Castan Centre for Human Rights Law
Monash University
Melbourne

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality

Prepared by Dr Paula Gerber, Sarah Austin, Erica Contini, Jonathan Devenish, Sophie Herreen, Lisa Lee, Senthuren Mahendren, Sebastian Quinn and Felicity Simons

Introduction

The Castan Centre thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to make this submission on the effectiveness of the *Sex Discrimination Act 1984* (Cth) (SDA). The submission addresses two specific aspects of the terms of reference, namely:

> (a) the scope of the Act, and the manner in which key terms and concepts are defined; and
> (g) preventing discrimination, including by educative means.

We submit that the act is currently too narrow in its protections and scope in that it fails to provide protection from sex discrimination for intersex, transsexual or transgender individuals, and fails to include a sufficient mandate for education about sex discrimination, particularly in schools. The Castan Centre submits, that the SDA needs to be amended to address these two deficiencies.

The Role of Education in Preventing Sex Discrimination

Introduction

In order to help eradicate sex discrimination from Australian society, it is vital that the SDA recognise the importance of human rights education (HRE) about sex discrimination for all Australians, in particular for young Australians in primary and secondary school. At present, the SDA does not include any mandate to provide students with education about sex discrimination. While it does provide that one of the functions of the Human Rights & Equal Opportunity Commission (HREOC) is to undertake education programs concerning sex discrimination,[1] this broad mandate is only one of its many functions and to date educative initiatives relating to sex discrimination have focused primarily on the work place i.e. materials have been developed for employers and employees.

As the SDA is currently the only Commonwealth Act which deals with sex discrimination, the failure to include any mandate that school students be educated about sex discrimination is a major omission. Without school based education about sex discrimination, it is unlikely that this form of discrimination will ever be effectively eliminated from Australian society.

The right to live free from sex discrimination is a fundamental human right which must be protected. As the Office of the United Nations (UN) High Commission for Human Rights has stated, the protection of human rights can "only be achieved through an informed and continued demand by people for their protection."[2] Providing HRE helps to promote "values, beliefs and

[1] *Sex Discrimination Act 1984* (Cth) s 48(1)(e).
[2] Office of the United Nations High Commissioner for Human Rights, *Human Rights Education and Training* <http://www2.ohchr.org/english/issues/education/training/index.htm> at 6 August 2008.

attitudes that encourage all individuals to uphold their own rights and those of others," and helps to "make human rights a reality in each community."[3]

For the purpose of this submission, the following definition of human rights education is used:

> …human rights education shall be defined as training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes, which are directed towards: (a) the strengthening of respect for human rights and fundamental freedoms; (b) the full development of the human personality and the sense of its dignity; (c) the promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups; (d) the enabling of all persons to participate effectively in a free society; (e) the furtherance of the activities of the United Nations for the maintenance of peace.[4]

The need for human rights education in order to achieve long-term prevention of human rights abuses, including sex discrimination, has been widely recognised.[5] For example, the UN General Assembly, in establishing the World Programme for Human Rights Education (2005-ongoing), commented that:

> Human rights education is essential to the realization of human rights and fundamental freedoms, and contributes significantly to promoting equality, preventing conflict and human rights violations and enhancing participation and democratic processes, with a view to developing societies in which all human beings are valued and respected, without discrimination or distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.[6]

The link between education and preventing human rights violations has been further recognised by a number of academic writers. For example, Newell and Offord have argued that knowledge of our basic human rights is crucial to understanding "what it means to be human, to be part of society and connected to others."[7] They go on to say that when curriculum in schools is

[3] Ibid.
[4] *Plan of Action for the United Nations Decade for Human Rights Education, 1995-2004; Human rights education – lessons for life,* UN GAOR, 51st sess, Agenda Item 110(b), appendix(I(2)), UN Doc A/51/505/Add.1 (1996).
[5] Office of the United Nations High Commissioner for Human Rights, above n 2.
[6] *Resolution on the World Programme for Human Rights Education*, GA Res 59/113, UN GAOR, 59th sess, Agenda Item 105(b), UN Doc A/Res/59/113 (2005).
[7] Christopher Newell and Baden Offord, 'Introduction' in Christopher Newell and Baden Offord (eds), *Activating Human Rights in Education: Exploration, Innovation and Transformation* (2008) 9.

guided by human rights principles, then educators will be "engaged in making a society that is humane, democratic, socially inclusive and collaborative."[8]

Furthermore, according to Baxi human rights education must not only examine the rights in existence today, but must also look at violations which have occurred in the past in order to help prevent them occurring again in today's society. After all:

> The single most critical source of human rights is the consciousness of peoples of the world who have waged the most persistent struggles for decolonization and self-determination, against racial discrimination, gender-based aggression and discrimination, denial of access to basic minimum needs, environmental degradation and destruction, systematic 'benign neglect' of the disarticulated, disadvantaged and disposed (including the Indigenous peoples of the Earth). [9]

Education is also offered as a preventative strategy and an alternative to activism by writers such as Mihr and Schmitz, who believe that a greater emphasis on human rights education will help to strengthen "transnational ties and local support for international human rights standards."[10] They also note that HRE in schools, both by non-governmental organisations (NGOs) and the State, helps people to internalise human rights standards, including their broader political and social meaning in the context of everyday life.[11] This internalisation process helps to develop a community in which human rights are considered to be of utmost importance.

Australia's Obligations Under International Law

Australia's Obligations to Prevent Sex Discrimination

The fact that Australia has international obligations to adhere to rights and guidelines relating to sex discrimination is unambiguous. These obligations arise from either international treaties and/or Optional Protocols that Australia has ratified. While it is important to note that the SDA was intended to give effect to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[12] this is not the only source of Australia's international obligations. The most significant treaties relating to sex discrimination are summarised below.

[8] Ibid.
[9] Upendra Baxi, 'Human Rights Education: The Promise of the Third Millennium' (paper presented at the Conference of the United Nations Member States and Non-Governmental Organizations, New York, NY, 9 December 1994).
[10] Anja Mihr and Hans Peter Schmitz, 'Human Rights Education (HRE) and Transnational Activism' (2007) 29(4) *Human Rights Quarterly* 973, 973-4.
[11] Ibid 990.
[12] *Convention for the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

The International Covenant on Civil and Political Rights (ICCPR)[13] and International Covenant on Economic, Social and Cultural Rights (ICESCR)[14] also contain provisions relating to sex discrimination. Article 2 of the ICCPR sets out the requirement for every individual to be respected, regardless of characteristics such as race, **gender**, religion, or other status.[15] Article 23 of the ICCPR then refers to the requirement for equal rights in the marriage context,[16] while discrimination is specifically noted at Article 26.[17] Additionally, Article 2 of the ICESCR refers to a guarantee that the Covenant will be exercised without discrimination of any kind,[18] while Article 3 stipulates that parties must ensure that the rights guaranteed within it are enjoyed equally by men and women.[19] The right to equality in the ICESCR also extends to conditions of work, including rates of pay.[20]

In addition to the above, CEDAW is the main international treaty specifically on the topic of the elimination of discrimination against women. Section 3 of the SDA states that one of its main aims is to "give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women".[21]

The domestic implementation of CEDAW by Australia demonstrates Australia's unequivocal acceptance of the requirement for gender equality and the prevention of sex discrimination. Article 1 of CEDAW defines the scope of the term 'discrimination against women':

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[22]

[13] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[14] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[15] ICCPR art 2(1): "Each States 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."
[16] ICCPR art 23(4): "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."
[17] ICCPR art 26: **"**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."
[18] ICESCR art 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[19] ICESCR art 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social cultural rights set forth in the present Covenant."
[20] ICESCR art 7(i): "Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."
[21] The *Sex Discrimination Act* 1984 (Cth) s 3.
[22] CEDAW art 2.

Protection against discrimination of any form against a child is particularly enunciated at Article 2 of the Convention on the Rights of the Child (CROC), with this extending to discrimination against a child's parents or family.[23]

Australia's Obligations to Provide Human Rights Education

In addition to the obligation to prevent sex discrimination, Australia also has an obligation to provide students with a human rights education. It is evident from the provisions in a number of treaties, to which Australia is a party, that international law stipulates that persons are not only to be educated in an environment free from discrimination, but students are also to be educated specifically about human rights and sex discrimination. It is important to note that these are two separate obligations – the first prohibits discrimination in the context of providing students with an education, while the second requires States to educate students about discrimination for the purpose of preventing such discrimination from occurring. The main treaties setting out such obligations are set out below.

Article 13 of ICESCR provides that:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace[24]

The extent of Australia's obligations under this treaty provision can be further seen in the General Comments issued. For example, in the General Comments on Article 13 of the ICESCR, it is stated that "education is both a human right in itself and an indispensable means of realizing other human rights."[25] This demonstrates a clear recognition that HRE is vital to creating a society in which all human rights are protected and valued.

Article 29(1) of CROC refers to the provision of education stating that:

> States Parties agree that the education of the child shall be directed to: …

[23] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3, art 2 (entered into force 2 September 1990): "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

[24] ICESCR art 13(1).

[25] *General Comment No. 13: The Right to Education (Art. 13)* Committee on Economic, Social and Cultural Rights, UN ESCOR, 21st sess, UN Doc E/C.12/1999/10.

> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
> (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.[26]

The obligation on States to provide appropriate means for the elimination of sex discrimination through education is unequivocally expressed in Article 10 of CEDAW:

> States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: …
>
> (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.[27]

More recently, the international community has been vocal about the need for greater HRE as evidenced by the proclamation of the UN Decade for HRE (1995-2004) and the subsequent World Programme for HRE (2005 – ongoing). Australia has been a strong supporter of both these initiatives.

The Current Situation in Australia

Under the Australian Constitution, the Commonwealth does not specifically have the power to legislate with respect to education. However, the Government can use its good relationship with the states and territories to implement the recommended education component of the SDA. This can be done through co-operative federalism i.e. the Commonwealth and the States

[26] CROC art 29(1).
[27] CEDAW art 10.

exercise concurrent legislative powers to achieve a result that neither of them could achieve on their own.[28]

The government has already utilised this concept to good effect in its *Realising Our Potential* plan in the 2007-2008 budget, when it indicated that it will provide additional funding in order for states to introduce core curricula standards across Australia for years 10 to 12.[29] In particular, the Government proposes, in cooperation with the states, to introduce a national history curriculum. The Castan Centre submits that the Government should show similar initiative and amend the SDA to mandate the study of human rights, including sex discrimination, by all Australian school students.

The *Sex Discrimination Act 1984* (Cth) and the Work of HREOC

As stated above, the only mention in the SDA of preventing sex discrimination through HRE is in relation to the functions of the HREOC.[30] The fundamental mission of HREOC is the promotion and protection of human rights in Australia, including through education.[31] HREOC runs various community education programs to "build community awareness and support different groups"[32] and has created a fact sheet outlining the basics of the SDA for young women.[33] It also provides a range of specific training services.[34] Unfortunately, in regards to sex discrimination, these programs have focused almost entirely on discrimination in the work place and providing education materials for employers and employees.[35] HREOC has developed materials for teachers on human rights generally, but the issue of sex discrimination appears to be absent from these.[36] Furthermore there are no requirements that the valuable programs be used within schools and they may therefore be an untapped resource.

While HREOC does play a small role in providing limited HRE resources to schools, this is not enough to satisfy Australia's international obligations under the abovementioned treaties to provide human rights education. To remedy

[28] *BP Australia Ltd v Amann Aviation* (1996) 62 FCR 451, 493 (Lindgren J.). Indeed, Justice Selway has argued that the core concept within the Constitution, "namely its federal structure, was and is entirely unworkable but for the co-operation of the legislatures and executives... of the Commonwealth and the states … [for] [w]ith some exceptions the Commonwealth cannot achieve 'national' policies without the co-operation and use of the legislative and executive powers of the states." Bradley Selway, 'The Federation – What Makes it Work and What Should We Be Thinking About for the Future' (2001) 60(4) *Australian Journal of Public Administration* 116, 119.

[29] Australian Government, *Realising Our Potential (2007-2008 Budget Overview)*(2007) Parliament of Australia <http://www.aph.gov.au/budget%20dummy/budget%202007-08%20mirror/2007-08/overview2/download/overview2.pdf> at 6 August 2008.

[30] *Sex Discrimination Act 1984* (Cth) s 48(1)(e).

[31] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11.

[32] HREOC, *About Sex Discrimination* <http://www.hreoc.gov.au/sex_discrimination/about_sex_discrimination.html> at 6 August 2008.

[33] HREOC, *Getting to know the Sex Discrimination Act: A guide for young women* (2002) <http://www.hreoc.gov.au/sex_discrimination/publication/young_women/index.html> at 6 August 2008.

[34] HREOC, *Education* <http://www.hreoc.gov.au/education/index.html> at 6 August 2008.

[35] HREOC, *Sex Discrimination* <http://www.humanrights.gov.au/sex_discrimination/index.html> at 6 August 2008. current and new projects include "It's About Time: Women, Men, Work & Family", "Who cares? Managing flexibility in the workplace" and "Trafficking: The Need for a Human Rights Based Approach" among others.

[36] HREOC, *Education Resources* (for teachers, for students aged 12-17) <http://www.humanrights.gov.au/education/modules.html> at 6 August 2008. 2 resources on the website provide teaching materials about human rights generally. "Youth Challenge: Teaching Human Rights and Responsibilities" for students aged 11-17 does have a unit on 'Tackling Sexual Harassment in Your Classroom". This unit provides an excellent introduction into the sexual harassment component of sex discrimination but fails to cover the broader concepts or other was sex discrimination can arise. The second resource, "Voices of Australia" does try to address broad issues of human rights but focuses primarily on racial discrimination.

this shortfall, the SDA should be amended to require compulsory education in schools about sex discrimination and human rights.

The State Acts and the Work of State Commissions and Boards

The different State and Territory Acts which prohibit sex discrimination usually follow a similar pattern to the Commonwealth SDA in that they provide for a Board or Commission to carry out some form of education role.

For example, the *Equal Opportunity Act 1995* (Vic) stipulates that one of the functions of the Victorian Equal Opportunity and Human Rights Commission is to "undertake programs for the dissemination of information for the education of the public with respect to – (a) the elimination of discrimination [and] sexual harassment… (b) the promotion of equality of opportunity; (c) any other matters relevant to the provisions of this Act."[37] See also the *Anti-Discrimination Act 1991* (QLD),[38] the *Anti-Discrimination Act 1977* (NSW),[39] the *Anti-Discrimination Act 1998* (TAS),[40] the *Equal Opportunity Act 1984* (SA),[41] the *Equal Opportunity Act 1984* (WA),[42] the *Discrimination Act 1991* (ACT),[43] and the *Anti-Discrimination Act 1996 (*NT). [44]

For more detailed information regarding the education-related work of each of these Commissions and Boards, see Schedule 1 (attached) However, for present purposes it is important to note that there remains a lack of compulsory HRE at all levels of schooling, with education programs implemented by the Boards and Commissions largely focused on sex discrimination in the workplace and directed at employers and employees.

Conclusion

Human rights education is fundamentally important to preventing sex discrimination and promoting gender equality in Australian society. Formal, structured education concerning human rights generally, and sex discrimination more particularly, is needed at both primary and secondary levels in order to create a culture of respect for human rights and freedoms from a young age. It is only through education that the aims of the SDA can be achieved, and sex discrimination eliminated.

Unfortunately, there is currently a widespread absence of HRE in the curriculum taught at all levels of Australian schools. While some of the relevant Commissions and Boards at both the Commonwealth and State levels are providing schools with basic information about human rights and sex discrimination, the material covered and the reach of such programs is simply insufficient. In order to fulfil Australia's international human rights law obligations - both to eliminate sex discrimination itself and to provide students

[37] *Equal Opportunity Act 1995* (Vic) s 162.
[38] *Anti-Discrimination Act 1991* (QLD) s 235(d).
[39] *Anti-Discrimination Act 1977* (NSW) s 119(1)(b)&(c).
[40] *Anti-Discrimination Act 1998* (Tas) s 6(e).
[41] *Equal Opportunity Act 1984* (SA) s 11(2).
[42] *Equal Opportunity Act 1984* (WA) s 75.
[43] *Discrimination Act 1991* (ACT) s 111.
[44] *Anti Discrimination Act 1996* (NT) s 13.

with a human rights education - such an education must be made compulsory for all school students. Unless and until this occurs, Australia will not be in compliance with its international obligations.

The Castan Centre therefore submits that the SDA must be amended to include compulsory HRE, including sex discrimination, for young Australians, both in primary and secondary schools. This will not only ensure compliance with all relevant treaties, but will also play a large part in creating a society free from sex discrimination and other human rights abuses.

The Need to Expand Protections to Include Transgender, Transsexual or Intersex and other people

Introduction

The Commonwealth *Sex Discrimination Act 1984* does not currently contain any provisions relating specifically to the protection of the rights of transgender, transsexual and intersex people. The stated object of the SDA is "to promote recognition and acceptance within the community of the principle of the equality of men and women."[45] Section 4 of the SDA defines "man" as a person who is a "member of the male sex" and "woman" as a person who is a "member of the female sex". At no point does the SDA make mention of intersex people, nor does it outline how it purports to deal with those who do not consider themselves to be a member of the sex into which they were born. Thus, the SDA does not adequately protect rights of transgender, transsexual and intersex people to the extent that it does not mention the possibility of discrimination or vilification on the basis of real, perceived or assumed gender identity.

All Australian jurisdictions – except the Commonwealth – have legislation in place that attempts to deal with issues of discrimination and vilification against people with transgender, transsexual, or intersex identities.[46] However, the current legislative provisions are neither consistent nor comprehensive in their approach to protecting such people from discrimination. The lack of statutory protection for transgendered communities at the federal level is an omission of much concern. The fact that states and territories (albeit not uniformly in absence of federal guidance) have instigated attempts to deal with 'trans' issues, represents a fragmented and inadequate response to the obvious necessity for such protection.

Protection against such discrimination is inherently the Commonwealth's responsibility due to Australia's obligations under various international treaties, particularly in regard to addressing discrimination.[47] These obligations are contained in ICCPR and CEDAW. Australia has a clear, and outstanding obligation to implement these treaties on the domestic front. Australia's ratification of CEDAW, and the direct encapsulation of discrimination against women in the SDA,[48] has lead to a "mixed story" of positive and negative affirmation of women's rights in Australia.[49] The lack of uniform protection of Australia's trans-communities is an even more despondent state of affairs. There is no denying that the issue is complex – medically, socially, legally and in the familial context – but this does not excuse failure of the Commonwealth to provide basic protection against discrimination.

[45] *Sex Discrimination Act 1984* (Cth) s 3(d).
[46] In Western Australia, protection from discrimination is based on 'gender history'. Thus, protection from discrimination only extends to those persons who have had sex affirmation surgery.
[47] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (2nd ed, 2004) 863.
[48] *Sex Discrimination Act 1984* (Cth) s 3.
[49] Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 27(3) *University of New South Wales Law Journal* 858, 864.

The Castan Centre submits that the Committee consider ways in which these issues can be addressed in the SDA to ensure that there is consistency between Commonwealth and State legislation, and that Australia conforms with its international human rights obligations under Articles 2 and 26 of the ICCPR.

Definitions

The definition and scope of terminology is particularly difficult to enunciate in respect to persons with trans-gendered status. A plain dictionary definition of the world "transsexual" is "a person born with the physical characteristics of one sex who emotionally and psychologically feels that they belong to the opposite sex."[50] "Transgender" is defined as an adjective for transsexual.[51] "Intersex" is defined as "hermaphroditism."[52] These definitions are not necessarily correct. Karen Gurney, an eminent Australian academic on transsexual discrimination, states that "transsexualism is now known to occur when the person's brain differentiates as to sex in the opposite direction to their genotype (chromosomes) and phenotype (gonads and genitals)."[53] Gurney reiterates that "transsexualism is not transgender, for the individual's gender is fixed and it is the phenotypic sex characteristics they seek to change…transsexualism is not a sexual orientation…transsexualism is not a choice."[54]

There is a tendency in the current State and Territory legislation[55] to use the terms transsexualism, transgenderism and intersexuality interchangeably. This is wrong as these terms do not mean the same thing, and arguably confuses the matter even further. In order to promote consistency in application and to ensure that all gender-identities and sexual-identities are protected against discrimination, the Castan Centre submits that the Federal Government show leadership on this issue and amend the SDA to include clear and accurate definitions of the main terms used in State and Territory legislation. Given the importance that medical evidence holds for this issue, the definitions should be drafted having regard to key points made by leading experts. For example, whilst giving expert evidence during the United Kingdom Court of Appeal case of *Bellinger v Bellinger*,[56] Professor Louis Gooren of University Hospital in Amsterdam, a leading expert on endocrinology and biomedical studies, stated that:

> Traditionally it is assumed that sexual differentiation, the process of becoming man or woman is completed with the

[50] The Oxford Dictionary, accessible online at <http://www.askoxford.com/concise_oed/transsexual?view=uk>.
[51] The Oxford Dictionary, accessible online at <http://www.askoxford.com/concise_oed/transgender?view=uk>.
[52] The Australian Concise Oxford Dictionary, accessible online at <http://www.askoxford.com/concise_oed/intersex?view=uk>.
[53] Karen Gurney, 'More? You want More?'... Of Course I do! Transsexualism and birth certificates: changing records or attitudes?' (2005) 8(2) *Flinders Journal of Law Reform* 209, 212-13.
[54] Ibid 213.
[55] *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1995* (VIC); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1991* (QLD); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1998* (Tas).
[56] *Bellinger v Bellinger* (unreported, CA) [2001] EWCA Civ 1140.

> formation of the external genitalia, the criterion used to assign a new-born child to the male or female sex…The human condition requires that new-borns are assigned to one sex of the other. *The social and the legal system has left no room for intersexed subjects*.[57]

Further, in a speech to the Council of Europe on "23rd Colloquy on European Law: Transsexualism, medicine and law", Professor Gooren recommended the following for European legislators:

> Legal and sex assignment by the criterion of the morphology of the external genitalia is based on only one of the five criteria of sex presently known; the other criteria are gonadal, genital and brain sex…in order to do justice to the rare individuals in whom sexual differentiation of the brain postnatally has not followed the path prognosticated, for example, by the external genitalia, the law must make provisions. *If we have the constitutional right to be treated equally and the same by the law, the law must do justice to the rare individuals in whom sex errors of the body occur.* This is a personal misfortune, but no ground for unfair treatment.[58]

According to Professor Milton Diamond of the University of Hawaii, one of the world's foremost experts in the study of human sexuality, biology and anatomy, the term *transsexual* describes adult individuals who "…manifest the diagnostic criteria for gender dysphoria or Gender Identity Disorder (GID)". [59] The diagnostic criteria for GID include:

1. The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment;

2. The transsexual identity has been present persistently for at least 2 years;

3. The disorder is not a symptom of another mental disorder or a chromosomal abnormality.[60]

The term 'transgender' on the other hand describes adult individuals who see "gender as being either constructed or inborn but nevertheless open in

[57] Louis Gooren, *Expert Witness Statement*, (1999) Men's Australia Network <http://home.vicnet.net.au/~man/archives/99/gooren.html> at 5 August 2008.
[58] Louis Gooren, '23rd Colloquy on European Law: Transsexualism, medicine and law' (closing speech delivered at the Council of Europe, 16 April 1993) accessible at <http://www.pfc.org.uk/node/276>.
[59] Milton Diamond, 'Sex and Gender are Different: Sexual Identity and Gender Identity are Different' (2002) 7 *Clinical Child Psychology and Psychiatry* 320, 324.
[60] The Harry Benjamin International Gender Dysphoria Association, *Standards of Care For Gender Identity Disorders, Sixth Version* (2001) World Professional Association for Transgender Health Inc <http://www.wpath.org/Documents2/socv6.pdf> at 22 July 2008.

manifestation."[61] It also includes "anyone who simultaneously exhibits traits or characteristics of both men and women."[62] It is often used to refer to individuals who have no difficulty accepting that they are male/female but who want to live as women/men respectively, for at least part of their lives. Thus individuals that exhibit transgender behaviours don't necessarily want to change their sex but do want to change aspects of their gender.[63]

Finally, 'intersexuality' describes someone born with physical characteristics that are both male and female. Intersexed men and women might identify as female, male or intersexed and they might live ostensibly as women or men or in some sort of neuter manner.[64] For a comprehensive discussion of the different terms, see Milton Diamond's seminal work, *Sex and Gender are Different.*[65]

The Castan Centre submits that the Federal Government consult with the 'trans' community and utilise experts in the relevant medical fields to assist in the enunciation of appropriate legislative definitions in the SDA. The inclusion of definitional terms in the SDA will assist in the consistency and uniformity of approach at State and Territory levels.

Australia's International Treaty Obligations and Other International Standards

Australia is a party to a number of international instruments and conventions which deal, in various ways, with the issue of transgender, transsexual and intersex people and their right for recognition and to be free from discrimination.

International Covenant on Civil and Political Rights

Though the rights of transgender, transsexual and intersex peoples are not expressly enumerated in the ICCPR, it does make explicit the obligation of each State Party to ensure that *ALL* individuals within its territory and subject to its jurisdiction are afforded the rights contained within the Covenant:

> Article 2(1): 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.

[61] Diamond, above n 59, 330.
[62] Ibid.
[63] Bonnie Bullough, Vern L. Bullough, and James E. Elias (eds), *Gender Blending* (1997) referred to in Diamond, above n 59.
[64] Diamond, above n 59, 326.
[65] (2002). Accessed at www.hawaii.edu/PCSS/online_artcls/intersex/sexual_I_G_web.html on 22 July 2008.

Whilst the ICCPR does not specifically refer to transgenderism, transsexuality or intersexuality as a basis of distinction, the inclusion of the words "or other status" arguably extends the application of Article 2 to transgenderism, transsexuality and intersexuality.

Article 26 of the ICCPR provides that:

> 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.[66]

This provision requires equal protection of the law without discrimination on grounds of 'sex' or 'other status'. Again, this arguably extends the protection to include transgenderism, transsexuality and intersexuality.

In order for Australia to satisfy its obligations under the ICCPR it is necessary for the Commonwealth to legislate to explicitly include transgender, transsexual and intersex people in its Anti-discrimination legislation.[67]

Convention on the Elimination of All Forms of Discrimination against Women

Though CEDAW is specific to discrimination against women, Article 1 of the convention states "discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex…" Read with the ordinary meaning in mind, the convention is against any discrimination made on the basis of an individual's sex (female or otherwise).

Article 5(a) of CEDAW specifically calls upon State Parties to:

> Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

CEDAW therefore arguably calls for the re-examination of stereotyped understandings of what is it is 'to be' female and 'to be' male.

[66] ICCPR, art 26.
[67] ICCPR, art 2(2) *"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant."*

Other International Approaches

European Court of Human Rights
While Australia is not bound to follow the decisions of the European Court of Human Rights, its rulings in cases in which the rights of transgender, transsexual and intersex people are in issue provide some guidance as to what the international community is doing in order to protect the rights of transgender, transsexual and intersex people.

Legal Recognition of Post-Operative Sex
The position of the European Court of Human Rights in regards to the status and recognition of transsexual people has become clearer in recent years with the rulings in *Christine Goodwin v UK*[68] and *I v United Kingdom*.[69] In these cases the European Court found that the United Kingdom was in breach of Article 8 and Article 12 of the European Convention on Human Rights (a right to respect private life; and a right to marry) by failing to recognise in law the Applicant's gender reassignment.

Protection of the Rights of Transsexual People Against Discrimination
The position that the European Court of Human Rights takes with regards to the status of transsexual people has been further underlined by the 2007 case of *L v Lithuania.*[70] In this case the Applicant alleged the lack of legal regulation regarding transsexuals in Lithuania amounted to violations of Articles 3, 8, 12, and 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms.* In making a judgement in favour of the Applicant the Court concluded that a "fair balance had not been struck between the public interest and the rights of the applicant" and that a violation of Article 8 of the Convention had occurred.

The above cases illustrate that States have a positive obligation to legislate inclusive of transgender, transsexual and intersex people. As the court noted in *L v Lithuania* the specific and particularly painful outcome of not properly legislating domestically for transsexual peoples is that those effected are left in a situation "of distressing uncertainty vis-à-vis his [or her] private life and the recognition of his [or her] true identity." And whilst Lithuania may, to a degree, be afforded some leniency as a result of budgetary considerations; such considerations cannot and should not be afforded to Australia.

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity
The Yogyakarta Principles were developed in 2006 by a group of international human rights experts[71] in response to well-documented patterns of abuse

[68] *Christine Goodwin v UK* (2002) EHRR 18.
[69] *I v United Kingdom* (2003) 36 EHRR 53.
[70] *L v Lithuania* (Application no. 27527/03).
[71] Panel included: Elizabeth Evatt (Australia), Former member and chair of the UN Committee on the Elimination of Discrimination Against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists; Michael O'Flaherty (Ireland), Member of the UN Human Rights Committee and Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre at the University of Nottingham, United Kingdom (Rapporteur for development of the Yogyakarta Principles); Mary Robinson (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative and former President of Ireland and former United Nations High Commissioner for Human Rights; and others

based on sexual orientation and gender identity.[72] While these principles are not legally binding upon Australia or the international community, they do provide useful guidance on human rights protection and sexuality. The Yogyakarta Principles set out the application of Human Rights Law in relation to Sexual Orientation and Gender Identity to which all States should comply.

Principle 2 of the Yogyakarta Principles establishes that:

> [E]veryone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.[73]

Under the Yogyakarta Principles, States should embody this principle *"in their national constitutions or other appropriate legislation"*. Thus States should review, and where necessary amend, their domestic legislation to prevent discrimination on the basis of gender identity. Australia can meet this requirement by amending the SDA to include protection for transgender, transsexual and intersex people.

The Need for Uniformity: Inconsistent Legislation Between the States, and Relevant Case Law

With the exception of the Commonwealth, all Australian jurisdictions have legislation in place that attempts to deal with issues of discrimination against people who express transgender, transsexual, or intersex identities.[74] However, the current legislative provisions are neither consistent nor comprehensive in their protection from discrimination of people who express such identities. Loretta De Plevitz stated that "in every jurisdiction except the federal jurisdiction, it is unlawful to discriminate on the grounds of sexual orientation or gender identity."[75] There is a distinct need for the Commonwealth to legislate to provide uniform protection of the rights of

[72] *Backgrounder: About the Yogyakarta Principles* (2007) <http://www.yogyakartaprinciples.org/backgrounder_en.pdf> at 6 August 2008.

[73] *Yogyakarta Principles* (2007) <http://www.yogyakartaprinciples.org/principles_en.pdf> at 6 August 2008. In the Yogyakarta Principles Introduction, "Sexual orientation" is understood to refer to "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender". "*Gender identity" on the other hand is understood 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".*

[74] In Western Australia protection from discrimination is based on 'gender history'. Thus, protection from discrimination only extends to those who have had sex affirmation surgery.

[75] Loretta De Plevitz, 'Take-Home Lessons for Gay, Lesbian, Transgender and Bisexual School Students' (2005) 30(4) *Alternative Law Journal* 180,181. De Plevitz refers in her footnotes to: *Discrimination Act 1991* (ACT) s 7, *Anti-Discrimination Act 1992* (NT) s 19, *Anti-Discrimination Act 1977* (NSW) s 38B, *Anti-Discrimination Act 1991* (Qld) s 7(1), *Equal Opportunity Act 1984* (SA) s 29(3), *Anti-Discrimination Act* (Tas) s 16, *Equal Opportunity Act 1995* (Vic) s 6, and *Equal Opportunity Act 1984* (WA) s 35AB and s 35O.

transgender, transsexual and intersex people. As the SDA is the only legislation at the Commonwealth level that contains provisions relating to discrimination based on gender and sexuality, it is the natural home of these protective measures.

Legal Recognition of Post-operative Sex

All states and territories, except South Australia, allow a post-operative transsexual person to alter their sex on their birth certificate.[76] In South Australia, a recognition certificate is issued, which for all intents and purposes under South Australian law, recognises the individual's post-operative sex. The problem with the issuing of a recognition certificate, as opposed to altering the birth certificate, is that it cannot be used for legal purposes in places outside of South Australia unless the laws of that place expressly allow it and the relevant authorities are informed of the reassignment of sex.[77]

Protection of the Rights of Transgender People Against Discrimination

New South Wales,[78] the ACT,[79] Victoria,[80] Queensland[81] and South Australia[82] provide statutory protection for transgender people against discrimination. Neither the Northern Territory[83] nor Western Australia[84] expressly protect transgender people against discrimination and do not mention transgenderism as a ground on which discrimination is not permitted within their relevant legislation. Tasmania's *Anti-Discrimination Act*, contains no express protection of transgender people.[85] Transgenderism however, may fall under the category of gender discrimination which is prohibited under this Act.

[76] *Births, Deaths And Marriages Registration Act 1995* (NSW) s *32B*; *Births, Deaths and Marriages Registration Act 1997* (ACT) s 24; *Births, Deaths and Marriages Act Registration Act* (NT) s *28B*; *Births, Deaths and Marriages Registration Act 1996* (VIC) s *30A*; *Births, Deaths and Marriages Registration Act 2003* (QLD) s *22*; *Births, Deaths and Marriages Registration Act 1999* (TAS) s *28A*; *Gender Reassignment Act 2000* (WA) s *18*.

[77] *Sexual Reassignment Act 1988* (SA) s 9(4). This results in added difficulty for a transsexual person who has been issued a recognition certificate when it comes to marriage in another state where the marriage would not be recognised because of their transsexual status.

[78] *Anti-Discrimination Act 1977* (NSW), Part 3A of the act covers discrimination on transgender grounds, expressly protecting both transgender and transsexual people, regardless of pre or post operation.

[79] *Discrimination Act 1991* (ACT) s 7.

[80] *Discrimination Act 1991* (ACT) s 7. Statutory protection from discrimination is now provided on the ground of 'gender identity'. Gender identity has been broadly defined to include transgender people.

[81] *Anti-Discrimination Act 1991* (QLD) s 7. The definition has been broadly defined to include any persons who identifies or has identified themselves as a member of the opposite sex by living or seeking to live as a member of that sex, thus including transgender people.

[82] *Equal Opportunity Act 1984* (SA) s 5. The definition used for the term transsexual within this Act is quite broad and may cover both transsexual and transgender people. Interpretation of transsexual provided in the act is 'a person of the one sex who assumes characteristics of the other sex'.

[83] *Anti-Discrimination Act 1992* (NT) s 4. Interpretation of 'sexuality': "sexuality" means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality.

[84] *The Equal Opportunity Act 1984* (WA) protects discrimination against a 'gender reassigned' person, which is defined in the Act (in section 4) as "a person who has been issued with a recognition certificate under the *Gender Reassignment Act 2000* or a certificate which is an equivalent certificate for the purposes of that Act." This provides protection for transsexual people against discrimination, however it fails to expressly protect the rights of transgender people.

[85] *Anti-Discrimination Act 1998* (Tas) s 3 Interpretations. The Act also, along with protection against discrimination based on sexual orientation, provides for protection based on gender (section 16(e)). It is debatable whether this provides protection against discrimination targeting transgender people.

Protection of the Rights of Transsexual People against Discrimination

South Australia,[86] the ACT,[87] Northern Territory,[88] New South Wales[89] and Tasmania[90] expressly provide statutory protection from discrimination for transsexual people. Victoria[91] and Queensland[92] provide statutory protection from discrimination based on gender identity. Gender identity has been broadly defined to include transsexual people.[93] In Western Australia, the *Equal Opportunity Act* 1984 protects discrimination against a 'gender reassigned' person.[94] Note that this only applies to post-operative transsexuals.

Protection of the Rights of Intersex People against Discrimination

Queensland, Victoria and New South Wales are the only Australian states to explicitly recognise the rights of intersex people in their legislation. In Queensland it is not permitted to discriminate on the grounds of gender identity,[95] in Victoria it is not permitted to discriminate on the basis that a person of indeterminate sex identifies as a member of a particular sex[96] and in New South Wales discrimination is not permitted because a person is a recognised transgender person, including a person of indeterminate sex who identifies as a member of a particular sex[97].

The ACT,[98] Northern Territory,[99] Tasmania[100] and South Australia[101] only explicitly mention transsexuality as a category for protection and there are no specific mentions of protection of intersex people. It is possible however that the protection from discrimination on the grounds of gender in the Tasmania legislation may be interpreted to include intersex persons.[102]

The Western Australia legislation prevents discrimination on the basis of a person's gender history. A person has a gender history if the person identifies as a member of the opposite sex, meaning the sex that they were not a

[86] *Equal Opportunity Act 1985* (SA) s 5: "sexuality" means heterosexuality, homosexuality, bisexuality or transexuality
[87] *Discrimination Act 1991* (ACT) s 7(1) This Act applies to discrimination on the ground of any of the following attributes: (c) Transsexuality.
[88] *Anti-Discrimination Act 1992* (NT) s 19. Section 4 Interpretation of 'sexuality': "sexuality" means the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality;
[89] *Anti-Discrimination Act 1977* (NSW) s 38A Interpretation: A reference in this Part to a person being transgender or a transgender person is a reference to a person (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.
[90] *Anti-Discrimination Act 1998* (Tas) s 16, A person must not discriminate against another person on the ground of any of the following attributes: (c) sexual orientation; (e) gender. Section 3 interpretations: "sexual orientation" means (d) transsexuality.
[91] *Equal Opportunity Act 1995* (Vic) s 6.
[92] *Anti-Discrimination Act 1991* (Qld) s 7.
[93] *Equal Opportunity Act 1995* (Vic) s 4. 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). *Anti-Discrimination Act 1991* (QLD) Sch Dictionary: 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.
[94] *Equal Opportunity Act 1984* (WA) s 35AB. Section 4: 'gender reassigned' person defined as 'a person who has been issued with a recognition certificate under the Gender Reassignment Act 2000 or a certificate which is an equivalent certificate for the purposes of that Act'.
[95] *Anti-discrimination Act 1991* (QLD) Sch Dictionary: Gender Identity includes having an indeterminate sex and seeking to live as a member of a particular sex.
[96] *Equal Opportunity Act 1995* (VIC) s 4.
[97] *Anti-Discrimination Act 1977* (NSW) s 38A.
[98] *Discrimination Act 1991* (ACT) s 7.
[99] *Anti-Discrimination Act 1992* (NT) s 4.
[100] *Anti-Discrimination Act 1998* (Tas) s 16. Definition of sexual orientation in section 3.
[101] *Equal Opportunity Act 1985* (SA) s 5.
[102] *Anti-Discrimination Act 1998* (Tas) s 16.

member of at birth.[103] As intersex people may be born with characteristics of both male and female sex they would not fall under this definition.

The Need for Reform

The need for law reform in Australia is quite evident from a consideration of the cases involving discrimination against transsexuals, transgendered persons and intersex persons. In *Secretary, Department of Social Security v SRA*,[104] the Federal Court of Australia considered whether, for the purposes of social security, a transsexual was qualified under the *Social Security Act 1947* (Cth) to receive a wife's pension as the wife of an invalid pensioner. The Federal Court held that "the ordinary meaning of the words 'woman' and 'female', include a post-operative male-to-female transsexual who is anatomically and psychologically female. Where the anatomical sex and the psychological sex have not harmonised that person does not fall within the ordinary meaning of the words 'woman' and 'female'."[105] Therefore, the post-operative status of a transsexual was deemed crucial at law to the 'harmonisation' required to be legally considered female.

As stated by Professor Andrew Sharpe, a leading Australian scholar in the area of transgender law reform, "more recently, and with greater consistency, the test of psychological and anatomical harmony has been adopted in Australia."[106] This means that the Australian judiciary has realised the broad scope within which the law should be applied, and that a transsexual is not determined solely on biological factors.

The common law in Australia, in respect to transsexual and transgender issues, is enunciated within two very important cases decided in 2001, and on appeal in 2003. These were the two *Re Kevin* cases. The first case was an application to the Family Court by a post-operative transsexual (Kevin) to have his marriage to his wife, Jennifer, declared valid pursuant to the *Marriage Act 1961* (Cth) in 2001.[107] The judgment of Justice Chisholm in the Family Court has been lauded for what has been seen as a progressive view of transgender issues in the upper echelons of the Australian judiciary, The marriage between Kevin and Jennifer was declared valid, and importantly:

> Unless the context requires a different interpretation, the words 'man' and 'woman' when used in legislation have their ordinary contemporary meaning according to Australian usage. That meaning includes post-operative transsexuals as men or women in accordance with their sexual reassignment.[108]

The case was subsequently appealed to the Full Court of the Family Court by the Attorney-General, with the Human Rights and Equal Opportunity

[103] *Equal Opportunity Act 1984* (WA) s 35AA.
[104] *Secretary, Department of Social Security v SRA* 43 FCR 299.
[105] Ibid.
[106] Andrew Sharpe, 'Thinking Critically in Moments of Transgender Law Reform' (2002) 11(2) *Griffith Law* Review 309, 312.
[107] *Re Kevin: validity of marriage of transsexual* (2001) 28 Fam LR 158.
[108] Ibid.

Commission as intervener in the second *Re Kevin case*.[109] Judgment was handed down by the Full Court of the Family Court in 2003. The key findings were that, in general, the words 'man' and 'woman' when used in legislation have their ordinary contemporary meaning according to Australian usage and that meaning includes post-operative transsexuals as men or women in accordance with their sexual reassignment. For the purpose of ascertaining validity of marriage under Australian law, the question of a person's gender stood to be determined at the date of marriage rather than at birth. Specifically, considering Kevin at birth had female chromosomes, gonads and genitals, but was a man for the purpose of marriage law at the time of marriage having regard to all the circumstances and in particular that he always perceived himself to be male and was perceived that way by others, he was accepted as a man for a variety of social and legal purposes, and that his marriage as a man was accepted in full knowledge of his circumstances by family, friends and work colleagues.

The appeal was dismissed. The Full Court handed down this final sentiment:

> Our decision like that of Chisholm J in this case, is in our view, the correct interpretation of the law. We would add, however, that we believe that the recognition of the position of post-operative transsexual persons is at least a step in the direction of the recognition of the plight of such persons and hopefully a step that will enable them to lead a more normal and fulfilling life.[110]

This was in consideration of the fact that, although indeed a step in the right direction, it was still left undetermined as to the legal status of a pre-operative transsexual. The Australian case law shows recognition of post-operative transsexuals, once the mental and anatomical sexes have apparently 'aligned' enough to satisfy the legal requirements, or more aptly, legislation. It was stated by the Full Court in its judgement:

> This leaves the more difficult question of the position of pre-operative transsexual persons. As we have said, this case does not require us to determine this question. In all the decided cases to which we have referred their position has been distinguished from post-operative transsexual persons and comments have been made to the effect that this is a matter for Parliament to determine. In this country at least, there have been no signs that the Federal Parliament has any interest in these questions. The solution is not, of course, solely in the hands of the Federal Parliament. There has been greater interest within most of the States and Territories and for many purposes it is the law of the States and Territories that most affect transsexual persons.[111]

[109] *The Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 30 Fam LR 1.
[110] Ibid para 388.
[111] Ibid para 382.

Furthermore:

> A question arises as to whether the courts can logically maintain that the position of post-operative transsexual persons is a matter for them but that of pre-operative transsexual persons is one for Parliament.[112]

In *Farmer v Dorena*,[113] an action was taken in New South Wales in 2002 by a transgender Applicant against an employment agency for discrimination. In this case, the Respondent took no action to process the Applicant's application forms, and also failed to take action to place the Applicant in any employment. This was found to be based upon the Applicant's transgender status, and was thus discriminatory.

In 2003, the case of *Houston v Burton* went before the Tasmanian Anti-Discrimination Tribunal,[114] and the Tribunal found that the Respondent had acted in a hostile manner towards the Applicant (a transgender female) including making comments to the Applicant along the lines of "I do things here which are more legal than you, you sicko pervert, transvestite, transsexual cock sucker, with your dick cut off," "yes, I have a real cunt here, not what you have got, you pervert", and "you have no right to call the Housing Services and the police on me, you of all people." The Tribunal found that the conduct of the Respondent towards the Applicant was not discriminatory under the *Anti-Discrimination Act 1998* because it was based upon their antagonistic personal relationship and there was no evidence that he would not have acted with equal hostility towards her if she had not been transsexual. The Tribunal also considered whether the Respondent was in breach of section 22(1) of the Act[115] either through discrimination or prohibited conduct towards a person engaged in accommodation.[116] Because the relevant incident occurred and impacted upon the quality of the Applicant's accommodation, it therefore fell under the Act. The Tribunal found that the Respondent did engage in prohibited conduct towards the Applicant in that he was clearly offensive, humiliating, insulting or ridiculing towards her. However, the section is limited to the attributes of gender, marital status, pregnancy, breastfeeding, parental status or family obligations and the Tribunal found that the Respondent targeted the Applicant's "*transsexuality and not her gender."*[117] The only section of the Act that the Tribunal found the Respondent had breached was sexual harassment.[118] The Tribunal found that the Respondent's comments about the Applicant's transsexuality were a dominant feature of his conduct towards her and the offensive quality of these combined with a physical attack of jabbing the Applicant in the chest with his fingers meant that the attack could properly be regarded as sexual

[112] Ibid para 383.
[113] *Farmer v Dorena Pty Ltd t/as Kyle Management Resources* [2002] NSWADT 81.
[114] *Houston v Burton* TAS Anti-Discrimination Tribunal, 18 June 2003.
[115] *Anti-Discrimination Act* 1998 (Tas).
[116] Ibid.
[117] *Houston v Burton* [2003] TASADT 3, para 124.
[118] *Anti-Discrimination Act 1998* (Tas) s 17(3).

harassment. This case went on appeal to the Supreme Court of Tasmania,[119] but the appeal was ultimately dismissed in 2004.

This case highlights the fact that while some states do have laws aimed at protecting transsexuals, these laws are inefficient, failing to provide appropriate levels of protection, and failing to prevent sex discrimination. In light of such inadequacies, it is imperative that the SDA be amended to fill this gap.

This year, Lockhart J in the Administrative Appeals Tribunal case of *Re Secretary, Department of Employment and Workplace Relations and Samantha Scafe*, stated that:

> Such a person has not harmonised her anatomical sex and her social sex; they are not in conformity. She still has the genitals of a man. I realise that there are cases (this is such a case) where a person has not undergone surgery for legitimate reasons, including its cost or medical or psychological reasons which render them unfit for the operation. Nevertheless the interests of society and the individual must be balanced in the determination of the ordinary meaning of the words with which this case is concerned and the application of the facts to those meanings. The requirement of reassignment surgery also has the benefit of society acknowledging that an irreversible medical decision has been made, confirming the person's psychological attitude.
>
> Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. There is an increasing awareness today of the importance of the right to privacy, and growing tolerance of a person's identity. But where the psychological sex and the anatomical sex of a person do not conform to each other it seems to me that the sex of a person must be determined by the anatomical sex. The day may come when the same result may achieve the anatomy of the other sex through chemical treatment if that ever becomes possible; but the evidence in this case and the material which is before the court do not support the conclusion that this stage has been reached. When it does, the result may be different.[120]

While acknowledging that the post-operative gender of a transsexual will be recognised by the Tribunal, it held that this recognition would only occur once the person has actually 'harmonised her anatomical sex with her social sex'. The consequence of this, as the Member rightly pointed out, is that those

[119] *Burton v Houston* [2004] TASSC 57.
[120] *Re Secretary, Department of Employment and Workplace Relations and Scafe and Other Party* (2008) 100 ALD 131, citing Lockhart J in *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299, 326.

individuals, who are unable or unwilling, for whatever reason, to realign their anatomical sex, will not be afforded protection and recognition before law of their social sex. Transgender individuals will be prevented from having their social sex recognised by the law which in itself amounts to discrimination.

The Victorian Civil and Administrative Tribunal recently held in *Hanover Welfare Services (Anti Discrimination Exemption)* that Hanover could exercise discretion to "refuse to provide accommodation there to a person who identifies as a male-to-female transsexual or transgender person unless and until that person provides to the Applicant a medical certificate certifying that that person has had gender reassignment surgery".[121] Gurney and her co-author, Eithne Mills, commented that:

> Transgendered people, and those affected by transsexualism or some other variation in sexual formation, have figured very prominently in discrimination statistics in proportion to their numbers. In the first few years of the millennium, Australians with a transsexual background or other intersex condition have finally achieved legal status as members of their contemporaneous sex for all purposes under both the common law and statute. They consequently now enjoy a level of recognition and protection under the law not yet available to those who, because they are trangendered or have not completed the process of sex affirmation, identify as belonging to one sex while retaining the unambiguous sex phenotype of the other. For members of this latter group, who are so often stigmatised for it, their sole source of legislated protection from ridicule, discrimination and even vilification is the relevant anti-discrimination Act.[122]

It is clear from the above analysis, that this issue is one which needs to be addressed through legislative changes. The Castan Centre submits that the Federal Government needs to amend the SDA to protect the human rights of transsexual, transgendered and intersex persons against discrimination.

CONCLUSION

The need for consistent and comprehensive protection of the rights of transgender, transsexual and intersex people at the Commonwealth level is clear. Since 1995, when the Australian Democrats first introduced the Sexual and Gender Identity Discrimination Bill (Cth) into the Senate for consideration, there have been numerous attempts to enact Commonwealth legislation that specifically recognises and protects the rights of transgender, transsexual and

[121] *Hanover Welfare Services (Anti Discrimination Exemption)* [2007] VCAT 640.
[122] Karen Gurney and Eithne Mills, 'VCAT, Hanover and the Transgender Conundrum' (2007) 32(4) *Alternative Law Journal* 203, 207.

intersex people.[123] Unfortunately, while debate on the Sexual and Gender Identity Discrimination Bill (Cth) has occurred periodically, the Bill has yet to be able to be brought to a vote in the Senate.

The current lack of uniform protection from discrimination of transgender, transsexual and intersex people across Australia means that Australia is in breach of its international obligations under the ICCPR to ensure the rights contained in the ICCPR are afforded to all Australians "without distinction of any kind". It is unfortunate, but hugely indicative of the inadequacy of legal affirmation of transsexual, transgender and intersex persons, that such persons have to try to come within the ambit of the catch-all "or other status" in these treaty provisions on basic and fundamental human rights.

The support for uniformity and legislative redress at the federal level has been found in legal, academic, medical and in many social, and communal, groups. The case law in Australia, whilst promising, tends to highlight the sorry state of affairs for those transgendered persons who are lumped together with either intersex persons or pre-operative transsexual — they fail to have their social sex recognised before the law. As noted above, the lack of federal definition of these terms has meant that State and Territory legislation has to be more heavily relied upon, and Federal legislation regarding matrimonial and social security matters relied upon as a means to an end. What is required is progression for pre-operative transsexuals and transgendered communities, and definitive progression at that. Comparatively speaking, post-operative transsexuals are afforded much more legal recognition and avenues purely as a result of being able to define themselves as "female" or "male" at law. The medical evidence is advancing in leaps and bounds, and it is now well established that persons are not solely biologically determined at birth. However, that transsexuals should be given more medical options in order to fully harmonize with their mental sex is simply not a feasible, nor fair, answer.

Not to be afforded a status at law, is to be cast adrift into a sea of discrimination, prejudice and fear.

[123] Most recently the Sexuality and Gender Identity Discrimination Bill (Cth) was debated in November 2003 after being introduced for general consideration by National Democrats Senator Brian Greig.

Schedule 1 - Work of State Commissions and Boards

In Victoria, workshops for advocates, schools, and the community are provided. These are designed to help such organisations understand and apply the rights and obligations contained in the Victorian Charter of Human Rights and the Victorian Equal Opportunity Act.[124] For schools in particular, the Victorian Equal Opportunity and Human Rights Commission runs a number of seminars; however, these are aimed at teachers and administrators rather than students. Workshops are also run for the private sector and local government.[125] The education consultancy team can also customise education programs depending on an organisation's needs.[126] Further, the Commissioner is undertaking general training programs in order to provide participants with an overview of equal opportunity/anti-discrimination law, which would presumably include all areas of discrimination, including discrimination on the basis of sex. Information available for school students includes the Safe Schools Program, a collaborative effort by the Federal government, the State and Territory governments, and non-government school authorities (as well as other key stakeholders) that presents a way of achieving a shared vision of physical and emotional safety and wellbeing for all students in Australian schools.[127]

In Queensland, the Anti-Discrimination Commission runs educational workshops, including a forum on sexuality, gender identity and equal opportunity for employers, as well as discrimination law for community organisations. [128] The Commissioner runs general training programs to provide participants with an overview of equal opportunity/anti-discrimination law, and also distributes media releases. Information available for school students includes the Schools Project,[129] where secondary schools in the Brisbane area have been offered the opportunity to participate in a pilot program involving a specially developed two-hour discrimination course in their schools.[130]

In New South Wales, the Anti-Discrimination Board offers training for employers, which includes training on implementing equal opportunity principles in the workplace, recruitment and termination, harassment and bullying prevention, handling grievances, contact officers skills training, managing psychiatric disabilities, and in-house services. It also trains community groups on anti-discrimination (rights, advice and strategies), as well as bullying and harassment. Information available for school students includes the NSW Schools Writing Competition[131] where students wrote about their experiences of discrimination, harassment and bullying and were required to describe a world without same.

---

[124] http://www.humanrightscommission.vic.gov.au/education%20and%20training/community%20workshops/.
[125] http://www.humanrightscommission.vic.gov.au/education%20and%20training/workshops%20at%20the%20commission/ .
[126] http://www.humanrightscommission.vic.gov.au/education%20and%20training/education%20and%20consultancy/ .
[127] http://www.humanrightscommission.vic.gov.au/Safe%20Schools/Teachers/.
[128] http://www.adcq.qld.gov.au/main/training.html.
[129] QADC newsletter. issue 4. Nov 1998. http://www.adcq.qld.gov.au/newsletter/issue04/story12.html.
[130] This was offered to Legal Studies courses for year 11 and 12 students. The session includes a cross-cultural activity, video presentation, explanation of the *Anti-Discrimination Act 1991* and a small group activity.
[131] http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_writingcompetition.

In South Australia, the Equal Opportunity Commission runs training sessions in workplace bullying, discrimination and harassment, complaint handling, the role and responsibilities of contact persons, recruitment dilemmas and developing workplace equal opportunity policies. The Board also offers general training programs to provide participants with an overview of equal opportunity/anti-discrimination law. Information available for school students includes online basic quizzes including questions about sex discrimination, summaries of discrimination and harassment laws, case studies including sexual harassment at school and work, discrimination at school based on pregnancy, sex discrimination in booking accommodation, sexism in dress requirements and task allocation at work. [132]

In Tasmania, the Community Education and Liaison Officer conducts general information sessions and provides advice on discrimination and prohibited conduct under the Act to the community, educational institutes, non-profit groups and non-government agencies, and their Training Consultants also conduct fee-based services for the corporate and public sectors.[133] The general training programs provide participants with an overview of equal opportunity/anti-discrimination law in the State.

In Western Australia, the Commissioner considers education to be a vital part of their function. One of the Equal Opportunity Commissioner's major roles is to encourage recognition and understanding of the principles of equal opportunity though education.[134] The Commissioner provides community education and engagement forums free of charge to not-for-profit community organisations,[135] and also provides general training programs at a cost (which are open to everyone).[136] The community education and engagement forums can be designed to focus on a range of human rights issues, including equality between men and women.[137] The Commissioner also provides general training programs designed to provide participants with an overview of Equal Opportunity Law, its application and implications,[138] and provides customised training tailored to the needs of any given organisation.[139]

In the ACT, the Human Rights Commission workshop program includes an introduction to the *Discrimination Act* and *Human Rights Act*, contact officer training, discriminatory harassment and bullying, disability discrimination, discrimination in employment, as well as tailor-made workshops. The general training programs provide participants with an overview of human rights/discrimination law, and the Human Rights Commission also distributes booklets on discrimination generally, including sex-based discrimination.[140]

---

[132] http://www.eoc.sa.gov.au/site/eo_for_schools.jsp.
[133] http://www.antidiscrimination.tas.gov.au/what_we_do.
[134] http://www.equalopportunity.wa.gov.au/abouteoc.html.
[135] http://www.equalopportunity.wa.gov.au/socialcommunitysector.html.
[136] http://www.equalopportunity.wa.gov.au/generaltraining.html.
[137] http://www.equalopportunity.wa.gov.au/socialcommunitysector.html.
[138] http://www.equalopportunity.wa.gov.au/generaltraining.html.
[139] The EOC also produces a 2 page booklet on sex discrimination, accessible online at http://www.equalopportunity.wa.gov.au/customisedtraining.html.
[140] http://www.hrc.act.gov.au/assets/docs/Discrimination%20Act%20Brochure.doc.

Finally, in the Northern Territory, the Anti-Discrimination Commission runs training in anti-discrimination, harassment and bullying, preventing workplace discrimination, protecting human rights in Australia and customised workplace training.[141] The general training programs provide participants with an overview of human rights/discrimination law, presumably including sex discrimination.

[141] http://www.nt.gov.au/justice/adc/docs/TrainingProgramJuly-Dec08.pdf.