**Jon Stanhope** MLA

**CHIEF MINISTER**

ATTORNEY GENERAL  MINISTER FOR HEALTH  MINISTER FOR COMMUNITY AFFAIRS  MINISTER FOR WOMEN

**MEMBER FOR GINNINDERRA**

# Foreword

It is my Government's belief that all people are entitled to respect, dignity and the right to participate in society and to receive the protection of the law regardless of their sexual orientation or gender identity.

In early 2002 I requested that the Department of Justice and Community Safety develop a comprehensive law reform proposal to give effect to these principles.

As part of developing this proposal, the Department of Justice and Community Safety has undertaken a comprehensive review of ACT legislation to identify those provisions that discriminate against same sex couples, or against transgender people or intersex people.

This issues paper is the first consultative phase of a process of law reform that will achieve equality for particular groups of people within the community who face discrimination in their day to day lives.

The issues paper poses a number of questions on which the Government welcomes community views. What is the most appropriate way for the law to recognise the relationships between people of the same sex? Do our laws meet the needs of transgender people and intersex people? Do our laws provide appropriate protection against discrimination and harassment?

The Government welcomes your views on these and other issues raised in this paper.

Jon Stanhope MLA
Chief Minister
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ACT LEGISLATIVE ASSEMBLY

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# Gay, Lesbian, Bisexual, Transgender and Intersex people in the ACT:

## an issues paper

The issues paper is a brief survey of issues for the purposes of stimulating community debate. It is not a comprehensive statement of the law nor should it be taken to be a definitive statement of the ACT Government's position on any of these matters.

The Government will consider all comments received on this issues paper in developing further amendments to ACT legislation. Comments received will also be reflected in the Government's report on this law reform initiative, due to be tabled in the ACT Legislative Assembly by 1 May 2003.

This issues paper can be viewed online at www.jcs.act.gov.au.

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**To provide comments on the Issues Paper–**

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You can provide comments ONLINE: www.consultation.act.gov.au

**Comments must be received no later than 28 February 2003.**

# Contents

# The law reform process

This issues paper and the Legislation (Gay, Lesbian and Transgender) Amendment Bill 2002 are the first stage of a law reform process to address discrimination on the basis of sexuality or gender identity in the ACT.

The Department of Justice and Community Safety has reviewed all ACT legislation to identify provisions that discriminate against same sex couples, or against transgender people or intersex people. The review identified some 70 Acts and Regulations that contain provisions that potentially discriminate against gay, lesbian, bisexual, transgender and intersex people, and that may need amending.

Because of the number and range of issues identified in the review, amendments to address discriminatory aspects of ACT legislation will proceed in two stages. The first stage will consist of the more straightforward amendments and these amendments are contained in the Legislation (Gay, Lesbian and Transgender) Amendment Bill 2002 that was introduced into the Legislative Assembly on 12 December 2002[1].

The second stage amendments will address the more complex issues. Matters that will be dealt with in stage two include:

- issues that are legally complex (including matters relating to parenting and children, such as recognising the same sex partner of a birth mother as a parent of a child);
- issues that present significant administrative difficulties (such as identifying an alternative process where legislation relies upon discriminatory Commonwealth definitions or where the legislation is part of an agreed national scheme); and
- issues that are likely to be the subject of particular community interest.

The Government will consult on these issues before deciding on the most appropriate way to progress these matters. Drafting of the second stage amendments will proceed at a later stage in light of this consultation.

The issues that are identified in this paper are intended to serve as a focus for community consultation. In line with the Government's law reform objectives, the paper examines issues of discrimination on the basis of sexual orientation and issues of discrimination on the basis of gender identity.

The issues paper concentrates on existing ACT legislation. It does not examine the law on matters such as marriage, superannuation, taxation and social security over which the ACT Government has no control. While these are significant matters in which same sex couples continue to face discrimination, they are also matters that are legislated by the Commonwealth Government. Under the *Australian Capital*

[1] Available online at www.legislation.act.gov.au.

*Territory (Self-Government) Act 1988* the ACT Legislative Assembly cannot make laws that are inconsistent with a Commonwealth law that is in force in the ACT.

This issues paper has been developed by an interdepartmental committee comprising representatives from all ACT Government Departments.

# Review of ACT legislation

A complete review of all ACT legislation has been undertaken to identify those provisions that may have a discriminatory application to a person because of their sexual preference or gender identity.

The main focus of the review in terms of discrimination on the grounds of sexual preference has been on the recognition of relationships between people of the same sex, as it is in personal relationships that a person's sexual preference is reflected.

The main focus of the review in terms of discrimination on the grounds of gender identity has been on the way in which a person's sex is recognised.

### What is discrimination?

The aim of the review is to achieve, so far as is possible, equal legal status for lesbian, gay, bisexual, transgender and intersex people by eliminating discriminatory references in ACT legislation.

But what do we mean by discrimination?

There are two ways of approaching discrimination. Under the ACT *Discrimination Act 1991*, discrimination occurs if a person is treated unfavourably because of a particular attribute. So in respect of a same sex couple, this approach would ask whether a couple in a same sex relationship are treated unfavourably because they are of the same sex.

The second approach would be to use a comparator such as in legislation like the Commonwealth *Sex Discrimination Act 1984*. Using this approach, the question would be whether a same sex couple in a relationship are treated differently to an opposite sex couple in the same type of relationship.

The comparator approach has been used for the purpose of this review, due to the fact that it is opposite sex concepts of *marriage* and *de facto spouse* that are currently used in legislation, and because the objective is to achieve equal status. Achieving equal status necessarily implies the use of a comparator such as A=B.

The application of the comparator approach to legislative discrimination in respect of gender identity is slightly different. Gender is relevant in legislation where there is a reliance on *male* and *female* and where there are requirements for a person to state their *sex*. Where this may become discriminatory is in application – that is, whether the particular provision recognises that a person is of the gender that they identify themselves as being.

# Discrimination and same sex relationships

The central issue for people in same sex relationships is the extent to which the law recognises those relationships.

### What is the comparison?

The types of opposite relationships currently referred to in ACT legislation are marriage ('spouse') and de facto relationships ('*de facto* spouse'). In applying the comparator, it is not possible to compare the legislative treatment of a same sex married couple to an opposite sex married couple because there is currently no provision in Australian law for two people of the same sex to legally marry – that is, there is no legally recognised way for two people of the same sex to enter into a voluntary union that attracts the same rights and obligations of marriage. The issue of registered relationships, or civil unions, is examined further in a separate section of this paper.

The initial comparison that has been made for the purposes of the review is between the legislative treatment of a same sex "de facto" couple and an opposite sex *de facto* couple. This is because in the absence of the option of marriage, the law must rely on the objective approach of the nature of the relationship that two people *do* have, as opposed to what they *might* have if the option (ie. marriage) was available.

It is arguable that it is not possible to compare a same sex de facto couple to an opposite sex de facto couple because the term *de facto* itself means that the parties are living together as husband and wife although not legally married to each other – ie, it is a marriage *in fact* but not in law. Clearly, a same sex couple cannot "live together as husband and wife". But it is also inherently contradictory to say that an opposite sex couple "live together as husband and wife" when they have not married, and in fact, may not be able to marry (eg. one of them is married to, and not yet divorced from, another person).

Rather than looking at these relationships from the point of view of marriage, it is more useful to look at the functional definition of a de facto relationship, which is of two people living together as a couple on a genuine domestic basis. This type of functional definition is used in section 44 of the *Administration and Probate Act 1929*, which relevantly provides:

> ***eligible partner***, in relation to an intestate, means a person other than the intestate's legal spouse who—
>
> (a) whether or not of the same gender as the intestate, was living with the intestate immediately before the death of the intestate as a member of a couple on a genuine domestic basis.

The comparison is thus a comparison of the difference in the legislative treatment of two people of the same sex living together as a couple on a genuine domestic basis and the legislative treatment of two people of the opposite sex living together as a couple on a genuine domestic basis.

**Issue:** Is this comparison an appropriate comparison?

## Recognition of same sex relationships in ACT legislation

In the ACT, the principal piece of legislation that recognises same sex relationships is the *Domestic Relationships Act 1994.* This Act contains a quite broad definition of domestic relationship:

> ***domestic relationship*** means a personal relationship (other than a legal marriage) between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage.

This definition includes a same sex relationship. The Act sets out principles to be applied by the courts when dealing with property disposition on the dissolution of domestic relationships. These are similar to provisions for property disposition on the breakdown of marriage in the Commonwealth *Family Law Act 1975*.

It is important to draw a distinction between a *domestic relationship* within the meaning of the *Domestic Relationships Act 1994* (set out above), and same sex relationships for the purposes of this review of legislation.

The definition of *domestic relationship* encompasses a wide range of relationships, of which a de facto marriage and a same sex relationship are a subset. A domestic relationship includes, for example, an adult child providing care to an elderly parent, or two brothers living together and sharing household duties and expenditure. This latter example, notwithstanding that the two persons are of the same sex, is not a type of relationship that is intended to be covered by the review.

Since the enactment of the *Domestic Relationships Act 1994*, many ACT laws that previously had a discriminatory application to same sex couples have been amended. For example:

- The eligibility criteria for first home owner grants under the First Home Owner's Grant Act 2000 include consideration of whether the applicant, or the applicant's partner, has previously held an interest in land, or previously received a first home owner's grant. The definition of "applicant's partner" includes a same sex partner.

- Under the *Administration and Probate Act 1929*, the same sex partner of an intestate person may benefit from the estate of the intestate on the same basis as if they were a de facto spouse of the intestate.

- The *Coroners Act 1997* includes a same sex partner in the definition of "spouse" for the purposes of the Act.

This legislation has also been included in the review because although the legislation has been amended, the level of recognition and the terminology used to describe such a relationship is not consistent across this legislation.

There are also some ACT laws that have not been amended and continue to have a discriminatory application to people in same sex relationships. For example:

- The *Parental Leave (Private Sector Employees) Act 1992* provides that an employee to whom the Act applies is entitled to the same entitlements in respect of parental leave as those provided for in the draft parental leave clause set out in the parental leave case decision, attachment A. The entitlement is to maternity leave for the mother of the child, and paternity leave for the father of the child. In a lesbian relationship, the birth mother of a child would be eligible for maternity leave, but her female partner would not eligible for any leave equivalent to paternity leave.

- Under the *Protection Orders Act 2001*, a spouse and a de facto spouse are included in the definition of 'relevant person' for the purposes of the domestic violence provisions. Under this Act, a person's behaviour is domestic violence if it causes physical injury to a relevant person. The definition of relevant person would only include a same sex partner if the partner 'normally lives, or normally lived, in the same household as the original person'. This inclusion, although slightly circuitous, would pick up same sex relationships. While the inclusion of a member of the same household in the current provisions would bring a same sex partner under the domestic violence provisions of the Act, such a partner is treated differently under the legislation. The legislation is discriminatory in form.

- The *Adoption Act 1993* provides that only a heterosexual couple may adopt a child.

**Issue:** Would there be any adverse outcomes if all ACT laws gave the same recognition to same sex relationships that is given to opposite sex relationships?

## The *Discrimination Act 1991* and same sex relationships

Section 7(1) of the *Discrimination Act 1991* sets out a number of attributes that are protected from discrimination. A person discriminates against another person if they treat them unfavourably because that other person has an attribute listed in section 7(1). Included in these attributes are *sexuality* and *marital status*.

"Sexuality" is defined under the Act as meaning "heterosexuality, homosexuality (including lesbianism) or bisexuality".

The Discrimination Amendment Bill 2002 (No 2) will amend the provisions of the Act relating to marital status to provide for equal treatment of same sex partnerships with marriages and de facto marriages. Although the Act makes discrimination on the ground of sexuality unlawful, it has not, to date, provided the same protection from discrimination to same sex couples as it does to heterosexual couples.

While it seems likely that discrimination against a person on the basis of their same sex relationship would usually also be discrimination on the grounds of sexuality, this may not necessarily be the case. The Discrimination Amendment Bill 2002 (No 2) will insert the inclusive new term "domestic partner" in place of "de facto spouse" and replace "marital status" with "relationship status".

**Issue:** Does the *Discrimination Act 1991* provide adequate protection from discrimination for people in same sex relationships?

# Discrimination and transgender and intersex people

The term *transgender* is not a term that has a universally accepted meaning. Section 17 of the ACT *Crimes (Forensic Procedures) Act 2000*, for example, defines transgender in the following terms:

(1) A ***transgender person*** is a person who—

(a) identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or

(b) has identified as a member of the opposite sex by living as a member of the opposite sex; or

(c) is of indeterminate sex and identifies as a member of a particular sex by living as a member of that sex;

whether or not the person is a recognised transgender person.

(2) A ***transgender person*** includes a person who is thought of as a transgender person, whether or not the person is a recognised transgender person.

(3) A ***recognised transgender*** person is a person the record of whose sex is altered under the *Births, Deaths and Marriages Registration Act 1997*, part 4 or the corresponding provisions of a law of a State or another Territory.

This definition is different to the everyday usage of transgender.

The term *transgender* is more generally used to refer collectively to people who cross dress, cross-live in a different gender, and to transsexuals who permanently alter their bodies to more closely conform with their gender identity.[2] This is a slightly broader definition than the one that is used in legislation in that it includes a person who cross dresses but does not necessarily cross-live in a different gender. Paragraph (1)(c) would also seem to include a person who is an intersex person, where the more recent trend would seem to be to identify intersex people as being distinct from transgender people.

An *intersex* person is someone whose gender was ambiguous at birth –ie. the person is born with sex chromosomes, external genitalia, or an internal reproductive system that are not considered 'standard' for either male or female.[3] An intersex person may identify as exclusively male or female, or neither exclusively male nor exclusively female.

This issues paper adopts the everyday meaning of transgender rather than the meaning in the *Crimes (Forensic Procedures) Act 2000*, and also recognises that intersex people are a distinct and separate group of people from transgender people.

[2] Transgender Outreach Canberra – Glossary: http://www.tgo.org.au/
[3] Definition from the Intersex Society of North America: http://www.isna.org/

Many of the issues for transgender people and intersex people are similar. The fundamental issue with laws and with other societal structures is that there is little or no recognition that there is a broader spectrum of sex than male and female only. Gender is largely viewed as a binary system (1:0) where if a person is not male, then they must be female and vice-versa. It is an all or nothing approach.

## How is gender identity recognised in legislation?

Where terms such as 'sex', 'male', 'female', man' and 'woman' are used in legislation they are not defined and hence will take their ordinary meaning. The limited Australian case law involving consideration of gender issues and transsexual persons suggest that this ordinary meaning "relates to anatomical and physiological differences rather than to psychological ones"[4]. The Macquarie Dictionary definitions of 'sex' include:

1. the character of being either male or female: persons of different sexes.
2. the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences.

This seems to suggest that generally speaking, a transgender person will not be regarded as being of the gender with which they identify for the purposes of ACT law. There are exceptions to this.

Part 4 of the *Births, Deaths and Marriages Act 1997* provides a mechanism for a person to change the sex recorded on their birth certificate in certain circumstances. This issue is discussed in more detail later in this issues paper but basically, it only covers a transgender person or an intersex person who has undergone sexual reassignment surgery – ie. a transsexual person. Part 4 further provides that a birth certificate issued in respect of a transsexual person is, for the purposes of any law of the Territory, conclusive evidence of the person's sex as stated in the certificate.

As with the ordinary meaning of sex, part 4 of the *Births, Deaths and Marriages Act* emphasises the anatomical and physiological aspects of gender. A transgender person who cross dresses or cross-lives in a different gender but who has not undergone sexual reassignment surgery will not be helped by the provisions in part 4. One of the reasons for this is that sexual reassignment surgery provides an objective, and presumably permanent, threshold for determining a person's sex.

Other legislation takes a broader approach. Section 17 of the *Crimes (Forensic Procedures) Act 2000* provides that a transgender person is a person who:

(a) identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex; or

(b) has identified as a member of the opposite sex by living as a member of the opposite sex; or

[4] Secretary, Department of Social Security v SRA (1993) 118 ALR 467, Black CJ at para 9.

(c) is of indeterminate sex and identifies as a member of a particular sex by living as a member of that sex.

This definition has much less emphasis on the anatomical and physiological aspects of gender, and more on the social aspects of a person living as a member of a particular sex. The reason for the emphasis on how a transgender person identifies themself is because of the purpose of the provision in determining the appropriate sex of a person to search a transgender person under the Act.

**Issue:** Is there a need to define "sex" for the purposes of ACT law? If so, should different definitions apply for different purposes?

## The *Discrimination Act 1991* and transgender and intersex people

Under the *Discrimination Act 1991*, *sex* and *transsexuality* are both protected attributes under the Act. "Sex" is not defined under the Act and hence it would take on its ordinary meaning – ie. being either male or female. The Act defines "transsexual" as meaning:

a person of one sex who—

(a) assumes the bodily characteristics of the other sex, whether by means of medical intervention or otherwise; or

(b) identifies himself or herself as a member of the other sex or lives, or seeks to live, as a member of that other sex.

**Issue:** Does the *Discrimination Act 1991* provide adequate protection from discrimination for transgender people and intersex people?

# Reproductive and parenting rights

One of the main areas in which ACT legislation is either actively discriminatory or silent, is in the area of reproductive and parenting rights.

### *Adoption Act 1993*

One of the issues that attracts the most comment in any discussion on equality of treatment for same sex couples is the laws relating to adoption of children.[5] The *Adoption Act 1993* discriminates in two fundamental aspects:

- a same sex couple are not eligible to adopt a child as a couple – section 18(1); and
- the same sex partner of the parent of a child is not eligible to adopt the child (a 'step parent' adoption) – section 18(2).

The fact that a person or a couple is eligible to adopt a child does not mean that they will become adoptive parents. Before making an adoption order, the court is required to consider a multitude of factors including whether the applicants are fit and proper persons to adopt the child and also what is in the best interest of the child. Excluding potential applicants on the basis that they are both of the same sex is discriminatory.

In the ACT, there are only 1-2 local adoptions a year, 10-20 inter-country adoptions and 2-5 step-parent/ foster carer adoptions.

**Issue:** Should the *Adoption Act 1993* be amended to provide that same sex couples are eligible to adopt a child?

### *Artificial Conception Act 1985*

As noted above, the number of adoptions in the ACT is quite low. An area of discrimination that has a potentially far greater impact on parenting rights is the presumptions about parentage that arise when a child is conceived using either artificial insemination or in vitro fertilisation. Under the *Artificial Conception Act 1985* certain conclusive presumptions about parentage arise where a child is conceived using one of these procedures:

- the woman who has undergone the procedure as a result of which she has become pregnant is conclusively presumed to be the mother of the child that is then born – section 6(a);
- if the ovum from another woman was used in the procedure, then that other woman is conclusively presumed *not* to be the mother of the child – section 6(b);

[5] Eg. comments of Gary Humphries MLA, Leader of the Opposition, *Hansard* 28 August 2002 at 2991.

- if the woman who has undergone the procedure has a husband or de facto spouse who has consented to the procedure, then that man is conclusively presumed to be the father of the child – section 5(1)(a);
- if the semen used in the procedure was from a man other than the woman's husband or de facto spouse, then that man is conclusively presumed *not* to be the father of the child – section 5(1)(b); and
- if the woman who has undergone the procedure has no husband or de facto husband, or if she undergoes the procedure without his consent, then the donor of the semen used in the procedure is conclusively presumed *not* to be the father of the child – section 7.

This law gives legal recognition to the social, rather than the biological parents of a child born using artificial insemination or in vitro fertilisation. This has a number of immediate beneficial consequences for the child and the parents in terms of ability to make medical and other decisions on behalf of the child, inheritance and maintenance of the child.

The Act has a discriminatory application in respect of same sex couples. Where a lesbian couple have a child in the same circumstances, only the birth mother of the child will be recognised as a parent under this Act. Western Australia has recently amended its laws to also recognise as a parent of the child the non-birth mother of a child born in such circumstances.

**Issue:** Should the *Artificial Conception Act 1985* be amended to recognise the non-birth mother in a lesbian relationship as a parent of a child born through assisted reproductive technology?

## Surrogacy arrangements

The *Artificial Conception Act 1985* also allows the genetic parents of a child born under a substitute parent agreement to apply for an order recognising them as the parents of the child (a "parentage order"). Currently, the provisions would prohibit a same sex couple from applying for an order as the Act only recognises a substitute parent agreement under which "a man and a woman"[6] have indicated their intention to become the parents of a child born as the result of the surrogacy arrangement.

This means, for example, that while two gay men who are a couple may enter into a surrogacy arrangement with a woman under which the woman agrees to become pregnant using the semen of one of the men, and it is intended that the child born as a result of the pregnancy will be taken to be the child of the couple, this parentage relationship can not be recognised in the same way as would a relationship involving an opposite sex couple.

[6] Definition of *substitute parent agreement*, section 2 of the *Artificial Conception Act 1985*

**Issue:** Should the *Artificial Conception Act 1985* be amended to allow same sex couples to apply for a parentage order where a child is born pursuant to a substitute parent agreement?

## Transgender people and parenting

As noted above, the *Births, Deaths and Marriages Act 1997* provides that a new birth certificate issued to a transsexual person under part 4 of that Act is conclusive evidence that the person's sex is the sex stated in the certificate. This applies for all ACT law including the *Artificial Conception Act 1985*. This means that a female to male transsexual person would be conclusively presumed to be the father of a child in the circumstances of section 5(1)(a) of the *Artificial Conception Act 1985*.

Similarly, such a transsexual person may also be able to apply for a parentage order for a child born under a surrogacy arrangement under division 3.2 of the *Artificial Conception Act 1985*.

# Registering relationships

Section 51 (xxi) of the Australian Constitution gives power to the Commonwealth Government to make laws with respect to marriage. This means that the ACT along with all other states and territories have to rely on Commonwealth laws in this area. The Commonwealth *Marriage Act 1961*, while it does not directly define marriage, is premised on marriage as being "...the union of a *man* and a *woman* to the exclusion of all others, voluntarily entered into for life" (see eg section 46 of the Act – Certain authorised celebrants to explain the nature of marriage relationship). It is not possible for same sex couples to marry under existing Australian law.

It is not illegal to conduct commitment ceremonies between same sex couples provided that they do not purport to be legal marriages. Such couples are denied the legal and economic privileges automatically bestowed by marital status.

A same sex couple may enter into a domestic relationship agreement that makes provision for particular matters. The financial aspects of that agreement may be enforced under the *Domestic Relationships Act 1994* and the agreement is otherwise subject to, and enforceable under, the law of contract.

Currently the only mechanism for "registering" a relationship under ACT law is the *Registration of Deeds Act 1957*. This Act provides that a person may register a deed with the Registrar-General. While a relationship may be registered as a deed no legal status would arise from this. It is simply entered on the register.

The central issue to be examined here is not so much how a relationship is to be registered but what consequences, if any, should flow from registration.

One purpose for a couple in registering a relationship, or civil union, might be to make a public statement or declaration in respect to their bond. This would serve as a historical record in much the same way as the current register of births, deaths and marriages.

Another purpose of registering a relationship might be to immediately confer particular status under legislation that would otherwise only arise after a period of time. For example, under the *Administration and Probate Act 1929*, an eligible partner of a person who dies without a will may benefit from the person's estate. An eligible partner may be a spouse or a domestic partner (including a same sex partner). A domestic partner must have lived with the deceased together continuously for two or more years or there must be a child of the relationship. By contrast, a spouse may benefit from the deceased's estate regardless of the length of the marriage. In effect, marriage is treated as a clear statement of intention, while relationships other than marriage must show that intention through length of commitment etc. The law could provide that a registered union be regarded as clear statement of intention for these purposes, in the same way that marriage is treated as a clear statement of intention.

It may be possible for the scheme to be developed in such a way that it could enforce the registered relationship as a legally binding contract to the extent that ACT laws apply, and would have effect from the date of registration. The civil union may confer status to a couple that, whilst not the same as marriage, would have a significant and meaningful effect.

Unlike marriage, a registered relationship or civil union could only be recognised for ACT purposes. A registered relationship would not be recognised for Commonwealth purposes such as taxation, superannuation or social security.

It is possible that any ACT law that purports to give marriage like status to same sex relationships could be challenged on constitutional grounds on the basis that it is inconsistent with the Commonwealth *Marriage Act 1961*.

**Issues:** Is there a benefit in the ACT providing a mechanism to register same sex relationships in the ACT? Should this also apply to opposite sex relationships? What consequences should flow from this under ACT law?

# Anti-vilification legislation

Current anti-vilification legislation in the ACT only applies to racial vilification. Section 66 of the *Discrimination Act 1991* provides that:

> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

The Act provides for circumstances where such acts are not unlawful including for example, the fair reporting of acts of racial vilification or where the act of vilification has been done in good faith for academic or research purposes. Serious racial vilification involves the use or threat of violence and constitutes a criminal offence.

As present, the specific vilification provisions do not extend to any acts toward lesbians, gays, bisexuals, transgender and intersex people nor do they specifically cover acts of vilification toward persons infected with HIV/AIDS. In many circumstances vilification on these grounds will be covered by the Act as a form of discrimination (which is defined in the Act as "unfavourable treatment"). For example, if a person were ridiculed at work, teased or bullied at school, etc on the basis of their sexuality or transsexuality, this could be unlawful discrimination.

It is worth noting that the test for unlawful discrimination under the Act (unfavourable treatment) is much broader than the Act's current definition of (racial) vilification, which requires a public act and incitement to hatred, serious contempt or severe ridicule.

The NSW *Anti-Discrimination Act 1977* protects against acts of vilification on the grounds of race, HIV/AIDS and homosexuality (male and female). Serious homosexual vilification constitutes a criminal offence in NSW.

The Tasmanian *Anti-Discrimination Act 1998* also makes it an offence to incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on several grounds including sexual orientation. Sexual orientation is defined in the Act to include heterosexuality, homosexuality, bisexuality, or transsexuality (which for the purposes of this paper includes transgender and intersex people).

Sexuality, transsexuality and HIV/AIDS complaints account for a very small percentage of complaints made to Discrimination Commissioners throughout Australia. This may support the notion that firstly, vilification laws do not appear to be a very efficacious way of preventing people suffering various kinds of insults; and secondly, the more specific any law is, the greater the chance that an individual's concerns will fall outside the provisions of that law. Contrary to this may be the belief that the existence of the provision constitutes recognition of the problem, and that this itself is important for the affected class of people.

**Issue:** Should the vilification provisions of the *Discrimination Act 1991* be extended to prohibit acts of vilification against gay, lesbian, transgender and intersex people, or people with HIV/AIDS?

# Defence of provocation – the 'gay panic' defence

The law in all States and Territories currently recognises the defence of provocation. The defence operates to reduce a charge of murder to manslaughter.

In the ACT the elements of the provocation defence are set out in section 13 of the *Crimes Act 1900*. It provides that conduct causing death shall be taken to have occurred under provocation where:

(a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

(b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control—

(i) as to have formed an intent to kill the deceased; or

(ii) as to be recklessly indifferent to the probability of causing the deceased's death;

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

For example, the defence may be available to partially excuse a man who kills another man who has made a homosexual advance on him. The High Court case of *Green v The Queen*[7] contains a comprehensive discussion on the availability of the defence in the circumstances of a non-violent homosexual advance. The rationale for the defence is based on the view that there is a difference between intentional killing in "cold blood" and killing in an extreme emotional state of lost self-control. The defendant may intend to kill the victim, however the quality of his or her intention is diminished by the fact that his or her free will was impeded to the extent that they were provoked into acting as they did.[8]

The defence has attracted a great deal of criticism, with a number of law reform bodies calling for its abolition.[9] The defence itself contains a number of conceptual difficulties concerning intention. Those who rely on provocation intend to kill. So why does the fact that the defendant was acting out of control partly negate this intention? The response is that people who lose self-control are not in the same category as those who kill in cold blood.

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[7] (1997) 191 CLR 334.

[8] Model Criminal Code Officers Committee, *Fatal Offence Against the Person: Discussion Paper* 1998, page 99; S Bronitt and B McSherry, *Principles of Criminal Law*, LBC, 2002, page 286.

[9] See, for example, Model Criminal Code Officers Committee, *Fatal Offences Against the Person: Discussion Paper*, 1989; Attorney General's Department, *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (The 'Gibbs Report'), 1990; New Zealand Law Reform Committee, *Report on Culpable Homicide*, 1976; New Zealand Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee*, 1991.

Proponents for the abolition of the provocation defence essentially reject the proposition that hot-blooded killers are less culpable than other killers. They maintain that the overriding consideration should be for the sanctity of human life and that the use of deadly violence should not be partly excused. For them provocation should only be considered at the sentencing stage.

A major argument for the abolition of provocation is its potential for abuse. It can be difficult to distinguish between those cases where a defendant was really provoked into losing self-control, and those where the defendant merely lost his or her temper and decided to kill.

The availability of the defence also creates a legal anomaly in the ACT, in that it does not reduce attempted murder to attempted manslaughter. This can create a situation whereby a successful (provoked) killer would receive a shorter sentence than one who failed in the attempt.

The Department of Justice & Community Safety is reviewing the law of provocation as part of progressive reforms to ACT criminal legislation and adoption of the Model Criminal Code. The Model Criminal Code proposes that the partial defence of provocation be abolished in the sense that its consideration should be confined solely to the sentencing process.

**Issues:** Should the defence of provocation be abolished in the circumstances of a non-violent homosexual advance? Should the defence of provocation be abolished generally?

# Meeting the needs of transgender people

As noted earlier in this issues paper, there are several provisions in current ACT law that address the needs of transgender people.

### *Births, Deaths and Marriages Registration Act 1997*

Part 4 of the *Births, Deaths and Marriages Registration Act 1997* provides a mechanism for a transgender person (and also an intersex person) to obtain a new birth certificate stating their new sex. Such a certificate is only available to a person:

- whose birth is registered in the Territory; and
- who is not married; and
- who has undergone *sexual reassignment surgery*.[10]

The parents of a child who has undergone *sexual reassignment surgery* may also apply to the Registrar-General for an alteration of the record of the child's sex in the registration of the child's birth.

"Sexual reassignment surgery" is defined as meaning:

> a surgical procedure involving the alteration of a person's reproductive organs that is carried out—
>
> (a) for the purpose of assisting a person to be considered to be a member of the opposite sex; or
>
> (b) to correct or eliminate an ambiguity relating to the sex of the person.

The fact that a person has undergone sexual reassignment surgery must be verified by a declaration from two doctors. The fact of sexual reassignment surgery is used in the legislation as an objective test.

Section 29 provides that a birth certificate issued in respect of a transsexual person is, for the purposes of any law of the Territory, conclusive evidence of the person's sex as stated in the certificate.

While a birth certificate with a person's new sex stated on it is conclusive evidence for the purposes of ACT law, the certificate may not necessarily be recognised in other jurisdictions. There has, however, been some recent decisions by Australian courts in this respect. In *Re Kevin*,[11] Chisholm J of the Family Court decided that a post operative transsexual female to male person is a man for the purposes of the Commonwealth *Marriage Act 1961*, and able to enter into a valid marriage with a woman. The Full Bench of the Family Court has yet to reach a decision in the Commonwealth's appeal in this matter.

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[10] Section 24 of the *Births, Deaths and Marriages Act 1997*
[11] *Re Kevin* (2001) 165 FLR 404

Currently there is no provision to alter the record of the person's sex in the registration of the person's birth where sexual reassignment surgery has not taken place. No other Australian jurisdiction allows for alteration of the record by way for example, of psychological evidence provided to support the identity of a transgender person. Nor is there provision in the ACT to correct a birth certificate at a later date where a child is an intersex child. Such an alteration could only be achieved where it can be established that there is a mistake on the record or, using part the provisions of part 4 of the Act, following sexual reassignment surgery. If surgery is not required the child will remain registered as the sex they are assigned at birth, even though they may grow up in a gender identity that is the opposite of the gender stated on the birth certificate.

**Issues:** Are the provisions in part 4 of the *Births, Deaths and Marriages Act 1997* appropriate?

### *Discrimination Act 1991*

Under the *Discrimination Act 1991*, *sex* and *transsexuality* are both protected attributes under the Act. "Sex" is not defined under the Act and hence it would take on its ordinary meaning – ie. being either male or female. The Act defines "transsexual" as meaning:

> a person of one sex who—
>
> (a) assumes the bodily characteristics of the other sex, whether by means of medical intervention or otherwise; or
>
> (b) identifies himself or herself as a member of the other sex or lives, or seeks to live, as a member of that other sex.

**Issue:** Does the *Discrimination Act 1991* provide adequate protection from discrimination for transgender people?

## Other legislative provisions

As outlined earlier in this paper the government has undertaken a review of all ACT legislation from the point of view of whether it discriminates against both transgender and intersex people. The main focus for the purposes of the amendments in the Legislation (Gay, Lesbian and Transgender) Amendment Bill 2002 is on provisions that make particular provision for matters in respect of a person's sex. The most common provisions in this respect are provisions relating to searches of a person, where the legislation requires personal searches to be conducted by a person of the same sex as the person who is being searched.

Search provisions may have an ambiguous, but not necessarily discriminatory, application to a transgender person, depending on how, as an administrative matter, the person conducting the search decides upon the sex of the person being searched. These issues are also relevant to intersex people.

The implicit policy presumption that has been taken in these type of provisions is that a person would feel most comfortable with a body search being conducted by a person of the same sex. On the basis of this policy presumption, it would be appropriate for the legislation to contain an interpretive provision in respect of transgender and intersex persons that uses a person's self-identified sex to determine who is a person of the same sex or opposite sex for the purposes of conducting a personal search.

Such a provision is already contained in section 17 of the *Crimes (Forensic Procedures) Act 2000.* This provision has the effect of applying the provisions of that Act in relation to sex as the person's self-identified sex. The provision also covers intersex persons under the definition of "transgender person" as a person who:

> (c) is of indeterminate sex and identifies as a member of a particular sex by living as a member of that sex.

The Legislation (Gay, Lesbian and Transgender) Amendment Bill 2002 contains amendments to include this type of provision in other ACT legislation that contains search provisions requiring a search to be conducted by a person of a particular sex.

A similar issue arises with respect to legislation such as the *Public Baths and Public Bathing Act 1956*. Section 18 of this Act provides that:

> Except for the purpose of giving assistance in the case of emergency, a person who has attained the age of 6 years shall not, without lawful excuse, enter a part of any public baths which is set apart for the exclusive use of persons of the sex opposite to the sex of that person and bears a notice to that effect.
>
> Maximum penalty: 1 penalty unit.

This provision may in practice have a discriminatory application to transgender people. The fact that a penalty is attached to this provision (albeit a maximum of $100) suggests that there should be some clarity. As noted earlier in this paper, the ordinary meaning of sex would indicate an emphasis on the anatomical and physiological aspects of gender. A transgender person who has undergone sexual reassignment surgery would be regarded as being of their reassigned sex. The application of this legislation to a transgender person who has not undergone sexual reassignment surgery, however, is less clear.

**Issues:** What is the appropriate approach to meeting the needs of transgendered people in respect of sex segregated public facilities such as public baths? How should this approach also take into account the needs of other users of such facilities?

**Issues:** The government welcomes submissions on how current legislative schemes are addressing the needs of transgender people. Are there needs that are not covered by this issues paper that should be addressed?

# Intersex people and 'normalising' surgery

The main issues surrounding intersex people and normalising surgery arise out of surgery performed on intersex children.

As with any surgery involving children, the ability of the parent to consent to the particular procedure is an issue.

There is a medical paradigm (which may or may not be accepted by practitioners in the ACT) which suggests that an intersex child must be ascribed a particular sex. Often, this is carried to the point of surgical intervention to create 'normal' (male or female) genitalia for the intersex child. There is a growing movement within the community of people affected by intersex conditions asserting that such surgery should not be carried out unless it is medically necessary.

There is currently no specific formal policy or protocol on this matter within the public hospital system in the ACT and these issues are left as matters between the legal guardian of an intersex child and the clinician.

**Issue:** Is it necessary to regulate normalising surgery carried out on intersex children?

The *Crimes Act 1900* has some bearing on this issue. A medical practitioner who carries out normalising surgery that involves the removal of the external female genitalia may be committing an offence. This offence carries a maximum penalty of 15 years imprisonment. Female genital mutilation is defined in section 73 as follows:

> ***female genital mutilation*** means—
>
> (a) clitoridectomy or the excision of any other part of the female genital organs; or
>
> (b) infibulation or similar procedure; or
>
> (c) any other mutilation of the female genital organs.

Section 76 provides an exception to the offence where the female genital mutilation has a genuine therapeutic purpose.

Section 77 provides a further exception to the offence in the case of sexual reassignment procedures. This particular provision clearly contemplates gender reassignment surgery for a transgender (female to male) person, but also includes normalising surgery on intersex children as an exception to the offence. Section 77 provides:

> (1) It is not an offence against this part to perform a sexual reassignment procedure or to take, or arrange for a person to be taken, from the ACT with

the intention of having a sexual reassignment procedure performed on the person.

(2) In subsection (1):

***sexual reassignment procedure*** means a surgical procedure performed by a medical practitioner to give a female person, or a person whose sex is ambivalent, the genital appearance of a person of the opposite sex or of a particular sex (whether male or female).

**Issues:** Is the exception in section 77 of the *Crimes Act 1900* appropriate? Should the exceptions be limited to the "genuine therapeutic purposes" contemplated in section 76?

# Policy, programs and priorities

There are a number of Government policies and programs that affect lesbian, gay, bisexual, transgender or intersex people in the ACT.

ACT Policing has Gay and Lesbian Liaison Officers to provide support and advice to members of the public and to AFP personnel. Gay and Lesbian Liaison Officers are trained to deal with gay, lesbian, bisexual, transgender and intersex issues with sensitivity.

The Department of Education, Youth and Family Services has introduced a number of initiatives that are aimed at promoting a school culture that is inclusive. Countering homophobia is a particular outcome that is being pursued through specific training for teachers, such as the "2 in every classroom" program run by Sexual Health and Family Planning ACT, and through projects such as the distribution of posters and booklets aimed at countering homophobia in schools.

The Government is also currently reviewing its policies and procedures for the management of transgender and intersex persons detained at the Belconnen Remand Centre, Symonston Temporary Remand Centre and Periodic Detention Centre.

As an employer, the ACT Government has an Equity and Diversity Framework. The Equity and Diversity Framework sets directions for active future development of Equal Employment Opportunity in the ACT Public Service from which agencies will be able to build and develop their own policies and plans that allow all employees to work to their full potential within an equal and diverse environment.

**Issues:** **Does the ACT Government need to take better account of the specific needs of lesbian, gay, bisexual, transgender or intersex people in the ACT? Are there particular priority areas?**