



Australian and New Zealand
Professional Association for Transgender Health

Modernisation of the *Anti-Discrimination Act*:

**Submission by Australian and New Zealand Professional
Association for Transgender Health (ANZPATH)**

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About ANZPATH

ANZPATH was formed by Australasian attendees at the 2009 World Professional Association for Transgender Health (previously known as the Harry Benjamin International Gender Dysphoria Association) conference in Oslo, Norway.

'Transgender' as used in the name of this organisation is an umbrella term and incorporates many identities and human phenomena associated with sex and/or gender variance. It is not intended to express an opinion about the aetiology or diversity of sexual formation and/or gender expression. Neither does it intend to conflate these various experiences of living.

ANZPATH has the following aims:

- To promote the subjects of the health, rights and well-being of people who experience difference in sexual formation and/or gender expression, within professional training programs
- To serve as a forum for and promote communication and collaboration amongst professionals involved in the health, rights and well-being of people who experience difference in sexual formation and/or gender expression
- To encourage, promote and share research in the fields of the health, rights and well-being of people who experience difference in sexual formation and/or gender expression
- To develop best practices and supportive policies which promote the health, rights and well-being of people who experience difference in sexual formation and/or gender expression, and
- To establish a known network of professional service providers in the fields of the health, rights and well-being of people who experience difference in sexual formation and/or gender expression

Scope of this Submission

This submission will address modernisation reforms specifically related to questions:

1. Is updating the term sexuality to sexual orientation without labels appropriate?
Are there any alternative suggestions?
2. Should the attribute of “gender identity” be included in the Act?

A comparison of the Commonwealth, States and Territories Anti-Discrimination and Equal Opportunity Acts: A background

The commonwealth government

When first enacted, the Sex Discrimination Act (1984) conveyed no rights to transgender people. A person’s gender or gender identity were unknown entities at the time the legislation was introduced. The legislation assumed the binary nature of sex/gender and was written in terms of men and women. In 2013, the Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill was passed. The introduction of this Bill has marginally eased the psychosocial burden of transgender people when dealing with the Commonwealth Government and its departments. The Bill offers some measure of protection and recognition. In that legislation, gender identity (along with sexual orientation and intersex status) were recognised as attributes and offered some protection under the law similar to that which already existed in the original 1984 legislation to men and women. Under Part 1 Subsection 4(1) of the Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill (2013), gender identity was defined as “the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.”

As previously noted, in July 2013, the Commonwealth introduced guidelines on the recognition of sex and gender to enable consistency at the Commonwealth level in official record keeping (Australian Government, 2013). Commonwealth government departments and agencies had until July 2016 to implement those guidelines. This

process has already begun, allowing transgender people to change their sex and gender markers in key areas such as health, pensions and taxation on written verification from a medical practitioner that transition is taking place (Australian Government, 2013). That is to say, hormonal and surgical treatments are not necessarily required for these changes to gender markers in these areas. Nonetheless, at the time of the guideline implementation, there was confusion among transgender networks of the extent of the guidelines, as the wording within implied an Australia wide approach (as it included the States and Territories). The following personal communication by a transgender advocate indicates this confusion: “They changed the wording from ‘Australian Government’ to ‘New Commonwealth Guidelines’. The original media release read as if all Australian Governments were party to this Bill” (K. Noble, personal communication, July 5, 2013).

Similarly, in 2011, the Commonwealth removed the prevailing policy of SRS as a prerequisite for obtaining a passport. According to the Department of Foreign Affairs (2011, para. 4), this administrative change “significantly reduces the administrative burden for sex and gender diverse people who want a passport that reflects their gender and physical appearance.” The recognition by the Commonwealth Government of the non-binary nature of gender was a welcome inclusion into the Australian political landscape, but relies upon “issues of medical treatment and practice” (Bennett, 2013, p. 390), whereby social factors are ignored. The work done by the Commonwealth Government in this area stems from The Australian Human Rights Commission (2009) consultative process with sex and gender diverse people, which made 15 recommendations to government on the legal recognition of sex in documents and government records. Unfortunately, most of the recommendations were ignored, and in one particular area, the Gillard Labour Government chose to amend legislation to prohibit change. In part, Recommendation 13 (Australian Human Rights Commission, 2009, p. 4) states:

...amend the Sex Discrimination Act 1984 (Clth) to ensure that the protection against marital status discrimination applies in the context of married persons seeking to amend their birth certificates, to

effectively override the existing discrimination under state and territory births registration legislation.

Indeed, the Commonwealth Government did amend the above mentioned legislation. Prior to the introduction of this legislation (Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill, 2013) and guidelines (Australian Government, 2013; Department of Foreign Affairs and Trade, 2011), the Commonwealth effectively gave the States and Territories the power to discriminate against transgender people when it introduced and passed the Sex and Age Discrimination Legislation Amendment Bill (2011). Under Section 40(5) of that Bill, the States and Territories were given an exemption to “refuse to make, issue or alter an official record of a person’s sex if a law of a State or Territory requires the refusal because the person is married.”

This exemption effectively excluded all transgender people who were legally married under the Marriage Act (1961), which is Commonwealth legislation, and wished to remain married, from changing their gender marker to recognise their change in status as a postoperative transgender person if the States and Territories deemed it so. Additionally, one can interpret that it would seem to give some type of precedence to the introduction of same sex marriages if transgender people could change their gender marker and remain married. The complexity and the inconsistency of the phenomenon is compounded by the extent of legislation that exists at State and Territory level of government for the reason that most of the States and Territories also have their own versions of the Sex Discrimination Act (1984), all of which have varying degrees of protection.

The state and territory governments

In summary, the States and Territories have 10 separate pieces of anti-discrimination legislation which can, and do, impact upon the everyday lives of transgender people.¹

¹ Equal opportunity, and anti-discrimination legislation includes:

- Equal Opportunity Act 1984 (SA)
- Equal Opportunity Act 1995 (Vic)
- Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000 (Vic)
- Discrimination Act 1991 (ACT)
- Anti-Discrimination Act 1977 (NSW)

However, there is no consensus on their approaches to the area of anti-discrimination legislation. In three jurisdictions, South Australia (Equal Opportunity Act, 1984), the ACT (Discrimination Act, 1991) and Victoria (Equal Opportunity (Gender Identity and Sexual Orientation) Act, 2000; Equal Opportunity Act, 1995), it is unlawful to discriminate on the grounds of gender identity. The definition of gender identity in these instances is considered broad enough to include both medical intervention and/or social circumstances as an appropriate basis to identify as a person of another gender.

For example, in Victoria, under Part 14(1) of the (Equal Opportunity Act, 1995), gender identity means:

(a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)—

(i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or

(ii) by living, or seeking to live, as a member of the other sex

In Western Australia (Equal Opportunity Act, 1984), protection is given on the grounds of gender history, and only to those who have been gender reassigned, which is defined as someone who has been issued with a Gender Recognition Certificate under the Gender Reassignment Act (2000). In Western Australia, under Part IIAA, Section 35AA(1) of the Equal Opportunity Act (1984), gender history refers to identifying and living or seeking to live in the opposite sex, where opposite sex is interpreted as not the birth sex.

In Queensland's Anti-Discrimination Act (1991), gender identity means that you identify as, and must live or seek to live as a member of the opposite sex. In New South Wales, the Transgender (Anti-Discrimination and Other Acts Amendment) Act (1996) offers

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- Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 (NSW)
 - Anti-Discrimination Act 1991 (Qld)
 - Equal Opportunity Act 1984 (WA)
 - Anti-Discrimination Act 1992 (NT)
 - Anti-Discrimination Act 1998 (Tas)

protection to a transgender person by living, seeking to live, or identifying as a member of the opposite sex, and being thought of as a transgender person regardless of being considered a recognised transgender person. According to Part 1(4) of the Anti-Discrimination Act (1977), a “**recognised transgender person** means a person the record of whose sex is altered under Part 5a of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction.”

That is to say, being thought of as a transgender person may reflect the present or former social status of that person. In the Northern Territory, the Anti-Discrimination Act (1992), sexuality is protected. Under Part 1(4) of the Act, sexuality is defined as “the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality.” Similarly, Tasmania considers “transsexuality” to be aligned with sexual orientation, and is not expressly protected. Norfolk Island does not have any anti-discrimination legislation. Appendix A summarises the legislative criteria for the States, Territories and the Commonwealth Governments in reference to the various sex, equal opportunity and discrimination Acts which exist. This diagrammatic representation highlights the inconsistencies of the various legislations that impact upon transgender people. When the Commonwealth government enacted the Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill (2013), the States were “given until July 2014 to ensure that all state laws were amended to be consistent with the new federal provisions” (Australian Human Rights Commission, 2015, p. 71). That deadline was extended until July 2015, and as yet has been largely ignored.

Sexuality and gender

The current NT legislation conflates the terms of sex and gender by referring to transsexuality as a specific form of “sexuality”. This is a common misconception, even in wider society when referring to the LGBTI community (LG&B refer to sexual orientation, while T&I refer to gender). Transsexual is an unfortunate, archaic term which originated in the 20th century literally to portray someone who changed sex from either male to female or from female to male (and this binary notion of gender is still apparent in the literature in some academic circles).

Post-modern thinking around gender makes it clear that gender goes beyond, between, and outside the binary framework of male and female, which is the predominant mode of understanding the body. Perceptions of gender in the modern era neatly stigmatised bodies outside the binary framework (Benjamin, 1966; Berger & Luckmann, 1966). Binary notions of sex and gender do not fit all lived experiences and are viewed as problematic in those circles of people to which the term is applied, and generally to those who work with transgender people in the health professions, such as here in ANZPATH.

The complexities of changing gender may exist within a binary framework for those who experience that reality. Indeed, gender can equally be experienced in a non-binary frame or as gender neutral (see, for example, “NSW Registrar of Births Deaths and Marriages v. Norrie”, 2014). In doing so, the multiple categories of gender become the property of subjective transgender realities. The above words assume that to be *real*, a choice of male or female needs to be made, whereas it is argued that being transgender is an alternative reality where multiple genders are possible, and to be *real* cannot be simplified to male and female. It is important here to note that for transgender people, sexual orientation is multi-faceted. It is indeed an incorrect assumption that transgender people are automatically gay or lesbian, or that being transgender is in itself a sexual orientation (American Psychological Association, 2011).

As a result of the conflation of sex and gender, gender/gender identity is not protected under the Act. It is for this very reason that other jurisdictions around Australia have included gender identity in their specific legislations to protect people outside the binary framework of male and female; the Commonwealth (Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill (2013), South Australia (Equal Opportunity Act, 1984), the ACT (Discrimination Act, 1991), and Victoria (Equal Opportunity (Gender Identity and Sexual Orientation) Act, 2000; Equal Opportunity Act, 1995).

Recommendation:

Therefore, ANZPATH believe that using labels to define people within any anti-discrimination legislation around terms of sexuality must be avoided. We are in agreement that the term “sexuality” as such with labels of “*heterosexuality*,

homosexuality, bisexuality or transsexuality” that currently stand in the Act should be amended, and that that “gender identity” should be a protected attribute under the amended Act.

- A general term of “sexual orientation” should be included without labels to denote sexual orientation
- The term “sex” should also be defined to denote biology: *A biologically assigned attribute defined by primary sexual characteristics.*
- The term “gender” should be defined in terms of its social ascription: *A socially ascribed attribute; the state of being male, female, neither or both.*
- The term “gender identity” should be defined in broad terms to denote the multiplicity of gender identities that exist while at the same time resisting from the use of labels, some of which offend
- Existing legislation in other states frames its term “gender identity” to include both medical intervention and/or social circumstances as an appropriate basis to identify as a person of not being defined by their biological characteristics

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Appendix A: Australian Sex, Equal Opportunity and Anti-Discrimination Legislation^{2,3}

Level of Government	Name of Legislation	What/who is protected?	Relevant Definitions
Commonwealth	Sex Discrimination Act (1984)	Men Women	a member of the male sex irrespective of age a member of the female sex irrespective of age
Commonwealth	Sex and Age Discrimination Legislation Amendment Bill (2011)	Single transgender people	Nothing in Division 2 renders it unlawful to refuse to make, issue or alter an official record of a person's sex if a law of a State or Territory requires the refusal because the person is married.
Commonwealth	Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill (2013)	Gender identity	the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth
State (Victoria)	Equal Opportunity (Gender Identity and Sexual Orientation) Act (2000)	Gender identity	the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)— (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex
State (South Australia)	Equal Opportunity Act (1984)	Chosen gender	the person identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex
Territory (ACT)	Discrimination Act (1991)	Gender identity	the identification on a genuine basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)— (i) by assuming characteristics of the other sex, whether by way of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex

² Norfolk Island does not have any Anti-discrimination legislation.

³ All references to intersex have been excluded.

State (Western Australia)	Equal Opportunity Act (1984)	Gender reassigned person	a person who has been issued with a recognition certificate under the Gender Reassignment Act
Gender history			2000 or a certificate which is an equivalent certificate for the purposes of that Act a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex
State (Queensland)	Anti-Discrimination Act (1991)	Gender identity	means that the person identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex
State (New South Wales)	Transgender (Anti-Discrimination and Other Acts Amendment) Act (1996)	Transgender or transgender person Recognised transgender person	is a reference to a person, whether or not the person is a recognised transgender person: (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person. a person the record of whose sex is altered under Part 5A of the <i>Births, Deaths and Marriages Registration Act 1995</i> or under the corresponding provisions of a law of another Australian jurisdiction.
State (Tasmania)	Anti-Discrimination Act (1998)	Sexual orientation Transsexual (not expressly protected) Gender	means - (a) heterosexuality; or (b) homosexuality; or (c) bisexuality; or (d) transsexuality means a person of one sex who - (a) assumes the bodily characteristics of the other sex by medical or other means; or (b) identifies himself or herself as a member of the other sex; or (c) lives or seeks to live as a member of the other sex Refers to men and women
Territory (Northern Territory)	Anti-Discrimination Act (1992)	Sex Sexuality	means men or women irrespective of age means the sexual characteristics or imputed sexual

			characteristics of heterosexuality, homosexuality, bisexuality or transsexuality
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