

29 October 2021

Law Reform Commission
GPO Box F317
PERTH WA 6841

To The Law Reform Commission of Western Australia,

RE: REVIEW OF THE EQUAL OPPORTUNITY ACT

Thank you for the opportunity to make a submission in relation to the Commission's review of the *Equal Opportunity Act 1984 (WA)* (the 'Act'). My submission relates wholly to the questions surrounding gender history, gender identity, and intersex status as grounds of discrimination. I write on the basis of my experience as a legal academic who researches and teaches about LGBTQI+ peoples and the law.

In summary, my submission supports the following proposals:

- Expanding protections in the Act to include transgender people who have not received a recognition certificate;
- Using the concept of 'another sex' rather than 'opposite sex' when referring to transgender people; and
- Including intersex status as a protected ground separately from the ground which protects transgender people.

My submission does not support the introduction of any 'balancing' provisions which weigh against the protection of transgender or intersex peoples.

1 Transgender people

1.1 Inconsistency in the current Act

In its current form, the Act is somewhat inconsistent in the way that it protects transgender people. The Act only provides protections for 'gender reassigned'¹ persons – ie, those who have been granted a recognition certificate under the *Gender Reassignment Act 2000 (WA)* (the 'GRA'). The protected ground of discrimination for 'gender reassigned' persons is their 'gender history'.²

The inconsistency arises when the definition of 'gender history' in s 35AA is considered. That section includes that a person has a 'gender history' if they are 'seeking to live' as a member of the opposite sex.³ In order to be issued a recognition certificate, the GRA requires that a person must have 'adopted the lifestyle of' the gender which they are seeking recognition of.⁴ That is, a person must actually *already* be living as the gender they are seeking recognition of – a higher threshold than the 'seeking to live' standard in the definition of 'gender history'.

¹ I acknowledge that this term is outdated and is regarded as offensive by many transgender people. I am using this terminology only because it is the terminology used in the Act, not because I endorse its use.

² *Equal Opportunity Act 1984 (WA)* s 35AB.

³ *Ibid* s 35AA.

⁴ *Gender Reassignment Act 2000 (WA)* s 15.

The effect of this is that the words 'seeking to live' in the Act are to no effect. The Act does not actually provide any protection for people who are 'seeking to live' as a gender other than their sex assigned at birth, as the only people who are protected on the ground of gender history are people who *have* a recognition certificate so by definition are *already* living as their affirmed gender.

1.2 Including transgender people who have not received a recognition certificate

It is appropriate for the Act to protect transgender people on the ground of their transgender identity (and their gender identity more broadly) whether or not they have received a recognition certificate.

As recognised by the Commission's 2018 *Review of Western Australian Legislation in Relation to the Registration or Change of a Person's Sex and/or Gender and Status Relating to Sex Characteristics*, the process for obtaining a recognition certificate is described by those who have participated in it as 'difficult', 'humiliating', 'expensive', 'onerous', and 'confusing'.⁵

It is not appropriate for the Act to protect only those transgender people who have the means, ability, and will to persist with that process to obtain a recognition certificate. A transgender person is no less transgender simply because they do not have a recognition certificate. It is not appropriate to exclude from protection those transgender people who do not have a recognition certificate.

Similarly, and using the same reasoning, it is not appropriate to exclude from protection those transgender people who do not have the means, ability, or will to obtain medical or surgical treatment to affirm their gender.⁶ Again, a transgender person is no less transgender simply because they have not sought affirmation treatments. This is especially so because not all transgender people wish for medical or surgical treatment to affirm their gender.⁷

The Act currently only protects transgender people who have received a recognition certificate, and medical or surgical treatment which alters a person's characteristics is a prerequisite of obtaining such a certificate.⁸ As such, the Act does not presently protect those people who are transgender but have not been able to, or do not wish to, access affirmation treatments.

1.3 'Another sex' vs 'opposite sex'

The term 'opposite sex' should be replaced with 'another sex' insofar as it is necessary to include references to such a term. The term 'opposite sex' is unduly restrictive and does not recognise the medical, social, and psychological realities that there is a diversity of sex and gender beyond the two binary sexes.⁹ The phrase 'opposite sex' implies that there are only two sexes, and that those sexes are 'opposite' to one another. The existence of intersex people and the existence of non-binary gender identities sit counter to that understanding of sex and gender. For this reason, the term 'another sex' or 'another gender' is preferable.

⁵ Law Reform Commission of Western Australia, *Review of Western Australian Legislation in Relation to the Registration or Change of a Person's Sex and/or Gender and Status Relating to Sex Characteristics* (2018) 38.

⁶ For an analysis of the various factors which contribute to the difficulties transgender people face in accessing affirmation treatments, see generally Jae A Puckett et al, 'Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals' (2018) 15(1) *Sexuality Research and Social Policy* 48.

⁷ Ibid 49.

⁸ *Gender Reassignment Act 2000* (WA) ss 3, 15.

⁹ Goran Strkalj, 'Beyond the Sex Binary: Toward the Inclusive Anatomical Sciences Education' (2020) 14(4) *Anatomical Sciences* 513; Janet Hyde et al, 'The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary' (2019) 74(2) *American Psychologist* 171; Sarah Hunt, 'Embodying Self-Determination: Beyond the Gender Binary' in *Determinants of Indigenous Peoples' Health, Second Edition: Beyond the Social* (2nd ed, 2018); Emmie Matsuho and Stephanie L Budge, 'Non-binary/Genderqueer Identities: a Critical Review of the Literature' (2017) 9(1) *Current Sexual Health Reports* 116; Ada S Chung et al, 'Non-Binary and Binary Gender Identity in Australian Trans and Gender Diverse Individuals' (2020) 49(1) *Archives of Sexual Behaviour* 2673.

2 Intersex people

Many intersex people experience discrimination on the basis of their intersex status.¹⁰ It is appropriate for the Act to protect intersex people against discrimination as the equivalent legislation in many other Australian jurisdictions does.

In my view, it is not appropriate for the Act to protect intersex people and transgender people together using the same provisions. Being intersex is not the same as being transgender – they are different identities and demand separate consideration by the law. Though there is much that unites people belonging to the various identities under the LGBTQI+ umbrella, it must also be recognised that there is rich diversity within the LGBTQI+ community. It is not appropriate for anti-discrimination legislation to 'lump together' these identities and deal with them together without regard for the differing experiences of people belonging to those various identities.

Whilst the Act should expressly protect intersex people from discrimination, it should do so separately from those provisions which protect transgender people.

3 'Balancing' provisions

It is not appropriate to introduce any of the so-called 'balancing' provisions which were called for by some of the preliminary submissions.

To the extent that concerns exist about privacy and safety,¹¹ these interests are already protected by other areas of law – especially the criminal law and (to a lesser extent) tort law. There is no need to protect those particular interests any further in this context in anti-discrimination legislation.

To the extent that concerns exist about challenging the traditional conceptions of birth sex status, these concerns are misplaced. As set out above, diversity of sex and of gender is a medical, social, and psychological reality.¹² Concerns such as these should not act as a barrier to protecting transgender or intersex people, and should not provide any basis for so-called 'balancing' provisions.

Thank you for considering my submissions. I would be happy to further discuss any of these matters.



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¹⁰ See, eg, Julie A Greenberg, 'Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination Symposium: LGBT Identity and the Law' (2011) 45(1) *Loyola of Los Angeles Law Review* 849; Chinyere Ezie, 'Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination' (2011) 20(1) *Columbia Journal of Gender and Law* 141.

¹¹ Concerns which are not borne out by reality – transgender people are much more likely to be victims of violence – see generally Caroline White and Joshua Goldberg, 'Expanding Our Understanding of Gendered Violence: Violence Against Trans People and Their Loved Ones' (2006) 25(1)–(2) *Canadian Woman Studies* 124; Jill C Hoxmeier and Melody Madlem, 'Discrimination and Interpersonal Violence: Reported Experiences of Trans* Undergraduate Students' (2018) 5(1) *Violence and Gender* 12.

¹² Goran Strkalj, 'Beyond the Sex Binary: Toward the Inclusive Anatomical Sciences Education' (2020) 14(4) *Anatomical Sciences* 513; Janet Hyde et al, 'The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary' (2019) 74(2) *American Psychologist* 171; Sarah Hunt, 'Embodying Self-Determination: Beyond the Gender Binary' in *Determinants of Indigenous Peoples' Health, Second Edition: Beyond the Social* (2nd ed, 2018); Emmie Matsuho and Stephanie L Budge, 'Non-binary/Genderqueer Identities: a Critical Review of the Literature' (2017) 9(1) *Current Sexual Health Reports* 116; Ada S Chung et al, 'Non-Binary and Binary Gender Identity in Australian Trans and Gender Diverse Individuals' (2020) 49(1) *Archives of Sexual Behaviour* 2673.