



TransGender Victoria Inc

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RESPONSE TO KEY QUESTIONS RAISED IN THE EQUAL OPPORTUNITY ACT REVIEW DISCUSSION PAPER

TransGender Victoria (TGV) welcomes the opportunity to contribute to this discussion. We chose to focus largely on areas relating to transgender issues as per our area of expertise.

TransGender Victoria fully supports the submissions of:
the Attorney-General's Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) issues;
the ALSO Foundation; and
the Victorian Gay and Lesbian Rights Lobby Inc

Is there a case for reforming the law?

Question1: Does the law need to be changed to improve equality of opportunity and the elimination of discrimination in Victoria?

In short, yes! Growth in awareness and understanding of transgender issues continues to be rapid and the law must keep up the pace.

Further, the intensity of discrimination faced by transgender people, including rape and attempted murder in workplaces and being 10 times more likely than the average citizen to be on the receiving end of assault¹ requires that every message be sent to society that this type of prejudice is unacceptable. At a minimum, in the words of Martin Luther King Jr, "judicial decrees may not change the heart, but they can restrain the heartless."

However, in an effort to "change the heart" it is vital to make proactive and preventative efforts to reduce discrimination. This includes uprooting systemic discrimination and prejudice in relation to sex and gender identity eradicating limiting assumptions in this area e.g. males are always masculine, females are always feminine; genitalia and/or chromosomes at birth determine sex for all of a person's life.

Further, the recently released report "Tranznation" found unemployment in the transgender community to be 9.1%, which is double the national average. The wastage and disadvantage for both the transgender community and all of society and our economy from such a statistic speaks for itself.

We believe that the Victorian Human Rights and Equal Opportunity Commission ("the commission") or any reformed successor body is in an ideal position to carry out these proactive efforts. We agree that any perceived conflict between the current role of complaint conciliation and the new proactive role needs to be carefully managed. However, based on past experience we believe this can be easily achieved.

¹ Enough is Enough 2000, Tranznation 2007



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Question 6: Could technical aspects of the law (including protected attributes and the definitions of 'direct' and 'indirect' discrimination) be improved so that the law itself does not prevent the elimination of discrimination?

We strongly urge the protection on the basis of gender expression. This could be achieved by the addition of a new attribute or expansion/clarification of an appropriate existing attribute e.g. sex.

Gender expression refers to a person's expression of masculine or feminine irrespective of their sex, sexual orientation or gender identity. Examples of gender expression include but are not limited to whether a female wears slacks or a skirt, whether a person is logical or feeling in their mental or communication processes and stereotypical limitations of gender e.g. females can't be assertive or angry, being sensitive (for anyone) is "weak." These have no effect on a person's ability to perform in employment, their right to receive education or any other area of public life yet can be used in a detrimental way.

TGV expresses disappointment that the area of exceptions and exemptions is beyond the scope of the review.

Religious exemptions

In particular, we believe there is no scope for religious exemptions in the 21st century. Just because a belief system is called "religion" does not make it superior to any other belief system, nor does it give it the right to treat people detrimentally. This is the total opposite of equality and democracy. Further, we find it unacceptable that religious bodies that receive government funding can be allowed to discriminate.

Competitive sport

We also believe that advances such as recognition of transsexuals by the Olympics have rendered s(66)1 obsolete.

"A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant."

This is now excessive and we believe each situation needs to be treated on its merits rather than being subject to a more "blanket" exemption.

Reasonable notice s27B

(1) An employer may discriminate against another person on the basis of gender identity in any of the areas specified in section 13 or 14 if—

(a) the person does not give the employer adequate notice of the person's gender identity; or

(b) the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

(2) In determining whether or not it is unreasonable for the employer not to discriminate against the person, all relevant facts and circumstances must be considered, including—

- (a) the cost to the employer of not discriminating;
- (b) the feasibility of the employer not discriminating;
- (c) the financial impact on the employer of not discriminating;

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- (d) the financial circumstances of the employer;
- (e) the impact of the proposed discrimination on the person;
- (f) any other relevant factors.

This needs to be removed on two grounds:

- a) It is common sense that would be implied in any common law situation; and
- b) It is excessive and could be construed as applying to all transgender (and intersex) people when it was only intended to apply to those employees affirming their gender identity with the same employer

3.2.6.5 Should the Commission or any other body have the power to resource litigation?

The current processes regarding VCAT are extremely disadvantageous to already marginalised groups and are in need of major reform. 3 recent cases Lesfest (2003), Hanover Welfare Services (2007) and Peel Hotel (2007) provide clear evidence of the need for reforms.

Lesfest was the subject of an individual conciliation case between a transgender person and a group that publicly advertised a policy that excluded transgender women from a “womyn’s [sic] only” gathering. Before conciliation processes were complete, Lesfest made a case to VCAT trying to gain an exemption from the gender identity attribute.

TGV recommends all applicants to VCAT be subject to cross-referencing with current VHREOC cases prior to granting of a hearing at VCAT. If there is an unfinished conciliation matter at the commission, no hearing should be allowed. This would result in a freeing up of VCAT resources, lower costs for all and greater usage of more conciliatory and informal processes that are in the spirit of the law and the spirit of celebrating diversity in society.

The Peel Hotel case related to a venue, the majority of its clientele being gay males. VCAT granted exemptions from the Equal Opportunity Act in relation to three attributes including gender identity. However, at no point was any evidence tendered regarding transgender or intersex people, let alone why an exemption including the gender identity attribute was necessary. The granting of the exemption created considerable upset (not just among transgender people), was derogatory towards transgender people and saw some transgender people boycott the establishment. The Hanover Welfare Services case particularly outraged the transgender community in that a whole community was victimised for the alleged actions of one person.

In both the Peel and Hanover cases we believe much acrimony could have been prevented by a “registration” system. Using TransGender Victoria as an example, we suggest a process along the following lines:

1. TransGender Victoria registers with VCAT as a party interested in and with expertise in gender identity issues.



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2. On any occasion where a party applied to VCAT for an exemption from the gender identity attribute, it would compulsory for the party to enter conciliatory processes involving TGV. TGV would assist in offering alternative solutions to a VCAT exemption.

Had such a process been in place at the time of the Peel and Hanover cases, we believe the following alternatives could have resulted:

Peel Hotel: the owner would have simply withdrawn gender identity from the hearing,
Hanover: TGV could have offered expertise in internal processes and offered the experience of a member of the GLBTI community who had experienced a very similar situation.

In both cases the results would have been lower costs, freeing up of VCAT resources, greater conciliation and greater harmony across groups in society and a far greater win-win result for all parties involved.

We believe such an approach would also reduce the extreme disadvantage faced by other small groups in society.

3.2.7.2 Are any other measures needed to ensure that the law does not discriminate?

We strongly recommend protection of volunteers on an equal basis with employees. Often, the intensity of discrimination faced by transgender people sees them use volunteering as a path to paid employment. However, without equal opportunity protection this path often becomes strewn with obstacles. We cannot see why volunteers are less worthy of protection from discrimination than paid workers. (We note also the same principle needs to apply to bullying as covered by occupational health and safety laws).

Again, we believe such an approach would also reduce the extreme disadvantage faced by other small groups in society e.g. differently-abled, those from small religious groups.

It is also noted that many organisations claim to welcome volunteers from all of the GLBTI community. Unfortunately, as evidenced by the "Transgender Needs Assessment" report, the most discriminatory group towards transgender people was gay men. Anecdotal evidence of such occurrences within such organisations is rife. Further at a transgender community awards ceremony called the "Trannys" held in 2006, the most nominated category was "most transphobic and unhelpful gay and lesbian organisation" (receiving 7 nominations). Protecting volunteers equally with employees would contribute to eradicating discrimination within the GLBTI community and hence GLBTI organisations.

We strongly urge protection from violence and vilification on the bases of gender identity (and sexual orientation). When transgender people in rural areas of Victoria have rocks thrown through the windows of their home, when transgender people driving down suburban Melbourne streets have rubbish bins through their car windscreens, the law and society are failing to protect its vulnerable citizens.

We also believe there is a need to reduce obstacles, both real and perceived in making complaints, both financially and otherwise. This would reduce the burden on



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people from groups already facing extreme disadvantage. Financially, greater funding by Victoria Legal Aid of equal opportunity cases could be one possibility.

We also believe suppression of names needs to be more widely considered for VCAT cases. Many transgender people face extreme prejudice and do not wish to “out” themselves, even to achieve justice. Others may live in small and/or remote communities and may be at greater risk on that basis.