

State and federal exemptions granted by The Australian and NSW Anti-discrimination departments

A Paper for and on behalf of Sex And Gender Education Australia (SAGE): A lobbying group that works on behalf of sex gender and sexuality diverse people

We suggest that this document is also read in co-ordination with SAGE's Legal Policy Document (<http://www.sageaustralia.org/documentssage.html>) and SAGE's Sex and Gender Guidance Document For Government Employees.(website)

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This paper is written both as a public comment and as a guideline for government departments to follow when considering applications for the granting of exemptions to Anti-Discrimination Acts designed to protect the rights of sex, gender and sexuality diverse people (SGSDP). One of the huge problems for law-makers and policy-makers in Australia has always been the disparity between state and federal laws. It is obvious at this present time that such complications cause many government officials trying to interpret the law great confusion and caution both at state and federal law levels. Two cases will be reviewed as background to consider how the operation of granting exemptions against SGSDP has operated in New South Wales.

In 2004 an exemption was granted to the Christian organisation Mission Australia in Sydney, NSW, which runs refuges and day centres for the homeless and is partly government funded. This exemption from the Anti-Discrimination Act 1996 included three primary projects: Lou's Place, A Woman's Place and Women in Supported Housing (WISH), all located in Sydney, and other services specifically for service-users' dependent children. The exemption was granted on 24th June 2004. These are services that generally deal with homeless people having difficulties with accommodation, work and social issues within the community, particularly Sydney.

Upon it becoming public knowledge that Mission Australia had applied for this exemption, the Anti Discrimination Board of NSW (ADB) received requests both from the political lobbying group SAGE and from the Gender Centre (a Sydney-based government-funded SGSD facility) to be consulted on this possible exemption. What happened, however, was that the ADB recommended to the Attorney General (AG) of NSW that the exemption be granted without any consultation with the SGSD community. So the granting of the exemption was granted in almost secrecy by the Attorney General on the advice of the ADB with no community consultation.

What is disturbing about the ADB's actions is that a legal representative from the ADB told SAGE that it had no legal obligation to consult with any community concerning any exemptions from the Anti-Discrimination Act. Unfortunately, since Australia does not

have a Bill of Rights in national government, both state and government bodies are often able to wield the sword of law-making and interpretation without public consultation or accountability.

The granting of this exemption was undoubtedly an appeasement of a right wing religious faction with little consideration for the people that the exemption actually affected. There is no doubt that the application for this exemption was sought out of prejudice against and misunderstanding of SGSDP in the ADB government department that is supposed to enforce anti-discrimination. To support this exemption was inappropriate. Many people who are SGSD and homeless can no longer access these essential services at a time when they are most vulnerable. The further consequence of the ADB's actions have been that the SGSD community in NSW now presently have very little trust of or faith in the ADB. Elizabeth Riley, the general manger of the Gender Centre told the head of the ADB that its actions had brought trust between it and the SGSD community to an all time 10-year low.

In a meeting between the Gender Centre, SAGE and the AIDS Council of New South Wales (ACON), the head of the ADB said that his hands were tied because of the way the law stands in NSW and he had not had any other choice than to recommend the exemption be granted by the AG. He pleaded that the ADB was simply a cog in the wheel, but surely even for civil servants the law is open to interpretation. The ADB, however, is subject to acting on the legal advice of government lawyers and those lawyers advised that the emption was valid.

In the Kevin case 2003 the applicant to the court was granted the right to marry as a male, having undergone transition from being registered female at birth. One of the comments in the case by the judge was that because Kevin lived as male and was taken by others as a male, he was entitled under the law to be considered male for the purposes of marriage, even though he had not undergone genital construction of a penis. The judge determined that genitals were only one of the indications of a person sex. (Wallbank 2003).

In considering the exemption to the Anti-Discrimination Act 1996 for Mission Australia, the ADB failed to take into account the Kevin case's decision and chose to judge that only transsexual women who had undergone genital reconstruction could be considered women. This attitude flies in the face of science and the judgment of the Kevin case and is a form of body fascism. Many transsexuals cannot afford to have genital reconstruction and others are not medically or psychologically suited to undergo such a complicated surgery that can for some people be life-threatening.

The judgment also means that women with adrenal hyperplasia who have long and extended clitorises that simulate a penis would not qualify to be accepted by Mission Australia's refuges. It also means intersex people who may have bodily characteristics of both sexes would not be able to be helped by those refuges because they do not fit Mission Australia's prejudicial opinion of what a women should look like. Recent science has now discovered that at least 1 percent of the population is intersexed and over

300 intersex conditions have been identified. This would mean that at least 1 percent of the people applying to use Mission Australia's facilities for women will be turned away.

Female-identified transsexual and intersexed people have and are generally granted access to female space. They are often at risk in male spaces when it comes to sleeping accommodation and accessing facilities that can be used by disturbed and violent males. With these projects that now have gained the exemption we are talking about how they are given money by the government to set up facilities to help the most desperate in our society: the homeless, often jobless and most economically desperate. This client group is at the bottom of the social ladder and is unlikely to have a plethora of documentation to support their claims of being female or request that they should be treated as female. For them to be forced to undergo a physical examination to prove they are female is inhuman and against all human rights charters.

Many women may physically have some male characteristics but that does not necessarily mean that they are male. To judge a person's sex only by some of their physical characteristics is not understanding reproduction or sex identity at all. Sex and gender identity is arrived at by primary sex reproductive function, secondary reproductive function, gonadal function, brain sex, genetic profiling, hormonal profiling, bodily characteristics, sex identity, gender identity, and social and historic identity. In some individuals those indicators may be in alignment towards male or female but never truly pure; but in other people there may be contraindications. In cases where there are genuine contradictions, it is only humane to treat the person in line with how they are presenting themselves socially.

To reject a human being because they do not fit a perfect physical profile according to religious text or doctrine is sexism and prejudice, and not the kind of action that a country like Australia, that prides itself on the motto 'Fair Go For Everyone' should be supporting. It is also, according to the Bible, un-Christian as Jesus did not walk on the other side of the street, but embraced all human beings treating them equal.

SGSDP who are homeless may spend many years battling with coming to terms with their identities and seeking the help to adjust their physical bodies to come in line with what they believe to be their identity. Such help is often out of their economic or intellectual reach due to the fact they are at the bottom of the social strata. For such people to then be rejected when they seek help from a refuge causes untold damage to their mental and physical health, and for the law to support that act of violence is barbaric.

The irony of the situation is that by the guidelines the ADB, AG and MA have set down, someone who has a penis, a beard, no breasts and dresses and acts as a male would be allowed to stay at the refuge if they had a female birth certificate, which many female-to-males transsexuals do.

Mission Australia put out a transgender policy document to its staff saying all clients upon first contact must be informed that the projects affected are only for women. All

clients will need to produce documentation that they are in fact women. As part of the identification required during intake, staff will accept:

Birth certificate

Passport

Recognition certificate

Doctor's certificate verifying post-operative status

Other relevant documentation such as Centrelink documents, Medicare card

Driving licence

Staff may have discretion to admit someone but documentation will need to be provided within 48 hours. Women who are unable to prove that they are women by documentation will be rejected by the project. To subject SGSD women to this interrogation is an abuse of their human rights. Homeless people in need of help from projects like these will be unlikely to possess that kind of documentation because:

1. Many post-operative transsexual women are unable to change their birth certificates to female for a number of legal complexities out of their control.
2. The same situation applies to passport status which is in disarray as some long-term post-operative transsexual women in Australia are still unable to get a female passport.
3. Recognition certificates issued by the Australian government are issued to transsexuals who have undergone surgery. For some people surgery is not viable medical option. To discriminate against these people is no less than a form of segregation and discrimination.
4. A doctor validating that a patient has had genital reconstruction does not change the medical sex of that person. In medicine and other health professions, those professionals are obliged to treat the patients as the sex they present as socially. In medicine genitalia is only one indication of sex identity and not always a true one. A doctor may issue someone with a medical certificate saying they are female, even though that person may have a penis and testicles.
5. Due to the complexities of legal status for many people who are SGSD, some people's social security documentation may not link in with how they may be presenting socially.
6. A driving licence in New South Wales does not indicate a person's sex.

In reviewing the attitude of Mission Australia and its desire to be purist in the kind of women it lets into its projects for the homeless in Sydney, it is plain to see its position was reached purely out of prejudice against SGSD people and not innocent ignorance. For many years those projects supported SGSD women so they had knowledge of the kind of desperate position that homeless SGSD women find themselves in when they are without shelter and vulnerable. Furthermore, Mission Australia had worked for many years with The Gender Centre and ACON to help SGSD people. Mission Australia could have sought help from these institutions if it was having difficulty understanding any issues surrounding SGSD people. Instead it went behind the backs of these institutions to

gain the exemption, and once the legal process was in place, it ceased to communicate with the institutions even though it had had written requests to do so.

The consequences of the exemption have been that some women in need who are of SGSD identity, who staff have presumed are transsexual, have been turned away from the three projects. Other institutions have had to take on those clients but Mission Australia still retains the same government subsidy it did before. Many Sydney projects will now not work with Mission Australia projects, and the homeless are of course the ones who miss out. The true ramifications of this exemption were never properly projected by Mission Australia, the ADB's office or the AG before the exemption was granted and the client group it affected.

On Mission Australia's website it quotes: *"No longer are we content to simply rescue people from their problems: we also aim to empower them with the support, skills and self-confidence to embrace life, and take their place in the community."* It seems, however, that by its actions it is selective about the kind of people it helps and certainly about the kind of people it empowers, which evidently does not currently include non-operative transsexual women. (www.mission.com.au)

Edward Eager Lodge Exemption

This is a facility run by the Wesley Mission, a parish in the uniting church of Australia. Its full title is the Wesley Mission Homeless Persons Services and it provides short-term crisis accommodation for a variety of persons over the age of 18. There is also a daycare centre for the homeless. An exemption to the Anti-Discrimination Act was granted to the Edgar Gear Lodge to refuse service to non-operative transsexual women presenting as female. A review of that exemption is due during 2005. (<http://www.wesleymission.org.au/wedo/homelessness>).

The granting of the exemption was given before the occurrence of the Kevin case so at the time there were no precedents set in law that considered that SGSD people (in the Kevin case namely a transsexual male) presenting as their chosen sex should be taken as that sex. The exemption is dangerous in that it allows Edward Eager Lodge to turn away transsexual people, particularly non-operative transsexual women, because it does not accept them as women.

At the moment Edgar Edward Lodge has a policy that it accepts non-operative transsexuals. The exemption is also dangerous because it allows latitude for abuse and discrimination in that, even if it does allow non-operative SGSDP into its facilities, it may allow the staff to ask them to use inappropriate toilets or bathing spaces: for example asking non-operative transsexual women to use the men toilets or showers.

The organisation advertises that it provides accommodation for disabled people, therefore it would be in contravention of the Anti-Discrimination Act not to provide appropriate facilities for those disabled persons. Following that logic it is also an abuse for Edward Eager Lodge not to provide at the very least private facilities for persons who are gender

variant or non-specific identifying as female. To have an exemption in law to force SGSD persons to use the toilets or showers associated with their opposite chosen sex and gender is inappropriate.

There is no logical humane basis to renew this exemption in 2005 when knowledge about SGSD persons has advanced considerably over the past 10 years. It is plain to see both in scientific and sociological literature that they pose no physical, mental or social threats to anyone. To renew this exemption at this time would be nothing more than supporting prejudice against SGSD people.

Internal letters

During the writing of this paper the author became aware of a letter that was written from Bob Debus the Attorney General to Clover Moore, MP for Bligh. The letter was a response to Ms Moore's previous letter of the 13 September 2004 stating that some of her constituents were concerned about the manner of the granting of the exemptions from the Anti-Discrimination Act against SGSDP in MA projects.

In Debus's reply he states that the following considerations need to be taken into account when an exemption is reviewed:

- (a) whether the proposed exemption is appropriate and reasonable,
- (b) whether the proposed exemption is necessary,
- (c) whether there are any non-discriminatory ways of achieving the objectives or purposes for which the proposed exemption is sought,
- (d) Whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption.
- (e) The public, business, social or other community impact of the granting of the proposed exemption,
- (f) Any conditions or limitations to be contained in the proposed exemption.

It is plain to see in reviewing the granting of the exemption that MA did not take reasonable steps to secure the safety of their female clients by other means. Alongside that it is also easy to see that neither did the ADB require it to do so and that the ADB was not transparent in its dealing with the SGSD community and its concerns about the impact of the proposed exemption.

Rights of passage for females in society with atypical genitalia.

In many societies, rights of passage into female space is not dependent on proof of stereotypical female genitalia. In Native American cultures there are four genders and space is made in the socially determined female space for males who identify as female,

sometimes known as two-spirited persons. Within the Western cultures these people would be identified as transsexual, transgender or intersex to the native Americans as they are simply accepted as persons of female identity without question, examination or interrogation. In Oman there has traditionally been spaces within the women's space from males who are identified as being without maleness or feminine in nature. These individuals are not identified socially as males and they may wear brightly coloured clothing rather than traditional white worn by males. (O'Keefe, 1997)

There presently exists an anomaly in some of the Australian governmental attitudes to people who are SGSD and an uncertainty of who is really entitled to have access to female space. Strangely enough, no ban is generally applied to transsexual women who transition to male. This shows us that SGSD women are still being seen by society as sexual deviants who may carry with them potentially dangerous behavior. This is partly due to the Australian macho culture in that men are seen as much more powerful than women and therefore carry with them more threat of sexual abuse. In Australia, women's rights have not followed the progress that has been made in Europe, North America, and some other cultures and this is easy to confirm by looking at the balance of political power between the sexes.

In the document put out by the ADB of NSW explaining the rights of transgender people with regards to discrimination, the department shows a lack of knowledge about the diversity of ways in which SGSD present themselves. Admittedly the document was conceptualised in the 1990s but it is now profoundly out of date. It groups together all non-typical male or female persons as being transgender. This is simply not true as some SGSD people are intersexed. It also does not differentiate between people who are transgendered and people who are transsexual, which makes it difficult for the ADB to uphold enforcing of any anti-discrimination against subgroups because each group has its own issues about discrimination. (ADB-NSW, 2002).

The document basically divided what it calls the transgender person into two categories: the recognised and non-recognised. The clear division is made between those who change their birth certificates by virtue of (a) being born in a jurisdiction that allow this change, and (b) having had genital surgery, and those have not changed their birth certificates, regardless of surgical status.

In 2005 the UK government is bringing into practice the new Gender Recognition Act. As part of the Act, a person transitioning to the female or male identity is not dependent on them having undergone genital reconstruction. Female-identified SGSDP may be able to change their birth certificate to female even if they have not undergone construction of typical female genitalia. What the British government has understood in passing this Bill is that genitals alone do not determine sex nor gender recognition and the many other factors may outweigh genital presentation (Gender Recognition Panel, UK).

When an individual changes their sex or gender presentation, it often marginalises them to a social minority and in many cases causes them to be vulnerable. Atypical females that may have intersex, transsexual, transgender or androgynous identities are in danger of

assault, rape and violence in male spaces, just as ordinary women can be, and have traditionally through history in many cultures been given access to female space for safety purposes. Many of these people also strongly identify as female and are greatly offended by the ignorance and rejection or prejudicial attitudes of both men and women who deny them access to that female space.

Consideration of Danger For the Users of Mission Australia's Female Facilities

We at SAGE recognise that MA provides facilities for vulnerable females at the aforementioned projects. Some of these females will have physical and mental health problems and may have been subjects to physical and mental abuse by men. This can make this client group vulnerable in that they are seeking female space, as a place of safety and refuge and it is the job of MA to secure that space as female only to reassure the client group. MA, however, has failed to recognise that women come in all shapes and sizes and some of them physically may have considerable resemblances to males but these women too also need shelter, care and security in female-only spaces.

If MA had clients who were afraid of black people, would they then seek to ban all people of colour? Should MA get a client who was raped by a Muslim man and says that they are afraid of all Muslims, would it then seek to ban all Muslims? SGSDP are of no threat to women and to paint them as possibly being so is ludicrous and without logic. Transsexual women need to be treated as women when presenting themselves as being so. The exemption granted to MA from the Anti-Discrimination Act is nothing more than a hate crime.

Peer Project Reviews

As the exemptions discussed in this paper became heated topics in the Australian SGSD community there were several postings to the SAGE discussion group. SAGE steering committee members also canvassed the policies of other projects in Sydney. What became clear was that many other projects dealing with the same kind of client group reported that they had no problems in admitting SGSDP identifying as female.

There were even postings from other counties where they also reported that it had been the policies of many of those projects from many years that they admitted non-operative transsexual women. Consequently this seemed to be a non-issue for those projects and that there were no reported stories of trouble.

The Action the Anti-Discrimination Board and the Attorney General Need to Take

It is a sad day when public offices set up to protect the public do in fact abuse the very public they are set up to protect. It is plain to see from both the exemptions discussed that the government pandered to the persuasion of religious prejudices. The ADB and the AG need to take action to right the wrongs that have been perpetrated against the SGSD community, particularly non-operative transsexual women. The granting of the exemption to MA needs to be reviewed and revoked. The granting of an extension of the

exemption to Anti-Discrimination Act for Edward Eagar Lodge should not be granted. In future, exemptions against individuals when their behaviour is inappropriate needs to be the first course of action that the ADB could take, but never should such exemptions be granted against whole communities: this is pure sectarianism.

Suggested Guidelines For Anti-Discrimination Boards and Attorney Generals

1. It is always prudent for any law-makers and policy-makers to consult communities about any changes in the law that will affect those communities, as this is part of the democratic process. All ADBs and AGs need to thoroughly and fully consult with various SGSD communities before passing exemptions that will bar SGSDP indiscriminately from social spaces.
2. Transsexualism is now generally in medicine, sexology, psychiatry, psychology and the law established as an intersex physical and mental state. Other intersex conditions often result in people who may be seen as one sex externally but are in fact another sex and this means that nature is incongruent, not that this person is a fraud. If a person presents themselves socially and behaves as a particular sex, then establishments need to accept that person as that sex as a matter of courtesy and cater for any special needs they may have.
3. ADB's and AGs need to put in place new policies that protect the rights of the individual who may be SGSD and who are often vulnerable members of society. These laws currently need updating and evolving.
4. Any exemption that is granted against a SGSD person should only be on an individual basis that results from a person's inappropriate or disruptive behaviour. Institutions as well as individuals have the ability through the magistrates court to take out an Anti-Violence Order (AVO) against anyone who displays threatening or violent behaviour.
5. ADBs and AGs need to understand the difference between sex and gender identity. Sex identity is a person's affinity with their own biological sex, and gender identity is a person's way of presenting themselves to the public. Some people may have a biological sex but their gender identity may be incongruent with that sex and they need to be treated in accordance with their gender of choice and presentation. Some people may not have a clearly defined sex or gender identity but will need to access female space as a place of refuge and safety and in other cases male space. It is always inappropriate for these people to be treated any differently from normal males or females if that is what they desire.
6. Many people complain that the presence of people with male characteristics in female space makes them feel uncomfortable. This is a form of prejudice and must always be identified as such because to discriminate against someone, who bears no threat, simply upon his or her physical characteristics is sexism. Many people who are sex, gender and sexuality diverse may not fit classical male or

- female appearances but may still have a valid claim to be in male or female space, depending on how they are presenting to the public.
7. Religious factions should not be exempt from anti-discrimination laws concerning SGSDP.
 8. Ags and ADBs would be well-advised to take advice from professionals in the field of sexology who would have first-hand knowledge of how such bans would effect the SGSD community.

End note

Sex and Gender Education (SAGE) has won its campaign to stop Edward Eagar Lodge extending its exemption to the Anti-Discrimination Act allowing it to force transsexual women to be housed in the men's section of its refuge and to turn them away from the female refuge. The news was announced in a meeting with the ADB of SAGE members, along with the Gender Centre and ACON. SAGE is continuing its efforts to try and overturn a similar ADB exemption granted to Mission Australia.

Bibliography

O'Keefe, Tracie, **Sex, Gender & Sexuality: 21st Century Transformations**.
Extraordinary People Press, London, 1999.

Papers

Wallbank, Rachael, [The Legal Environment Following Re Kevin: New Perceptions and Strategies for Effective Law Reform in Respect of the Legal Rights of People Who Experience Variation in Human Sexual Formation and Expression by Rachael Wallbank, www.sageaustralia.org](#) 2003.

Internet

Gender recognition Panel, <http://www.grp.gov.uk>

Mission Australia <http://www.mission.com.au/cm/p.aspx?n=BLNEY-LGMXH-WWOYH-KYAEY-VHYJI>

SAGE's Legal Policy Document http://www.sageaustralia.org/docs/legal_policy.pdf

SAGE's Sex and Gender Identity Guidance Document For Australia Government Employees.
<http://www.sageaustralia.org/docs/Sex%20and%20Gender%20%20Identity%20Guidance%20Document%20For%20Australian%20%20.pdf>

Wesley Mission www.wesleymission.org.au/wedo/homelessness

Leaflets

Anti-Discrimination Board of New South Wales, Transgender Discrimination: Your Rights, 2002.

Anti-Discrimination Board of New South Wales, Discrimination & the Anti-Discrimination Board of New south Wales, 9/01.

Letters

Copy of **letter from Bob Debus**, Attorney General of NSW to Clover Moore, MP for Bligh, January/February 2005.

Conversations

Conversations between **Norrie May-Welby** from the AIDS Council of New South Wales, **Tracie O’Keefe** from the Australian Health & Education Centre, **Grace Abrams** from the Gender Centre, with other project managers in Sydney, and through internet postings on the SAGE Yahoo group.