



**Submission to the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper**  
**1 February 2012**

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## **Introduction**

The Australian Sex Party is a registered federal political party. We represent a diverse group of more than 4,000 members, who are united in a belief of free speech and sexual expression. Since the party was formed in 2009 we have campaigned on a range of issues including law reform in the areas of sexual equality, sex work and gender expression.

We believe that all changes and additions to the existing federal law should serve stated purposes of anti-discrimination law. These include extending legal equality to all people<sup>1</sup> and to eliminating, as far as possible, discrimination based on protected attributes.<sup>2</sup> Accordingly, we consider that changes to the federal law should only be adopted if they strengthen existing legislative protections. Anti-discrimination law is enacted to affirm the right of every individual to the protection of the law,<sup>3</sup> and as such, we believe that the definitions contained within the Consolidated Act should be broad and inclusive.

This submission does not intend to address all the questions posed in the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (**Discussion Paper**).<sup>4</sup> In drafting this submission we have focused on questions related to our policy areas of sexuality,<sup>5</sup> gender identity<sup>6</sup> and sex workers' rights.<sup>7</sup> However, our decision not to answer certain questions should not be taken as an indication that we are satisfied with the existing law in that area. We believe anti-discrimination law could be much more effective in achieving its aims than it currently is.

The way the terms 'sexual orientation' and 'gender identity' are protected in the Consolidated Act are a high priority for us and our members. The existing State and

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<sup>1</sup> *Sex Discrimination Act 1984* (Cth) Long Title, *Discrimination Act 1991* (ACT) s 4(d).

<sup>2</sup> *Disability Discrimination Act 1992* (Cth) S 3(a), *Sex Discrimination Act 1984* (Cth) s 3(d), *Equal Opportunity Act* (Vic) s 3.

<sup>3</sup> *Sex Discrimination Act 1984* (Cth) Long Title.

<sup>4</sup> Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion Paper (2011).

<sup>5</sup> The Australian Sex Party, *Equality for the GLBTIQ Community* (21 September 2010) <<http://www.sexparty.org.au/index.php/news/asp-news-a-updates/875>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Australian Sex Party, *Policies* <<http://www.sexparty.org.au/index.php/policies>>.

Territory protections based on sexuality<sup>8</sup> are inconsistent, inadequate and accordingly, should not be relied on to form the basis of how these terms are defined in the Consolidated Act. Further, we submit that the Consolidated Act must provide far greater protection to people based on their sexual orientation and gender identity than currently exists under State and Territory law.

The Consolidated Act has the potential to only to prevent discrimination but also to send a clear message to the Australian community that discrimination based on these attributes is unacceptable. We therefore think it is important that any exceptions and exemptions to this Act are narrow and balanced against the detriment to particular persons should that exception or exemption be allowed.

## **Recommendations**

We provide our recommendations below before expanding on them in the body of our submission.

### **Recommendation 1**

Sexual orientation should be defined as sexual attraction, sexual identity, and/or sexual behaviour.

### **Recommendation 2**

Gender identity should be defined as a person's actual or perceived sex, as well as a person's gender-related self-image, gender-related appearance, or gender expression whether or not that gender-related self image, gender-related appearance, or gender expression is different from that traditionally associated with a person's sex at birth.

### **Recommendation 3**

There should not be an exception to the gender identity ground for sporting activities.

### **Recommendation 4**

The Consolidated Act should include profession, trade, occupation or calling as a protected attribute.

### **Recommendation 5**

The Consolidated Act should not include religious exceptions that apply to discrimination on the grounds of sexual orientation or gender identity.

### **Recommendation 6**

If the Act does include religious exceptions, they should apply only to the ordination or appointment of priests, ministers of religion or members of a religious order.

### **Recommendation 7**

Any religious exception should not apply to institutions or organisations that receive public funding.

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<sup>8</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZG, *Equal Opportunity Act 1984* (SA) s 29(3), *Discrimination Act 1991* (ACT) s 7(1)(b), *Anti-Discrimination Act 1991* (Qld) s 7(n), *Anti-Discrimination Act 1992* (NT) s 19(c), *Equal Opportunity Act 1984* (WA) s 35O, *Anti-Discrimination Act 1998* (Tas) s 16, *Equal Opportunity Act 2010* (Vic) s 6(p).

**Recommendation 8**

Religious organisations that wish to be exempt from anti-discrimination law should be required to apply to the Australian Human Rights Commission for temporary exemptions.

## How should sexual orientation be defined?

### Recommendation 1

*Sexual orientation should be defined as sexual attraction, sexual identity, and/or sexual behaviour.*

## Sexual Orientation Grounds in State anti-discrimination law

Each of the State anti-discrimination Acts include some protection on the grounds of sexual orientation:

- Homosexuality is a protected attribute in New South Wales;<sup>9</sup>
- Sexuality is a protected attribute in South Australia,<sup>10</sup> the Australian Capital Territory (ACT),<sup>11</sup> Queensland<sup>12</sup> and the Northern Territory;<sup>13</sup> and
- Sexual orientation is a protected attribute in Western Australia,<sup>14</sup> Tasmania<sup>15</sup> and Victoria.<sup>16</sup>

In each of the States with sexuality/sexual orientation grounds, the words 'sexuality' or 'sexual orientation' are defined as heterosexuality, homosexuality or bisexuality.<sup>17</sup> Tasmania and the Northern Territory also include transsexuality in their definitions.<sup>18</sup> Victoria, ACT and WA also include lesbianism in their definitions.<sup>19</sup>

## Defining Sexual Orientation

1. The list of terms provided in the State and Territory definitions are insufficient to encompass the range of human sexualities that exists. This is because these Acts rely on a list of labels for their definitions of sexual orientation. In order to protect all people from discrimination on the basis of their sexuality or sexual orientation, the Consolidated Act should contain a broader definition

<sup>9</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZG.

<sup>10</sup> *Equal Opportunity Act 1984* (SA) s 29(3).

<sup>11</sup> *Discrimination Act 1991* (ACT) s 7(1)(b).

<sup>12</sup> *Anti-Discrimination Act 1991* (Qld) s 7(n).

<sup>13</sup> *Anti-Discrimination Act 1992* (NT) s 19(c).

<sup>14</sup> *Equal Opportunity Act 1984* (WA) s 35O.

<sup>15</sup> *Anti-Discrimination Act 1998* (Tas) s 16.

<sup>16</sup> *Equal Opportunity Act 2010* (Vic) s 6(p).

<sup>17</sup> *Equal Opportunity Act 1984* (SA) s 5 (definition of 'sexuality'), *Discrimination Act 1991* (ACT) Dictionary (definition of 'sexuality'), *Anti-Discrimination Act 1991* (Qld) Dictionary (definition of 'sexuality'), *Anti-Discrimination Act 1992* (NT) s 4 (definition of 'sexuality'), *Equal Opportunity Act 1984* (WA) s 4 (definition of 'sexual orientation'), *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'sexual orientation'), *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'sexual orientation').

<sup>18</sup> *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'sexual orientation'), *Anti-Discrimination Act 1992* (NT) s 4 (definition of 'sexuality').

<sup>19</sup> *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'sexual orientation'), *Discrimination Act 1991* (ACT) Dictionary (definition of 'sexuality'), *Equal Opportunity Act 1984* (WA) s 4 (definition of 'sexual orientation').

than currently contained in the State/Territory Acts and a non-limiting definition of sexuality.

2. The Attorney General's Discussion Paper gives consideration to a conceptual definition of sexuality that does not rely solely on 'labels'.<sup>20</sup> We support such an approach and recommend that sexual orientation be defined as:
  - Sexual attraction (e.g. same-sex attracted, other-sex attracted, both-sex attracted, all-sex attracted, no-sex attracted);
  - Sexual identity (e.g. heterosexual, homosexual, gay, lesbian, bisexual, asexual); and
  - Sexual behaviour (e.g. lawful sexual activity).<sup>21</sup>
3. This definition of sexual orientation is broader and more inclusive than the existing protections. However, it still includes labels as examples of sexual orientations to assist with interpretation. The aim of this definition is to ensure that people can read it and know that they are protected from discrimination based on their sexual orientation, regardless of whether it is easily categorised. By adopting a broad and inclusive definition, we can ensure that people of all sexual orientations will be protected from discrimination.

### **Sexual Identity**

4. Sexual identity is one dimension of sexual orientation. Anti-discrimination law should recognise that there are sexual identities that do not fall within labels of heterosexual, homosexual and bisexual. For example, people also identify as asexual, lesbian, queer and pansexual.
5. In preparing this submission, we asked our members how they would wish to see sexual orientation defined in the Consolidated Act. We also asked our members if they had any experience with State and Territory anti-discrimination law and whether the existing Acts are achieving their purpose of protecting people from discrimination based on their sexuality.
6. According to one of our members:

*The problem I see with defining 'sexual orientation' is that you then run the risk of discriminating against people that identify as being outside of a non-binary gender system ... a definition also needs to acknowledge that there are people who are not male OR female e.g. third gendered people.*

7. There are Australians who do not identify as either male or female. Some have a gender identity that does not match the sex characteristics they were born

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<sup>20</sup> Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion Paper (2011) 21.

<sup>21</sup> Freedom! Gender Identity Association Inc, Submission to the Australian Human Rights Commission, *Consultation: protection from discrimination on the basis of sexual orientation and sex and/or gender identity*, 25 November 2010, 5.

with. Others were born intersex, with sex characteristics that cannot be classified as clearly male or female.<sup>22</sup>

8. A number of our members are concerned that their sexual identity is not covered by any of the terms homosexuality, heterosexuality or bisexuality. Each of these terms gains its meaning from a gender binary - homosexuality is same-sex attraction, heterosexuality is opposite sex attraction and bisexuality is an attraction to two sexes.
9. The State and Territory Acts do not recognise other gender identities in their definitions of sexuality and so force people to identify themselves as either male or female. For example, if a gender diverse person is attracted only to men, they may not see themselves as heterosexual or homosexual. They are neither same-sex nor opposite sex attracted. But for the purposes of State anti-discrimination law they would need to choose whether they have been discriminated against based on either heterosexuality or homosexuality and so identify as either male or female.
10. The Consolidated Act should recognise that there are intersex and gender diverse people in Australia, who are not male or female. The Act should use language which reflects this diversity.
11. The definition should retain the terms homosexuality, heterosexuality, lesbianism and bisexuality as examples of sexual identities, in order to assist with interpretation of the term 'sexual identity'. This is an inclusive list; it is not intended to be a comprehensive list of sexual identities. People should be free to use the terminology they are most comfortable with when discussing their own sexual identity.

### **Sexual Attraction**

12. Sexual attraction is another dimension of sexual orientation, which can be distinct from sexual identity. For example, a recent Youth Affairs Council of Victoria survey found that 30% of people surveyed identified as same-sex attracted (as opposed to identifying as gay).<sup>23</sup> This demonstrates that many people reject identity labels, or prefer to define their sexual orientation by reference to attraction.
13. The Australian Study of Health and Relationships found that sexual identity and same-sex attraction are often not aligned. 3.5% of men identified as either gay or homosexual or bisexual and 8.6% of men reported some attraction to

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<sup>22</sup> Intersex in Australia, *What is intersex?* (31 December 2011) Organisation Intersex International Australia Ltd < <http://oiiiaustralia.com/>>.

<sup>23</sup> Youth Affairs Council of Victoria, Submission No 52 to Australian Human Rights Commission, *Protection from Discrimination on the basis of sexual orientation and sex and/or gender identity*, December 2010, 5.

men. 2.2% of women identified as lesbian or homosexual or bisexual and 15.1% of women reported some level of same-sex attraction.<sup>24</sup>

14. The use of identity labels alone, is therefore insufficient to define sexual orientation. The Consolidated Act should include sexual attraction as a dimension of sexual orientation.

### **Sexual Behaviour**

15. The Consolidated Act should protect freedom of choice and sexual expression. We recommend that the Consolidated Act include “sexual behaviour” as a part of the definition of sexual orientation. The term sexual behaviour encompasses the expression of one’s sexuality. This dimension of the definition of sexual orientation would protect people against discrimination based on lawful sexual activity including sex work, casual sex, BDSM, swinging, fetish and kink, and sexual relationships.

16. At state level:

17. Lawful sexual activity is a protected attribute in Victoria, Tasmania and Queensland.<sup>25</sup> In Queensland the act defines lawful sexual activity to mean only lawful employment as a sex worker.<sup>26</sup>
18. The inconsistency in the current State protections for lawful sexual activity should be resolved. The Consolidated Act should protect against discrimination based on lawful sexual activity so that all Australians can benefit from this protection, regardless of which state or territory they reside in.

### **Transexuality**

19. In Tasmania and the Northern Territory, transexuality is part of the definition of the term ‘sexual orientation’.<sup>27</sup> In the Consolidated Act the definition of sexual orientation should not include the term ‘transexuality’. This is because transexuality is an aspect of gender identity and not sexuality. Protection for those who identify as transsexual or transgender should come from the gender identity ground and not the sexual orientation ground. Gender identity and sexual orientation should be separate protected attributes. Nor should they be conflated.

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<sup>24</sup> Anthony M.A. Smith et al, ‘Sexual identity, sexual attraction and sexual experience among a representative sample of adults’ (2003) 27(2) *Australian and New Zealand Journal of Public Health* 138, 141.

<sup>25</sup> *Equal Opportunity Act 2010* (Vic) s 6(g), *Anti-Discrimination Act 1998* (Tas) s 16(d), *Anti-Discrimination Act 1991* (Qld) s 7(1).

<sup>26</sup> *Anti-Discrimination Act 1991* (Qld) Dictionary (definition of ‘lawful sexual activity’).

<sup>27</sup> *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘sexual orientation’), *Anti-Discrimination Act 1992* (NT) s 4 (definition of ‘sexuality’).

## **How should gender identity be defined?**

### **Recommendation 2**

*Gender identity should be defined as a person's actual or perceived sex, as well as a person's gender-related self-image, gender-related appearance, or gender expression whether or not that gender-related self image, gender-related appearance, or gender expression is different from that traditionally associated with a person's sex at birth.*

## **Gender Identity and Expression**

20. We support the use of the terms 'gender identity' and 'gender expression' in the Consolidated Act (and the protection of people who fall within the meaning of these terms). We recommend a definition similar to that used in the Human Rights Law of the city of New York:<sup>28</sup>

Gender identity includes a person's:

- actual or perceived sex;
- gender-related self-image;
- gender-related appearance; or
- gender expression

whether or not that gender-related self image, gender-related appearance, or gender expression is different from that traditionally associated with a person's sex at birth.

## **Gender Identity Grounds in State Law**

21. Each State and Territory gives some protection against discrimination on the basis of gender identity, although these protections vary significantly.
- Transgender is a protected attribute in New South Wales.<sup>29</sup> Also, New South Wales gives extra protection to a 'recognised transgender person'.<sup>30</sup>
  - Gender Identity is a protected attribute in Victoria,<sup>31</sup> ACT<sup>32</sup> and Queensland.<sup>33</sup>
  - Chosen Gender is a protected attribute in South Australia.<sup>34</sup>

<sup>28</sup> *New York City Administrative Code*, Ch 1 NYC Admin. Code §§ 8-102.23 (2010).

<sup>29</sup> *Anti-Discrimination Act 1977* (NSW) s 38B(1).

<sup>30</sup> *Anti-Discrimination Act 1977* (NSW) s 38B(1)(c).

<sup>31</sup> *Equal Opportunity Act 2010* (Vic) s 6(d).

<sup>32</sup> *Discrimination Act 1991* (ACT) s 7(1)(c).

<sup>33</sup> *Anti-Discrimination Act 1991* (Qld) s 7(m).

<sup>34</sup> *Equal Opportunity Act 1984* (SA) s 29(2a).

- Transsexuality forms part of the protected attribute of sexuality in Tasmania<sup>35</sup> and the Northern Territory.<sup>36</sup>
- Gender History is a protected attribute in Western Australia.<sup>37</sup> In order to receive protection from discrimination based on gender history in Western Australia you need to have been granted a recognition certificate, which states that you have undergone a gender reassignment procedure.<sup>38</sup>

### **Problems with the existing state laws**

22. We submit that the Consolidated Act needs to address the inconsistencies between the State and Territory legislation. One reason for this is that gender diverse people have varying (and inadequate) levels of protection depending on which state or territory they live in. Further, the Consolidated Act should clearly send the message to all Australians that discrimination against gender diverse people is unlawful.
23. Transgender people report experiencing serious discrimination in the workplace, in housing and in the provision of services.<sup>39</sup> According to the Tranznation report, more 87% of transgender people surveyed had experienced stigma or discrimination.<sup>40</sup> A third had been threatened with violence and 19% had been physically attacked.<sup>41</sup> Discrimination against gender diverse people is widespread in Australia and must be addressed. The existing State protections are narrow, inconsistent and subject to significant exemptions. A broad definition of gender identity in the Consolidated Act is essential to achieving legal equality for all gender diverse people in Australia.

### **Gender History and Gender Reassignment**

24. The Western Australian laws provide the least protection from discrimination, as the laws in that state only protect people from discrimination based on gender history if the person has a gender recognition certificate.<sup>42</sup> In *WA v AH & AB* the Supreme Court of Western Australia found that in order to be granted a gender recognition certificate, individuals must be able to demonstrate that they have undergone a procedure to have their genitals physically altered.<sup>43</sup> On appeal, the High Court found that hormone therapy satisfies the requirement of the Act and genital surgery is not required.<sup>44</sup>

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<sup>35</sup> *Anti-Discrimination Act 1998* (Tas) s 3.

<sup>36</sup> *Anti-Discrimination Act 1992* (NT) s 4.

<sup>37</sup> *Equal Opportunity Act 1984* (WA) s 35AB.

<sup>38</sup> *Equal Opportunity Act 1984* (WA) s 4 (definition of ‘gender reassigned person’).

<sup>39</sup> Murray Couch et al, *Tranznation: A report on the health and wellbeing of transgender people in Australia* (2007) Australian Research Centre in Sex, Health and Society 9 <[http://glhv.org.au/files/Tranznation\\_Report.pdf](http://glhv.org.au/files/Tranznation_Report.pdf)>.

<sup>40</sup> *Ibid*, 9.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Equal Opportunity Act 1984* (WA) s 4 (definition of ‘gender reassigned person’).

<sup>43</sup> *The State of Western Australia v AH* [2010] WASCA 172.

<sup>44</sup> *AB v Western Australia* [2011] HCA 42 (6 October 2011).

25. Anti-discrimination law in Western Australia provides no protection at all to those who have been discriminated against based on their gender identity, but have not undergone some medical or surgical procedure.
26. Protections in the Consolidated Act should not be contingent on whether a person has undergone a medical procedure. Gender reassignment surgery is invasive and it is unaffordable for most people. There are a myriad of personal reasons and health reasons why a person may choose not to undergo procedures. It is offensive for the law to give no protection to gender diverse people who have not and do not intend to undergo surgeries or undergo hormone replacement therapy.

### **Chosen Gender**

27. South Australia protects people from discrimination based on chosen gender.<sup>45</sup> The Consolidated Act should not use the term chosen gender as it implies that gender diverse people have merely made a choice and could have decided otherwise.

### **Bona fide/genuine basis**

28. In Victoria, the protections against discrimination based on gender identity depend on “the identification on a bona fide basis by a person of one sex as a member of the other sex”.<sup>46</sup> ACT legislation is similarly worded, except it uses the term “genuine basis”.<sup>47</sup> South Australian law also requires identification to be on a genuine basis.<sup>48</sup>
29. The Consolidated Act should not include a requirement that gender identity is genuine or bona fide. This implies that some people’s gender expression is false or questionable. There is no reason why gender identity should have such a test, when the other grounds do not. Without this test the courts will still have the discretion to reject fanciful claims. Laws that are designed to protect people from discrimination should not in themselves discriminate against people based on whether their gender identity is perceived to be genuine or not.
30. The Consolidated Act should also recognise that there are more than two forms of gender identity and avoid terms such as “the other sex” that imply that there are only two sexes. The Consolidated Act should include a broad definition and provide protections for all forms of gender identity and expression, whether fixed or fluid.

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<sup>45</sup> *Equal Opportunity Act 1984* (SA) s 29(2a).

<sup>46</sup> *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘gender identity’).

<sup>47</sup> *Discrimination Act 1991* (ACT) Dictionary (definition of ‘gender identity’).

<sup>48</sup> *Equal Opportunity Act 1984* (SA) s 5(5)(a).

**Question 17. Should discrimination in sport be separately covered? If so, what is the best way to do so?**

**Recommendation 3**

*There should not be an exception to the gender identity ground for sporting activities.*

31. In NSW and Victoria, the gender identity grounds are subject to exceptions for sporting activities. In NSW transgender people can be excluded from participating in any sporting activity based on sex.<sup>49</sup> In Victoria people can be excluded from a competitive sporting activity based on their gender identity if the “strength, stamina or physique of competitors is relevant.”<sup>50</sup>
32. The Consolidated Act should not include exceptions for sporting activities. Automatic exceptions discourage gender diverse people from participating in sport and send the message to the sporting community that discrimination against gender diverse people is acceptable. Sport is important to many Australians’ health, fitness and social lives. Exclusion from sport could have negative impact on a person’s physical and mental health.
33. The exceptions are based on an assumption that male to female transsexual people have an unfair physical advantage in women’s sport.<sup>51</sup> This supposed physical advantage has been challenged by research which shows that hormonal treatment alters a person’s physiology such that an athletic advantage may not exist.<sup>52</sup> As a result of this research, the International Olympic Committee has concluded that transgender people should be permitted to participate in the Olympics, subject to certain conditions.<sup>53</sup> This demonstrates that the assumptions behind this type of exception are open to questioning. Furthermore, any advantage that exists may differ from sport to sport.
34. A sporting exception would have a negative effect on the lives of gender diverse people. An automatic exception should not apply. Sporting bodies that wish to exclude transgender people from competing should be given the option to apply for a temporary exemption from the ground. The sporting body would be required to provide reasons for why transgender people should be excluded; drawing on the Victorian exception, these reasons could be related

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<sup>49</sup> *Anti-Discrimination Act 1977* (NSW) s 38P(1).

<sup>50</sup> *Equal Opportunity Act 2010* (Vic) s 72(1).

<sup>51</sup> Heather Skyes, ‘Transsexual and Transgender Policies in Sport’ (2006) 15(1) *Women in Sport and Physical Activity Journal* 3, 8.

<sup>52</sup> J C Reeser, ‘Gender identity and sport: is the playing field level?’ (2005) 39 *British Journal of Sports Medicine* 695, 696.

<sup>53</sup> *Ibid.*

to the relevance of strength, stamina or physique to the particular sport.<sup>54</sup> The tribunal would then need to decide whether to grant the exemption by balancing the freedom from discrimination and the right to equality with considerations of fairness in the particular sporting activity.

**Are the current protections against discrimination on the basis of these attributes appropriate?**

**Recommendation 4**

*The Consolidated Act should include profession, trade, occupation or calling as a protected attribute.*

35. Federal anti-discrimination law currently protects against discrimination based on attributes including age, race, sex and disability. The Consolidated Act will also protect against discrimination on the grounds of gender identity and sexual orientation. We recommend that this list of protected grounds be expanded to respond to other areas of systemic discrimination.
36. The Australian Sex Party includes many members who work in the sex industry, including sex workers, adult filmmakers and sex shop owners. In advocating for our members, we are constantly reminded that those working in the sex industry are subject to ongoing discrimination. Unfortunately, many of our members have come to expect that people will discriminate against them based upon their occupation.
37. In Australia the majority of sex workers have been discriminated against based on their occupation.<sup>55</sup> Sex workers in Australia are subject to discrimination from health services, the police force, in housing and in seeking other employment. Sex workers are often denied loans and credit cards based on their occupation.<sup>56</sup> This ongoing discrimination has serious ramifications for sex workers, their families, their partners and their clients.
38. In order to promote legal equality for all Australians, the Australian Government should respond to discriminatory practices within the community with appropriate protections. We recommend that a protected attribute of profession, trade, occupation or calling be included in the Consolidated Act to respond to the discrimination faced by workers in the sex industry.
39. Currently, the ACT is the only jurisdiction in Australia to include profession, trade, occupation or calling as a protected attribute in an anti-discrimination act.<sup>57</sup> This ground was introduced in response to discrimination against people in all occupations, but in particular to address discrimination against those in the sex industry.

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<sup>54</sup> *Equal Opportunity Act 2010* (Vic) s 72(1).

<sup>55</sup> Scarlet Alliance, *Unjust and Counter-Productive: The Failure of Governments to Protect Sex Workers From Discrimination* (1999) <<http://www.scarletalliance.org.au/library/unjust-counterproductive>>.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Discrimination Act 1991* (ACT), s 7(1)(m).

40. Victoria, Tasmania and Queensland also have protections in place for sex workers under lawful sexual activity grounds.<sup>58</sup>
41. According to the Australian Human Rights Commission (AHRC), the absence of an occupation ground in federal anti-discrimination law “ sends a poor message to the Australian community that discrimination on such grounds is acceptable.” The AHRC has recommended that an occupation ground be included in federal law in order to implement Australia’s international obligations.<sup>59</sup>
42. An occupation ground would address discrimination by giving sex workers legal recourse. It would also raise awareness of the challenges that people working in the sex industry face. It would send the message to service providers and educational institutions that they cannot treat a person unfavourably because of their occupation. Sex workers are entitled to the same treatment as people in any other field of work.

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

**Recommendation 5**

*The Consolidated Act should not include religious exceptions that apply to discrimination on the grounds of sexual orientation or gender identity.*

**Recommendation 6**

*If the Act does include religious exceptions, they should apply only to the ordination or appointment of priests, ministers of religion or members of a religious order.*

**Recommendation 7**

*Any religious exception should not apply to institutions or organisations that receive public funding.*

**Recommendation 8**

*Religious organisations that wish to be exempt from anti-discrimination law should be required to apply to the Australian Human Rights Commission for temporary exemptions.*

**State Religious Exceptions**

43. Religious exceptions vary significantly from state to state.

Every State and Territory in Australia has religious exceptions in place, which allow for religious groups to discriminate against people based on their sexual

<sup>58</sup> *Equal Opportunity Act 2010* (Vic) s 6(g), *Anti-Discrimination Act 1998* (Tas) s 16(d), *Anti-Discrimination Act 1991* (Qld) s 7(l).

<sup>59</sup> Australian Human Rights Commission, *National Human Rights Consultation* (2009) <[http://www.hreoc.gov.au/legal/submissions/2009/200906\\_NHRC.html](http://www.hreoc.gov.au/legal/submissions/2009/200906_NHRC.html)>.

orientation or gender identity.

- All States except Tasmania have exceptions for practices of a body established for religious purposes;<sup>60</sup>
- Queensland and Tasmania have exceptions for a genuine occupational requirement that the person act in a way consistent with the employer's religious beliefs;<sup>61</sup>
- Victoria has an exception for discrimination by a person against another person if the discrimination is reasonably necessary to comply with their religious beliefs;<sup>62</sup> and
- New South Wales has an exception for the provision of adoption services by faith-based organisations.<sup>63</sup>

### **Religious Exceptions in the Consolidated Act**

44. We recommend that all religious exceptions be removed in the Consolidated Act. We submit that religions should be subject to the same laws as other private organisations as we do not believe that religious beliefs justify discriminatory acts.
45. The purposes of anti-discrimination law include to eliminate all discrimination based on protected attributes.<sup>64</sup> Its purposes also include affirming “that every individual is equal before and under the law, and has the right to equal protection and equal benefit of the law, without discrimination”.<sup>65</sup> Any exception to anti-discrimination law expressly allows for further discrimination to take place and undermines the purpose of the legislation.
46. Religious exceptions have far reaching implications for same-sex attracted people. Religious exceptions extend to religious charities, religious educational institutions, and religious accommodation. In Australia many publically funded services have a religious affiliation. In most Australian States and Territories all of these branches of religion have been granted exceptions to protections based on sexual orientation.
47. In a recent case, the NSW Supreme Court found that a religious organisation could refuse an application from a lesbian couple to become foster parents due to their sexual orientation.<sup>66</sup> The organisation relied on a religious exception to the Anti-discrimination Act.<sup>67</sup> Such an exception, and similar ones like it,

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<sup>60</sup> *Equal Opportunity Act 1984* (SA) s 50(1)(c), *Anti-Discrimination Act 1977* (NSW) s 56(d), *Discrimination Act 1991* (ACT) s 32(d), *Anti-Discrimination Act 1991* (Qld) s 109(d), *Anti-Discrimination Act 1992* (NT) s 51(d), *Equal Opportunity Act 1984* (WA) s 72(d), *Equal Opportunity Act 2010* (Vic) s 82(2).

<sup>61</sup> *Anti-Discrimination Act 1991* (Qld) s 25(3), *Anti-Discrimination Act 1998* (Tas) s 51(1).

<sup>62</sup> *Equal Opportunity Act 2010* (Vic) s 84.

<sup>63</sup> *Anti-Discrimination Act 1977* (NSW) s 59A(1).

<sup>64</sup> *Equal Opportunity Act 2010* (Vic) s 3.

<sup>65</sup> *Sex Discrimination Act 1984* (Cth) Long Title.

<sup>66</sup> *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWACT 293.

<sup>67</sup> *Anti-Discrimination Act 1977* (NSW) s 56.

prevent people from accessing services and exclude them from programs. Religious exceptions discourage same-sex attracted people from even engaging with organisations that have a religious affiliation, for fear that they will be treated in a discriminatory and dehumanising way.

48. It follows that we oppose any religious exception based on sexual orientation and gender identity. If the government is serious about eliminating discrimination based on these attributes, then it should not undermine the purpose of the law by granting an exception to the very organisations that are most likely to discriminate against sexual minorities and gender diverse people. Religious freedoms should not be privileged above the freedom from discrimination. The Consolidated Act should not permit religious organisations to treat people unfavourably because of their sexual orientation or gender identity.
49. If religious exceptions are to be included in the Consolidated Act, then they should be narrow in scope. No religious exceptions should apply to organisations that receive public funding. The Australian Government cannot claim to be working to eliminate discrimination if they continue to allocate funds to organisations that discriminate against people based on protected attributes.

### **Examples of Discrimination**

50. In preparing this submission we asked our members how the religious exceptions to State and Territory anti-discrimination law have affected their lives. Many of our members had been discriminated against by religious organisations based on their sexuality and gender identity. In particular, our members were concerned that religious schools are permitted to discriminate under State law.

### **Students at Religious Schools**

51. Each state and territory offers protections against discrimination based on sexual orientation and gender identity in accepting and expelling students.<sup>68</sup> However, in some jurisdictions these protections are subject to exceptions for private and religious schools. These exceptions vary from state to state, from a broad exception for religions in New South Wales<sup>69</sup> to no religious exception in Tasmania.<sup>70</sup> Where exceptions apply, the requirements for discrimination to be lawful are inconsistent between States and Territories.
52. New South Wales,<sup>71</sup> Western Australia,<sup>72</sup> Victoria and ACT have exceptions for accepting and expelling students.

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<sup>68</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZO(1), *Equal Opportunity Act 1984* (SA) s 37(1).

<sup>69</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZO(3).

<sup>70</sup> *Anti-Discrimination Act 1998* (Tas) s 22(b).

<sup>71</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZO(3).

<sup>72</sup> *Equal Opportunity Act 1984* (WA) s 73(3).

53. In Australia, more than 1.1 million students attend non-government schools and 90% of these schools are religious.<sup>73</sup> This means about a third of all school students in Australia are enrolled at a religious school. Depending on the State or Territory that they live in, these students can have no protection from discrimination based on their sexual orientation and gender identity. These schools receive public funding, yet are given exceptions from the laws that apply to public schools.
54. Our members have experienced the effects of the exceptions in private schools. One of our members was required to attend conversion counselling and expelled from a religious school because she was a lesbian. A teacher locked the daughter of one of our members in a classroom by herself when the school found out she was same-sex attracted. She had her phone, pockets and bag searched. Another member describes growing up gay in a religious school as horrific: *“They ban teens from taking their same sex partners to dances/formals also. Homosexuality is never spoken about as anything other than a sin. It’s a horrible place to grow up gay.”* Many same-sex attracted students face discrimination throughout their schooling.
55. With increasing harmonisation of the schooling system in Australia, the Consolidated Act has an important role towards eliminating discrimination within the schooling system and accordingly, the Consolidated Act should not include exceptions to discrimination based on sexual orientation and gender identity for religious schools in accepting and expelling students. It is unacceptable that Australian laws allow schools to refuse students and expel students based on their sexuality. These exceptions undermine the purpose of anti-discrimination law. Instead, they have the potential to create an environment where young people are forced to hide their sexual identity for fear of being expelled. It teaches students that discrimination and intolerance are acceptable.
56. Studies have found that young people who are not heterosexual and young people who are gender diverse are at a higher risk of depression, self-harm and suicide. Rates of self-harm and attempted suicide are estimated to be from 3.5 to 14 times higher for non-heterosexual and gender diverse people than the general population.<sup>74</sup> This is an appalling statistic. The Australian Government needs to act to change this rate and help improve the lives of young people. A change that would make a difference in many students’ lives would be to have anti-discrimination law apply to non-government schools.

57. According to one of our participants:

*I went to a country school in WA and was the only gay person in the school. I came out to one person and soon everyone knew and so did all the teachers. At this stage my parents didn't know. I got called into*

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<sup>73</sup> Jennifer Buckingham, ‘The Rise of Religious Schools’ (2010) *CIS Policy Monographs* 111.

<sup>74</sup> Suicide Prevention Australia, *Position Statement: Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities* (August 2009)

<<http://suicidepreventionaust.org/?statement=suicide-and-self-harm-among-gay-lesbian-bisexual-and-transgender-communities>>.

*the principal's office and sent for counseling about my "problem" I confessed to the counselor and said I have no problem with my newfound sexuality. But it seems everyone else did. I left school that day and when I got home my family told me that the school had called about my problem...I didn't even get a chance to tell my parents myself.*

58. If religious schools were subject to the same anti-discrimination laws as public schools then it would be unlawful to treat this student unfavourably because of her sexuality. Her school was given an exception which allowed them to treat her sexuality as if it were a problem. If our recommendation were adopted, then she would have legal recourse against the school. Furthermore, all religious schools would be sent a clear message that they cannot discriminate against same-sex attracted students. Schools with a culture of homophobia would be required to change the way they treat same-sex attracted students.
59. If the Australian Government is serious about preventing and responding to discrimination based on sexual orientation and gender identity, then it should not include exceptions that nullify the protections in the places where they are most important. Young same-sex attracted people are particularly vulnerable and they must be protected from discrimination based on their sexual orientation even if they are enrolled in a religious school.

### **Employees of Religious Schools**

60. According to one of our members:

*I work in a publically funded Catholic university and feel that I have to keep both my sexual orientation and my personal faith private as I feel being too out there will have an impact on my limited chances of career advancement within the organisation.*

61. State and Territory anti-discrimination law provides little to no protection from discrimination based on sexuality and gender identity to people who are employed by religious educational institutions.
62. All states except Queensland and Tasmania have exceptions for employment by a religious educational institution. Queensland has an exception for a genuine occupational requirement that the person act in a way consistent with the employer's religious beliefs.
63. Approximately 36% of teachers in Australia work at non-government schools.<sup>75</sup> Many teachers and support staff at these schools fear that they will be discriminated against if they are open about their sexual orientation or gender identity. It is unacceptable that these employees do not receive the same protections against discrimination as other professionals. They should not have to make the choice to hide part of their identity in order to protect

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<sup>75</sup> Australian Bureau of Statistics 2010, *Schools, Australia*, cat. no. 4221.0 viewed 30 January 2012, <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4221.0Main%20Features62010?opendocument&tabname=Summary&prodno=4221.0&issue=2010&num=&view=>>>.

their job. Just as students should not be expelled because of their sexual orientation, the employees of schools should not be subject to any less secure employment because of their sexual orientation or gender identity. Religious schools should not be granted an exception to anti-discrimination law under the Consolidated Act.

### **Temporary Exemptions**

64. We recommend that automatic exceptions for religious organisations be removed and temporary exemptions be retained. Religious organisations that wish to be exempt from anti-discrimination law should be required to apply to the Australian Human Rights Commission for temporary exemptions.
65. Temporary exemptions would be granted for a defined period, after which the organisation would need to reapply in order to continue to receive an exception under the Consolidated Act.<sup>76</sup>
66. Exemptions permit people to discriminate against people based on protected attributes. If broad exemptions are granted, then the effectiveness of anti-discrimination law is significantly reduced. The Australian Human Rights Commission should only grant temporary exemptions that are consistent with the aims and purposes of anti-discrimination law.<sup>77</sup>
67. This approach is preferable to having automatic exceptions, as it would require religious organisations to give reasons for why they require an exemption from the law (which would then be considered by the relevant tribunal). The test for granting exemptions to religions could take into consideration specific doctrines, tenets or beliefs of the religion and the susceptibilities of the adherents. These could be compared against the detriment suffered by a particular group or persons with a particular attribute should the exemption be permitted.
68. The process of applying for temporary exemptions would make discrimination by religious groups more transparent. Religions would be required to be forthcoming about their intentions to discriminate based on their faith. Religious organisations could not take for granted the fact that exceptions apply.
69. If this approach was taken, people engaging with religious organisations and religious services would have a greater awareness of their rights under anti-discrimination law. Employees of religious organisations would know if they have the protection of anti-discrimination law.

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<sup>76</sup> For how such an exemption could operate see: Discrimination Law Experts' Group, Submission to Attorney General, *Consolidation of Anti-Discrimination Law*, 13 December 2011, 17.

<sup>77</sup> Ibid.