



Australian
Human Rights
Commission

Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights

NATIONAL CONSULTATION REPORT · 2015



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SOGII Rights

Sexual Orientation, Gender Identity & Intersex Rights

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Message from the Commissioner



Tim Wilson
Human Rights Commissioner
Australian Human Rights
Commission

The role of the Human Rights Commissioner is to raise systemic public policy issues that impact on human rights, and seek reform.

The Commission has in its legislation commissioners responsible for age, disability, race and sex discrimination. There are also commissioners responsible for children's rights and Aboriginal and Torres Strait Islander social justice. These portfolios are often represented through dedicated Ministers in state and federal governments, as well as significant government agencies.

There is no dedicated commissioner for sexual orientation, gender identity and intersex (SOGII) issues in the Commission's legislation, nor Commonwealth Ministers or government agencies that take primary responsibility for advancing issues that arise for lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians.

As a consequence, SOGII issues too often fall through the cracks of policy. This is particularly concerning because of the level and type of State-sanctioned discrimination experienced by LGBTI Australians. To address this, I have also taken on the role as the de facto SOGII Commissioner at the Commission to ensure that LGBTI people have a voice.

The Commission has previously undertaken significant work on SOGII issues, sporadically and as capacity allows. This includes landmark work that led to the removal of discrimination against LGBTI people across approximately 100 federal laws. Taking on this role, on an ongoing basis ensures that these issues are at the heart of the Commission's work at all times.

It is a privilege to serve in this important role. Many of the issues that impact on LGBTI people go to the heart of liberal individual human rights, including the dignity of the individual, personal freedom and bodily autonomy.

In 2014, two consultations were held in parallel to inform my work in human rights and SOGII issues. The outcome of the consultations on the general level of protection of rights and freedoms in Australia is set out in a separate report – *Rights & Responsibilities – Consultation Report 2015*.

This report concludes the SOGII consultations and is designed to give a voice to the lived experiences of LGBTI Australians. Their stories deserve greater prominence. The report details unjust discrimination and significant human rights challenges that must be addressed. It is only by giving these stories and challenges a national platform that they can be visible and addressed.

I would like to thank everyone who participated in this national consultation. Thank you to the staff at the Commission, notably Siri May, Louise Bygrave, Simone Guirguis, Lucian Tan and Alex Borowsky. I also thank the organisations that hosted public events and strategic meetings, which enabled me to meet more than 250 people who shared their personal experiences and professional perspectives on human rights.

Everyone's contributions – written and verbal – have been considered in this report.

A handwritten signature in black ink that reads "Tim Wilson". The signature is fluid and cursive, with the first name "Tim" and last name "Wilson" clearly legible.

Tim Wilson
Human Rights Commissioner
Australian Human Rights Commission

A road map for inclusion

Despite progress being made in recent years, LGBTI people continue to face a range of significant challenges in Australia including:

- Poor community understanding and visibility of the distinct issues that affect people on the basis of SOGII status, particularly in relation to gender identity and intersex status.
- State-sanctioned structural discrimination on the basis of SOGII status, which has flow on impacts in legitimising institutional and interpersonal discrimination.
- A lack of cultural competency and understanding of the distinct needs of LGBTI people in the provision of public services, including education, health and aged care.
- The intersection of the human rights of LGBTI people with the rights of others, notably in relation to religious freedom.
- Attitudes from people from different cultural backgrounds that have a negative attitude toward SOGII issues and their rights, especially children during the developmental stage of their life when they need support.
- Unacceptably high rates of marginalisation, bullying, harassment and violence.

The legacy of State-sanctioned discrimination is significant in its legitimisation of institutional and interpersonal discrimination across society. Governments have had a leading role in creating this culture, and so must also take a lead role in undoing it.

Some of the issues that remain to be addressed can be done so readily and easily. There are also more complicated and broader challenges around systemic and social discrimination against LGBTI people that must also be addressed.

Despite the concerning issues raised in the consultation, it should not be forgotten that there is significant room for optimism. As the Case Studies in this report demonstrate, the LGBTI community is incredibly resilient. Individuals are bringing about the change they want in the world through many successful and exciting initiatives to promote awareness and inclusion of SOGII issues, and often without any government support.

Through the consultation process, the Commission heard evidence of the impact of unjust discrimination in the delivery of government services, notably health and education, as well as public participation in employment and sport. The experience of unjust discrimination remains a key barrier in advancing a culture of respect for LGBTI people. Removing unjust discrimination is vital to ensuring the LGBTI people feel confident to realise their full potential and maximise their contribution to Australian society.

The consultation raised significant issues regarding relationship recognition, families and protecting the best interests of children. It also identified specific, distinct barriers faced by trans and gender diverse people, intersex people, and Aboriginal and Torres Strait Islanders who are LGBTI.

To address the issues raised requires a variety of responses federally and at the state and territory level. This includes law reform, changes to policy and practice, the prioritisation of research and SOGII diversity training in professional settings.

To ensure all Australians are treated equally and fairly by the law and government, the following **law reform** should occur promptly at a **Commonwealth level**:

1. Amendment of the *Marriage Act 1961* (Cth) to equally recognise the partnership of two adult persons regardless of the gender of the partners.
2. Alternative options be identified to the requirement of a Family Court Order for access to hormone treatment for children under the age of 18 (while continuing to ensure there are adequate safeguards that take into account the opinion of relevant and appropriate medical practitioners and the views of the young person seeking treatment).

To ensure all Australians are treated equally and fairly by the law and government, the following **law reform** should occur promptly at a **state and territory level**:

1. All states and territories should review the coverage of SOGII issues in anti-discrimination laws and amend these laws as appropriate so that they are inclusive of different SOGII issues.
2. In the interests of preserving resilient families and marriages, all states and territories should remove the requirement that married couples get divorced in order for one partner that is transitioning their gender to have it acknowledged on official documentation.

3. Provide a final 12-month extension for states to bring their laws into conformity with the *Sex Discrimination Act 1984* (Cth), coupled with a clear statement that after July 2016 no further extension will be provided.
4. In line with the High Court case of *AH & AB v the State of Western Australia*, all states and territories legislate to require that a self-identified legal declaration, such as a statutory declaration, is sufficient proof to change a person's gender for the purposes of government records and proof of identity documentation.
5. The Australian Capital Territory, Northern Territory, Queensland, Tasmania, and Western Australia legislate to expunge criminal records of historic consensual homosexual sex offences. That Western Australia and the Northern Territory commit to schemes that expunge the criminal records of historic consensual homosexual sex offenses. That the Australian Capital Territory, Queensland and Tasmania implement intended schemes to expunge these criminal records. That South Australia develop an implementation process following the introduction of legislation to expunge these records.
6. Queensland and South Australia legislate to abolish the homosexual advance defence.
7. Victoria complete the repeal of section 19A of the *Crimes Act 1958* (Vic) that creates a dedicated criminal provision for HIV.
8. In the interests of promoting public health and ensuring testing for sexually transmitted infections, blood borne viruses and HIV, Queensland amend the age of consent to ensure the equal treatment of teenage gay males.
9. Relevant state and territory laws be amended to ensure that parents can be recognised on birth certificates (regardless of their SOGII status) and in adoption processes.
10. Northern Territory, Queensland, South Australia and Victoria amend laws to allow couples to adopt children based on their capacity, not their SOGII status.
11. South Australia amend laws to ensure access to Assisted Human Reproduction Services is not restricted on the basis of SOGII or marital status.

Further, any consideration of the nation-wide ban on commercial surrogacy should be pursued without discrimination against people on the basis of their SOGII status, and should be guided in seeking to protect the best interests of the child and the surrogate.

Addressing the issues raised in these consultations also requires the cooperation of **Commonwealth, state and territory governments** to address cross-government **law and practice**. As a consequence, the following should occur promptly:

1. All states and territories to develop and implement policies on the placement of trans and gender diverse prisoners in correctional services and for access to hormone therapy to be based on medically-identified need, not discretion.
2. Through the Council of Australian Governments (COAG), all states and territories to review the nation-wide ban on commercial surrogacy with any policy outcome focused on protecting the best interests of the child and surrogate, with no discrimination on the basis of SOGII status.
3. The establishment of a trans-specific policy stream across the health system to ensure that trans people do not face bureaucratic barriers to accessing healthcare, including:
 - the potential for rebates for necessary pharmaceutical and surgical treatments consistent with rebates enjoyed by all other Australians.
 - standardised treatment access and commencement policy for hormone therapy and gender affirmation procedures across state and territories.
4. Implement the recommendations of the Australian Senate Community Affairs Committee's 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*, as well as consult with LGBTI people in responding to the Family Law Council's 2013 *Report on Parentage and the Family Law Act*.
5. The inclusion within family and domestic violence strategies of measures to address violence in same-sex relationships, and toward trans and gender diverse people.
6. A review at the end of 2016 of complaints about SOGII issues lodged under the School Chaplaincy Program to establish whether concerns about allegations of harmful practice are based in evidence.

The Australian Human Rights Commission has a key role working with other bodies to foster and implement change:

1. Reducing rates of violence against LGBTI people is vital. The Australian Human Rights Commission will undertake a scoping project to explore available and potential data documenting rates of violence against LGBTI people to inform future work in this area.
2. The Human Rights Commissioner will establish a **religious freedom roundtable** to bring together representatives of different faiths to identify how to recognise religious freedom within law, policy and practice in Australia. This will include, but not exclusively focus on, SOGII issues. The Commissioner will maintain an ongoing dialogue with LGBTI representatives to identify how to appropriately balance religious freedom and the rights of LGBTI people to be treated equally under law and by government. When considering LGBTI issues, the roundtable will be guided by principles, including:
 - The extensive and **significant common ground** between religious communities and LGBTI people on the use of law of any accommodating competing rights.
 - The equal treatment by the law and government of LGBTI people and religious freedom and that each of these considerations are equally important.
 - The need to protect the rights of **all** people at vulnerable stages of their life.

The roundtable will consider the scope of exemptions to the *Sex Discrimination Act 1984 (Cth)* for service providers to LGBTI people, particularly those who are delivering services funded by government such as in relation to healthcare, education and crisis intervention.

SOGII diversity training should also be developed and incorporated into:

1. Medical, health science and allied health courses (through the university and vocational training sectors), as well as being included in the professional development of current medical practitioners via the Australian Medical Council and other health worker professional bodies.
2. Teacher and welfare courses (through the university and vocational training sectors), as well as being included in the professional development of current practitioners via the Australian Teachers Federation and other professional bodies.

3. The National School Curriculum, including information about sexual health for LGBTI people.
4. Resources that build awareness of the specific therapeutic and medicinal needs of transgender and gender diverse people, targeted to those being trained and existing practitioners.
5. Professional and community sporting codes, particularly for the inclusion of trans and intersex people.

To advance this training, the Australian Human Rights Commission will:

1. Work with universities, vocational education providers and professional bodies (such as medical bodies and teaching associations) to undertake an audit of the inclusion of SOGII issues in the health and education fields. This audit will identify existing resources, where gaps remain, and how best to develop necessary resources to improve coverage of SOGII issues.
2. Review the evidence-base on the experiences of trans, gender diverse and intersex people in sport, and engage in policy processes to promote better inclusion practices.

The following issues should also be prioritised for **research** by other bodies so we can better understand their full impact on the rights of LGBTI people:

1. The nature, cause and effects of unconscious bias and direct discrimination against LGBTI people within the Australian healthcare system.
2. The experiences of discrimination by intersex people in Australia.
3. The specialist clinical service provision needs of trans and gender diverse people and how they could be better provided for by Medicare.

Given the lack of visibility of issues facing **intersex people** and **Aboriginal and Torres Strait Islander peoples** who are LGBTI, support should be provided for mechanisms to ensure their representation in public policy in Australia.

A note on terminology

The Australian Human Rights Commission recognises that respect for individuality impacts on a person's self-worth and inherent dignity. The use of inclusive terminology respects individuality and enables visibility of important issues.

The Commission supports the right of people to identify their sexual orientation, gender identity or intersex status as they choose. The Commission also recognises that terminology is strongly contested, particularly terminology to describe gender identity. Previous consultation work conducted by the Commission revealed there is no clear consensus on what is appropriate terminology in this area.¹

Some of the terminology used in our work is explained below:

Gender: The term 'gender' refers to the way in which a person identifies or expresses their masculine or feminine characteristics. A person's gender identity or gender expression is not always exclusively male or female and may or may not correspond to their sex.

Gender expression: The term 'gender expression' refers to the way in which a person externally expresses their gender or how they are perceived by others.

Gender identity: The term 'gender identity' refers to a person's deeply held internal and individual sense of gender.

Intersex: The term 'intersex' refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'. Intersex people have a diversity of bodies and identities.

LGBTI: An acronym which is used to describe lesbian, gay, bisexual, trans and intersex people collectively. Many sub-groups form part of the broader LGBTI movement.

Sex: The term 'sex' refers to a person's biological characteristics. A person's sex is usually described as being male or female. Some people may not be exclusively male or female (the term 'intersex' is explained above). Some people identify as neither male nor female.

Sexual orientation: The term 'sexual orientation' refers to a person's emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.

SOGII: An acronym which is used to describe sexual orientation, gender identity, and intersex status collectively for the purposes of law and policy, most often in human rights and anti-discrimination law.

SOGII rights: Ensuring the equal application of human rights to everyone regardless of an individual's sexual orientation, gender identity and intersex status.

Trans: The term 'trans' is a general term for a person whose gender identity is different to their sex at birth. A trans person may take steps to live permanently in their nominated sex with or without medical treatment.

Other notes:

Throughout different cultural contexts transgender identities have specific terms. For example in some Aboriginal and Torres Strait Islander communities some *Sistergirls* and *Brotherboys* are also trans people.

At times our work refers to LGBTI to describe people affected by discrimination on the basis of sexual orientation, gender identity or intersex status. At other times our work refers to SOGII to describe relevant areas of law and policy.

The Commission acknowledges that some community members have expressed concern about the appropriateness of some of the terms outlined above, including LGBTI as an umbrella term and the term 'gender identity'.

Our work uses the phrase 'gender identity' in the context of both international treaties and domestic law. While international human rights discourse often uses the phrase gender identity, many state and territory laws use a variation of this phrase. For consistency the Commission uses the phrase 'gender identity' when referring to either international treaties or state and territory laws.²

Introduction

‘SOGII rights’ are ultimately about ensuring the equal application of human rights to everyone, irrespective of their sexual orientation, gender identity or intersex status.

This is provided for in international treaties to which Australia is a party. Specifically, the obligation to ensure equality before the law has been interpreted as applying equally to people on the basis of their sexual orientation, gender identity or intersex status.³ Appendix A provides an overview of the key international treaties and how SOGII rights apply to them.

The status of SOGII rights in Australia has improved significantly over the past two decades. Despite this, LGBTI people still face unacceptable and significant discrimination and barriers to their fair and equal treatment.

National Human Rights Institutions (NHRIs) such as the Commission can act as a link between civil society and the government to advance human rights. They can also assist businesses and the private sector to implement human rights-based approaches to improve practice and outcomes. Importantly NHRIs are a point of access for citizens to understand their rights and corresponding responsibilities.⁴ In Australia, state and territory-based equal opportunity, anti-discrimination and human rights institutions also contribute to this dialogue.

As Australia’s NHRI, the Australian Human Rights Commission has been working with LGBTI civil society on SOGII rights for over a decade.⁵ The National SOGII Consultation and this report constitute the fifth major national project on SOGII rights conducted by the Commission in this time.

The National Consultation was designed to offer communities and stakeholders an opportunity to voice their opinions about the status of SOGII rights in Australia. The outcomes of the National Consultation are intended to assist in setting the Commission’s priorities on SOGII issues for at least the next four years.

The National Consultation confirmed that as a group, people of diverse SOGII status still experience an unacceptable level of discrimination through law, policy, practice and social attitudes in Australia. The National Consultation also identified inspiring examples of the way that everyday Australians combat discrimination and promote respect and inclusion among communities, businesses, sporting organisations and institutions.

Although simple in principle, achieving equal respect in law and practice can be complicated in application. Just as the rest of the population are not a homogenous group, LGBTI people are a diverse group of different cultures, races, classes, abilities, geographical locations and ages.

Ensuring the full respect for human rights presents distinct challenges for different groups of SOGII people.⁶ A challenge of working within umbrella terms such as SOGII or LGBTI is seeking a balance between maintaining a separate focus on individual needs, while also recognising that there are shared and common experiences amongst individuals.

Participants in the National Consultation identified a range of rights and responsibilities requiring protection and promotion. They did not all agree on how such issues should be prioritised. Further, they did not agree on how this should be achieved.

Full realisation of the enjoyment of human rights, regardless of SOGII status, necessitates an expansion beyond the traditional dialogue between governments and advocates. It will require engagement from all sectors in Australia. The success of these efforts will require a willingness from each sector to acknowledge the challenges that exist within their field and work on constructive reform.


The Commission's previous work on SOGI issues

The Commission has conducted significant work on SOGI issues over its history. In the 1990s this included important work that led to the de-criminalisation of homosexual sex (following the *Toonen* decision of the UN Human Rights Committee) and the development of a toolkit for service providers, focused on rural areas, in delivering services to LGBTI people ('Not Round Here: Affirming Diversity, Challenging Homophobia').

Over the past decade, the Commission has conducted four major projects as follows:

- **Same-Sex: Same Entitlements** – a year-long national inquiry conducted in 2007 into discrimination against people in same-sex relationships in federal law. The Commission recommended that the Australian Government amend laws which discriminate against same-sex couples and their children in the area of financial and work-related entitlements and benefits. At the end of 2008, the government amended 84 laws which discriminated against same-sex couples in a wide range of areas including taxation, social security, employment, Medicare, veteran's affairs, superannuation, worker's compensation and family law.
- **Sex Files report** – based on consultations in 2008 with trans, gender diverse and intersex people, the report identified challenges with the existing system for recognising sex identity. Changes to sex identifiers in documents and government records was identified as a key issue. In July 2013, the government released the Australian Government Guidelines on the Recognition of Sex and Gender in response to the report. Other key issues remain unresolved, including access to health services and treatment, the practice of non-therapeutic infant genital surgeries, ensuring greater public awareness on gender identity and intersex issues and appropriate protection from discrimination.
- **Consultations on protection from discrimination on the basis of sexual orientation and sex and/or gender identity** – in 2010 the Commission canvassed the experiences of people who may have been discriminated against on the basis of their sexual orientation and sex and/or gender identity. The subsequent report *Addressing sexual orientation and sex and/or gender identity discrimination* aimed to strengthen human rights safeguards for all Australians.
- Informed by this report, the Australian Government introduced the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)* (SDA Amendment Act) in August 2013. The SDA Amendment Act inserted these new grounds into the *Sex Discrimination Act 1984 (Cth)* (SDA). LGBTI people are now able make complaints to the Australian Human Rights Commission if they believe they have been discriminated against on the basis of their SOGI.
- **Position paper on marriage equality** – in September 2012 the Commission released a public position paper on marriage for same-sex couples. This paper considered how the human rights principle of equality before the law underpins legislative recognition of marriage for same-sex couples. The Commission outlined that the *Marriage Act 1961 (Cth)* discriminates against same-sex couples by explicitly excluding them from the opportunity to have their relationship formally recognised under federal law.

All materials are available online at the Commission's LGBTI portal: <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/lesbian-gay-bisexual-trans-and-intersex>.



CHAPTER
03

Methodology

The aim of this project was to consult with key stakeholders to identify key issues that can inform the Commission's future work on SOGII issues. The findings and recommendations of this report are based on a thorough examination of the available literature and the information received.

The methodology employed in the National Consultation was based on the following principles:

1. **Comprehensive:** Stakeholders were provided with several access points to participate in the consultation.
2. **Consultative:** The project aimed to consult as widely as possible with LGBTI people and allies to hear their views, experiences and suggestions for change. The consultation actively sought out those most vulnerable to the impact of unjust discrimination and those located outside capital cities.
3. **Inclusive:** Participants of diverse SOGII status were encouraged to participate in the consultation. This was achieved through the national stakeholder engagement process.
4. **Confidential:** All survey responses and personal case studies were de-identified. All quantitative data contains aggregated responses only.
5. **Evidence-based:** Published research and qualitative and quantitative data from the consultation informed the conclusions of the report.

Consultations took place between August 2014 and February 2015. The Commissioner travelled nationally to consult with key stakeholders. The consultation was informed by a desktop literature review covering the areas of law, policy, social research, community development and public health.

The consultation sought views from interested LGBTI people and allied individuals, groups, service providers and organisations on three key areas:

- How well SOGII rights are respected and protected in Australia.
- Examples of legislation, as well as policies and practices that unduly restrict SOGII rights.
- What is being done, and what more should be done, to promote a culture of respect for SOGII rights.

A key focus of the consultation was the role of civil society in building and encouraging a respect for SOGII rights within the Australian community.

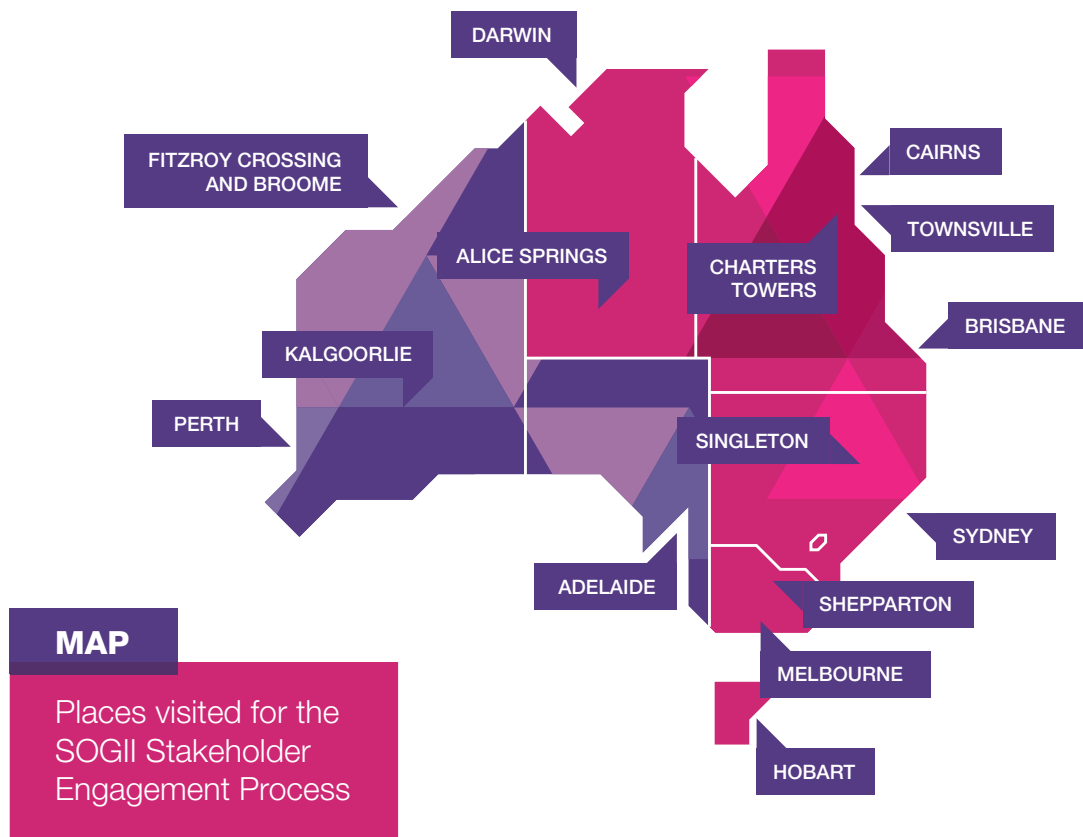
3.1 National stakeholder engagement process

Face-to-face meetings were held with LGBTI groups, organisations and individuals across the country. This was done in conjunction with broader consultations on rights and responsibilities for the general community.

The Human Rights Commissioner held more than 37 meetings with over 78 organisations to inform the consultation. These meetings were held in locations across the country including Broome, Kalgoorlie, Adelaide, Alice Springs, Darwin, Townsville, Brisbane, Alice Springs, Hobart, Sydney and Melbourne.

Altogether, the Commissioner met with more than 250 people specifically on SOGII issues at public events and strategic meetings.

A map highlighting a selection of the places visited is shown below, while the list of individuals and organisations that met with the Human Rights Commissioner is set out in chronological order in Appendix B.



3.2 Online consultation tools

A discussion paper was released on 10 December 2014 to guide the consultations.⁷ It was made available on the Commission’s SOGI webpage and copies of the paper were distributed to targeted networks and stakeholder groups established during the stakeholder engagement process.

Written submissions on the issues raised in the discussion paper were accepted from 10 December 2014 through to 6 February 2015.

This was supplemented by an online survey,⁸ available for completion from 10 December – 24 December 2014.⁹

The Commissioner received 47 written submissions and 1518 people completed the online survey. Submissions provided to the consultation are listed at Appendix C. Participants and responses to the online surveys were anonymous.¹⁰

Data collected from meetings, survey responses and submissions was cross referenced to ensure the information was valid and reliable. Many of these issues were consistent across the country, unless they related specifically to a unique state or territory.

Describe your ideal inclusive Australia

Participants in the Commission's survey were asked to describe what an inclusive Australia would look like to them. The following are a selection of quotes from survey respondents.

Equality at all levels, no special rules for minorities but neither should there be any persecutions for people's preferences whatever they may be.

A place where it is simply unremarkable to be LGBTI.

If they [people] obey the laws of this country, then the law should protect everyone equally and apply to everyone equally ... Simple – the same law for everyone.

One where sexuality, gender identity and intersex status are not seen as significant; that is, where it is a non-issue, and people are given the universal and inalienable rights of freedom of expression, speech and association and identity.

An Australia that celebrates difference for all the richness it provides. LGBTI individuals would be able to fully express who they are ...

There would be equality before the law (for instance, with the right to marry) and people should be able to express their love for their partners in public without anyone batting an eyelid (as is currently the case for heterosexual couples).

A country where I can walk down the street and hold the hand of the woman I love without prejudice. A country where the word gay is not used to describe something negative ... where I choose I can marry whoever I want be they male or female and feel accepted and nurtured by society....That's the country I want to live in.

People wouldn't feel pressured to hide their sexuality, gender identity [or] intersex status. Couples could just hold hands in public and trans people could use the bathroom and feel safe. And the man I love could say he loves me and not feel ashamed.

A place where I don't have to be afraid to leave the house ... It would be great if there was a place on forms for a third gender option that is not transsexual/intersex as neither apply to me and a place on forms for preferred names and preferred pronouns.

People's gender identity is respected and understood – correct pronouns used, no barriers to employment, services etc ... Intersex children are not surgically forced into a male or female gender.

It would be great if I didn't have to have surgery and/or hormones to change my gender and where being not male or female is okay. It would be great if government and community workers had education about trans and gender-diverse people.

I would be able to go outside, participate in sport and have employment.

Two men can hold hands down the street without people gawking or without people even thinking it is a political statement or without people thinking it is inappropriate.

CHAPTER 04

SOGII issues and religious freedom

Accommodating religious freedom and equality before the law for SOGII people was a consistent theme throughout this consultation. Despite perceptions, there is considerable common ground between how these rights should be accommodated in law from both the LGBTI and religious communities.

The *SOGII Rights Consultation* was conducted in parallel to the *Rights & Responsibilities 2014* consultation.¹¹ The latter consultation specifically considered the enjoyment of liberal human rights, including freedom of speech, association, religious freedom and property rights.

Issues relating to religious freedom were consistently raised in both sets of consultations. In particular the consultations raised concerns about the accommodation between protecting religious freedom and advancing SOGII rights. For example, one submission notes:

Although the right to freedom of religion is of vital importance... it is not an absolute right, should be limited in certain circumstances and must be balanced with the right to equality before the law.¹²

Throughout the *Rights & Responsibilities 2014* consultation it became clear that religious organisations were particularly concerned about the impact on religious freedom from a number of issues. Specifically related to issues raised in this report they identified the application of existing anti-discrimination laws and the possible consequences should same-sex couples be able to legally marry.

- In the context of anti-discrimination law, the primary focus was the ability of religious communities and service providers to choose staff for employment that willingly act consistent with the organisation's religious beliefs.
- In the context of marriage, the main concerns were that individuals would be forced to act against their conscience. Many of these concerns were raised directly as a consequence of developments overseas, notably in the United States.

Throughout both sets of consultations, views were sought about whether, and how, these issues should be addressed. Views were mixed across all audiences.

Table A sets out key concerns raised during the consultations regarding the potential diversity of opinion between how the right to freedom of religion and equality before the law for SOGII should be addressed.

Following the *Rights & Responsibilities 2014* consultation, the Human Rights Commissioner announced the formation of a religious freedom roundtable. The Religious freedom roundtable will explore the full-breadth of issues that emerge from religious freedom and its interaction with public policy in 21st Century Australia. This will include, but not exclusively focus on, SOGII issues.

The roundtable will seek to work with all stakeholders to advance both human rights principles through constructive and respectful dialogue. While the focus of the religious freedom roundtable will be on the views and attitudes of religious communities, there will also be opportunities to include the perspective of LGBTI people on issues that relate to them.

The Commissioner will maintain an ongoing dialogue with LGBTI representatives to identify how to appropriately balance religious freedom and the rights of LGBTI people to be treated equally under law and by government. When the roundtable considers LGBTI issues the roundtable will be guided by principles, including:

- Recognising the significant common ground between religious communities and LGBTI people on the use of law of any accommodating competing rights.
- The equal importance and equal treatment by the law and government for LGBTI people and religious freedom.
- The need to protect the rights of all people, especially at vulnerable stages of their life.

This will consider the scope of exemptions to the *Sex Discrimination Act 1984* (Cth) or SDA for service providers to LGBTI people, particularly those who are delivering services funded by government such as in relation to health care, education and crisis intervention.

This report identifies the significant issues involved but does not make recommendations to specifically address them. Those recommendations will result from consideration of the issues through the religious freedom roundtable and the specific inclusion of views from the LGBTI community.

**TABLE
A**

Perspectives on accommodating religious freedom with the equal treatment by law and government for LGBTI people

Issue	SOGII submissions	Religious Submissions in R&R2014
<p>Marriage</p>	<p>Legislating marriage for same-sex couples is necessary to achieve equality before the law.</p> <p>It is appropriate to have necessary safeguards to ensure religious groups are not required to marry same-sex couples if it is not consistent with their faith.</p>	<p>Legislating marriage for same-sex couples would lead to impingement on religious freedom.</p>
<p>Religious exemptions in anti-discrimination law</p>	<p>Public services (including education, health and welfare services) in receipt of taxpayer's funds should not enjoy religious exemptions under anti-discrimination law for employment or selection of clients.</p> <p>In the opinion of some, any public service, regardless of whether it is in receipt of taxpayer's funds, should not enjoy religious exemptions under anti-discrimination law for employment or selection of clients.</p> <p>Prioritising the physical and mental health, safety and welfare of all people (especially school-aged children and vulnerable people) is paramount in any discussion about balancing rights.</p>	<p>Employers of religious bodies need to have the freedom to choose their employees consistent with the values of their faith.</p> <p>In some circumstances, legally compelling religious bodies to accommodate LGBTI clients can undermine the operation of a distinct religious community.</p> <p>In some circumstances, legally compelling religious bodies to educate others about same-sex relationships and diverse gender identity can be inconsistent with faith-based practices.</p>

Unjust discrimination: A lived reality

The consultations revealed that despite societal advances, LGBTI people continue to experience unjust discrimination in Australia today. Discriminatory practices that seek to diminish the participation of people on the basis of SOGII status can facilitate a culture of intolerance in which LGBTI people are marginalised, feel excluded, face harassment and experience violence.

Such discrimination, intended or otherwise, functions at a range of levels including:

- **structural**, such as when caused directly or indirectly by the operation of the law;
- **institutional**, for instance, in the provision of services; and
- **interpersonal**, in interactions occurring between individuals.¹³

5.1 Licensing behaviour: Structural discrimination and its legitimising effects

Structural discrimination is primarily avoided by having laws that are inclusive and do not discriminate on the basis of SOGII status. There are also some structural protections for LGBTI people against institutional and interpersonal discrimination. It is unlawful to discriminate on the basis of SOGII status in certain areas of public life as a result of recent amendments to the *Sex Discrimination Act 1984* (Cth) (SDA).¹⁴ In the SDA, discrimination is unlawful in the areas of employment, education, provision of goods and services, accommodation, interests in land, clubs, administration of Commonwealth laws and programs and requests for information relating to these areas. Protections also exist in state and territory anti-discrimination and human rights legislation, although it is different in each jurisdiction. State and territory laws are considered in more detail in section 9.8 below.

The SDA contains exemptions that allow some clubs and religious service providers to lawfully discriminate against LGBTI people in service provision, employment, education and sports. These exemptions exist to accommodate competing rights, including religious freedom and freedom of association.

There are a variety of views about the scope of these exemptions. Some argue that these exemptions are necessary to protect religious freedom. Conversely, others argue that the exemptions are too broad and vague, and in effect perpetuate homophobia in Australian society.

Areas of direct structural discrimination that operate in Australia are:

- the definition of marriage as being between a man and a woman which explicitly excludes consensual same-sex couples from civil marriage; and
- the prohibition for same-sex couples to adopt children in some states.

Direct structural discrimination denies equal treatment of LGBTI people, regardless of their capacity and circumstances. It amounts to State-sanctioned discrimination. This has immediate and negative effects on LGBTI people.

Direct and unjustified discrimination has both a legal and social impact on LGBTI people. When law is used to sanction discrimination it legitimises institutional and interpersonal discrimination. State-sanctioned discrimination can facilitate an environment in which discrimination towards LGBTI people is normalised. This has adverse consequences for the health and wellbeing of LGBTI people.

State-sanctioned discrimination can also confuse social norms. Participants throughout the consultations highlighted that inconsistent messages are being sent to the public. They are concurrently being told that institutional and interpersonal discrimination is wrong, while government perpetuates this discrimination.

Public understanding of the human rights of LGBTI people in Australia is complicated by the presence of State-sanctioned discrimination. In the absence of full equality before the law for LGBTI people, SOGII rights can be difficult to comprehend. Very few participants in the online survey reported thinking that SOGII rights are well understood in Australia.

QUESTION

09

How well are rights of lesbian, gay, bisexual, transgender and intersex, or “SOGII rights” understood in Australia?

Answered: 1,419
Skipped: 99

Very well understood

4%

Somewhat understood

53%

Poorly understood

43%

5.2 The human face: Marginalisation, harassment and violence

Research has consistently identified higher than average rates of violence, harassment and bullying towards LGBTI people in Australia.¹⁵ It is well established that violence, harassment and bullying affect the wellbeing and quality of life of the people who experience it.¹⁶

In its submission, ACON argued that the disproportionate levels of violence experienced by the LGBTI community across all age groups were such that there is an urgent need for the development of a comprehensive national action plan by government.¹⁷

The 2012 *Private Lives 2* report revealed 25.5% of survey respondents reported an experience of homophobic abuse or harassment in the previous 12 months. In addition, a further 8.7% reported experiencing threats of or actual physical violence.¹⁸

Violence, harassment and bullying are not uniform across the SOGII spectrum. Figures on violence, harassment and bullying suggest experiences of this discrimination are even more acute for trans and gender diverse people.

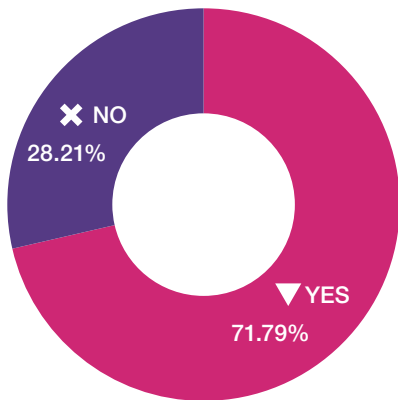
In the *Private Lives 2* report approximately 40% of trans men and women reported experiencing some form of verbal abuse, and almost a quarter reported some form of harassment.¹⁹ Additionally 64.8% of participants in the 2014 *First Australian National Trans Mental Health Study* reported experiencing discrimination or harassment.²⁰ It is difficult to comment on rates of violence, harassment and bullying for intersex people due the absence of available data.

These findings are affirmed in the results of the online survey. Almost 75% of survey respondents reported experiencing some type of bullying, harassment or violence on the basis of their SOGII status. Additionally, almost 90% reported knowing someone who had reported experiencing some type of bullying, harassment or violence on the basis of their SOGII status.

QUESTION 29

Have you ever experienced violence, harassment or bullying on the basis of your sexual orientation, gender identity or intersex status?

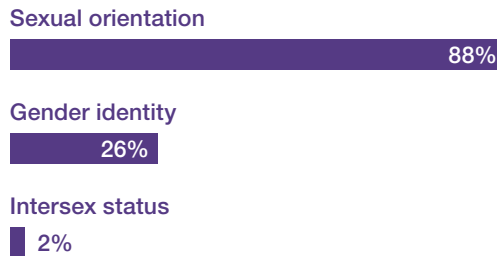
Answered: 1,361
Skipped: 157



QUESTION 30

If you answered yes to the previous question, on what grounds?

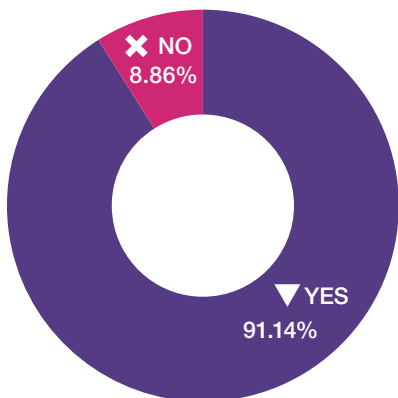
Answered: 976
Skipped: 542



QUESTION 31

Do you know someone who has experienced violence, harassment or bullying on the basis of their sexual orientation, gender identity or intersex status?

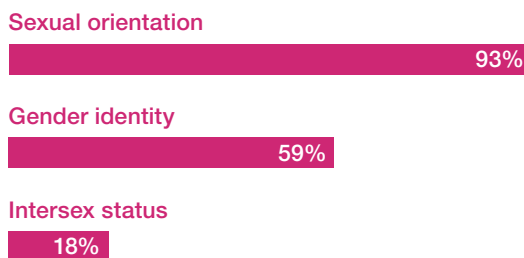
Answered: 1,354
Skipped: 164



QUESTION 32

If you answered yes to the previous question, on what grounds?

Answered: 1,234
Skipped: 284

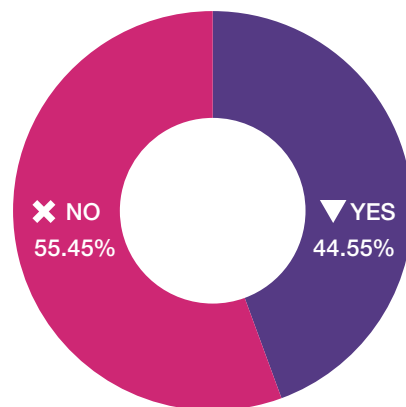


5.3 Human consequences: Personal harm and societal cost

Numerous consultation submissions noted that discrimination impacted on LGBTI people being able to access education and health services. It also results in lower rates of participation in community activities, such as sport. Almost half the participants in the online survey reported that they felt excluded from participating in an activity, organisation or event on the basis of SOGII status.

QUESTION 13 | Have you ever been excluded from participation in an organisation, event or activity on the basis of your sexual orientation, gender identity or intersex status?

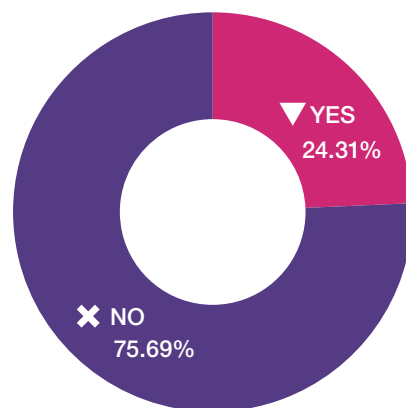
Answered: 1,412
Skipped: 106



The refusal of service provision on the basis of SOGII status was of concern throughout the National Consultation. Almost 25% of survey participants reported that they had experienced refusal of service on the basis of SOGII status.

QUESTION 25 | Have you ever been refused a service on the basis of your sexual orientation, gender identity or intersex status?

Answered: 1,374
Skipped: 144



Research has established a strong correlation between the experience of discrimination and lower enjoyment of health and wellbeing.²¹ It also highlights that a lived experience of unjust discrimination can significantly limit an individual's sense of security to publicly participate in activities such as employment and sports.²²

More recently, research reveals that the cost of unjust discrimination on the basis of SOGII status extends well beyond LGBTI people. Studies show that aggregate social and economic welfare losses from a lack of respect for LGBTI people in societies similar to Australia can have an effect on healthcare, productivity rates and national economic growth figures.²³

5.4 Health and welfare

The World Health Organisation defines health as a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.²⁴

Submissions to the National Consultation highlighted a number of ways in which the health of LGBTI people is impacted by unjust discrimination. These observations are affirmed by studies that compare the health of LGBT people with other sections of the Australian community.²⁵

LGBT Australians report lower health outcomes in the areas of cancer, sexual health and cardio vascular disease, and from health impacting behaviours such as alcohol and tobacco consumption and illicit substance use.²⁶

Participants noted that the burden of ill-health is not distributed equally across the SOGII spectrum. For example, successive studies in Australia have demonstrated poorer health outcomes experienced by bisexual people compared to lesbian and gay people. These include higher levels of documented anxiety and depression.²⁷

The limited information available on the health and wellbeing of trans and gender diverse people suggests that they also experience higher morbidities and lower life expectancy.²⁸ Information on the health and wellbeing of intersex people remains almost non-existent and hence it is not possible to draw clear conclusions about any health consequences resulting from unjust discrimination that they face.²⁹

Mental health and wellbeing emerged as a particular concern raised in the consultation. Issues raised included acute pathologies such as clinical depression, self-harm and general anxiety disorder, to experiences of episodic low self-esteem and self-worth related to the consequences of unjust discrimination.

Research suggests that the rate of suicide for LGBT people is 3.5 to 14 times higher than the general population.³⁰ LGBT people are also at a higher risk for a range of mental diagnoses³¹ and significantly more likely to be diagnosed with depression or anxiety.³²

Experiences of interpersonal and institutional discrimination in settings such as schools, healthcare facilities, and structural barriers to informed and appropriate healthcare are amongst the key factors that contribute to this risk profile.³³ Disturbingly, nearly 25% of respondents in the online consultation reported being refused a service (of some kind) on the basis of their SOGII status.

Submissions to the consultation also raised concern about the silence of national policy on the mental health and wellbeing of LGBTI people. LGBTI people are absent from the current National Mental Health Policy, the National Mental Health Plan, the Council of Australian Governments' National Action Plan on Mental Health and the National Mental Health Report.³⁴

The absence of inclusion of LGBTI people in mental health strategies was highlighted in the National Mental Health Commission's Report on the National Review of Mental Health Programmes and Services. The report also included a recommendation that relevant contracts for service providers require expertise and cultural sensitivity for LGBTI people.³⁵

5.5 Denial of dignity: Employment

Unjust discrimination was raised as a significant factor affecting employment and a barrier to equal participation in the workplace. For example in its recent report *Working for the Future*, Diversity Council Australia found that:

16% of gay men and lesbians said they had been discriminated against at work on the basis of sexual orientation. They were also more likely than straight employees to strongly disagree or disagree that, in their job, people treated each other with respect (26% vs 17%) and were less likely to indicate that people are chosen for jobs on the basis of their competency (50% vs 70%).³⁶

Another recent Australian study identified an unexplained wage gap between Australian workers doing the same job based on their sexual orientation. However this initial study concluded that there were benefits for lesbian women compared to heterosexual women, and negatives for gay men compared to heterosexual men.³⁷

Other studies highlight that despite high levels of education, trans and gender diverse people report substantially higher levels of unemployment.³⁸ Although there is a lack of empirical data, anecdotal contributions from submissions to the consultation also reported that intersex people are disproportionately unemployed.³⁹

In its submission Diversity Council Australia observed:

Overt discrimination, harassment, bullying and victimization, while not an insignificant problem, is only part of the discussion, with research also indicating there are significant consequences for individuals and organisations where LGBTI feel unable to be honest about their sexual orientation at work.⁴⁰

Related to these issues are experiences within employment environments, such as fear of discrimination. A significant number of participants in the online survey reported feeling unable to disclose their sexual orientation in the workplace, despite wanting to so.

QUESTION

17

Have you ever felt you wanted to, but felt unable to disclose your sexual orientation in the workplace?

Answered: 1,390
Skipped: 128



CASE STUDY

Employer support for LGBTI workplace inclusion – Pride in Diversity⁴¹

Pride in Diversity is Australia's national not-for-profit employer support program for LGBTI workplace inclusion. The program was established as a social inclusion initiative by ACON in 2009. It seeks to improve the health and wellbeing of LGBTI people by reducing exclusion, homophobia and stigma in the workplace. It has gained an international reputation amongst peer organisations as a leading edge employer initiative and for its Australian Workplace Equality Index (AWEI), which benchmarks employers on the basis of their treatment of LGBTI staff.

Pride in Diversity supports Australian employers via a membership offering or fee-for-service consulting and training. The program operates nationally and offers expertise in policy review and the development of LGBTI diversity strategies and inclusion initiatives effective LGBTI employee networks and encourages leadership buy-in and cultural change. Pride in Diversity also assists in the workplace with employees who are transitioning their gender.

For members, the program offers diversity best practice roundtables, networking events, publications and promotion via its recruitment guide alongside training hours and unlimited telephone/email support. In 2014, Pride in Diversity's released *An Employer's Guide to Intersex Inclusion* in conjunction with Organisation Intersex International Australia (OII Australia). This made international headlines and is currently cited worldwide as best practice.

The Australian Workplace Equality Index (AWEI)

is Australia's definitive national benchmark on LGBTI workplace inclusion allowing organisations to obtain annual benchmarking data and strategy support for their inclusion initiatives. The AWEI is a free service offered by Pride in Diversity and is open to all Australian employers independent of membership. The AWEI determines the Top 20 Employers for LGBTI Inclusion leaderboard annually along with a host of individual awards for excellence in this area. The Awards Luncheon in May aligns with International Day against Homophobia and Transphobia and includes high profile diversity and inclusion awards.

Pride in Diversity can also assist those organisations involved in health or service provision with accreditation towards The Rainbow Tick.

Pride in Diversity's annual **Pride in Practice LGBTI Workplace Inclusion Conference** takes place the first week of December each year. This conference showcases Australian best practice bringing together a diverse group of organisations across all sectors alongside academics, practitioners and international speakers.

For more information on Pride in Diversity, the AWEI, the Workplace Inclusion Conference or for assistance with LGBTI workplace inclusion initiatives, visit www.prideindiversity.com.au.



5.6 Participation in sport

Participation in both competitive and community level sports was also raised as a concern during the consultation. Sports play an enormously important role throughout life, particularly for youth, in building confidence and promoting mutual respect.

While some LGBTI people reported positive experiences in team sports and club sports, others reported feeling unwelcome in settings such as community clubs and competitions. Some participants reported experiences of exclusion, violence and harassment in sports on the basis of SOGII status.

Recently the first international study of homophobia in sport was released. The study, *Out on the Fields*, revealed that 70% of the 9,500 respondents across six countries reported thinking that youth team sporting environments were not safe for or supportive of LGB people. The study also found that 80 per cent of Australian participants believe that LGB athletes are either not accepted, accepted a little or only moderately accepted in sport.⁴²

A number of reforms have occurred at state and territory level in Australia in recent years. For example, *Play by the Rules* is a collaboration between the Australian Sports Commission, the Australian Human Rights Commission, all state and territory departments of sport and recreation, all state and territory anti-discrimination and human rights agencies, the NSW Commission for Children and Young People and the Australian and New Zealand Sports Law Association.

Play by the Rules provides information, resources, tools and free online training to increase the capacity and capability of administrators, coaches, officials, players and spectators to assist them in preventing and dealing with discrimination, harassment and child safety issues in sport, including homophobia and discrimination on SOGII issues.

A number of submissions observed the separate and specific barriers to participation in sports for trans, gender diverse and intersex people.⁴³ These issues were raised in relation to formal competitive sports and non-competitive competitions. State based human rights institutions affirmed these concerns separately in submissions. For example the Office of the Commissioner for Equal Opportunity, South Australia advocated that:

Every reasonable effort should be made to facilitate fair participation in sporting competitions of a person's chosen gender and that in practice very few individuals will undergo gender reassignment surgery (in particular those transitioning from female to male).⁴⁴

A number of significant structural barriers to intersex participation in sports were highlighted in the consultation. For example Organisation Intersex International Australia (OII Australia) submitted that the current exemptions in the *Sex Discrimination Act 1984* (Cth):

...creates the potential for elite women athletes with intersex variations to be excluded from competition, even while the IAAF [International Association of Athletics Federations] evidence shows that there is no scientific basis for the exclusion of women athletes with intersex variations.⁴⁵

CASE STUDY

Improving LGB inclusion in sport – the Bingham Cup anti-homophobia & inclusion policy⁴⁶

The *Anti-Homophobia & Inclusion Framework for Australian Sport* (Framework) was signed by all major professional Australian sporting codes in 2014 as an initiative of the Bingham Cup Sydney 2014. The Bingham Cup is the world cup of gay and inclusive rugby teams, which in 2014 was hosted by the Sydney Convicts Rugby Club, Australia's first gay and inclusive rugby club.

The organisers of the Bingham Cup recognised that the significant level of public support for the 2014 Bingham Cup provided an unprecedented opportunity for Australian sports to develop diversity initiatives for the benefit of lesbian, gay and bisexual players, supporters, officials and spectators. As a consequence, the organisers, with support from numerous organisations including the Australian Human Rights Commission and the Australian Sports Commission, drafted the Framework.

In April 2014, the Bingham Cup organisers brought together the CEO's of Football Federation of Australia, Cricket Australia, the Australian Rugby Union, the National Rugby League and the Australian Football League to sign the Framework. By doing so the codes committed to finalise and implement their own anti-homophobia and inclusion policies consistent with the Framework.

The Framework provides a structure for the development of inclusion policies on lesbian, gay and bisexual issues by each of the sporting codes, and provides a draft inclusion policy that with minimal amendment could be adopted by the codes. It recognises the importance of anti-discrimination law in Australian sports; and acknowledges that to change culturally, sports must implement bold initiatives and actively engage the community.

The Framework allows each signatory sporting code to custom build diversity policies based on six core areas:

- dissemination and training;
- sanctions and reporting;
- implementation by sports' clubs, unions and members;
- review and responsibility; and
- leadership and partnerships.

The strength of the Framework lies in its integrated approach: it acknowledges that change happens from all angles. For example, sanctions for homophobic abuse can be effective only if reinforced by positive public support of the community and a dissemination of core ideals of diversity and inclusion to member clubs and players.

Following the development of the framework, the Australian Human Rights Commission has commenced consultations with transgender, intersex and gender diverse people about extending the Framework to address the additional challenges that they face.



Relationships and family issues

Relationships and families were recurrent themes in the consultation. This section sets out the issues, identifies areas of conflict and suggests proposals for reform. These issues include equal relationship recognition (including marriage), recognition of same-sex parents on birth certificates, adoption, fostering and access to assisted human reproductive services (AHRS).

6.1 Equal relationship recognition

Australia has differing forms of relationship recognition across the country. States have de facto relationship recognition for long term cohabiting couples that afford equivalent legal recognition and benefits afforded to married couples. State-based de facto laws were amended to include same-sex couples over the period of 1999 and 2006.⁴⁷

In 2008 the definition of de facto in the *Family Law Act 1975* (Cth) was extended to include same-sex couples.⁴⁸ A further 98 Acts were amended to remove federal discrimination towards same-sex couples and their children.⁴⁹

The consultation generally acknowledged these reforms as positive. However, a number of submissions observed that the definition of 'de facto' in comparison to 'marriage' is broad and vague. Submissions also highlighted that unlike marriage, to establish a de facto relationship requires proof of the relationship such as cohabitation and interdependence.

Judge Harman, of the Federal Circuit Court of Australia, made a number of observations about this and in particular the difficulty of determining de facto status in the case of *Benedict v Peake* [2014] FCCA 642. He noted (at [1]–[3]):

The ironic conundrum of judicial determination of proceedings such as these (a factual determination of whether the parties have lived together in a de facto relationship as defined in section 4AA of the *Family Law Act 1975* (Cth)) is that an independent third person (a judicial officer) is called upon to make an authoritative determination of events and decide what actually occurred when he or she was not present during the occurrence of those events.⁵⁰

An example of the challenges that can arise in determining de facto status is demonstrated by a recent case in Tasmania involving the death of a de facto partner. The Office of the Tasmanian Anti-Discrimination Commissioner reported:

A number of reports reveals that some coronial decisions have released a body to a person other than the de facto partner on the basis that a couple did not have a registered civil relationship, despite clear guidelines that require the body to be released to the partner. In one case, the fact a couple had an argument several days before the death of one of them was included in a police report to the coroner and appears to have been considered relevant to the decision about to whom the body would be released.⁵¹

To address some of the issues that come from the formal recognition of relationships for same-sex couples some states have introduced state-based relationship registers for domestic partnerships.

TABLE B Relationship registries for same-sex couples by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Relationship registry	▼	▼	✘	▼	▼	▼	▼	✘
	Civil unions	Domestic partnership (registry)	Defined as 'de facto', no registry	Domestic partnership (registry)	Domestic partnership (registry)	Relationship register (registry)	Domestic partnership (registry)	Defined as 'de facto', no registry

▼ YES ✘ NO

In the consultations, some participants argued that these registers are an inferior alternative to marriage and do not have the same standing as the institution of marriage amongst the general population. It was suggested that these relationship registers are not widely used by same-sex couples.

The Commonwealth Constitution provides the Parliament the power to make laws with respect to marriage.⁵² In 2013, the High Court held that this power was broad enough to encompass marriage for same-sex couple. However, under the *Marriage Act 1961* (Cth) as it presently stands, marriage is defined as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.⁵³

1. Same-sex couples are denied access to the civil institution of marriage.
2. Marriage is an important institution that reflects a cultural understanding of relationship; by not extending marriage to same-sex couples, the social exclusion of same-sex couples is perpetuated.

3. An established married couple, one of whom is a trans person, is legally required to divorce in order for the trans person to amend their birth certificate.
4. A couple cannot access civil marriage if one party is legally recognised as a sex other than male or female.⁵⁴
5. Queensland case law suggests that irrespective of the sex marker on a birth certificate, some intersex people may not come within the definition of a man or a woman for the purposes of the *Marriage Act 1961* (Cth), and therefore are denied access to civil marriage.⁵⁵

The personal impact of these exclusions was raised many times throughout the online survey. The following are quotes from survey respondents.

How dare the ATO class my boyfriend as a partner for tax purposes but the rest of the government doesn't recognise us.

I have been married 43 years to my wife and the state would force us to divorce if I chose to have my birth certificate [changed] to female.

Now I'm living full time as a trans woman, I can't be married. I am the same person that I was, this hurts. This makes us second class citizens and either pitied or persecuted.

I serve my country at the risk of my life as a member of the ADF [Australian Defence Force], but cannot marry my partner. I have also represented my country as an athlete, dedicating years and (great expense) to achieving medals and success for my country, but that same country will not let me just marry my partner.

This is not a debate for anyone except the two people who wish to marry each other.

My partner and I have been together for more than 13 years and year in year out we see all our friends and family marry the one they love. Enough is enough!

(continued)

We live in a first world country. But I'm not equal? I pay taxes. I vote. I help my community. I contribute. Why aren't I equal?

My partner & I have lived together for 23 years – why can we not be married?

Equality of opportunity will become a reality for more LGBTI people if marriage equality happens here, for the simple reason that it legalises and legitimises our relationships in a peaceful and loving way. In my opinion, marriage equality is the most significant but least disruptive way of bringing LGBTI members of our culture back into the family instead of pushing them to the margins and having them/us feel all the resulting sense of failure and loss at being made outcasts in their/our own culture.

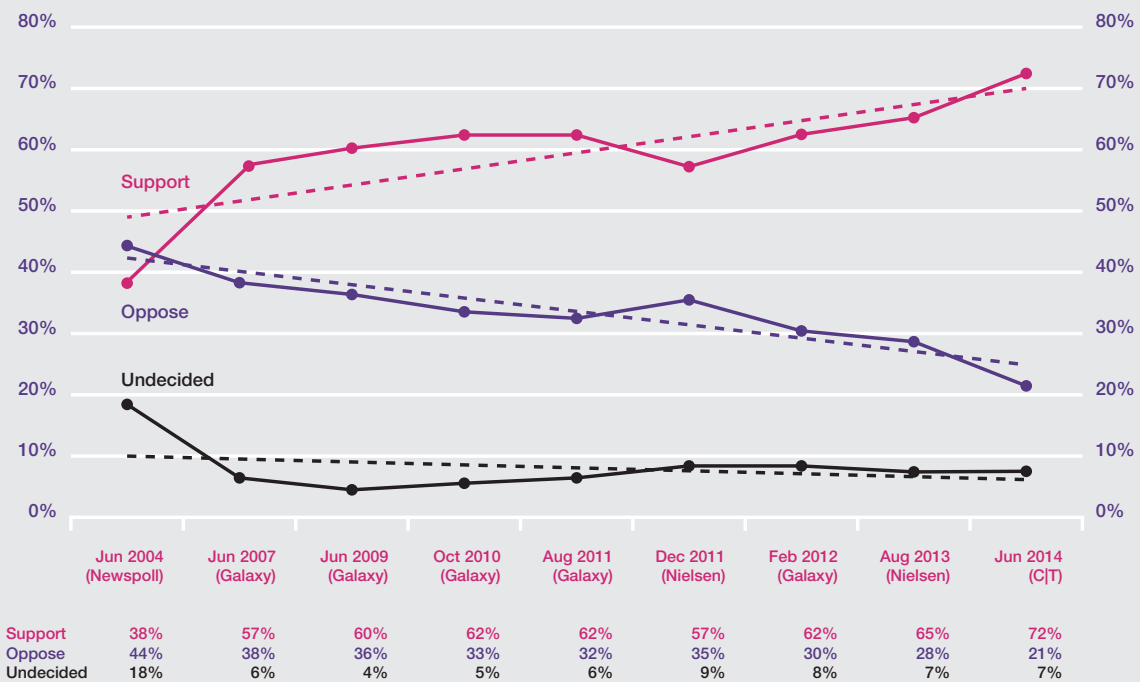
Submissions also noted that a married couple are able to easily prove their relationship with a marriage certificate when required by governments and other institutions, whereas other forms of recognition are much more intensive to establish.

A general consensus emerged throughout the consultation that marriage reform has broad community support and is essential to upholding SOGII rights and equality before the law in Australia.⁵⁶ For example the Diversity Council of Australia articulated that:

Principles of equality require that any formal relationship recognition available under law to opposite sex couples should also be available to same-sex couples, including civil marriage.⁵⁷

These conclusions are backed up by public opinion polling. For example, an analysis by the firm Crosby Textor has shown during the period June 2004 to June 2014 that public 'support' for same-sex couples being able to access the civil institution of marriage has risen in a relatively linear fashion from 38% to 72%. During the same time period the number that 'oppose' has similarly decreased in a relatively linear fashion from 44% to 21%, and those 'undecided' dropped from 18% in June 2004 to six per cent in June 2007 and has hovered between eight and four per cent thereafter.⁵⁸

GRAPH A | Public support for same-sex marriage in Australia⁵⁹



Consultation participants raised concerns that this formal discrimination against same-sex couples leads to an unacceptable tolerance of other forms of institutional and interpersonal discrimination against same-sex couples and their families.

These experiences of discrimination have an adverse impact on health outcomes for LGBTI people. Further input also revealed that the refusal of marriage to same-sex couples compromises the best interests of the child, and increases their exposure to inequalities, indignities and insecurities.⁶⁰

6.2 Reproduction and protecting the interests of children

Submissions and feedback from consultations raised concerns about the impact that the limits of relationship recognition for same-sex couples has on the safety and wellbeing of their children.

The 2013 Australian Government Report, *Same-sex parented families in Australia*, reviewed over 40 years over national and international research into the emotional and physical wellbeing of children from same-sex parent families. The report found that the research supports positive outcomes for children in same-sex parented families.⁶¹

The process of registering births in some states and territories do not provide equal acknowledgment to same-sex couple parents compared to their heterosexual counterparts. In other instances, adoption laws prevent same-sex couple parents from adopting children together. For example the Office of the Commissioner for Equal Opportunity South Australia submitted that:

The South Australian Adoption Act 1988 does not currently allow same-sex couples to jointly adopt a child. Only a heterosexual couple, or in exceptional circumstances a single person, can legally adopt in South Australia (Adoption Act 1988 s 12)...

The Commission suggests that the law should consider objectively that the prospective parent's fitness, ability and commitment provide care and nurture required by each particular child, regardless of the prospective parent's sexuality or marital status. South Australia's adoption laws are currently being reviewed, with a committee expected to report on the findings of a public consultation to Government in June 2015.⁶²

The Victorian Equal Opportunity and Human Rights Commission also argued that that reform 'beyond legislative change' is required, and that state and territory governments must:

...remove process and policy barriers in birth and death registrations – one example given [to the Commission] was a woman who was unable to be registered as a parent because she had not attended the first counselling session with the birth mother.⁶³

The case referenced by the Victorian Equal Opportunity and Human Rights Commission was extrapolated in the submission to the consultation:

I am in a loving same-sex relationship with my partner of three plus years and my gorgeous baby daughter of (almost) nine months.

According to Births, Deaths & Marriages, I am not legally seen as [name omitted] 'other mother'. We have been pleading our case with Births, Deaths & Marriages since [name omitted] birth with no avail. To attempt to obtain this legal right, we employed lawyers to assist in amending [name omitted] Birth Certificate to include my name as a parent (letter delivered 11 September 2014 with no response still) pursuant to Section 13 of the Status of Children Act 1975 (Vic).

Our initial plea (placing my name on the birth certificate) was rejected, as although we both consented to having [name omitted] together, I had not attended the original counselling sessions through Melbourne IVF (these are now completed as we are about to have our second child together).⁶⁴

TABLE C

Equal recognition of same-sex couples in legislation regulating birth certificates, fostering and adoption by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Adoption	▼	▼	✘	✘	✘ ¹	▼	✘ ¹	▼
Foster Parenting	▼	▼	▼	▼	▼	▼	▼	▼
Recognition of parents on birth certificate	▼	▼	▼	▼	▼	▼	▼	▼

▼ YES ✘ NO

¹ Under review.

State and territory law and regulations govern access to assisted human reproduction (AHR) in Australia. AHR includes a range of treatment options such as prescription fertility drugs, *in vitro* fertilisation (IVF) and donor insemination.

TABLE D

Access to AHR for people of diverse SOGII status by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Equal access to fertility services	▼	▼	▼	▼	✘	▼	▼	▼

▼ YES ✘ NO

While South Australia continues to deny unmarried women and same-sex couple's access to fertility services, such access is now common place across the rest of Australia. However, in some states and territories assumptions in service delivery, policy restrictions and, in the case of surrogacy, legislative restrictions prevent some LGBTI

people from accessing AHR service provision. For example in the Northern Territory women requires a medical diagnosis of infertility to access AHR services. Single women and women in same-sex relationships cannot access the service on the basis of 'social infertility' alone.

In other instances, access to services for transgender or intersex people is restricted due to a system bias. In a submission by the Australasian Sexual Health Association, it was observed that:

Reproduction is another particular area in which LGBTI people are receiving less than equitable support. There are currently insufficient AHR services for LGBTI people, in particular, transgender and intersex people undergoing surgical gender reassignment, who may wish to access services such as gamete freezing and related technologies. AHR systems need to be supported to ensure that LGBTI people can be provided equitable treatment, information and resources.⁶⁵

Surrogacy laws create increasingly complex public policy challenges for same-sex couples as well as governments. Apart from South Australia and Western Australia, all other states and territories allow same-sex couples to engage in altruistic surrogacy. Altruistic surrogacy occurs when a woman consents to carry a baby from insemination to birth on a non-commercial basis on behalf of another person or another couple.

By comparison, commercial surrogacy is illegal across all of Australia. This has particular implications for gay male couples wishing to have biological children. While the issue of commercial surrogacy was controversial in the consultation, there was a general consensus that it required further exploration.

The consequences of nation-wide bans mean that many couples, both heterosexual and homosexual, go to foreign countries to seek commercial surrogacy arrangements. This can have adverse outcomes for the surrogate and the child in the absence of regulation. According to the NSW Gay and Lesbian Rights Lobby, doing so raises a number of challenges for the parents, the child, the surrogate and government, including:

1. Unclear legal and regulatory standards to ensure that the interests of the child are put ahead of the preferences of parents in the country of commercial surrogacy.
2. Unclear legal and regulatory standards to protect the interests of the surrogate.
3. Legal recognition of the same-sex couple on the child's birth certificate when it is issued in a foreign jurisdiction.
4. Legal recognition of the child when it is born in a foreign jurisdiction and is brought to Australia.⁶⁶

**TABLE
E**

Access to surrogacy for people of diverse SOGII status by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Altruistic surrogacy	▼	▼	▼	▼	×	▼	▼	×
Commercial surrogacy	×	×	×	×	×	×	×	×

▼ YES × NO

Health-related issues

Ensuring LGBTI Australians can access appropriate healthcare and services was consistently raised in meetings across Australia. The following section sets out the issues and identifies areas of conflict and proposals for reform. These issues include system bias, health worker education, the adequacy of mental health services and aged care services, and the human consequences of religious exemptions in the SDA.

7.1 Unconscious bias

The concept of ‘unconscious bias’ in service provision was raised during meetings and in numerous written submissions. Participants observed that as a whole, healthcare systems operate with the assumption that clients are heterosexual and that people are partnered or married.⁶⁷ Consequently, healthcare systems unconsciously fail to meet the specific and unique healthcare needs of LGBTI clients who do not conform to these assumptions through the design of systems and practice.

A significant consequence of unconscious bias flows directly from the interpersonal relationships between LGBTI clients and healthcare service providers. Many people raised concerns that they continually needed to ‘out’ themselves to healthcare providers in response to questions and processes that assumed they were heterosexual or did not recognise a trans or intersex experience.

This was particularly true for issues relating to mental health and sexual health. For example a participant in a Western Australian stakeholder meeting explained her distress when presenting at a local GP for a general health check-up:

She asked me if I was sexually active. I said, “Yes”. She asked me if I used contraception; I said, “No, there is no need”. She raised her eyebrows and asked me if I was infertile. I said, “No”, and was about to say, but my partners are not men, but she interrupted and said pointedly – “Then there’s a need”! I just shut up then.⁶⁸

This was also identified as a particularly significant factor in the experience of lesbians and other same-sex attracted women in contact with healthcare settings throughout the consultation.

[Lesbian] women’s sexual health is still very much misunderstood and plagued by misinformation.

Online survey participant

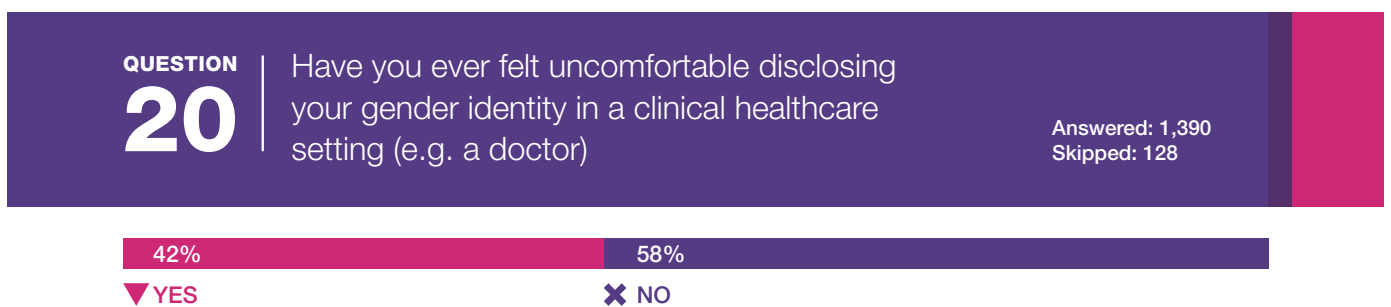
Social and health research reveals that as a result of unconscious bias, lesbian women's health has been largely ignored and, at best, considered synonymous with 'women's health'.⁶⁹ Similarly, as a consequence of the HIV/AIDS epidemic in Australia, the primary focus of SOGII-related health issues has remained on gay men. This meant that research funding, practitioner specialisation and service provision has been less attentive to lesbian women.

While many LGBTI Australians are comfortable discussing their SOGII status openly, others are not, and the obligation on individuals to 'out' themselves often means they feel uncomfortable in a healthcare or clinical setting.

The online survey revealed almost 50% of relevant participants reported feeling uncomfortable disclosing their sexual orientation in a healthcare setting. Various submissions reported that incorrect assumptions resulted in significant discomfort for clients which at times led to a decision not to disclose their SOGII status.



The survey also revealed similar results reported by trans and gender diverse participants, with almost 50% reporting feeling discomfort disclosing their gender identity in a healthcare setting.



7.2 LGBTI-specific training for health workers

Health workers are one of the ‘six essential building blocks’ of a health system. As the World Health Organisation notes:⁷⁰

A well-performing health workforce is one which works in ways that are responsive, fair and efficient to achieve the best health outcomes possible, given available resources and circumstances. ... There are sufficient numbers and mix of staff, fairly distributed; they are competent, responsive and productive.⁷¹

A small but significant number of participants raised concerns that LGBTI people continued to face interpersonal discrimination from clinical and allied healthcare service providers. In particular, a number of submissions noted that some practitioners pathologised the SOGII status of the client in a presentation, rather than as a context for treatment of an unrelated health issue.

The federal government should mandate LGBTI training for health and legal professions.

Online survey participant

Submissions recommended that health workforce strategies include appropriate human rights training, including respect for diversity, the importance of treating clients and others with courtesy and opportunities for further professional training.⁷² This is particularly important with evidence that suggests cultural attitudes can impact on the healthcare provided to patients. Service provision for LGBTI people can be adversely impacted by cultural perceptions.

An additional challenge sits with the health workforce. Information provided to the consultation revealed that service provision for LGBTI people can be adversely impacted by cultural perceptions. It was reported that in some instances new migrant health workers can be less accepting of diverse SOGII. In her work as Age Discrimination Commissioner, the Hon Susan Ryan addresses this issue and highlights that there is:

An urgent need to develop a national aged care workforce strategy, aiming not only to bring sufficient numbers of workers into this area, but to ensure they are trained to understand the human rights based approach, and to be aware and sensitive to minority populations, including LGBTI people.⁷³

Throughout the consultations, individuals shared experiences of times they faced differential treatment from healthcare practitioners on the basis of different attitudes toward their sexual orientation and gender identity.

CASE STUDY

Improving health practice outcomes for LGBTI people – the Rainbow Tick program⁷⁴

The Rainbow Tick Accreditation Program is a national LGBTI-inclusive accreditation program. The program is a world first and was developed by Gay and Lesbian Health Victoria (GLHV), La Trobe University in collaboration with Quality Innovation Performance (QIP), a not-for-profit accreditation organisation.

The Standards

The Rainbow Tick consists of six standards against which organisations can be accredited to demonstrate that all their practices, procedures and protocols are LGBTI-inclusive. These standards are:

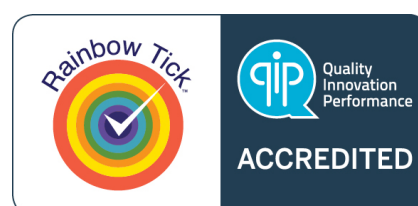
- Organisational capability
- LGBTI cultural safety
- Professional development
- Consumer consultation and participation
- Disclosure and documentation
- Access and intake

Be Prepared

Service accreditation depends on organisations demonstrating a minimal level of competency against each of the six standards and the capacity for ongoing quality improvement. This requires considerable planning, resources and commitment. GLHV has developed an internal audit to assist organisations assess their current level of LGBTI inclusivity. GLHV also offers professional development and staff training on LGBTI issues and a HOW2 course run over six months that takes organisations through each of the six Rainbow Tick standards (accessible at www.glhv.org.au).

Assessment and Accreditation

In order to demonstrate compliance with the Rainbow Tick standards, organisations undertake GLHV's internal audit, followed by an independent on-site assessment conducted by a QIP assessment team. Organisations that gain Rainbow tick accreditation will be listed on a national registry of LGBTI-inclusive, rainbow-ticked agencies.



7.3 Mental health services

Concerns were raised about the adequacy of mental health services that service people of diverse SOGII status.

We need people to understand that there's nothing wrong with being [LGBTI] ... that we are not different, we are normal and deserve to be treated as such. We need more understanding health services, for both physical and mental health.

Online survey participant

The need for mental health services to meet the specific requirements of LGBTI people is acute. The National Mental Health Commission discussed this extensively in its review of mental health services across Australia. In *Contributing lives, thriving communities: Report of the National Review of Mental Health Programmes and Services*, the National Mental Health Commission observed that:

Violence and discrimination are the key risk factors for the relatively poorer health of lesbian, gay, bisexual, transgender and intersex (LGBTI) people. Research suggests that LGBTI people are at increased risk of a range of mental health problems, including depression, anxiety disorders, self-harm and suicide.⁷⁵

The review found that:

Many people with mental health difficulties face compounding disadvantage – particularly Aboriginal and Torres Strait Islander peoples, people living in rural and remote regions, those who are marginalised due to their sexuality, gender, cultural background or their job, people who have difficulties with alcohol or other drugs, people living with an intellectual disability and people who experienced childhood trauma.⁷⁶

Further, the review found that the mental health system has fundamental structural shortcomings that prevent the system from adequately responding to these challenges.⁷⁷ The lack of visibility of the issues and the necessary support services led the Chair of the Commission, Professor Allan Fels AO, to argue recently:

Too often, a lack of early intervention cements their disadvantage, discrimination adds to their exclusion, and many people feel that they and their struggles are invisible. Whenever the commission has held community meetings, suicide and mental illness in the LGBTI community has come up. Sometimes it's raised by parents, sometimes siblings and often by people themselves. The common thread is that suicide and mental health problems in the LGBTI community are an enormous issue, but one that seems to be invisible.⁷⁸

The consultations also identified that LGBTI people in regional and remote communities particularly face inadequate services to meet their mental health needs.

In *Contributing lives, thriving communities: Report of the National Review of Mental Health Programmes and Services*, the National Mental Health Commission recommended that:

Contracts should require expertise and cultural sensitivity to the communities being supported – for example, people from culturally and linguistically diverse backgrounds and Lesbian Gay Bisexual Transgender and Intersex (LGBTI) people.

Specific mental health challenges: support the development of gender-sensitive inpatient units, expand training and development to ensure truly trauma-informed mental health services, and ensure that gaps in knowledge about, and services for, LGBTI communities and older people are addressed.

Develop evidence about what works in areas which have the potential to realise the greatest public value; for example mental health for vulnerable groups e.g. people from culturally and linguistically diverse backgrounds, Lesbian Gay Bisexual Transsexual and Intersex (LGBTI) people.⁷⁹

While not frequent, several submissions also recounted distressing personal stories of discrimination experienced in institutions run by religious organisations, for example mental health crisis services and hospitals, at a time when they were vulnerable.

7.4 Healthcare services provided by religious organisations

The relationship between religious freedom and the rights of LGBTI people to receive equal and fair treatment was a consistent theme throughout the consultations, particularly when services run by religious organisations were taxpayer funded.

For historical reasons a significant share of Australia's health services (including hospitals, clinics, aged care and mental health services) are provided by religious institutions. Some religious faiths that provide health services also believe that homosexual acts are inconsistent with their faith.

LGBTI people reported mixed experiences in religious run healthcare services. Some reported caring and inclusive environments where they received the healthcare they required. Others reported feeling unsupported.

The perception and assumption by LGBTI clients that they would face discrimination in health services run by religious bodies also contributed to patients not disclosing their SOGII status where it may have been relevant to improve their comfort or clinical outcome.

The impact of religious exemptions in the SDA on healthcare delivery in particular for LGBTI people was raised as a significant concern across a range of age groups. ACON in its submission made the following observation:

Consultations held by ACON with older LGBT people reveal a high level of awareness of the SDA exemptions and a high level of anxiety in relation to them, resulting in some cases in avoidance of services or the avoidance of disclosure. This results in reduced health seeking behaviours and can leave providers in a position of being unable to provide an appropriate service as a consequence of clients' reluctance to disclose information about their sexuality, gender status or intersex status.⁸⁰

Multiple consultation submissions observed that LGBTI people experience both the fear of, and actual, discrimination in essential service provision. This includes primary healthcare, crisis intervention, aged care, mental health and disability services and schools.

In its submission ACON also argued:

Many instances of discrimination against LGBTI people occur in institutions controlled by religious organisations that operate in the secular public sphere, for example, aged care facilities, disability support services, schools and hospitals.

With the receipt of public funding, the implicit authority of the state to perform government functions, these organisations should be subject to the same obligations as the government including the obligation not to discriminate. They should also be subject to the same regulatory framework as other NGOs operating in the same space; otherwise an unequal regulatory environment will continue to exist.⁸¹

The SDA contains statutory exemptions for religious bodies under section 37. Section 37 permits discrimination on the basis of all protected attributes.⁸² The exemption applies where the action by a body established for religious purposes:

Conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.⁸³

In effect, the SDA exempts, in broad terms, all religious bodies including service providers from unlawful discrimination on the basis of SOGII status.⁸⁴

An exception to these exemptions is Commonwealth-funded aged care. This means that unlike all other religious run service providers, these aged care facilities cannot lawfully discriminate against clients the basis of SOGII status.⁸⁵

Diversity Council Australia argued:

...that the current exemptions and exceptions in anti-discrimination law at both State and Commonwealth level diminish the appropriate coverage of anti-discrimination protections for LGBTI people.

The Diversity Council of Australia is also of the view that religious exemptions on any grounds should be specifically limited to those circumstances where there is a specific religious element to employment or the provision of goods and services, mirroring the inherent requirement and genuine occupational qualifications in all other areas. This is a particularly crucial issue in the context of growing outsourcing of government functions – especially in the areas of education, health, and aged care and community services – to the private sector where employers are increasingly religious organisations.⁸⁶

Several submissions recognised that religious exemptions do not reflect the current practices of all religious organisations in service provision. In a joint submission the Victorian Gay and Lesbian Rights Lobby and the Human Rights Law Centre highlighted:

...that a significant number of faith based service providers themselves report that the current law does not represent an accurate reflection of their standing operating procedures and policies.⁸⁷

However, participants also raised concern that LGBTI people often fail to see a distinction between the service delivery and the public position of the religious institution running the service.

Many submissions argued that the exemptions do not adequately account for the difference between a religious body for the purpose of religious practice, and a religious body for the purpose of providing essential community services. This was of particular concern in relation to religious run service providers in receipt of public funds outside of the aged care sector.⁸⁸

An overarching theme in the consultation was that the SDA fails to find a clear and appropriate balance between equality before the law and religious freedom in healthcare. Whilst there was general agreement that there was a role for the respect for legitimate religious freedom, there was general consensus that the exemptions in their current form are too broad and do not meet the needs of the LGBTI community or religious communities.

Proposals for reform suggested exemptions should be made minimal, temporary and specific.⁸⁹ In addition, it was reflected that these experiences often occur at 'particular points of vulnerability for people – exactly the time when discrimination can have its harshest impact.'⁹⁰

Both religious freedom and equal treatment by government are important human rights concerns. It is undesirable that law should seek to force an individual to act against their conscience.

7.5 Aged care services

LGBTI-sensitive aged care services was an issue identified throughout the consultations.

Unlike other health services, aged care service providers run by religious institutions are not exempt from anti-discrimination law. As outlined by the Age Discrimination Commissioner:

Importantly, and historically, the amendments change the “religious exception” provision of the Sex Discrimination Act 1984 to remove the ability of Commonwealth government funded, church based aged care providers to discriminate against those receiving care on the basis of their sexual identity.

The reforms mean that no providers should exclude or treat in any inferior way individuals with minority sexual identities seeking care. Should any provider persist in such discrimination despite the law, the discriminated against individual now has redress.⁹¹

However, the application of anti-discrimination laws does not address all concerns with aged care.

For most people now requiring aged care services, homosexuality was illegal during their lifetime. As a consequence many have kept their LGBTI status very discreet and private throughout their life. Aged care settings can be confronting for anyone after living independent lives. For LGBTI patients in aged care there can often be a fear of disclosing their SOGII status because of a concern it could lead to discrimination. Similarly for those that have previously lived 'out' lives there is fear about the need to return to live in 'the closet' because they now live in a communal environment.

The consequences of LGBTI people not feeling open to continue living an 'out' life after entering aged care can undermine their sense of safety and security, and also undermine health outcomes where unique treatment is required, such as people living with HIV/AIDS.

The Australian government has recognised these challenges and provided funding through the National Health Alliance for LGBTI-specific training for aged care services.

From this funding selected non government organisations have provided training for aged care centres and professionals on LGBTI diversity and awareness in service provision. However, there remain some aged care networks that have not participated in training.

Education

Ensuring that the education system is accommodating and respectful of LGBTI people, is vital for ensuring equal access to the education system. This is particularly true when LGBTI people are in the developmental phase of their life in primary and secondary education. The education system is equally important to ensure that, where relevant, subjects, or components of subjects, in professional qualifications include relevant education on LGBTI-specific issues.

8.1 Young people in primary and secondary school

Young LGBTI people face specific and unique challenges in the school environment related directly to a sense of difference, awareness of their SOGII status and the attitudes of their peers and families during a vulnerable and developmental phase of their life.

The consultation received a number of submissions expressing concern about the safety of young LGBTI people in schools. The *Writing Themselves in Report 3*, a longitudinal national study into young LGBTI people, revealed that 61% of participants experienced verbal abuse and 18% experienced physical abuse.⁹² The same report found that 80% of all the abuse reported happened at school.⁹³

These issues are compounded by a lack of visibility in LGBTI representation within school policy, the curriculum and leadership. A number of submissions raised the omission of SOGII issues in the national high school curriculum:

The recently developed national Health & Physical Education curriculum does not even include the words lesbian, gay or bisexual, and does not guarantee students will be taught comprehensive sexual health education (even omitting the term HIV). This is a massive failure to ensure all students learn vital information that is relevant to their health.⁹⁴

In 2014 the Australian Curriculum, Assessment and Reporting Authority conducted a review of the Australian curriculum.⁹⁵ Inclusion of SOGII issues in sex education components of the high school curriculum were removed from the final draft document.⁹⁶

Particular concern was raised throughout the consultation regarding the experience of young LGBTI people in religious schools.

Many submissions outlined fear for the safety of young LGBTI people in schools exempt from unlawful discrimination towards students on the basis of SOGII status. While it was acknowledged that freedom of religion requires a level of protection, it was strongly emphasised that in resolving a conflict of rights it is imperative to prioritise the physical safety and emotional wellbeing of young people.

LGBTI young people [are] rejected by family, schools and churches: while institutional exemptions (on the grounds of religion) exist and homophobia goes unchecked, this will persist. Large organisations such as schools receive huge amounts of recurrent government funding and tax breaks but can [discriminate] on the basis of sexuality and (trans) gender.

Online survey participant

The religious exemptions in the SDA, referred to above, extend to schools run by religious organisations. For example the Victorian Gay and Lesbian Rights Lobby posited that:

[the] broad permanent exemptions for educational institutions and religious bodies should not be permitted and sections 37 [religious bodies] and 38 [Education institutions established for religious purposes] should either be removed and replaced with a general justification defence or general limitations clause, or narrowed significantly. Such an approach would, for example, most likely permit discrimination in circumstances specifically enumerated in s 37, such as the ordination of priests.⁹⁷

Specifically the SDA exempts religious educational institutions from unlawful discrimination on the grounds of SOGII status in the area of employment of staff and treatment of both staff and students. In practice, the breadth of religious exemptions allow religious schools to:

- ‘Hire’ and ‘fire’ staff, or allow them only to hold certain positions within a school, because of their SOGII status, where this conduct conforms to the tenets of their faith.
- ‘Hire’ and ‘fire’ staff, or allow them only to hold certain positions within a school, based on other personal factors, such as marital or pregnancy status, where this conduct conforms to the tenets of their faith.
- Not accept, or expel, students based on their SOGII status, where this conduct conforms to the tenets of their faith.
- Not accept, or expel, students based on other personal factors, such as pregnancy status, where this conduct conforms to the tenets of their faith.

There is limited research looking at the practice of religious exemptions in anti-discrimination laws across Australia. One study published in the *University of Melbourne Law Review* completed an evidence-based analysis of the understanding and experience of religious schools on religious exemptions. The conclusions of the study found:

Some schools rarely or never use the exceptions for religions in the current anti-discrimination legislation. Others use the full range of exceptions and find ways to push beyond the current bounds of the legislation. Some see the mere application of anti-discrimination law to their schools as a denial of a fundamental right to religious freedom and autonomy. Others see any denial of equal opportunity as a blatant misuse of religion and a denial of the fundamental right to equality.⁹⁸

One justification for religious exemptions in the SDA is premised on the ability of individuals to choose from a range of available services, including both religious and non-religious providers.⁹⁹ Multiple submissions argued that ‘the luxury of choice’ is simply not available in many areas and settings.¹⁰⁰

This restriction on choice is particularly acute in regional and remote areas of Australia where at times the sole service provider is run by a religious organisation.¹⁰¹ This point was further emphasised by the Office of the Tasmanian Anti-Discrimination Commissioner, who observed that the:

...percentage of children in non-government schools is increasing and is currently over 30 per cent [and further that] this will have an increasing impact of the question of ‘choice’.¹⁰²

CASE STUDY

Improving LGBTI inclusion in schools – Safer Schools Coalition¹⁰³

The Safe Schools Coalition Australia is a coalition that helps Australian schools to be safer and more inclusive for same-sex attracted, intersex and gender diverse students, staff and families. Joining the coalition is free and represents a commitment to building a school that is free from homophobic and transphobic bullying and welcomes and supports the whole school community.

Safe Schools Coalition Australia is nationally convened by Foundation for Young Australians (FYA) and funds delivery partners in every state and territory to support local schools. Building on the original Victorian model, the national program is funded by the Australian Government Department of Education and Training and supports the National Safe Schools Framework. The program is overseen through a National Steering Committee with representatives including the President of the Australian Secondary Principals Association, the Australian Human Rights Commissioner and academic experts.

The Safe Schools Coalition Australia is a nationwide program available to schools across all sectors. It provides professional development for school staff, printed and digital resources and advice and support for schools to reduce homophobia and transphobia and actively include same-sex attracted, intersex and gender diverse students, staff and families.

Since the beginning of the program, school membership has now more than doubled, rising from 135 Victorian schools in June 2014 to 288 schools nationally at April 2015. Within those schools more than 7,500 teachers have been supported through professional development opportunities. In addition to a steady increase in school membership and teacher training, the coalition has received overwhelming support from the broader community. Almost 50 community and parents organisations have pledged their support for the program and its underpinning values. A number of Ministers of education and human rights commissioners have submitted messages of support.

A new teaching package, titled *All of Us*, will be available soon. This will include videos of LGBTI youth accompanied by lesson plans and unit guides.

Schools can join the Safe School Coalition Australia and find out more information by visiting www.safeschoolscoalition.org.au.



8.2 School chaplains program

A concern raised in almost all public meetings across both the *Rights & Responsibilities 2014* consultation and the *SOGII Rights consultation* was perceptions about how the National School Chaplaincy Program would treat LGBTI students.¹⁰⁴

Beginning in 2007 and ending in 2014, the Australian Government established and implemented the National School Chaplaincy and Student Welfare Program. The program funded religious chaplains in schools. In 2011, the policy was amended to:

- require chaplains to have a Certificate IV in Youth Work, Pastoral Care or an equivalent qualification; and
- allow schools to opt to have a secular welfare officer instead of a religious chaplain.¹⁰⁵

By 2,013, the majority of those funded were religious chaplains (2339), with a sizeable proportion of student welfare workers (512).¹⁰⁶

Following two High Court challenges, chaplaincy services are now provided through tied grants to each of the states and territories.¹⁰⁷ The funding is limited to religiously affiliated chaplains, removing the option for taxpayer funded secular counsellors.¹⁰⁸ All states have signed up to the program, and there is a significant demand for funding for chaplains.¹⁰⁹

Based on feedback from the *Rights & Responsibilities 2014* consultations, those who support chaplaincy services argue that there are few complaints about conduct and that the demand for them is evidence that they are wanted. Conversely, some submissions argued that in the presence of concurrent funding cuts to school counsellor positions, the chaplaincy program replaces secular welfare support and operates as the sole counselling service for students.

The school chaplains program remains a significant concern amongst LGBTI people and their families. Much of the concern about the program is based on whether chaplains would act as de facto counsellors to students and would place their private, personal and moral attitudes ahead of the wellbeing of the child on SOGII issues.

Participants in the consultation were particularly concerned that children who present about their SOGII status may be told by chaplains to repress their 'feelings' or 'emotions'. Should this occur, it would place LGBTI students at risk of inappropriate or inadequate support at a vulnerable time of their life.

As noted in *Writing Themselves in 3*, many religious youth feel that their sexual orientation or gender identity is at odds with their religion.¹¹⁰ Despite restrictions on chaplains providing religious services, this perception may result in young people not accessing important counselling services.

The school chaplaincy program includes complaint mechanisms where data can be collected. In the absence of evidence of a formal evaluation or review it is not possible to adequately assess whether the perception matches practice.

CASE STUDY

Improving LGBTI inclusion at university – the Australian LGBTI University Guide¹¹¹

The Australian LGBTI University Guide (lgbtiuniguide.org.au) was developed as a collaboration between five organisations – the NSW Gay and Lesbian Rights Lobby, Star Observer, Transgender Victoria, Organisation Intersex International Australia, and Out for Australia (a student mentoring organisation).

The guide aims to provide information about how well Australian universities cater to the needs of LGBTI students through initiatives such as inclusive policies and staff training, as well as information, resources and support. It will assist students in making informed decisions about where to study, and it will help universities understand how they can better support their students.

Universities are assessed on the basis of information which is publicly available through university and student union websites. This is designed to mirror the experience of what information could be easily accessible to a prospective student who is considering applying to study at a university

Common facilities at the leading universities – which included Curtin, Queensland, La Trobe, UNSW, Sydney, Sunshine Coast, Western Australia and Wollongong – were staff and student ally networks, dedicated social spaces for LGBTI students and public celebrations of events such as International Day Against Homophobia and Transphobia.

Some of the more progressive initiatives were gender-neutral toilets, bursaries for LGBTI students and the vetting of internship programs to ensure employers were LGBTI friendly.

It is clear that some Australian universities are going to significant lengths to include LGBTI people, and are moving beyond tolerance towards active engagement with LGBTI students. Others, however, have some way to go.

Across the board, universities appear to be doing more for lesbian, gay and bisexual students than for those who are trans or intersex. While the federal Sex Discrimination Act was amended in 2013 to include intersex as a protected attribute, only one university in ten had updated its policies to reflect this.

Already, in the early stages of its existence, the guide has sparked conversations between the organisers and numerous universities, student bodies, and individuals, who are collectively focused on making Australia's university campuses safer, more inclusive places for LGBTI students.

The guide will be regularly updated and refreshed as universities continue to improve their policies and practices.





CHAPTER
09

Trans and gender diverse people

The consultations identified that trans and gender diverse people experience a range of distinct structural, institutional and interpersonal barriers to equality in Australia. This includes access to healthcare, identity documents and experiences of discrimination.

9.1 The 'gendered' nature of healthcare

Unconscious bias in healthcare systems is particularly relevant to the experiences of trans and gender diverse people. The gendered nature of healthcare systems make trans and gender diverse people specifically vulnerable to exclusion and discrimination in these settings.

For example, trans or gender diverse people assigned female at birth are at risk of cervical cancer if they are sexually active and have an intact cervix. By extension trans and gender diverse people who have not undergone the surgical removal of breasts, uteruses, ovaries or testicles remain at risk for cancer in these organs and must undergo screenings recommended for these cancers.

Because reproductive health screenings are often rigidly gendered, simple procedures such as pap smears and prostate exams are difficult to obtain without fear of humiliation.

9.2 Restriction of access to healthcare

As a group, trans and gender diverse people report comparatively poorer outcomes across a range of health performance indicators. This is particularly true for mental health and wellbeing.¹¹² Extensive research confirms a strong link between access to therapeutic treatment such as hormones and surgical interventions and better health outcomes for trans and gender diverse people.¹¹³ This link was affirmed through numerous personal stories provided at meetings and in written submissions to the consultation.

In particular, necessary pharmaceutical and surgical procedures are not listed on the Medicare schedule.¹¹⁴ Hence these procedures are substantially or entirely privately funded and can cost upwards of \$50,000.

I desperately need medical procedures some only minor, some a bit more. These are to me potentially lifesaving or at the very least would allow me back some quality of life in the world outside. These procedures even minor with medical insurance are beyond affordability.

Online survey participant

Clinical representatives argued that an urgent need for improved access to publicly funded specialist outpatient healthcare in both paediatric and adult settings is required in order to provide trans and gender diverse people with adequate and comprehensive care.¹¹⁵

Funding such care alone would not be sufficient in addressing the deficit in current practice standards.¹¹⁶ Alternative models of care for transgender patients were suggested at the stakeholder meetings. For example, a model of care known as 'the informed consent model' was suggested for Australia. This model requires a detailed discussion between the clinician and patient that covers the risks and benefits of treatment. International evidence provided in the consultation posited that such models are rapidly gaining international support.¹¹⁷

Other submissions suggested that overseas models in which hormones and gender affirmation procedures are covered within the public health system were of particular assistance in any review process undertaken in Australia.¹¹⁸ For example, the Royal Australasian College of Physicians observed that:

Gonadotropin-releasing hormone analogues used to suppress puberty in adolescents are not funded through the Pharmaceutical Benefits Scheme and currently cost approximately \$5000 per patient per year. This cost prevents care from being affordable in general practice and community settings. Similarly, Medicare item numbers do not exist for therapeutic surgical procedures, which prevents surgical care being provided in public hospitals or being subsidised in private settings. Surgical treatment is in essence denied to those of low socioeconomic status.¹¹⁹

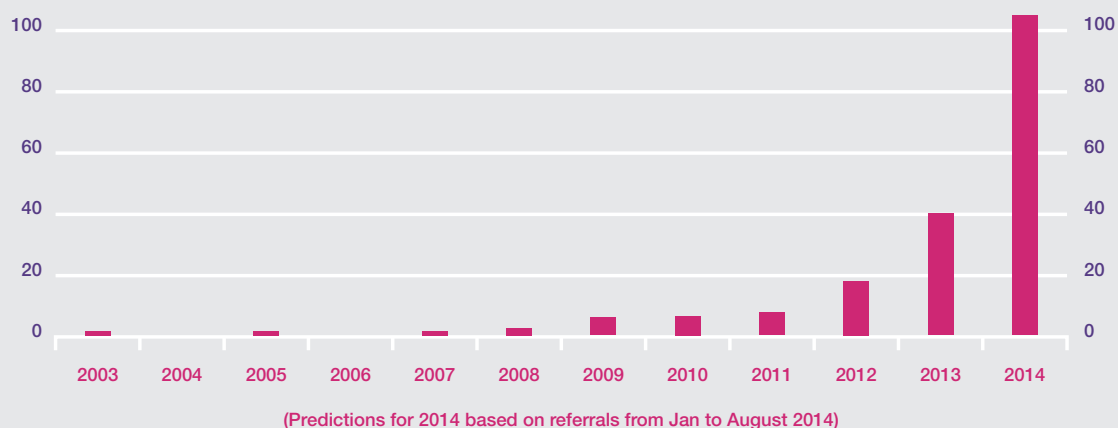
A number of parents and clinicians submitted specific recommendations on the current restrictions to stage two hormone treatment. Numerous submissions proposed that the current restrictions should be lifted in line with international standards. Waiting for young trans people to reach the age of 16 is counterproductive to ensuring their optimal health.¹²⁰

There is an additional barrier for young people under the age of 18 years. The Family Court of Australia is required to approve oestrogen and testosterone treatment in some circumstances. Following the Re Jaime case it is no longer necessary to seek court authorisation for stage one treatment.¹²¹ However, in the case of stage 2 treatment, the court will allow the young person to make the decision only if they are found competent.¹²² The cost of obtaining a court order in this context is approximately \$30,000.¹²³ The consultation heard from a large number of concerned parents experiencing distress about this process:

The prospect of facing family court, when [name of child] is ready for cross hormone therapy is daunting. We haven't spoken to her about the cost or the possibility that she may have to face cross-examination questioning her commitment to her affirmed gender. We are hoping things will change so we never have to have that conversation. It is a cruel and punitive process. It is a process that does not reflect the vulnerability of young transgender people. Nor does it acknowledge an individual's expertise in knowing themselves and professional expertise in determining an accurate diagnosis.¹²⁴

The number of young trans people presenting to specialist clinics is increasing. The experience of the Royal Children's Hospital Melbourne is indicative. Graph B demonstrates the number of referrals to the Royal Children's Hospital Melbourne for young people experiencing gender dysphoria.¹²⁵

GRAPH B | New referrals to the RCH Gender Dysphoria Service by year



Clinical specialists submitted evidence of the benefits of early intervention hormone treatment. Further, they submitted that removing the requirement for the Family Court of Australia to approve treatment using oestrogen and testosterone in people under the age of 18 years is of paramount importance.¹²⁶

Numerous medical and legal practitioners argued that the Court's requirements did not reflect the best interest of young people. Some young people have reported severe health consequences such as self-harm, depression and suicidal thoughts or feelings as a result of being denied treatment.¹²⁷

The consultation process also heard from a large number of parents of children with gender dysphoria or who are in the process of affirming their gender. The issue of hormone treatment access was raised many times in these submissions.

Our son began puberty suppressants just after the court situation was changed therefore we did not need court permission to access these drugs. We are, aware though of the trauma and angst families have faced before us and are very grateful things have changed. We are now considering hormone treatment which at the moment will require us to get court approval. This appears to be a waste of time and money for all involved and makes no sense at all. The lives of transgender teens and their families would be much improved if this situation was changed and the family.¹²⁸

Similarly, many parents and organisations raised concerns about the availability of qualified mental health practitioners and workers able to support children and young people during the identification of their gender dysphoria and transition, as well as support for parents who also needed assistance during this period of change.¹²⁹

For example, Twenty10 provided a case study on a young trans woman who experienced significant discrimination in housing crisis services:

Rather than be provided with appropriate support, she has been told by workers that her gender expression needs to be toned down, that she is inappropriate (as opposed to her behaviour) and that she is putting herself at risk ... Despite direction from senior staff and handover protocols, workers repeatedly refuse to use the clients' affirmed name and pronoun, choosing her birth assigned name and masculine pronouns.¹³⁰

Experiences shared by some parents clearly demonstrated the absence of support for their children and themselves; during this period they relied on the support of families who had gone through the same experience. The consultation revealed that the human consequences for families and children going through transition were real and taxing. Further these families and children often received limited or no support.

We love our daughter and her siblings totally adore her for who she has grown into, who she is! We can't even tell you what families have to go through and [this submission] hasn't even scraped the surface of what our beautiful children have to endure on their journey through life! A Proud Parent.¹³¹

Please do what you can to make this journey easier for future families. Not all families have the luxury of time on their side. Support needs to be made available. It is a basic human right in Australia. Parents seeking support for their child with diabetes or asthma would never experience the stress and turmoil we had to endure.¹³²

We are very lucky that we live in the inner city, where there seems to be great support for diversity broadly, and where there are schools which support diversity. We are also lucky we are experiencing these issues in the 2010s, when gender diversity and transgender issues are starting to be more widely recognised, publicised, advocated for and supported. However there are still a range of concerns we have about our daughter's rights and future wellbeing, and the laws and policies in place to support them.¹³³

One night as I was saying goodnight to [name removed], she whispered that she could not see what her future looked like: she said she didn't think she had one ... These few quiet words had a greater impact on us than anything that had come before ... Every action we have taken from that point on has been with that sole purpose in mind and it has spurred us on to advocate for [name removed] and move for quicker change.¹³⁴

9.3 Trans-specific education for healthcare workers

The education and training of health care workers is crucial to the delivery of appropriate and best practice healthcare for trans and gender diverse people. In addition to general SOGII diversity training for health workers, specific training on gender identity and gender affirmation processes is also lacking.

The Australian research report *Health Care Experiences of People whose Gender Identity Differs from Expected to their Natally Assigned Sex*, revealed that young trans and gender diverse people report a lack of basic understanding needed to tackle trans issues. In the same report, older participants found that the right counsellor who understands trans issues makes the world of difference.¹³⁵

In addition, the study found that for trans people, the requirement to educate a professional ‘who does not understand gender issues’ can lead to a sense of feeling unheard and that can have carry on blocking effects to the effectiveness of treatments.¹³⁶ The report concluded:

Most important is the need for better training of all mental and physical health care professional ... This is an entire workforce issue, rather than focusing solely on people who already provide services.¹³⁷

Clinicians observed that improving treatment access requires the integration of training on gender identity and transgender medicine into existing undergraduate and postgraduate medical courses, increased Medicare funding for medical and surgical treatment options, and review of specific judicial processes.¹³⁸

9.4 Identity documents

Most Australians take their identity documents for granted. However, when a person is required to change the sex marker on their identity documents they face a number of bureaucratic hurdles related to changing their birth certificate, passport and driver’s licence.

It is important to note that the sex marker classification has different implications for trans and gender diverse people in comparison to people who are intersex. As a consequence, the solutions to these barriers for trans and gender diverse people will not be the same as those for people who are intersex.

This section addresses issues canvassed by trans and gender diverse people during the consultation. The next section deals specifically with the issues identified by intersex people in the consultation.

The birth certificate is the cardinal document in proof of identity, and dictates the acquisition of all other identity documents in Australia. State and territory law governs the classification of sex markers on birth certificates.

We need consistent legislation across all states and territories in relation to birth certificates, standard definitions for transgender and intersex.

Online survey participant

As the table below demonstrates, outside of the Australian Capital Territory a person must be unmarried and provide evidence of a surgical procedure in order to meet the requirements for a change of legal sex on birth certificates in Australia.¹³⁹

**TABLE
F**

Requirements for change of sex
on birth certificate by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Requires evidence of surgical procedure	✘	▼	▼	▼	✘	▼	▼	✘
Requires a divorce from existing marriage	▼	▼	▼	▼	▼	▼	▼	▼

▼ YES ✘ NO

The surgical procedures required to meet the criteria for a change of legal sex vary across states and territories. As highlighted in the previous section the procedures are expensive and create barriers for trans people. In certain cases these surgeries also have low medical success rates or are unavailable in Australia.

The requirement to be unmarried in order to obtain a change of legal sex compel trans people who are married to choose between the legal recognition of their affirmed gender and the legal recognition of their primary partnership.

These processes can be further complicated for trans and gender diverse people who were born overseas and who are subsequently required to address sex markers on citizenship certificates.¹⁴⁰

Self-identification with supporting clinical treatment is the approach both supported by community and reflected in the High Court case of *AH & AB v the State of Western Australia*.¹⁴¹ This case was cited across a number of submissions as an example of an application of this principle.

CASE
NOTEAH & AB v the State of
Western Australia¹⁴²

In *AH & AB v the State of Western Australia*,¹⁴³ the High Court considered the application of the *Gender Reassignment Act 2000 (WA)* (GR Act) to two transsexual men who had undergone double mastectomies and hormone treatment.

Commission's intervention

The Australian Human Rights Commission was granted leave to intervene in the High Court proceedings. The Commission submitted that the focus of the relevant inquiry should be on how those with whom the appellants will deal in their daily lives will perceive them and how they perceive themselves and present to others. This construction was evident from the GR Act's overarching purpose, which is to eliminate discrimination both in terms of enabling applicants to obtain a certificate recognising his or her correct gender and prohibiting others from discriminating against a person on the basis of their gender history in their daily lives.

The Commission also submitted that this construction was consistent with the right to recognition as a person before the law under article 16 of the ICCPR and the right to privacy under article 17 of the ICCPR as understood by the *Yogyakarta Principles*.¹⁴⁴ Additionally, the Commission submitted that a construction that requires transsexual men to undergo a phalloplasty in order to qualify for a recognition certificate is discriminatory and should be avoided, as it would make it more difficult, if not impossible, for transsexual men to obtain a recognition certificate.

High Court's decision

The High Court overturned the earlier Court of Appeal's decision with the result that both appellants were granted recognition certificates recognising them as men. Consequently, they will both benefit from the relevant non-discrimination provisions in the *Equal Opportunity Act 1984 (WA)*. Consistent with the Commission's submissions, the High Court determined that the relevant inquiry under the GR Act required the board to approach its task from a 'social perspective'. That is, by reference to 'how other members of society would perceive the person, in their day-to-day lives' that at conclusion would be reached by reference to the person's appearance and behaviour, among other things. It does not require detailed knowledge of a person's bodily state or remnant sexual organs.

In this case, the appellants had undergone the requisite reassignment procedure by having a double mastectomy and hormone treatment. The High Court recognised that under the terms of the GR Act, a reassignment procedure could be either a medical or surgical procedure. It confirmed that hormone therapy is sufficient. The High Court then determined that each of the appellants would be identified as having the gender characteristics of a male in their daily interactions, despite not having had a phalloplasty or hysterectomy.

Conclusion

The High Court's decision clarifies that surgery to construct and remove a person's genitals and reproductive organs is not required for a grant of a recognition certificate under the GR Act. This decision is critical for transsexual men with a connection to Western Australia because it will enable them to apply for a recognition certificate without first undergoing a phalloplasty, which is risky, expensive and generally not performed in Australia. The decision will also be important for transsexual men with a connection to South Australia, as the *Sexual Reassignment Act 1988 (SA)* is written in similar terms to the GR Act.

While the High Court's decision turns on the construction of the GR Act, members of the broader transsexual community should still celebrate it. The decision supports the view that surgery to fully remove and construct genitalia is not required in order for community members to identify a person as a man or woman in their daily lives. This view contrasts with the dictionary definitions of the male and female gender and perceived community standards, which focus upon genitalia and reproductive organs. Indeed, statutory gender or sex recognition regimes in all other Australian states (other than South Australia) and territories only enable legal recognition of a person's gender after they have undergone surgery to alter their reproductive organs. These states and territories should seek to amend their legislation so that risky surgery, not performed in Australia, is no longer a prerequisite to legal recognition of gender or sex in Australia.

Throughout the consultation self-identification was proposed as an appropriate and sufficient basis upon which to apply for change of sex on legal records. Self-identification removes the need for medical confirmation and can be achieved cheaply and efficiently through a form of legal declaration such as a statutory declaration. This conclusion was confirmed by the Commission's 2009 *Sex Files* report, and by the Australian Capital Territory Standing Committee on Justice and Community Safety.¹⁴⁵

In 2013 the Australian Government Guidelines on the Recognition of Sex and Gender were released in response to the Commission's *Sex Files* report.¹⁴⁶ The guidelines recognise the right of individuals to have their gender officially recorded as X. The document is only applicable to federal agencies, and therefore does not apply to state and territory governmental departments. The ACT has now enacted laws effectively implementing the guidelines, however, in general, other state government departments do not permit people to register their gender as 'non-specific' on the basis of affirmed identity.¹⁴⁷

The High Court's decision in *Norrie v NSW Registrar of Births, Deaths and Marriages* went some way in permitting the NSW Registrar to register a person's sex as 'non-specific'.¹⁴⁸ However the requirement for sex reassignment surgery as a pre-requisite for this still applies.

Because of these prescriptive requirements, the decision does not provide the same rights to people who cannot afford or don't want to engage in surgical procedures in order to have their sex documentation or gender documentation amended.¹⁴⁹ In fact, it is only applicable to a very specific situation in NSW, prompting stakeholders such as Amnesty International to submit that whilst the court's ruling is promising, there is still more to be done.¹⁵⁰

CASE
NOTENorrie v NSW Registrar of Births,
Deaths and Marriages

Norrie v NSW Registrar of Births, Deaths and Marriages was the first case in Australia which recognised that sex is not binary.¹⁵¹ It thereby gives formal recognition to people who do not identify as male or female on identity documents.¹⁵² While this decision only applies to individuals who have undergone sex affirmation surgery, it may have extensive ramifications.¹⁵³

Broadly speaking, the implications of this decision are twofold. First, the implications are symbolic.¹⁵⁴ By recognising that sex is non-binary, this ruling endorses the notion that sex is a fluid concept. Documents administered by the NSW Births, Deaths and Marriages are cardinal.¹⁵⁵ The importance of having an identity document which matches a person's gender expression should not be underestimated. It provides empowerment, engenders respect, and mitigates potentially difficult situations for gender diverse individuals.

Notwithstanding this important symbolic change, the findings in *Norrie* are actually quite narrow. Although Sackville AJA briefly considers the existence of intersex, the decision only applies to transgender persons.¹⁵⁶ Citing *AH & AB v the State of Western Australia* and *Secretary v SRA* the judgment makes it clear that intersexuality is not the same as transsexuality.¹⁵⁷ The ruling thus affords no recognition to intersex people and, by creating an additional third category, may even entrench stigmatisation against intersex people.¹⁵⁸

Beazley ACJ was critical of the Registrar's reliance upon the dictionary definition of sex.¹⁵⁹ Although definitions are a common method of statutory construction, she opined that the fact that there is a dictionary definition does not render other 'relevant meanings' inconsequential.^{160 161} Her comments suggest that decision makers should have regard to wider societal meanings and the evolution of language, as well as dictionary definitions.

Finally, this ruling fails to consider what distinctions, if any, exist between sex and gender. Whereas sex is commonly understood to refer to biological characteristics, gender is often considered a social construct. Arguably, a failure to explore the concepts of sex and gender is a notable lacuna in the judgment. Although perhaps intentional, this means that the Court missed an important opportunity to clarify the meaning of sex and gender in law and public policy. That said, by conflating sex and gender the decision recognises that the use of labels and categories can be offensive. Such an approach is appropriate, being consistent with the Commonwealth's approach in the new Guidelines on the Recognition of Sex and Gender as well as the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) (SDA Amendment Act).^{162 163}

While the full implications of this decision are not yet clear, a liberal construction of the term sex provides important recognition for individuals who have undergone sex affirmation surgery. It may also provide persuasive dicta for courts in other states,¹⁶⁴ and is significant in light of the SDA Amendment Act.¹⁶⁵ Consequently, the decision may have implications for law and public policy.

9.5 Experiences of discrimination by trans and gender diverse people

While comparatively little data is available on the experiences of trans and gender diverse people, a significant number of structural barriers exist to equality of opportunity. Trans and gender diverse people also report disproportionately high rates of violence, harassment, bullying and exclusion related to their identity.¹⁶⁶

Submissions from the consultations reinforced these concerns. Differences in the physical presentation to a

person's gender identity (particularly during transition) led to significant unjust discrimination for the trans person for a number of participants in the consultation. These experiences of discrimination heightened and exacerbated reported feelings of shame and low self-worth.

Submissions argued that the requirements for a change of sex on birth certificates inadvertently entrench a medical model of gender that pathologises gender identity. This approach de-legitimises the experiences of people who cannot or choose not to have surgery as part of their gender affirmation.¹⁶⁷

CASE STUDY

Addressing discrimination on the basis of SOGI status at the Commission

Under the *Australian Human Rights Commission Act 1986* (Cth) and the *Sex Discrimination Act 1984* (Cth), the Commission is empowered to investigate and resolve complaints of discrimination, harassment and bullying based on a person's:

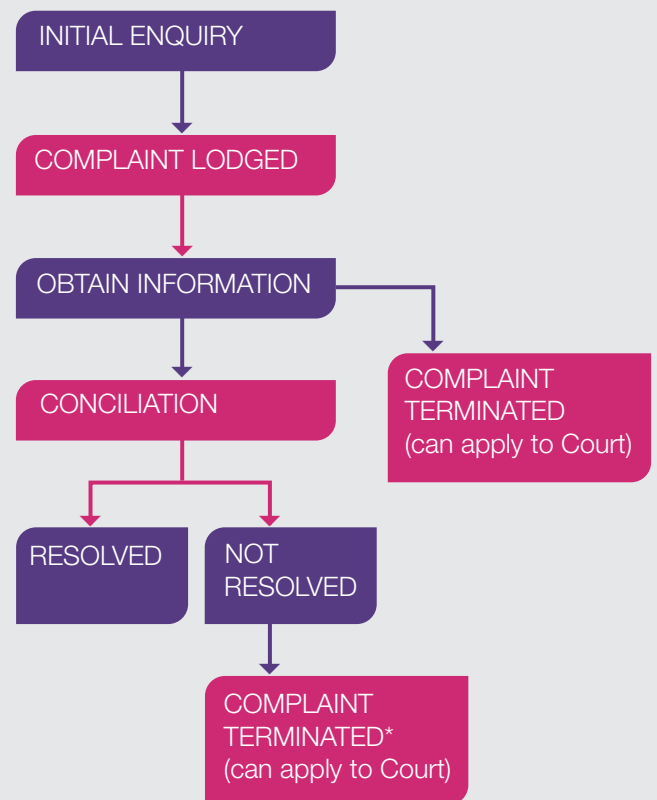
Sex, including pregnancy, marital or relationship status (including same-sex de facto couples), breastfeeding, family responsibilities, sexual harassment, gender identity, intersex status and sexual orientation.

Complaints to the Commission are resolved through a process known as conciliation. Complaint outcomes can include an apology, reinstatement to a job, compensation for lost wages, changes to a policy or developing and promoting anti-discrimination policies.

The complaints process within the Commission is also used to identify systemic and institutional issues, which inform the Commission's policy work and also provides the means for the Commission to work with organisations and institutions to address these issues that are identified.

The Australian Human Rights Commissioner maintains a watching brief on the Commission's SOGI complaints data submitted through the SDA. This information is used in part to contribute to decisions on Commission interventions in court proceedings that involve human rights issues. The data also assists in informing the strategic advocacy agenda of the Commissioner.

The Complaint Process



* The Commission may ask for further information before terminating the complaint.

(continued)

Complaint to the Commission of gender identity discrimination in the provision of goods, services and facilities

The complainant, who is a transgender woman, attended a branch office of the respondent insurance company to update her personal records to reflect a change from a male name to a female name. She claims that staff at the company asked her inappropriate questions about her gender identity in front of other customers, including asking her whether she had a 'sex change operation'. The complainant also claimed that after she suggested that the respondent amend its processes to make it easier for transgender customers to be able to make a change to name and sex on their records, she was told that the company does not have many requests for this.

On being notified of the complaint, the respondent company indicated a willingness to participate in a conciliation process.

The matter was resolved with an agreement that the company would:

- implement a national training package on gender diversity and intersex status discrimination for its staff;
- review the company's procedures and policies with a view to mainstreaming gender diversity and intersex status issues in the context of employee relations and business service processes;
- form a partnership with a not-for-profit organisation which specialises in transgender issues to inform the above process re-design and the development of the training package; and
- make a \$5,000 donation to an NGO, nominated by the complainant, which advocates on gender diversity issues.

The company also invited the complainant to provide a presentation to the management team about her lived experience as a transgender woman and a customer of the company.

People with intersex variations

There is a lack of comprehensive, valid and reliable data about intersex people in the Australian context. However, significant anecdotal evidence was submitted to the consultation.¹⁶⁸ The major issues identified include:

- Lack of empirical data on the rates and impact of unjust discrimination towards intersex people in Australia.
- Unnecessary surgery on intersex children and infants in the absence of informed consent.
- Classification of intersex infants as a third sex or indeterminate.

In its submission OII Australia observed that a number of research projects that include intersex in a broader LGBT agenda have failed to distinguish between gender identity and intersex status.¹⁶⁹ Subsequently, the experiences of intersex people in relation to discrimination are not well documented in LGBTI health and social research:

A shift in terminology from LGBT to LGBTI over recent years has not been matched by an increase in understanding of intersex, nor action by non-government organisations on intersex issues. We are aware of multiple education programs that have framed intersex as a gender identity issue, as if all people with intersex variations share the same gender identity. We've also seen many cases of intersex (and trans) issues framed as issues of sexual orientation.¹⁷⁰

Submissions to the consultations strongly encouraged the funding of research into the nature and impact of unjust discrimination toward intersex people. It was repeatedly suggested that funding be available to support intersex participation in key decision making processes the impact on them.

10.1 Surgery on infants and children

A unique issue faced by the intersex community relates to involuntary surgery on infants born with part or both genitals. Surgery commonly occurs with parental consent shortly after birth on the advice of doctors. While parents and doctors are undoubtedly motivated by their belief that they are acting in the best interests of the child, it can cause challenges later in life.

Consultation participants raised significant concern about cosmetic genital surgery on infants and children with intersex variations in Australia.¹⁷¹ Specifically submissions argued that the interventions compromise the individual rights to bodily autonomy, integrity and dignity.¹⁷²

A number of submissions also questioned the rationale of surgical interventions to 'normalise' the appearance of intersex children and infants, suggesting that this objective was informed by redundant social constructs around gender and biology.¹⁷³ Submissions emphasised that in order to address these gaps, education policies must contain adequate recognition of the existence of intersex bodily diversity.¹⁷⁴

In *Contributing lives, thriving communities: Report of the National Review of Mental Health Programmes and Services*, the National Mental Health Commission observed that:

The birth of an intersex child is often treated by health professionals as a 'psycho-social emergency', with a strong focus on early medical intervention. Except in the case of actual health emergencies, this is not the case, yet premature medical intervention has potential lifetime repercussions on the mental health of individuals.¹⁷⁵

A significant number of submissions referred to the Australian Senate Community Affairs Committee 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia*. The report found that there is no medical consensus around the conduct of normalising surgery.¹⁷⁶

A number of submissions raised concern that decisions to perform cosmetic genital surgery on infant's remains central to clinical practice, without reference to a human rights based approach. In cases provided to the consultation, recommendations about surgical intervention were made prior to family consultations with psychological professionals. Specialists also cited psychological rationales without deference to the appropriate specialist.¹⁷⁷ Participants raised concern that this practice occurred with little evidence to substantiate benefit to the child. In some cases participants reported disadvantage to the child as a result of these surgeries.¹⁷⁸ The need for incorporating clinical practitioners into a human rights based agenda for reform was clearly outlined in the consultation.

In particular, many submissions referred to the fact that the recommendations of the Australian Senate Community Affairs Committee 2013 *Report on the Involuntary or Coerced Sterilisation of Intersex People in Australia* that have yet to be addressed in legislative or policy reform.¹⁷⁹ The two key recommendations from the report were repeatedly cited in the consultation proposed that:

... All medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework.

The guidelines should favour deferral of 'normalising' treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.¹⁸⁰

Several participants recommended that the type of protection afforded to female infants and children in relation to that national legislative framework on female genital mutilation be extended to infants and children with intersex variations.

While data on the prevalence of the surgical procedure is not publically available, evidence of its continuing practice in Australia was provided in a number of submissions to the consultation.¹⁸¹

By law, Australia still allows the practice of cosmetic genital surgery on infants and children with intersex variations. Such practice is prohibited on non-intersex children, excluding the practice of male circumcision.¹⁸² The rationale for this procedure is essentially cultural and generally based on psychosocial reasoning such as minimising family concern and distress and mitigating the risks of stigmatisation and gender identity confusion.¹⁸³

10.2 Classification of intersex infants as a third sex or indeterminate

The issue of sex marker classification was raised in relation to intersex infants and young people. Consistent concern regarding the conflation of gender identity and intersex status was raised by intersex participants and representatives throughout the consultation. For example Morgan Carpenter, president of OII Australia articulated:

One of our key human rights issues is not really the existence of binary genders, but what is done medically to make us conform to those norms.

This issue was particularly relevant to classification categories on birth certificates and other identity documents. Submissions raised that in the case of children with an intersex variation consent is a necessary precondition to fully respect their human rights. For example, OII Australia submitted that:

Defining intersex as a third classification for infants and children with intersex variations, as is the case in the ACT will place children at risk. Persons so assigned will have lesser rights, and will face stigma and outing in school environments, and we oppose such classification without the voluntary and informed consent of the person so classified, as a human rights abuse.¹⁸⁴

A number of participants echoed these concerns and emphasized the importance of self-identification for any classification system:

We need to ensure that novel sex/gender classifications remain voluntary and opt in, and ensure that no-one is so classified remains voluntary and opt in, and ensure that no-one is so classified without their personal consent.

Online survey participant

This is consistent with recommendation 5 of the Commission's 2009 *Sex Files* report:

A person over the age of 18 years should be able to choose to have an unspecified sex noted on documents and personal records.¹⁸⁵

Aboriginal and Torres Strait Islander peoples

LGBTI Aboriginal and Torres Strait Islander peoples experience a number of significant and intersecting points of discrimination and marginalisation in Australia.¹⁸⁶ They contend with structural, institutional and interpersonal forms of discrimination based on race, gender, colonialism and SOGII status.¹⁸⁷ Racism has been positioned as a public health issue in and of itself according to Pat Anderson:

There are a number of ways in which racism has a negative effect on the health of Aboriginal and Torres Strait Islander peoples. First, for individuals, exposure to racism is associated with psychological distress, depression, poor quality of life, and substance misuse, all of which contribute significantly to the overall ill health experienced by Aboriginal and Torres Strait Islander peoples.¹⁸⁸

Significantly submissions highlighted the intersectional role racism plays in the health of brotherboys, sistergirls and other LGBTI Aboriginal and Torres Strait Islander Australians.

Participants in the consultation observed that historically brotherboys, sistergirls and other LGBTI Aboriginal and Torres Strait Islander peoples remain under-represented in research and under serviced on SOGII issues.¹⁸⁹ They remain largely absent from most national studies into SOGII rights, wellbeing and health. The comparatively small level of research available is largely framed within the context of sexually transmissible infection (STI) and blood borne virus (BBV).

Very little investigation has gone toward the social and emotional wellbeing of Aboriginal and Torres Strait Islander peoples, recognising the importance of connection to land, culture, spirituality, ancestry, family and community and how these affect the individual.¹⁹⁰

For example a submission by Black Rainbow Living Well observed:

In the last 15 years there has been no national strategy, plan or research to identify and meet the needs of the Aboriginal and Torres Strait Islander LGBTI community. Previous LGBTI reports have excluded Aboriginal and Torres Strait Islanders in national strategies and health plans specific to LGBTI people ... the nuanced intersections of respondents needs ... are just the beginning of further work to be done in this area.¹⁹¹

The majority of input about brotherboys, sistergirls and other LGBTI Aboriginal and Torres Strait Islander peoples was provided to the consultation in face to face meetings held across the country. During these meetings participants spoke candidly about tensions between maintaining important cultural ties and family support and recognition of diverse sexual orientation and gender identity. This issue was particularly pertinent for sistergirls in areas where gendered cultural initiation processes could not accommodate their gender expression. No information was received about intersex status in this context.

Significantly, participants expressed concern about the gap between Aboriginal specific service provision and service provision that accommodates for diverse SOGII status. This was particularly relevant for lesbian and other same-sex attracted women, who lack the formal representation afforded to gay men and sistergirls through HIV, STI and other BBV specific organisations.

Participants referenced the *United Nations Declaration on the Rights of Indigenous Peoples*, and specifically Article 18 as a potential mechanism for facilitating diversity in self-determination frameworks:

'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.' –

UNDRIP Article 18

Gone are the days of a single 'Indigenous voice' at the table, and we have more to offer that just our Indigeneity and/or cultural experiences and knowledge.¹⁹²

As with the rest of the population, LGBTI people are not a homogenous group, and nor are Aboriginal and Torres Strait Islander peoples. LGBTI Aboriginal and Torres Strait Islander peoples face unique challenges that cannot be readily or appropriately addressed through generic services targeting the LGBTI community, or the Aboriginal and Torres Strait Islander communities.

CASE STUDY

Indigilez¹⁹³

In response to the unique issues faced by Indigenous lesbian women, Rebecca Johnson and Tanya Quakawoot decided to develop a leadership and support group in 2008 for Indigenous lesbians. The first Rainbow Dreaming Retreat was established and hosted at Nungeena Aboriginal Women's Corporation located at the Glass House Mountains, Queensland. They describe Indigilez as follows:

As Indigenous lesbians we are a minority within a minority within a minority:

We're black, we're women and we identify as lesbian or being same-sex attracted women.

We established from the retreat that we, as Indigenous lesbians, were suffering from similar barriers in everyday life, and that a support group was needed. Aboriginal and Islander lesbian women can find it difficult to come out because they are afraid of the ramifications, such as rejection from family and friends. As Aboriginal and Islander people we have strong connections to family, it is our support base. We heavily rely on this connection to help us overcome a lot of obstacles throughout our life.

We have identified that over 50% of the women that attend the retreats have suffered from trans generational issues. The complexities of these issues are post-traumatic stress disorder (PTSD), symptoms of major mental health issues, depression and isolation of country connection. A high number of the women have been subject to discrimination and isolation. Over 80% of the women have suffered inequality, racism and discrimination within the LGBTI community and the wider community.

Indigilez is a place where the women find connection. Indigilez provides the safe place for Indigenous women to speak their mind and tell their journey of sexuality and culture. Indigilez empowers and provides leadership to a minority group of women that were once isolated, discriminated against and not treated equal. Indigilez uplifts the spirits and encourages healthy life style choices for today and the future.



Criminal and justice issues

There are specific implications for some Australians of diverse SOGI status in their interaction with criminal justice systems in Australia. The following section profiles state and territory based concerns raised in the consultation. These are:

- The expungement of criminal records for convictions under historic legislation criminalising consensual adult sexual activity.
- The existence of the homosexual advance defence.
- The unequal age of consent for different adult sexual activity.
- HIV and Australian law.
- The treatment of trans prisoners in correctional services in Australia.

12.1 Expungement of criminal records

In 1997 Tasmania became the last Australian state to decriminalise sex between consenting adult men in private.¹⁹⁴ While consensual sexual activity between men is no longer illegal in Australia, many men who received convictions prior to decriminalisation reform hold a criminal record relating to the charge. These records have an impact on their full participation in society. The process for expunging records varies across states and territories in Australia.

Evidence of the harm caused by a failure to expunge the criminal records of men who were convicted for having consensual sex at a time it was illegal was provided in a number of submissions and at stakeholder meetings.¹⁹⁵ These included feelings of shame, impact on employment prospects, and in some cases restrictions on travel.

According to the former Victorian Attorney-General, Robert Clark:

The historical convictions had caused long-term harm to those prosecuted, sometimes leading to difficulties with employment and travel as well as the stigma of a criminal conviction for a consensual sexual act.¹⁹⁶

In previous public comment on the issue the Human Rights Commissioner has echoed such concerns, stating that there remains:

A real human consequence for failing to expunge records, including that many people continue to shoulder the stigma and legacy of unjust persecution by the State.¹⁹⁷

Prior to 1992 the Australian Defence Forces discharged service men and women who were found to be same-sex attracted.¹⁹⁸ The Australian Defence Force Discharge records can now be altered on request to reflect for instance, a voluntary discharge.

**TABLE
G**

Jurisdictions that have expunged criminal records for homosexuality by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
--	-----	-----	----	-----	----	-----	-----	----

Process for expungement

✘	▼	✘	✘	✘ ¹	✘	▼	✘
---	---	---	---	----------------	---	---	---

▼ YES ✘ NO

¹ Legislation passed – but process still in development.

South Australia was the first state to expunge historical gay sex convictions in 2013 with the *Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA). However, since its passage the process for expungement has not been resolved. In 2014 Victoria and New South Wales passed legislation expunging records for consensual same-sex activity. The remaining states and territories are yet to establish legislation or mechanisms for expunging these records, leaving men with criminal records based on redundant legislation.

In its submission, the National Association of Community Legal Centres highlighted:

The importance of such schemes in removing stigma and practical consequences of such convictions. We suggest that the Commission advocate for the adoption of expungement schemes in the remaining jurisdictions, and encourage the design, development and implementation of schemes that are confidential, accessible and fair, and enable decision makers to consider all relevant evidence to the benefit of applications.¹⁹⁹

The experience of states that have expunged these records has been complex. While there is no parallel between the activities, many convictions for homosexual activity were categorised with other crimes that remain on the statutory books, such as opposite sex or same-sex paedophilia. As a consequence each conviction record is carefully investigated before it can be expunged.

12.2 Homosexual advance defence

In a homosexual advance defence, evidence of an unwelcome sexual advance made by a purportedly gay victim towards the accused is led in support of establishing the defence of provocation.²⁰⁰

Participants in stakeholder meetings and the online survey spoke candidly to the way in which they believed violence towards gay men is legitimised in law through use of the defence. Australian research has affirmed this link. For example:

While provocation arguably continues to play an important role in the Queensland justice system, no such claim can be made for the homosexual advance defense, which is no longer in sync with prevailing social norms and serves to legitimize – if indirectly – homophobia.²⁰¹

In his dissenting judgement on the High Court's decision in *Green v R*, Justice Kirby stated:

In my view, the “ordinary person” in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or inflict grievous bodily harm.

If every woman who was the subject of a “gentle”, “non-aggressive” although persistent sexual advance ... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation will be sorely tested and undesirably extended ... this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent...²⁰²

The table below shows how most states and territories in Australia have restricted this defence by legislation. The most recent change was the Crimes Amendment (Provocation) Act 2014 (NSW), which was assented to in May. Crimes Act 1900 (NSW) in relation to the partial defence of provocation

to a charge of murder. The object of the amending Act was to reformulate the law of provocation in New South Wales in order to restrict its operation. The object of the NSW Bill was to reformulate the law of provocation in order to restrict its operation.²⁰³

**TABLE
H**

Jurisdictions that have legislated to abolish the use of the homosexual advance defence by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
--	-----	-----	----	-----	----	-----	-----	----

Abolition of homosexual advance defence	N/A	▼	N/A	✘	✘	▼	▼	▼
Year of abolition		2014		Under review	Under review	2003	2005	2008

▼ YES ✘ NO

Participants in meetings and the online consultation process raised concern over the persistence of the use of the defence in Queensland and provided examples of its recent successful use in two murder trials in the regional city of Maryborough in Queensland:

In both trials, defence barristers explained that their clients flew into a homicidal rage because they had suffered the insult of a sexual overture from another man. In each case, the jury found the killer guilty of manslaughter rather than murder, assigning less culpability and enlivening a lower sentencing range.²⁰⁴

Queensland amended the defence in 2011 following the recommendation of the 2008 Queensland Law Reform Commission review.²⁰⁵ The amendments stipulated that provocation could no longer be based 'on words alone, other than in circumstance of the most extreme and exceptional character'.²⁰⁶ However, consultation participants maintained that this reform did not go far enough.

In a report by the Chair of the Government Working Party set up to examine reforms of the homosexual advance defence, John Jerrard QC, also commented that the 2011 Queensland reforms had not progressed far enough in eliminating the homosexual advance from Queensland law, and recommended that further reform was required.²⁰⁷

12.3 Unequal age of consent

The law on 'unlawful sodomy' is located in section 208 of the Queensland criminal code.²⁰⁸ This law defines a higher age of consent at 18 years of age for sodomy, which is largely associated with homosexual male intercourse, in comparison to other consenting sexual activity, which is currently lawful at 16 years of age. The penalty for any offender is up to 14 years imprisonment.²⁰⁹

According to the NSW Gay and Lesbian Rights Lobby:

The unequal age of consent is discriminatory and directly contributes to detrimental health outcomes for young gay men. It provides tacit support to extend homophobia – adding to the oppression of young gay men who already face very high levels of suicide, depression and other mental health risks due to discrimination and societal pressure.²¹⁰

Concern was raised throughout the consultation process that while the sodomy law does not directly target young people on the basis of their sexual orientation, in *practice* the law discriminates on the basis of sexual orientation. Participants observed that unequal age of consent based on different sexual activity had disproportionate and adverse impacts on gay men in Queensland.

A particular fear was raised regarding the safety and wellbeing of young same-sex attracted men under the age of 18. One medical practitioner outlined in the consultations that they had heard of other health workers who discouraged gay males under the age of 18 from disclosing their sexual activity if it involved anal sex because the age of consent laws would require the medical practitioners to treat their behaviour as a criminal matter. The consequence of the law is that young gay men were less likely to be able to then get proper sexual health advice.

A number of submissions and meeting participants observed that the unequal age of consent law for sodomy prevented access to appropriate and accurate information and support on mental health and sexual health for young gay men between 16 and 18 years of age.

These observations were of significant importance in consideration of the higher risk rate for young gay men to contract HIV in Queensland. In 2011, Queensland reported the highest rise nationally in new notifications of HIV in this target group.²¹¹

12.4 HIV and Australian law

A number of submissions raised the issue of HIV and the law in Australia, specifically the criminalisation of HIV transmission and in some cases disclosure of HIV status. For example, the Victorian Equal Opportunity and Human Rights Commission submitted that it supported:

The Victorian State Government's commitment to end criminalization of the intentional transmission of HIV as a stand-alone offence that is directed only at this infection.

We recognize that HIV and the stigma attached to it is not just an issue for the LGBTI community. However, it is a welcome step towards addressing the stigma associated with HIV, which has had a particular impact in the gay community.²¹²

The nature of the HIV epidemic in Australia means it is a health issue disproportionately impacting gay men.²¹³ Of all HIV diagnoses made between 2008 and 2012, 67% of transmissions occurred among men who have sex with men.²¹⁴ By 31 December 2012, men comprised 90% of the estimated 23,037 people with HIV in Australia.²¹⁵

Australia's HIV response is based on a public health framework informed by human rights protections. HIV is a notifiable disease in all states and territories, providing a mechanism for doctors to mandatorily report de-identified HIV diagnoses.²¹⁶

In 2013 UNAIDS published a guidance note based on the 2012 *Recommendations of the Global Commission on HIV and the Law on criminalization of HIV non-disclosure, exposure and transmission*:

The overly broad application of criminal law to HIV non-disclosure, exposure and transmission raises serious human rights and public health concerns. Because of these concerns, the Joint United Nations Programme on HIV/AIDS (UNAIDS) urges States to (i) concentrate their efforts on expanding the use of proven and successful evidence-informed and rights-based public health approaches to HIV prevention, treatment and care, and (ii) limit any application of criminal law to truly blameworthy cases where it is needed to achieve justice. States should strengthen HIV programmes that enable people to know how to protect themselves from HIV and to avoid transmitting it, and they should help people access the services and commodities they need for HIV prevention, treatment, care and support.²¹⁷

Most Australian jurisdictions have a dual system of legal regulation of HIV transmission: criminal law and public health law.²¹⁸ According to the Australian Federation of AIDS Organisations (AFAO):

These laws are most commonly applied in relation to sexual transmission or exposure. Some states have specific offences relating to disease transmission, while in others an HIV-positive person can be charged with offences such as 'grievous bodily harm'.

Although most jurisdictions have public health laws under which people may be charged for failing to disclose their HIV status and/or take precautions to prevent HIV exposure or transmission, those laws have rarely been used. For example, the NSW legislation criminalising failure to disclose HIV-positive status to a sexual partner (irrespective of transmission risk, including instances where condoms are used), has been applied only twice since its enactment two decades ago.²¹⁹

Victoria continues to have a HIV-specific provision under section 19A of the *Crimes Act 1958* (Vic). This provision now sits in isolation from all other States and unnecessarily perpetuates stigmatisation of people who live with HIV.

TABLE | Criminal and public health laws with reference to HIV transmission and/or exposure by state/territory²²⁰

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Criminal Law	<i>Crimes Act 1900</i>	<i>Crimes Act 1900</i>	<i>Northern Territory Criminal Code Act</i>	<i>Criminal Code 1899</i>	<i>Criminal Law Consolidation Act 1935</i>	<i>Criminal Code Act 1924</i>	<i>Crimes Act 1958</i>	<i>Criminal Code</i>
	Transmission offences No exposure offences No HIV-specific offences	Transmission or attempted transmission No exposure offences No HIV-specific offences	Transmission and exposure offences No HIV-specific offences	Transmission offences No exposure offences No HIV-specific offences	Transmission and exposure offences No HIV-specific offences	Transmission offences No exposure offences No HIV-specific offences	Exposure and transmission offences HIV-specific offences (serious bodily disease)*	Transmission offences No exposure offences No HIV-specific offences
Public Health Law	<i>Public Health Act 1997</i>	<i>Public Health Act 1991</i>	N/A	<i>Public Health Act 2005</i>	<i>Public and Environmental Health Act 1987</i>	<i>Public Health Act 1997</i>	<i>Health Act 1958</i>	<i>Health Act 1911</i>
	No specific sections regarding responsibilities of HIV-positive individuals with respect to sexual intercourse or disclosure	Disclosure required before sexual intercourse	No laws specific to HIV disclosure or transmission	Safe sex required Disclosure not specifically required but is a defence to transmission Additional offence of exposure to infection as well as actual infection	Safe sex required No specific disclosure requirement	No provision specific to HIV exposure	Safe sex required Disclosure not specifically required but is a defence to any infection transmitted	No specific sections regarding responsibilities of HIV-positive individuals with respect to sexual intercourse or disclosure

* Under review.

12.5 Correctional services

The safety and protection of LGBTI people in prisons was raised a number of times during the consultation. The capacity for correctional services to meet the needs of LGBTI people is an evolving area of public policy, particularly related to providing safe environments for transgender people.

The biological approach to gender classification places prisoners in a facility based upon the prisoner's genitalia. Under this policy, transgender prisoners are placed with inmates that they may consider to be of the opposite sex.

The Australian Institute of Criminology observed that:

'It is clear that a transgender inmate, whether [male to female] MtF or [female to male] FtM, who is placed with biologically male prisoners is likely to be at a much greater risk of harm, particularly sexual assault, than those placed within a female institution'.²²¹

In particular the policy places male-to-female transgender prisoners at a significant risk of violence and sexual assault from other male inmates on the basis of their feminine characteristics.²²² Numerous reports reveal that transgender women are raped and abused by male inmates in prisons in Australia.²²³

It has been widely recognised that transgender people are more likely than the general population to experience assault and self-harm, and that these vulnerabilities are magnified when transgender persons are incarcerated.²²⁴

Policies that inform the treatment and protection of LGBTI people in correctional facilities vary across states and territories in Australia. According to the Association for the Prevention of Torture:

LGBTI persons in detention – or persons perceived as belonging to this group – are in a situation of particular vulnerability, at risk of human rights violations and abuses – including by fellow detainees – throughout the entire criminal justice system.²²⁵

There are no guidelines for lesbian, gay or other same-sex attracted prisoners in Australia. While guidelines for transgender prisoners do exist they are inconsistent and often left to the discretion of managers. Approaches to gender classification range from the traditional approach of surgical intervention, to the 'social-based' approach, which emphasises how a person self-identifies.²²⁶

TABLE J Policy on the issue of trans and gender diverse prisoners by state/territory

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Policy on placement	▼	▼	✘	▼ ✘*	▼ ✘	▼**	▼	▼ ✘***
Access to hormone treatment or gender affirmation surgery while in prison	▼ ✘ The General Manager, Custodial Operations will have the discretion to refuse treatment '[w] here doubts exist regarding any risk to the security and good management of the [Alexander Maconochie Centre]'. ²²⁷	▼ Hormonal therapy is generally provided to the applicant and funded by the state following clinical review. ²²⁸ Applications to commence hormonal treatment or gender reassignment surgery while imprisoned may be made at any time. ²²⁹	✘ The Northern Territory Department of Correctional Services advised that the development of operational procedures on the management of transgender prisoners was to be undertaken.	▼ ✘ A request for hormone treatment or gender reassignment surgery will only be considered if the treatment or surgery commenced prior to incarceration'. ²³⁰ The Assistant Director-General and Senior Director have the discretion to refuse. Blanket refusal of treatment for transgender prisoners who have not commenced treatment prior to incarceration.	▼ Prisoners who wish to continue hormonal treatment or begin to undergo hormonal treatment are referred to SA Health, whose responsibility it is to consider these requests.	▼ Hormone treatment programs commenced prior to incarceration may continue 'if this is recommended by Correctional Health Services'. Prisoners are not permitted to commence hormone treatment or undergo reassignment surgery while in custody. ²³¹	▼ 'Issues relating to medical treatment of remand and sentenced prisoners will be referred to the treating medical officer at the prison.' ²³²	✘

▼ YES ✘ NO

Notes:
 * In effect the Queensland procedure provides for the initial placement of transgender prisoners to be based on biological features, with provision for them to be moved to a facility that accords with their gender self-identification where the Assistant Director-General and Senior Director consider the transfer appropriate.
 ** Tasmania Prison Services advised that a full review of Standing Orders was underway.
 *** The Western Australian policy says very little about female to male transgender prisoners, leaving their placement entirely at the discretion of policy administrators.

CHAPTER 13

Anti-discrimination law

A general consensus that emerged from the consultation process was that state and territory law provided incomplete and inconsistent protection from discrimination on the grounds of SOGII status.²³³ This was affirmed in the results of the online survey in which very few participants reported believing that their rights were effectively protected under state or territory law.

QUESTION 10

How well are the rights of LGBTI people protected by the state or territory law in which you reside?

Answered: 1,419
Skipped: 99

Effectively protected

7%

Adequately protected

37%

Poorly protected

56%

All states and territories have laws that prohibit discrimination on the basis of sexual orientation, although these laws contain a wide range of terminology to describe the prohibited grounds of discrimination.²³⁴ Some definitions limit the protection to specific identities within various sexual orientations while others use outdated terminology.

As Tables K and L demonstrate, most state and territory laws include separate provisions prohibiting discrimination on the basis of gender identity, although the terminology varies greatly across jurisdictions.²³⁵ At times this terminology conflates gender identity, biological sex and sexual orientation. Finally, only Tasmania offer anti-discrimination protection on the grounds of intersex status.

The range of terminology for SOGII statuses articulated in state and territory anti-discrimination law can be attributed to the various points in time at which the legislation was developed. For example, in NSW, the *Anti-Discrimination Act 1977* (NSW) makes it unlawful to harass or discriminate against a person on the basis of their homosexuality.²³⁶ In comparison, amendments to the Tasmanian *Anti-Discrimination Act 1998* (Tas) in 2013 extended protection on the basis of intersex status. Protections on the basis of sexual orientation were in place from the passage of the Act in 1988.

Following amendments to the SDA in 2013 States, states were given until July 2014 to ensure that all state laws were amended to be consistent with the new federal provisions. That process requires states to conduct an audit of state laws that include language or provisions that discriminate against a person on the basis of SOGII status. Many of these changes reflect simple wording changes from 'he' or 'she' to 'they'. Others relate to disputed areas of public policy, such as adoption.

In July 2014, the Commonwealth Attorney-General of Australia provided a 12 month extension to the exemption of state and territory anti-discrimination laws from the operation of the SDA. The extension is due to expire on 31 July 2015.

**TABLE
K**

Range of terminology in grounds covered for SOGII status in anti-discrimination law

Definition	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Sexual orientation	▼	×	×	×	×	×	▼	▼	▼
Gender identity	▼	▼	×	×	▼	×	▼	▼	×
Intersex status	▼	×	×	×	×	×	▼	×	×
Sexuality		▼	×	▼	▼	▼	×	×	×
Heterosexuality		▼	×	▼	▼	▼	▼	▼	▼
Homosexuality		▼	▼	▼	▼	▼	▼	▼	▼
Homosexual aspects of bisexuality		▼	▼	▼	▼	▼	▼	▼	▼
Bisexuality		▼	×	▼	▼	▼	▼	▼	▼
Lesbianism		▼	×	×	×	×	×	▼	▼
Transexuality		×	×	▼	×	▼	×	×	×
Homosexual		▼	▼	▼	▼	▼	▼	▼	▼

Table K – Range of terminology in grounds covered for SOGII status in anti-discrimination law (continued)

Definition	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Male homosexual		▼	▼	▼	▼	▼	▼	▼	▼
Female homosexual		▼	▼	▼	▼	▼	▼	▼	▼
Chosen gender			✘	✘	▼				
Gender history			✘	✘	▼				
Gender reassigned person			✘	✘	▼				
Transgender		▼	▼	✘	▼	▼	▼	▼	▼
Recognised transgender person		▼	▼	✘	▼				

▼ YES ✘ NO

TABLE
L

Defined sexual orientation grounds in state and territory anti-discrimination legislation

Act	Ground	Definition of ground
<i>Discrimination Act 1991 (ACT)</i>	'sexuality'	'sexuality means heterosexuality, homosexuality (including lesbianism) or bisexuality'
<i>Anti-Discrimination Act 1977 (NSW)</i>	'homosexuality'	'homosexual means male or female homosexual'
<i>Anti-Discrimination Act 1992 (NT)</i>	'sexuality'	'sexuality means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality'
<i>Anti-Discrimination Act 1991 (Qld)</i>	'sexuality'	'sexuality means heterosexuality, homosexuality or bisexuality'
<i>Equal Opportunity Act 1984 (SA)</i>	'sexuality'	'sexuality means heterosexuality, homosexuality or bisexuality'
<i>Anti-Discrimination Act 1998 (Tas)</i>	'sexual orientation'	'sexual orientation includes – (a) heterosexuality; and (b) homosexuality; and (c) bisexuality'
<i>Equal Opportunity Act 2010 (Vic)</i>	'sexual orientation'	'sexual orientation means homosexuality (including lesbianism), bisexuality or heterosexuality'
<i>Equal Opportunity Act 1984 (WA)</i>	'sexual orientation'	'sexual orientation, in relation to a person, means heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person'

**TABLE
M**

Defined gender identity grounds in state and territory anti-discrimination legislation

Act	Ground	Definition of ground
<i>Discrimination Act 1991 (ACT)</i>	'gender identity'	'gender identity means – (a) the identification on a genuine basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such) – (i) by assuming characteristics of the other sex, whether by way of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification on a genuine basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such) – (i) by assuming characteristics of that sex, whether by way of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of that sex'
<i>Anti-Discrimination Act 1977 (NSW)</i>	'transgender' 'recognised transgender person'	'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' 'recognised transgender person means a person the record of whose sex is altered under Part 5A of the <i>Births, Deaths and Marriages Registration Act 1995</i> or under the corresponding provisions of a law of another Australian jurisdiction'
<i>Anti-Discrimination Act 1992 (NT)</i>	See 'sexuality' in Table K	'sexuality means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality'
<i>Anti-Discrimination Act 1991 (Qld)</i>	'gender identity'	'gender identity, in relation to a person, means that the person – (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or (b) is of indeterminate sex and seeks to live as a member of a particular sex'

Table M – Defined gender identity grounds in state and territory anti-discrimination legislation
(continued)

Act	Ground	Definition of ground
<i>Equal Opportunity Act 1984 (SA)</i>	‘chosen gender’	‘For the purposes of this Act, a person is a person of a chosen gender if – (a) the person identifies on a genuine basis as a member of the opposite sex by assuming characteristics of the opposite sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the opposite sex; or (b) the person, being of indeterminate sex, identifies on a genuine basis as a member of a particular sex by assuming characteristics of the particular sex (whether by means of medical intervention, style of dressing or otherwise) or by living, or seeking to live, as a member of the particular sex’
<i>Anti-Discrimination Act 1998 (Tas)</i>	‘gender identity’	‘gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual’s designated sex at birth, and includes transsexualism and transgenderism’
<i>Equal Opportunity Act 2010 (Vic)</i>	‘gender identity’	‘gender identity means – (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such) – (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such) – (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of that sex’
<i>Equal Opportunity Act 1984 (WA)</i>	‘gender history’ ‘gender reassigned person’	‘a person has a gender history if the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex’ ‘opposite sex means a sex of which the person was not a member at birth’ ‘gender reassigned person means a person who has been issued with a recognition certificate under the <i>Gender Reassignment Act 2000</i> or a certificate which is an equivalent certificate for the purposes of that Act’

**TABLE
N**

Defined intersex status grounds in state and territory anti-discrimination legislation

Act	Ground	Definition of ground
<i>Anti-Discrimination Act 1998 (Tas)</i>	'intersex'	'intersex' means the status of having physical, hormonal or genetic features that are – (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.

Other issues

The consultation received a number of submissions about other issues that impact on SOGII rights in Australia. The consultation received suggestions on the following issues which are discussed further below:

- Conversion therapy
- Domestic/family violence
- Processing of sexual orientation-based asylum claims
- Guardianship, power of attorney and superannuation issues for LGBTI people

14.1 Conversion therapy

The practice of sexual orientation conversion therapies was raised by a number of participants. Conversion therapy involves same-sex attracted people getting support to effectively suppress their sexual orientation and act as though they are heterosexual. For example the NSW Gay and Lesbian Rights Lobby submitted:

There is little evidence to suggest that conversion therapy is effective. In fact, individuals who have undergone conversion therapy are likely to suffer negative mental health effect[s]. Practitioners are rarely accredited therapists or counsellors, as such, this is a dangerous and unregulated practice with detrimental effects on often vulnerable and troubled young Australians.²³⁷

International studies reveal that conversion therapies are often practised in a manner inconsistent with professional ethics codes. In particular violations are identified on the ground of informed consent, confidentiality, coercion and provision of referrals.²³⁸

In its submission freedom2b highlighted:

Conversion programs are often aimed at vulnerable LGBTI young people coming to terms with their sexuality for the first time. Many are minors ... The programs are totally ineffective. They do not result in changed sexual orientation. This is the personal testimony of many freedom2b members. But it is also the testimony of a significant number of former leaders of organisations which have promoted such therapies.

We are encouraged about the motion passed in the NSW parliament in 2013. However we believe there is a further role for governments in banning, through specific legislation, the use of these therapies for minors. This would be a welcome development in the effort to advance human rights of LGBTI youth in Australia.²³⁹

As conversion therapy operates outside of the regulated medical system it is not clear how prevalent the service is, or how many people seek it out.

14.2 Domestic/family violence

The issues of domestic and family violence for LGBTI people is another issue that lacks research and visibility. The rates of violence and inclusion of LGBTI needs in support services was raised a number of times in the consultation.

[The Government] must legislate and resource support services (refuges, perpetrator rehabilitation, etc) for LGBTI people experiencing domestic and family violence. Domestic and family violence affects the same proportion of LGBTI people as it does the non-LGBTI population – 1 in 3 people experience it.

Online survey participant

According to the NSW LGBTIQ Domestic Violence Interagency:

The police, domestic violence services, LGBTI organisations and other services all report that they are working with individuals who have experienced or are experiencing same-sex domestic violence. To date, there is limited Australian research that records the level of domestic violence in same-sex relationships. However, a number of overseas studies suggest that the general patterns and levels of domestic violence in same-sex relationships are about the same as in heterosexual relationships. These studies also show that once the violence starts it is likely to get worse.²⁴⁰

Participants raised the issues of gaps in mainstream service provision as well as research into the nature and frequency of domestic and family violence in LGBTI relationships. The National Association of Community Legal Centres observed an increase in the frequency of such presentations in community legal centres:

Community Legal Centres are increasingly providing services to clients experiencing family violence in [diverse] relationships, including lesbians, gay men and bisexual people in same-sex relationships. As well as bisexual, trans and intersex people in either same-gender or opposite gender relationships.

There is a need for a holistic approach and response to reducing and eliminating family violence in LGBTIQ communities. The National Association of Community Legal Centres outlines some of the key challenges in reducing and eliminating family violence including: system fragmentation and the need for an integrated and consistent approach; inadequate funding; gaps between legislative and policy and intent and implementation in practise; and inadequate monitoring and reporting. It is important to recognise that policy decisions in related areas such as housing, health and welfare, have flow on effects for family violence and the need for legal assistance.²⁴¹

The reason for the lack of visibility in same-sex relationships is not clear, but is likely a consequence of the traditional gendered nature of family and domestic violence in heterosexual relationships that is not considered in the context of same-sex relationships, that is, that there can be domestic violence in a relationship between two women or two men.

14.3 Processing of sexual orientation-based asylum claims

The consultation maintained a focus on domestic issues, however seeking asylum on the basis of sexual orientation was raised as an area of concern.

Australia is one of an increasing number of countries around the world that recognise sexual orientation and gender identity as valid grounds to claim asylum. While this is promising, a lack of consistency in decision making combined with a lack of resources to assist in understanding the unique identities and experiences of sexual and gender minorities has led to numerous claims for asylum being improperly decided or litigated.²⁴²

Research on a large data set of over 600 Australian cases have revealed overturn rates of approximately 30% for sexual orientation based claims in comparison to a rate of approximately 15% on other claims.²⁴³ Based on this evidence, it is clear departmental decision making concerning sexuality based claims requires improvement. The current inconsistency in departmental level decisions on sexual orientation and gender identity present an unnecessary cost burden, and further inhibits Australia from meeting its obligations under international treaties it has ratified.²⁴⁴

For example the Refugee Council of Australia submitted:

...Analysis of the limited information available – namely, decision records published by the refugee review tribunal and Australian courts – suggest that there are significant shortcomings in Australia’s processes for assessing sexual orientation-based claims. Key issues of concern include significant inconsistencies in decision making; use of inappropriate methods to assess credibility (such as relying on stereo types, failing to take into account differences in cultural norms and asking invasive questions about the person’s sexual history); use of poor quality or unreliable country of origin information; and lack of understanding of the diversity of human sexuality.²⁴⁵

Properly assessing claims for asylum on the basis of sexual orientation is particularly complex because it is not superficial or can necessarily be proven by sexual activity. However, for the integrity of legitimate LGB asylum seeker applications, rigorous and objective assessment is necessary.

14.4 Guardianship, power of attorney and superannuation issues for LGBTI people

The LGBTI National Health Alliance submitted specific information on the way in which some guardianship acts cause potential problems for LGBTI people. Concerns around guardianship focus on family members deliberately displacing the legitimate spouse or nominated guardian from making decisions when the person is no longer able to communicate or consent. This issue is exacerbated as, in the absence of a marriage certificate, same-sex couples where the spouse is the nominated guardian cannot prove their relationship.

The LGBTI National Health Alliance observed:

In NSW and Tasmania if there is [a] guardian appointed then there is a hierarchy of people that can be approached to make decisions on a person’s behalf. This commences with the ‘spouse’ and concludes with a ‘person who has care of the person’ and ‘close friend or relative of the person’.

This is problematic for a number of reasons for LGBTI people, especially if the person has dementia, is unconscious or is unable to clearly state who they want to make decisions on their behalf. In addition their partner may also be fearful of identifying themselves if the family is unaware of, or disapproves of, their relationship. For example in recent interviews conducted by Val’s Café a key issue for LGBTI people with dementia is that they are having their rights violated by family members – who take the opportunity to reassert control over sexuality or gender.²⁴⁶

Key international treaties and SOGI rights

Below is an outline of how international treaties have been interpreted to apply to people of all sexual orientations and sex and/or gender identities. Australia has committed to uphold these standards.

International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (ICCPR) enshrines the rights of all people to non-discrimination and equality before the law. Article 2(1) of the ICCPR sets out the principle of non-discrimination:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR sets out the principle of equality before the law:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Other relevant rights set out in the ICCPR include the right to privacy (article 17) and the right to marry and found a family (article 23).

The ICCPR does not specifically refer to sexual orientation. However, the United Nations Human Rights Committee has found that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.

In *Toonen v Australia*, the Human Rights Committee held that the reference to 'sex' (ICCPR article 2) and the right to privacy (ICCPR article 17) include sexual orientation.¹ The Committee has also held in *Young v Australia* that distinctions made between same-sex couples and opposite sex couples in relation to veterans entitlements were discriminatory, in breach of article 26 of the ICCPR.²

Within previous consultation work at the Commission, the Law Council of Australia noted it is likely that the principles of the ICCPR would extend to gender identity under its 'other status' grounds.³ The Human Rights Committee has, for instance, placed emphasis on the need to protect trans communities from violence, torture and harassment⁴ and to recognise the right of trans people to change their gender by permitting the issuing of new birth certificates.⁵

Other international treaties

United Nations Committees have recognised the right to non-discrimination on the basis of sexual orientation under the following international treaties:

- *International Covenant on Economic, Social and Cultural Rights*⁶
- *Convention on the Rights of the Child*⁷
- *Convention on the Elimination of All Forms of Discrimination against Women*.⁸

The Committee on Economic, Social and Cultural Rights has specifically stated that gender identity is recognised as a prohibited ground of discrimination.⁹

The Committee on the Rights of the Child has commented on the rights of young people who are 'transsexual' and recommended that the United Kingdom government provide adequate information and support to homosexual and transsexual young people.¹⁰

The Committee is concerned that homosexual and transsexual young people do not have access to the appropriate information, support, and necessary protection to enable them to live their sexual orientation.¹¹

The Committee on the Elimination of Discrimination against Women has recognised that discrimination experienced by women is connected to discrimination on the basis of sexual orientation and gender identity.

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health status, age, class, caste, and sexual orientation and gender identity.¹²

Australia is also a signatory to the *International Labour Organization Convention No. 111* (ILO 111). This international agreement prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin. Parties to this convention can include additional grounds for domestic purposes, and in 1989 Australia added several grounds including 'sexual preference'.¹³

UN statements on sexual orientation and gender identity

Support for the view that international human rights standards apply to people of all sexual orientations and gender identities is found in several United Nations statements.

On 22 March 2011, the UN Human Rights Council issued a Joint Statement on Sexual Orientation and Gender Identity that was supported by 85 countries.¹⁴ This builds on earlier statements in 2006 (supported by 54 countries) and in 2007 (supported by 66 countries).¹⁵ These statements demonstrate the growing international support for and recognition of the rights of all people regardless of their sexual orientation or gender identity.

The Yogyakarta Principles

The *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* were developed in 2006 by a group of international legal experts and adopted in March 2007 in Yogyakarta, Indonesia.¹⁶

The Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the viewpoint of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.

In particular, Yogyakarta Principle 3 outlines the right to recognition before the law for all people regardless of gender identity:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

In addition, Yogyakarta Principle 3 details actions that countries such as Australia should undertake to ensure they are not in breach of their human rights obligations, including:

- embodying the principles of equality and non-discrimination on the basis of sexual orientation and gender identity into national constitutions or other appropriate legislation
- adopting appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity.¹⁷

The Preamble recognises the historical human rights violations faced by people who are lesbian, gay, bisexual, trans or intersex. However, the Principles themselves do not use these terms. Instead, the Yogyakarta Principles are phrased in neutral language that aims to recognise the rights of all peoples.¹⁸

- 1 *Toonen v Australia*, above n7.
- 2 Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003); Nowak, Manfred. *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), 623.
- 3 Australian Human Rights Commission (2011), above n10; see also O'Flaherty, Michael and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) *Human Rights Law Review* 207.
- 4 See, for example, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Russian Federation*, 24 November 2009, UN Doc CCPR/C/RUS/CO/6; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Colombia*, 4 August 2010, UN Doc CCPR/C/CO/6.
- 5 See, for example, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Ireland*, 30 July 2008, UN Doc CCPR/C/IRL/CO/3.
- 6 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 20 – Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009).
- 7 See, for example, Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, UN Doc CRC/GC.2003/4.
- 8 See, for example, Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan*, 5 February 1999, UN Doc A/54/38.
- 9 Australian Human Rights Commission (2011), above n10.
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- 11 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child regarding the United Kingdom*, 9 October 2002, UN Doc CRC/C/15/Add.188, p 11.
- 12 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, UN Doc CEDAW/C/2010/47/GC.2.
- 13 *Australian Human Rights Commission Act 1986* (Cth), Schedule 1.
- 14 International Service for Human Rights, *Ground-breaking statement on sexual orientation and gender identity by record number of 85 States* (24 March 2011). At: http://www.ishr.ch/council/1033-ground-breaking-statement-on-sexual-orientation-and-gender-identity-by-record-number-of-85-states?utm_source=ISHR+Publications+and+News&utm_campaign=279226daf8-RSS_Email_Campaign_Council&utm_medium=email
- 15 See statements at International Lesbian, Gay, Bisexual Trans and Intersex Association, *UN Gen. Assembly Statement Affirms Rights for all* (19 December 2008). At <http://ilga.org/ilga/en/article/1211> (viewed at 6 April 2011) and United Nations Department of Public Information, 'General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social and Humanitarian Issues', Media Release (18 December 2008). At: <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>.
- 16 Amnesty International, *About LGBTIT Rights* (2014). At: <http://www.amnestyusa.org/our-work/issues/lgbt-rights/about-lgbt-human-rights>
- 17 Amnesty International (2014), above n35.
- 18 Quinn (2010), above n2.

Meeting schedule

The Human Rights Commissioner thanks the following people and organisations who met with him as part of this consultation.

Broome: 17–24 August 2014

Black Rainbow Living Well

Adelaide: 1–3 September 2014

Safe Schools Coalition SA, SHine
South Australian Equal Opportunity Commission

Darwin and Alice Springs: 22–25 September 2014

Damien Ryan, Mayor of Alice Springs
Northern Territory Anti-Discrimination Commission
Sisters and Brothers NT
Alice Springs Women's Shelter

Canberra: 1 October 2014*

ACT Human Rights Commission – public event

Adelaide: 3–6 October 2014

ANZPATH Conference organisers & delegates

Perth and Kalgoorlie: 13–15 October 2014

Centrecare WA Kalgoorlie
Equal Opportunity Commission Western Australia
Kalgoorlie Accommodation Support (Anglicare WA)
Pride WA
St Andrews Anglican Church
Living Proud (formerly the Gay and Lesbian Community Services of WA)

Sydney: 21 October 2014*

National LGBTI Health Alliance

Cairns, Townsville and Charters Towers:

27–29 October 2014

Cairns Regional Council – public event
Charters Towers Regional Council – public event
Queensland AIDS Council (QuAC)
Townsville Correctional Centre
TransHealth Australia and Cairns Sexual Health Service
Stand Up With Pride
Jude Comfort, Curtin University

Brisbane and Roma: 10–13 November 2014

Allens Linklaters Brisbane – public event
Brisbane Women's Correctional Centre
Queensland AIDS Council (formerly Queensland Healthy Communities)
PFLAG Brisbane
LGBTI Legal Service
Open Doors Youth Service
Headspace Clinical Managers

Sydney 21 November 2014

National LGBTI Health Alliance

Hobart: 23–24 November 2014

Amnesty International Tasmania
Working It Out
National Disability Services – public event

Melbourne, Lorne and Shepparton: 25–27 November 2014

Roundtable on sexual orientation

- Prof. Dennis Altman, La Trobe University
- Shaun Staunton, Beyondblue
- Dr. Paula Gerber, Castan Centre for HR Law
- Dr. Douglas Pretsell, Kaleidoscope Australia
- Roz Ward, Safe Schools Coalition
- Sally Goldner, Transgender Victoria
- Jason Rostant, CoHealth
- Julian Alban, VEOHRC
- Anna Brown, Human Rights Law Centre/VGLRL
- Sunil Patel, GLHV
- Amao Leota Lu

Roundtable on gender identity

- Shaun Staunton, Beyondblue
- Michelle Telfer, Royal Children's Hospital
- Dr Douglas Pretsell, Kaleidoscope Australia
- Roz Ward, Safe Schools Coalition
- Sally Goldner, Transgender Victoria
- Jason Rostant, CoHealth
- Julian Alban, VEOHRC
- Kerin Leonard, VEOHRC
- Anna Brown, Human Rights Law Centre/VGLRL
- Sunil Patel, GLHV
- Amao Leota Lu

Uniting Care Kildonan

Greater Shepparton Council

Victorian Equal Opportunity and Human Rights Commission
– public event

Sydney: 4 December 2014

Crimtrack

Australian Marriage Equality

* Since commencing on 18 February 2014, the Human Rights Commissioner has met extensively with organisations and individuals in Sydney, Canberra and Melbourne. Their views have also been considered in the drafting of this report. Some key organisations include: A Gender Agenda, ACON, The Bingham Cup, Organisation Intersex International Australia and The Pinnacle Foundation.

Public submission schedule

The Human Rights Commissioner received submissions from the following people and organisations.

1. Darwin Community Legal Service
2. Twenty10
3. Rainbow Territory
4. Alastair Lawrie
5. Banyule City Council
6. Diversity Council Australia
7. Organisation Intersex International Australia
8. The Refugee Council of Australia
9. Freedom2b
10. LGBTIQ Network of the National Association of Community Legal Centres
11. South Australian Equal Opportunity Commission
12. ACON
13. Scarlet Alliance, Australian Sex Workers Association
14. Penelope Rumble
15. Black Rainbow Living Well Foundation
16. Transgender Australia
17. NSW Gay and Lesbian Rights Lobby
18. Seahorse Victoria
19. Marrickville Legal Centre
20. The Royal Australian College of Physicians
21. GRAI, GLBTI Rights in Ageing
22. Melody Moore
23. Victorian Equal Opportunity Commission
24. Victorian Gay & Lesbian Rights Lobby
25. Human Rights Law Centre
26. Dr Rosemary A Jones
27. National LGBTI Health Alliance
28. Indigilez
29. Pride and Diversity
30. The National Safer Schools Coalition

We also received ten confidential submissions and five confidential case studies.

Endnotes

- 1 Australian Human Rights Commission, *Sex Files: the legal recognition: Concluding paper of the sex and gender consultation* (2009). At: <https://www.humanrights.gov.au/sex-files-legal-recognition-concluding-paper-sex-and-gender-2009> (viewed 22 May 2015).
- 2 S Quinn, *An Activists Guide to the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (November 2010), The Principles in Action – hosted by ACR International. At: http://www.ypinaction.org/files/02/85/Activists_Guide_English_nov_14_2010.pdf (viewed 23 May 2015).
- 3 Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Snap Shot Report Background Paper* (2014). At: <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights> (viewed 22 May 2015).
- 4 FL Seidensticker, *National Human Rights Institutions – models, programs, challenges, solutions. A study for the Ministry of Foreign Affairs of the People's Republic of Vietnam* (9 July 2012), United Nations Development Program. At: http://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/Building-a-National-Human-Rights-Institution-A-study-for-the-Ministry-of-Foreign-Affairs-of-the-Peoples-Republic-of-Viet-Nam.html (viewed 22 May 2015).
- 5 Australian Human Rights Commission, *Sexual Orientation, Gender Identity and Intersex Snap Shot Report Background Paper* (2014). At: <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights> (viewed 22 May 2015).
- 6 T Wilson, 'Beyond Rights to Exercising Freedoms' (speech delivered for the National Press Club Speech Series, The National Press Club, Canberra 18 February 2015). At: <https://www.humanrights.gov.au/news/speeches/beyond-human-rights-exercising-freedoms> (viewed 22 May 2015).
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- 8 The research was not designed as representative social survey with statistically significant conclusions about the whole population of LGBTI people in Australia.
- 9 A copy of the survey is available at: <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights>.
- 10 Information to identify people who completed the online survey was collected only to ensure data validity and reliability.
- 11 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015). At: <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/rights-responsibilities-2014> (viewed 22 May 2015).
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- 13 A Sanson, et al, *Racism and Prejudice – a Position Paper for the Australian Psychological Association* (September 1997), The Australian Psychological Association. At: <https://www.psychology.org.au/publications/statements/racism/> (viewed 22 May 2015).
- 14 Protections also exist in state and territory anti-discrimination and human rights laws, although these protections are differently framed in different jurisdictions.
- 15 See for example, W Leonard, M Pitts, A Mitchell, A Lyons, A Smith, S Patel, M Couch and A Barrett, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Monograph Series Number 86, (The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012).
- 16 Australian Human Rights Commission, *Violence, Harassment and Bullying* (14 December 2012) Australian Human Rights Commission. At: <https://www.humanrights.gov.au/what-bullying-violence-harassment-and-bullying-fact-sheet> (viewed 22 May 2015).
- 17 ACON, public submission 11 to the Australian Human Rights Commission, *National SOGII Consultation*, 6 February 2015. At: <https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/sogii-rights> (viewed 22 May 2015).
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- 20 Z Hyde, M Doherty, PJM Tilley, KA McCaul, R Rooney, J Jancey, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014).
- 21 See for example, W Leonard, M Pitts, A Mitchell, A Lyons, A Smith, S Patel, M Couch and A Barrett, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Monograph Series Number 86, (The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012); Z Hyde, M Doherty, PJM Tilley, KA McCaul, R Rooney, J Jancey, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014).
- 22 See for example, A Constable, N de Castro, R Knapman and M Baulch, *One Size Does Not Fit All: Executive Gap Analysis of NSW domestic violence support services in relation to LGBTI communities' needs* (ACON, 2011). At: <http://static1.1.sqspcdn.com/static/f/471667/11593332/1302072161743/Gap+Analysis.pdf?token=ZAWoPyyrfZ3k0NZoE%2FTmmFFicq%3D> (viewed 22 May 2015); J Irwin, *The Pink Ceiling is Too Low*, Australian Centre for Lesbian and Gay Research (University of Sydney, 2003). At: <http://www.glhv.org.au/report/pink-ceiling-too-low-work-place-experiences-lesbians-gay-men-and-transgender-people> (viewed 22 May 2015); L Hillier, T Jones, M Monagle et al, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (Australian Research Centre in Sex, Health and Society, La Trobe University, 2010); A La Nauze, 'Sexual orientation-based wage gaps in Australia: The potential role of discrimination and personality' (2015) 26:1 *The Economic and Labour*.
- 23 MV Badgett, S Nezhad, K Waaldijk, and Y van der Meulen Rodgers, *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economics* (The Williams Institute, UCLA School of Law, 2014). At: <http://williamsinstitute.law.ucla.edu/research/international/lgbt-incl-econ-devel-nov-2014/> (viewed 22 May 2015).
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- 25 See for example, W Leonard, M Pitts, A Mitchell, A Lyons, A Smith, S Patel, M Couch and A Barrett, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Monograph Series Number 86, (The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012); Z Hyde, M Doherty, PJM Tilley, KA McCaul, R Rooney, J Jancey, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014).
- 26 See for example, J Mooney-Somers, R M Deacon, J Richters, K Price, S León de la Barra, K Schneider, G Prestage, S Clayton, N Parkhill, *Women in contact with the gay and lesbian community in Sydney: Report of the Sydney Women and Sexual Health (SWASH) Survey 2006, 2008 and 2010* (ACON & VELIM, University of Sydney, 2015); W Leonard, M Pitts, A Mitchell, A Lyons, A Smith, S Patel, M Couch and A Barrett, *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Monograph Series Number 86, (The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012); Z Hyde, M Doherty, PJM Tilley, KA McCaul, R Rooney, J Jancey, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014).
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- 34 Commonwealth Department of Health and Ageing, *National Mental Health Policy (2008)*; Commonwealth Department of Health and Ageing, *Fourth National Mental Health Plan: An Agenda for Collaborative Government Action in Mental Health 2009-2014*, (2009); Commonwealth Department of the Prime Minister and Cabinet, *COAG National Action Plan on Mental Health (2006-2011)* (2006), Commonwealth Department of Health and Ageing, *National Mental Health Report 2010: Summary of 15 Years of Reform of Australia's Mental Health Services under the Mental Health Strategy 1993- 2008* (2010).
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