



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

Summary of Web Comments

January 2011

Introduction

The Australian Human Rights Commission launched its consultation regarding protection from discrimination on the basis of sexual orientation, sex and/or gender identity on 1 October 2010.

An internet-based questionnaire was provided on the Commission's website to facilitate public contribution to the consultation. By 26 November 2010, we received comments from 51 individuals.

Many participants requested that their identity be withheld. A few participants requested that their comments be treated as confidential. Some participants chose not to respond to all of the questions listed.

In order to respect the privacy of participants and reflect the diversity of comments received, a summary of responses provided to each question is provided below.

1 What benefit would there be in federal law prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity?

The overwhelming majority of comments received supported the need for federal laws prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity. Many participants commented that such laws would have an important symbolic value and educational role in promoting the equality of all people regardless of their sexual orientation or their sex and/or gender identity.

For example, one participant noted:

Most importantly, [discrimination law] serves as an educational guide which says to all members of Australian society that discrimination on the basis of actual or perceived sexuality or actual or perceived gender identity is morally wrong, unethical, illegal, un-Australian and not condoned by the Australian government and Australian people. Secondly, it fills the gaps which are not covered by state and territory legislation, and which have been exploited by those who wish to discriminate.

Comment 2

Many participants commented that a person should not be discriminated on the basis of a private matter such as sexual orientation. Many participants also expressed the view that federal laws would create some consistency and uniformity in protection from discrimination on these grounds across Australia.

Some participants commented that federal laws were required to prevent discrimination by Commonwealth agencies in the provision of services and employment. Participants argued that such laws would protect:

- job security

- access to education.

Other benefits raised included:

- consistency throughout Australia in laws relating to changing sex on identity documents
- improvement of the mental health of LGBTI people as a result of reduced discrimination.

One participant noted that federal laws could be used to bring about an equal age of consent for sex in Queensland.

Some participants noted the importance of ensuring adequate protection of freedom of religion, for example:

I see some benefits, but there has to be allowance within any legal framework for certain organised groups, primarily religious groups, to discriminate in matters of employment where the group's deeply held philosophical and theological position is reflected in a policy.

Comment 128

I see the benefit as negative – that is it would be a detriment – unless there is companion legislation which fully and comprehensively legislates for and protects the freedoms of religion and speech which are contained in the International Covenant of Civil and Political Rights which Australia has both signed and ratified; and such legislation makes clear beyond doubt that the freedoms of religion and speech are fundamental rights which may not be abridged or restricted in any way by anti-discrimination legislation.

Comment 32

Several participants argued that there would be little or no benefit to protections in this area. Some people felt that there would be no benefit because existing laws adequately protected people from discrimination on these grounds.

2 What benefit would there be in federal law prohibiting vilification and harassment on the basis of sexual orientation and sex and/or gender identity?

Again, the majority of responses to this question indicated that there would be an enormous benefit to protection from vilification and harassment on the basis of sexual orientation and sex and/or gender identity. Many comments stated that vilification or harassment on any grounds is wrong or unacceptable. For example:

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.

Comment 54

It would allow people to feel safe and secure in the knowledge that they have a right to act against vilification and harassment based on their sexuality/gender.

Comment 79

People, especially the younger parts of the community, would not have to worry that they are going to be judged for existing. They will have confirmation that there is nothing wrong with them and that they should not have to put up with things like harassment.

Comment 69

Several participants raised concerns about the ambiguity of anti-vilification laws and expressed that the law should clearly define what constitutes vilification or harassment.

Vilification of any person or group is an ugly thing but the law should carefully define what constitutes slander / vilification. Religious groups also have reason, on occasions, to speak about and even against the teachings of other religious groups in society. Anti-harassment and anti-vilification laws should not prevent the free exchange of dialogue on such matters.

Comment 128

Some participants felt that there should be minimal exceptions to vilification or harassment, reflecting that this was perceived to be a more serious form of discrimination.

A few participants commented that there would be some benefit to protections against vilification or harassment provided freedom of religion and speech were also adequately protected. Others felt that there would be little or no point to such protection, with some people commenting that adequate protections already existed.

3 Can you provide examples of situations where federal protections from discrimination on the basis of sexual orientation, sex and/or gender identity are needed because state and territory laws do not provide adequate protections

This question prompted a wide range of responses. Examples of situations where participants felt that state and territory laws did not provide adequate protections included:

- the lack of protection against vilification and harassment under Western Australian law
- the inability to take action against a facility that will not provide access to appropriate toilets
- inadequate protection in any state from discrimination on the basis of gender identity.

Some participants also provided examples of the discriminatory operation of state laws, including:

- the lack of recognition of non-birth mothers in some states leading to lesbian couples travelling interstate to give birth

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- the distinction in the age at which consensual sex is permitted for same-sex attracted men in Queensland, compared to the age of consent that applies to heterosexual couples
- the difficulty in changing sex on official documents, including the requirement in some states that a person who has changed their sex must divorce their spouse in order to change their legal sex on official documents
- the prohibition on same-sex adoption in some states.

Some participants also raised concerns about the operation of exemptions in state laws:

- one participant argued that the exemption of not-for-profit organisations from Queensland discrimination law was wrong
- some participants argued that Victoria's anti-discrimination laws provided exemptions to religious groups which are too wide
- others argued that Victoria's laws did not provide enough protection to religious groups, referring to the *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Anor* case as an example.

Many people supported the notion of consistent laws across Australia rather than the widely diverse laws which currently exist in each state and territory. Participants felt that inconsistent laws create confusion and uncertainty about what laws apply.

Many states are behind on this issue with regards to legislation, and if they have legislation in place, it needs amending.

Comment 79

4 Have you experienced discrimination because of your sexual orientation or sex and/or gender identity for which there is no legal protection?

In response to this question, some participants answered yes or no without elaborating further. Others chose not to provide a response to this question.

Examples of discrimination provided by participants included:

- discrimination in employment including not getting jobs, being dismissed or forced to leave employment
- being unable to use female bathrooms in some workplaces
- being refused rental accommodation.

One participant gave the example of discrimination occurring as a consequence of not being able to change identity documents:

I was issued with an infringement notice by the WA Police, which listed my sex as 'male' – even though I am clearly not. Due to the legal requirements behind receiving a Gender Recognition Certificate including strict surgical requirement, leading to having

my birth certificate modified, I have so far been banned from making this important change as I have not undergone the appropriate surgery.

Comment 98

Some participants described the impact this form of discrimination had on them personally:

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. I was often physically attacked at school as well. I am surprised I got through those years. I did so by retreating inwards, not even attempting to try any form of sex, shying off when friends started coupling, focussing on my work and study, hiding in the library at lunch time to avoid being mocked and bullied. How many more young people are less resilient than I was?

Comment 7

Another participant described a more positive experience:-

Not as yet on a personal basis, I've only accepted my situation/life in the last two years and I have a good employer. Things are a lot better in public these days too but I'm sure that one day it will happen to me for sure, I just don't know when as I do live a simple life.

Comment 22

A bystander who witnessed discrimination on these grounds noted their concerns:

No, I am heterosexual but I have witnessed others being treated unfairly based on their sexuality. The problem is 'policing' – because we don't have strong leadership on what is right and wrong – teachers, police etc can be discriminatory.

Comment 15

5 Have you experienced vilification or harassment because of your sexual orientation or sex and/or gender identity for which there is no legal protection?

Again, many people described their personal experiences with vilification and harassment whilst others chose not to elaborate on this question. Some people gave the same answer as for Question 4.

Examples of vilification or harassment provided by participants included:

- bullying and harassment at schools and universities
- 'verbal abuse from some religious zealots'
- homophobic comments made by customers in a workplace.

For example, one participant commented:

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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. Students would play pornography on their phones/iPods and show it to me during class. Many classmates consistently asked me unnecessary and invasive questions about my sex life and preferred sexual practices. Food was thrown at me on a number of occasions. I was pushed, spat on and hit... None of the people who bullied me were ever punished.

Comment 70

An intersex participant commented:

I am "outed" on a daily basis by people who think they know my "secret" sometimes they then proceed to refuse service, use inappropriate pronouns or otherwise be rude. The fundamental harassment is Intersexphobic, transphobic and homophobic at once because I am thought to be lesbian when with my partner. When using the airports I am routinely scanned for explosive residue and have my bags searched. My partner who often accompanies me and is frequently standing next to me has never been scanned or searched once.

Comment 8

Another participant commented that although they hadn't personally experienced vilification or harassment, they would like gay/lesbian friends to have that same freedom.

6 What terminology should be used in federal anti-discrimination legislation if protection from discrimination on the basis of sexual orientation is to be included?

The most common response to question 6 was to express support for the use of the term 'sexual orientation'.

The majority of participants suggested that broad, all inclusive terms should be used, rather than the categorisation of specific subgroups.

One participant advocated for non-specific terminology, which did not use categorising words such as gay, lesbian, transgender, intersex and queer, stating:

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

Comment 79

Another participant noted:

I think broad terms like "sexual orientation and/or gender identity" are helpful because they are understood by most people and not just those who are already immersed in the discourse of sex and gender rights.

Comment 54

Many participants were opposed to any terminology which implied that sexual orientation is a choice or preference.

A few participants suggested the use of the term 'same-sex attracted'.

Several participants also suggested that legislation should protect people for both 'actual' and 'perceived' sexual orientation. One participant asserted that an individual's actual sexuality or gender may differ from another person's perceptions of their sexuality or gender (Comment 105). Another participant suggested the term 'actual or perceived non-heterosexuality'.

Two participants were opposed to the use of the term 'sexual orientation'. One asserted that the term 'sexual orientation' implies that everyone has a distinct orientation. Use of this term will thus pressure people to "fit the template" and thus should not be used (Comment 123). Another participant preferred the term 'sexuality' instead of 'sexual orientation'.

Finally, one participant argued that there needs to be a clear distinction between discrimination on the basis of sexuality, sexual formation and gender expression in order to adequately recognise the distinct legal and human rights of all Australians (Comment 118).

7 What terminology should be used in federal anti-discrimination legislation if protection from discrimination on the basis of sex and/or gender identity is to be included?

Most participants opposed the use of terms which emphasised choice such as 'chosen gender' and preferred all inclusive terms such as 'sex and gender identity' and 'sex and gender diverse'. There was also some support for using the term 'gender expression' as well as 'gender identity'.

One participant argued that legislation 'should protect all sex and gender diverse people regardless of how they personally identify'.

One participant asserted that legislation should read as follows:

It is illegal to discriminate against a person or persons on basis of their gender identity, gender presentation, gender history, level of physical transition, level of social transition or legal sex.

Comment 70

Several submissions asserted that legislation should clearly prohibit discrimination on the grounds of both sex and gender. For example, Comment 75 defines sex as the 'physical characteristics of a person's reproductive organs' and gender as 'the emotional, behavioural, and cultural manifestations of masculine and feminine and the spectrum surrounding those terms in one person'.

One participant suggested that the use of the phrase 'diversity in sexual formation or expression' would avoid the controversy and potential for error associated with the terms 'transgender', 'transexual/ism' and 'intersex'. (Comment 118).

7a What are the advantages or disadvantages of the terms used in state and territory laws, including: gender identity; chosen gender; gender history; a gender reassigned person; or a recognised transgender person; or transexuality?

Several participants argued that common terminology should be used in State and Territory laws. Comments included:

Some people do not feel that they fit within some of these terms, a term that can be used for all laws would be best practice.

Comment 6

The major disadvantage is that there is no standard or common law between most states. A person can be discriminated [against] in one state for reasons that another state disallows.

Comment 98

Another participant commented that the terms currently used in State and Territory laws are 'conflicting and confusing' and 'outdated, vague, misleading and discriminating' (Comment 118).

The term 'chosen gender' was criticised by several participants for implying that people have a choice (Comments 51, 58, 69, 70, 79):

The disadvantages of including the word 'chosen' in 'chosen gender' are that it is implied that these are choices for all people, and therefore to not be discriminated against is an extraordinary privilege not a right.

Comment 75

Another participant expressed opposition to the use of the term 'transsexuality':

I personally dislike transsexuality as to me it belittles the person and makes them sound like a porn star. Transgender to me personally is more descriptive of the person.

Comment 53

A few people were opposed to using specific categories and preferred all inclusive phrases. One participant asserted that categories 'reinforce the notion that certain sexual and gender orientations are still considered "other" when held up against heterosexuality' (Comment 79).

Several submissions supported the use of the term 'gender identity'.

7b Should protection from discrimination be provided if a person has or appears to have the characteristics of any gender?

The majority of participants asserted that protection from discrimination should be provided if a person has or appears to have the characteristics of any gender. There

was a lot of support for protection against discrimination on the basis of actual or perceived gender and the use of broad terminology (see Comment 105).

For example, one participant responded:

Absolutely. There is a huge continuum of gender and how people express their gender. It cannot be defined as one or the other.

Comment 12

Another participant asserted:

People should have the right to present as whatever gender they chose without fear of discrimination.

Comment 54

Only one submission was opposed to providing such protection. That participant maintained that 'it is our right to discriminate' and that employees should be able to discriminate (Comment 11).

8 What terminology should be used to ensure that people who identify as intersex are protected from discrimination in federal law? Should the term intersex be used? Should protection from discrimination on the basis of sex include people who are of indeterminate sex?

The majority of participants who responded supported the use of the word 'intersex'. Several comments also supported the use of the term 'indeterminate sex'.

Examples of comments provided include:

Intersex is the only accurate term that describes individuals who have differences of sex anatomy without perceiving those differences as disability or illness. Intersex differences themselves do not disable a person or cause any illness. The single most damaging issue for Intersex is social attitudes to our differences.

Comment 8

The laws should DEFINITELY protect those who are of 'indeterminate sex'; all humans deserve equality.

Comment 79

One comment opposed the use of the terms 'intersex' and 'indeterminate sex' preferring instead the term 'diversity in sexual formation', 'defined broadly to include transsexualism as well as the other diverse manifestations of intersex (Comment 118).

Many participants declined to offer an opinion as they are not themselves intersex.

9 What special measures designed to benefit specific groups based on sexual orientation and sex and/or gender identity should be allowed by federal anti-discrimination law?

Some comments supported special measures designed specifically to redress discrimination against a particular group of people. For example one participant commented ‘while inequality exists between sexes, genders and sexual orientations, then measures seeking to improve the situations of those affected are not discriminatory’ (Comment 75).

Some participants responded to this question by commenting on exemptions. For example, one participant suggested the exemptions be decided on a case-by-case basis by application only:

No blanket exemptions. Exemptions by application only, and public notification of those exemptions provided by those who receive any exemptions.

Comment 92

Other participants responded to this question by discussing general initiatives that they felt would address discrimination on the basis of sexual orientation and sex and/or gender identity, for example providing education, supporting people in employment, or supporting people through transition processes.

A few participants stated the view that special measures were not necessary as there is already adequate protection in anti-discrimination laws.

10 What other actions would you like to see the Australian Government take to better protect and promote the rights of LGBTI people in Australia?

An overwhelming number of participants commented that they would like to see education about LGBTI issues in schools, and workplaces and provided through the media:

Funding and proactive efforts into putting constructive education into schools and into the mass media, about gender and sex diversity and sexual orientation. Discrimination starts at home and helping peoples’ understanding and acknowledgment of it will also help reduce discrimination in current and future generations of Australians.

Comment 98

An equally large number of participants stated that the *Marriage Act 1961* (Cth) should be amended so that it no longer defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. Some participants also argued for the establishment of a Commonwealth civil, domestic or de facto partner registration scheme.

Other suggestions included:

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- allowing people who remain married to change their legal sex on official documents
- government funding for sex affirmation treatment and medical treatment for intersex people
- increased funding for organisations working in the LGBTI community
- the creation of a specific department within the Australian Human Rights Commission for sexual orientation, sex and gender identity
- the creation of a ministerial position to address these issues
- the provision of a 'not disclosed/ applicable' option on forms that ask for information about a person's sex
- federal legislation providing for equal rights in adoption, surrogacy, IVF, and taxation
- amending the federal Sex Discrimination Act to include protection on the basis of 'relationship status' rather than 'marital status'
- removal of government funding from organisations that discriminate against LGBTI people.

A small number of comments were opposed to any additional actions to protect and promote LGBTI rights. A few comments noted that any other actions to promote rights should be balanced with freedom of religion.