

**Australian Human Rights Commission - DRAFT submission for Australia's Universal Periodic Review appearance – SAGE's response May 2010**

**Equal Human Rights for Intersex, Sex and/or Sex Gender Diverse People (ISGD) And Proposed Changes To Australian Antidiscrimination Laws**

**Consultation Process**

**Paper prepared and submitted by Sex And Gender Education (SAGE**

**(Australia) For the Australian Human Rights Commission (AHRC)**

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SAGE is a political lobbying group that campaigns for the legal and civil rights of intersex, transexed, transsexual, transgender, androgynous, sinandrogynous (without sex and gender identity), cross-dressers and people of cultural sex and/or gender diverse differences. Collectively these groups are referred to as intersex, sex and/or gender diverse (ISGD) people.

**Background**

Over the past nine years Sex And Gender Education (SAGE (Australia) has campaigned to the government for the rights of each and every one of these groups and continues to do so under the metaphor **Intersex, Sex and/or Gender Diverse People (ISGD)**. This metaphor is never intended to be used as a personal noun or adjective but is simple a descriptive phrase to cover all of these different groups of people that retain their original descriptive identification.

([http://www.tracieokeefe.com/Transgender\\_umbrella\\_death.htm](http://www.tracieokeefe.com/Transgender_umbrella_death.htm), May, 2010)

It has become obvious over the past years that collective bargaining under the term 'transgender' has failed to work for many intersex, sex and/or gender diverse people because it alienates too many of the aforementioned groups of people. THE AHRC in its 2009 report, the Sex Files, on the legal rights of sex and gender diverse people successfully negotiated its inquiry by using the open language phrase 'sex and gender diverse' while including each groups' concerns and issues. The phrase is now becoming more popular with health professionals, government and some political campaigners and SAGE uses intersex, sex and/or gender diverse people (ISGD) in this paper.

([http://www.hreoc.gov.au/genderdiversity/sex\\_files2009.html](http://www.hreoc.gov.au/genderdiversity/sex_files2009.html), May, 2010)

There are now over 300 medically recognised intersex conditions. Some may need medical intervention to retain the health of the individual. Other people who are intersexed, however, may never need or perhaps might not want any kind of medical intervention but simply see

themselves as having a physical body that is other than typically male or female. There are various laws in Australia that might protect intersex people but they are within the context of the stereotypically male and female focused bipolar model of human sexing. Many human beings, however, are not physically typically male or female and presently have no real protection in law in Australia.

Both transsexual and transgender people in Australia have different laws that attempt to protect them against discrimination. But the terms are often used interchangeably and inappropriately, causing confusion in the law. These two groups are two very different identities and to confuse one with the other can cause great offense. Transexed people are further identified as people who are both intersex and transsexual but have previously been denied an intersex status.

There are also groups of people who identify as having identities that are both male and female and are basically androgynous. Some others have no sex and gender identity at all, with the most famous in Australia being Norrie, who is presently fighting for the legal right to have 'sex not specified' on zie's documents. We also include people who are culturally associated cross-dressers and people who are culturally sexed and gendered differently such as fa'fafini or sistergirls and brother boys (O'Keefe, 1999)

(<http://www.thescavenger.net/glbgdq/sex-not-specified-australia-leads-the-way-in-legal-document-756345.html>, May, 2010)

### **Purpose of the paper**

This paper is to guide the AHRC in the Australian Human Rights Commission's draft submission for Australia's appearance before the United Nations Human Rights Council's Working Groups on the Universal Periodic Review (UPR) in January 2011.

SAGE was a major contributor to the 2009 AHRC Sex Files Report that recommends 15 changes in law and identified areas of legal discrimination against SGD people by the government and society in Australia. It is important to note here that the AHRC specifically did not use the overview phrase 'transgender' as a metaphor finding that many ISGD people find the phrase extremely offensive in that it fails to describe and in fact misdescribes their experience.

(<http://www.thescavenger.net/glbgdq/dont-call-me-transgender.html>, May, 2010)

At the time of writing this paper the AHRC itself constantly uses offensive language to misdescribe many ISGD groups as transgendered, who do not identify as transgender. It has also failed to follow its own recommendations in the 2009 Sex files report.

The drawback with using a single or minimal reductionist phrase describing identities in legislation is that at later dates people who are discriminated differently may not fit into the narrow descriptive phrases. I will give an example.

In NSW it is illegal to discriminate against a transgender person. The problem with this legislation, however, is the question of who is or is not transgender. It is open to purely subjective interpretation and people who do not match that narrow description have been unable to bring such cases when they did not match that limited description, which was basically a medically altered transsexual.

Replacing the term transsexual with transgender was meant to overcome the descriptive limitations of the description transsexual. It failed, however, to make anti-discrimination protection more available to a wider number of ISGD people. Not only had the word transsexual been limited but its replacement transgender then became too limited. This will always be the case when one makes legislation to protect narrow groups of people based on a singular group's features instead of wider principles.

([http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_transgender](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_transgender), May, 2010)

This papers also aims to suggest how the AHRC can create better more judicious anti-discrimination federal law for ISGD people.

### **Male & Female Sexism – Section 10 AHRC Document**

At least 1% of the population in some form has an intersex, sex and/or gender diverse manifestation. In section 10 of the AHRC's document it uses the word gender when it talks about sex. This needs to be corrected. The law needs clear clarification on precisely how society's rights are divided and a person's sex may not be congruent with their gender presentation. Misunderstanding on these points will have grave consequences for future generations of sex and/or gender diverse people.

The language used is elitist and ignores that around 1% percent of the population may be neither strictly male nor female. When the legislation talks about equality for both men and women it needs to be replaced with the phrase 'all human beings'.

Whilst it is legitimate to talk about men's and women's rights being important, and women in particular being disadvantaged in society, it is important to recognise that families and partnerships today may be made up of many different types of families that may be other than a man and a woman.

### **Misunderstanding between Sex and Gender identity - Section 11 AHRC Document**

A person's sex is the sum total of many concomitant factors:

Genital sex - primary sex characteristics

Body characteristics - secondary sex characteristics

Ancillary sex - connected sex organs, genetics,

Brain sex

Hormonal sex

Chromosomal sex

Internal fantasy sex

Spiritual sense of sex

Social sex

Historical sex

Cosmetic sex

Linguistic sex

Legal sex

The sum congruency of a person's sex is sometimes different from their social gender interpretation of socially constructed behaviours, which is their gender performance (O'Keefe, 1999).

It is plain to see from the AHRC document that AHRC does not understand the difference between sex and gender. If future laws are made with such confusion it will have grave consequences for some ISGD groups of people.

### **Bullying, violence and harassment against ISGD people – Item 17 AHRC Document**

This is indeed one of the largest problems facing people who present in public as intersex, sex and/or gender diverse. The government itself commissioned a study a few years ago on the impact of violence against trans people but on its completion they failed to publish the very serious results. Sex and/or gender diverse people have one of the highest levels of unemployment in Australian society.

One of the greatest problems in this area is the bullying of ISGD people but the government ignores this population by failing to give the ISGD population equal rights. In the AHRC's Sex Files Report 2009, the then Commissioner Graeme Inness, recognised that referring to many of this population as transgender was a form of bullying and he referred to the population as sex and gender diverse people. Ironically the AHRC has reverted to that kind of bullying by referring to this population as transgender. This needs to stop.

### **Discrimination Against Children's Medical Rights**

Australia is a prime abuser of children's medical rights. Adults abuse children's medical rights in Australia under the concept of adults know better. Intersex children are not protected by law to make their own decisions about the course their lives will take and have treatments forced upon them, including hormones and surgery, by clinicians, parents and even the courts.

Trans children are denied hormonal and surgical treatment in Australia unless their parents apply to the courts for permission to treat these children before the age of 18. The process is

often far too trying for the children, families and all involved so those children are left untreated and some commit suicide, become depressed, develop addictions and may develop poor mental health outcomes. In Europe and America those children are treated without court intervention as young as preteens.

Boys are also assaulted in Australia by being subject to circumcision, without their permission, under the felonious philosophy of cultural tradition. If anyone performs female circumcision in Australia they could be prosecuted under the law but so called religious tolerance allows boys to be butchered in this way.

In the AHRC 2009 paper on medical intervention of intersex children the paper wrongly relied on the Marion court case (AHRC, 2009). Marion was a mentally disabled teenager whose parents wished to sterilise her – she was a not legally compos mentis and not capable of making her own decisions.

Intersex, trans children and young boys cannot be said to be without their faculties even though they may be young. Such an attitude is ageist. Children should be allowed to make these important decision themselves, with their doctors, without overt interference from parents or the courts. Such decisions affect a person for life and the child's wishes must be counted higher than cultural prejudices.

Anti-discrimination laws need to allow those children to bring cases, without time limitation, against adults, parents, doctors, and the courts themselves. When non-medical emergency procedures are forced upon them without their permission or they were denied medical procedures they needed and requested at that time, both need to be considered a crime.

The controlling of children's medical fates through the courts on these matters is nothing more than denigration of intersex and trans children motivated purely through prejudice, heterosexism and fear of ISGD people.

### **The danger of compulsory third gendering.**

European-derived Judeo-Christian colonialists attempted to wipe our third and fourth gendered spaces from native second world countries that they invaded over the past 400 years. In America those spaces were Berdash, Winkete, in Inuit cultures maled females and in Polynesia fa'fafini and so on. In many Judeo/Christian-based, European-derived cultures those third and fourth gendered spaces were considered anti-religious and heathen. What must be remembered is that those social spaces were more often self-elective than compulsory.

ISGD civil rights campaigners fear that third gender spaces could become compulsive unless the law states that those who may be intersex, sex and/or gender diverse, who do not indentify as third or more gendered persons, have the option to be simply identified as male or female. For instance one example could be a transsexual woman who underwent transition and then was discriminated against as a woman, but if the law was not properly defined, she could be forced to apply for an anti-discrimination remedy as a third-gendered person. This would be disastrous for that woman and would in no way give her a fair remedy.

## **ISGD is Not a Gay Issue**

There is much confusion in the public's mind, and it seems at present from the AHRC, about the dividing line between gay, lesbian and bisexual (GLB) issues and those of ISGD people. SAGE categorically wishes to emphasise that ISGD issues are not GLB associated.

Many GLB campaigners put a T for Transgendered and I for intersex people on the end of their acronym to make GLBTI in order to increase the numbers of their campaign. SAGE wishes the AHRC to separate GLB issues from ISGD issues as one is mainly sexuality, the other is mainly about sex and/or gender identity, which are different things that requires different legal criteria.

The AHRC has no right to ask the GLB rights lobby groups to overlook proposed legal documents or anti-discrimination law proposals that pertain to ISGD people. They do not have the expertise. Neither is it appropriate to ask the GLBTI lobby to do the same in the name of ISGD lobby groups. Many ISGD people do not identify as trans in any way. They may have transitioned and live as ordinary heterosexual men and women and do not want to be gay-tagged for false, supposed short-term legal gain by those who believe into the GLBTI paradigm. There are also ISGD people who have never made any kind of physical or social transition who need protection.

SAGE has never campaigned on the GLBTI ticket as we believe that ISGD groups should have the right to speak out for their own need.

I will include a recent comment from a trans campaigner in reaction to the suggestion that in looking at law changes we must also consider the tens of thousands of ISGD people in Australia who are not out in public. The campaigner came from a solely GLBT perspective and suggested that people who have not publicly embraced their trans identities did not deserve representation. This shows a profound naivety about the many thousands of people in Australia who are intersex or have transitioned their sex and/or gender identities but are not out in public.

SAGE requests the AHRC to run any proposed final drafts concerning ISGD people's civil rights and anti-discrimination law proposals by our organisation.

## **What we need from future drafting laws**

What needs to happen in drafting future legislation to protect intersex, sex and/or gender diverse people is for the law to use open language and say that *people may not be discriminated against on the grounds of Sex, Gender or Sexuality*. This will create equality in law and the protection enshrined in future law to apply all human beings regardless of their identities. It will also allow for the protection of identities that we may begin to recognise in the future, making the need to continually recreate the discrimination laws in this area obsolete. Times change and descriptions such as hermaphrodite, sex change, transsexual and transgender have been very controversial and gone out of vogue in many sectors of society.

To base laws on reductionist linguist descriptive nominalisations poses dangers for future generations by being too restrictive and thereby excluding some people from protection from discrimination.

There further are often problems in Australia in judges interpreting laws in a way that they sometimes read intentions into the written law that were never intended. Since Australia is such a small population the avenues of appeal for complaints in discrimination cases is also limited unlike other democratic cultures like Europe or in America. Therefore we propose a belt and braces approach with further clarification stating that *vulnerable groups include all intersex, sex and/or gender diverse people who may be physically intersex, transexed, transsexual, transgendered, androgynous, sinandrogynous (without sex and/or gender identity), cross-dressers or people of culturally associated sex and/or gender diverse differences.*

We are aware that there may even be a need for different protections between those groups but on principle they all need to be collectively dealt with under the ISGD umbrella.

### **Continuing Consultation**

SAGE has established good relations with the AHRC over the past several years. However, over the past year SAGE believes that AHRC has taken a step backwards and is not implementing the directions and ethos of the Sex Files Report. The language being used by the Commission and its staff is still sexist and genderist and directly impacts on the lack of human rights for many ISGD people.

SAGE offers its wealth of expertise in guiding the Commission to correct its present offensive behaviour and encourages the AHRC to forge greater consultation with members of our organisation.

For us it would be better if the anti-discrimination proposal was put together more carefully and sympathetically to all ISGD people. Otherwise those new laws will not mean a reduction in the number of anti-discrimination cases for ISGD people, just the need to bring cases of a different kind.

### **Bibliography**

Australian Human Rights Commission, **Surgery on Intersex Infants and Human Rights**, Australia 2009.

O'Keefe, Tracie, **Sex Gender and Sexuality, 21<sup>st</sup> Century Transformations**. Extraordinary people press London, UK, 1999.

### **Internet**

**Sex Files: the legal recognition of sex in documents and government records:  
Concluding paper of the sex and gender diversity project**

[http://www.hreoc.gov.au/genderdiversity/sex\\_files2009.html](http://www.hreoc.gov.au/genderdiversity/sex_files2009.html)

Fox, Katrina, **Sex Not Specified**, The Scavenger, April 2010 (accessed 22 May 2010).

<http://www.thescavenger.net/glbsgdq/sex-not-specified-australia-leads-the-way-in-legal-document-756345.html>

O'Keefe, Tracie, **Don't Call Me Transgender**, The Scavenger, April 2010 (accessed 18 May 2010)

<http://www.thescavenger.net/glbsgdq/dont-call-me-transgender.html>

O'Keefe, Tracie, **Intersex, Sex and/or Gender Diverse People and the Death of Transgender as an Umbrella Term**, May 2010 (accessed 23 May 2010).

[http://www.tracieokeefe.com/Transgender\\_umbrella\\_death.htm](http://www.tracieokeefe.com/Transgender_umbrella_death.htm)

**NSW Anti-Discrimination laws –Transgender**. NSW Government, Australia (accessed 24 May 2010).

[http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_transgender](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_transgender)