

Sex And Gender Education (SAGE) Australia) Response to the Human Rights And Equal Opportunities Commission (HREOC) Expression of Interest Document On the Rights of Sex And Gender Diverse People (HREOC: Sex And Gender Diversity Issues Paper: May 2008)

Prepared For SAGE by Tracie O'Keefe: Sexologist, May 2008

SAGE is a political lobbying group that campaigns for the rights of sex and gender diverse (SGD) people. Its member include people who are intersex, transexed, transsexual, transgendered, androgynous and without sex and gender identity.

Sex: Male, female, intersex, or of indeterminate sex.

Gender: Social interpretation and presentation of sex type that may or may not match a person's biological sex.

This paper is written in response to HREOC's announcement that it is seeking consultation from the sex and gender diverse community on how it may go forward in 2008 in aiding human rights issues for sex and gender diverse people.

Historical Context

Primitive cultures often made spaces for people who are sex and gender diverse e.g. native Americans, Polynesians, Inuits etc. Australia after colonisation became basically a Christian culture that exhibited prejudice towards people who were atypically male or female and often continues to do so up until the present day. Changes in law to accommodate or discriminate against sex and gender diverse people have been piecemeal to say the least, varying from state to state, and government to government. The legal benchmarks have often relied more upon legal precedents than actual laws. This has left sex and gender diverse people in a vulnerable position where rights they have fought for for many years can be overturned in an instant, without public consultation, by any government minister exercising their own extremist agenda. Indeed this happened in 2007 when the Department of Foreign Affairs took away the rights of some intersexed, transexed, transsexual, and transgender people to travel abroad on gender-appropriate passports.

The Real Situation for Sex and Gender Diverse People in Australia

HREOC has already been made aware by submissions sent to it, within the last two months by various interested parties, of many of the human rights issues raised around SGD people. These issues include medical, legal and discrimination issues. The issues raised and identified are several but it would be impossible to identify all of them until any enquiry of some kind has taken place. The validation for this argument is that in 2007 HREOC published its findings on the inequalities suffered by same-sex couples which included 58 recommendations for legal change. Consequently further investigations since that time by the government has led to more than a hundred identified inequalities. This plainly shows that to level the playing field in Australian society for sex and gender diverse people, a full inquiry of some kind does need to be held in order to identify the very depth all of the issues affecting discrimination they suffer.

HREOC's Lack of Funding

SAGE understands when HREOC says it does not have the large funds available to hold a full-scale enquiry on the rights of sex and gender diverse people in Australia. Under the last government funds were dramatically cut in the area of human rights. Under the present new Labor government there has been a series of cost-cutting announcements that are strategically designed to curb the economy and cap rising inflation. Such an economic strategy from a government trying to bring a runaway economy under control is honorable; but from a human rights perspective it leaves a moral chasm in that there appears that there is little money available to investigate the human rights abuses taking place against sex and gender diverse people in Australia by members of the public, corporations and the government itself.

Funds were found in recent years for a Same Sex Entitlements enquiry which is obviously more popular because the number of people in same-sex relationships in Australia far outweighs the number of sex and gender diverse people. Same-sex issues are also more likely to grab headlines and fit in with a greater international demand on countries to align human rights issue. Sex and gender diverse people, however, find themselves at the bottom of priority needs requirements for different countries' human rights laws, including Australia.

Present Political Disinterest

For politicians there appears little kudos in taking on the rights of sex and gender diverse people. They are such a small minority of the population, and are often invisible by their nature, so it is unlikely politicians will gain votes by championing such a cause. This becomes very clear when government ministers refuse to meet with members of the sex and gender diverse community to listen to their issues and discuss what can be done about such lack of human rights.

Exclusion of sex and gender diverse people also became very clear at the recent 2020 Summit held by the government, in 2008, on how to take Australia forward in the future. Despite submissions for attending the summit being made by sex and gender diverse people, no SGD representative was invited. This was clearly not confusion but exclusion because SAGE alerted the organisers at the last moment to this omission but they refused to include SGD people.

In reality we presently have a populist government that is concerned with dealing with populist issues. Sex and gender diverse people's human rights will never be populist, because of the small numbers of people, and their complicated situations are often too difficult for the public to comprehend. We also have a situation in Australia where governments are put in power by many extremist religious factions that are often hostile to sex and gender diverse people, and do not wish them to have equal human rights. Such governments pander to those core religious extremists and do not go near sex and gender diversity issues for fear of alienating voters.

An example of the government's hostility towards sex and gender people can be seen in the email below:

From: XXXXXX@dfat.gov.au

Sent: Tuesday, 20 May 2008 10:42 AM

To: XXXXXX@yahoo.com.au

Subject: Overseas Surgery Passports [SEC=UNCLASSIFIED]

Grace,

Thank you for your email of 2 May which has been passed to the Passport Strategy, Policy and Coordination Section for a reply. I'm sorry it has taken a little longer to respond to you than I anticipated.

Australian passports are issued with the personal details (name, date and place of birth and gender) that are contained on the person's Australian birth or citizenship document. This policy applies to all passport applicants regardless of gender or whether they are transgender applicants. The Department does not itself initiate a change to the gender recorded by these agencies for passport issuing purposes but relies on information shown in the birth or citizenship records. In some very limited circumstances, such as where a person has meet the normal requirements to amend the gender on their birth or citizenship certificate but is unable to do so because that person is married, the Australian Passport Office may consider a variation to this policy.

Where an applicant intends travelling overseas for the purposes of undertaking gender reassignment surgery the Australian Passport Office will only issue a passport in the details contained on the applicant's birth or citizenship certificate in line with the Australian Passports Amendment Determination 2007 (No1). The person is also given the option of travelling on a limited validity Document of Identity that does not show any gender of the holder. The person may then be issued with another travel document in the reassigned gender when they can meet the requirements (i.e. provide a birth or citizenship certificate in the reassigned gender). A Document of Identity is a highly credible, International Civil Aviation Organisation (ICAO) compliant document valid for entry and exit purposes in many countries including Thailand, USA, U.K. and New Zealand. Where an applicant takes up this option they are

provided with the attached letter.

I hope the above is useful.

Regards

Jane Luckhurst

Executive Officer

Passports Strategy, Policy and Coordination Section Grace Abrams Project
Officer _____

It can be seen from this above email that the passport office seeks to mislead the public. An enquiry was sent to DFAT, asking them to state their position on issuing passports to trans people. What DFAT did not know is that Grace was actually Grace Abrams, who won a case against the passport department in 2007 when they denied her a female passport, having transitioned to female, yet she was post surgically reassigned. In the decision the judge handed down, he instructed that the passport department had no business denying passports to people who had transitioned but were still married. It can be seen, however, from this email that the passport office does not honestly declare in the email that that is the case but implies to the

recipient that it is upon their good charity and the applicant's good fortune that an applicant just may receive their entitlement.

See copy of documents below.



USA Backlog of Passport Applications Reaches Three Million

United States at government expense in July and August to deal with the problem.

The department faces withering criticism from citizens and lawmakers over its failure to cope with unprecedented passport demand that has led to major delays in processing and disrupted travel plans for thousands.

"I am asking all foreign service personnel with consular experience to look at whether you can volunteer and serve our citizens here at home," Undersecretary of State for Management Henrietta Fore said in a cable sent Friday to all U.S. diplomatic missions abroad.

"All related travel, lodging, and per diem costs will be covered," she said in the unclassified memo, a copy of which was obtained by The Associated Press. The memo also offers training and refresher courses for those who might be rusty.

"The needs are real and we need your help now," Fore said. "We recognize, and accept, that there will be an impact on other services and activities. All volunteers are welcome."

Two groups of 50 diplomats each are needed. The offer expands on a similar but less costly appeal earlier this month for diplomats planning to be on home leave this summer to work at the overwhelmed National Passport Center in New Hampshire and other processing facilities.

The department's Bureau of Consular Affairs, which oversees passport operations, could not say how much money may have been set aside to pay for airfare, hotels and meals for the volunteers.

Officials said the offer is an indication of how serious the department is in ending the passport mess that has crippled the system despite the hiring of additional staff.

Fore said the goal is to clear the backlog by the end of September, when a temporary suspension of a major new border security initiative that had caused the surge in applications expires.

The contents of her cable were first reported by The Washington Times.

The following item was reported by *The Associated Press* on 25 June 2007.

State Department Ups Ante Amid Passport Crisis

WASHINGTON -- Desperate times call for desperate measures.

In a move that may affect services at U.S. embassies and consulates worldwide this summer, the State Department is trying to lure diplomats back home over the next two months to help clear a massive backlog in passport applications.

Unable to cope with nearly 3 million backed up applications and thousands more that are pouring in each day, the department has issued an urgent all-points global appeal seeking volunteers to return to the

Transgender Passport Applicants: New Policy

On 31 May 2007 the Foreign Minister signed Australian Passports Amendment Determination (2007 (No. 1), which spells out that a person's identity for passport issuing purposes comprises four pieces of information; that is name, gender, place and date of birth, as recorded on the applicant's cardinal document. This amendment particularly affects the issue of travel documents to transgender people and new policy instructions are being drafted and will be released shortly via the Content Management System (CMS).

Transgender people travelling overseas for gender reassignment surgery will no longer be able to obtain a limited validity passport reflecting their intended sex. Instead, they may be issued a limited validity passport showing the gender recorded on their cardinal

document, which may be replaced gratis after the gender reassignment is completed and the person meets full requirements (i.e. produces a cardinal document in their assigned gender). Alternatively, a limited validity Document of Identity (DOI), which does not include a gender field, may be issued. When a DOI is issued, Letter 10 must be given to the client explaining the limitations of the document and Letter 11, acknowledgement of receipt of the advice must be completed by the client.

Transgender clients are often supported by active advocacy groups and passport applications should be handled sensitively. Any client issues should be documented carefully. Only cases that meet this new policy may be issued a passport in their assigned gender.

Handwritten signature/initials

It can be seen from this document that the minister for foreign affairs and trade in 2007 changed the guidelines for issuing passports to trans people; this would also include people who are both trans and intersex. This was done without any consultation with the public, medical professionals involved in the field of sex and gender diversity or with any organization or member of the sex and gender diverse

community. It is indicative of the way sex and gender diverse people are treated by the government and lawmakers.



Australian Government
Department of Foreign Affairs and Trade

ACKNOWLEDGEMENT RECEIPT

87005690N

I, _____

acknowledge receipt of advice from the Department of Foreign Affairs and Trade regarding possible problems associated in travelling with a Document of Identity. These possible problems being:

- some countries do not regard a Document of Identity as a valid travel document
- customs/immigration authorities in some countries may view the possession of a Document of Identity in lieu of a passport with suspicion and consequently delay or harass the bearer at entry points; and
- should customs officers decide to conduct a body search there is a very real risk of embarrassment to the bearer (this may also occur to a pre-operative person issued with a limited validity passport).

I agree to being issued with an Australian Document of Identity.

Signature

Date

**It is a criminal offence under the *Australian Passports Act 2005* to make false or misleading statements.
(There are penalties of up to 10 years' imprisonment or a fine of \$110 000, or both.)**

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It can be seen from this document issued by DFAT that having been refused the appropriate passport, a sex and gender diverse person has to travel either on a passport stating the wrong gender or a Document of Identity, which the government itself, by asking people to sign this form, admits is dangerous.

The Danger of a Missed Opportunity in Only Considering a Small Portion of the Rights of Sex and Gender Diverse People

Minorities often have great trouble in getting their voices heard. Minorities who may offend religious fanaticism find getting their voices heard almost impossible in countries like Australia. In the year of writing this paper the Pope visits Australia, an outspoken homophobe and transphobe, and the government welcomes him with open arms, and pays millions of dollars to facilitate his visit. There are many other fanatics that the government welcomes to Australia, who are also phobic against SGD people, yet Australian sex and gender diverse people themselves cannot get the attention of politicians to discuss the daily abuse they are presently suffering.

The lives of sex and gender diverse people can be very difficult on a daily basis so when HREOC offers to listen to their difficulties and try and aid in changing laws it must be appreciated that this a big opportunity for sex and gender diverse people. Getting such attention by a government department may never happen again in a generation so it is important the opportunity is maximised. To fix one small area of the many difficulties suffered by sex and gender people would not greatly address the spectrum of difficulties they suffer. It would be like asking a man with gangrene in both legs which leg he would like amputated to save his life; it is a gesture but definitely not a solution.

Solution to HREOC'S Funding Problem

SAGE therefore offers a solution to HREOC funding problems. It is proposed that HREOC uses the available money to allow the setting up of a voluntary 12-person advisory committee, approved by HREOC, to advise HREOC on the issues facing SGD people and suggestions on how the government can fix these problems. This committee could be made up by six volunteers from the health and legal professions and academia, plus six volunteers from the sex and gender diverse community. Those on the committee could be further charged with producing a report within a year equivalent to the report produced by HREOC for the Same Sex Entitlements enquiry. Since academics and scientists will be on this committee such a report

would be within its capabilities. SAGE is prepared to offer HREOC help in setting up such a committee.

In the 1990s Britain set up a voluntary parliamentary advisory committee on transsexualism that led to the passing of the Gender Recognition Act. This actually worked very well and the government of the day took the advice of the committee in setting up the Gender Recognition Act. By using such a solution as this HREOC would have discharged its moral obligation to consider sex and gender diverse people's needs in a holistic way. Such a solution would make great economic sense for HREOC and largely satisfy the needs of the sex and gender diverse community.

How Much Work Would Be Involved for the Committee?

The field of human rights for sex and gender diverse people is somewhat already evolved intellectually. In Britain they have the Gender Recognition Act, some of which works, and some of which does not. Spain has laws that afford sex and gender diverse people a good spectrum of human rights along with Holland. In New Zealand the *To Be Who I am* report was published, in 2007 by the Human Rights Commission addressing the human rights of trans people. All of the aforementioned documents and formats, plus others, contain large amounts of information and formats that could guide the committee in how to consider the situation in Australia.

Along with public consultation from interested parties the committee could very quickly amass a large amount of data for analysis in a short time frame. In other words any committee carrying out this work would not have to reinvent the wheel because much of the information is already readily available. HREOC could use the money they have to provide a coordinator and assistant for this project.

Conclusion

The human rights needs of sex and gender diverse people in Australia are presently not in line with international charters on human rights. Many people in Australia are suffering physically, mentally and socially because of these human rights abuses. Even with limited funds HREOC now has the ability to guide an inquiry and carry out

an inquiry by volunteers overseen by HREOC in order to address these issues. The results of this report can then be used as recommendations to government to change laws and policies correcting the human rights abuses presently being suffered by sex and gender people in Australia and leading to the passing a Sex And Gender Identity Act.

Sex and gender diverse people in Australia are not asking for any special consideration, just the same equal rights afforded to all Australians by virtue of their citizenship. All they are asking for is 'A Fair Go'.