



Submission to:

**The Attorney General's Department Consultation
on Consolidation of Commonwealth Anti-
Discrimination Laws**

February 2012

About ACON

ACON (formerly known as the AIDS Council of NSW) was formed in 1985 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Today, ACON is Australia's largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON provides information, support and advocacy for the GLBT community and people living with or at risk of acquiring HIV, including sex workers and people who use drugs.

ACON is home to the Lesbian and Gay Anti-Violence Project (AVP), the Community Support Network (CSN), and the Sex Workers Outreach Project (SWOP). ACON has its head office in Sydney as well as branches in the Illawarra, Northern Rivers, the Hunter region and the Mid North Coast.

Our interest in human rights

ACON is a community based organisation that seeks to improve the health and wellbeing of the GLBT community, sex workers, people who use drugs, people with HIV, and reduce HIV transmission. We do this with an understanding that good health can only be achieved when human rights are realised. Anti-discrimination protection is important as our communities, made up of rights holders, often find their rights not being upheld, and experience high rates of discrimination. The impact of discrimination on our communities is well documented¹.

Our response to the discussion paper

ACON has focused on the issues that relate directly to our communities. While there are important issues in the discussion paper, such as defining discrimination, comparators, effective ways of creating access to legal remedy and other technical issues, that impact on our communities, organisations including the NSW Gay and Lesbian Rights Lobby and the Human Rights Law Centre have the mandate to address some of these broader issues and we support their comments towards these matters.

ACON fully supports the protection of intersex people in anti-discrimination legislation, and encourages the Commonwealth to consult with the intersex community to achieve this end. We understand that Organisation Intersex International Australia will be making a submission to this inquiry. Our submission however will be grounded in ACON's experience as a community health organisation working within the GLBT community. As a member of the Australian Federation of AIDS Organisations and the National LGBTI Health Alliance, we also support the submissions put forth by these organisations.

¹ Australian Research Centre in Sex, Health & Society, *Private Lives: a report on the health and wellbeing of LGBTI Australians*, (2006); L Hillier, T Jones, M Monagle et. al., *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010); NSW Gay and Lesbian Rights Lobby, *The Pink Ceiling is Too Low*, (2003); NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2001), Beyondblue, *Feeling Queer and Blue*, (2009).

Meaning of Discrimination

Question 6: Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

Harassment and vilification against members of the GLBT community is shown to be widespread. Harassment, vilification, and abuse are experienced by the GLBT community at higher rates than the general community. According to a report by the NSW Attorney General's Department, 85% of the GLBT community in NSW have experienced homophobic abuse, harassment or violence in their lives.² Furthermore 56% of the GLBT community in NSW have experienced homophobic abuse, harassment or violence in the past 12 months.³ A recent national study into young GLBT people reported that 61% experienced verbal abuse and 18% experienced physical abuse.⁴

Vilification and harassment is particularly severe for people in educational settings where 80% of abuses occur for young GLBT people.⁵ The effect of pervasive abuse can be the development of significant mental health issues, which has been evidenced in high rates of anxiety, depression and suicidal ideation amongst GLBT people.

The impacts of discrimination, homophobia and violence were reflected in an analysis of 2007 Australian Bureau of Statistics data which shows that GLB people were more than twice as likely to experience 'any mental disorder'.⁶ Alarmingly, homosexual and bisexual people were more than three times more likely to have had an affective disorder such as depression compared to heterosexuals.⁷

The impact of vilification and harassment can have significant long term negative impacts on the GLBT community, such as suicidal ideations and suicide attempts. International and Australian research estimates that suicide attempts in the GLBT community are 3.5 to 14 times higher than their peers who are not GLBT.⁸

The Senate Community Affairs References Committee recognised that homophobia, especially when targeted at young people at a time when they are coming to terms

² NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2003), p. i.

³ *Ibid.*

⁴ L Hillier, T Jones, M Monagle *et. al.*, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010), p. 39.

⁵ *Ibid.*, p. 39.

⁶ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing*, (2007).

⁷ *Ibid.*

⁸ Suicide Prevention Australia, *Position Statement: Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities*, (2009), p.2, at http://suicidepreventionaust.org/_notitia/FileHandler.ashx?id=EF740238ACF5729B7B20F25703BFD96611BF6D12 (accessed 13 November 2009).

with their sexual orientation and/or gender identity, has been linked to suicide attempts by young GLBT people.⁹

Further, data from the report, *Writing Themselves in 3*, shows that young GLBT people who have experienced verbal abuse are twice as likely to have attempted suicide compared to their peers who have not been verbally abused. Alarming, for young GLBT people who have been physically abused, they are four and a half times more likely to have attempted suicide.¹⁰

Anti-vilification protections at the NSW level have not been effective in tackling verbal abuse and harassment against GLBT communities due to the high threshold of where only actions that “incite hatred towards, serious contempt for, or severe ridicule” are prohibited.

While protections vary at the State and Territory level, the *Race Discrimination Act* (RDA) sets the appropriate standard of prohibiting not only speech that vilifies or incites hatred, but also speech that is likely to, “offend, insult, humiliate or intimidate”. This is an appropriate threshold as speech that may not incite violence does cause offence, insult, humiliation and/or intimidation on the basis of a person’s sexual orientation and/or gender identity and has the capacity to cause harm to individuals and groups.

Anti-harassment protections, such as those that exist within the *Sex Discrimination Act*, are important tools to address the nature of abuse experienced by many GLBT people, especially young GLBT people in educational environments. Such protections are essential to addressing the systemic and widespread experiences of homophobic abuse by young GLBT people and the negative health outcomes caused by such abuse.

The experience of harassment and vilification for gay men in NSW has also been closely linked with vilification on the basis of HIV status. As gay men account for around 80% of all people that have been diagnosed with HIV,¹¹ vilification on the grounds of HIV status disproportionately affects gay men. ACON recommends that HIV status be included as grounds where harassment and vilification is prohibited.

Recommendation 1: That a prohibition on vilification and harassment be incorporated in to the consolidated anti-discrimination legislation, covering all protected attributes, and be based on the standard set in the current Racial Discrimination Act 1975.

⁹ Senate Community Affairs References Committee, *The Hidden Toll: Suicide in Australia*, Commonwealth of Australia, June (2010), p. 102, referring to the Mental Health Council of Australia, *Submission 212*, p. 25.

¹⁰ L Hillier, T Jones, M Monagle et. al., *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010), p. 51.

¹¹ National Centre in HIV Epidemiology and Clinical Research, *HIV, viral hepatitis and sexually transmissible infections in Australia Annual Surveillance Report 2010*, University of New South Wales, (2010), p. 46.

Protected Attributes

Question 7: How should sexual orientation and gender identity be defined?

Discrimination and its impacts on GLBT people are well documented. These impacts include poorer mental health outcomes, higher levels of suicide, higher rates of substance abuse, verbal and physical violence as well as economic disadvantage.¹² Discrimination violates the fundamental principle of equality and the human rights of the victims.

Sexual orientation, gender identity, gender expression, sex characteristics, marital and/or relationship status, and lawful sexual activity need to be protected attributes under the consolidated anti-discrimination act. ACON welcomes the commitment of the government to provide federal coverage of sexual orientation and gender identity. The current lack of protection for GLBT people at the federal level in anti-discrimination legislation in Australia has been problematic. Coverage of sexual orientation and gender identity will make sure that GLBT community members are provided with a greater sense of their right to live free of discrimination. This in turn will progress towards a society that protects and promotes human rights as the foundation for good health.

Sexual orientation, marital and/or relationship status, and lawful sexual activity are the terms that ACON argues should be used to cover a range of discriminatory practices that affect the GLBT community. These are terms broad enough to cover a range of sexualities and sexual expression. They are more useful terms than the language, such as the term homosexuality that is used in the Anti-Discrimination Act (NSW). Homosexuality can be viewed as an identity that is exclusionary to other identities such as bisexuality, and the effect of this is to exclude people who identify with one term but may not identify with another. Gender identity, gender expression, and sex characteristics, similarly, are terms that can cover transgender, intersex and other people who do not fit the gender binary of male and female.

Protections at the Commonwealth level are required so that government services are prohibited from discriminating on the grounds of sexual orientation and sex and gender identity. The recent case of *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)*¹³ at the Full Federal Court ruled that the Commonwealth and its agencies were not bound by the Anti-Discrimination legislation enacted by the Tasmanian government. This ruling demonstrates the need for anti-discrimination protections at the Commonwealth level for GLBT people as universal protection at

¹² Australian Research Centre in Sex, Health & Society, *Private Lives: a report on the health and wellbeing of GLBTI Australians*, (2006); L Hillier, T Jones, M Monagle et. al., *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010); NSW Gay and Lesbian Rights Lobby, *The Pink Ceiling is Too Low*, (2003); NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2001), Beyondblue, *Feeling Queer and Blue*, (2009).

¹³ *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)*¹³ (2008) 248 ALR 494

state and territory levels will not adequately protect GLBT people from discrimination.

Experiences of discrimination from Commonwealth funded services such as aged care services¹⁴ are well documented. There have also been cases of discrimination against immigrants and asylum seekers by the Department of Immigration and Citizenship and their contractual partners. These experiences of discrimination violate the human rights of GLBT people, especially their right to non-discrimination, their right to equality before the law and their right to health,¹⁵ all rights guaranteed in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both of which Australia have signed and ratified.

Discrimination and stigma are still common occurrences for people living with HIV. ACON welcomes the commitment by the federal government to ensure that there is no diminution of rights in the consolidation process and that HIV will continue to be covered, as it is currently under the Disability Discrimination Act 1992.

Recommendation 2: Sexual orientation, gender identity, gender expression, sex characteristics, marital and/or relationship status, and lawful sexual activity should be included as protected attributes under the consolidated anti-discrimination legislation.

Recommendation 3: HIV status continues to be a protected attribute under the consolidated antidiscrimination legislation.

Question 9: Are the current protections against discrimination on the basis of these attributes appropriate?

ACON calls on the government to include coverage of 'profession, trade, occupation, or calling' as a category of unlawful discrimination. This coverage is necessary to ensure that sex workers are afforded appropriate protection from discrimination. The United Nations, through UNFPA¹⁶, has called for anti-discrimination protection of sex workers as part of creating an enabling environment for HIV prevention, treatment and support.

The International HIV/AIDS Alliance and the Commonwealth HIV and AIDS Action Group also made a similar call for all members of the Commonwealth of Nations to

¹⁴ C Barrett, *My People: A project exploring the experiences of Gay, Lesbian, Bisexual, Transgender and Intersex seniors in aged-care services*, Matrix Guild Victoria, (2008), pp. 13-14.

¹⁵ See for example United Nations Committee on Economic Social and Cultural Rights, *General Comment number 14 The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (2000).

¹⁶ Thematic Task Team on Creating an Enabling Legal and Policy Environment, 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, *Creating an Enabling Legal and Policy Environment for Increased Access to HIV & AIDS Services for Sex Workers*.

implement anti-discrimination protection¹⁷, and they use Queensland's Anti-Discrimination Act (1991) as an example.

The imperative for anti-discrimination protection is broader than creating an enabling environment for HIV prevention, treatment and support. It is a fundamental right to be able to live free from discrimination, harassment and vilification and this applies equally to sex workers as it does to a worker in any other industry.

Unfortunately, sex workers face discrimination, harassment and vilification too frequently, impacting sex workers access to services, creating low self-esteem, which affects sex workers' health, safety and wellbeing¹⁸.

Recommendation 4: That coverage of sex workers is included in the consolidated anti-discrimination legislation through coverage of "profession, trade, occupation, or calling" as a category of unlawful discrimination.

Exceptions and Exemptions

Question 22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

The right to freedom from discrimination is established in the Universal Declaration of Human Rights. Aspects of this right are expanded upon through the thematic human rights conventions such as the *Convention on the Elimination of all forms of Discrimination against Women*. The Yogyakarta Principles outlines how human rights apply explicitly to GLBT people.

Exemptions in discrimination law amount to state sanctioned discrimination. As these exemptions are the denial of human rights for those affected, they should be minimal, temporary and specific. Current exemptions, as they exist in NSW legislation, are too broad and indefinite. The impact of these exemptions, as well as the public statement that is made through their existence, demands that they be targeted and limited.

ACON, along with other GLBT and generalist human rights organisations, is calling for no blanket exemptions to exist in the consolidated legislation. Any exemption should be temporary and need to be applied for, in a similar way in which organisations have to apply for exemptions to meeting *Disability Discrimination Act* standards.

While ACON supports the freedom of religious belief guaranteed under the *International Covenant on Civil and Political Rights* as well as the Australian

¹⁷ International HIV/AIDS Alliance and the Commonwealth HIV & AIDS Action Group, 2010, *Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth*.

¹⁸ Michael L Rekart, *Sex-work harm reduction*, *The Lancet*, Volume 366, Issue 9503, Pages 2123 - 2134, 17 December 2005

Constitution, this right is not interpreted to confer an unlimited prerogative to discriminate. Many instances of discrimination against GLBT people occur in institutions controlled by religious organisations that operate in the secular public sphere. For example, private schools, hospitals, aged care facilities, disability supports and community services. With the receipt of public funding, and the authority of the state to perform government functions, these organisations should be subject to the same obligations as the government, including the obligation not to discriminate.

However, ACON understands that the government has made it clear that broad exemptions will exist. If this is the case, ACON is disappointed that the government will be undermining its own Human Rights Framework and the universal, inalienable, interdependent and interrelated nature of human rights and anti-discrimination protection. The existence of exemptions sends a message to the public that it is ok to discriminate against GLBT people.

If the government takes the unfortunate path of sanctioning discrimination through broad exemptions then ACON demands that the organisations that utilise these exemptions must make this public when they are utilising the exemptions. This will allow organisations who do not utilise them to show this and those that do will inform the public when they are being utilised. This would include statements in job advertisements, throughout enrolment processes, through applications for service as well as on websites and in official publications. This will limit any confusion by members of the public, as is currently the case when applying for jobs or seeking services with faith based organisations, and minimise the likelihood of negative consequences for all those involved.

Consistency of anti-discrimination protection across the country is valuable for rights holders to understand the protections available. Consistency also makes it easier for organisations to comply. With the disparate exemptions that exist across states ACON believes that the Commonwealth should adopt best practice, as this will ensure that compliance with Commonwealth protections will be compliant with all state based requirements.

In our view, an example of best practice is that of Tasmania, which has taken the approach of not granting permanent exceptions or exemptions. This is also the approach that is taken by the United Kingdom in their *Equality Act*. At the Commonwealth level, the Senate Standing Committee on Legal and Constitutional Affairs have also recommended a narrowing of exemptions within the *Sex Discrimination Act*.

Recommendation 5: That no exemptions to the consolidated anti-discrimination legislation are available for any organisation receiving government funding when performing those government functions.

Recommendation 6: That if exemptions do exist they should be narrow, temporary and made public by organisations utilising them, including when advertising for jobs or the provision of services.

Unfortunately discrimination against people with HIV, as well as other people with attributes covered by the *Disability Discrimination Act*, is sanctioned within Australia's migration legislation. ACON urges the government to end its support for the current discriminatory immigration policy.

Currently the Migration Act is not subject to the protections available under the *Disability Discrimination Act 1992*. This is a serious impediment to people living with HIV to enter Australia under a range of different categories. The United Nations has called for strong and wide ranging anti-discrimination protection for people living with HIV in order to create the most enabling environment for HIV prevention, treatment and support. The current regime is a disincentive that must be fixed. It is also stigmatising.

ACON supports the calls of other HIV, disability and social justice organisations to make the provisions of the new anti-discrimination legislation apply to the *Migration Act*. In the past, the Australian Federation of AIDS Organisations, of which ACON is a member, the National Association of People Living with HIV/AIDS and other leaders in the HIV sector have called for this change. Equally, the National Ethnic Disability Alliance, People with Disability Australia and the Australian Federation of Disability Organisations and other leading organisations in the disability sector have called for this change. This would bring the Australian Government into line with the international obligations outlined in the *International Convention on the Rights of Persons with Disability*.

The Australian Government should then move to lift its formal reservation attached to the *Convention on the Rights of Persons with Disability* which will assist in improving Australia's reputation as a good international citizen and leader in disability rights.

Recommendation 7: That the Migration Act is subject to the consolidated anti-discrimination legislation.

Complaints and Compliance Framework

Question 27: Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

To enable the Australian Human Rights Commission to be known to GLBT people as a place where they can seek redress from discrimination, an additional Commissioner with responsibilities over sexual orientation, gender identity and sex characteristics discrimination is required.

Additional staffing for the Commissioner as well as for complaints handling would enable the Commission to deal with discrimination against GLBT people by providing alternative dispute resolution as well as conducting policy and advocacy activities. This model would be similar to the current arrangement for Sex Discrimination, Age Discrimination, Race Discrimination, Disability Discrimination and Social Justice Commissioners.

Recommendation 8: That the legislation provides for an additional Commissioner at the Australian Human Rights Commission with responsibilities for discrimination on the grounds of sexual orientation, gender identity and sex characteristics.

Recommendation 9: That the legislation provides for additional staff members at the Australian Human Rights Commission, including the establishment of a policy unit for the new Commissioner.