

## **Protection Under Anti-Discrimination Laws for All Sex and/or Gender Diverse (SGD) Groups of People**

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### **Sex and Gender Education Australia (SAGE)**

SAGE is a campaigning group for the legal and social rights of sex and/or gender diverse people.

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### **A response to the Federal Attorney General’s Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper, Australia – 2011**

#### **Abstract**

This paper looks at the need for the Australian federal extension to the anti-discrimination laws to include all sex and/or gender diverse groups of people. It cites flaws in the Federal Attorney General’s Discussion Paper, 2011, and shows how many people will be missed out from protection. Contributors tell their stories and state how the present Federal Attorney General’s proposals are dangerous to them. Finally it shows reasons why the Federal Attorney General’s office, in drafting new anti-discrimination laws, needs to follow the directions of the Australian Human Rights Commission’s Sex Files Report , 2009 and use the phrase ‘sex and/or gender diverse people’.

#### **Introduction**

Sex and/or gender diverse (SGD) is simply a meta-phrase that includes all sex and/or gender diverse groups. This paper deals with the development of Australian federal anti-discrimination laws for people who come from SGD groups, not sexuality anti-discrimination, which is a different field. There is a need for all SGD groups of people to be included in the proposed extension to the Australian Federal Anti-discrimination legislation.

SGD people are made up from many differing groups including people who are intersex, transexed, transsexual, transgendered, androgynous, without sex and/or gender identity, cross-dressers and people with sex and/or gender culturally-specific differences. They are people who experience variations in physical presentation and social behaviour that is other than stereotypically male or female, masculine or feminine. Each group may have its own physical, psychological, social, legal and political issues that may not necessarily relate to any of the other groups.

#### **Background**

Physiologically sex is a matter of degree. Sex considers the physical and biological characteristics and whether a person has ovaries, testicles, ovotestis, diverse hormone levels or genetics, a vagina, a penis, breasts, male or female type brain or something in between and secondary sex characteristics. Most people are predominantly male or female, some people are diagnosed as intersex and others have sex polymorphism, which means they are sex diverse but impossible to diagnose (O’Keefe, 1999).

Gender is a social construct. It is the acting out of social roles around masculinity, femininity or neuter. A person is a sex and does gender. Sex and gender are often confused but in reality

they are two different things and should not be confused as one is biological and physiological and the other is social performance (O’Keefe, 1999).

The Sex Discrimination Act 1984 only protects men and women on the grounds of sex discrimination. Should someone want to bring a case for being discriminated against on the grounds of being sex and/or gender diverse then this Act does not cover them and they are excluded from anti-discrimination legislation. Several cases brought on those grounds have been rejected by the Australian Human Rights Commission (AHRC), the mediating body in such cases. It posits that the Sex Discrimination Act was only designed for resolving the war between men and women and not intended to apply to sex and/or gender diverse people.

In the Australian Human Rights Commission’s Sex Files Report: The legal Recognition of Sex in Documents and Government Records, 2009, the authors used the phrase ‘sex and/or gender diverse’ when referring to a collective of different groups from that populous.

“Despite this lack of consensus over the exact meaning and definition, sex and/or gender is an important part of a person’s personal identity. Sex and/or gender identity defines a person’s sense of self and positions them in a social and political context. Every person has the right for their sex and/or gender identity to be recognised and respected.” (AHRC, 2009, 4.1).

The Submission by the Australian Human Rights Commission under the United Nations Universal Periodic Review process states:

“People who are intersex or sex and/or gender diverse: **There is no federal law prohibiting discrimination on the grounds of sex or gender identity. People who are sex and/or gender diverse face difficulties obtaining official documents that accurately reflect their status.** The Commission recommends that sex or gender diversity be included as grounds of discrimination in federal laws, and that the *Sex Files* report be implemented.” (AHRC, 2010, item 12).

The AHRC’s discussion paper ‘Protection From Discrimination on the Basis of Sexual Orientation And Sex and/or Gender Identity’ (AHRC 2, 2010) also uses ‘sex and/or gender identity’. It failed, however, to make it clear that whilst a person may have a gender identity, a person’s sex is simply a fact, not an identity. Some people are predominantly male, some female, many are in between or neither, but over 200,000 Australians are sex and/or gender diverse.

In mid 2011 the Federal Attorney General’s Department stated it considered the phrase “sex and/or gender” optimal for covering groups of people who were sex and/or gender diverse. At the time it was commencing an inter-departmental survey of how government departments were recording sex or gender.

“The Attorney General’s Department considers ‘sex and/or gender diverse’ to be the most appropriate term as it recognises variations in sex and gender, without being overly specific and excluding certain groups. It is also consistent with terminology used by Australian Human Rights Commission.” (Federal Attorney General’s Office 3, 2011)

The Australian Passport Office uses the phrase ‘sex and gender diverse’ on its website in regards to issuing passports to people who may not be strictly male or female or masculine or feminine (Department of Foreign Affairs, 2011). The Minister for Foreign Affairs, Kevin Rudd and Federal Attorney General Robert McClelland, recognised that it is difficult in many cases in dealing with a labelling system such as ‘trans’ or ‘intersex’ so the department

allows people to change their passport to male, female or X with a simple letter from a doctor.

In a media release on 14 September 2011, Rudd and McClelland stated:

“Foreign Minister Kevin Rudd and Attorney-General Robert McClelland today announced new guidelines to make it easier for sex and gender diverse people to get a passport in their preferred gender.

“Under the guidelines, sex reassignment surgery will no longer be a prerequisite to issue a passport in a person’s preferred gender.

“Sex and gender diverse people now have the option of presenting a statement from a medical practitioner supporting their preferred gender,” said Mr Rudd.”

“This initiative is in line with the Australian government’s commitment to remove discrimination on the grounds of sexual orientation or sex and gender identity.”

(Federal Attorney General’s Office 2, 2011)

### **The First Sex and/or Gender (SGD) Diversity Human Rights and Dignity Conference, Australiasia, 2 December 2011**

This was a national community-based consultation process which made the following recommendations:

“The need for anti-discrimination laws that protect all sex and/or gender diverse people not just special interest groups such as trans or intersex. The areas of life in which discrimination may apply for SGD people needs to be broadened, without religious exemption.”

(Recommendations, Legal Section, item 19)

“1. The use of Gay, Lesbian, Bisexual, Transgender, Intersex (GLBTI) as an umbrella acronym is offensive and disempowering. GLBTI confuses sexuality with sex and/or gender diversity and they are two different things. GLBTI also leaves out many different kinds of sex and/or gender diverse people.

2. Both GLB and SGD should be treated as separate fields. Gay, lesbian and bisexual (GLB) people should never speak on behalf of SGD groups.

3. Transgender and queer are also not acceptable as umbrella terms. Whilst some SGD groups may be queer-identified, many are not. Many SGD groups are not transgender.

4. No one person can be SGD. People may be diverse in their physiological sex and/or gender presentation so sex and/or gender diverse (SGD) people was endorsed to be the umbrella term to use when referring to differing groups of people experiencing of sex and/or gender diversity.”

(Plenary Recommendations)

## **AHRC Recommendation**

The AHRC made the below recommendation in 2011 to include in future anti-discrimination protection of the grounds of ‘sex characteristics, gender identity and gender expression’ (AHRC, 2011, p.21).

‘Recommendation 19: The Commission recommends that coverage of sexual orientation, sex characteristics, gender identity and gender expression in a consolidated Commonwealth equality law be framed to achieve the broadest coverage of people of all sex and/or gender identities and to provide improved protection against discrimination.’ (AHRC, 2011, p.23)

Whilst this is indeed a noble recommendation, the AHRC saying that the law should cover the “broadest coverage” of people falls short of advocating the protection of *all* sex and/or gender diverse Australians, including sex diverse people with primary and/or secondary diverse sex characteristics.

## **Discussion**

### **The failure of laws that using labelling strategies**

It can be seen that constructing laws that use discriminatory labelling strategies creates massive holes in legislation and causes them to be inoperable for many members of the population. This is true of all state laws throughout Australia that seek to protect sex and/or gender diverse groups. The very people that they may be intended to protect often are not protected or the law fails to protect other vulnerable groups that cannot fit into outdated or inexact labels such as ‘transgender’, ‘intersex’, or ‘gender variant’.

The perfect example is with the NSW Anti-Discrimination law that purports to protect people on the grounds of being ‘transgender’ (NSW Government, 1996). Its definition of transgendered, however, is a person who has undergone surgery, which would make many people from sex and/or gender diverse groups ineligible to bring cases. The law makers substituted ‘transsexual’ for ‘transgender’ and went on to create a whole new strata of discrimination based on hierarchical subgroup recognition and rejection.

The law was supposed to cover other people under the transgendered label but it has not been operated that way. People were often unable to bring complaints under that legislation to the extent that many of the sex and/or gender diverse populations just gave up using the complaint system and generally suffered in despair.

### **“Part 3A Discrimination on transgender grounds**

#### **Division 1 General**

#### **38A Interpretation**

A reference in this Part to a person being transgender or a 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, or

(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex, and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.’

(New South Wales Government, Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996)

‘Recognised’ meant those who had undergone genital surgery according to the way the Births, Death and Marriages ACT; Section 32 A (b) (Births Deaths and Marriages (BDM) Act, NSW Government, date) was interpreted by the NSW Attorney General. So a loophole was created in that the anti-discrimination law proposing to protect all so-called ‘transgender’ people, with levels of protection higher for those who had genital surgery, but the NSW BDM denied recognition to those who had not had surgery.

### “32A Definitions

In this Part:

*recognised details certificate* means a certificate issued under section 32DD certifying the sex of a person who has undergone a sex affirmation procedure.

*sex affirmation procedure* means a surgical procedure involving the alteration of a person’s reproductive organs carried out:

- (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
- (b) to correct or eliminate ambiguities relating to the sex of the person.”

(NSW government, 1995 No 62)

What the NSW BDM Act also did was assume that everyone has an opposite sex. It bought into the binary falsehood of people being only male or female. If that were so, why would the Act in the first place even mention the phrase ‘indeterminate’ sex? Why would the anti-discrimination legislation say it protected people of ‘indeterminate’ sex?

Intersex people do not want to have to bring discrimination cases under laws that refer to ‘transgender’ people. They are not ‘transgender’ per se and may not even be ‘trans’ so they not only could not but would be unlikely to use such laws. It also can be seen that NSW anti-discrimination laws were supposed to cover a person of indeterminate sex (intersex or even not determinable) but never did.

In the Norrie May-Welby case (Administration Decisions Tribunal, 2011) the NSW BDM has claimed that the NSW Births, Death And Marriages ACT, Section 32A (a) (b) (Births, Deaths and Marriages, Registration Act 1995 No 62) only refers to males and females, despite the Act using the word ‘indeterminate sex’. So not only do the anti-discrimination laws in NSW in this area become a farce but the Births, Deaths and Marriages Act follows close behind.

The reality is that around 1% of a population or around 200,000 people in Australia cannot fit into strict bipolar categorisation of male or female, masculine or feminine (O’Keefe, 1999). If

new anti-discrimination laws do not include all those people then it is creating discriminatory laws and replacing one form of discrimination with another. It is not creating anti-discrimination laws but a new kind of sex and/or gender apartheid.

In this document I shall address only the anti-discrimination laws' incongruence in NSW but in examining the other states similar inconsistencies can be found. There are over 300 recognised intersex manifestations, with even diverse variations of gender expressions in today's society. The lack of human rights on the statute books for sex and/or gender diverse groups is endemic. The lack of congruent anti-discrimination for many sex and/or or gender diverse groups exists throughout Australia.

### **Flaws in the Federal Attorney General's Consolidation or Commonwealth Anti-Discrimination Laws Discussion Papers**

In the Federal Attorney General's Discussion Paper (Attorney Generals Department, 2011) there seems to have been a deviation from the approach adopted by the AHRC in using the phrase 'sex and/or gender diverse'. What the paper has done is abandoned the phrase and used the old and outmoded subdivision between groups on the basis of one group being of 'indeterminate sex' and the other being 'gender variant'. This once again creates a hierarchical subdivide that does not exist in other anti-discrimination laws such as race, sex, disability, and so on.

“Sexual orientation and gender identity

2. Each of the States and Territories cover sexual orientation as a protected attribute to some extent. Sexual orientation is generally defined as heterosexuality, homosexuality, lesbianism and bisexuality. An alternative way to define sexual orientation is by using a conceptual definition – rather than referring to 'labels', such a definition would encompass the broad concept of person's sexual attraction to, and sexual activity with, people of a particular gender. An inclusive definition of this nature would include the terms outlined above but also include circumstances which may fall outside those terms, if appropriate.

3. Gender identity is a complex concept. Most State and Territory jurisdictions<sup>1</sup> define the concept to:

- apply equally to:
  - males who identify as female
  - females who identify as male, and
  - intersex people (ie people born of indeterminate sex)<sup>2</sup> who identify as male or female
- apply to people who genuinely identify as a member of a particular sex, including by assuming characteristics of that sex, whether medically, by style of dress or otherwise, or by living, or seeking to live, as a member of that sex, and
- apply regardless of whether a person is legally recognised as a member of the sex with which they identify.

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4. The *Crimes Act 1914* contains a similar definition in the context of recognising how transgender people are to be treated for the purposes of collecting forensic material.

(Federal Attorney Gender Department, 2011, p21-22)

The above Discussion Paper confuses sex with gender and the two are very separate. Some people may experience variations in their physical sex that places them as being other than stereotypically male or female. Some of those people may get a medical diagnosis as intersex or a person of indeterminate sex. Others, however, may only be partially intersex, and used to be referred to as pseudo- hermaphrodites. They may have many features that are atypical to their major sex but they would not officially get a diagnosis of being intersex according to the ICD 10 (World Health Organisation, 2010). They may never have changed their gender role so they would not be protected under the discussion paper's proposal.

People are not just born intersex. Many people may develop intersex experiences through their life at any stage due to illness, iatrogenic drug use, exposure to radiation and environmental toxins, trauma, genetic mutation, organ pathology and hormonal dysfunction (O'Keefe 1999). There are large issues around the biomedical pathologisation of the intersex experience. Many people who experience intersex do not consider themselves to have a pathology, just a developmental difference and they are simply sex diverse.

What is disturbing about the Federal Attorney General's proposed statute (Federal Attorney General's Department, 2011, p22) is that it looks remarkably like the NSW anti-discrimination legislation that has proved to be a total disaster for a large number of sex and/or gender diverse groups of people because it buys into labelling theory and many vulnerable people were excluded (NSW Government, 1977). It buys into labelling unlike the federal race discrimination legislation that does not, therefore it remains universal in its concept (Federal Government, 1975).

In the section on sexuality the paper does understand the danger of using labels: "An alternative way to define sexual orientation is by using a conceptual definition – rather than referring to 'labels'." (Federal Attorney General's Department, 2011, p21). However, when it talks about sex polymorphism under gender identity issues it is incorrect. Sex diversity is different from gender diversity. Some people with sex diversity may never experience gender diversity and vice versa. Some may experience both but not for most of those populations.

It can be seen that the Federal Attorney General's office is not complying with the recommendations of the Sex Riles Report (AHRC, 2009). It has difficulty understanding that people can be sex diverse, gender diverse or both.

**The below people agreed to contribute towards this paper:**

**D:** "I am gender diverse. I guess you would say I'm a butch, tomboy, whatever you want to call it. I dress very masculine and don't have a single piece of girls' clothing. I don't want to have any hormones or surgery, I am happy being a butch woman. I work in forestry and live in the country so I don't mix much with society. I worked in town once when I left school but sticky beaks kept telling me I should dress like a girl? Why?"

So I'm not transgender or intersex or nothing out of the ordinary other than a butch woman. I'll probably stay living in the country as it's peaceful and I can do what I want. Bush people accept you just the way you are but town people want to change you to suit them. If you are going to make some anti-discrimination laws you need to include me please. Thank you."

- The proposed anti-discrimination laws will cover this person.

**Grace:** “I am a 37-year-old transsexual woman. In 2000 I transitioned and over the years I changed my name officially at NSW BDM, and changed all my other documentation as well, like driver's licence etc. The name-change certificate still divulges my old name and sex and my birth certificate still says 'male', so neither is very useful for documentation because they out me as trans and create problems. Sometimes vilification, weird looks and comments, but usually it means not getting hired.

This is because most jobs specifically ask for a birth certificate for identification and so I am refused employment often (naturally being given other reasons) despite being highly skilled, very presentable, qualified and with good references etc. The NSW BDM will not change my birth certificate because I am married. In order for my birth certificate to be amended, NSW BDM insist I have to divorce my partner, which is manifestly unfair when we want to stay together! This is at odds with the fact I have a female Australian passport, which I had to fight in court for my right to have one recognised. Every time I go for a job, I do well until the interview stage, when I have to provide documentation.

It is clear to me after years of only sporadic employment despite CV rejigging and following countless suggestions, that I face discrimination I am powerless to avoid. I have no legal recourse to amend my birth certificate or force an employer to hire me if they consider me being trans an issue, even if the problem is non-existent, invented or imagined.”

**- The proposed FAD's anti-discrimination laws would NOT cover this person.**

**Claire:** “I get teased a lot because I am big, very strong and hairy. I had an adrenal gland issue when I got to puberty. I work in a factory and many of the workers refer to me as one of the boys. I don't like it. There is nothing abnormal about me and everything is in the right place and it works. I've been tested and I'm all female. I have two children but people often think I look like a man. It's upsetting being taunted but there is nothing I can do about it. I complained to my union but they said they cannot help me. There is no law that protects me. I am a single parent so I cannot afford to lose the job and just have to put up with it. I got so depressed the doctor put me on anti-depressants but that does not stop the other workers harassing me.”

**- The proposed anti-discrimination laws would NOT cover this person.**

**Max:** “I have Klinefelter's Syndrome, which means I have an extra X on my XY chromosomes, making me XXY. The doctors argue over whether I'm intersex or not. I was always very feminine, well not quite masculine like other boys. When I got to 15 I got breasts and I had to leave school because of the bullying. In the army it was the same so I left. I've never had any surgery to remove the breasts. I tried testosterone treatment once but it made me psychotic so I stopped after two weeks. My wife gets annoyed with people commenting about how feminine I look so I don't socialise much because other men have problems accepting me. They think I'm gay and I'm not. I had to leave the golf club because of rumours I was having a sex change. So I stay at home and work on the computer as a programmer. It would be good if there were laws that would protect me against other people saying degrading things about me.”

**- The proposed anti-discrimination laws would NOT cover this person.**

**Bob:** “I had cancer when I was nine and spent years in hospital. The treatment nearly killed me when I had chemotherapy three times over seven years. My parents had to spend all their money and in the end we went to America for the last lot. My father is very small and the treatment stunted my growth and I did not really develop very much. I’m very short and I’ve got a high squeaky voice. People assume I am a woman who changed over to be man but I’m not. I got chased and attacked once when I was in the city on a Saturday night. These bogans were yelling ‘trannie’ after me but I am not. Why does the law not protect me?”

- **The proposed anti-discrimination laws would NOT cover this person.**

**Jasinda:** “I have a very extreme form of Polycystic Ovary Syndrome. My doctor says it’s the weirdest one he has seen. He’s nice though. It means I get lots of testosterone, grow a full beard and have to shave, have a lot of acne, am very boyish physically, and have diabetes and my boyfriend says I’m grumpy. Most people like me put on lots of weight but I am just naturally skinny. I could have my ovaries taken out but later I want children.

I do get lots of hassle for being so boyish. I’m not intersex and I’m not a trans. I’m not even gay. So the laws that the Attorney General’s office are making need to include people like me and protect us from hassle. Why should you just protect intersex people and trans people? It’s not fair.”

- **The proposed FAD’s anti-discrimination laws would NOT cover this person.**

**Malcolm:** “I grew up as a girl but had hormones and surgery to be a guy. It’s good you know. It worked real well. I’m happy. No one knows about my past where I live. I drive a truck in the mines to make enough money to buy a house. My workmates don’t know. My boss is a real dickhead. He hates blacks, gays, women. You name it. If he knew what I was he would fire me and I know the law does not protect me at the moment. He fired an Aboriginal guy then got into trouble. I know if he finds out about me and comes after me I haven’t got a chance, so I live with my secret. You need to make laws to protect people like me. I had the sex changed on my birth certificate. I had my sex corrected. It was nothing to do with gender. My sex is unusual. I was not my fault. I’m legally a man now and I will never use anti-discrimination laws that talk about my gender. Sex anti-discrimination laws should include me. Thanks.”

- **The proposed anti-discrimination laws would NOT cover this person.**

**Tracie** (paper author): “I am intersex. I was brought up until 15 years old as a boy. I started to transition to female when I was 12 but the terrible legal complications in those days prevented me. So I am both intersex and transexed. I do not, however, have an official intersex diagnosis. I tried to bring a case in Adelaide a few years ago against a group of women who excluded me from a public gathering. They would not have done that unless they knew my history. It took years and was a waste of time. The laws did not protect me. Other intersex people were allowed into the venue but I was not because I was also trans. It is ridiculous. I need to be protected by anti-discrimination on the grounds of being sex diverse. I emigrated to Australia. My legal status in Australia has never been anything other than female. My gender has not changed or varied and is certainly not diverse. I would never use laws that only protect gender diverse people.”

- **The proposed anti-discrimination laws would NOT cover this person.**

**Sophie:** “I am just your ordinary type of transsexual, straight up and down. I had my surgery 30 years ago. I’m not a transgender. It is all very simple. I changed my sex and that was it. Stupid making laws for transgenders because that does not include me. Get it right. I changed my sex so I should be covered under sex discrimination. The sex on my birth certificate was changed not my gender. Birth certificates do not show gender.”

- **The proposed FAD’s anti-discrimination laws would NOT cover this person.**

**Norrie:** “I have no sex. Two doctors have certified I have no sex. This is a medical fact. I don’t have a concrete gender either. The Sex Files Report (AHRC, 2009) recommended that people such as me should be given space in society as ‘sex non specific’ and covered under federal anti-discrimination laws against harassment. At the moment I am fighting a legal case to get back the BDM NSW certificate indentifying me as ‘sex non specific’. The category was part of the recommendation in the Sex Files Report but the BDM NSW took it back in panic and are refusing to comply. I have read the draft of the anti-discrimination (Federal Attorney General’s Office, 2011) and it would not cover me. If it complied with the AHRC’s recommendations of referring to all groups as sex and/or gender diverse (SGD) people I would be covered but at the moment I’ve been missed out.”

- **The proposed anti-discrimination laws would not cover this person.**

The Federal Attorney General’s Discussion Paper (Federal Attorney General’s Office, 2011) currently excludes sex diverse people who exist, as has been demonstrated by the people reporting in this paper. An intersex diagnosis is a deeply controversial and imprecise process. It may take some people 50 years to get such a diagnosis, involving tens of thousands of dollars of medical services. Setting intersex or indeterminate sex as a separate category in the anti-discrimination law will create a prejudicial classist set of laws. Some people may not get an intersex diagnosis but are clearly sex diverse and still need to be included under such legislation. From the people reporting in this paper it is easy to see that some people are sex diverse, even though they do not have an intersex diagnosis, but they are not gender diverse or variant. To leave these people out of such anti-discrimination laws would be a tragedy.

### **Flaws in the Federal Attorney General’s Consultation Strategies**

Over the consultation period there seems to have been problems with the Federal Attorney General’s Office’s consultation processes. Staff come and go from the office and new employees who take on consultation processes do not understand the continuity needed in the process of community consultation.

After consultation with the AHRC and discussion of how individuals are registered on government documents the Federal Attorney General’s Office met with interested parties at a meeting in late 2010 at the AHRC office in a process of community consultation. They were furnished with the Sex Files Report (2009) and heard very clearly from the Sydney consultation (public meeting) that people wanted laws to reflect that some people are male or female and some are other, so laws must reflect that fact. It was clearly stated in the Sydney meeting that GLBTI was not acceptable to many sex and/or gender diverse people.

A survey was sent out from the Federal Attorney General's Office in 2011 to government departments to find out if people had complained about not being able to have documents that were other than male or female (Australian Federal Government , 2011). There was a major flaw in that survey. In research one must not ask confusing questions. The survey used the phrase 'sex/gender'. In survey language this is deeply confusing. Readers of the survey may interpret such questions as meaning one item interpreted as two words to represent the same thing. This was pointed out to the Federal Attorney General's Office but they refused to change the survey. Therefore that survey will have produced inaccurate results.

The deviation in the present discussion papers abandoned the phrase 'sex and/or gender diverse' which was arrived at by community consultation. This shows a lack of sensitivity and communication abilities by the Federal Attorney General's Office (Federal Attorney General's Department, 2011).

On 18 November the Federal Attorney General's Office held a meeting with what it called "stakeholders" in Sydney. Sex and Gender Education Australia (SAGE) the campaigning group has been a major stakeholder in the process of legal change in Australia but was not informed of or invited to the meeting. Neither were many other stakeholder bodies involved in campaigning for the rights of sex and/or gender diverse people.

When the Federal Attorney General's Office was challenged on this point, the author got the following reply:

"There has not been a specific meeting on sex and/or gender diverse issues held recently nor is there one planned. However, there was a stakeholder roundtable held in Sydney on 18 November relating to the project to consolidate federal anti-discrimination laws into a single Act. As part of this process, the Government will introduce protections against discrimination on the basis of sexual orientation and gender identity.

"There were some LGBTI stakeholders in attendance at the roundtable and these new protections were discussed briefly. However, there was limited capacity so not all of our stakeholders could be invited. In addition, as the roundtable was a single-day discussion of all matters relevant to the consolidated law, the new grounds of sexual orientation and gender identity were only discussed briefly." (Federal Attorney General's Office 4, 2011).

It is plain to see from this reply that the meeting was held in secret or the Federal Attorney General's Office department were quite negligent. Having organisations that represent mainly gay issues speaking for sex and/or gender diverse people is not appropriate. The Federal Attorney General's Office refused to disclose who the stakeholders were that attended the meeting.

If the Federal Attorney General's Office can spend millions of dollars fighting the public on legal issues, can it not spend \$100 or more on a bigger room for a meeting?

It is clear that the Federal Attorney General's Office is not engaging in proper community consultation. It is adopting a defensive communication process and excluding many stakeholders. This document shows its complete lack of consistency in its approaches indicating a lack of proper stakeholder consultation.

## **Flaws in the Australian Human Rights Commission's Approach**

In the Sex Files Report (2009) the AHRC used the phrase 'sex and/or gender diverse'. This worked very well and has come to be accepted by many to mean all sex and/or gender diverse groups.

In that document (AHRC, 2009) and others (AHRC, 2010) (AHRC, 2011) it started to use 'sex and/or gender identity'. Sex is simply a fact. It is not an identity. People who are sex diverse rarely wander around saying to themselves that they have an identity about the facts around their sex, just as ordinary men and women do not either. It may be difficult for heteronormative people to understand that being from a sex and/or gender diverse group is simply a fact and not a figment of their imagination, but that is a reality. To use 'sex and/or gender identity' as a legal marker implies it is simply a cognitive identity and is an insult and prejudicial.

People do not get discriminated against because they have an identity but get discriminated against because of what they are. Comparatively, disabled people in Australia do not get discriminated against for imagining they are disabled, they are actually disabled. A second comparative is with the 1985 Sex discrimination Act, in that women and men do not get discriminated against because they have a male or female identity, they get discriminated against because of their sex.

There was also the danger in those later documents of creating an élite kind of intersex person. Those who are determined to be intersex solely on their primary sex characteristics under the biomedical model. In reality secondary sex diverse characteristics also lead to someone being intersex or having an intersex variation. People with all sex polymorphism should simply be considered sex diverse, in anti-discrimination law, without the need for a hierarchical labelling system.

When considering sexuality or gender diversity the AHRC does not get into the labels war and neither should it when discussing sex diversity. Full intersex (indeterminate sex), quarter intersex or slightly intersex should not be the course taken when forming any anti-discrimination laws.

In 2011 'intersex' was added to the front of sex and/or gender diverse (SGD) to make Intersex, sex and/or gender diverse (ISGD) but it was rejected by some intersex communities so SGD has retained its common usage. The AHRC also rejected ISGD and has retained its 'sex and/or gender diverse' focus.

## **State and Federal Divide**

A major problem that exists in Australia for all anti-discrimination legislation exists around the state and federal divide. Where federal anti-discrimination law do operate, state government departments, which have cases brought against them, deny that the federal jurisdiction has any power over them because they are state bodies. In creating laws that will protect all sex and/or gender diverse Australian people there will be a need not only to create federal laws but also coordinate a change across each state's anti-discrimination legislation through the Council of Australian Governments (COAG) working committee.

## **Extended Areas of Anti-discrimination Protection**

It is necessary in forming these anti-discrimination laws that they apply in all places as per other anti-discrimination laws. For instance it is illegal for people to discriminate against people in religious contexts on the grounds of them being disabled or having certain skin colour. The scope of federal anti-discrimination laws to protect sex and/or gender diverse people must extend to all areas covered by other federal anti-discrimination legislation.

## **Families, Friends and Associates**

It is imperative the protection for families, friends and associates is included in this legislation. Many suffer violent, abusive and ostracising attacks upon them because they are related to a person from a sex and/or gender diverse group.

## **Legal Right to Redress**

In forming new legislation one needs to consider to whom that legislation will be applicable. There is little doubt from the literature that many sex/and or gender diverse groups of people are not only economically disadvantaged, because of discrimination, but also may be unable to negotiate a complex legal system. Many of this populous may be long-term unemployed or suffer from adjunct anxiety issues due to their position in society. They may also be educationally disadvantaged because of prejudice that has marginalised them in the education system.

For these reasons any legal process for redress of discrimination needs to provide a no penalties system for persons bringing such a case. If the complainant loses their case they should not be saddled with costs because that would discourage the very people that this law would be designed to protect from bringing any such cases in the first place. Legal redress that pertains only to the wealthy is not human rights but simply protection of well-heeled, gated communities.

## **Extended Liability**

Discrimination is not just the result of interpersonal prejudice but also the result of employers' negligence, whether that is in the private or public sectors. Corporations, private employers and government departments should all have a duty of care to ensure these groups are treated with the utmost respect and not discriminated against because of their sex and/or gender status.

This must include the responsibility that these bodies and any establishment must undertake staff training to implement anti-discrimination workplace policies. Failure to do so and to police the execution of those policies must in any remedy lead to culpability of those employers and/or public institutions where such discrimination took place.

## **The Universality of Anti-Discrimination Laws is the Solution**

When looking at how successful anti-discrimination laws are formed it is necessary to consider the principle of 'lowest common denominator'. For instance Australia's race discrimination laws do not discriminate between whether someone is of Aboriginal or Asian

derivation. The principle of protection is that anyone who is discriminated against because of their race can bring a complaint.

### **Anti-Discrimination Protection on the Grounds of Sex and/or Gender Diversity**

What is plain to see is that some people are **sex diverse**, some **gender diverse** and some both. Laws constructed to protect all '**sex and/ or gender**' (**SGD**) groups of people need to use the simple phrase '**sex and/or gender diverse**' people, which will avoid anyone being left out of anti-discrimination legislation and afford protection to all these groups. There are also progressive medical developments and emerging identities in the future in this field that cannot be presently named, so taking a universal approach would automatically protect those people instead of keep having to reinvent the wheel of anti-discrimination laws.

### **Conclusion**

It is clear that the Discussion Paper from the Federal Attorney General's Office has strayed from the AHRC's course of reason in not using the phrase 'sex and/or gender diverse' to cover all these vulnerable groups. This phrase was arrived at by a national consultation during the Sex Files Report's, 2008-2009 national information gathering forums. The First Australasian Sex and/or Gender Diverse Human Rights and Dignity Conference, 2011, also a national consultation forum, came to the same conclusion. The anti-discrimination amendments using 'indeterminate' and 'gender variant' phrases will create discrimination and leave many people out of protection, as shown by this paper.

This change of law has an opportunity to put Australia on the map as the most humane country in the world for sex and/or gender diverse people. The Australian Passport Office has put us ahead of the rest of the world by using 'sex and/or gender diverse (SGD)' and federal anti-discrimination laws need to do the same. We as Australians all deserve nothing less than a 'fair go for all'.

**All Australian people should be protected from discrimination on the grounds of any form of sex and/or gender diversity**

**Sex and/or gender diverse (SGD) is simply a meta-phrase**

**In the reading of any bill, it needs to be clear that sex and/or gender diverse people covers all the inevitabilities listed below to ensure as the law is enacted in the future that all these vulnerable groups are covered under anti-discrimination legislation.**

**Sex and/or gender diverse (SGD) people are made up from many differing groups including people who are intersex, transexed, transsexual, transgendered, androgynous, without sex and gender identity, cross-dressers and people with sex and gender culturally-specific differences. They are people who experience variations in physical presentation and social behaviour that is other than stereotypically male or female, masculine or feminine. Each group may have its own physical, psychological, social, legal and political issues that may not necessarily relate to any of the other groups.**

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