

# **Sex and Gender Education (SAGE) Response Document to Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT: An Issues Paper**

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This document responds to issues raised in the titled ACT document that looks at and examines the situation for gay, lesbian, bisexual, transgender and intersex people. The issues document proposed to be all inclusive by use of this extended title; however, SAGE believes that it would be more concise and semantically correct to use the phrase 'sex and gender diverse people' to represent those who come under the many forms of sex and gender diversity. The phrase 'transgender' does not apply to many people who consider themselves transsexual, intersex, or of a sex and gender identity that is other than bipolar male or female, or of a fixed sex or gender identity. It must also be noted that many people who may be sex and gender diverse will claim an identity by declaring themselves as male or female and that for the purposes of this document or any other document that SAGE produces, we include those persons under our description of sex and gender diversity.

It can be remembered that there are also people who will not want to declare their sex and gender identity and for them to do so will be considered a compromise of their wellbeing. They may consider themselves outside the traditional Australian marginalisation of sex and gender identities and in considering moving forward and equalising the law for all, it might be wiser that future laws allow people to define their own diversity. This may include people who are transsexual, transgender, intersex, androgynous by design or persons who may wish to devoid themselves of any male or female characteristics (SAGE Legal Policy Document 2002).

## **Responses to Issues:**

**'The fundamental issue with laws and with other societal structures is that there is little or no recognition that there is a broader spectrum of sex than male and female only. Gender is largely viewed as a binary system (1:0) where if a person is not male then they must be female and vice-versa.'** (page 12 of the issues paper)

What a wonderful opportunity this review presents.

For law reform to be as fair as possible to all, the law must recognise the fact that sex and gender are not binary systems. Also, it needs to be recognised within the legislative structure that sex is indeed not the same as gender identity, the first being a physiological manifestation of breeding potential or lack of it, and the second being a social presentation of self based or not on interpreting sex morphology (Money 1986, Dreger 1999, Feinberg 1996, O'Keefe 1999).

## Discrimination and Same Sex Relationships

**‘What is the comparison? The comparison is thus a comparison between the differences in the legislative treatment of two people of the same sex living together on a genuine domestic basis and the legislative treatment of two people of the opposite sex living together as a couple on a genuine domestic basis.’** (page 8 of the issues paper)

Issue: Is this comparison an appropriate comparison?

Only in an environment where everyone is assumed to be one of two sexes is this comparison appropriate.

While we appreciate that this section of the paper deals with the extent to which the law recognises gay and lesbian (same sex) relationships, it is important that in addressing this issue other people are not further marginalised.

We would prefer an approach where:

- through definitions in the law, recognition is given to the fact that sex and gender identity are not binary or bipolar systems (discussed later in comments);
- domestic partnerships can be defined without a presumption that there are only two sexes or gender identities (we believe the definition of domestic partnership in the *Legislation (Gay, Lesbian and Transgender) Amendment Bill 2002* achieves this); however, we do believe that all legislation should be referring to sex and gender diverse people as an all encompassing category;
- ACT laws are amended to treat all domestic partnerships equally.

### **Recognition of Same Sex Relationships in ACT Legislation**

Issue: Would there be any adverse outcomes if all ACT laws gave the same recognition to same sex relationships that is given to opposite sex relationships?

We can see no adverse outcomes if the three acts used as examples - *Parental Leave (Private Sector Employees) Act 1992*, *Protection Orders Act 2001* and *Adoption Act 1993* – were amended so that all people in a **domestic partnership** (as defined in the *Legislation (Gay, Lesbian and Transgender) Amendment Bill*) and all domestic partnerships were treated equally.

### **The Discrimination Act 1991 and Same Sex Relationships**

Issue: Does the *Discrimination Act 1991* provide adequate protection from discrimination for people in same sex relationships?

While we consider that the Discrimination Act 1991 provides adequate protection from discrimination for people in same sex relationships, we think it would be an improvement if the *Discrimination Amendment Bill 2002 (No2)* were enacted.

## **Discrimination and Transgender and Intersex People**

**‘How is gender identity recognised in legislation?’** (page 12 of the issues paper)

Issue: Is there a need to define ‘sex’ for the purposes of ACT law? If so, should different definitions apply for different purposes?
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There is good cause to define sex for the purposes of ACT law.

Firstly, it would provide the opportunity to recognise that not all people are male or female. At the very least a third value of ‘sex and gender diverse’ could be recognised. This would result in the need for legislation to be amended so that terms like “the other sex” or “opposite sex” are eliminated (Whittle 2002, Atkins 1998, O’Keefe & Fox (Eds) 2003).

Secondly, the absence of a definition means that reliance is placed on a person’s physiology, as defined by others, to recognise their sex. For sex or gender diverse people, their physiology is not always consistent with their gender identity and presentation. Currently, some people in this category can have their sex recognised. Others, who cannot afford surgery, who are not healthy enough for surgery, who choose for whatever reason not to have surgery, who do not wish to divorce their spouse, who were unlucky enough to be born in a jurisdiction which does not allow birth certificates to be changed or who do not identify as strictly male or female cannot have their sex recognised. This is not fair and does not give effect to the principles mentioned in the Chief Minister’s foreword. One must also bear in mind that a person’s sex is defined by multiple physical concomitants including genitalia, reproductive ability, secondary body sex characteristics, hormonal influences, brain structure and psychological behaviour. There are people who, when their sex was registered, may have appeared to be one sex at a cursory glance, but develop later in life to be predominantly another sex than first thought. Therefore a principle of fairness must be based on an individual’s ability to self-define their own physiological sex in accordance with their own affinity and congruence to their physiological sex manifestations.

We think it is important that people be allowed to define their own sex and gender based on their concepts of their own sex and gender identity and presentation.

A signed Declaration of Change of Sex registered with the ACT government should be all that is required. Because of Commonwealth law, it may still be necessary for a person to be single in order to make such a declaration although we would prefer that this was not the case. It is inappropriate for any government to attempt to destabilise and split up a family unit that may be stable and productive in order for an individual to correct a bureaucratic inaccuracy of their sex and gender presentation. People who are already married or in recognised domestic partnerships can suffer devastating

personal, emotional and social consequences, along with their families, due to an enforced divorce that serves no real or necessary purpose. If the ACT government is to recognise a same sex relationship or a relationship as a domestic partnership, then it is illogical and fruitless for the government to try and force an individual who is undergoing sex and gender alteration to become divorced before that alteration can be legally recognised.

A person's sex for the purposes of ACT law would be:

- a) the sex recorded on a registered Declaration of Change of Sex or
- b) the sex recorded on their birth certificate.

It should be an offence for a person who has a registered Declaration of Change of Sex to use a birth certificate with a different sex recorded, for the purposes of proving their sex.

Issue: Does the *Discrimination Act 1991* provide adequate protection from discrimination for transgender people and intersex people?

We do not think the current legislation provides adequate protection.

The *Discrimination Act 1991* would be improved by extending protection to all sex and gender diverse people. Rather than just "transsexuality" being a protected attribute, we would prefer to see "sex and gender diversity" being a protected attribute.

A sex or gender diverse person could be self-defined and self-declared as a person:

- a) whose sex is neither male nor female or
- b) whose sex and gender identity or presentation is not consistent with the sex assigned to them at birth.

## **Reproductive and Parenting Rights**

### ***Adoption Act 1993***

Issue: Should the *Adoption Act 1993* be amended to provide that same sex couples are eligible to adopt a child.

Yes. All domestic partnerships should be treated equally.

### ***Artificial Conception Act 1985***

Issue: Should the *Artificial Conception Act 1985* be amended to recognise the non-birth mother in a lesbian relationship as a parent of a child born through assisted reproductive technology?

Yes. All domestic partners should be treated equally.

## **Surrogacy Arrangements**

Issue: Should the *Artificial Conception Act 1985* be amended to allow same sex couples to apply for a parentage order where the child is born pursuant to a substitute parent agreement?

Yes. All domestic partnerships should be treated equally.

### **Transgender People and Parenting**

Issue: Why is there no issue identified?

Currently, the treatment of transgender people under the Artificial Conception Act 1985 varies depending on whether or not they have, among other things, undergone certain surgery. This is wrong. All domestic partnerships, regardless of a person's type of sex and gender diversity, should be treated equally.

### **Registering Relationships**

Issue: Is there a benefit in the ACT providing a mechanism to register same sex relationships in the ACT? Should this also apply to opposite sex relationships? What consequences should flow from this under ACT law?

The registering of domestic partnerships could act as a public statement of commitment and provide an historical record. With regard to probate, it would seem fair if all domestic partnerships were treated equally when a partner dies without a will. It must also be recognised that simply to provide a mechanism for registering same-sex relationships does not cover the relationships of those who declare themselves as being sex and gender diverse, therefore the ACT government would be wise to simply allow the registration of domestic partnerships regardless of sex and gender identity.

### **Anti-Vilification Legislation**

Issue: Should the vilification provisions of the Discrimination Act 1991 be extended to prohibit acts of vilification against gay, lesbian, transgender and intersex people, or people with HIV/AIDS?

A definition of vilification needs to be more concise in that, is it the simple debate of a person's inappropriate behaviour or does such vilification perpetuate acts of violence, slander and discrimination? If it was found that such vilification did perpetuate such acts, then it could be covered under the sex discrimination acts and also under acts governing public order. For instance, in cases where acts of violence, loss of dignity, property or personal safety came about through racial discrimination, then that would be considered by a government to be an illegal act. On the same basis then if an individual or group attempted to harass, damage or ruin a sex and gender diverse individual through such aforementioned mechanisms, then that must also be

considered as an act against good public order and an individual's right to live their life in a legal and peaceful way.

SAGE respects the right in law to freedom of speech; however, all governments in considering the right of freedom of speech must also consider that incitements of sexism, gender harassment and vilification because of sexism and gender harassment should not be tolerated by any free society. Where acts of violence against a person or their property occur as a result of someone inciting such actions then the person inciting those actions should be held equally liable for such crimes.

It must be remembered that sex and gender diverse people, along with gay, lesbian and bisexual people, can often, through ostracisation, be considered as marginalised and vulnerable groups in society, therefore it is the duty of any society and legal system to guard against all attacks upon those individuals or groups that may cause harm to their wellbeing. In drafting such legislation, it can be remembered that the World Health Organisation defines 'health' as an individual's sense of physical, mental and social wellbeing.

### **Defence of Provocation – the 'Gay Panic' defence**

Issues: Should the defence of provocation be abolished in the circumstances of a non-violent homosexual advance? Should the defence of provocation be abolished generally.
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The defence of provocation should be abolished in the circumstances of a non-violent homosexual advance. It should also be abolished in the circumstances of a non-violent advance made by a sex or gender diverse person. Such an advance is often wrongly regarded as a homosexual advance.

### **Meeting the Needs of Transgender People**

#### ***Births, Deaths and Marriages Registration Act 1997***

Issue: Are the provisions in part 4 of <i>the Births, Deaths and Marriages Act 1997</i> appropriate?
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No. This Act discriminates against those sex and gender diverse people who cannot afford surgery, are not well enough for surgery or for whatever reason choose not to undergo surgery. This is bad law.

Surgery is not cheap and is very invasive. The cost runs into tens of thousands of dollars that individuals are often called upon to fund themselves and some people, for whatever reason, simply cannot afford that medical attention. Surgery also carries with it the risk of severe medical complications and, at times death, so it cannot be the job of the state to require individuals to undergo what is sometimes life-threatening surgery in order for them to attain social recognition.

The sex recorded on a birth certificate should be changed on request on the evidence of a registered Declaration of Change of Sex (discussed earlier).

### ***Discrimination Act 1991***

Issue: Does the *Discrimination Act 1991* provide adequate protection from discrimination for transgender people?

The current legislation provides adequate protection for certain, but not all, sex and gender diverse people.

The *Discrimination Act 1991* would be improved by extending protection to all sex and gender diverse people, regardless of the type of their diversity. Rather than just 'transsexuality' being a protected attribute, we would prefer to see 'sex or gender diversity' being a protected attribute.

A sex or gender diverse person could be self-defined and self-declared as a person:

- a) whose sex is neither male or female or
- b) whose sex and gender identity or presentation is not consistent with the sex assigned to them at birth.

### **Other Legislative Provisions**

Issues: What is the appropriate approach to meeting the needs of transgender people in respect of sex-segregated facilities such as public baths? How should this approach also take into account the needs of other users of such facilities?

By defining sex along the lines discussed earlier, many of the needs of sex and gender diverse people in respect of sex-segregated facilities would be met. In the case of people who identify their sex and gender identity as other than strictly male or female and in the absence of facilities for them, they should be able to use the facilities in which they feel most comfortable. It is also important that the individual be permitted in the first place to choose the facilities that they feel are appropriate for their sex and gender self-declaration.

There is also a need to look at laws relating to searches and custodial escorts in respect of sex and gender diverse people. There is also a need to look at the laws that govern the rules within the custodial system to ensure the safety of sex and gender diverse people within that system, prohibiting them being subjected to violence and abuse.

Issues: The government welcomes submissions on how current legislative schemes are addressing the needs of transgender people. Are there needs that are not covered by this issues paper that should be addressed?

Many people who have a sex and gender identity and gender presentation that is not consistent with the sex assigned to them at birth do not wish to have their birth sex known to others. It should be an offence for a person to disclose the former sex of

person to a third person without consent.

It is also important that an individual, for purposes of documentation, is not forced into putting male or female on official documents when they do not believe that is appropriate. There has recently been a case in Western Australia where an individual has achieved the right to have no sex or gender registered on their birth certificate or passport so they may move comfortably in an identity that they feel is right for them (Butler 2003). Some people would be more comfortable simply having their birth certificate or public documents with no reference to sex or gender and those individuals need the right to do that, rather than being marginalised into bipolar identities of male and female, which is plainly not right for them.

### **Intersex People and ‘Normalising Surgery’**

Issue: Is it necessary to regulate normalising surgery carried out on intersex children?

Many intersex people have suffered great anguish as a result of other people making well-intended decisions on their behalf. The views of intersex persons are paramount when deciding on appropriate legislation.

‘Normalising’ surgery that defines a child as male or female should not be carried out on intersex children, unless it is life-saving. Surgery that has been performed on intersex children has often damaged their genitalia severely, obliterating their reproductive ability and taking away their capacity to enjoy sexual acts. Any surgery performed on an intersex person should be done with their informed consent. There should be protocols covering counselling of parents of intersex children, disclosure of intersex conditions to intersex children and counselling of intersex children at an appropriate stage of their development. Protocols need to be in place regarding the recording of an intersex child’s sex on their birth certificate. In such cases it would be more appropriate that the birth certificate be left blank and amended at a later stage when the child or adult decides what identity is appropriate to them. Such surgery carried out on an uninformed individual child or adult without their express permission should be considered in law to be a criminal act of assault, along with enforced circumcision, castration, removal of the ovaries and any form of genital mutilation. The extended treatment of such individuals that may include enforced hormone treatment should also be considered as assault, unless that individual has expressed the desire to undergo such treatment.

Issue: Is the exception in section 77 of the *Crimes Act 1900* appropriate? Should the exceptions be limited to ‘genuine therapeutic purposes’ contemplated in section 76?

Section 77 should only provide exception to the offence in the case of sexual realignment procedures carried out with the fully informed consent of the patient.

### **Policy, Programs and Priorities**

Issue: Does the ACT Government need to take better account of the specific needs of lesbian, gay, bisexual, transgender, or intersex people in the ACT? Are there

particular priority areas?

In drafting new legislation and implementing programmes, the ACT government can consider that any individual with health and a sense of wellbeing is likely to be a contributing member of society as well as a taxpayer. When sex and gender diverse people are compromised, both socially and legally by inappropriate laws that restrict them and prohibit them from leading fulfilling lives, they can become a burden on the state rather than an integrated citizen.

There is no doubt that sex and gender diverse people can indeed at times be a vulnerable group in society, particularly when they are in need of medical, psychological and social services in order for them to define their identities. It is a matter of financial and social economics that a society should have as many members as it can contributing towards the whole. In drafting new laws, it is imperative that the ACT government understands the profound diversity in nature and nurture concerning people who are sex and gender diverse. Previously held bipolar concepts of male and female sex and gender identity are now academically seen to be primitive and our greater knowledge of medicine, psychology and sociology has shown us that more than 1 per cent of the population is sex and gender diverse. This figure is increasing as we discover more physiological diversity and recognise an evolution of acceptance of an individual in whatever form they wish to present themselves.

Poor laws seek to restrict people's sex and gender diverse expression and result in court cases against the state, eating up public funds as individuals seek to claim their right to define their own sex and gender diversity. Judicious law-making in permitting and protecting the right to sex and gender diversity gives back to that society more contributing members whose autonomy is protected and whose human rights are treasured.

We ask the ACT government in drafting, extending and developing new laws that they take a different approach in the future by seeing those who are sex and gender diverse simply as other members of society who should be entitled to the same rights and privileges as the average person. We welcome dialogue with the ACT government representatives in forming and reforming laws concerning sex and gender diverse people at this time and in the future. We encourage the government to take full advantage of the expertise of our members, who are sex and gender diverse, in this field.

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