Submission on the Consolidation of Commonwealth anti-discrimination laws discussion paper

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I am taking this opportunity to write a submission on this matter as a person who has experienced discrimination that has not been properly dealt with. I don't have the legal jargon to be able to adequately answer each question so I will attempt to use personal examples where they are appropriate to demonstrate where things currently don't work well and my ideas on what needs to change or what outcomes need to be achieved where I don't know what needs to be changed to achieve certain outcomes.

Question 1.	**What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?**

I am not sure of the legal jargon to use here, suffice to say though that I know that I have been treated differently and in a way that has had a negative detrimental effect on me and my immediate family.

In my case, being a defence member I am subject to rules and internal policies that may or may not actually stand up to external scrutiny, one key decade old policy has in fact been cancelled as a result of my case so far. The simplest way to describe and illustrate the point that I am trying to make is with my issue of promotion, which is only one of many aspects to my claim of discriminatory treatment.

There is an internal policy that details criteria for promotion and within that policy it also states that were those criteria are not met that in exceptional circumstances people can be provisionally promoted. Having met people who have been provisionally promoted they usually have a time caveat to meet the missing requirements to become substantively promoted.

For me, when the factor that I was discriminated against was introduced, ie being diagnosed as a transsexual and beginning the course of treatment, numerous things happened. Many of these things have since been overturned or identified as being incorrect or not respecting my rights, however none of these things have been considered discriminatory. Instead of holistically looking at the situation and observing that once I was diagnosed that several events and adverse decisions were initiated that prevented me from in my case completing two courses, Defence has obstinately taken the view of that I have not met some criteria for promotion and that I can't be promoted, end of story, no discrimination from their perspective. However, as a result of me being treated in a discriminatory manner, that simply resulted in two significant things, one being issued with a termination (of my employment) notice and the other was being denied the ability to

transition at work for around six months effectively prevented me from attending key courses for that calendar year and set the conditions for a protracted dispute.

Yes therefore I did not meet some criteria for promotion, however no one considers the fact that it was discriminatory treatment that prevented me meeting some of those criteria and therefore that aspect of the differential treatment is ignored.

Whatever legal testing method that is able to be applied to assess a situation from a larger perspective must be employed. Rather than looking narrowly at the fact that a person has had a simply worded policy used to refuse something like employment/employment progression/a service etc based on the fact that some aspect of that person has caused them to not be able to meet criteria when they would have met those criteria had they not been treated adversely because of an aspect of their being.

Question 2. How should the burden of proving discrimination be allocated?

Full burden of proof must not be placed on a complainant. There has to be a significant amount of emphasis placed on the respondent proving that they have not in fact discriminated against someone.

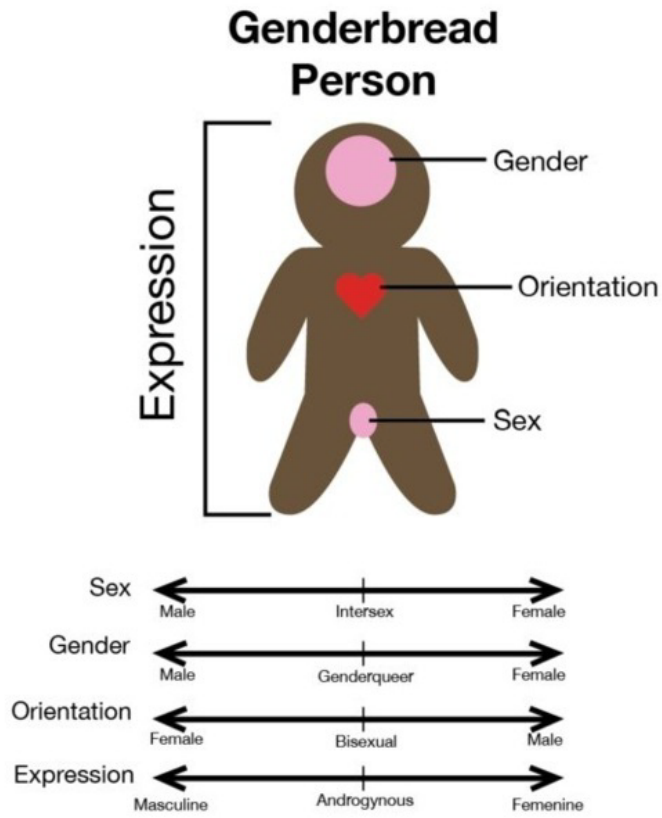
A power imbalance already exists in most cases where a complainant is one person who has been mistreated by a large powerful organisation of some sort. A complainant will usually have less resources to be able to construct a complaint and do their research so when they do they have invested a lot of effort in doing so. It isn't appropriate then for a respondent to simply dismiss the claim or belittle it, the respondent should have to clearly and articulately respond to each and every detail that a complainant has submitted to the AHRC explaining how they believe that their actions were fair and equitable rather than discriminatory.

Question 5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Yes of course. The government as an employer should be a model for current and best practice. It is not satisfactory to have laws in place that are not necessarily adhered to by the government in its employer role and putting the burden of proving that they are in breach of laws by people who are discriminated against and have the courage to say something about it.

This could be monitored by the AHRC by reporting on complaints against public sector organisations and by self reporting and auditing on policies and practices.

Question 7. How should sexual orientation and gender identity be defined?



I don't know the origins of the above graphic, I have found it in numerous places on the internet, uncredited. Despite the cartoonish nature of the diagram, I am yet to see a better summary explanation of the range of possibilities that exist within people in terms of sexuality, sex and gender.

It should be apparent that there are four aspects to a person. The majority of people if they plotted where they themselves fit on each of the four continua, would have all four at either end of the scale. The majority of society fit neatly at each end of the scale with most biological males being placed towards the left side of each continua and most biological females being placed towards the right side of each continua. This is termed heteronormativity.

All that it takes to be different is for one component to be close to the centre or at the opposite side to what is considered heteronormative. The main point here is that if heteronormative covers the majority, then that leaves us with a minority of people in society who don't necessarily have things in common. This is commonly expressed with many acronyms, the most comprehensive is LGBTIQ. This encompasses Lesbian, Gay, Bisexual, Transgender, Intersex and Queer. Even if the revised anti discrimination laws defined what each of those terms were and stated that it was prohibited to discriminate against anyone on the basis of any of those aspects some people would still manage to fall outside of the definitions.

Another approach rather than using established, yet still disputed terms might be to categorise the aspect of diversity to be protected. So sexuality diversity covers everyone's orientation towards others, sex and gender diversity covers everyone who has differences in their biological sex, their gender or the way that they express themselves. This might be a way to protect people who don't identify with a specific term but who are outside of the heteronormative boundaries.

Question 8. How should discrimination against a person based on the attribute of an associate be protected?

This will be difficult to define but the fact that it is raised in this paper is appropriate. My example of this is that I have been locked in a battle to be treated appropriately by Defence since December 2009. In that time I have suffered from an adjustment disorder with depressive and anxious symptoms dealing with a frustrating organisation, career setbacks that would have most likely resulted in promotion and higher income and my gender transition that should have been a euphoric experience has been soured by the fact that it caused the discrimination to occur. This has had a direct affect on my wife and family and whilst it is hard to quantify, it is something that is immediately apparent when explained to someone. The only problem is that nothing seems to be able to be done about it.

I suppose in determining the extent of the effects of discrimination someone will need to look at a snapshot of a person, their family and situation at the time before the event(s) in question are raised and how they differ at the time that the complaint is being made. What would have to be taken in to account also is any ongoing detriment, ie, job loss, ongoing medical expenditure etc. For our example things that were in place before I was discriminated against included the fact that my wife was not being medicated for depression, our oldest child had no reported signs of anxiety, we were significantly paid ahead on our mortgage and I had a secure and long term career. That differs significantly to the position we are in after months of discriminatory treatment.

Question 11. Should the right to equality before the law be extended to sex and/or other attributes?

As a lay person I am not going to attempt to go in to full detail and try and justify this using legal arguments. I will simply say that in researching information to help me with my case against the ADF I found numerous references to the below quote from article 2 of the ICCPR:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized 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**"

I found numerous published papers and writing by law societies and the like where the "or other status" was used to cover things that really have not been fully understood or

become socially acceptable until well after the ICCPR was drafted and signed, being in the 1950s and 1960s. Both variances in sexuality and in gender identity have gone through stages as being understood to be psychiatric disorders for a time and more recently accepted as being biological variations in humans that are not a disorder or something that can be chosen. Intersex conditions are another biological variance that is only now beginning to receive mainstream attention, despite the fact that it has always existed and fallen outside of many laws and processes.

As it stands though and as I have experienced personally, organisations like Defence are quickly dismissive of something that is not specified explicitly, despite the caveat of "or other status" being included. I have been told in no uncertain terms that Defence does not believe that the ICCPR protects transgender people. This is why I have the stance that too narrowly defining what is protected will always result in some people being excluded.

The Yogyakarta principles should be taken in to account when defining people as well. Without going in to detail, things like whether or not a transsexual person has had or not had surgery should not be a barrier to them being treated in all respects as a person of their innate or brain gender.

Rather than looking at it from the perspective of extending equality to particular attributes, the focus of this reform should be the elimination of any attribute being used as cause for a lack of equality. If we define too narrowly what *can't* be discriminated against then anything that isn't specified will be seen to be able to be used as grounds to discriminate.

Question 12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

There should be no aspect of a person whatsoever that makes any part of their existence a barrier to full and equal participation in all areas of public life.

The trap here that is easy to fall in to is that if there is too much specifying of protected activities that assumptions will be made about any activities that are not specified.

Privacy remains paramount. Personally I have found that organisations that are outside of government have been great in changing my details on their records including name, gender and titles on correspondence. Government on the other hand seems to act in a way that indicates that they believe that they are able to unnecessarily probe or not change details leaving me in a position that precludes me from being able to disclose my past in certain circumstances where it isn't even relevant.

The current status quo of the public health system as it relates to transsexual people effectively results in discriminatory treatment. Most countries in Europe, the UK, Canada and others publicly fund all aspects of the medically necessary treatment required for transsexual people, unfortunately in Australia we do not. However the Government imposes the requirement of having had surgery in order to change your legal gender. This creates a situation where part of the medically necessary treatment that is not funded

is a requirement to proper legal recognition, resulting in already marginalised people going not only without proper medical treatment but also going without legal recognition of themselves as a person. This is a separate issue, however it will need to be addressed otherwise at some point after these laws are revised. It is likely that if trans people are included in the revision as being protected by these laws, that the fact that trans people can not get their medical treatment through the public system might be proven to be against anti discrimination laws, because if they had any other condition that required treatment they would be able to access it through the medicare system.

Question 17. Should discrimination in sport be separately covered? If so, what is the best way to do so?

I do not think that it is appropriate to give sporting bodies in Australia blanket exemptions from anti discrimination laws.

The International Olympic Committee has developed guidelines that are appropriate to apply to the highest levels of competitive sport in Australia. This will ensure that whilst including athletes at a local and community level, there will be no risk of having someone who is able to compete within Australia rising to a level where they could be competing internationally but don't meet the IOC's guidelines. Whether that is a matter for legislation or whether this should be controlled through the sports commission or some other mechanism is something that needs to be determined.

Two sports that I am currently considering competing in are cycling and triathlon. I competed in triathlon events before I transitioned and at the moment am effectively unable to compete in a triathlon without invasion of my privacy or risking embarrassment.

Cycling Australia's Member Protection policy states:

"CA recognises that the exclusion of transgender or transsexual people from participation in sporting events has significant implications for their health, well-being and involvement in community life. In general CA will facilitate transgender or transsexual persons participating in our sport of the sex with which they identify..... If issues of performance advantage arise, CA will seek advice on the application of those laws in the particular circumstances. CA is aware that the International Olympic Committee (IOC) has established criteria for selection and participation in the Olympic Games. Where a transgender or transsexual person intends competing at an elite level, we will encourage them to obtain advice about the IOC"s criteria which may differ from the position taken by CA."

This to me appears to be as good a policy statement as an organised sport would be able to have. It acknowledges the aspects of health, wellbeing and social inclusion and also deals with potential issues of performance advantage if it were to arise. I am in the position of being a post operative transsexual woman who should be able to compete with other women in a local cycling event and who probably could have competed pre surgery in accordance with this policy. I have the disadvantage of course in that the State and Commonwealth Governments refuse to allow my legal gender recognition, meaning that if

challenged I would be suitably embarrassed and humiliated were I to be outed because of participation in sport.

Triathlon Australia on the other hand, have this in their Member Protection Policy:

"Triathlon Australia recognises that the exclusion of transgender or transsexual people from participation in sporting events has significant implications for their health, well-being and involvement in community life. In general Triathlon Australia will facilitate transgender or transsexual persons participating in our sport of the sex with which they identify. Triathlon Australia also recognises there is debate over whether a male to female transgender person obtains any physical advantage over other female participants. This debate is reflected in the divergent discrimination laws across the country. If issues of performance advantage arise, Triathlon Australia will seek advice on the application of those laws in the particular circumstances. Triathlon Australia is aware that the International Olympic Committee (IOC) has established criteria for selection and participation in the Olympic Games. Where a transgender or transsexual person intends competing at an elite level, we will encourage them to obtain advice about the IOC's criteria which may differ from the position taken by Triathlon Australia.

Any transgendered (male-to-female) person wishing to compete in Triathlon competition

sanctioned by TA may do so under the following conditions - 1. Compete as a male, and be eligible for prizes offered to participants in the applicable category (ie. elite or age group); or

2. Upon satisfaction of certain criteria, compete as a female, however any placing in the applicable category will not be recognised and the competitor will not be eligible for prizes. The criteria that must be satisfied in order to compete in this way are - (a) The competitor must provide written verification from a source approved by TA (eg. a certificate from a suitably qualified medical practitioner) that they have undergone a medical or surgical procedure to alter the gender characteristics of a male, so as to be identified as a female; and (b) Provide a statutory declaration from the competitor that - (i) They believe that their true gender is that of a female; and (ii) They have adopted the lifestyle of a female.

3. Upon satisfying the criteria set out in 2 above, and the extra criteria set out below, the competitor may compete as a female and have their placing in the applicable category recognised, and be eligible for prizes. The extra criteria they must satisfy to compete in this way is - (a) They must provide a medical opinion from a suitably qualified medical practitioner or exercise physiologist (the person must be independent and authoritative in this field of assessment) which verifies to TA's reasonable satisfaction that having regard to the competitive nature of the sport of triathlon, that the competitor would have no significant performance advantage in competing as a female consequent to their medical history and gender background. (b) Provide the identity and qualification of the suitably qualified medical practitioner or exercise physiologist providing the opinion to TA.

Unfortunately, because of this policy I can't with my dignity in tact go and compete in triathlons like I used to. I know that I wouldn't automatically win just because I am transsexual but I would like that feeling of inclusion to be able to do some of the triathlon

events around South East Queensland but am denied that aspect of social inclusion. My wife competes and I watch from the sidelines.

That they have an option for a transwoman to compete as a male is ridiculous, insulting and would expose a person to vilification or ridicule.

The fact that a sport is able to have a policy that demands probing and detailed information that all transsexual people have had to show to numerous people numerous times is depressing. Once legally recognised, there should be no more need for any medical proof to be provided at anything below state or national levels of competition as these details have already been provided to the relevant state BDM. As cost precludes many from being able to access surgery though, there will always unfortunately remain some requirement for non or pre operative trans people to provide medical verification of their condition.

Assuming that sport is included in law, logically at elite levels within Australia should utilise the same guidelines as the IOC. As for lower level sport, I believe that Cycling Australia's policy is a good starting point. Finally, once your gender is legally recognised there should be no need for a person to prove their gender just to participate in low levels of sport, if that person somehow progresses to higher levels then before they reach an elite level the proof can come out when adhering to the IOC's criteria.

Question 18. How should the consolidation bill prohibit discriminatory requests for information?

The overriding factor in this regard should be protection of privacy. For example no one should be able to request information regarding a previous name or sex/gender of a person unless it is for something such as a security clearance or an equivalently serious matter. In terms of employment, membership and other simple forms of information or identity gathering, privacy has to be protected.

Question 21. How should a single inherent requirements/genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

The burden of proof should be put back on to the organisation who requires such an exemption. It should be publicly disclosed why it was granted and there should be a regular review of whether the exemption remains valid.

For example, current exemptions prevent people through various forms of disability being a UAV pilot within Defence, when the reality is that there is nothing preventing a person who is paraplegic from operating a UAV.

If certain areas within an organisation have an inherent requirement and this can be demonstrated then that can be imposed. However to simply grant overarching exemptions doesn't seem to fit modern society.

Question 22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

Religious exemptions are dangerous. They give the impression to the organisations who have them that they have carte blanche to discriminate and even go further to actively discredit the validity of people in those groups.

Religious spokespeople have been stating publicly damaging opinions that are contrary to the WHO, AMA APS, UN and other bodies who speak with authority without any justification or actual basis for their claims. They would feel less able to do so if they were in a position of having real scrutiny applied and not such an easy process of being exempt from anti-discrimination laws.

Churches are not an authority in a secular society but by having such ingrained exemptions seems to give them the impression that they can do whatever they like and are above the law in that regard.

The Government has to be cognisant of the fact that religious organisations run public education, charitable and support services. There should be a caveat that regardless of whatever exemptions religious organisations might be granted are limited to applying only within their church. All services that religious organisations provide to the community must have equal access and can't be allowed to discriminate in any way.

Question 23. Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

I am firmly of the belief that all exemptions to anti-discrimination legislation should be temporary. There should be no exemptions in law that stand until such time as the laws are revised next as that might be another quarter of a century away. During that time progress in other areas of society may make those exemptions invalid, however it is harder to change wording of the law than it would be to not renew a periodically reviewed temporary exemption.

If we take the example of being homosexual or transsexual, there have been relatively recent decades where either or both have been considered a psychiatric disorder. It could therefore be considered reasonable in the past that for example where safety was concerned such as in Defence, that an exemption to people with psychiatric disorders might have been granted, or in Australia's case they weren't even protected in laws that were passed in that era. However as we have seen in Australia, medical advances have lead to a change in understanding and even legal rulings on the matter. These changes have occurred at a much faster rate than legislation has been able to keep up with.

Things that should be taken in to account are; societal and cultural standards; scientific and medical information; similar situations and rulings in developed countries with similar human rights standards to Australia and lastly the basis of the exemption and the effect on the excluded people and society in general.

Any exemptions granted to organisations should be public. Wherever an Act is available or information about it, such as the AHRC website, details of the exemption should be provided. The kind of detail that should be publicly available should explain clearly why the exemption was sought and a record of the decision making process that lead to the granting of the exemption. I believe that two years is a reasonable period to grant an exemption for.

Question 24. Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

Using sport as an example, logically where the situation is that bodies of varying sizes across the country with various levels ranging from community to national, there should be guiding principles developed. It would make sense if these guiding principles were established at the highest levels, where an appropriate amount of scrutiny can be applied and they can be written to comply fully with the law. These sorts of guiding principles can then be pushed down through organisations as overarching principles which will both reduce the burden on smaller, lower level organisations in developing their own policies as well as preventing them from writing policies that don't comply with the spirit or the letter of the law.

Question 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

The AHRC acting as an "impartial third party during the conciliation process" means that in effect conciliation only works when a respondent is fully compliant and conciliatory. It doesn't remove any pre-existing power imbalances that exist and allows the party with power and resources to use them unfairly. I have witnessed first hand what happens when Defence as a respondent attended a conciliation meeting and refused to conciliate a matter stating that they only could conciliate *if* I had presented something that would completely convince them that they would lose in court. Nowhere in the AHRC's documentation does it state that you have to prove as a complainant to a respondent that they would lose in court, that is what court itself is for. As a result I had to present my information to the Inspector General ADF, who in a formal report identified among other things that my rights were in fact not respected for a period of 9 months that occurred before conciliation using information that was all internal to Defence already. I can only hope that at a subsequent attempt at conciliation that this is finally resolved. I am aware that I have digressed with this personal example, but I believe that I have shown that I presented to the AHRC a legitimate and now confirmed complaint that the respondent, Defence, a Commonwealth department, has been able to pervert the conciliation process simply by being obtuse and obstinate and were not held to account by a powerless AHRC and are not likely to in future. This sort of situation should not be allowed to continue.

I believe that the following key aspects are essential roles that the AHRC has to be able to play during conciliation: Maintaining the commission's impartiality; the elimination of power imbalances; prevention of a discriminatory status quo; keeping both parties on task

during conciliation and lastly having the authority and ability to hold to account both vexatious complainants and combative, stubborn respondents.

Question 27. Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

Currently the AHRC submits reports to parliament about serious human rights issues that appear to be being ignored by parliament. In a modern world the pace at which the Australian Government responds to change is unacceptably slow. There are numerous recent reports submitted to parliament in the areas of sexual orientation and gender identity that the UK and Canada for example have dealt with in some cases over a decade ago. These same issues have been highlighted in reports on numerous occasions over the same timeframe in parliament but are only being addressed in this discussion paper now. The AHRC could be empowered to be able to highlight Australian human rights deficiencies to parliament, citing overseas examples where necessary and imposing a time limit on the Government to take reasonable action to address the issues raised. This would be more effective than the current situation where it appears that the Government ignores the AHRC and acts on human rights issues when they get around to it.

Question 29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

Instances where State and Territory laws are in contravention of Commonwealth laws should not be allowed to occur. Unfortunately in the past they have, which has allowed a technically unlawful status quo to develop. This has resulted in a recent amendment to the Commonwealth Sex Discrimination Act that allows States and Territories to discriminate on marital status against transsexual people and their families by association.

This sort of situation should never have been allowed to occur in the first place and should not be allowed to occur in future.

Question 30. Should the consolidation bill apply to State and Territory Governments and instrumentalities?

The consolidated anti discrimination laws should ideally be newer and more complete than all current State and Territory laws. Therefore they should protect all citizens at least as well or better than current laws. There should not be differences to the way that any citizen of Australia is treated between States and Territories and Commonweal laws for anti discrimination are one way to ensure that.