



Australian
Human Rights
Commission
everyone, everywhere, everyday

Protection from discrimination on the basis of sexual orientation and sex and/or gender identity

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Discussion Paper

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1 What is this consultation about?

The Australian Human Rights Commission (the Commission) is conducting a targeted consultation regarding federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity.

Currently federal law protects against discrimination on the basis of race, sex, disability and age. However, there is little protection in federal law, unlike in state and territory laws, from discrimination on the basis of sexual orientation and sex and/or gender identity.

In April 2010, the Australian Government announced the Human Rights Framework¹ (the Framework) in response to the report of the National Human Rights Consultation. The Framework included a commitment to:

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

These initiatives offer an opportunity to ensure that concrete steps are taken to promote and protect the human rights of people of all sexual orientations and sex and/or gender identities.

This consultation will consider the possible inclusion of protections against discrimination on the basis of sexual orientation and sex and/or gender identity in federal anti-discrimination law. The outcomes of this consultation will be summarised and provided to the Australian Government as it works towards harmonising and consolidating federal anti-discrimination laws.

The consultation will also consider what other measures might be included in a National Action Plan on Human Rights to further protect and promote the human rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people in Australia.

This discussion paper opens with a brief explanation of the terminology employed and an explanation of the consultation process. It then considers:

- the levels of discrimination experienced by LGBTI people
- how international human rights standards about discrimination apply to LGBTI people
- discrimination protections for LGBTI people in federal law
- discrimination protections for LGBTI people in state and territory laws.

The paper concludes with a list of discussion questions about how protections from discrimination on the basis of sexual orientation and sex and/or gender identity might be included in federal law.

This discussion paper is based on a longer research paper prepared by Anna Chapman of the University of Melbourne. The research paper includes an appendix of the specific definitions contained in state and territory anti-discrimination

legislation. The research paper may be accessed at:
http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/research_paper.html

2 A note on terminology

The Commission acknowledges the significance of terminology and that the use of inappropriate terminology can be disempowering. The Commission also acknowledges that terminology is often contested.

The term LGBTI is used in this paper as it is a broadly understood abbreviation that describes people who identify as lesbian, gay, bisexual, trans or intersex.

2.1 Sexual orientation

The term sexual orientation is used in this paper as a generic term to describe a person's sexuality, their sexual preference or their sexual orientation. It includes the sexual orientation of people who identify as gay, lesbian or bisexual.

2.2 Sex and/or gender identity

There are various legal, social, medical and scientific opinions and theories about what constitutes sex and what constitutes gender. Sex is more generally understood as whether a person is male or female. The Commission recognises that some people do not have a sex identity that is either male or female or exclusively male or female. Gender is a cultural expression of sex identity (often but not always based on stereotypes of masculinity and femininity). Gender can be understood as a person looking, dressing or acting as male or female. Some people do not have a gender identity that is either exclusively male or female. Some people do not have a gender identity that is linked to their sex.

The phrase sex and/or gender identity is used in this paper as a broad term to refer to diverse sex and/or gender identities and expressions. It includes being transgender, trans, transsexual and intersex. It also includes being androgynous, agender, a cross dresser, a drag king, a drag queen, genderfluid, genderqueer, intergender, neutrois, pansexual, pan-gendered, a third gender, and a third sex. It also includes culturally specific terms, such as sistergirl and brotherboy, which are used by some Aboriginal and Torres Strait Islander peoples.

The Commission occasionally uses the phrase 'gender identity' in this paper because most of the existing state and territory laws use terminology related to gender.

One of the issues that the Commission is interested in exploring through this consultation is the appropriate terminology to describe a range of sex and/or gender identities within federal anti-discrimination legislation.

2.3 People who identify as being intersex

The Commission is also interested to consider the issues faced by people who identify as being intersex. A person who is intersex is a person whose chromosomal,

gonadal or anatomical sex is not exclusively 'male' or 'female'. A person who is intersex may or may not identify their sex and/or gender identity as intersex.

It should be noted that while there are a range of terms used in social contexts, this consultation is particularly interested in identifying appropriate terms for use in *legislation*.

3 How can you participate in the consultation?

The Commission invites all individuals and community organisations with an interest in these issues to make a contribution to this consultation process.

3.1 Written comments

You can make comments directly or upload attachments on this website [[link](#)].

Written comments can also be emailed to lgbti@humanrights.gov.au

Comments can also be mailed to:

LGBTI Discrimination Consultation
Australian Human Rights Commission
GPO Box 5218 Sydney NSW 2001

In particular the Commission is interested in responses to the discussion questions listed at the end of this paper. However, you should not feel limited by these questions; they are simply intended as a guide.

The deadline for comments is **26 November 2010**.

3.2 Participate in a roundtable conversation

The Commission will hold two roundtable conversations in each of Sydney and Melbourne as part of this consultation. Each discussion will be led by a professional facilitator. Information about the roundtables can be found on the Commission website at: www.humanrights.gov.au/human_rights/lgbti/index. Alternatively you can email lgbti@humanrights.gov.au for more information.

28 October 2010, Sydney

Venue: Australian Human Rights Commission, Level 8, 133 Castlereagh Street,
Sydney

2.00 – 4.30pm - focussing on discrimination on the basis of sexual orientation

6.00 – 8.30pm - focussing on discrimination on the basis of sex and/or gender
identity

9 November 2010, Melbourne

Venue: Victorian Equal Opportunity and Human Rights Commission, Level 3, 380
Lonsdale Street, Melbourne VIC 3000

3.00 – 5.30pm - focussing on discrimination on the basis of sexual orientation

6.00 – 8.30pm - focussing on discrimination on the basis of sex and/or gender
identity

Some financial assistance may be available for individuals or organisations located in other states who are interested in attending the roundtables and who would be otherwise unable to do so.

4 What will the Commission do with your contributions?

The Commission will prepare a summary report for the Australian Government setting out what the Commission has heard from the community about protection from discrimination on the basis of sexual orientation and sex and/or gender identity.

All comments provided to the Commission as part of this consultation may be published on the Commission website, unless you ask us to keep your comments confidential.

The Commission will also publish brief summaries of the discussions held at each of the roundtable meetings.

Remember, the deadline for written comments is **26 November 2010**.

5 What levels of discrimination are experienced by LGBTI people

Discrimination limits participation in public life. The Commission is aware that there is empirical evidence that people who identify as lesbian, gay, bisexual, trans or intersex experience high levels of discrimination and violence. A 2005 study of people who self-identified as LGBTI found that two-thirds of participants modified their daily activities, at least some of the time, due to fear of prejudice or discrimination. This survey also found that 59.3% of participants reported experiencing personal insults or verbal abuse, whilst threats of violence or intimidation were reported by 23% of participants.² Other studies reveal similarly high levels of violence and discrimination against LGBTI people.³

There is also a growing body of evidence that indicates that LGBTI people experience anxiety and depression at higher rates than the heterosexual population. This is particularly the case for same-sex attracted young people, who experience both higher rates of depressive symptoms and higher rates of suicidal behaviour than do their heterosexual peers. A large Australian research project conducted recently concluded that the most effective response to addressing depression and suicidal behaviour amongst LGBTI people would be to institute measures to combat homophobia, transphobia and social prejudice in the general community.⁴

6 How do international human rights standards about discrimination apply to LGBTI people?

There is no separate international human rights treaty focusing on sexuality and gender rights but all people have the same human rights regardless of their sexual orientation or sex and/or gender identity. In particular, all people have the fundamental rights of non-discrimination and equality before the law contained in articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR).⁵ Australia has committed to uphold these standards.

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

Each State Party to the present Covenant undertakes to respect and ensure to 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.

Significantly, the Human Rights Committee has held that the reference to 'sex' in article 2 and article 17 (the right to privacy) of the ICCPR is 'to be taken as including sexual orientation'.⁶ Moreover, sexual orientation is arguably subsumed under the category of 'other status'.⁷ Applying the reasoning of the Human Rights Committee to complaints of sexual orientation it is arguable that sex and/or gender identity would also be covered under the ground of 'other status'. Other human rights treaty bodies have also identified sexual orientation and in some cases gender identity, as prohibited grounds of discrimination.⁸

On 18 December 2008, a non-binding *Declaration on Sexual Orientation and Gender Identity*⁹ was put to the UN General Assembly, reaffirming human rights and equality for all people and condemning violence and violation of human rights based on sexual orientation and gender identity. This document has been endorsed by over 60 States including Australia.

6.1 The Yogyakarta Principles

In March 2007, a group of human rights experts developed what are known as the Yogyakarta Principles which consider the application of international human rights law in relation to sexual orientation and gender identity.¹⁰

The Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the view point of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people of all sexual orientations and gender identities.

In particular, Yogyakarta Principle 3 outlines the right to recognition before the law for all people regardless of gender identity:

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

In addition, Yogyakarta Principle 3 details actions that countries such as Australia should undertake to ensure they are not in breach of their human rights obligations.

7 What discrimination protections exist for LGBTI people in federal laws?

In 2008, the Commonwealth Parliament legislated to remove most discrimination experienced by same-sex couples from Commonwealth laws.

However, recognition of LGBTI rights in federal law remains limited, especially when compared to the recognition of similar rights at the state and territory level. In particular:

- federal anti-discrimination law regarding sexual orientation and sex and/or gender identity is virtually non-existent
- federal industrial law fails to prohibit discrimination on the basis of gender identity
- federal marriage law discriminates against people in same-sex relationships.

7.1 Commonwealth anti-discrimination law

Although state and territory laws provide protection from discrimination on the basis of sexual orientation, and in some cases gender identity, these laws have no application in relation to the Commonwealth or Commonwealth agencies such as Centrelink or Medicare.

Federal anti-discrimination law contains very little, if any, effective coverage in relation to LGBTI rights. As mentioned earlier, there are no provisions at the federal level that make discrimination on the basis of sexual orientation, sex and/or gender identity or same-sex relationship status unlawful.

Amendments to federal discrimination law to prohibit discrimination on the basis of sexual orientation and sex and/or gender identity could contribute to a significant cultural change. Such legislation would formally recognise these protections are as important as those prohibiting discrimination on the basis of race, sex, disability or age. However, such amendments would not in themselves stop the unequal

treatment of LGBTI people in all areas, due to the breadth of other federal legislation effecting fundamental rights. For example, federal discrimination law will not override potentially inconsistent federal legislation, such as the *Marriage Act 1961* (Cth).

(a) *The Australian Human Rights Commission complaints process*

The Australian Human Rights Commission can inquire into and conciliate complaints regarding discrimination on the basis only of 'sexual preference' and only in the context of employment. Conciliation is an informal process that allows the complainant and the respondent to talk about the issues in the complaint and try to find a way to resolve the matter. The Commission can report a finding of discrimination to the Attorney-General, however there is no avenue to seek a tribunal or court hearing about discrimination of this kind and the Commission cannot enforce recommendations if it finds that discrimination has occurred.

(b) *Sex Discrimination Act*

The *Sex Discrimination Act 1984* (Cth) (SDA) prohibits discrimination on the basis of 'sex'.¹¹ Arguments that discrimination against lesbians and gay men on the basis of sexual orientation is a form of sex discrimination under the SDA have been explicitly rejected by Australian tribunals and courts.¹²

The SDA defines a 'man' as a person of the male sex and a 'woman' as a person of the female sex.¹³ These definitions do not appear to recognise the full spectrum of sex diversity that exists. The SDA may not provide adequate protection to those who are of indeterminate sex (including people who identify as androgynous or third sex).

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 SDA. 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 people of diverse sex and/or gender identities is uncertain as it has not been tested in Australian tribunals or courts interpreting the SDA.¹⁴

The SDA 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.¹⁵ A Senate inquiry report has recommended that the term 'marital status' be replaced with 'marital or relationship status' which would include people in same-sex relationships.¹⁶

Were the 'marital status' ground of the SDA to be amended to include protection in relation to same-sex relationships, there might be consequences for areas of state and territory law that continue to discriminate against same-sex couples in the provision of services.

7.2 Federal industrial law

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) now prohibits discrimination on the basis of 'sexual preference' in relation

to all aspects of employment, from hiring, to promotion and training opportunities, and to dismissal.¹⁷

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

7.3 Commonwealth marriage law

Marriage has different meanings in different contexts. To some people marriage is a powerful symbolic union of two people in a religious or secular ceremony. To others, it is a legal contract recognised by the government. For many it is both. The term 'civil marriage' refers to the legal concept of marriage. It does not refer to 'civil unions' which exist in some states and territories in Australia.

The *Marriage Act 1961* (Cth) continues to discriminate against same-sex couples and against people with diverse sex and/or gender identities.

The federal legal concept of marriage is defined as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.¹⁸ In 2004 the Marriage Act was amended to specify the sex of the parties to a marriage. This was an attempt by the federal government to prevent same-sex marriage solemnised outside Australia (in a country such as the Netherlands, Belgium, or Canada) from being recognised by Australian law.¹⁹

The Commission believes that formal relationship recognition, including civil marriage, should be available to same-sex couples on an equal basis with opposite-sex couples. The Commission also supports the recognition in Australia of same-sex marriages entered into in other jurisdictions.²⁰

This consultation is not directly concerned with the question of whether same-sex marriage should be permitted in Australia.

8 Other actions that could be taken by the Australian Government to protect the LGBTI human rights

The development of a National Action Plan on Human Rights offers an opportunity to develop concrete actions to further the promotion and protection the human rights of LGBTI people in Australia.

For example, such actions could include:

- community education programs that aim to reduce homophobia and transphobia in our community
- public sector human rights education and training that includes consideration of LGBTI rights
- ensuring that all Commonwealth agencies have appropriate policies regarding support for people who are transitioning from one sex to another.

The Commission welcomes any further ideas of actions that could be included in a National Action Plan on Human Rights that would improve the enjoyment of human rights by LGBTI people in Australia.

9 What discrimination protections exist for LGBTI people in state and territory laws?

This section of the discussion paper outlines the discrimination protections that are found in state and territory laws throughout Australia. The existing protections are set out here to assist consideration of what protections could be included in federal anti-discrimination law, and how they might be framed.

(a) Discrimination

Discrimination is usually defined in state and territory anti-discrimination laws to include both direct discrimination and indirect discrimination.

Direct discrimination would occur where an LGBTI person is treated less favourably than a person who does not identify as LGBTI.²¹ For example, this would cover a situation where an employer treated a lesbian less favourably in a recruitment selection process than a heterosexual person with similar qualifications, and the less favourable treatment was because of her sexual orientation.

Indirect discrimination would occur where an LGBTI person is disadvantaged by an unreasonable policy.²² For example, this would cover a situation where an employer has an informal policy of rewarding employees who take part in work sporting activities, team sports and weekend trips away. A trans or intersex colleague might be excluded from these activities if other staff are not comfortable with sharing change rooms, toilets and accommodation with that person. In a case such as this, an employer may have indirectly discriminated against the trans or intersex worker.

(b) State and territory protection from discrimination on the basis of sexual orientation

State and territory protections from discrimination on the basis of sexual orientation are worded in a number of different ways.

The New South Wales law uses the term 'homosexuality', and 'homosexual' is defined to mean a 'male or female homosexual'.²³ This means that in New South Wales heterosexuality is not covered by the legislation, and bisexuality is only covered to the extent that the discrimination related to 'the homosexual aspects' of the person's life, or their assumed homosexuality.²⁴

Other states and territories use the following terms:

- 'sexuality' (Queensland, South Australia, Australian Capital Territory, and the Northern Territory)²⁵
- 'sexual orientation' (Victoria, Western Australia and Tasmania).²⁶

Both the terms of ‘sexuality’ and ‘sexual orientation’ are defined in similar ways to include the concepts of ‘heterosexuality’, ‘homosexuality’, and ‘bisexuality’.²⁷ Three definitions (Victoria, Western Australia, and the Australian Capital Territory) also name ‘lesbianism’.²⁸

(c) *State and territory protection from discrimination on the basis of gender identity*

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

- Victoria, Queensland and the Australian Capital Territory prohibit discrimination on the basis of ‘gender identity’.²⁹
- South Australia prohibits discrimination on the basis of a person’s ‘chosen gender’.³⁰
- 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).³¹
- New South Wales prohibits discrimination against a ‘transgender’ person and also some additional discrimination protections that relate to a ‘recognised transgender person’ (a person who has received legal recognition of their preferred sex).³²

Neither the Northern Territory nor the Tasmanian laws contain a separate gender identity ground. They both include ‘transsexuality’ within their sexuality ground.³³

The gender identity grounds generally cover 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).³⁴ 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, tranny, transsexual, or something else).³⁵

Three Australian state statutes contain additional provisions in relation to their gender identity grounds 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.³⁶
- The New South Wales Act provides that treating a ‘recognised transgender person’ as if they were their former sex is discrimination.³⁷
- The Western Australian Act provides similarly that to treat ‘a gender reassigned person’ as being of the person’s former sex is unlawful.³⁸

The legal concepts ‘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.³⁹

(d) *Specific state and territory protection from discrimination for people who identify as intersex*

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’,⁴⁰ and this description is thought to encompass intersex conditions.⁴¹

Gender-related identity – proposed discrimination protection in the United States of America

A Bill currently before the United States Senate contains an interestingly worded gender identity ground. The Bill for the *Employment Non-Discrimination Act of 2009* (S. 1584) adds new grounds of sexuality and gender identity to the current federal protections against discrimination in the employment context. In the Bill the term ‘gender identity’ is defined to mean ‘the 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’.⁴²

The wording of the federal Bill has a number of advantages over the narrower Australian definitions that only protect people who identify as a member of the ‘opposite’ or ‘other’ sex.

(e) *Extension of state and territory protections from discrimination on the basis of sexual orientation or gender identity*

All state and territory anti-discrimination statutes cover situations where an employer or other respondent assumed or thought that a person had a particular sexual orientation or gender identity, and on that basis discriminated against them. Four state and territory laws also cover situations where discrimination is related to sexual orientation or gender identity that the person had in the past (but no longer has).⁴³

In addition to prohibiting discrimination on the basis of sexual orientation or gender identity, all state and territory anti-discrimination statutes prohibit discrimination against a person where that conduct was a response to the sexual orientation or gender identity of the complainant’s ‘associate’ or ‘relative’.⁴⁴

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 or gender identity.⁴⁵

(f) *State and territory protection from vilification and harassment*

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.⁴⁶ 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 and 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.

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 and sex and/or gender identity.⁴⁷

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,⁴⁸ whilst the Tasmanian statute prohibits harassing behaviour on the ground of the person’s relationship.⁴⁹ The remaining state and territory anti-discrimination statutes are silent on the issue of harassment related to sexual orientation, gender identity and relationship.

(g) *Exemptions from state and territory laws relevant to discrimination on the basis of sexual orientation 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.⁵⁰ It is not unlawful to discriminate if an exemption applies.

It is important to note that 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.⁵¹

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

Below are some of the exemptions that may be applicable in relation to claims of discrimination on the basis of sexual orientation or gender identity.

Discrimination in employment:

- Discrimination in employment in religious institutions such as schools, hospitals, nursing homes, and welfare institutions, where the reason for the discriminatory decision is related to religious beliefs and principles.⁵²
- Discrimination in employment where the employment is in a private home.⁵³
- Discrimination in employment where discrimination arises because the employer has imposed a genuine occupational qualification for a position that relates to, for example, conducting clothing and body searches, or authenticity in dramatic performances.⁵⁴

- Discrimination in employment where the employment is in a small business (that does not exceed five employees).⁵⁵

Discrimination in the provision of reproductive services and adoption services:

- Discrimination in the provision of assisted reproductive technology services (and artificial fertilisation procedures).⁵⁶
- Discrimination in the provision of services by a government in relation to adoption.⁵⁷

Discrimination in education:

- Discrimination in the provision of education in religious schools and in schools that are run in accordance with religious beliefs and principles.⁵⁸

Discrimination in accommodation:

- Discrimination in the provision of accommodation where the accommodation is in the provider's home (or the home of their relative).⁵⁹

Discrimination in sport:

- Discrimination in sport on the ground of gender identity (or sex) where the discrimination arose out of a decision as to a person's entitlement to participate in a single sex competitive sporting activity (or a competitive sporting activity where strength, stamina or physique is relevant).⁶⁰

Discrimination in superannuation and insurance:

- Some discriminatory decisions that relate to the provision of financial services such as superannuation and insurance.⁶¹

Discrimination that has statutory or tribunal authority:

- Where the discriminatory conduct was done in order to comply with an order of a court, or some Act other than the anti-discrimination statute.⁶²
- Where the discriminatory conduct is exonerated by a tribunal order granting a temporary exemption from the relevant anti-discrimination statute.⁶³

The Victorian Act also has a very broad religious belief exemption that applies outside the context of religious institutions such as religious schools. It exonerates discrimination where the reason for the discriminatory decision related to the respondent's religious beliefs and principles.⁶⁴ The Western Australian statute has an exemption that relates to the provision of accommodation and the provision of education by a religious body,⁶⁵ and the Northern Territory statute exempts accommodation provided by a religious body.⁶⁶

All state and territory 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.⁶⁷ For example, this would allow the

provision of a benefit or service solely to members of the LGBTI communities, if the purpose was to promote equality.

(h) Exemptions from state and territory laws regarding vilification

The 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; or
- the conduct would be covered by the defence of absolute privilege in a proceeding for defamation; or
- the conduct was 'done reasonably' and in good faith, for academic, artistic, scientific or research purposes or for other purposes 'in the public interest'.⁶⁸

10 Discussion questions

The Commission invites comment on the following list of questions. You should not feel limited by these questions; they are simply intended as a guide.

1. What benefit would there be in federal anti-discrimination laws prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity?
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?
3. Can you provide examples of situations where federal protections from discrimination on the basis of sexual orientation or sex and/or gender identity are needed because state and territory laws do not provide adequate protections?
4. Have you experienced discrimination because of your sexual orientation or sex and/or gender identity for which there is no legal protection?
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?
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?
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?
 - 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 transsexuality?

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

¹ Commonwealth of Australia, *Australian Human Rights Framework* (2010). At <http://www.ag.gov.au/humanrightsframework> (viewed 22 September 2010).

² M Pitts, A Smith, A Mitchell & S Patel, *Private Lives: A Report on the Health and Wellbeing of LGBTI Australians*, Australian Research Centre in Sex, Health & Society, Monograph Series Number 57, La Trobe University (2006), pp 48-51.

³ See, for example, Attorney-General's Department, Parliament of NSW, *'You Shouldn't Have to Hide to be Safe': A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW*, Sydney (December 2003); L Hillier, *Writing Themselves In Again – 6 Years On: The Second National Report on the Sexuality, Health and Well Being of Same Sex Attracted Young People*, Australian Research Centre in Sex, Health and Society, La Trobe University (2005); Victorian Gay and Lesbian Rights Lobby, *Enough is Enough: A Report on the Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria* (2000); J Irwin, *The Pink Ceiling is Too Low: Workplace Experiences of Lesbians, Gay Men and Transgender People*, Australian Centre of Lesbian and Gay Research, University of Sydney (1999). See also Human Rights and Equal Opportunity Commission, *Stories of Discrimination Experiences by the Gay, Lesbian, Bisexual, Transgender and Intersex Community* (2007).

⁴ J Corboz, G Dowsett, A Mitchell, M Couch, P Aguis & M Pitts, *Feeling Queer and Blue: A Review of the Literature on Depression and Related Issues among Gay, Lesbian, Bisexual and Other Homosexually Active People*, Australian Research Centre in Sex, Health and Society, La Trobe University (2008). See also Suicide Prevention Australia, *Position Statement: Suicide and Self-Harm Among Gay, Lesbian, Bisexual and Transgender Communities* (2009); W Leonard (ed), *What's the Difference? Health Issues of Major Concern to Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Victorians*, Research Paper, Department of Human Services, State of Victoria (2002); Hillier, note 3.

⁵ *International Covenant on Civil and Political Rights*, 1966, article 2, 26.

⁶ *Toonen v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92 and *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000

⁷ Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p. 623.

⁸ See, for example, the Committee on Economic Social and Cultural Rights General Comment on non discrimination which refers to sexual orientation and gender identity. It specifically states 'other status' includes sexual orientation and that gender identity is recognised as a prohibited grounds for discrimination. 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). At <http://www1.umn.edu/humanrts/gencomm/escgencom20.html> (viewed 24 September 2010).

⁹ 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*, (2008). At <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm> (viewed 24 September 2010).

¹⁰ International Commission of Jurists, *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007). At http://www.yogyakartaprinciples.org/principles_en.htm (viewed 21 September 2010).

¹¹ *Sex Discrimination Act 1984* (Cth) (SDA (Cth)), s 5.

¹² *Felix Walter Rohner v Linda Scanlan and The Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 24; *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.

¹³ *Sex Discrimination Act 1984* (Cth), s4

¹⁴ 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, para 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, para 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.

¹⁵ 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. At http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html, viewed 27 October 2010.

¹⁶ 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 27 September 2010.

¹⁷ *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.

¹⁸ *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).

¹⁹ *Marriage Act 1961* (Cth), s 88EA, inserted by the *Marriage Amendment Act 2004* (Cth). Some have argued that this 2005 amendment may be unconstitutional as attempting to establish a Christian religious understanding of marriage: P Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009), pp 862-3.

²⁰ Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Marriage Equality Amendment Bill 2009* (10 September 2009). At http://www.humanrights.gov.au/legal/submissions/2009/20090910_marriage_equality.html.

²¹ See, for example *Anti-Discrimination Act 1977* (NSW) (*ADA* (NSW)), ss 38B(1)(a), 39(1)(a), 49ZG(1)(a); *Equal Opportunity Act 1995* (Vic) (*EOA* (Vic)), s 8; *Anti-Discrimination Act 1991* (Qld) (*ADA* (Qld)), s 10; *Equal Opportunity Act 1984* (WA) (*EOA* (WA)), ss 35AB(1), 35O(1), 35O(2); *Anti-Discrimination Act 1998* (Tas) (*ADA* (Tas)), s 14. The *Discrimination Act 1991* (ACT) (*DA* (ACT)) (at s 8(1)(a)) and *Equal Opportunity Act 1984* (SA) (*EOA* (SA)) (at ss 29(2a)(a), 29(3)(a), 85T(2)(a)) have a slightly different understanding of direct discrimination as treating a person 'unfavourably'. But see also *EOA* (SA), s 6(3), which mirrors the definition in other states' statutes more closely.

²² See, for example *ADA* (NSW), s 38B(1)(b), s 39(1)(b), s 49ZG(1)(b); *EOA* (Vic), s 9; *ADA* (Qld), s 11; *EOA* (WA), s 35AB(3)(b), s 35O(3); *ADA* (Tas), s 15. The *DA* (ACT) has a slightly different understanding of indirect discrimination as disadvantaging a group of people: s 8(1)(b). The *EOA* (SA) understanding is also slightly different: ss 29(2a)(b), 29(3)(b), 85T(2)(b).

²³ *ADA* (NSW), s 4(1) ('homosexual'), pt 4C.

²⁴ Anti-Discrimination Board of New South Wales, *The Neglected Communities* (2003), p 22. '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' (p 22; emphasis removed). The question of coverage of bisexuality under the *ADA* (NSW) has not been tested in a tribunal.

- ²⁵ ADA (Qld), s 7(n); EOA (SA), pt 3; DA (ACT), s 7(1)(b); *Anti-Discrimination Act (ADA (NT))*, s 19(1)(c).
- ²⁶ EOA (Vic), s 6(l); EOA (WA), pt IIB; ADA (Tas), s 16(c).
- ²⁷ EOA (Vic), s 4(1) ('sexual orientation'); ADA (Qld), s 4, ('sexuality'); EOA (SA), s 5(1) ('sexuality'); EOA (WA), s 4(1) ('sexual orientation'); DA (ACT), s 2, Dictionary ('sexuality'); ADA (NT), s 4(1) ('sexuality'); ADA (Tas), s 3 ('sexual orientation', 'transsexuality' and 'transsexual').
- ²⁸ EOA (Vic), s 4(1) ('sexual orientation'); EOA (WA), s 4(1) ('sexual orientation'); DA (ACT), s 2, Dictionary ('sexuality').
- ²⁹ EOA (Vic), ss 4(1) ('gender identity'), 6(ac); ADA (Qld), ss 4 ('gender identity'), 7(m), Dictionary; DA (ACT), ss 2, 7(1)(c), Dictionary ('gender identity').
- ²⁹ EOA (SA), ss 5(5) ('chosen gender'), s 29(2a).
- ³⁰ Ibid.
- ³¹ EOA (WA), s 4(1) ('gender reassigned person), pt IIAA, s 35AA ('gender history').
- ³² ADA (NSW), s 4(1) ('recognised transgender person'), pt 3A (especially s 38A ('transgender')). On the additional provisions, see in particular s 38B(1)(c).
- ³³ ADA (NT), s 4(1) ('sexuality'); ADA (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'.
- ³⁴ Note that the ADA (NSW) test is narrower in that it does not apply to people who assume characteristics of their preferred gender: s 38A.
- ³⁵ Anti-Discrimination Board of New South Wales, note 22, p 13.
- ³⁶ EOA (SA), s 29(2a)(d).
- ³⁷ ADA (NSW), s 38B(1)(c).
- ³⁸ EOA (WA), s 35AB(3)(a). See s 4(1) definition of 'gender reassigned person'.
- ³⁹ ADA (NSW), s 4(1) ('recognised transgender person'); EOA (WA), s 4(1) ('gender reassigned person').
- ⁴⁰ ADA (NSW), s 38A; EOA (Vic) s 4(1) ('gender identity'); ADA (Qld), Dictionary ('gender identity'); EOA (SA), s 5(5); DA (ACT), s 2, Dictionary ('gender identity'). Western Australia, the Northern Territory and Tasmania may cover intersex conditions under their disability/impairment provisions. This is not clear.
- ⁴¹ Disability/impairment discrimination provisions may also be relevant as intersex conditions are seen as genetic conditions.
- ⁴² *Employment Non-Discrimination Act* of 2009 (S. 1584), s 3(6) (USA).
- ⁴³ EOA (Vic), s 7(2)(a); ADA (Qld) s 8(d); EOA (SA), ss 29(2a)(a), 29(3)(a), 85T(2)(a); DA (ACT), s 7(2)(d).
- ⁴⁴ ADA (NSW), ss 38B(1)(a), 38B(1)(b), 39(1), 49ZG(1); EOA (Vic), s 6(m); ADA (Qld), s 7(p); EOA (SA), s 29(2a)(e), s 29(3)(d), s 85T(2)(d); EOA (WA), s 35O(2); DA (ACT), s 7(1)(n); ADA (NT), s 19(1)(r); ADA (Tas), s 16(s).
- ⁴⁵ See, for example, ADA (NSW), s 38B(2), s 39(1A), s 49ZG(2); EOA (Vic) ss 7(2)(b), 7(2)(c); ADA (Qld), ss 8(a), 8(b); EOA (SA), s 29(2a)(c), s 29(3)(c), s 85T(2)(c); EOA (WA), ss 9(1)(b), 9(1)(c), 35AB(2)(a), 35AB(2)(b), 35O(1)(b), 35O(1)(c); ADA (NT), ss 20(2)(b), 20(2)(c); DA (ACT), ss 7(2)(a), 7(2)(b); ADA (Tas), ss 14(2), 15(1)(b).
- ⁴⁶ ADA (NSW), pt 3A div 5 ('transgender' vilification), pt 4C div 4 ('homosexuality' vilification); ADA (Qld), s 124A (vilification on grounds of 'sexuality' and 'gender identity'); DA (ACT), pt 6 ('sexuality vilification'); ADA (Tas), ss 3 ('public act' (inciting hatred on the ground of 'sexual orientation')), 19. These vilification provisions do not extend to the relationship grounds.
- ⁴⁷ 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.
- ⁴⁸ ADA (NT), s 20(1)(b) (in that context harassment is not defined or explained).
- ⁴⁹ 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': ADA (Tas), s 17(1). This approach is similar to the legislative formulation of sexual harassment. See, for example, *SDA* (Cth), s 28A.
- ⁵⁰ 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.

⁵¹ *New South Wales v Amery* (2006) 226 ALR 196 at [138] per Kirby J; *Qantas Airways Limited v Christie* (1998) 193 CLR 280 at [152] per Kirby J.

⁵² ADA (NSW), s 56; EOA (Vic), s 75; ADA (Qld), ss 25(2), 25(3); EOA (SA), ss 34(3), 50, 85Z(2), 85ZB(3), 85ZM; EOA (WA), ss 72, 73(1), 73(2); DA (ACT), ss 32, 33; ADA (NT), ss 37A, 51. These exemptions potentially apply to a broad range of employees, from gardeners in schools, to nurses in hospitals. In addition, the EOA (Vic) contains the broadest exemption that makes discrimination lawful (in all employment contexts, and other contexts) where the discrimination ‘is necessary’ for the respondent ‘to comply with the ... [respondent’s] genuine religious beliefs or principles’: s 77. The breadth of this exemption, as it relates to the grounds of sexual orientation, gender identity and marital status, will remain with the commencement of the *Equal Opportunity Act 2010* (Vic), s 84.

⁵³ ADA (NSW), ss 38C(3)(a), 40(3)(a), 49ZH(3)(a); EOA (Vic), s 16; ADA (Qld), ss 26, 27; EOA (WA), ss 35AC(3), 35P(3), 35R(2); DA (ACT), ss 24, 25; ADA (NT), s 35(2).

⁵⁴ EOA (Vic), s 17 (relates to sex only); ADA (Qld), s 25; EOA (SA), s 34(2).

⁵⁵ ADA (NSW), s 38C(3)(b), s 40(3)(b), s 49ZH(3)(b); EOA (Vic), s 21 (see also s 20). These two exemptions are not contained in the new *Equal Opportunity Act 2010* (Vic).

⁵⁶ ADA (Qld), s 45A; EOA (SA), s 5(2); ADA (NT), s 4(8).

⁵⁷ EOA (WA), s 4(1) (definition of ‘services’); DA (ACT), s 25A. The exemptions for conduct that is authorized under another statute are also relevant here: see footnote 70 below. Five States and Territories explicitly exclude same-sex couples from eligibility to adopt: see footnote 108 and text below.

⁵⁸ ADA (NSW), s 56; EOA (Vic), ss 75, 76; EOA (SA), s 50; EOA (WA), s 72; DA (ACT), s 32; ADA (NT), s 51. In addition, the EOA (Vic) contains the broadest exemption that makes discrimination lawful (in all employment contexts, and other contexts) where the discrimination ‘is necessary’ for the respondent ‘to comply with the ... [respondent’s] genuine religious beliefs or principles’: s 77. The breadth of this exemption, as it relates to the grounds of sexual orientation, gender identity and marital status, will remain with the commencement of the *Equal Opportunity Act 2010* (Vic), s 84. The New South Wales statute exempts employment in, and the provision of education by, all private educational authorities (whether religious or not): ADA (NSW), ss 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49ZH(3)(c), 49ZO(3).

⁵⁹ ADA (NSW), ss 38N(3)(a), 48(3)(a), 49ZQ(3)(a); ADA (Qld), s 87; EOA (SA), 40(3); EOA (WA), ss 21(3), 35AM(3), 35Z(3); DA (ACT), s 26(1); ADA (NT), s 40(1).

⁶⁰ ADA (NSW), ss 38, 38P; EOA (Vic), s 66(1); ADA (Qld), s 111(3); EOA (WA), s 35AP. See also EOA (SA), s 48; ADA (NT), s 56.

⁶¹ On superannuation: ADA (NSW), ss 38Q, 49; EOA (Vic), s 72, s 73; ADA (Qld), s 59; EOA (WA), s 35AR; DA (ACT), s 29; ADA (NT), s 49; ADA (Tas), s 30. On insurance: EOA (Vic), s 43; ADA (Qld), s 73; EOA (WA), s 34; DA (ACT), s 28; ADA (NT), s 49(1)(b); ADA (Tas), s 30.

⁶² ADA (NSW), s 54; EOA (Vic), ss 69, 70; ADA (Qld), s 106; EOA (WA), s 69; DA (ACT), s 30; ADA (NT), s 53; ADA (Tas), s 24.

⁶³ ADA (NSW), s 126; EOA (Vic), s 83; ADA (Qld), s 113; EOA (SA), s 92; EOA (WA), s 135; DA (ACT), s 109; ADA (NT), s 59; ADA (Tas), s 56. Broadly speaking, a temporary exemption will be granted where the circumstances further the statute’s objective of equality.

⁶⁴ EOA (Vic), s 77. The breadth of this exemption, as it relates to the grounds of sexual orientation, gender identity and marital status, will remain with the commencement of the *Equal Opportunity Act 2010* (Vic), s 84.

⁶⁵ EOA (WA), ss 21(3)(b), 35AM(3)(b), 35Z(3)(b), 73(3).

⁶⁶ ADA (NT), s 40(3).

⁶⁷ EOA (Vic), ss 19, 61, 82; ADA (Qld), ss 104, 105; EOA (SA), ss 47, 85ZB(2), 85ZK; EOA (WA), ss 31, 35ZD; DA (ACT), s 27; ADA (NT), s 57; ADA (Tas), ss 25, 26. As the grounds in ADA (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.

⁶⁸ ADA (NSW), ss 38S(2), 49ZT(2); ADA (Qld), 124A(2); DA (ACT), s 66(2); ADA (Tas), s 55. Note that the ADA (Tas) does not contain a reasonableness requirement, and the ADA (NSW) additionally refers to the purposes of religious instruction and discussion.