

Senate Standing Committee on Education and Employment
Submitted online

Friday 9 July 2021

To the Committee

Submission re the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Thank you for the opportunity to provide a submission on this important legislation.

Just.Equal Australia is a national LGBTIQ+ advocacy organisation advancing equality, human rights and justice for LGBTIQ+ people. Just.Equal Australia is based in the LGBTIQ+ community and regularly consults with that community to determine our priorities and strategies.

To begin, we note that the long title of this Bill is 'A Bill for an Act to amend the *Fair Work Act 2009* and the *Sex Discrimination Act 1984*, and for other purposes'.

We submit that one of those purposes should be to amend the *Fair Work Act 2009* (Cth) to ensure that trans, gender diverse and intersex employees are explicitly protected against adverse action and unlawful termination.

We submit that a second of those purposes should be to make consequential amendments to the *Fair Work Act* and *Sex Discrimination Act 1984* (Cth), including to ensure terminology is up-to-date and appropriately covers people with intersex variations of sex characteristics.

It may surprise some members of the Committee to learn that trans, gender diverse and intersex employees are not currently protected against adverse action and unlawful termination.

'Gender identity' and 'sex characteristics' are protected attributes in the *Sex Discrimination Act* but neither is explicitly included in the *Fair Work Act*. For example, sub-section 351(1) of the *Fair Work Act* provides that:

'An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

While sub-section 772(1)(f) of the *Fair Work Act* provides that:

'An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons...

race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

From Just.Equal Australia's perspective, we can see no legitimate reason why trans, gender diverse and intersex employees should be excluded from this long list of protected attributes which enjoy guaranteed access to the Fair Work Commission where they have experienced mistreatment or unfair dismissal in the workplace.

Indeed, we can see absolutely no possible justification why women, and lesbians, gay men and bisexual people, are protected under both the *Sex Discrimination Act* and *Fair Work Act*, while trans, gender diverse and intersex people are only explicitly included in the former.

Our objection to this omission is not just on the basis of principle, but also on the practical impact this may have on members of our community.

For example, the recent *Private Lives 3* Report found that respondents were far more likely to experience unfair treatment on the basis of gender identity than sexual orientation:¹

While 4.5% of respondents reported being unfairly treated 'always' or 'a lot' in the past 12 months because of their sexual orientation, 19.8% of respondents reported the same with respect to their gender identity.

In a separate question, 9.9% of LGBT respondents combined reported being 'refused employment/promotion' in the previous 12 months,² which is a disturbingly high figure.

Meanwhile, although intersex status was not included in the above questions, when asked whether they currently felt accepted 'a lot' or 'always' at work, only 50% of intersex respondents answered yes.³

It is clear to us that trans, gender diverse and intersex employees need *at least* the same level of workplace protections as their lesbian, gay and bisexual counterparts, as well as women, people with disability and others.

Just.Equal Australia, and our members, have made this point clearly and consistently to the Commonwealth Government for more than three years.

Current Board Member Alastair Lawrie raised this issue with then Prime Minister Malcolm Turnbull, and then Minister for Jobs and Innovation (and current Attorney-General) Senator Michaelia Cash, in May 2018.⁴

¹ Adam O. Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia*, La Trobe University, August 2020, page 40.

² Ibid.

³ Ibid, page 93.

⁴ 'Unfairness in the Fair Work Act', 27 May 2018, via: <https://alastairlawrie.net/2018/05/27/unfairness-in-the-fair-work-act/>

Disappointingly, the response from then Minister for Small and Family Business, the Workplace and Deregulation, Craig Laundy, cited the protections offered by the *Sex Discrimination Act*, without addressing the serious shortcomings of the *Fair Work Act*.

The same board member also raised the lack of adverse action and unlawful termination protections for trans, gender diverse and intersex employees in February 2020 through a submission to the Commonwealth Attorney-General's Department consultation paper 'Cooperative Workplaces – How can Australia capture productivity improvements from more harmonious workplace relations.'⁵

Just.Equal Australia and our members also made submissions on this issue last year to the tri-partite consultation process involving Government, business and unions on reforms to industrial relations legislation to help support economic recovery from the coronavirus crisis – highlighting that trans, gender diverse and intersex employees should have the same rights to be included in that recovery as everybody else.

Interestingly, and of relevance to this inquiry, the Assistant Secretary of the Economics and International Labour Branch of the Attorney-General's Department responded to Alastair Lawrie on 1 September 2020 (MC20-026753), including the following paragraph:

'I note the discrepancies you raise between the language in the *Fair Work Act 2009* and the *Sex Discrimination Act 1984*. At this point in time, the Australian Government has not indicated an intention to amend the *Fair Work Act 2009* to explicitly include gender identity or intersex status as grounds for lodging an adverse action or unlawful termination application. In saying this, however, you may be interested to know that the Australian Government is currently considering its response to a number of recommendations made in the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report*. This process provides scope for the issues you have raised here to be considered further in the implementation of any proposed recommendations.'

In effect, the Attorney-General's Department both acknowledged the lack of explicit protection in the *Fair Work Act* for trans, gender diverse and intersex employees, and pointed to the Government's possible response to *Respect@Work* – which led to the legislation currently being considered by this Committee – as an opportunity to remedy it.

Despite this, when Senator Rice asked the Attorney-General's Department about this issue at Senate Estimates on 24 March 2021, the Departmental representative responded in the following way:⁶

Ms Durbin:... In terms of your specific question, we have not provided advice to government in terms of amending the *Fair Work Act* to specifically refer to sexual identity-
Senator Rice: Gender identity.

⁵ 'Cooperative workplaces must be trans and intersex inclusive workplaces', 24 February 2020, via: <https://alastairlawrie.net/2020/02/24/cooperative-workplaces-must-be-trans-and-intersex-inclusive-workplaces/>

⁶ See Appendix A for a full transcript of this exchange.

*Ms Durbin: Sorry, gender identity-
Senator Rice: And sex characteristics.*

Ms Durbin: and that's really a matter for government, but we have not provided advice on that particular issue.

Following the ministerial reshuffle at the end of March 2021, Just.Equal Australia wrote to the new Attorney-General, and Minister for Industrial Relations, Senator Michaelia Cash, specifically about the exclusion of trans, gender diverse and intersex employees from adverse action and unlawful termination provisions of the *Fair Work Act*.

At the time of this submission, we are still yet to receive a reply.

The point of including this detailed background is to demonstrate that both the Government and the Attorney-General's Department have been repeatedly made aware of the gaps in the *Fair Work Act* for more than three years, and the Attorney-General's Department itself highlighted the legislative response to Respect@Work as an opportunity to remedy it.

Which makes the Government's failure to include provisions to address this problem in the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 incredibly disappointing, not just to us but to trans, gender diverse and intersex employees across Australia.

Part of this disappointment derives from the fact that the legislative fix to this problem is relatively straight-forward.

First, it involves adding the protected attribute of 'gender identity' to the adverse action and unlawful termination provisions of the *Fair Work Act*.

Gender identity could be defined for this purpose in the same way it is currently defined in section 4 of the *Sex Discrimination Act*:

'gender identity means 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'.

Recommendation 1: Include 'gender identity' as a protected attribute in sections 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), with a definition based on section 4 of the *Sex Discrimination Act 1984* (Cth), to ensure that trans and gender diverse employees are explicitly protected against adverse action and unlawful termination.

Second, the legislative fix to this problem means ensuring intersex employees are protected under those same provisions.

Importantly, terminology has moved on since the historic *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, which first added 'intersex status' as a protected attribute to the *Sex Discrimination Act 1984*.

Instead, intersex advocates have called for a protected attribute of ‘sex characteristics’, as articulated in Article 9 of the March 2017 *Darlington Statement*:⁷

‘We call for **effective legislative protection** from discrimination and harmful practices on grounds of **sex characteristics**’ (emphasis in original).

‘Sex characteristics’ is also the relevant attribute referred to in the *Yogyakarta Principles Plus 10*,⁸ defined as:

‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.’

We note that this change in terminology has progressively been reflected in state and territory anti-discrimination laws, with the *Anti-Discrimination Act 1998* (Tas) amended in 2019 to cover ‘intersex variations of sex characteristics’, while the *Discrimination Act 1991* (ACT) was amended in 2020 to cover ‘sex characteristics’, based on the following definition:

‘sex characteristics-

(a) means a person’s physical features relating to sex; and

(b) includes-

(i) genitalia and other sexual and reproductive parts of the person’s anatomy; and

(ii) the person’s chromosomes, hormones and secondary physical features emerging as a result of puberty.’⁹

We understand that this definition was adopted following consultation with intersex organisations, including Intersex Human Rights Australia.

Just.Equal Australia believes that, as well as being up-to-date, terminology should be supported by the communities it describes. Therefore, we support the protected attribute of ‘sex characteristics’ being added to the *Fair Work Act*.

Recommendation 2: Include ‘sex characteristics’ as a protected attribute in sections 351(1) and 772(1)(f) of the *Fair Work Act 2009* (Cth), with a definition based on the *Discrimination Act 1991* (ACT), to ensure that intersex employees are explicitly protected against adverse action and unlawful termination.

⁷ Darlington Statement: <https://darlington.org.au/statement/>

⁸ *Yogyakarta Principles Plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles*, as adopted on 10 November 2017, Geneva: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

⁹ ‘Sex characteristics’ will also soon be added as a protected attribute to the *Equal Opportunity Act 2010* (Vic), via the *Change of Suppression (Conversion) Practices Prohibition Act 2021* (Vic), although as at 3 July those provisions have yet to take effect.

Obviously, should the Committee and ultimately the Parliament choose to support this recommendation, then it would be logical to simultaneously update the terminology of the *Sex Discrimination Act* from 'intersex status' to 'sex characteristics', using the same definition, to ensure consistency between the two.

Recommendation 3: Update the protected attribute of 'intersex status' in the *Sex Discrimination Act 1984 (Cth)* to a protected attribute of 'sex characteristics', with a definition based on the *Discrimination Act 1991 (ACT)*.

Finally, while including trans, gender diverse and intersex employees in the adverse action and unlawful termination provisions of the *Fair Work Act* is the most important change to that Bill from our perspective, we note there are other provisions of that Act which include a long list of protected attributes, but which also exclude gender identity and sex characteristics.

This includes section 153(1), which provides that:

'A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

And section 195(1), which provides that:

'A term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

And finally section 578(c), which provides that:

'In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the [Fair Work Commission] must take into account... the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

This last omission in particular means the Fair Work Commission does *not* need to take action to prevent and eliminate discrimination on the basis of gender identity and sex characteristics. Given the high rates of discrimination experienced by trans, gender diverse and intersex employees, this is a gross oversight.

Recommendation 4: Make consequential amendments to the *Fair Work Act 2009* (Cth), ensuring gender identity and sex characteristics are treated on exactly the same basis as other protected attributes, including in sections 153(1), 195(1) and 578(c).

Before concluding this submission, we note that some people have pointed to the Fair Work Commission 'General protections benchbook'¹⁰ ('the Benchbook') as a reason why reform in this area is not needed.

In particular, the Benchbook attempts to incorporate the definition of 'gender identity' in the *Sex Discrimination Act* within the definition of 'sex' for the purposes of the *Fair Work Act*. It also appears to imply 'intersex status' falls within either or both gender identity and sex (the Benchbook wording is confusing on this point).

Just.Equal Australia believes there are problems with this approach, because the concepts of gender identity, sex and sex characteristics are distinct, both in common understanding and in legal usage.

In terms of common understanding, trans, gender diverse and intersex employees checking the *Fair Work Act* to determine whether they are protected following a workplace incident are unlikely to see themselves in the wording of 'sex' (and therefore may believe they are not protected).¹¹

Legally, we are also not aware of any decisions prior to the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (which introduced gender identity as a protected attribute within the *Sex Discrimination Act*), interpreting gender identity as falling *inside* the meaning of sex (hence the need to introduce a separate attribute in the first place).

It would therefore seem convoluted to argue the introduction of a stand-alone attribute in the *Sex Discrimination Act* in fact created a combined attribute in the *Fair Work Act*.

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* actually raises another problem. That legislation also updated the adverse action and unlawful termination provisions of the *Fair Work Act*, changing the protected attribute from 'sexual preference' to 'sexual orientation', to ensure consistency in terminology with the *Sex Discrimination Act*.

¹⁰ Fair Work Commission, 'General protections benchbook', accessed 5 July 2021:

<https://www.fwc.gov.au/general-protections-benchbook/other-protections/discrimination/gender-identity-sexual-orientation>

¹¹ Noting also that the absence of explicit inclusion of gender identity and intersex protections (including where they are subsumed within or conflated with other terms, such as 'other status' or 'sex') can lead to serious problems and even harm for trans, gender diverse and intersex people (Kelly Richards and Angela Dwyer, 'Unspeakably present: the (un)acknowledgement of diverse sexuality and gender human rights in Australian youth justice systems', *Australian Journal of Human Rights*, Volume 20(2), 2014, pages 63-79).

However, Parliament in 2013 did not add 'gender identity' and 'intersex status' to the *Fair Work Act* at the same time, despite that Bill adding these attributes to the *Sex Discrimination Act*. That omission raises further questions about the Benchbook approach.

We also note that none of the communications from the Attorney-General's Department on this issue, from their replies in 2018 and 2020, to their evidence when questioned by Senator Rice at Senate Estimates in March 2021, expressed any support for the view that the *Fair Work Act* protected attribute of sex already *includes* the *Sex Discrimination Act* attributes of gender identity and intersex status.

In our view, the correspondence and evidence from the Attorney-General's Department casts additional doubt on the Benchbook approach.

In the context of this significant doubt, Just.Equal Australia submits that there is only one way in which to ensure trans, gender diverse and intersex employees are expressly and unequivocally covered by adverse action and unlawful termination protections – and that is to explicitly include gender identity and sex characteristics in the *Fair Work Act* itself.

In conclusion, Just.Equal Australia believes that trans, gender diverse and intersex employees are deserving of the same respect, and the same rights, as every other Australian, including lesbians, gay men and bisexuals, as well as women, people with disabilities and others.

We hope that members of the Committee, and Parliament more broadly, agree.

Just.Equal Australia submits that the current provisions of the *Fair Work Act 2009* (Cth) fall well short of this principle, by excluding gender identity and sex characteristics from provisions concerning adverse action and unlawful termination, as well as other matters.

We hope that members of the Committee, and Parliament more broadly, acknowledge these serious gaps, and take urgent action to remedy them, by amending the Sex Discrimination and Fair Work Amendment (Respect at Work) Amendment Bill 2021 to ensure trans, gender diverse and intersex employees finally receive the workplace protections they deserve.

Thank you in advance for your consideration of this submission and the above recommendations.

We would welcome the opportunity to answer questions about this submission if the Committee chooses to hold hearings as part of this inquiry.

Sincerely (on behalf of Just.Equal Australia),

Rodney Croome AM

Sally Goldner AM

Dr Angela Dwyer, Associate Professor, Policing and Emergency Management, University of Tasmania

Appendix A

Exchange between Senator Janet Rice, and Ms Alison Durbin, First Assistant Secretary Employment Conditions Division, Attorney-General's Department, Senate Estimates, Education and Employment Legislation Committee, 24 March 2021, pages 30-31:

Senator RICE: Can I get a response on the issue of the discrepancy between the Sex Discrimination Act and the Fair Work Act in terms of which cohorts of the LGBTIQ+ community are protected? I want to know whether the department has prepared any advice or amendments or undertaken any work to ensure that the adverse action or unlawful termination provisions of the Fair Work Act are amended to include gender identity and intersex status or sex characteristics, which would ensure that trans and gender diverse and intersex employees are directly and explicitly covered by the Fair Work Act?

Ms Durbin: Senator, as you are aware, the Fair Work Act provides that an employer must not take adverse action. So that could include dismissing or otherwise disadvantaging or damaging an employee on the basis of a range of protected attributes, and, under the Fair Work Act, sex and sexual orientation are included. As you've pointed out, sexual identity is not included in the Fair Work Act—

Senator RICE: Gender identity.

Ms Durbin: gender identity—but it is covered in the Sex Discrimination Act, and the Sex Discrimination Act obviously does extend to the world of employment. So, to that extent, there is that coverage there, through that legislative vehicle of the Sex Discrimination Act. In terms of your specific question, we have not provided advice to government in terms of amending the Fair Work Act to specifically refer to sexual identity—

Senator RICE: Gender identity.

Ms Durbin: Sorry; gender identity—

Senator RICE: And sex characteristics.

Ms Durbin: and that's really a matter for government, but we have not provided advice on that particular issue.

Senator RICE: The issue is that there is this discrepancy, and it would be clearer, in legislation, if the characteristics that are covered under the Sex Discrimination Act were actually transferred over into the Fair Work Act. Would you see that as being something that would be a valuable thing to do?

Ms Durbin: The attributes that were carried into the Fair Work Act were carried over from the predecessor legislation—

Senator RICE: Yes.

Ms Durbin: in 2009, and they have not been updated in that period, as opposed to the Sex Discrimination Act, which, I think, was amended in 2013. So I can't express an opinion, but, as I said, it's not something we have provided advice to government on.