

Concerning the draft antidiscrimination legislation:

I support in principle the legislation and its goals.

Upon careful examination of the draft legislation and its explanatory notes I have seen a series of important problems which I believe need to be addressed in order to meet those goals successfully.

In general human rights are rights shared by all people. Sometimes these do need to address unique issues and groups but, where possible, a right, or a protected trait, should cover all people fairly and equally, redressing any inequalities or special impediments where necessary. For example, everyone is usually considered to have a race and protecting rights based on this trait protects everyone from those who often experience racial discrimination to those who rarely do so. Some of the areas in this legislation do not do this when they could, and worse they fail some of those most in need because of being inaccurately narrowly defined.

The key areas of sex, sexuality, gender identity and gender expression and the human rights principles relevant to them are dealt with in the Yogyakarta Principles. Where the definition of Gender Identity from the preamble is:

"UNDERSTANDING 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;"

This clearly covers every person. The draft legislation's definition however does not. It incorrectly defines gender identity within a strict binary framework that only recognises an identity of male or female that is contradicting of regional cultural traditions amongst parts of Australia's Indigenous cultures and our Pacific neighbours, contradicting the current scientific and medical knowledge which recognises a spectrum of diverse gender identities, contradicting the WPATH International guidelines on the treatment of Transgender people.

What do we know about the people not fully covered by the draft legislation's definition?

* Best estimates, such as those by Dr Lynn Conway, have the vast majority of Transgender people not transitioning surgically-transsexuals who fit a binary gender model. (<http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html>) Terms for the remainder include bi-gender, genderqueer, crossdressers and more. Collecting accurate demographics in the climate of regular harassment and vilification is impossible, still as the surgically transitioning transsexuals are more often protected by law this supports the likelihood that they represent a minority of Transgender phenomena. So the draft legislation covers only a minority of Transgender people because of its incorrectly defined version of Gender Identity.

* Transgender people have a very high attempted suicide rate over 30% (TranzNation report, LaTrobe University)

* Transgender youth face severe bullying in schools with severe consequences "While they were more likely to be out than other SSAY, they were less likely to get support. They were also at greater risk of homelessness, physical abuse, self-harm and suicide." (Writing Themselves In 3, LaTrobe University, page 98)

* Are victims of violence to such a great extent that a Queensland study found nearly half have been assaulted and over a third of male-to-female spectrum transgender people have been assaulted with a weapon (*Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland.*)

The largest American study of Transgender peoples experiences of discrimination, Injustice At Every Turn http://www.thetaskforce.org/reports_and_research/ntds found that those they termed Visual Non-Conformers, those who were more easily recognised as transgender, experienced proportionately higher rates of unequal treatment, discrimination in public accommodation, verbal harassment, being assaulted, being sexually assaulted etc.

Without a definition that covers everyone the majority of these extremely vulnerable and persecuted people will not have the same protections so many Australians depend upon. Also in the currently unlikely but always possible event that a non-transgender (the technical term is Cisgender, cis being the little-used but age-old english opposite to the prefix trans) person is discriminated against for not being transgender then under the current definition they have no protection, this is usually a good test for the quality of any anti-discrimination definitions. Of course provision can and should be made for exemptions allowing for efforts required to rectify existing disadvantage while such disadvantage remains such as have been used with sex discrimination.

The recent Tasmanian draft legislation, which in fairness was only released just before the federal antidiscrimination legislation, does a far better job of covering everyone. It covers Gender Identity thusly:

"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;"

"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;"

"transgender means a person who –
(a) does not identify, to whatever degree, with the gender identity assigned them at birth; and
(b) at times, or permanently, has a gender identity which might be perceived as atypical for his or her birth gender;"

"transgenderism means the condition of being a transgender;
transsexual means a person who, whether or not intersex and having been legally assigned one gender at birth –
(a) assumes the bodily characteristics of the other gender by medical or other means; or
(b) identifies himself or herself as a member of the other gender; or
(c) lives or seeks to live as a member of the other gender;
transsexualism means the condition of being a transsexual;"

These definitions make no doubt as to the coverage of Intersex and covers the full array of Transgender people and also all cisgender (non-transgender) people too. So it is fair and equitable and meets the goals of the legislation.

This legislations definiton of Gender Identity should be changed to meet the benchmark provided by the Tasmanian draft legislation and the Yogyakarta Principles.

Of particular importance is the removal of the 'on a genuine basis' part. This is not used on any other protected trait and for good reasons. Discrimination can occur based on erroneous perception, should cisgender people mistakenly be believed to be transgender have no recourse against discrimination they suffer based on that misperception? I doubt anyone would argue that would be appropriate. This 'genuine' piece also places a special hurdle, an extra obstacle, in order to have the same protections enjoyed by other Australians whose protections are based on immutable traits like race or changeable ones of choice like religion and do not have to justify their access to such protections. We as a nation would not countenance the idea that a person must prove they genuinely belong to a particular race or religion if they have been discriminated against on the belief that they were, whether that belief were mistaken or not the discrimination would not have been valid anyway.

Often there is an assumption that there will be additional costs in providing amenities if the entirety of gender identities are protected, namely that recognising the medical fact that some people's bodies and/or minds are a combination of or fit between male and female or the like, would constitute a need for a 3rd set of public amenities wherever any amenities are provided or that this will prove a safety threat to the users of those amenities. These concerns are very easily resolved.

Firstly these people already use public amenities, all the time. Simply by existing whether recognised in law properly or not, whether protected or not the necessity of biology means that like everyone else they make use of public amenities right now. Something that pretty obviously on reflection shows most of the concerns usually raised are completely unwarranted.

Secondly unisex bathrooms are already provided especially in regard to disability access, and so those identifying as neither male nor female may make use of existing unisex bathrooms.

Thirdly on the safety issue this is based on a series of false assumptions such as that people of diverse gender identity and intersex people pose an increase in the risk of sexual assault etc where this has never been shown to be so in the 30 or more years since the first inclusive antidiscrimination protections around the world and all studies and statistics available show they are far more likely to be victims of it than perpetrators and much more importantly there is the false assumption that existing bathrooms are places free of sexual assault. This however requires disregard of the fact of same-sex sexual assault and child abuse. Public amenities currently tend to have a 'private communal area' where sinks are placed and from which there is access to multiple showers or toilets or stalls or lockers. This area is unsafe with or without the recognition that gender diverse and sex diverse people already make use of them and if people are to take seriously the dangers inherent in this 'private communal area' part of public amenities then we would reform the building codes to ensure all such new amenities, and eventually replacing existing ones not heritage listed, are single-user-only where the dangerous private communal space has been removed. This would be of particular value to transgender and intersex people who from what studies are available show face a higher rate of sexual assault and of being victims of physical assault than the cisgender (non-transgender) people who might be afraid of sharing such amenities with them based on myths and prejudice. In fact the case from America of the Transgender woman dragged out of the bathroom by her hair and assaulted inside a McDonalds restaurant by a non-transgender woman which was recorded on camera by an employee and posted to youtube shows that Transgender people are not safe, just as no-one is safe, inside current public amenities, and illustrates that it is the transgender people most at risk from cisgender people in public amenities not the other way round. Because such a solution to violence in public communal amenities is outside this legislation I recommend it be considered by appropriate stakeholders, ministers and administrative bodies, meanwhile this legislation merely needs to recognise that the need of people who identify other than solely male or solely female etc for access to public amenities is resolved by the existing ready access of unisex bathrooms and the fact they are using existing public amenities right now.

Also, often the trait upon which many Transgender people are discriminated against isn't their gender identity itself but their gender expression and the degree to which it corresponds to the cultural stereotypes of male and female. This isn't just a problem for Transgender people, it is faced by many cisgender women and men, particularly gays and lesbians for whom, especially as youth, a greater degree of gender diverse expression has been noted. As such without protection of gender expression there is not full coverage for transgender people, for gays and lesbians, for heterosexual men and women who do not fit stereotypes. It is also a way that protections can be worked around, excluding people not for their sexuality but for example for expressing it in a way outside the gender stereotypes used in heterosexual culture. So it is essential that gender expression be a protected trait to protect all Australians.

The coverage of Intersex people under the Gender Identity section is fraught with problems as discussed in the OII submission and the AHRC submission. There too, much discrimination can be based on a persons actual or perceived sex characteristics. This is also something that occurs to non-intersex people, we all have sex characteristics and we all may be discriminated against warrantlessly based on them. Adding it as a protected trait that specifically says it includes intersex would strengthen not only protections for intersex people but also for all non-intersex people. At the least the Tasmanian inclusion of Intersex as a protected group is warranted.

I also think it problematic that already widespread and generous religious exemptions are still being applied to schools where this conflicts with the duty-of-care the school has to the child and the rights of the child. I urge the committee to review, if it has not already done so, the study *Writing Themselves In 3* from LaTrobe University and the statistics related to the harm done to Gender Questioning and Same Sex Attracted Youth in religious schools.

Religious rights exist to protect peoples right to religious ritual traditions and beliefs, outside of ritual spaces such as churches and temples this does not require exemptions remotely as broad as are already in legislation. A business owned by a religious group has no reasonable religious reason to discriminate in matters of hiring unless that business directly involves the handling of purely sacred paraphernalia such as objects used for religious ritual or that involve necessary access to ritual spaces such as the cleaners of a temple or church or those who fulfil a ritual function like a priest. If it is a profit-making business then the happenstance of being owned by a religious body does not mean it is fulfilling a religious ritual function and should not need any exemptions because making non-religious or non-ritual products for the community involves no religious requirement and therefore no need for the ability to discriminate in order to protect religious ritual. The same is true of religious owned/run charities and especially those groups receiving government funding and thus are charged with a duty to serve the Australian people, and especially the most vulnerable Australian people.

This means that a religious schools chaplain and the staff used in any school chapel including cleaning and security definitely need an exemption, but when it is regarding the teachers of other subjects this is far less justifiable. When it pertains to the welfare of children within their care during school hours the rights of the child should be paramount, so a religious school should not have carte blanche to treat children discriminatorily or with any reduced respect.

Also regarding children or adult dependents and discrimination i wish to note that when decisions are made 'in the best interest of' it is logically discriminatory for these decisions to be made without regard to the future autonomy of the dependent. The incapacity of them to make informed decisions on their own behalf on a variety of issues based on their age/ability only increases responsibility to them. Children as they grow up might claim or reject any part or all of their ethnic and/or cultural heritage, the religion they were brought up within or the sex assigned them at birth including any medical alterations to their body pertaining to their sex characteristics and this includes inaction as

well as action which is important regarding things like delaying puberty chemically or not. In all cases these potential future decisions should be understood to belong to the dependent's future self, and wherever possible any necessary decisions made on their behalf should be provisional, non-permanent and reversible. Imposing body-modifications whether cultural or involving non-vital intersex surgeries on a child who may, when reaching an age able to decide for themselves whether to accept or reject such things regrets the decisions made for them, is unethical and unjustifiable.

Much has been made regarding fears of loss of freedom of speech with this legislation. Where the term offense is used they may have some measure of valid concern in that anyone can potentially find anything at all offensive. However many call for the freedom to insult and mock others. I fail to see how insulting or mocking anyone has anything to do with the free interchange of ideas. It is nothing more than a call for freedom to bully. And bullying is about inflicting emotional harm in order to prevent someone contributing to public life or to silence them from public discussion which is directly contrary to the free interchange of ideas. Because of this while I agree that the term offense is problematic and could easily be abused and simply disagreeing with someone or holding a contrary view or making a statement contrary to their beliefs or opinions might be deemed by them offensive that no-one has any justification for mockery, rudeness, deliberately insulting or vilifying anyone and like our laws on libel and slander and perjury are a reasonable restriction on speech in order to actually protect the free interchange of ideas.

To get the fair go in reality that the Australian culture prides itself on as an ideal we need to be sure that all people are treated fairly. Currently this legislation includes or nearly includes many people who are particularly vulnerable and unjustly treated despite being no threat to anyone or anyone else's rights. I urge you to review the points I have raised and to move forward with a fully inclusive legislation.

Bayne MacGregor.