



# **Sex and gender diversity**

## **Report of initial consultation**

**July 2008**

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### **1 What is this paper about?**

On 9 May 2008, the Human Rights and Equal Opportunity Commission (HREOC) released an Issues Paper on sex and gender diversity. The Issues Paper sought the views of the sex and gender diverse community about the most pressing human rights issues they face. HREOC also sought ideas about how it might assist in promoting and protecting the human rights of people who are sex and gender diverse.

Responses to the Issues Paper were due by Friday May 30 May 2008. HREOC received 51 written responses from a range of individuals and organisations from the sex and gender diverse community. This paper is a summary of these responses.

During June and July, the Human Rights Commissioner, Graeme Innes held public meetings in Melbourne, Brisbane, Sydney, Perth and Canberra. These meetings were an opportunity for the Human Rights Commissioner to provide feedback on the material gathered during the initial consultation and for members of the sex and gender diverse community to raise specific issues with the Human Rights Commissioner. This paper references some of those comments made during those consultations.

## **2 What is the most important human rights issue to people who are sex and gender diverse?**

The Issues Paper outlined four broad areas of concern:

- the ability to change or correct official and identity documents
- health policy and services
- protection from discrimination and
- education and awareness.

Responses received by HREOC mentioned all of these the issues. However, the majority of responses identified that having their sex or gender appropriately recorded (including the ability to not conform solely to a particular sex or gender) on official documents and records was a priority issue.

Many responses noted that these issues were interrelated. For example, a discussion on the need for legal recognition and the ability to change documents also requires discussion about current health policy and the availability of surgery.

This paper outlines some of the responses that we heard in relation to each of the four broad areas of concern.

## **3 How should HREOC best promote the human rights of people who are sex and gender diverse?**

HREOC's Issues Paper also asked for feedback on potential outcomes of the sex and gender diversity project and the role that could be played by HREOC. The majority of responses suggested HREOC's role could be to seek legal or policy reform through reports, recommendations or other advocacy with government. Some responses called for a large national inquiry focusing on all sex and gender diversity issues.

Other opinions about HREOC's potential role:

*HREOC should [hold] seminars for hospitals, medical professionals, medical insurance organisations and child welfare agencies to educate them about human rights relevant to [infant surgery]. (Tony).*

*Research personal stories. Then make our stories available to the public and all those who should see them. (Mix Natasha)*

*Consideration could be given to a broader public awareness-raising forum that could be televised, such as that of the 'Insight' program. (Anna)*

#### **4 What did HREOC hear about terminology for sex and gender diversity issues?**

A variety of definitions and words can be used to discuss sex and gender diversity issues. Many of the responses to the Issues Paper highlighted that these definitions and words are contested and draw strong views from some members of the sex and gender diverse community. HREOC prefers to use the phrase sex and gender diversity as a celebration of and recognition of variations in sex and gender. Some responses indicated that people liked the phrase sex and gender diversity. However, others thought it suggested individual people have diverse sex and gender identities when the reality is that most people identify as one sex or gender (although that may differ from the details on their birth certificate).

The responses HREOC received also indicated that some people are comfortable with terms such as transgender or transsexual, while others are not. Some responses preferred that any discussion refer to a person's medical condition and not seek separate terminology that defines people. For example, some people wanted to be defined as having Harry Benjamin Syndrome rather than as being transsexual. Responses to the Issues Paper also indicate that there is debate over what is considered an intersexual condition and what is considered a transsexual condition.

Many responses argued that it is crucial to get terminology correct. They said that inappropriate terminology can be disempowering. Equally important, the terminology adopted by lawmakers or policymakers will determine whether a person has certain rights (such as the ability to correct a birth certificate) and whether a person has the protection of the law (such as in the case of discrimination laws).

In order to explain some of the terminology used in this paper, we have included some comments from the responses to highlight how members of the sex and gender diverse communities use and debate the words and definitions related to sex and gender diversity:

##### ***Use of the word transsexual***

*I see myself as an ordinary person, not a transsexual. (Barbara)*

*I am a person with Harry Benjamin Syndrome, not a transsexual. (Gayle)*

##### ***Defining sex and gender diversity issues as a disability or medical condition***

*The medical profession likes to give names to things. The name they give to my so-called disorder is gender identity disorder. (Donna)*

*Gender identity disorder should be a biological disorder, not a psychiatric disorder (Merryn).*

### **Discussing surgical procedures**

*I do not like the term sex change surgery. I prefer gender affirmation surgery. I do not consider myself to be changing sex. I am correcting my body so that my outside body is inline with how I feel on the inside. You see I feel that your sex has nothing to do with the sex you were assigned at birth. (Donna)*

*The phrase sex affirmation surgery is a very discriminatory term... [it] suggests that the surgery is performed as a form of ritual, akin to female circumcision. It suggests a primitive rite of passage one has to undergo before one is accepted by society as either male or female.... Surgery does not magically change the sex of a person; it only alters the genitals, not the sex that is part of our sense of self. (Susan)*

### **Defining sex and gender diversity issues in a non-binary way**

*Pangendered best describes who and what I am. I feel I am both fully woman and fully man at the same time. I am not androgynous because I have a strong urge to live both fully as a woman and fully as a man alternately. (Chris)*

'Genderqueer' is a term sometimes used by young people who may be questioning their gender or sex, or who do not wish to express themselves as completely male or female. Culturally appropriate terms

Sistergirls is the term sometime used to describe a transgender woman in Aboriginal and Torres Strait Islander communities. Sistergirls in the Tiwi Islands are known as Yimpininni.

*I have more than one spirit in me... I have a woman spirit and a man spirit. (Wilo)*

### **The language used by HREOC in relation to sex and gender diversity issues**

Some responses offered guidance to HREOC regarding the language used in the sex and gender diversity project.

*The answer is to avoid terminology traps and create terms based upon what people do and need. (Rebecca)*

Some responses also quoted Endocrinologist Professor Louis Gooren:

*There should be no escape for medical and legal authorities that these definitions ought to be corrected and updated when new information becomes available, particularly when our outdated definitions bring suffering to some of our fellow human beings.*

Understanding and using respectful words and definitions is an important aspect of HREOC's project. HREOC seeks to use words and definitions that are inclusive of diversity and recognise the experiences of many people who are sex and/or gender diverse. Most often, HREOC will use the term 'sex and gender diverse'.

## **5 What did HREOC hear about official and identity documents?**

There are many situations when sex and gender diverse people need to present documents that contain information about sex or gender. Having documents that contain accurate information about sex and gender is crucial for the full participation in society of people who are sex and gender diverse.

Australia does have systems that enable the sex marker on official documents to be changed. However, not all people who are sex and gender diverse can access those systems.

### **Difficulties faced by people who are married**

As noted in the Issues Paper, the current systems do not allow for people who are married to change some or all of their documents.

*Is the federal government aware that for a couple who remain married after one has undergone SRS [they are] forced to divorce in order for that person to amend document, they would have to commit perjury, as the law expects them to quote 'irreconcilable breakdown. (Kathy)*

*To change the gender on [my NSW birth certificate] I must divorce my 79 year old wife of 39 years marriage and commit perjury by claiming irreconcilable difference. This is totally impossible and draconian, not to mention discriminatory as [Anne] and I wish to remain married to honour our commitment and marriage vows to one another. (Diana)*

*[Diana] is still a wonderful person, nothing has changed there, so why can't we be treated by the governments with the respect we deserve, having come through a very hard time and do not want to divorce, but stay together as we are. We need the same status as we had before and should not be discriminated against because of something we had no control over. (Anne)*

*Surely the government should be doing all that it can to keep families together, and contribute to a better society. (Jackie)*

### **The need for surgery for legal recognition**

The current systems for changing the sex marker on some official documents can only be accessed by people who have undergone sex affirmation surgery.

*The first step that I undertook, alongside medical treatment, in correction of my sex and to become a more visible male in society, was to change my first and middle name on my birth certificate. I found the experience of changing my name an easy one. However, I am still unable to change my sex on my birth certificate as I have not undergone any major surgery. (Jonathon)*

*I live my life as a male and I love my body even with its bulk and am already grieving the fact that chest surgery will potentially damage part of me that myself, my male and female partners love and cherish. I believe it is a human rights violation that I am forced to undergo surgery which I don't need or want and that I feel is mutilation to be legally male. (Brad)*

*I am employed in a professional capacity (lawyer) and travel internationally. It is very important to me that my passport and other documentation accurately reflect my gender presentation. I do not believe that my ability to change these documents should depend upon my surgical status. (Nick)*

*The insistence of specific surgeries – and in particular the gross violation of the person with regard to removal of reproductive organs and what is effectively a form of blackmail to ensure sterilisation – before a change of documentation is approved, is entirely unsupportable on any legitimate grounds. (Benjamin)*

*I saw a medical specialist just last week and he asked me when I was going to have a hysterectomy. When I asked him why I should have one he said 'so that you can get a male passport and change your birth certificate'. When I asked him if there were any medical reasons for me to have a hysterectomy, he said 'no'. (Mitchell)*

The ability to change documents also has an impact in situations where people may be imprisoned. For example, a prisoner who has not had surgery and has not changed their documents will be placed in a male or female prison on the basis of their genitals and the sex noted on their documents even if they live as another sex or gender. One woman told HREOC that she received violent treatment and faced difficulties obtaining female clothing while housed in a male prison.

*Most correctional services in Australia continue to incarcerate and treat offenders as male or female on the basis of their genitalia – if it's got tackle, it's a bloke. (Gill)*

### **Gender as unnecessary on documents**

Some of the responses to the Issues Paper queried why sex or gender needs to be noted on documents at all.

*I live in two genders female 60% of the time and male 40% of the time. I am constantly having to out myself because I have gender markers attached to most of my documentation and if this was removed I would no longer be discriminated against. (Antonia)*

Some responses indicated that government departments often cite security reasons for needing to know a person's sex or gender. One response questioned the validity of this approach:

*Government departments only need to identify that the person they are dealing with is the person they are dealing with. The only people that need to know what form my genitals take are my lover and my doctor... The fact that a person has a penis or a vagina is of no use when searching for someone in a crowd. (Susan)*

### **Government registers and records**

HREOC heard that even if a person has changed their documents, government registers and records may cause difficulties for people who are sex and gender diverse.

*A reissued birth certificate in Queensland lists the date of birth, but also lists a new date of registration. In my case the date of birth was in the 1960s, but the date of registration of the birth was now very recent. The fact that the registration date wildly differs from the date of birth on these new certificates mean questions are still likely to be asked. (Michael)*

*I sent my resume off to a number of job network providers and waited for the phonecalls... I didn't receive any calls. [They] were linked into a small part of the Centrelink database [and] it turned out they were seeing - Name: [Susan Smith], Gender: Male. (Susan)*

*Every time I go for a job, the police send a criminal record check to the employer with my previous male name. (Jemma)*

## **People with intersex conditions**

HREOC heard that issues relating to changing or amending official and identity documents are not a huge concern for the majority of people with intersex conditions. This is because people with intersex conditions usually identify as either male or female and in accordance with the gender in which they were raised. However, some intersex people do not identify as strictly male or female and argue that a third option for sex or gender should be available.

## **Solutions and process**

Some responses offered solutions to the current difficulties with the systems for sex or gender recognition.

*The process for changing documents needs to be streamlined through a central agency. (Ramona)*

*Changing the laws to follow the UK or Spanish system would be a great start. (Xan)*

*Documents should provide multiple options for sex or gender:*

Male  Female  Transgender  Intersex  Other (Ramona)

## **6 What did HREOC hear about health policy and services?**

Health policy and practice, and access to health services are important issues for people who are sex and gender diverse. This is because many people who are sex and gender diverse require or choose to take hormone therapy, undergo surgery or access counselling services.

### **Treatment and surgery not covered by Medicare**

The cost of treatment and surgery was a focus of many responses to the Issues Paper. HREOC heard that the cost of treatment or surgery was prohibitively expensive for many

people who are sex and gender diverse. The inability to access treatment or surgery deeply concerns many people as it is required for people to be able to change or amend their documents.

*It isn't uncommon for [people] to prostitute themselves because they are desperate to gain funds for treatments. (Marina)*

*I would rather work as a sex worker as a woman than get work as a drag queen and pretend to be a man. (Sherry)*

The inclusion of treatment for transsexualism in the Medicare system was listed as a priority human rights issue in a number of responses.

*If you arrive at psychiatric hospital suicidal because of a drug dependency that underlying problem would be treated through Medicare and the state public health systems through things like rehabilitation and counselling etc. But if you arrive at a mental hospital suicidal because of a confused gender identity very little is done for you. The lack of Medicare treatment for transsexuals persecutes those on a low income like myself who have a disability and openly discriminates against us. (Sam)*

Other responses noted that the health system is not inclusive of people who are sex and gender diverse. Several responses mentioned that in order to receive specific hormone treatment a person must be labeled a sexual deviant.

*Androcur is prescribed to block and reduce production of testosterone in men with testicular cancer, prostate cancer or other androgen-aggravated cancer or to convicted sex offenders to reduce sex drive and chemically castrate if taken in high doses. Because one of these reasons must be given to prescribe Androcur, and the patient is not a male with cancer, the one left is 'reduction of drive' – and this means, that to have this medication the patient will then have the letters "SD" on their medical record for Sexual Deviant. (Evelyn)*

### **Lack of choice and appropriate health services**

Many responses noted concern with the lack of specialised health services for people who are sex and gender diverse.

*I always feel resentful when I see my GP because it always takes so long for me to explain to her what she should be doing. If ever I actually have a question for her about a particular drug or side-effect her usual response is to tell me to look it up on*

*the internet and then let her know so that she can tell other patients. Then I leave, and I get charged \$150 for a long consultation. (Nils)*

*In South Australian legislation for a medical practitioner [must] be approved by the Minister in order to carry out reassignment procedures, which limits the number of practitioners practicing in this field. (Ramona)*

*To the best of our knowledge, there are no practicing surgeons in Australia who performs sex affirmation surgery for men who were born female. (Mitchell)*

Some responses indicated that health services, even specific services for people who are sex and gender diverse, could be improved.

*Some gender clinics have the reputation of being conservative and only allow those male to female transsexual patients through that confirm to a very stereotypically feminine aesthetic – so much so, that criteria such as wearing jeans, having largish hands or masculine appearance will rule them out. (Evelyn)*

*Education to improve the 'bedside manner' of some health practitioners is needed. (Michael)*

Two responses specifically concerned Red Cross. These responses claimed that Red Cross did not accept their sex or gender.

*[Red Cross] have said that we have to complete their questionnaire using the gender we were assigned on our birth record originally. Therefore we would be obliged to answer yes to the question regarding male to male sex, and therefore, not be permitted to be a donor. They are telling me that we can be rejected as blood donors purely on our declared transgenderism alone, whether there is actual evidence of high risk behaviour or not. (Monika)*

## **Children and Young People**

Some responses noted concern that children and young people who are sex or gender diverse do not have access to appropriate health care.

Some responses were greatly concerned that surgical procedures on infants with intersex conditions still occur.

*A child's right to self determination and protection from irreversible, non-therapeutic surgical intervention was upheld by the High Court of Australia in Marion, which also held that the scope of parental authority did not extend to special medical procedures. These special medical procedures also include the hormonal and surgical intervention of children with intersex conditions. The Australian government should no longer allow these treatments to continue, and should educate doctors, paediatric hospitals and medical insurers of their obligations in these circumstances. (Tony)*

One parent of a gender questioning child was concerned about the lack of appropriate health care for families:

*As he approaches 10 years of age, he still retains this gender confusion, and we are concerned to help him resolve these feelings he has about being a girl or a boy. He tells us sometimes he feels like he is a girl and sometimes a boy... There is a large need for greater availability of high quality advice and counselling during childhood. We do know which direction our son's identity will take when he reaches adolescence, and we still feel that our access to knowledge to help him is limited. (Mark)*

Some responses argued that protection for children and young people was a priority human rights issue. Specifically, some genderqueer young people noted that schools need to be healthy and safe places and should address bullying and provide appropriate support to genderqueer young people.

*Protecting genderqueer youth in school and promoting tolerance and acceptance of diversity in schools is a crucial issue so that other generations needn't suffer as I have. As I grew up I would crossdress in private while my day to day appearance became increasingly gender variant, in my teens while I let my beard grow much of the time I let my hair and nails grow very long. I suffered a great deal of bullying all the way through school, being quiet, sensitive, intelligent and not being interested in the typical guy stuff of sport and cars etc I was a constant target. [I changed] schools several times. (Dale)*

## **7 What did HREOC hear about protection from discrimination?**

Many responses identified discrimination laws as important for improving the lives of sex and gender diverse people. Responses noted the definitions currently used in various discrimination laws do not cover all people who are sex and gender diverse. Many state discrimination laws only protect people who have undergone surgery and therefore do not cover the majority of people in the sex and gender diverse community.

*Often a pre-operative is not covered, and it is these people who are most at risk and likely to suffer discrimination. In order to qualify for sex reassignment surgery means a pre-op trans person must live, dress, work and be treated fulltime in that gender presentation, including using the appropriate bathrooms and other facilities designated for that sex. Yet Anti-Discrimination laws deny the legal recognition and right to so until after SRS. (Sam)*

One response recommended that protection from discrimination should not rely on limited definitions:

*All people deserve the right to express gender in any way they can imagine without fear or harm. (Rebecca)*

Another response noted that issues of sexuality, sex, gender are confused and this makes it difficult for the community to understand the specific difficulties that are faced by people who are sex or gender diverse:

*For example in the definition in the Equal Opportunity Act 1984 (SA), transsexuality is included in the definition of sexuality and is framed in binary terms. (Ramona)*

### **Discrimination at work**

Some responses to the Issues Paper dealt with the issue of discrimination in the workplace.

*HR also made known to all managers and security guards within the organisation what was happening concerning my transition 'in order to ensure my safety' however this occurred whilst I was on leave and without my knowledge. The first I knew of it was when managers I had never met or been introduced to suddenly started greeting my by name in the corridors and checking that everything was ok. (Ramona)*

*[A] provision in the Anti-Discrimination Act 1991 (Qld) equates transgender people with convicted sex offenders and allows for lawful discrimination against transgender people working with children.(Evelyn)*

*HR asked that I use the disabled toilets early in my transition. (Ramona)*

Other responses detailed some positive experiences in the workplace:

*I had no trouble re-registering as a female with the Nurses Registration Board and continued nursing until I retired. (Gayle)*

*Next month I qualify for a 20 year service award with the [Company Name]. Coming back to the factory here post transition was rather interesting. There are still a couple of people who can't look me in the eye but most have just accepted me and we get on with the job. (Monika)*

### **Discrimination in accessing services**

Some responses looked at the inadequacy of protection from discrimination under anti-discrimination laws in accessing services.

*[The] religion exemption under anti-discrimination laws are granted to allow organisations to deny homeless transwomen access to their services, despite their crisis accommodation service at the time being the only one available. (Evelyn)*

*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 that 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. (Lee)*

## **8 What did HREOC hear about education and awareness?**

Many responses identified education and awareness as necessary for the acceptance of sex and gender diversity in society and for the appropriate treatment of people who are sex and gender diverse. Responses argued that education could address the bullying of young people and violent behaviour towards people in the sex and gender diverse community.

*The overarching issues which impacts on all areas of human rights and gender is community education. I know a Yr 11 child who was all ready to transition at school because she couldn't stand to use the wrong toilet and wear the wrong uniform. The child's parents and teachers were supportive but the parents of other children objected. The child left school without completing her education. (Doctor)*

HREOC also heard that general awareness of sex and gender diversity was seen as important to improve the treatment of people who are sex and gender diverse in day to day interactions and conversation. Many people expressed concern about the use of pronouns by

government employees, other authority figures or by members of the broader Australian community:

*I find it offensive when people use the male pronoun for me. I present as a woman and should be referred to as one. (Susan)*

## **9 What will happen next?**

This paper demonstrates that there are a variety of opinions about:

- the appropriate terminology used to discuss issues of sex and gender diversity
- the most pressing human rights issues for people who are sex and gender diverse and
- the actions that are required to address these issues.

Based on these responses, HREOC has begun developing a project considering reform of the legal recognition of sex. This project will consider laws and policy that govern the amendment of various identity documents. It will also consider the various ways that private and public organisations use or record information about a person's sex or gender.

HREOC will consult more broadly with the sex and gender diverse community to ascertain community views about how the legal recognition of sex impacts a person's ability to enjoy all human rights.

HREOC is developing an online blog where further discussion concerning the legal recognition of sex can occur. The blog will be located on HREOC's website at <http://www.humanrights.gov.au/genderdiversity>