‘transgender’ person and includes some additional discrimination protections that relate to a ‘recognised transgender person’ (a person who has received legal recognition of their preferred sex).¹⁶⁴

Neither the Northern Territory nor the Tasmanian laws contain a separate ‘gender identity’ ground. They both include ‘transsexuality’ within their sexuality or sexual orientation ground.¹⁶⁵

The gender identity ground generally covers a person who lives, or seeks to live, as a member of their preferred gender, and/or has assumed characteristics of that gender (whether by way of medical intervention or not).¹⁶⁶ As the Anti-Discrimination Board (NSW) has pointed out in relation to the NSW law:

A person does not have to have had any ‘sex change’ or other surgery, does not have to have taken any hormones in the past or to be taking them now. It does not matter what the person’s gender was at birth nor which gender is their preferred gender. It does not matter why a person is transgender. It does not matter how a person describes or ‘labels’ themselves (for example, as transgender, trans, transsexual, or something else).¹⁶⁷

Three Australian state statutes contain additional provisions in relation to the gender identity ground that specify particular conduct as an instance of discrimination:

- The South Australian Act provides that requiring a person of a ‘chosen gender’ to assume characteristics of the sex with which the person does not identify is unlawful.¹⁶⁸

- The New South Wales Act provides that treating a ‘recognised transgender person’ as if they were their former sex is discrimination.¹⁶⁹
- The Western Australian Act provides similarly that to treat ‘a gender reassigned person’ as being of the person’s former sex is unlawful.¹⁷⁰

The legal terms ‘gender reassigned person’ and ‘recognised transgender person’ refer to people who have had a sex reassignment procedure or sex affirmation procedure and have received legal recognition of their new sex, either through a formal alteration of the birth register and their birth certificate, or through being issued with a recognition certificate.¹⁷¹

No state or territory laws explicitly use the language of intersex, although all except Western Australia, the Northern Territory and Tasmania refer to people of ‘indeterminate sex’,¹⁷² and this description is thought to encompass intersex conditions.¹⁷³

As with state and territory protections from discrimination on the basis of sexual orientation, protection from discrimination on the basis of gender identity is extended to:

- situations where an employer or other respondent assumed or thought that a person had a particular gender identity¹⁷⁴
- conduct that is a response to the gender identity of a complainant’s ‘associate’ or ‘relative’¹⁷⁵
- conduct that is done on the basis of characteristics that are generally thought to relate to people of that gender identity.¹⁷⁶

(a) **Problems with existing state and territory laws**

A number of participants expressed concern about the terminology used in existing state and territory laws.¹⁷⁷ For example, the {Also} Foundation argued that:

Many of the terms derived from existing state and territory law (chosen gender; gender history; gender reassigned person; a recognised transgender person; or transsexuality) are problematic for their tendency to limit and/or define people in ways that they themselves do not identify ... and ultimately for their reinforcement of binary constructions of gender to which many people may not subscribe.¹⁷⁸

“Many of the terms derived from existing state and territory law ... are problematic for their tendency to limit and/or define people in ways that they themselves do not identify.”

Participant

The National LGBTI Health Alliance and A Gender Agenda raised concerns with a number of terms currently used in state and territory laws. For example:

- ‘Chosen gender’ implies a choice, which many gender diverse people do not feel they have, believing their condition to be innate.
- ‘Gender history’ is problematic for those at the beginning of a transition and those who are not seeking medical or surgical treatment.
- ‘A gender reassigned person’ is particularly problematic for those who for various reasons (such as cost, personal choice, or pre-existing medical conditions) do not seek medical or surgical treatment. Gender diverse people require protection whether or not they pursue reassignment treatments.
- ‘Recognised transgender person’ – recognised by whom? This also does not cover sex and/or gender diverse people who do not identify with terms such as transgender.
- ‘Transsexuality’ is a term referring to only one group of people, and not embraced by all sex and/or gender diverse people.¹⁷⁹

8.3 How protection from discrimination on the basis of sex and/or gender identity might be included in federal law

(a) Terminology

The consultation heard a broad range of suggestions regarding terms that might be included in federal law to ensure protection from discrimination on the basis of sex and/or gender identity.

Some participants emphasised that terminology should be as broad and as inclusive as possible. For example, A Gender Agenda told the Commission that:

As a guiding principle terminology 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).¹⁸⁰

The following list provides an overview of the range of terminology that participants suggested might be included in federal anti-discrimination law:

- gender,¹⁸¹ gender identity,¹⁸² gender history,¹⁸³ or gender expression/presentation¹⁸⁴
- transgender¹⁸⁵
- sex or sexual characteristics¹⁸⁶
- sex and gender identity¹⁸⁷
- sex characteristics, gender identity and gender expression¹⁸⁸
- intersex, sex and/or gender diverse¹⁸⁹
- diversity in sexual formation or expression.¹⁹⁰

(b) Sex characteristics, gender identity and gender expression

A number of consultation participants, in both written comments and at the Sydney and Melbourne roundtables, supported the use of the terms ‘sex characteristics’, ‘gender identity’ and ‘gender expression’.¹⁹¹ Consultation participants suggested that the use of these three terms would be sufficiently broad to include all of the attributes of trans and intersex people that require protection.

A Gender Agenda explained each of these terms:

Biological Sex Characteristics: This refers to all biological indicators of sex – for example chromosomal sex, endocrine activity, genitals and reproductive organs/capacity, menstruation, breasts, facial and body hair, depth of voice etc.

Gender Identity: This refers to how an individual identifies in their own gender – for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary.

Gender Expression: This refers to how the individual's gender is identified by others – for example as a man, woman, transgender, transsexual, intersex, genderqueer, non-binary.¹⁹²

They felt that the use of this terminology would ensure broad coverage:

This wording has been deliberately chosen to ensure people are protected from discrimination on the basis of:

- being intersex
- being transsexual, transgender
- being gender fluid or gender queer (includes androgynous and cross-dressing)
- expressing a non-traditional gender (eg. a feminine man who is not trans)
- being perceived as any of the above (even if this is not an accurate perception)

[and] to ensure that people are protected from discrimination without reference to:

- a binary construct of gender which only protects individuals who identify and present consistently as either male or female
- a binary construct of sex characteristics which fails to protect intersex individuals
- the legal sex currently recorded on a person's birth certificate (which some people are unable to change and some people do not wish to change).¹⁹³

The inclusion of 'sex' or 'sexual characteristics' was thought to provide appropriate protection to transsexual and intersex people:

Transsexual and intersex people can be protected by enacting legislation that prohibits discrimination on the grounds of *sex* or *sexual characteristics* (where the definitions of the above are broadened to include transsexualism and intersex conditions) irrespective of medical treatment undertaken or planned.¹⁹⁴

However, Organisation Intersex International told the consultation that while it agrees that the use of terms such as sex characteristics and indeterminate sex might be useful in framing laws so that they are inclusive of people who are intersex, 'we insist such terms cannot guarantee our rights unless those words are linked to definitions that specify unambiguously "Intersex"'.¹⁹⁵

(c) Extension of protection from discrimination on the basis of sex and/or gender identity

A number of participants also supported laws that extend to protecting a person from discrimination on the basis of:

- actual or perceived sex and/or gender
- their association with a trans or intersex person (including friends, family members or colleagues of a trans or intersex person)
- sex and/or gender history.¹⁹⁶

(d) Terminology used in other countries

Given the wide range of views about appropriate terminology to use in federal anti-discrimination laws, it is useful to consider the terminology used in other countries. For example:

- The *Canadian Human Rights Act 1985* (Canada) was amended on 9 February 2011 to include 'gender identity' and 'gender expression' as prohibited grounds of discrimination.¹⁹⁷
- The *Equality Act 2010* (United Kingdom) prohibits discrimination on grounds of 'sex' and 'gender reassignment'.¹⁹⁸ This is defined to include a person who is, proposes to change, or is changing their sex. Therefore, a trans person is no longer required to have surgery or be under medical supervision to receive protection from discrimination.
- The *Human Rights Act 1993* (New Zealand) prohibits discrimination on the grounds of 'sex' or 'sexual orientation'. The Solicitor General issued public advice on 2 August 2006 that sex discrimination covers transgender people.¹⁹⁹

A number of participants specifically referred to the terminology used in other countries as a model for federal laws. For example A Gender Agenda supported ‘gender’ being defined similarly to the New York City Human Rights Law (2002):

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.²⁰⁰

The Law Council of Australia suggested the following definition of ‘gender identity’ which is taken from the Bill for the *Employment Non-Discrimination Act of 2009* currently before the United States Senate:

[T]he gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.²⁰¹

8.4 Including protection for people who are intersex or of indeterminate sex in federal law

As noted above, a number of participants specifically supported the inclusion of the term ‘intersex’ in federal laws.²⁰² For example:


For the very unusual situation that there is virtually no protection for intersex people SAGE believes that there is a need for any anti-discrimination legislation to include the word intersex even though it cannot be exactly defined.²⁰³

A number of intersex individuals and organisations told the consultation that they felt that federal laws should include a specific reference to the term ‘intersex’ as the issues faced by intersex people are unique:

I also think there needs to be a statement or acknowledgement that issues that affect Intersex people are not necessarily the same as those that affect Trans people, or for that matter Gay, Lesbian or Bi people. While much of the discrimination which we all face is similar, there are many issues that Intersex people face that are totally different to those faced by Trans people.²⁰⁴

Other participants highlighted the current invisibility of intersex issues:

Furthermore, research shows that ‘intersex people report feeling invisible’ and ‘generally not acknowledged in society, by the media, the law or governments’. Providing federal protection from discrimination to those who are intersex may assist in addressing these feelings of isolation and invisibility, as well as provide a statement of recognition as to the existence of ‘sex diversity’ in our society.²⁰⁵



“Providing federal protection from discrimination to those who are intersex may assist in addressing these feelings of isolation and invisibility, as well as provide a statement of recognition as to the existence of ‘sex diversity’ in our society.”

Participant

Consultation participants emphasised that ‘being intersex is a statement of fact, not an identity’²⁰⁶ and that an intersex person may identify as male or female even though they have an intersex condition:

It is important to note that the vast majority of people with intersex conditions have a gender identity that is either exclusively male or female and are satisfied with the sex they were raised ... We nonetheless note that a small percentage of people with intersex conditions may also identify as having a gender that is intersex. That is, they may have a gender identity that is [not] exclusively male or female.²⁰⁷

The AIS Support Group Australia suggested the use of the phrase ‘people with intersex conditions’.²⁰⁸

Some participants thought the terms ‘indeterminate sex’ or ‘disorder of sexual development’ should be avoided because they are offensive or inappropriate.²⁰⁹ For example:

The [AIS Support Group Australia] does not support the use of the term [disorder of sexual development] as it is pathologising.²¹⁰

There is no Intersex to our certain knowledge who use or approve of [disorders of sexual development]. Indeed [Organisation Intersex International] considers it to be repugnant. Redefining our differences as disordered indicates we are not only somehow variant from the natural order of things it provides license to affect a cure.²¹¹

Section 9: Protection from vilification and harassment on the basis of sexual orientation and sex and/or gender identity

There are no protections from vilification and harassment on the basis of sexual orientation or sex and/or gender identity in federal law. The potential benefits of such protections are described in Section 6 above. This part describes:

- current protections from vilification and harassment on the basis of sexual orientation and sex and/or gender identity in state and territory law
- how protections from vilification and harassment on the basis of sexual orientation and sex and/or gender identity might be included in federal law.

9.1 Current protections from vilification and harassment on the basis of sexual orientation and sex and/or gender identity in state and territory law

In addition to prohibiting discrimination on the grounds of sexual orientation, gender identity and relationships, New South Wales, Queensland, the Australian Capital Territory and Tasmania also prohibit vilification on these grounds.²¹² Vilification refers to communications made in public that incite ‘hatred towards, serious contempt for, or severe ridicule of’, a person or group of people on the ground of their sexual orientation or sex and/or gender identity. This may include graffiti, comments made on radio or television, web pages with public access or verbal abuse in a public place.²¹³

It is very difficult to prove vilification. It is not sufficient that the respondent’s conduct conveyed hatred or expressed serious contempt. Rather, it must be shown that the respondent’s conduct was capable, in an objective sense, of urging or arousing other people to feel hatred towards the complainant, on the ground of their sexual orientation or sex and/or gender identity.²¹⁴

Only the Northern Territory and Tasmanian statutes prohibit harassment, and these prohibitions are very limited. The Northern Territory statute prohibits ‘harassment’ on the ground of sexuality,²¹⁵ whilst the Tasmanian statute prohibits harassing behaviour on the ground of the person’s relationship.²¹⁶ The remaining state and territory anti-discrimination statutes are silent on the issue of harassment related to sexual orientation, gender and relationship status.

9.2 How protection from vilification and harassment on the basis of sexual orientation and sex and/or gender identity might be included in federal law

A significant number of participants supported laws protecting from vilification and harassment on the grounds of sexual orientation.²¹⁷ For example, the Victorian Equal Opportunity & Human Rights Commission supports strengthening civil and criminal provisions protecting people from vilification on the basis that:

In the Commission’s view, such remedies are necessary because hate crime and hate conduct have a disproportionate impact on particular groups and their ability to realise other human rights. This should apply to attributes that include sex, sexual orientation and gender identity.²¹⁸

The Commission did not specifically seek feedback on the form of vilification and harassment laws, however some participants felt compelled to comment on this issue.

Several participants suggested that anti-vilification and harassment laws on grounds of sexual orientation should be similar provisions in the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act*.²¹⁹

Some participants expressed concern about anti-vilification and harassment laws because of the impact it might have on freedom of speech and freedom of religion.²²⁰ Other participants raised specific concerns about religious groups engaging in vilification.²²¹

Section 10: Exemptions

During the consultation, the Commission received a number of comments regarding exemptions from potential federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity. Many participants who supported new protections from discrimination argued that there should either be narrow or no exemptions at all. Some participants, particularly those affiliated with faith-based organisations, argued that there should be some exemptions in order to protect the human rights of freedom of religion and belief and freedom of expression.

10.1 Exemptions from state and territory laws prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity

Each state and territory anti-discrimination statute contains a number of exemptions that might be raised by an employer or other respondent to justify discriminatory conduct.²²² It is not unlawful to discriminate if an exemption applies.

Anti-discrimination legislation is remedial in character, and is designed to achieve the public purpose of redressing discrimination and upholding equal opportunity. Accordingly, the courts interpret exemptions narrowly.²²³

The range of exemptions, and their wording, varies considerably between states and territories. For example, whilst the Victorian Act contains numerous exemptions, the Tasmanian Act contains relatively few exemptions relating to sexual orientation or gender identity.

10.2 Exemptions from state and territory laws that are relevant to vilification

State and territory prohibitions on vilification have their own separate set of exemptions. These exemptions are consistent across the laws that prohibit vilification. The three exemptions are:

- the conduct was a ‘fair report’ of a public act
- the conduct would be covered by the defence of absolute privilege in a proceeding for defamation
- the conduct was ‘done reasonably’ and in good faith, for academic, artistic, scientific or research purposes or for other purposes ‘in the public interest’.²²⁴

10.3 Exemptions from federal law prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity

The Commission received a wide range of comments about whether potential federal protections from discrimination on the basis of sexual orientation and sex and/or gender identity should include exemptions or exceptions.

The majority of the participants who commented on the issue opposed exemptions. However a small number of participants argued that exemptions should be provided, allowing all faith-based organisations the freedom to practice and teach their beliefs.²²⁵

Those who opposed the inclusion of exemptions held a range of positions on the issue, including that there should be:

- no exemptions²²⁶
- no exemptions for organisations that receive public funding²²⁷
- no blanket exemptions, but that exemptions should be allowed on a case by case basis²²⁸
- only narrow exemptions if any exemptions are contained in federal anti-discrimination legislation.²²⁹

(a) Arguments against exemptions

A number of participants identified the Tasmanian Anti-Discrimination Act as a model for framing exemptions. The Tasmanian Gay & Lesbian Rights Group reported:

There are no exemptions in the Tasmanian Anti-Discrimination Act in regard to sexual orientation, including no exemptions for faith-based schools or charities. There are some general exemptions. There are also exemptions in regard to discrimination on the grounds of religious belief and practice, but it is quite clear in law [and] in relevant second-reading speeches that these do not apply to sexual orientation.²³⁰

Some organisations argued that national legislation should not fall below the standard in Tasmanian laws.²³¹ For example, the Freedom! Gender Identity Association commented:

If exemptions are deemed to be necessary, they should be on the basis of case-by-case applications. These must be minimal, temporary (with a requirement to reapply), reviewable, public and transparent (a requirement to proactively declare them).²³²

The Victorian Bar also argued that exemptions on the basis of religion should be narrow. Their comment argued that:

[R]eligious exemptions which allow religious bodies or individuals to treat people less favourably on the basis of sexual orientation in the areas of employment, education, provisions of goods, services and accommodation when available to the general public or a section of the general public should not be introduced.²³³

Some comments suggested the removal of current faith-based exemptions in state anti-discrimination law.²³⁴ For example:

[T]here is a gap in the law that permits discrimination against GLBTI individuals by certain institutions that needs to be addressed. It is unjust that religious institutions, in many ways the last network of institutions that can actively and legally discriminate against GLBTI individuals, remain immune to these laws.²³⁵

A significant number of participants argued that there should be no exemptions from federal discrimination protections regarding sexual orientation and sex and/or gender identity for organisations that receive public funding. For example:

[Women's Legal Services NSW] are particularly concerned that many religious organisations that receive public funding to provide services such as family relationships services, counselling services, adoption services and housing services are then able to discriminate against LGBTI people in employment and service provision. WLS NSW submits that the objective of any anti-discrimination legislation should be the elimination of all forms of discrimination against members of the minority groups to be protected. We believe that allowing people to lawfully discriminate under exemptions or exceptions would undermine the ability of the legislation to fulfil this purpose.²³⁶

Where services are provided to the 'public' with government funding (the state contracting out its responsibility to NGOs), we regard it as especially crucial that exemptions must be limited to 'special measures' to empower/target marginalised groups, such as LGBTI people (cf. the UK model). For example, an elderly gay man receiving in-home cleaning services from a faith-based organisation contracted by the government to supply such services was absolutely terrified that if they were aware of his sexual orientation that he would be harassed or lose the services on which he depends. The organisation has no statement on its website or in its publicly-available policies to reassure this man or make him aware of his rights.²³⁷

(b) Arguments in favour of exemptions

A number of faith-based organisations argued that there should be exemptions or exceptions for religious organisations and activities.²³⁸ For example:

Current exemptions should be maintained in order to ensure that faith communities can continue to exercise their rights to freedom of religion, consistent with both Australian and international law. It is almost of equal importance that these exemptions are not as burdensome or overbearing and provide a clear and simple mechanism for religious bodies including Christian schools to operate in accordance with their faith, values and beliefs. The existing and long standing form of exemption used in section 38 of the *Sex Discrimination Act 1984* (Cth) provides such a form of exemption. We would expect that an identically worded exemption would be included in any future legislation.²³⁹

The definition of a public authority in legislation should provide an exemption for religious bodies acting in conformity with their religious doctrines, beliefs or principles. Section 38 (4) and (5) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provide an appropriate model of such an exemption.²⁴⁰

Section 11: What did the consultation hear about special measures?

All state and territory anti-discrimination laws (apart from the New South Wales Act) contain a distinctive type of exemption that allows positive measures designed to benefit specific groups if they have the objective of furthering equality.²⁴¹ For example, this would allow the provision of a benefit or service solely to members of LGBTI communities, if the purpose was to promote equality.

Only a small number of comments to the consultation expressed a view regarding special measures. However, those that did express a view generally supported such measures. For example, the Law Council of Australia noted that ‘circumstances exist in which special measures provisions are appropriate to achieve substantive equality within the community’.²⁴² They suggested that examples of special measures could include the provision of LGBTI-specific services for support groups, medical services, accommodation providers and legal services, as well as employment policies which specifically support LGBTI employees.

The {Also} Foundation suggested some examples of where special measures might be of benefit:

It is not possible to individually list each and every kind of special measure that might be captured by such an exception in federal anti-discrimination legislation. However, some examples could include providing a housing service specifically for gay men; and restricting an employment opportunity to transgender candidates if the role to be performed involved delivering a service designed to support transgender youth.²⁴³

Other participants also highlighted the need for a special measures exemption to be carefully worded to protect the LGBTI community and to ensure that it is not abused.²⁴⁴ For example, the NSW Gay & Lesbian Rights Lobby commented:

A fine balance needs to be reached between outlawing all discrimination on the basis of sexuality and sex and/or gender identity, ensuring that the act is not used for spurious claims, and that the social and cultural identity of a disadvantaged community group is preserved. The preservation of the group’s identity is an important consideration in the framing of any federal anti-discrimination legislation on the basis of sexuality and sex and/or gender identity.

... Any ‘special measures’ included in the legislation should be considered in light of international law and Australia’s human rights obligations, including the need to consult with affected communities.²⁴⁵

Section 12: Other actions that could be taken by the Australian Government to protect LGBTI people in Australia

The consultation received a number of suggestions about other ways in which the Australian Government could protect the human rights of LGBTI people in Australia. Many participants argued that while anti-discrimination legislation is an important step towards equality, it is essential that it is accompanied by other actions. Suggestions were often informed by personal experiences of discrimination.

The consultation received suggestions on the following issues which are discussed further below:

- public education regarding issues facing LGBTI people
- health services
- marriage equality
- government funding for support services
- national LGBTI representative
- identity on official documents and *Sex Files*
- aged care
- prisons
- adoption rights.

12.1 Public education

The majority of the comments supporting new federal discrimination protections also argued that discrimination and vilification experienced on the basis of sexual orientation or sex and/or gender identity could be reduced through public education about these issues.²⁴⁶ For example the National LGBTI Health Alliance argued that:

Legislation is crucial but will not change ‘hearts and minds’. Federal antidiscrimination legislation must be accompanied by a targeted national action program that includes community education to reduce transphobia, homophobia and discrimination against intersex people and to empower LGBTI people to assert their rights and respond effectively to discrimination.²⁴⁷

They added that education programs should be developed in conjunction with LGBTI community organisations.²⁴⁸

Many participants called for a federally funded public education campaign as well as the development of education programmes specifically for schools, workplaces and the public sector.²⁴⁹ For example:

I would like to see efforts made to change community attitudes towards LGBTI people, especially in workplaces and schools. Attitudinal change is difficult to bring about, but without increased efforts to decrease discrimination, harassment and vilification there will be no decrease in the incidence of depression, drug abuse, self-harm and suicide among LGBTI people.²⁵⁰

Participants also expressed the need to ensure that all LGBTI people are informed of and understand their rights and the appropriate avenues available to them if they have been discriminated against.²⁵¹

The consultation heard that young LGBTI people face distinct challenges, especially at school.²⁵² Comments suggested that the new national curriculum for Australian schools should include education about all forms of sexual orientation and sex and/or gender identity. For example, comments made by roundtable participants included:

“Attitudinal change is difficult to bring about, but without increased efforts to decrease discrimination, harassment and vilification there will be no decrease in the incidence of depression, drug abuse, self-harm and suicide among LGBTI people.”

Participant

Education should be started early that there are males and females and some people do not fit into those categories. Discrimination is learnt. When I was in sex education in high school we were taught that there were males and females. It was confusing as I was obviously not male or female.²⁵³

Children are not taught about the occurrence of intersex births and neither are they taught about the occurrence of intersex, sex and/or gender diverse people. This ill-prepares children for the real world where they may encounter such people. Children themselves who are intersex, sex and/or gender diverse are marginalised in such circumstances and made to feel shame about [the] way they are.²⁵⁴

A number of organisations stressed the importance of education on the needs of trans and intersex people for health and community service providers.²⁵⁵ The current lack of understanding in this field was reported to be a barrier to accessing health care:

The practical result is that some sex and gender diverse people in the ACT either do not seek medical treatment, or choose not to disclose their full medical history for fear of facing potential discrimination from ill-

informed medical practitioners. This raises serious concerns on an individual level but also from the perspective of the need to protect and respect the human rights of all persons in Australia today.²⁵⁶

12.2 Health services

A number of participants raised concerns about the lack of access to appropriate medical care, especially for trans and intersex people.²⁵⁷ For example, the WA Gender Project suggested that specialist medical centres for transsexual and intersex people should be established in each state and territory.²⁵⁸

Participants also raised concerns about medical professionals overlooking trans and intersex people for conditions that are generally understood to affect either men or women exclusively, such as ovarian cancer and prostate cancer. For example, the consultation heard:

We would like to avoid replication here of the well-known case of an American female-to-male, Robert Eades, who died of ovarian cancer because doctors refused to treat him for an ‘inappropriate’ disease. We suggest that any medical procedure recommended by an authorised medical professional should be recognised as eligible for treatment, and the gender restrictions be removed from the Medicare tables.²⁵⁹

A trans person who was registered male at birth and then transitioned legally to female will still have a prostate. However, Medicare only allows men to access services to do with prostate issues. Therefore those people cannot gain prostate screening or be entitled to surgery or treatment with regard to benign prostate hyperplasia or prostate cancer.²⁶⁰

Several participants advocated for better access to gender affirmation treatment.²⁶¹ Currently such costs are high and there are long waiting lists due to the lack of experienced doctors in this area. Some participants maintained that Medicare should cover the costs of gender affirmation treatment while others suggested low interest loans should be available.²⁶² For example, the Gender Centre argued that:

On the larger question of access to male-to-female affirmation (or reassignment) surgery, the greatest impediments are the bottleneck caused by their being only two surgeons practicing this surgery on a regular basis in Australia, and the excessive cost for the procedures (\$25,000-\$30,000 for surgery, without the added costs for electrolysis, hormone therapy and at least two years of psychiatric preparation).²⁶³

Some participants advocated for access to medical and surgical treatment for fully consenting young people with parental consent:

Australian adolescents are being denied timely access to critical medical treatment - with life-threatening and degrading consequences - and families are in distress - because of the effects of the current erroneous interpretation of Marion's Case, expressed in the cases of Re A and Re Alex, which incorrectly extended the definition of "Special Medical Procedure" to therapeutic medical treatment for young people who experienced intersex conditions; including transsexualism.²⁶⁴

Some participants also called for the cessation of non-therapeutic medical interventions on non-consenting intersex children.²⁶⁵ For example:

[Organisation Intersex International Australia] affirms that the true sex of the child is determined by their own inner psychological perceptions and that the right of individual intersex persons to affirm their own sex identity without medical or governmental interference should be a basic human right.²⁶⁶

12.3 Marriage equality

The majority of consultation participants who favoured new anti-discrimination protections also expressed their support for marriage equality in Australia. Specifically, participants argued that subsection 5(1) of the *Marriage Act 1961* (Cth)²⁶⁷ should be amended so that all couples are able to marry.²⁶⁸ Comments included:

The exclusion of same-sex couples from the legal definition of 'marriage' is key to their experience of discrimination and in contravention of Australia's obligations under Article 2 and 26 of the International Covenant on Civil and Political Rights - Freedom from Discrimination. Amnesty International calls on the Australian Government to amend the Marriage Act 1961 to end discrimination, by allowing the marriage of Australian same-sex couples and permit the recognition of those same-sex married couples who formally united in marriage overseas.²⁶⁹

Legalise marriage, and not just for LGBTI people, but for ALL people, regardless of whether they are male, female, both, or neither.²⁷⁰

I support gay marriage. Why? Because it is an act of discrimination; it is discrimination pure and unadulterated. I would argue that the refusal to amend the Marriage Act is an act of discrimination. It is just as much discrimination as was [a] sign in a South African park or beach saying whites only.²⁷¹

The Kingsford Legal Centre argued that marriage has a particular significance in our community and thus equal legal recognition to non-heterosexual couples is not sufficient:

While many may argue that providing the same legal recognition to same sex couples as opposite sex de facto couples is sufficient, we would argue this is not sufficient. Marriage has a particular significance in our community. Across all religions and belief systems, marriage is the way in which committed relationships have been recognised. For this reason, committed relationships between people in same sex relationships should also be recognised through marriage. There is a social meaning to marriage which does not equate to de facto relationship recognition.²⁷²

Participants argued that it would be a contradiction to provide federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity while federal laws continue to discriminate.²⁷³

Organisation Intersex International argued that marriage equality would remove discrimination against intersex people who are currently forced to be legally a man or a woman in order to marry:

In the matter of marriage rights if the law is changed to allow for same sex marriage people who are Intersex will still not be able to marry unless they agree to conform to male or female sex anatomies and effectively have their Intersex erased.²⁷⁴

Another participant noted:

Why should I be forced to take on a gender identity that I am not? That is like telling a female that she has to identify as a male in order to marry. I identify (quite rightly too) as Intersex. Why should I have to change my gender to marry?²⁷⁵

A number of comments expressed opposition to marriage equality asserting that it is inconsistent with religious beliefs.²⁷⁶ For example, the Anglican Church Diocese of Sydney noted:

We commend the government for the introduction of legislative changes to offer privileges and protection to same-sex couples. But we do object to same-sex relationships claiming the name of the unique relationship which is marriage. We do not doubt that many of these relationships are committed, long-term and loving, but the fact is that they lack some of the fundamental characteristics that make marriage 'marriage', and thus should not claim this term to refer to their relationship.²⁷⁷

However, not all people were opposed to marriage equality on the grounds of their religious beliefs. One participant noted:

Despite the fact that I am a full member of the Uniting Church of Australia ... I fully support equality under the law for LGBTI people including the right to marry both legally and within the church.²⁷⁸

12.4 Government funding for support services

A number of participants argued that there should be more funding for organisations that provide support services to LGBTI people. For example:

There should be ongoing funding for LGBTI support services such as telephone support lines and health services.²⁷⁹

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 capital city.²⁸⁰

Some participants specifically argued for funding to community legal centres to ensure that people know their legal rights.

Increased funding to Community Legal Centres is also imperative to enable advice and representation for people complaining of discrimination and public interest-based organisations should be given standing to assist people make complaints under Federal anti-discrimination law.²⁸¹

12.5 National LGBTI representative

Several comments called for a national representative responsible for sexual orientation and sex and/or gender identity. Some participants suggested the appointment of a federal minister,²⁸² while others suggested the appointment of a Commissioner within the Commission.²⁸³

Participants argued a Commissioner should be responsible for increasing education and awareness of LGBTI issues in the wider community, monitoring human rights abuses, discrimination and vilification, research, legislative reform and facilitating outreach services.²⁸⁴ The National LGBTI Health Alliance also noted that there is no government-funded peak body for LGBTI people:

The Australian Government currently provides support to various equity groups, such as people with a disability, young people, seniors, women, culturally and linguistically diverse people, Aboriginal and Torres Strait Islander people, and people in Regional and Rural areas. Such support is provided through a Minister/Parliamentary Secretary, an Advisory Group, Departmental Unit, National Strategy/Plan and a funded NGO peak body. None of this government support is currently provided to people of diverse sexual orientations, and sex and/or gender diverse people. The National LGBTI Health Alliance is the peak body of organisations working to promote the health and wellbeing of LGBTI people. It is funded entirely from community raised money. Government support should be made available to the LGBTI community as a matter of extreme urgency.²⁸⁵

12.6 Identity on official documents and Sex Files

A significant number of participants expressed concern about the requirements for changing sex on legal documents.

Issues relating to changing the legal recognition of sex in documents and government records are discussed in detail in the Commission's 2009 paper *Sex Files*.²⁸⁶ Many participants raised issues that were considered by *Sex Files* and called on the Federal Government to implement the recommendations made in that report.²⁸⁷

Participants were particularly concerned about the requirement that a person must have had sex affirmation surgery²⁸⁸ and the requirement that a person not be married²⁸⁹ in order for them to change their legal sex.

The consequences of a person not being able to change their legal sex are considerable. A number of people raised issues of not being identified as the correct sex on passports, flight boarding passes, in hospitals, and by government agencies including Centrelink and Medicare. One person commented:

I changed my name more than ten years ago, but the trade certificate that I obtained was in my previous (female) name. I contacted the institution and asked that they re-issue the document in my new (male) name but they refused to do so. When I contacted the NSW Anti Discrimination Board I was advised that because the provision of a certificate was not the provision of a service, that there was nothing I could do. This has meant that the only way that I can verify that I've got any qualifications for a new job is to 'out' myself at the interview.²⁹⁰

Intersex people reported similar challenges as they are unable to indicate legally that they are intersex.

More times tha[n] I can count I have encountered various forms that do not allow me to correctly indicate that I am Intersex. Some of these go on to threaten punitive action for not providing correct information. This is quite stressful as I am continually not given the option to tell the truth, and am treated [differently] if I don't tell the truth. It wears you down after a while.²⁹¹

12.7 Aged care

Several community organisations maintained that work to increase awareness of LGBTI issues needs to be done in the aged care sector.²⁹² Some participants favoured LGBTI specific aged care services and facilities, while others advocated for educating mainstream service providers.²⁹³

Indeed, the transition process taking place towards Federal responsibility for aged care provides a significant window of opportunity for the [Australian Human Rights Commission] and the Federal government to ensure maximum protection from discrimination and well targeted education around certainty and safety for GLBTI aged care consumers.²⁹⁴

GRAI (GLBTI Retirement Association Incorporated) advocated for the following specific measures:

- aged care sector training and performance monitoring be modified to specifically address GLBTI needs
- GLBTI issues be included in all relevant training packages and best practice performance criteria

- the promotion of 'safe haven' reporting mechanisms, for example someone within a care establishment clearly identified as GLBTI friendly and informed.²⁹⁵

12.8 Prisons

Some participants raised concerns about the treatment of trans and intersex people in prisons. One participant commented:

People who happen to be transgendered and who happen to be imprisoned (possibly on some unrelated matter) should not be incarcerated with groups of whatever gender they happened to be at birth. There should be a consultation process to determine where they are held and their safety should be the foremost concern in this process.²⁹⁶

The Tasmanian Council for Sex and Gender Diverse People argued that a trans or intersex person should not be forced to be incarcerated with people who are of the same sex as they were at birth or forced into isolation:

Trans people should be put in prisons of the gender they are presenting as. Current policies also tends to require that they be put into isolation and are not allowed to mix with other prisoners. I can see that in some situations that would be for their protection. However, that should be their choice. They should not be treated differently from other prisoners.²⁹⁷

“... I am continually not given the option to tell the truth, and am treated [differently] if I don't tell the truth. It wears you down after a while.”

Participant

12.9 Adoption rights

Some participants advocated for equality in adoption, surrogacy and IVF.²⁹⁸ For example, Amnesty International Australia argued that:

[a]doption by same-sex parents is not contrary to a child's best interests. There is no evidence to suggest that a child would be harmed by being raised by same-sex parents.²⁹⁹

The Tasmanian Council for Sex and Gender Diverse People recommended that parenting and adoption laws for same sex couples should be equal to the laws that apply to heterosexual and married couples.³⁰⁰

12.10 Other suggestions

A wide range of additional suggestions were also made by participants, such as to:

- include the right to equality in our Constitution or a federal human rights Act³⁰¹
- implement appropriate policies in all Commonwealth agencies to support LGBTI people³⁰²
- ensure a commitment by the public sector to employ and support LGBTI people³⁰³
- include LGBTI status in the census so the government cannot dismiss the LGBTI community as only 2% of the population³⁰⁴
- appoint a teacher in every school as a 'safe teacher' who can support young people who are being bullied³⁰⁵
- provide ongoing training and support to increase understanding about rainbow families in family mediation and child support services etc³⁰⁶
- remove discrimination by providing equal age of consent to heterosexual and homosexual acts in Queensland³⁰⁷
- remove discrimination in employment for sex and/or gender diverse people wanting to work with children³⁰⁸
- eliminate the 'homosexual advance defence' in all Australian jurisdictions³⁰⁹
- allow intersex people to play sport competitively as a male or female, depending on what their physical physique is most closely associated with.³¹⁰

Section 13: Conclusion

Equality for people of all sexual orientations and sex/and or gender identities is supported by international human rights agreements which Australia has agreed to observe. Taking steps to achieve such equality is the responsibility of the federal government. For this reason, the Commission is particularly pleased by the Government's commitment to introduce federal protections from discrimination on the basis of sexual orientation and sex and/or gender identity.

The Commission acknowledges the efforts of all of the individuals and organisations that participated in this consultation. Their views are summarised in this report which outlines the significant levels of discrimination, vilification and harassment experienced on the basis of sexual orientation and sex and/or gender identity, the benefits of including protections in federal law, and how such protections might be framed. It also identifies other measures that could improve the protection of the human rights of LGBTI people in Australia.

There are significant gaps in the legal protection from discrimination on the basis of sexual orientation and sex and/or gender identity at the state and territory level and almost no protections at the federal level. This consultation has clearly demonstrated the need for comprehensive protections. The stories of discrimination, vilification and harassment, and the explanations of the potential benefits of new protections from discrimination, were compelling.

The belief that federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity would lead to cultural change was a common theme of contributions to the consultation. The consultation heard widespread support for the inclusion of protection from discrimination on the basis of sexual orientation in federal anti-discrimination laws. The consultation also heard of the importance of ensuring that people of all sex and/or gender identities are protected from discrimination by the use of broad and inclusive terminology in federal anti-discrimination law. State and territory laws provide incomplete and inconsistent protection from discrimination in this area. A number of consultation participants expressed support for including protection on the basis of sex characteristics, gender identity and gender expression in order to achieve the broadest coverage of people of all sex and/or gender identities. The Commission also heard of the need to ensure that people who are intersex are expressly included in legislative protections from discrimination.

The consultation also heard of alarming levels of violence and harassment, particularly towards trans and intersex people. The Commission encourages the Government to give consideration to providing appropriate protections from vilification and harassment on the basis of sexual orientation and sex and/or gender identity in federal anti-discrimination law.

The Commission acknowledges that a small number of participants did not support the inclusion of protection from discrimination on the basis of sexual orientation and sex and/or gender identity in federal law. Some participants argued that there should be exemptions to laws prohibiting discrimination on these bases, particularly for religious organisations. Determining the extent of any exemptions must involve careful balancing of the right to be free from discrimination with the right to freedom of religion and belief. The Commission's view is that there should be further consultation and careful consideration of this issue.

Federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity would send a powerful message to our community regarding equality. The Commission supports the introduction of such laws, which could have a profound impact on reducing discrimination, vilification and harassment experienced by LGBTI people in Australia.

The Commission is proud to provide this report to the Australian Government, to assist in the processes of consolidating and harmonising federal anti-discrimination laws and developing a National Action Plan on Human Rights.

Appendix 1: List of participants

The consultation received comments from the following 153 individuals and organisations.

Received from:	Comment No.
{Also} Foundation	84
A Gender Agenda	107
ACON	109
ACT Council of Social Services (ACTCOSS)	86
AIS Support Group Australia	117
Amnesty International Australia	89
Anglican Church Diocese of Sydney (Social Issues Executive)	76
Anglican Church Diocese of Sydney (Standing Committee of the Synod)	108
Anglican Public Affairs Commission	36
Anti-Discrimination Board of New South Wales	115
Anti-Discrimination Commission Queensland	131
Australian Christian Lobby	87
Australian Family Association	119
Australian GLBTIQ Multicultural Council (AGMC)	113
Aylward, Peta	22
Beckford, John	11
Botta, Richard	64
Brady, Rachael	14
Cartwright, Colleen and Lienert, Tania	31
Catholic Commission for Employment Relations	150
Centre for Multicultural Youth (Victoria)	102
Chad, David	5
Changeling Aspects	46
Christian Schools Australia	24
Commissioner for Children Tasmania	130
Confidential	1, 20, 47, 62, 88, 99, 105, 126, 146
David, Fiona and Bailey, Peter	147
Endeavour Forum	42

Received from:	Comment No.
Erinyes Autonomous Activist Lesbians	143
FamilyVoice Australia	41
Freedom! Gender Identity Association	90
GRAI (GLBTI Retirement Association Incorporated)	140
Harrison, Jo	78
Hawkesbury Nepean Community Legal Centre	97
Howat, Paul	7
Hume, Sydney Gordon	32
Inner City Legal Centre	142
Job Watch	95
Kacelnik, Lara	58
Kingsford Legal Centre	149
Law Council of Australia	132
Law Institute Victoria	144
Le Gros, Mark	83
Leigh, Lawrence	29
Madison, Alex	65
Marrickville Legal Centre	151
McClure, Monica	60
McGuire, Linda	50
McMaster, Sally	52
Name withheld	2, 3, 4, 6, 9, 10, 12, 16, 18, 19, 23, 25, 26, 28, 34, 35, 37, 38, 39, 40, 44, 45, 49, 51, 54, 55, 59, 61, 63, 66, 68, 69, 70, 71, 74, 75, 79, 80, 81, 85, 92, 96, 98, 104, 114, 120, 123, 133, 134, 135, 136, 139
National Children's and Youth Law Centre and Australian Youth Affairs Coalition (NCYL and AYAC)	145
National LGBTI Health Alliance	112
New Hope Baptist Church	129
NSW Gay & Lesbian Rights Lobby	94
Organisation Intersex International	82
Organisation of Rabbis of Australasia	100
OUTthere	72
Parents and Friends of Lesbians and Gays (PFLAG)	13
Petrie, Linda	17

Received from:	Comment No.
Presbyterian Church	56
Queensland Association for Healthy Communities (QAHC)	43
Redfern Legal Centre	91
ROAR Feminist Collective	141
South Australian Equal Opportunity Commission	110
Salt Shakers	124
Samantha	53
Seventh Day Adventist Church	77
Sex and Gender Education (SAGE) Australia and Australian Health and Education Centre (AHEC)	73
Smith, Philip	128
Starfield, Romanadvouratrelundar	21, 27
Still Fierce	111
Tasmanian Baptists	101
Tasmanian Council for Sexual and Gender Diverse People	33
Tasmanian Gay and Lesbian Rights Group	153
The Gender Centre	48
Thomas, Deryck	57
Todhunter, Liz	67
Tonti-Fillipinni, Nicholas and Durie, Mark	127
Victorian Bar	148
Victorian Child Safety Commissioner	138
Victorian Equal Opportunity & Human Rights Commission	121
Victorian Women Lawyers Association	93
WA Gender Project	125
Wallbank, Rachel	118, 122
WayOut	103
Webster, Julie	15
Western Australian Equal Opportunity Commission	137
Wilson, Gina	8, 30
Women's Legal Centre (ACT & Region)	106
Women's Legal Services NSW	116
Youth Affairs Council of Victoria	152

Appendix 2: Definitions in state and territory laws

**Table 1:
Sexuality Grounds in State and Territory Anti-Discrimination Legislation**

Act	Ground	Definition of Ground
Anti-Discrimination Act 1977 (NSW)	'homosexuality'	'homosexual means male or female homosexual'
Equal Opportunity Act 1995 (Vic)	'sexual orientation'	'sexual orientation means homosexuality (including lesbianism), bisexuality or heterosexuality'
Anti-Discrimination Act 1991 (Qld)	'sexuality'	'sexuality means heterosexuality, homosexuality or bisexuality'
Equal Opportunity Act 1984 (SA)	'sexuality'	'sexuality means heterosexuality, homosexuality or bisexuality'
Equal Opportunity Act 1984 (WA)	'sexual orientation'	'sexual orientation, in relation to a person, means heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person'
Discrimination Act 1991 (ACT)	'sexuality'	'sexuality means heterosexuality, homosexuality (including lesbianism) or bisexuality'
Anti-Discrimination Act 1992 (NT)	'sexuality'	'sexuality means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality'

Table 2: Gender Identity Grounds in State and Territory Anti-Discrimination Legislation (cont)		
Act	Ground	Definition of Ground
Equal Opportunity Act 1995 (Vic)	'gender identity'	'gender identity means - (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such) - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such) - (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of that sex'
Anti-Discrimination Act 1991 (Qld)	'gender identity'	'gender identity, in relation to a person, means that the person - (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or (b) is of indeterminate sex and seeks to live as a member of a particular sex'
Equal Opportunity Act 1984 (SA)	'chosen gender'	'For the purposes of this Act, a person is a person of a chosen gender if - 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 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'
Equal Opportunity Act 1984 (WA)	'gender history' 'gender reassigned person'	'a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex' 'opposite sex means a sex of which the person was not a member at birth' 'gender reassigned person means a person who has been issued with a recognition certificate under the Gender Reassignment Act 2000 or a certificate which is an equivalent certificate for the purposes of that Act'

Table 2: Gender Identity Grounds in State and Territory Anti-Discrimination Legislation (cont)		
Act	Ground	Definition of Ground
Discrimination Act 1991 (ACT)	'gender identity'	<p>'gender identity means -</p> <p>(a) the identification on a genuine basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such) -</p> <p>(i) by assuming characteristics of the other sex, whether by way of medical intervention, style of dressing or otherwise; or</p> <p>(ii) by living, or seeking to live, as a member of the other sex; or</p> <p>(b) the identification on a genuine basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such) -</p> <p>(i) by assuming characteristics of that sex, whether by way of medical intervention, style of dressing or otherwise; or</p> <p>(ii) by living, or seeking to live, as a member of that sex'</p>
Anti-Discrimination Act 1992 (NT)	See 'sexuality'	'sexuality means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality'
Anti-Discrimination Act 1998 (Tas)	See 'sexual orientation'	<p>'sexual orientation means -</p> <p>(a) heterosexuality; or</p> <p>(b) homosexuality; or</p> <p>(c) bisexuality; or</p> <p>(d) transsexuality'.</p> <p>'transsexuality means the condition of being a transsexual'</p> <p>'transsexual means a person of one sex who -</p> <p>(a) assumes the bodily characteristics of the other sex by medical or other means; or</p> <p>(b) identifies himself or herself as a member of the other sex; or</p> <p>(c) lives or seeks to live as a member of the other sex'</p>

- 1 Commonwealth of Australia, *Australian Human Rights Framework* (2010). At: <http://ag.gov.au/humanrightsframework> (viewed 25 March 2011).
- 2 See Australian Labor Party, *National Platform and Constitution 2009*, p 207; 'Abbott supports anti-discrimination legislation', *Star Observer*, 25 March 2010; and Coalition response in Law Council of Australia, *Federal Election 2010 Key Issues: Responses* (2010); as cited in Law Council of Australia, Comment 132, pp 13-14.
- 3 Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review: Australia*, 10th session (2011), Geneva, A/HRC/WG.6/10/L.8, pp 6-7. At: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 25 March 2011).
- 4 See: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/research_paper.html.
- 5 See: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/discussion_paper.html.
- 6 See: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/summary_web.html.
- 7 See: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/index.html.
- 8 Sheila Quinn, ARC International and International Commission of Jurists, *An Activists Guide to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2010). At: http://www.ypinaction.org/content/activists_guide (viewed 25 March 2011).
- 9 See, for example, Melbourne consultation on sexual orientation, 9 November 2010; Victorian Bar, Comment 148; Victorian Equal Opportunity and Human Rights Commission, Comment 121.
- 10 *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 11 Victorian Bar, Comment 148; Victorian Equal Opportunity and Human Rights Commission, Comment 121. See also ICCPR, arts 2 and 26.
- 12 Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992).
- 13 Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003). Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p 623.
- 14 Law Council of Australia, Comment 132. See also Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) *Human Rights Law Review* 207.
- 15 See, for example, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Russian Federation*, 24 November 2009, UN Doc CCPR/C/RUS/CO/6; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Colombia*, 4 August 2010, UN Doc CCPR/C/CO/6.
- 16 See, for example, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Ireland*, 30 July 2008, UN Doc CCPR/C/IRL/CO/3.
- 17 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 20 - Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009).
- 18 See, for example, Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, UN Doc CRC/GC.2003/4.
- 19 See, for example, Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan*, 5 February 1999, UN Doc A/54/38.
- 20 Law Council of Australia, Comment 132.
- 21 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 20 - Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom*, 9 October 2002, UN Doc CRC/C/15/Add.188.
- 22 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom*, 9 October 2002, UN Doc CRC/C/15/Add.188, p 11.
- 23 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, UN Doc CEDAW/C/2010/47/GC.2.
- 24 *Australian Human Rights Commission Act 1986* (Cth), Schedule 1.
- 25 International Service for Human Rights, *Ground-breaking statement on sexual orientation and gender identity by record number of 85 States*, 24 March 2011. At: http://www.ishr.ch/council/1033-ground-breaking-statement-on-sexual-orientation-and-gender-identity-by-record-number-of-85-states?utm_source=ISHR+Publications+and+News&utm_campaign=279226daf8-RSS_Email_Campaign_Council&utm_medium=email (viewed 25 March 2011).
- 26 See statements at International Lesbian, Gay, Bisexual Trans and Intersex Association, *UN Gen. Assembly Statement Affirms Rights for all*, 19 December 2008 (at: <http://ilga.org/ilga/en/article/1211>, viewed 6 April 2011) and United Nations Department of Public Information, 'General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social and Humanitarian Issues' (Media Release, 18 December 2008) (at: <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>, viewed 25 March 2011).

- 27 *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007). At: <http://www.yogyakartaprinciples.org/> (viewed 21 September 2010).
- 28 Above, Principle 2.
- 29 Above.
- 30 Sheila Quinn, ARC International and International Commission of Jurists, *An Activists Guide to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2010). At: http://www.ypinaction.org/content/activists_guide (viewed 25 March 2011).
- 31 Marian Pitts, Anthony Smith, Anne Mitchell and Sunil Patel, Gay & Lesbian Health Victoria and Australian Research Centre in Sex, Health & Society, *Private lives: A report on the health and wellbeing of GLBT Australians* (2006), p 51. At: www.glhv.org.au/files/private_lives_report_1_0.pdf (viewed 25 March 2011).
- 32 Working It Out, *Homophobia in the Workplace* (2010). At: http://www.workingitout.org.au/homophobia_workplace.html (viewed 25 March 2011).
- 33 South Australian Equal Opportunity Commission, Comment 110, p 3.
- 34 Name withheld, Comment 9, p 1.
- 35 Inner City Legal Centre, Comment 142, p 8.
- 36 Name withheld, Comment 70, p 1.
- 37 Romanadvouratrelundar Starfield, Comment 27.
- 38 WA Gender Project, Comment 125, p 3.
- 39 A Gender Agenda, Comment 107, p 14. See generally Women's Legal Centre (ACT & Region), Comment 106, p 2-3.
- 40 Organisation Intersex International, Comment 82, p 7.
- 41 GRAI (GLBTI Retirement Association Inc), Comment 140; Hawkesbury Nepean Community Legal Centre, Comment 97.
- 42 See also MetLife Mature Market Institute, *Out and Aging: The Metlife Study of Lesbian and Gay Baby Boomers* (2006), as cited in GRAI (GLBTI Retirement Association Inc) and Curtin Health Innovation Research Institute, *We Don't Have Any of Those People Here: Retirement accommodation and aged care issues for non-heterosexual populations* (2010).
- 43 Peter Keogh, David Reid and Peter Weatherburn, *Lambeth LGBT matters: The needs and experiences of lesbians, gay men, bisexual and trans men and women in Lambeth* (2006), as cited in GRAI (GLBTI Retirement Association Inc) and Curtin Health Innovation Research Institute, *We Don't Have Any of Those People Here: Retirement accommodation and aged care issues for non-heterosexual populations* (2010).
- 44 Ruth McNair and Nikos Tomacos, Victorian Gay and Lesbian Rights Lobby, *Not yet equal: Report of the VGLRL Same Sex Relationships Survey 2005* (2005), as cited in GRAI (GLBTI Retirement Association Inc) and Curtin Health Innovation Research Institute, *We Don't Have Any of Those People Here: Retirement accommodation and aged care issues for non-heterosexual populations* (2010).
- 45 Freedom! Gender Identity Association, Comment 90, pp 3-4.
- 46 See, for example, Dr Jo Harrison, Comment 78; GRAI (GLBTI Retirement Association Inc), Comment 140; Freedom! Gender Identity Association, Comment 90; National LGBTI Health Alliance, Comment 112.
- 47 WA Gender Project, Comment 125, pp 4-5.
- 48 Melbourne Roundtable on sex and/or gender identity, 9 November 2010. See also The Gender Centre, Comment 48, p 3.
- 49 National LGBTI Health Alliance, Comment 112, p 6.
- 50 Name withheld, Comment 120.
- 51 Above.
- 52 Inner City Legal Centre, Comment 142, p 9.
- 53 Romanadvouratrelundar Starfield, Comment 27.
- 54 Melbourne Roundtable on sex and/or gender identity, 9 November 2010.
- 55 Freedom! Gender Identity Association, Comment 90.
- 56 Above.
- 57 National LGBTI Health Alliance, Comment 112, p 6.
- 58 A Gender Agenda, Comment 107, p 16.
- 59 Above.
- 60 Above.
- 61 OUTthere, Comment 72, p 4.
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- 66 Victorian Equal Opportunity and Human Rights Commission, Comment 121, p 9.
- 67 Above.
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- 70 ACON, Comment 109, p 8.

- 71 ROAR Feminist Collective, Comment 141; Erinyes Autonomous Activist Lesbians, Comment 143.
- 72 Melbourne roundtable on sex and/or gender identity, 9 November 2010.
- 73 Above.
- 74 Lynne Hillier, Tiffany Jones, Marisa Monagle, Naomi Overton, Luke Gahan, Jennifer Blackman and Anne Mitchell, Australian Research Centre in Sex, Health and Society, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010), p 39.
- 75 Name withheld, Comment 105.
- 76 Dr Paul Howat, Comment 7.
- 77 Name withheld, Comment 105, p 3.
- 78 Name withheld, Comment 70, p 3.
- 79 Youth Affairs Council of Victoria, Comment 152.
- 80 Suicide Prevention Australia, *Position Statement: Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities* (2009), p 3. At: suicidepreventionaust.org/_notitia/FileHandler.ashx?id=EF740238ACF5729B7B20F25703BFD96611BF6D12 (viewed 25 March 2011).
- 81 Murray Couch, Marian Pitts, Hunter Mulcare, Samantha Croy, Anne Mitchell and Sunil Patel, Australian Research Centre in Sex, Health and Society, *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand* (2007), p 28. At: www.latrobe.edu.au/arcshs/downloads/arcshs-research-publications/Tranznation_Report.pdf (viewed 25 March 2011).
- 82 Fiona David and Peter Bailey, Comment 147, p 3.
- 83 See Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing* (2007), p 32. At: www.abs.gov.au/AUSSTATS/abs@nsf/DetailsPage/4326.02007?OpenDocument (viewed 25 March 2011).
- 84 See, for example, OUTthere, Comment 72; Name withheld, Comment 92; Women's Legal Services NSW, Comment 116.
- 85 Victorian Bar, Comment 148, p 4.
- 86 Melbourne roundtable on sexual orientation, 9 November 2010.
- 87 Tasmanian Gay and Lesbian Rights Lobby, Comment 153, p 2.
- 88 Name withheld, Comment 9, p 1.
- 89 Name withheld, Comment 54, p 1.
- 90 Melbourne roundtable on sexual orientation, 9 November 2010.
- 91 OUTthere, Comment 72, pp 2-3.
- 92 See, for example, above, p 2; The Gender Centre, Comment 48, p 1.
- 93 Name withheld, Comment 68, p 1.
- 94 Victorian Equal Opportunity and Human Rights Commission, Comment 121, p 10.
- 95 See, for example, Romanadvouratrelundar Starfield, Comment 27; Name withheld, Comment 35; Name withheld, Comment 63; Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 92; National LGBTI Health Alliance, Comment 112; GRAI (GLBTI Retirement Association Inc), Comment 140.
- 96 See, for example, The Gender Centre, Comment 48; Organisation Intersex International, Comment 82; Freedom! Gender Identity Association, Comment 90; Victorian Bar, Comment 148.
- 97 WA Gender Project, Comment 125, p 6.
- 98 Law Council of Australia, Comment 132, p 19.
- 99 Name withheld, Comment 75, p 1.
- 100 See, for example, Name withheld, Comment 6; Name withheld, Comment 9; Name withheld, Comment 75; Name withheld Comment 92; Law Institute of Victoria, Comment 144.
- 101 Victorian Bar, Comment 148, p 3. See *Anti-Discrimination Act 1977* (NSW), pt 4C.
- 102 Melbourne roundtable on sexual orientation, 9 November 2010.
- 103 Victorian Bar, Comment 148.
- 104 See, for example, Name withheld, Comment 16; Name withheld, Comment 18; Name withheld, Comment 23; Name withheld, Comment 29; Name withheld, Comment 32; Anglican Public Affairs Commission, Comment 36; Presbyterian Church of Australia, Comment 56; Anglican Church Diocese of Sydney, Comment 76; Seventh Day Adventist Church, Comment 77; Anglican Church Diocese of Sydney, Comment 108; Name withheld, Comment 127; Name withheld, Comment 128; Catholic Commission for Employment Relations, Comment 150.
- 105 See, for example, Australian Christian Lobby, Comment 87; Australian Family Association, Comment 119; New Hope Baptist Church, Comment 129; Name withheld, Comment 135; Name withheld, Comment 139.
- 106 Name withheld, Comment 16, p 1.
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- 108 See, for example, Name withheld, Comment 11; Name withheld, Comment 19; Name withheld, Comment 20; Name withheld, Comment 25; Name withheld, Comment 38; Name withheld, Comment 44; Name withheld, Comment 134.
- 109 Name withheld, Comment 28; Name withheld, Comment 39; FamilyVoice Australia, Comment 41; Endeavour Forum, Comment 42; Name withheld, Comment 49; Name withheld, Comment 61; Organisation of Rabbis Australia, Comment 100; Tasmanian Baptists, Comment 101; Salt Shakers, Comment 124; Name withheld, Comment 133.
- 110 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(ix). These regulations have effect under the *Australian Human Rights Commission Act 1986* (Cth). The concept of 'sexual preference' is not defined in the regulations or the Act. The regulations do not contain a ground of gender identity.
- 111 Australian Human Rights Commission, *Annual Report 2009-2010* (2010). At: http://humanrights.gov.au/about/publications/annual_reports/2009_2010/complaint-statistics.html (viewed 25 March 2011).
- 112 *Fair Work Act 2009* (Cth), ss 153, 186(4), 194, 195, 342, 351, 772(1)(f). In addition, personal/carer's leave has been extended to cover same-sex relationships as part of the employee's 'immediate family' for these purposes: ss 12, 97.
- 113 *Fair Work Act 2009* (Cth), ss 153, 195, 351, 578, 772.
- 114 *Sex Discrimination Act 1984* (Cth), s 5.
- 115 *Felix Walter Rohner v Linda Scanlan and The Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 454; *Roger Muller v Commonwealth of Australia* [1997] HREOCA 29 (29 May 1997). See B Gilmour-Walsh, 'Exploring Approaches to Discrimination the Basis of Same Sex Activity' (1994) 3 *Australian Feminist Law Journal* 117.
- 116 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the effectiveness*

- of the *Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (1 September 2008). At: http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html (viewed 25 March 2011).
- 117 Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, recommendation 11.15. At: http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm (viewed 25 March 2011).
- 118 *Anti-Discrimination Act 1977* (NSW), s 4(1) ('homosexual'), pt 4C.
- 119 'It is of course, a fine line, but the Act does not currently provide recourse for bisexuals who consider they have been subjected to discrimination because they are not homosexual': Anti-Discrimination Board of New South Wales, *The Neglected Communities* (2003), p 22, emphasis removed. At: http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_mardigrasforum2003 (viewed 25 March 2010). The question of coverage of bisexuality under the *Anti-Discrimination Act 1977* (NSW) has not been tested in a tribunal.
- 120 *Anti-Discrimination Act 1991* (Qld), s 7(n); *Equal Opportunity Act 1984* (SA), pt 3; *Discrimination Act 1991* (ACT), s 7(1)(b); *Anti-Discrimination Act 1992* (NT), s 19(1)(c).
- 121 *Equal Opportunity Act 1995* (Vic), s 6(l); *Equal Opportunity Act 1984* (WA), pt IIB; *Anti-Discrimination Act 1998* (Tas), s 16(c).
- 122 *Equal Opportunity Act 1995* (Vic), s 4(1) ('sexual orientation'); *Anti-Discrimination Act 1991* (Qld), s 4, ('sexuality'); *Equal Opportunity Act 1984* (SA), s 5(1) ('sexuality'); *Equal Opportunity Act 1984* (WA), s 4(1) ('sexual orientation'); *Discrimination Act 1991* (ACT), s 2 ('sexuality'); *Anti-Discrimination Act 1992* (NT), s 4(1) ('sexuality'); *Anti-Discrimination Act 1998* (Tas), s 3 ('sexual orientation', 'transsexuality' and 'transsexual').
- 123 *Equal Opportunity Act 1995* (Vic), s 4(1) ('sexual orientation'); *Anti-Discrimination Act 1991* (Qld) s 4(1) ('sexual orientation'); *Discrimination Act 1991* (ACT), s 2 ('sexuality').
- 124 *Equal Opportunity Act 1995* (Vic), s 7(2)(a); *Anti-Discrimination Act 1991* (Qld), s 8(d); *Equal Opportunity Act 1984* (SA), ss 29(2a)(a), 29(3)(a), 85T(2)(a); *Discrimination Act 1991* (ACT), s 7(2)(d).
- 125 *Anti-Discrimination Act 1977* (NSW), ss 38B(1)(a), 38B(1)(b), 39(1), 49ZG(1); *Equal Opportunity Act 1995* (Vic), s 6(m); *Anti-Discrimination Act 1991* (Qld), s 7(p); *Equal Opportunity Act 1984* (SA), ss 29(2a)(e), 29(3)(d), 85T(2)(d); *Equal Opportunity Act 1984* (WA), s 35O(2); *Discrimination Act 1991* (ACT), s 7(1)(n); *Anti-Discrimination Act 1992* (NT), s 19(1)(r); *Anti-Discrimination Act 1998* (Tas), s 16(s).
- 126 See, for example, *Anti-Discrimination Act 1977* (NSW), ss 38B(2), 39(1A), 49ZG(2); *Equal Opportunity Act 1995* (Vic), ss 7(2)(b), 7(2)(c); *Anti-Discrimination Act 1991* (Qld), ss 8(a), 8(b); *Equal Opportunity Act 1984* (SA), ss 29(2a)(c), 29(3)(c), 85T(2)(c); *Equal Opportunity Act 1984* (WA), ss 9(1)(b), 9(1)(c), 35AB(2)(a), 35AB(2)(b), 35O(1)(b), 35O(1)(c); *Anti-Discrimination Act 1992* (NT), ss 20(2)(b), 20(2)(c); *Discrimination Act 1991* (ACT), ss 7(2)(a), 7(2)(b); *Anti-Discrimination Act 1998* (Tas), ss 14(2), 15(1)(b).
- 127 Name withheld, Comment 79, p 2.
- 128 Law Institute of Victoria, Comment 144; Victorian Bar Association, Comment 148; Kingsford Legal Centre, Comment 149; Victorian Equal Opportunity and Human Rights Commission, Comment 121; ACON, Comment 109; Hawkesbury Nepean Community Legal Centre, Comment 97; Job Watch, Comment 95; NSW Gay & Lesbian Rights Lobby, Comment 94; Organisation Intersex International, Comment 82; Amnesty International Australia, Comment 89; Name withheld, Comment 69; Name withheld, Comment 68; Name withheld, Comment 65; Name withheld, Comment 54; Name withheld, Comment 51; Name withheld, Comment 40; Name withheld, Comment 31; Peta Aylward, Comment 22; Name withheld, Comment 9; Gina Wilson, Comment 8; Dr Paul Howat, Comment 7; Tasmanian Gay and Lesbian Rights Group, Comment 153.
- 129 Sydney roundtable on sexual orientation, 28 October 2010; Melbourne roundtable on sexual orientation, 9 November 2010.
- 130 Above.
- 131 Marrickville Legal Centre, Comment 151; Redfern Legal Centre, Comment 91; Queensland Association for Healthy Communities, Comment 43.
- 132 Freedom! Gender identity Association, Comment 90.
- 133 Melbourne roundtable on sexual orientation, 9 November 2010.
- 134 NSW Gay & Lesbian Rights Lobby, Comment 94, p 12.
- 135 ACON, Comment 109, p 4.
- 136 Name withheld, Comment 6; Name withheld, Comment 104; {Also} Foundation, Comment 84; Julie Webster, Comment 15; WA Gender Project, Comment 125.
- 137 Name withheld, Comment 123, p 1.
- 138 South Australian Equal Opportunity Commission, Comment 110 (supported the use of sexuality or similar terminology that encompasses the broad spectrum of sexual orientations); Victorian Women Lawyers, Comment 93; Name withheld, Comment 92.
- 139 Child Safety Commissioner Victoria, Comment 138; Law Institute of Victoria, Comment 144; Victorian Bar, Comment 148; Equal Opportunity Commission WA, Comment 137; Colleen Cartwright and Tania Lienert, Comment 31; WA Gender Project, Comment 125, p 9.
- 140 See, for example, Colleen Cartwright and Tania Lienert, Comment 31; OUTthere, Comment 72; WayOut, Comment 103.
- 141 Youth Affairs Council of Victoria, Comment 152, p 5.
- 142 Erinyes Autonomous Activist Lesbians, Comment 143; ROAR Feminist Collective, Comment 141; Women's Legal Services NSW, Comment 116; Equal Opportunity Commission WA, Comment 137.
- 143 Equal Opportunity Commission WA, Comment 137, p 2.
- 144 Anna Chapman, 'Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope' (1996) 3(3) *E LAW: Murdoch University Electronic Journal of Law*, as cited in Women's Legal Services NSW, Comment 116, p 3.

- 145 Law Institute of Victoria, Comment 144; Victorian Bar, Comment 148; Equal Opportunity Commission WA, Comment 137; WA Gender Project, Comment 125.
- 146 Inner City Legal Centre, Comment 142; Australian GLBTIQ Multicultural Council, Comment 113; NSW Gay & Lesbian Rights Lobby, Comment 94; Women's Legal Services NSW, Comment 116.
- 147 Freedom! Gender Identity Association, Comment 90, p 5. See also National LGBTI Health Alliance, Comment 112, p 7.
- 148 NSW Gay & Lesbian Rights Lobby, Comment 94; Freedom! Gender Identity Association, Comment 90; Tasmanian Council for Sexual and Gender Diverse People, Comment 33; Tasmanian Gay and Lesbian Rights Group, Comment 153.
- 149 Law Council of Australia, Comment 132, p 22.
- 150 Women's Legal Services NSW, Comment 116, p 3.
- 151 NSW Gay & Lesbian Rights Lobby, Comment 94. See also ACON, Comment 109.
- 152 See, for example, Amnesty International Australia, Comment 89; Inner City Legal Centre, Comment 142; Law Council of Australia, Comment 132; ACON, Comment 109; NSW Gay & Lesbian Rights Lobby, Comment 94.
- 153 See, for example, Anti-discrimination Commission Queensland, Comment 131; WA Gender Project, Comment 125; Australian GLBTIQ Multicultural Council, Comment 113; ACON, Comment 109; Freedom! Gender Identity Association, Comment 90; Lara Kacelnik, Comment 58; Queensland Association for Healthy Communities, Comment 43; WA Equal Opportunity Commission, Comment 137; Victorian Child Safety Commissioner, Comment 138; Name withheld, Comment 2; Law Council of Australia, Comment 132; National LGBTI Health Alliance, Comment 112, p 7; Melbourne roundtable on sexual orientation, 9 November 2010.
- 154 Law Council of Australia, Comment 132; ACON, Comment 109; Queensland Association for Healthy Communities, Comment 43. See also National LGBTI Health Alliance, Comment 112, p 7.
- 155 ACON, Comment 109; Freedom! Gender Identity Association Inc, Comment 90.
- 156 ACON, Comment 109A, p 5.
- 157 Law Council of Australia, Comment 132, p 26.
- 158 *Sex Discrimination Act 1984* (Cth), s 4.
- 159 See for example Sex and Gender Education Australia and Australian Health and Education Centre, Comment 73, p 3.
- 160 State tribunals interpreting State anti-discrimination statutes have expressed doubt that the ground of sex applies in relation to discrimination against a person on the ground of their transsexualism or transgenderism: *Menzies v Waycott* [2001] VCAT 415, [199]; *Opinion re: Australian Transgender Support Association of Queensland* [1996] QADT 8. The argument that sex discrimination is broad enough to encompass discrimination on a gender identity ground has received a more favourable reception in a more recent decision: *M v A and U* [2007] QADT 8, see [36]. A similar argument has been successfully made overseas, including in the United States, Canada and the European Union, where transsexuals and people who cross dress have used sex discrimination provisions. See *Smith v City of Salem* [2004] USCA6 278; *Maffei v Kolaeton Industry Inc* (1995) 626 NYS 2d 391; *Rosa v Park West Bank & Trust Co* [2000] USCA1 132; *Kavanagh v Canada (Attorney-General)* 2001 CanLII 8496 (CHRT); *P v S and Cornwall County Council* [1996] All ER (EC) 397.
- 161 *Equal Opportunity Act 1995* (Vic), ss 4(1) ('gender identity'), s 6(ac); *Anti-Discrimination Act 1991* (Qld), ss 4 ('gender identity'), 7(m), Dictionary; *Discrimination Act 1991* (ACT), ss 2, 7(1)(c), Dictionary ('gender identity').
- 162 *Equal Opportunity Act 1984* (SA), ss 5(5) ('chosen gender'), 29(2a).
- 163 *Equal Opportunity Act 1984* (WA), ss 4(1) ('gender reassigned person'), 35AA ('gender history'), pt IIAA.
- 164 *Anti-Discrimination Act 1977* (NSW), s 4(1) ('recognised transgender person'), pt 3A (especially s 38A ('transgender')). On the additional provisions, see in particular s 38B(1)(c).
- 165 *Anti-Discrimination Act 1992* (NT), s 4(1) ('sexuality'); *Anti-Discrimination Act 1998* (Tas), s 3 ('sexual orientation', 'transsexuality', 'transsexual'). The Northern Territory law does not define 'transsexuality'. The Tasmanian definition of 'transsexuality' is relatively broad and includes identifying as a member of the 'other sex'.
- 166 Note that the *Anti-Discrimination Act 1977* (NSW) test is narrower in that it does not apply to people who assume characteristics of their preferred gender: s 38A.
- 167 Anti-Discrimination Board of New South Wales, *The Neglected Communities* (2003), p 13. At: http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_mardigrasforum2003 (viewed 25 March 2010).
- 168 *Equal Opportunity Act 1984* (SA), s 29(2a)(d).
- 169 *Anti-Discrimination Act 1977* (NSW), s 38B(1)(c).
- 170 *Equal Opportunity Act 1984* (WA), s 35AB(3)(a). See s 4(1) definition of 'gender reassigned person'.
- 171 *Anti-Discrimination Act 1977* (NSW), s 4(1) ('recognised transgender person'); *Equal Opportunity Act 1984* (WA), s 4(1) ('gender reassigned person').
- 172 *Anti-Discrimination Act 1977* (NSW), s 38A; *Equal Opportunity Act 1995* (Vic), s 4(1) ('gender identity'); *Anti-Discrimination Act 1991* (Qld), Dictionary ('gender identity'); *Equal Opportunity Act 1984* (SA), s 5(5); *Discrimination Act 1991* (ACT), s 2, Dictionary ('gender identity'). Western Australia, the Northern Territory and Tasmania may cover intersex conditions under their disability/impairment provisions.
- 173 Disability/impairment discrimination provisions may also be relevant as intersex conditions are seen as genetic conditions.
- 174 See Section 7.2 Current protections from discrimination on the basis of sexual orientation.
- 175 Above.
- 176 Above.
- 177 {Also} Foundation, Comment 84. See also A Gender Agenda, Comment 107; The Gender Centre, Comment 48; Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 51.

- 178 {Also} Foundation, Comment 84, p 7.
- 179 National LGBTI Health Alliance, Comment 112, p 8; A Gender Agenda, Comment 107, p 22.
- 180 A Gender Agenda, Comment 107, p 20. See also, National LGBTI Health Alliance, Comment 112; WA Gender Project, Comment 125; {Also} Foundation, Comment 84.
- 181 Romanadvouratrelundar Starfield, Comment 27.
- 182 See, for example, Job Watch, Comment 95a; WayOut, Comment 72; Name withheld, Comment 70; Name withheld, Comment 69; Name withheld, Comment 58; Name withheld, Comment 54; Name withheld, Comment 9; Marrickville Legal Centre, Comment 151; Kingsford Legal Centre, Comment 149 (suggested that legislation should protect people who do not identify as either gender); Inner City Legal Centre, Comment 142; Women's Legal Centre (ACT & Region), Comment 106.
- 183 See, for example, Sex and Gender Education Australia and Australian Health and Education Centre, Comment 73; Name withheld, Comment 70; Name withheld, Comment 58.
- 184 See, for example, Name withheld, Comment 58; WA Gender Project, Comment 125; Women's Legal Centre (ACT & Region), Comment 106.
- 185 See, for example, Name withheld, Comment 53; The Gender Centre, Comment 48; Women's Legal Centre (ACT & Region), Comment 106.
- 186 WA Gender Project, Comment 125.
- 187 See, for example, Name withheld, Comment 75; Queensland Association of Healthy Communities, Comment 43; Tasmanian Council for Sexual and Gender Diverse People, Comment 33; Name withheld, Comment 6 (suggested sex and/or gender identity/diversity); Fiona David and Peter Bailey, Comment 147; Victorian Child Safety Commissioner, Comment 138.
- 188 See, for example, Freedom! Gender Identity Association, Comment 90; {Also} Foundation, Comment 84; A Gender Agenda, Comment 107; broadly supported by participants at the Sydney and Melbourne roundtables.
- 189 See, for example, Sex and Gender Education Australia and Australian Health and Education Centre, Comment 73; Still Fierce, Comment 111.
- 190 See, for example, Rachel Wallbank, Comment 122.
- 191 See, for example, WA Gender Project, Comment 125; {Also} Foundation, Comment 84; A Gender Agenda, Comment 107; Sydney and Melbourne roundtables.
- 192 A Gender Agenda, Comment 107, p 21. See also National LGBTI Health Alliance, Comment 112, p 8.
- 193 A Gender Agenda, Comment 107, p 21.
- 194 WA Gender Project, Comment 125A, p 18.
- 195 Organisation Intersex International, Comment 82, p 12.
- 196 See, for example, Freedom! Gender Identity Association, Comment 90; Queensland Association for Healthy Communities, Comment 43; Law Council of Australia, Comment 132; National LGBTI Health Alliance, Comment 112; A Gender Agenda, Comment 107. See also Section 7.3 above.
- 197 *Canadian Human Rights Act 1985* (Canada) as amended by Bill C-389.
- 198 *Equality Act 2010* (UK), ss 4, 7, 11 and 12.
- 199 New Zealand Government, 'Crown Law opinion on transgender discrimination' (Media Release, 2 August 2006). At: www.beehive.govt.nz/release/crown-law-opinion-transgender-discrimination (viewed 25 March 2011).
- 200 A Gender Agenda, Comment 107, p 20.
- 201 Law Council of Australia, Comment 132, p 26.
- 202 See, for example, Freedom! Gender Identity Association, Comment 90; Organisation Intersex International, Comment 82; Name withheld, Comment 75; Sex and Gender Education Australia and Australian Health Education Centre, Comment 73; Name withheld, Comment 70; Name withheld, Comment 69; Name withheld, Comment 68; Name withheld, Comment 58; Name withheld, Comment 54; Name withheld, Comment 51; Romanadvouratrelundar Starfield, Comment 27 ('intergender' was also suggested); Name withheld, Comment 22; Name withheld, Comment 9; Gina Wilson, Comment 8; Name withheld, Comment 7; Name withheld, Comment 2; National LGBTI Health Alliance, Comment 112; Youth Affairs Council of Victoria, Comment 152.
- 203 Sex and Gender Education Australia and Australian Health and Education Centre, Comment 73, p 12.
- 204 Romanadvouratrelundar Starfield, Comment 27A.
- 205 Youth Affairs Council of Victoria, Comment 152, p 14-15.
- 206 AIS Support Group Australia, Comment 117, p 3.
- 207 Above.
- 208 Above, p 4.
- 209 See, for example, AIS Support Group Australia, Comment 117; Organisation Intersex International, Comment 82; Romanadvouratrelundar Starfield, Comment 21; Freedom! Gender Identity Association, Comment 90.
- 210 AIS Support Group Australia, Comment 117, p 4. See also Freedom! Gender Identity Association, Comment 90, p 7; Organisation Intersex International, Comment 82, p 12.
- 211 Organisation Intersex International, Comment 82, p 11.
- 212 *Anti-Discrimination Act 1977* (NSW), pt 3A div 5 ('transgender' vilification), pt 4C div 4 ('homosexuality' vilification); *Anti-Discrimination Act 1991* (Qld), s 124A (vilification on grounds of 'sexuality' and 'gender identity'); *Discrimination Act 1991* (ACT), pt 6 ('sexuality vilification'); *Anti-Discrimination Act 1998* (Tas), ss 3 ('public act' (inciting hatred on the ground of 'sexual orientation')), s 19. These vilification provisions do not extend to the relationship grounds.
- 213 *Anti-Discrimination Act 1977* (NSW), ss 38R, 49ZS, 49ZT(1); *Anti-Discrimination Act 1991* (Qld), ss 4A, 124A; *Discrimination Act 1991* (ACT) ss 65, 66; *Anti-Discrimination Act 1998* (Tas), s 19.
- 214 See eg, *Turner v State Transit Authority* [2004] NSWADT 89; *JM and JN v QL and QM* [2010] NSWADT 66; *M v S and G* [2008] QADT 24; *Menzies v Owen* [2008] QADT 20.
- 215 *Anti-Discrimination Act 1992* (NT), s 20(1)(b) (in that context harassment is not defined or explained).

- 216 The Tasmanian Act provides that a person must not engage in any conduct which ‘offends, humiliates, intimidates, insults or ridicules’ a person on the ground of their relationship, in circumstances in which a reasonable person would have anticipated that the complainant would be ‘offended, humiliated, intimidated, insulted or ridiculed’: *Anti-Discrimination Act 1998* (Tas), s 17(1). This approach is similar to the legislative formulation of sexual harassment. See, for example, *Sex Discrimination Act 1984* (Cth), s 28A.
- 217 NSW Gay & Lesbian Rights Lobby, Comment 94; Victorian Women Lawyers, Comment 93; Freedom! Gender Identity Association, Comment 90; GRAI (GLBTI Retirement Association Inc), Comment 140; Law Council of Australia, Comment 132; Victorian Child Safety Commissioner, Comment 138; Anti-discrimination Commission Queensland, Comment 131; Women’s Legal Centre (ACT & Region), Comment 106; Victorian Equal Opportunity & Human Rights Commission, Comment 121; Hawkesbury Nepean Community Legal Centre, Comment 97.
- 218 Victorian Equal Opportunity & Human Rights Commission, Comment 121, p 9.
- 219 ACON, Comment 109; Victorian Child Safety Commissioner, Comment 138; Law Council of Australia, Comment 132; Hawkesbury Nepean Community Legal Centre, Comment 97. See *Racial Discrimination Act 1975* (Cth), pt IIA; *Sex Discrimination Act 1984* (Cth), pt II div 3.
- 220 See Section 6.4, Concerns about legal protection from discrimination on the basis of sexual orientation and sex and/or gender identity.
- 221 See for example, National LGBTI Health Alliance, Comment 112.
- 222 Some State and Territory anti-discrimination statutes use the terminology of exemptions and exceptions, whilst other statutes refer solely to exceptions. This discussion paper adopts the terminology of exemptions alone. Note that these exemptions are not generally applicable in relation to allegations of sexual harassment.
- 223 *New South Wales v Amery* (2006) 230 CLR 174, [138] (Kirby J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, [152] (Kirby J).
- 224 *Anti-Discrimination Act 1977* (NSW), ss 38S(2), 49ZT(2); *Anti-Discrimination Act 1991* (Qld), s 124A(2); *Discrimination Act 1991* (ACT), s 66(2); *Anti-Discrimination Act 1998* (Tas), s 55. Note that the *Anti-Discrimination Act 1998* (Tas) does not contain a reasonableness requirement and the *Anti-Discrimination Act 1977* (NSW) additionally refers to the purposes of religious instruction and discussion.
- 225 See, for example, Christian Schools Australia, Comment 24; Anglican Public Affairs Commission, Comment 36; Anglican Church Diocese of Sydney, Comments 76 and 108; Name withheld, Comment 127; New Hope Baptist Church, Comment 129; Catholic Commission for Employment Relations, Comment 150.
- 226 See, for example, {Also} Foundation, Comment 84; Tasmanian Council for Sexual and Gender Diverse People, Comment 33; Inner City Legal Centre, Comment 142; Victorian Child Safety Commissioner, Comment 138; Name withheld, Comment 136; WA Gender Project, Comment 125; Women’s Legal Services NSW, Comment 116; A Gender Agenda, Comment 107; Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 8.
- 227 See, for example, Kingsford Legal Centre, Comment 149; Erinyes Autonomous Activist Lesbians, Comment 143; Women’s Legal Services NSW, Comment 116; National LGBTI Health Alliance, Comment 112; ACON, Comment 109; A Gender Agenda, Comment 107; Hawkesbury Nepean Community Legal Centre, Comment 97.
- 228 See, for example, Job Watch, Comment 95a; WayOut, Comment 72; Kingsford Legal Centre, Comment 149; Australian GLBTIQ Multicultural Council, Comment 113; Women’s Legal Centre (ACT & Region), Comment 106; WayOut, Comment 103; Hawkesbury Nepean Community Legal Centre, Comment 97; NSW Gay & Lesbian Rights Lobby, Comment 94; Name withheld, Comment 92; A Gender Agenda, Comment 107.
- 229 Redfern Legal Centre, Comment 91; Victorian Bar, Comment 148; WA Equal Opportunity Commission, Comment 137; ACON, Comment 109; Anti-Discrimination Commission Queensland, Comment 131.
- 230 Tasmanian Gay and Lesbian Rights Group, Comment 153, p 5.
- 231 Tasmanian Council for Sexual and Gender Diverse People, Comment 33; Tasmanian Gay and Lesbian Rights Group, Comment 153; Freedom! Gender Identity Association, Comment 90.
- 232 Freedom! Gender Identity Association, Comment 90, p 7.
- 233 Victorian Bar, Comment 148, p 6.
- 234 Name withheld, Comment 96; {Also} Foundation, Comment 84; Tasmanian Council for Sexual and Gender Diverse People, Comment 33; Inner City Legal Centre, Comment 142; Victorian Child Safety Commissioner, Comment 138; Name withheld, Comment 136; WA Gender Project, Comment 125; Women’s Legal Services NSW, Comment 116; A Gender Agenda, Comment 107; Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 8.
- 235 Name withheld, Comment 96, p 2.
- 236 Women’s Legal Services NSW, Comment 116, p 3.
- 237 National LGBTI Health Alliance, Comment 112, p 10. See also ACON, Comment 109A, p 10.
- 238 See also Section 6.4 above.
- 239 Christian Schools Australia, Comment 24, p 2.
- 240 Anglican Public Affairs Commission, Comment 36, p 13. See also Anglican Church Diocese of Sydney, Comment 108, p 5.
- 241 *Equal Opportunity Act 1995* (Vic), ss 19, 61, 82; *Anti-Discrimination Act 1991* (Qld), ss 104, 105; *Equal Opportunity Act 1984* (SA), ss 47, 85ZB(2), 85ZK; *Equal Opportunity Act 1984* (WA), ss 31, 35ZD; *Discrimination Act 1991* (ACT), s 27; *Anti-Discrimination Act 1992* (NT), s 57; *Anti-Discrimination Act 1998* (Tas), ss 25, 26. As the grounds in *Anti-Discrimination Act 1977* (NSW) – homosexuality and transgender – provide protection only to members of the LGBTI communities, and not to, for example heterosexuals, a special measures exemption is not needed for the purpose of moving towards equality.
- 242 Law Council of Australia, Comment 132, p 27. See also Victorian Bar, Comment 148, p 7.

- 243 {Also} Foundation, Comment 84, p 7.
- 244 NSW Gay & Lesbian Rights Lobby, Comment 94; {Also} Foundation, Comment 84; Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 9.
- 245 NSW Gay & Lesbian Rights Lobby, Comment 94, pp 16-17.
- 246 See, for example, Tasmanian Council for Sexual and Gender Diverse People, Comment 33; {Also} Foundation, Comment 84; Freedom! Gender Identity Association, Comment 90; Redfern Legal Centre, Comment 91; South Australian Equal Opportunity Commission, Comment 110, Victorian Equal Opportunity and Human Rights Commission, Comment 121.
- 247 National LGBTI Health Alliance, Comment 112, p 1.
- 248 See above, p 10.
- 249 See Name withheld, Comment 9; Tasmanian Council for Sexual and Gender Diverse People, Comment 33; Name withheld, Comment 51; {Also} Foundation, Comment 84; NSW Gay and Lesbian Rights Lobby, Comment 94; Hawkesbury Nepean Community Legal Centre, Comment 97.
- 250 Name withheld, Comment 9, p 3.
- 251 See {Also} Foundation, Comment 84; Hawkesbury Nepean Community Legal Centre, Comment 97; Youth Affairs Council of Victoria, Comment 152.
- 252 Youth Affairs Council of Victoria, Comment 152, p 9.
- 253 Sydney roundtable on sex and/or gender identity, 28 October 2010.
- 254 Sex and Gender Education Australia and Australian Health Education Centre, Comment 73, p 15.
- 255 Freedom! Gender Identity Association, Comment 90; National LGBTI Health Alliance, Comment 112.
- 256 Fiona David and Peter Bailey, Comment 147, p 3.
- 257 See, for example, The Gender Centre, Comment 48; Redfern Legal Centre, Comment 91; WA Gender Project, Comment 125.
- 258 WA Gender Project, Comment 125, p 11.
- 259 The Gender Centre, Comment 48, p 3.
- 260 Sex and Gender Education Australia and Australian Health and Education Centre, Comment 73, p 13.
- 261 See, for example, Lara Kacelnik, Comment 58; Name withheld, Comment 120; Rachel Wallbank, Comment 122; Inner City Legal Centre, Comment 142.
- 262 Melbourne roundtable on sex and/or gender identity, 9 November 2010.
- 263 The Gender Centre, Comment 48, p 4.
- 264 Rachel Wallbank, Comment 118, p 4. See also A Gender Agenda, Comment 107, p 24.
- 265 See, for example, Gina Wilson, Comment 8; Organisation Intersex International, Comment 82; Freedom! Gender Identity Association, Comment 90; National LGBTI Health Alliance, Comment 112; Inner City Legal Centre, Comment 142; A Gender Agenda, Comment 107.
- 266 Organisation Intersex International, Comment 82, p 4. See also Inner City Legal Centre, Comment 142.
- 267 *Marriage Act 1961* (Cth), s 5, amended by the *Marriage Amendment Act 2004* (Cth). The *Family Law Act 1975* (Cth) contains a similar version of marriage, s 43(1)(a).
- 268 See, for example, David Chad, Comment 5; Dr Paul Howat, Comment 7; Gina Wilson, Comment 8; Julie Webster, Comment 15; Queensland Association for Healthy Communities, Comment 43; Sally McMaster, Comment 52; Lara Kacelnik, Comment 58; Name withheld, Comment 68; Name withheld, Comment 69; OUTthere, Comment 72; Name withheld, Comment 75; Name withheld, Comment 79; Mark Le Gros, Comment 83; Name withheld, Comment 85; Amnesty International Australia, Comment 89; Redfern Legal Centre, Comment 91; NSW Gay & Lesbian Rights Lobby, Comment 94; Hawkesbury Nepean Community Legal Centre, Comment 97; Name withheld, Comment 104; Women's Legal Centre (ACT & Region), Comment 106; Anti-Discrimination Board of NSW, Comment 115; Anti-Discrimination Commission Queensland, Comment 131; Kingsford Legal Centre, Comment 149; Name withheld, Comment 136.
- 269 Amnesty International Australia, Comment 89, pp 4-5.
- 270 Name withheld, Comment 79, p 3.
- 271 David Chad, Comment 5, p 1.
- 272 Kingsford Legal Centre, Comment 149, p 6.
- 273 Anti-Discrimination Board of NSW, Comment 115. See also David Chad, Comment 5; Name withheld, Comment 75.
- 274 Organisation Intersex International, Comment 82, p 7.
- 275 Romanadvouratrelundar Starfield, Comment 27, p 3.
- 276 Tasmanian Baptists, Comment 101; Organisation of Rabbis Australasia, Comment 100; Australian Christian Lobby, Comment 87; Anglican Church Diocese of Sydney, Comment 76; Presbyterian Church, Comment 56; Name withheld, Comment 49; Family Voice Australia, Comment 41.
- 277 Anglican Church Diocese of Sydney, Comment 76, p 2.
- 278 Name withheld, Comment 136, p 1.
- 279 Sydney roundtable on sexual orientation, 28 October 2010.
- 280 A Gender Agenda, Comment 107, p 24.
- 281 Hawkesbury Nepean Community Legal Centre, Comment 97, p 2.
- 282 Name withheld, Comment 12.
- 283 Freedom! Gender Identity Association, Comment 90.
- 284 See Gina Wilson, Comment 8; Organisation Intersex International, Comment 82.
- 285 National LGBTI Health Alliance, Comment 112, p 10.
- 286 Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records* (2009). At: www.humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 25 March 2011).
- 287 Above.
- 288 National LGBTI Health Alliance, Comment 112. See also Fiona David and Peter Bailey, Comment 147A; Freedom! Gender Identity Association, Comment 90.
- 289 See, for example, The Gender Centre, Comment 48; Name withheld, Comment 55; Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 120.

- 290 A Gender Agenda, Comment 107, p 15.
- 291 Romanadvouratrelundar Starfield, Comment 27, p 4.
- 292 See, for example, Colleen Cartwright and Tania Lienert, Comment 31; Dr Jo Harrison, Comment 78; Hawkesbury Nepean Community Legal Centre, Comment 97; A Gender Agenda, Comment 107; GRAI (GLBTI Retirement Association Inc), Comment 140.
- 293 See, for example, Colleen Cartwright and Tania Lienert, Comment 31; See also Dr Jo Harrison, Comment 78.
- 294 Dr Jo Harrison, Comment 78, p 2.
- 295 GRAI (GLBTI Retirement Association Inc), Comment 140, p 3.
- 296 Name withheld, Comment 54, p 2.
- 297 Romanadvouratrelundar Starfield, Comment 27B, p 2.
- 298 Tasmanian Council for Sex and Gender Diverse People, Comment 33; Name withheld, Comment 79; Amnesty International Australia, Comment 89.
- 299 Amnesty International Australia, Comment 89, p 5.
- 300 Tasmanian Council for Sex and Gender Diverse People, Comment 33.
- 301 Melbourne roundtable on sexual orientation, 9 November 2010; Name withheld, Comment 1; Women's Legal Centre (ACT & Region), Comment 106; Erinyes Autonomous Activist Lesbians, Comment 143.
- 302 Tasmanian Council for Sex and Gender Diverse People, Comment 33.
- 303 Name withheld, Comment 51.
- 304 Melbourne roundtable on sexual orientation, 9 November 2010.
- 305 Above.
- 306 Above.
- 307 Freedom! Gender Identity Association, Comment 90; Name withheld, Comment 104. See *Criminal Code 1995*, ss 227, 229; See also *Criminal Code Act 1899* (Qld), ss 229B, 208.
- 308 See, for example, *Anti-Discrimination Act 1991* (Qld), s 28; as cited in Freedom! Gender Identity Association, Comment 90; Romanadvouratrelundar Starfield, Comment 27.
- 309 Melbourne roundtable on sexual orientation, 9 November 2010. For an explanation of the Homosexual Advance Defence see Santo De Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment Of Culture As A Defence Strategy' (2002) 6 *Melbourne University Law Review* 110.
- 310 Mark Le Gros, Comment 83.

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Addressing sexual orientation and sex and/or gender identity discrimination

Consultation report

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Addressing sexual orientation and sex and/or gender identity discrimination is the report of a consultation, conducted by the Australian Human Rights Commission, to canvas the experiences and views of people who may have been discriminated against on the basis of their sexual orientation or sex and/or gender identity. It aims to inform and assist the implementation of the national Human Rights Framework, announced in April 2010.

During the consultation, the Commission heard many personal stories of discrimination, violence, harassment and bullying on the basis of sexual orientation and sex and/or gender identity. The majority of consultation participants identified a need for greater protection from such discrimination, supporting the inclusion of protection from discrimination on these grounds in federal anti-discrimination law. This report aims to capture the diverse range of views expressed by participants in the consultation about measures that would improve human rights protections for people of all sexual orientations and sex and/or gender identities.

April 2011



**Australian
Human Rights
Commission**

everyone, everywhere, everyday