

Victorian Parliamentary Inquiry into Anti-Vilification Provisions (Hearings)

[Posted to Medium 12th March 2020].

[This is the text of my opening statement, presented at 12.45pm on the 12th of March 2020. The full text of the subsequent discussion will be available on Hansard in due course].

I'm going to focus on the proposed protected attributes in the Racial and Religious Tolerance Amendment Bill 2019. I'll have nothing to say about sexual orientation and disability, but I'm going to argue against the inclusion of gender, gender identity, and sex characteristics; and for the inclusion of sex and gender expression instead.

Of all the protected attributes, both the existing two in the Racial and Religious Tolerance Act 2001 (namely race and religion) and the proposed five in the new Bill (namely gender, disability, sexual orientation, gender identity, and sex characteristics), one is ambiguous, because it is a contested term whose meaning is not yet settled (that is gender); one is not like the others, because it is entirely subjective and unverifiable (that is gender identity); and one is trying to do too much at once, and thereby failing its biggest constituency (that is, sex characteristics).

There is currently a culture war over what the words 'woman' and 'man' should mean, and what gender should be understood to be. For one group, gender should be one's subjective sense of gender identity, and 'woman' and 'man' should refer to this sense of identity. If a male-bodied person, physically indistinguishable from any other adult male, identifies as a woman then on this view he is a woman. For the other group, gender is just a polite term for 'sex', and 'woman' and 'man' are synonymous with 'female' and 'male' respectively. If 'gender' in the Bill is meant to pick out 'gender identity' then gender identity is protected twice under different names. If it's supposed to pick out sex, it can't afford to be euphemistic given that the culture wars may be won in the other direction.

Many feminists, as well as lots of other sensible people besides, think that sex matters and should not be displaced either in the law or in social life. Even if we want to recognize gender identity or something like it, this is not the same concept as, and not more important than, sex. Women continue to experience disadvantage on the basis of sex all around the world, in Australia from the disproportionate rates of indigenous women's incarceration, through rape and sexual assault, through domestic violence, through pregnancy and breastfeeding discrimination in the workplace.

The international law Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was set up explicitly to recognize that existing human rights law was not seeing women's rights fulfilled (and by its language it is clear that it means female people). If we're going to continue to protect sex – which we should, at least until such a time as it doesn't any longer disadvantage women – then we're also going to need to protect the words to refer to it. This means 'female', 'she/her/hers', 'lesbian', 'mother', and arguably also 'woman' given how frequently it is used synonymously with 'female' in both law and social life).

Will ‘sex characteristics’ do to protect sex? Arguably not, because the definition of this attribute has clearly been crafted with a view to ‘inclusion’ which means it is very much diluted. The list of sex characteristics given in Section 7 – Definitions (p. 3 of the Bill) separates out different aspects of sex for potential independent targeting. For example, an intersex female might be targeted on the basis of having male-typical genitalia, or a transwoman might be targeted on the basis of being a visibly male person with breasts. But when a high-profile female journalist receives rape and death threats online because she has been outspoken about something that aggravates the trolls, that is not because of her genitalia, or her chromosomes, or her breasts in particular or in isolation.

Rather, it is because she is female, a member of the sex caste picked out in our society as subject to particular kinds of constraining norms, expectations, and stereotypes. That she cannot progress as swiftly in her workplace because there is an expectation she will leave to have children; and that she will end up with significantly less superannuation at the end of her life and so be more vulnerable; is not due to possession of any particular sex characteristic, it is down to her sex, that is, simply to being female. The discrimination she faces is not the same as the discrimination a visibly male person with breasts faces. In trying to include everyone, this attribute fails to adequately protect its largest constituency, female people.

Let’s move on to the problem with the use of gender identity as a protected characteristic. As I mentioned before, most of the other attributes pick out clear groups of persons, on a basis that is objective and can be empirically verified. There is a fact of the matter about whether someone in fact has sexual or romantic relationships with people of the same sex (or is oriented so as to have, supposing they haven’t had the opportunity yet). There is a fact of the matter, or at least externally verifiable criteria that can be used to decide, whether someone in fact has a disability. Etcetera.

But ‘gender identity’ is very different. First of all, it’s entirely inside your head. Only you know know whether you ultimately feel like a woman, or feel like a man, or neither or both. Some of those who endorse the idea of gender identity think that it can be fluid, changing yearly, weekly, daily, even hourly. That makes it a poor attribute indeed when vilification provisions are supposed to pick out particular groups of citizens who are at risk of not being able to participate equally in all social, political, economic and cultural aspects of society because of the way vilification of them diminishes their dignity, sense of self-worth and sense of belonging to the community (all as stated in the Preamble of the 2001 Act).

Second of all, there has recently been a massive expansion in the membership of this group as a result of changing lobby group incentives. Where ‘gender identity’ might have at one time been an indirect way of referring to people who experienced a severe and debilitating sense of incongruence between the sex they desired themselves to be or believed themselves to be and the sexed bodies they in fact had, it is now a vague term that picks out absolutely anyone who chooses to identify as the opposite sex or as no sex or as a mixture of both sexes. It includes ‘nonbinary’ people who are motivated, not by bodily dysphoria, but by a politics of “smashing the gender binary”. (And note that this means it includes people who are indistinguishable from the most privileged people in our society, namely middle-class straight white males).

This group also includes young people who are simply experimenting with their personal styles and personalities, who might in previous eras have been punks or goths. It includes people who are refugees from their sex caste because of childhood trauma, and it includes people with undiagnosed autism – particularly female people – whose style of thinking appears more ‘male-

typical' to them or those around them. In short, this is now a large and growing group of people whose status depends entirely on their say-so. This is not even vaguely comparable to other attributes like race, religion, sex, sexual orientation, or disability. It doesn't have the long history of social exclusion, and it doesn't have the same clarity in membership.

All of this can be avoided by substituting something more objective and verifiable in place of 'gender identity'. 'Gender expression' is a good substitute. It would allow the protection of a larger class of people, including butch lesbians, tomboys, effeminate men, and really anyone who likes to have fun with the way they dress or present themselves. It could also cover secondary sex characteristics, such as when nonbinary female people have voluntary double mastectomies (and so lack a sex characteristic that female people typically have) or when transwomen have breasts (and so have a sex characteristic that male people typically lack). These can all be ways that people choose to express their gender.

In conclusion, sex and gender expression would do a much better job than gender, gender identity, and sex characteristics of protecting the various vulnerable social groups not already covered in the existing act.