



**Victorian Equal Opportunity
& Human Rights Commission**

1 December 2015

The Hon Marica Neave AO
Commissioner, Royal Commission into Family Violence
PO Box 535
Flinders Lane VIC 8009
By email: enquiries@rcfv.com.au

Dear Commissioner

Appearance at Royal Commission into Family Violence – Question on Notice

This letter is to provide you with a response to the question on notice taken during my appearance on behalf of the Victorian Equal Opportunity and Human Rights Commission at a Royal Commission hearing on 13 October 2015, at which time I undertook to provide you with further information on the Commission's views regarding the issue of some family violence services excluding boys over the age of 12 and transgender people.

The following response considers whether such exclusion may be permitted under the *Equal Opportunity Act 2010* (Vic). It also canvasses relevant policy considerations and makes recommendations for addressing concerns into the future. It does not refer to any data or anecdotal evidence about the incidence of exclusion, nor does it address the question of circumstances in which family violence services may be able to discriminate in the employment of staff.

Discrimination

Our analysis of the *Equal Opportunity Act 2010* (Vic) and relevant case law¹ suggests that exclusion of accompanying male children and exclusion of transgender people from a women's family violence service may prima facie constitute discrimination. However, the exceptions in s 60 (for 'welfare measures') and s 88 (for 'special needs') of the *Equal Opportunity Act* may apply to permit discrimination on the basis of sex.

¹ See, eg, *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384; *Hanover Welfare Services Ltd (Anti-Discrimination Exemption)* [2007] VCAT 640.

There is no definition of 'sex' in the *Equal Opportunity Act*. Determining the 'legal' sex of an individual is complex, contextual and contested. For example, Victorian Births, Deaths and Marriages requires that a person must have undergone sex affirmation surgery in order to apply for an alteration of sex in the Victorian birth register.² In contrast, Australian courts have considered various factors to be relevant, including surgical and medical procedures, external physical characteristics that are socially recognisable, and self-perception.³ Furthermore, Commonwealth policy allows for a person to change the gender marker on federal documents – including passports, which are recognised as cardinal legal documents – without requiring either surgical intervention or divorce. Under these circumstances, many transgender people have inconsistent cardinal documents – that is, their sex is recorded differently on their birth certificate and passport. The evidence relevant to determining 'sex' for the purposes of the *Equal Opportunity Act* is therefore not clear cut and may raise significant privacy concerns.

Based on existing jurisprudence, it appears unlikely that a family violence service established for women would be considered a 'special measure' under the *Equal Opportunity Act*.⁴

Assuming the exceptions referred to above apply, it would not be necessary for an exemption to be sought under s 89 of the *Equal Opportunity Act*.⁵ However, an exemption has, in the past, been granted to an organisation providing transitional and crisis accommodation to young women, allowing them to refuse services to a male-to-female transgender person unless that person could provide proof of gender reassignment surgery.⁶

Policy considerations

The practical difficulties that many transgender people experience in changing their legal sex in Victoria and around Australia have been well documented.⁷ Access to 'sex reassignment surgery' is extremely limited in Victoria and nationally, and any transgender person who was married prior to their transition is required to divorce in order to be able to change their legal sex. The reality for many transgender people is that they have a legal identity that does not align with their identity or presentation.

Under these circumstances, it is conceivable that the law could lead to a number of perverse outcomes. For example, the exceptions in the *Equal Opportunity Act* may:

- Allow a women-only family violence service to exclude a visibly female-bodied person who looks, sounds, presents and identifies as female but continues to have male recorded on her birth certificate;

² *Births, Deaths and Marriages Registration Act 1996* (Vic), s 30A.

³ See, eg, *Secretary, Department of Social Security v "SRA"* [1993] FCA 573; (1993) 43 FCR 299; *AB v Western Australia* (2012) 244 CLR 390; *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490.

⁴ *Georgina Martina Inc (Anti-Discrimination Exemption)* [2012] VCAT 1384.

⁵ *Ibid.*

⁶ *Hanover Welfare Services Ltd (Anti-Discrimination Exemption)* [2007] VCAT 640. The exemption also allowed the service to provide accommodation to women only.

⁷ Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and legal records* (2009).

- Not allow a women-only family violence service to exclude a visibly male-bodied person who looks, sounds, presents and identifies as male, but continues to have female recorded on his birth certificate.

It is also unclear how the law would apply to people who are legally neither male nor female, including intersex people. Such legal identities are currently possible on Australian passports (designated by a sex marker of 'x') as well as birth certificates issued in both NSW and the ACT, and the Victorian government is currently reviewing birth certificate legislation with a view to reform and potentially opening up options for legal identity outside of a binary male or female designation.

Further, excluding the male child of a victim of family violence could place him at risk of homelessness, and/or ongoing exposure to the violence that his mother is escaping. This may by extension also place his mother at greater risk of both homelessness and/or ongoing exposure to violence due to an understandable reluctance not to be separated from her child.

We note that as a matter of policy, there is no obligation to apply the exceptions in the *Equal Opportunity Act*, even when these are available, and great care should be taken in applying them given the consequences for families and individuals in these circumstances.

We also recognise the importance of ensuring that spaces for women escaping family violence remain safe. The overwhelming majority of perpetrators of family violence – against both women and men – are men, and for many female victims/survivors of violence perpetrated by a male partner the far reaching psychological and emotional impacts of the abuse they have suffered may lead to deep discomfort around, and feelings of being threatened or intimidated by, men. With a number of significant barriers already existing that stop women from reporting or escaping family violence, it is critical that refuges continue to be seen as safe and trusted places. Any inclusion of transgender women and boys over the age of 12 within these services therefore needs to be managed carefully and with great skill.

Human rights based approach

In view of the limitations of the law, and the need to balance potentially competing policy objectives, it is the Commission's view that a human rights based approach may offer a useful way forward. *The Charter of Rights and Responsibilities Act 2006* (Vic) identifies a number of relevant rights, including the right to recognition and equality before the law (s.8), the right to life (s.9), protection from cruel, inhuman and degrading treatment (s.10), the right to privacy (s.13), and protection of families and children (s.17).

A human rights based approach would require services to actively consider the human rights that may be engaged or limited by any overarching policies or individual decisions to exclude boys over the age of 12, and/or transgender people from accessing services. Ensuring that the safety of those both currently receiving, and seeking to receive services, is maintained should be the primary objective in these considerations.

Accordingly, it is our view that it would be beneficial to establish a sector wide approach to these issues, supported by the development of guidelines and training to service providers. We would strongly encourage close consultation with both service providers, and victim/survivors of family violence, including transgender people, in the development of these guidelines, to ensure both their workability and sensibility. The Commission has appropriate expertise regarding the operation of both the *Equal Opportunity Act* and the Charter to also assist with this work if required.

We further note that many of these difficulties arise due to a lack of sufficient resourcing for existing refuge services, resulting in too few services trying to respond appropriately to the needs of many. To this end, we recommend that further work should be undertaken to quantify the level of demand for family violence services from both families with boys over 12, and transgender people, in order to develop a more complete picture of the service landscape.

This in turn should inform the allocation of additional resourcing, either for the purposes of:

- establishing new specialised family violence services able to support the needs of (1) families with boys over the age of 12; and (2) lesbian, gay, bisexual, transgender and intersex (LGBTI) people; OR
- increasing funding to existing family violence services so that they can deliver services to a greater diversity of people in a way that meets all needs.

If you require further information about any of the issues discussed above, please contact Aram Hosie, Manager Strategic Policy & Projects on 9032 3422 or email Aram.Hosie@veohrc.vic.gov.au.

Yours sincerely



Kate Jenkins
Commissioner