

## Issues paper – Should the ground of discrimination against gender identity be broadened?

Part IIAA of the Act, specifically section 35AB, protects against discrimination against a gender reassigned person on the ground of their gender history, a characteristic that appertains generally to persons who have a gender history, or a characteristic that is generally imputed to persons who have a gender history. A gender reassigned person is a person who holds a recognition certificate under the *Gender Reassignment Act 2000* (WA) or another equivalent certificate. This certificate is issued to persons who have undergone medical procedures to change their sexual characteristics from male to female or vice versa. A person has a gender history if they identify as the opposite sex (i.e. a sex the person was not a member of at birth).

NSW, Queensland and Victorian provisions include 'indeterminate sex' in their definition of gender identity, while Tasmania defines 'gender identity' as identifying as the opposite sex or 'another sex.' The ACT Act is the broadest, as it protects gender identity irrespective of a person's gender at birth. Intersex status is also a protected attribute in the ACT, South Australia and Tasmania.

Section 5B of the SDA recognises gender identification as a protected attribute. It defines gender identity as: 'The gender-related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.'

The SDA includes intersex status as a ground of discrimination. Intersex status is defined to mean the 'status of having physical, hormonal or genetic features that are neither wholly female nor wholly male; or neither wholly female nor wholly male; or neither female nor male'.

The protection in the Act does not protect all gender diverse people. In the 2007 Review, the EOC identified that the protection in the Act does not apply to transgender people who cannot (or choose not to) obtain, or are in the process of obtaining a gender recognition certificate. TransFolk of WA suggests that the protection does not apply to gender diverse people who do not identify as the 'opposite sex'.

Although a number of preliminary submissions were received in support of expanding the protections of the Act with respect to gender identity and intersex status, concerns were also raised. It was suggested that the inclusion of gender identity would require 'strong balancing provisions' to safeguard the existing sex-based laws and the fundamental freedoms of people who hold different views on gender. These submissions appear to address the concern that a ground of discrimination based on a more expansive definition of gender history infringe the rights of others to privacy and safety, or, more fundamentally, challenge the traditional conceptions of birth sex status.

**The Commission seeks submissions on whether the protections in the Act should be expanded beyond the currently defined gender reassigned persons (for example, persons identifying as another sex)? Should there be exceptions?**

A full discussion of these issues is in the Discussion Paper at pages 19, 42 and 107-109.