



Gay & Lesbian Rights Lobby

EMBRACING EQUALITY:

SUBMISSION TO THE CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

JANUARY 2012

ABOUT THE GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the peak organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families.

The GLRL has a strong history in legislative reform. In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and subsequent amendments. The GLRL contributed significantly to reforms introducing an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report, *And Then ... The Brides Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000* (NSW).

EXECUTIVE SUMMARY

The submission by the NSW Gay and Lesbian Rights Lobby (GLRL) to the Consolidation of Commonwealth Anti-Discrimination Laws (**Consolidation Project**) does not respond to every question posed in the Discussion Paper. As an organisation that advocates on behalf of gay men, lesbians and their families, our remit is quite specific. However, while this submission focuses on reform for gay and lesbian people, we also note the important parallels, particularly with the sex and gender diverse communities. Therefore, in addressing the issues affecting gay and lesbian people, this submission also highlights overlapping issues affecting bisexual, transgender and intersex (LGBTI) communities, where appropriate.

In 2010, Australia was audited as part of the Universal Periodic Review. In reviewing Australia's compliance with their international human rights obligations, concern was noted at the absence of legislative human rights protection, especially in relation to sexual and gender minorities. In response, the Federal Government reiterated its commitment to the consolidation of anti-discrimination laws to ensure greater protections for vulnerable LGBTI people.

Currently, no Commonwealth anti-discrimination legislation prohibits discrimination against LGBTI people despite the fact that they continue to be subject to systemic discrimination in all aspects of daily life. In order to rectify this the GLRL recommends that as *a matter of priority* consolidated anti-discrimination laws include:

- **Comprehensive and inclusive terminology.** In specifying a list of protected attributes or characteristics, a Consolidated Act must proscribe the discrimination, harassment and vilification against people on the basis of sexual orientation. Appropriate terminology for protecting attributes relating to intersex, transgender, and sex and/or gender diversity should be developed in consultation with these particular communities.
- **Intersectional discrimination protections.** Discrimination does not necessarily have to be isolated to any one aspect of a person's identity. Rather, discrimination may be experienced through a combination of identity or characteristic factors (i.e. sexual orientation, age, race etc). Individuals should be able to lodge discrimination complaints on the basis of these 'intersecting' or multidimensional forms of discrimination.
- **Narrow exemptions.** Generally, exemptions (distinguished from special measures) are counterintuitive to the objects of anti-discrimination legislation. While we acknowledge that the Government intends to retain some exemptions, we strongly recommend that faith-based organisations should not be entitled to wide-ranging discretions that allow them to discriminate against sexual and gender minorities. If exemptions are to be provided under a Consolidated Act, they must be specifically narrowed to exclude any services that are funded by the government (i.e. education, aged care etc). Moreover, exemptions should be made by application and should be temporary. Organisations seeking to rely on exemptions must provide rigorous justification for its necessity. Where exemptions are utilised, they should be made public to improve transparency.

MEANING OF DISCRIMINATION

Li, NSW said:

It is hurtful when a law discriminates against you, and even more so when an opportunity to change that law is missed for political reasons. As a man believing in social justice and a fair go for all Australians, surely the equal application of laws to everyone is a fundamental right that should not be compromised. I hope you will protect equality for thousands of individuals and families.

Question 1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

International law provides a broad framework for defining discrimination in domestic legislation.¹ In Australia, however, there is no unified test for discrimination. Many state and Federal anti-discrimination laws distinguish between ‘direct discrimination’ (where a person is treated less favourably than another on the basis of their protected attribute) and ‘indirect discrimination’ (where a seemingly neutral condition disadvantages a person with a particular protected attribute). Current case law construes these areas as mutually exclusive, which is problematic.

A particular difficulty in relation to direct discrimination is the requirement that the discrimination is judged by reference to a ‘comparator’, or a person in the materially same circumstances who lacks the protected attribute. Such comparator tests are problematic because they often hinge on a hypothetical, rather than an actual, comparator to determine if a particular act constitutes direct discrimination. Such an unpredictable approach to determining unlawful discrimination under the *Anti-Discrimination Act 1977* (NSW) can be distinguished from the approach taken under the *Racial Discrimination Act 1975*, which does not rely on a comparative test of discrimination.²

Taken together, the disparate tests for discrimination on the basis of sexual orientation can refer to treating someone, or someone’s associates, less favourably, on the basis of their actual or perceived sexuality. The concept is usually raised in the context of discrimination against people who are gay, lesbian or bisexual.

Ultimately, the GLRL supports a broad definition of discrimination that should apply to all protected attributes across all areas. The GLRL recognises there may be value in unifying the definition of discrimination, but also in retaining two concepts of direct and indirect discrimination.

¹ *Racial Discrimination Act 1975* (Cth), s9.

² See *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 71 and 74.

If the two concepts were to be retained, additional clarification would be required in order to address some of the difficulties outlined above and they should not be construed as mutually exclusive concepts. In any event, the comparator element should be removed from the definition of discrimination.

Recommendation 1: The comparator element should be removed from the definition of direct discrimination.

Recommendation 2: If the direct and indirect discrimination are to remain separate concepts, they must not be construed as mutually exclusive.

Question 2. How should the burden of proof be allocated?

Individuals who experience discrimination often lack the financial and other resources necessary to enforce their rights. The current torts-based model of making complaints lacks equity by discouraging claims due to the excessive costs associated with pursuing litigation.

There are also evidentiary requirements in proving unlawful discrimination that disproportionately affect complainants. For example, respondents are often in a better position to provide evidence relating to causation, or why a particular policy or practice was engaged, and should be made accountable to provide such evidence.

Recommendation 3: A Consolidated Act should provide for shared onus of proof with a rebuttal presumption. That is, where a prima facie case of discrimination has been established, it is up to the duty holder to rebut the claim, and prove their impugned practice or action is not discriminatory.

Question 3. Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

Anti-discrimination laws should ensure that LGBTI groups are able to redress historical disadvantage through special measures. A fine balance needs to be reached between outlawing all discrimination on the basis of sexual orientation and sex and/or gender identity, ensuring that a Consolidated Act is not used for spurious claims, and that the social and cultural identity of a disadvantaged community group is preserved. The preservation of the group's identity is an important consideration in the framing of any federal anti-discrimination legislation on the basis of sexual orientation, and also sex and/or gender identity.

In line with the recommendations of the Sexuality Discrimination Inquiry in 1996, special-needs groups may be identified and seek positive discrimination measures to overcome past disadvantage, and establish gay and lesbian accommodation, aged care facilities, events or clubs.³ In addition, sexuality-specific organisations could apply for exemptions from providing services to the broader community, for example, health services.⁴

One way to address these concerns could be to insert a 'savings clause' in the consolidation bill, focusing on sexual orientation (and other protected attributes) as an 'inherent requirement.'

That is, a clause which stated that it is not unlawful to discriminate on the basis of someone's sexuality when it is a 'genuine occupational qualification' to be a person of a particular sexuality. Concern was raised by a number of critics that such a clause could be problematic, and could be used by churches, private educational institutions to assert that heterosexuality is an 'inherent requirement' for employment. If this clause were to be implemented, serious limitations would need to be included.

In light of the problems associated with the 'occupation' clause, a more appropriate savings clause would be one in which the social and cultural identity of sexual and gender minorities is preserved. The Lesbian and Gay Legal Rights Service gave the following example of such a clause:

*Nothing in this Act makes unlawful any activity, one of the primary objectives of which is to preserve, protect or promote the social, cultural or sexual identity of the lesbian, gay or transgender communities.*⁵

For an example of how such a clause works in state legislation, the Victorian *Equal Opportunity Act 2010* provides an exception for 'disadvantaged groups or minority cultures'. Section 61 states:

A club, or a member of the committee of management or other governing body of a club, may exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established if the club operates principally -

- (a) to prevent or reduce disadvantage suffered by people of that group; or*
- (b) to preserve a minority culture.*⁶

Any 'special measures' included in the legislation should be considered in light of international law and Australia's human rights obligations, including the need to consult with affected communities.

³ Senate Inquiry into Sexuality Discrimination, Recommendations, and Clause 27, Sexuality Discrimination Bill 1995 (Cth).

⁴ Clause 31, Sexuality Discrimination Bill 1995 (Cth).

⁵ Lesbian & Gay Legal Rights Service, 'Commonwealth Legislation to Prohibit Discrimination Against Lesbians, Gay Men and Transgender Persons – A Discussion Paper', July 1995.

⁶ *Equal Opportunity Act 2010* (Vic), s61.

Recommendation 4: A single ‘special measures’ clause should be introduced in a Consolidated Act to not make unlawful any activity that has a primary objective of promoting the social and cultural identity relating to any protected attribute. These special measures should be defined in accordance with international law.

Question 4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

The duty to make reasonable adjustments should be made express and apply to all protected attributes under the proposed consolidated legislation. Consistency and uniformity is necessary if this provision is to be effectively implemented.

Recommendation 5: We reiterate the proposal raised by the Australian Human Rights Commission’s submission on this issue, which notes that the reasonable adjustment provision in the *Disability Discrimination Act 1992* could be improved and simplified.

Question 5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Jack, NSW said:

Once in a PE change-room I had someone throw their testes in my face with a massive crowd around them all laughing and pushing me around...it was the most demoralising moment of my life.

Discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) is a systemic problem. Individual cases of discrimination often highlight broader structural or cultural practices that are driven by homophobia, transphobia and heterosexism. Effective anti-discrimination laws, then, must not just remedy individual cases of discrimination; legislation must proactively encourage substantive equality for the groups it aims to protect.

The need for proactive, rather than reactive, federal anti-discrimination legislation is evident in rates of harassment, discrimination and violence outside of the public sector. In 2003, the NSW Attorney-General’s Department released the report, *You Shouldn’t Have to Hide to be Safe*, which documented extensive homophobic abuse, violence and harassment in NSW. That report found that of the 600 gay and lesbian community members surveyed, over half of the respondents had experienced at least one form of harassment, abuse or violence in the preceding 12 months and 85% had at some stage in their lifetime.⁷

⁷ ‘You Shouldn’t Have to Hide to be Safe – A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW’, NSW Attorney-General’s Department, Crime Prevention Division, 2003, .

However, systemic discrimination is not confined to the public sector. Most recently, the *Private Lives* national LGBTI health and well-being survey, conducted by the Australian Research Centre in Sex, Health and Society and Gay and Lesbian Health Victoria, found that 67% of participants' fear of prejudice or discrimination caused them, at least sometimes, to modify their daily activities in particular environments. 90% of participants had at some time avoided expressions of affection in public and disclosure of their gender identity or sexuality.⁸

Discrimination against students and teachers in schools is a significant problem in educational settings. In a 2010 national study about the sexuality, health and wellbeing of same-sex attracted and gender questioning young people, it was found that over 60% had experienced some form of physical or verbal abuse. Most alarmingly the report found that 80% of all harassment, discrimination and abuse, happened in school settings.⁹

In terms of educational outcomes, homophobia can cause students to change schools, to perform below their academic abilities and to withdraw from the many informal school curricula relating to social interaction. Homophobic bullying can lead to mental health problems, including depression and in some circumstances suicide.¹⁰

Moreover, the discrimination and difficulties related to institutional homophobia or heterosexism manifests in accessing aged-care services. According to the *What's the Difference?* Study prepared by the Victorian Ministerial Advisory Committee on GLBTI Health and Wellbeing in 2002, there remains considerable discrimination in aged-care and health services. Over 89% of same-sex attracted people noted that they experienced judgmental or phobic attitudes from health care professionals.¹¹

Elders who have endured a history of stigma and harassment due to their relationships or identities often have to closet themselves when seeking residential care for fear of further discrimination.¹² Therefore, organisations, such as aged care providers must take positive measures to ensure the security and wellbeing of sex, sexuality and gender diverse older people.

⁸ Pitts, M. et al, *Private Lives – A Report on the Health and Wellbeing of GLBTI Australians*, 2006, Gay and Lesbian Health Victoria and the Australian Research Centre in Sex, Health and Society, p. 11.

⁹ Hillier, L., T. Jones, M. Monagle, N.Overton, L. Gahan, J. Blackman and A. Mitchell, 'Writing Themselves In 3: The third national study on the sexual health & well-being of same-sex attracted and gender questioning young people', Australian Research Centre in Sex, Health & Society, (ARCSHS), La Trobe University, 2010, p. 44.

¹⁰ *Id*, p. 31.

¹¹ See Ministerial Advisory Committee on Gay and Lesbian Health, '*What's the difference?': health issues of major concern to gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians* Melbourne: Department of Human Services 2002 available at www.health.vic.gov.au/glbtimeac.

¹² *Id*, p. 43.

There are poor levels of training in both the public and private sector and limited support networks available for gender diverse and transitioning individuals. Many sex and/or gender diverse persons report inappropriate care due to a lack of sensitivity or understanding from aged-care and health service providers about their anatomical, biological and/or social differences.¹³

Introducing positive duties will begin an important shift towards ‘capacity-based’ model of anti-discrimination law, in a similar vein to the UK, that recognises the need for promoting substantive equality and diversity and not simply ‘curing’ individual breaches of the law.¹⁴

Recommendation 6: In a Consolidated Act, positive duties should be placed on public sector employers, educational institutions and other service providers and organisations to promote equality and eliminate discrimination against sex, sexuality and gender diverse people.

Recommendation 7: In a Consolidated Act, positive duties should extend to private sector employers, educational institutions and other service providers and organisations to ensure comprehensive protection against discrimination.

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

Whilst making discrimination against gay men, lesbians and sex and/or gender diverse persons unlawful is necessary, it is not sufficient on its own. Vilification and harassment of these groups is a significant issue, which has been dealt with in a number of the state and territory acts.¹⁵ Anti-vilification legislation on the basis of sexuality aims to redress the high levels of violence and harassment against lesbians, gay men by outlawing public acts which:

‘Incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality [transgender]¹⁶ of the person or members of the group.’¹⁷

Such legislation seeks to not only prevent harassment, intimidation and violence, but also to educate the community about the occurrence of such acts.

Provisions in state legislation have presented a strong and important message that vilification against same-sex attracted or sex and/or gender diverse people will not be tolerated within society.

¹³ *Ibid.*

¹⁴ *Northern Ireland Act 1998* (UK), s 75, *Equality Act 2010* (UK), s149.

¹⁵ *Anti-Discrimination Act 1977* (NSW), s 49ZT and s 49ZTA; *Discrimination Act 1991* (ACT), ss 66(1)(b) and 67; *Anti-Discrimination Act 1991* (Qld), s 124A; *Anti-Discrimination Act 1998* (Tas), s 19.

¹⁶ *Anti-Discrimination Act 1977* (NSW), s 38S.

¹⁷ See, for example, *Anti-Discrimination Act 1977* (NSW), s 49ZT.

Unlike other forms of discrimination, legislative prohibitions of vilification are not limited by reference to particular areas of activity, such as employment, education or the provision of goods and services. Instead, their application is confined to instances of ‘public acts’.¹⁸

Public acts are defined to include ‘any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material,’ or any conduct observable by the public, such as actions, gestures, and the wearing or display of clothing, signs, flags, emblems and insignia’.¹⁹

However, inconsistencies and exemptions in state legislation and the lack of protection at a Federal level have resulted in very few cases of vilification being prosecuted successfully. LGBTI people in Australia continue to be subject to high levels of violence and harassment. Recent studies on homophobic and transphobic violence and harassment found that:

- 56% of lesbians and gay men had experienced homophobic abuse or violence in the previous 12 months;
- 85% of lesbians and gay men have experienced harassment or violence during their lifetime; and
- 73.5 per cent of transgender men and 69.7 per cent of transgender women report experiencing personal insults or verbal abuse.²⁰

These statistics indicate that there is an ongoing need for broader vilification legislation on the grounds of sexual orientation and sex and/or gender identity at a state level, and for such protections to be introduced at a federal level.

Cases in NSW have shown that vilification against gay men in particular often also relates to actual or perceived HIV status. As gay men account for around 80% of people living with HIV, the vilification on the ground of HIV/AIDS status would disproportionately affect gay men.

Vilification protections should broadly encompass acts which intimidate, humiliate and vilify a person, as well as acts capable of inciting violence. The protection that such legislation provides against vilification and violence is needed to reduce crimes against LGBTI people.

Recommendation 8: Prohibition against harassment and vilification should cover all protected attributes and areas, including sexual orientation. Protections should extend to sex and/or gender diverse people in consultation with these communities.

¹⁸ See, for example, *Anti-Discrimination Act 1977* (NSW), s 49ZS, *Anti-Discrimination Act 1998*, (Tas), s 19. See Mason, G., ‘Harm, Harassment and Sexuality’, *Melbourne University Law Review*, [2002] MULR 31, <http://www.austlii.edu.au/cgibin/sinodisp/au/journals/MULR/2002/31.html?query=sexuality%20and%20vilification#fn26>.

¹⁹ *Anti-Discrimination Act 1977* (NSW), s 49ZS.

²⁰ NSW Attorney-General’s Department, Crime Prevention Division, ‘You Shouldn’t Have to Hide to be Safe – A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW’, 2003; and Pitts, M., Smith, A., Mitchell, A., & Patel, S. (2006). *Private Lives: A Report on the Wellbeing of LGBTI Australians*, Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University.

Shanya, NSW said:

When I think about discrimination, I am often reminded about the racism, sexism and homophobia that dominate my life. Whether I am screamed at on the streets walking home as a “filthy queer who should go back home”, or denied the more lucrative work projects because my partner and I are going through IVF, discrimination continues to cut across my identity.

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

Sexual Orientation

The *Yogyakarta Principles* define sexual orientation as a person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.²¹

In Australia, the terms used to characterise sexual orientation in legislation vary from state to state. The Northern Territory, Queensland, South Australia, and Australian Capital Territory anti-discrimination and equal opportunity acts use the term ‘sexuality’²²; whilst Tasmania, Victoria and Western Australia use the phrase ‘sexual orientation’²³, and NSW uses the more specific term, ‘homosexuality’.²⁴ In a number of states, the definition of sexuality and sexual orientation incorporates gender identity.

A 1995 report by the Lesbian and Gay Legal Rights Service advocated for the use of ‘homosexuality’ as opposed to ‘sexuality’, one of its reasons being that the primary objective of anti-discrimination law is the protection of a disadvantaged group within society.²⁵ This approach recognises that discrimination on the basis of heterosexuality is not a source of disadvantage or oppression and that same-sex attracted people are the primary targets of such discrimination and harassment.

²¹ International Commission of Jurists, *The Yogyakarta Principles: Principles On The Application Of Human Rights Law In Relation To Sexual Orientation and Gender Identity* (2007), http://www.yogyakartaprinciples.org/principles_en.htm.

²² *Anti-Discrimination Act* (NT), s 19(c); *Anti-Discrimination Act 1991* (Qld), s 7(n); *Equal Opportunity Act 1984* (SA), s 29(b); *Discrimination Act 1991* (ACT), s 7(1)(b).

²³ *Anti-Discrimination Act 1998* (Tas), s 16(c); *Equal Opportunity Act 1996* (Vic), s 6(6) (1); *Equal Opportunity Act 1984* (WA), s 350.

²⁴ *Anti-Discrimination Act 1977* (NSW), pt 4C, s 49ZG.

²⁵ Lesbian & Gay Legal Rights Service, ‘Commonwealth Legislation to Prohibit Discrimination Against Lesbians, Gay Men and Transgender Persons – A Discussion Paper’, July 1995.

It is a possibility that the legislation using the broader term 'sexuality' could be used to attempt to undermine gay and lesbian organisations, or to file complaints against gay or lesbian community venues, for restricting access to heterosexual people. Some gay and lesbian organisations choose to employ gay men and lesbians, to create 'non-judgmental, safe spaces in which lesbians and gay men can socialise'.²⁶

However, 'homosexuality' is a narrow and archaic term and can exclude a range of diverse sexualities. 'Sexual orientation' is a more inclusive term, has currency under international law, and incorporates protection for not only gay and lesbian persons, but also bisexuals.

Similarly, looking at how other federal anti-discrimination acts address definitional questions, the racial discrimination legislation addresses 'race' rather than 'minority races', and sex discrimination laws deal with 'sex' rather than 'women'.²⁷

Any definition of 'sexual orientation' should also incorporate protection on the grounds of lawful sexual activity.

Given the breadth associated with the term sexual orientation, legislation must also extend protection to characteristics or traits associated to, or imputed to, diverse sexual orientations. One possible way of framing it is per the *Equal Opportunity Act 2010* (Vic), s. 7(2):

- Discrimination on the basis of an attribute includes discrimination on the basis—*
- (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;*
 - (b) of a characteristic that a person with that attribute generally has;*
 - (c) of a characteristic that is generally imputed to a person with that attribute;*
 - (d) that a person is presumed to have that attribute or to have had it at any time.²⁸*

Ultimately, the GLRL proposes that the definition and protection should be drafted on terms that are sufficiently inclusive and broad so as to ensure protection from discrimination on the basis of actual or presumed sexual orientation, gender identity and expression and intersex and sex identity.

Legislation should recognise the broad scope of the concept sexual orientation and extend protection to characteristics or traits associated to, or imputed to, diverse sexual orientations

Recommendation 9: With respect to gay and lesbian people, a Consolidated Act should use the broad terminology of 'sexual orientation', including characteristics associated or imputed to it. This is to be interpreted in reference to the *Yogyakarta Principles*.

Recommendation 10: Protection should extend to individuals who are perceived to have the protected attributes and associated or imputed characteristics.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Equal Opportunity Act 2010* (VIC), s7(2).

Gender Identities and Expressions

As the GLRL is an organisation that deals primarily with gay and lesbian people, we are not able to comment on appropriate terminology in the legislation relating to sex and/or gender identities. This terminology should be developed in consultation with transgender communities.

We do note, however, the term ‘gender expression’ broadens the application of gender identity to other individuals by targeting practices and behaviours of a person that is generally associated with a particular sex (whether or not the person is of that sex). Instead of focussing on legal sex, legislation must also prohibit discrimination against a person who chooses to perform their gender role atypically or fails to conform to a particular social norm attributed to their assumed sex. For example, a gay male identifying person, who has feminine mannerisms or comportment, would be entitled to protection for expressing gender traits not socially associated to a male sex.

Intersex

As the GLRL is an organisation that deals primarily with gay and lesbian people, we are not able to comment on appropriate terminology in the legislation relating to intersex people. This terminology should be developed in consultation with intersex communities.

We recognise the urgency of such recognition, however, as intersex people have no basic rights protection in Australia.

Recommendation 11: Terminology to be used in a Consolidated Act relating to sex and/or gender identity should be developed in consultation with transgender and intersex communities. We draw particular attention to the submission of the National LGBTI Health Alliance and OII Australia as a useful guide on these issues.

Relationship Status and Family Responsibilities

Relationship status relates to having been, or purporting to be, in a living situation with or without a de facto partner or spouse.

Currently, there is limited coverage for non-marital relationship statuses in Federal anti-discrimination law.²⁹ This is of particular concern for same-sex couples, as current definitions in the *Marriage Act 1961* preclude their ability to marry.

De facto partners are defined in common law, and couples can also access relationship entitlements and family responsibilities if they are living in a registered relationship.³⁰

²⁹ *Sex Discrimination Act 1984* (Cth), s4A and 6.

³⁰ See the definition of ‘de facto partner’ in the dictionary. This refers to the definition contained in section 22A of the *Acts Interpretation Act 1901* (Cth).

Extending the scope to 'relationship status' and 'family responsibilities' is consistent with state and territory anti-discrimination laws.³¹

A Consolidated Act must expressly provide that the principal objective of enacting federal anti-discrimination protections on the basis of sexual orientation and gender identity is to also address the discrimination and stigmatisation experienced by LGBTI couples and families in Australia.

Recommendation 12: A Consolidated Act should incorporate a definition of 'relationship status' and 'family responsibilities' that uses gender-neutral terminology to protect all non-married couples and families from relationship-based discrimination.

Question 8. How should discrimination against a person based on the attribute of an associate be protected?

With reference to points and recommendations outlined above, a Consolidated Act must proscribe discrimination against individuals who associate with a person with a protected attribute.

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

Australia does not have adequate domestic protections against discrimination. Australia is the only Western liberal democracy without some form of human rights charter. Despite this, Australia is a signatory to various human rights treaties.³² While this is promising, in the Australian legislative context, international treaty law is not automatically incorporated into Australia.

Without municipal incorporation, however, international human rights law has only limited persuasive value in judicial rulings.³³

In 2008, the *Yogyakarta Principles* were drafted to specify the international human rights obligations in relation to sexual orientation and gender identity. While these principles are not legally binding instruments, they act as persuasive interpretations of binding human rights treaties and relate to gay, lesbian and transgender people.³⁴

³¹ Recommendation 4 of Senate Legal and Constitutional Affairs Committee, *Report into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* Canberra: Parliament of Australia 2009.

³² These include the Convention Against Torture, International Covenant on Civil and Political Rights, Convention on the Elimination of all forms of Discrimination Against Women, Convention on the Elimination of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child.

³³ *Polyukovich v The Commonwealth* (1991) 172 CLR 501.

³⁴ International Commission of Jurists, *The Yogyakarta Principles: Principles On The Application Of Human Rights Law In Relation To Sexual Orientation and Gender Identity* (2007),

It should be noted that the *Yogyakarta Principles* are not inclusive of many areas of concern to intersex people.

Existing 'unlawful discrimination' at a federal level is covered by the *Age Discrimination Act 2004* (Cth) (ADA), the *Disability Discrimination Act 1992* (DDA), the *Racial Discrimination Act 1975* (Cth) (RDA) and the *Sex Discrimination Act 1984* (Cth) (SDA). The grounds of discrimination covered under these Acts include: race, colour, descent or national or ethnic origin; sex; marital status; pregnancy or potential pregnancy; family responsibilities; disability; and age.

In addition, 'unlawful discrimination' also includes offensive behaviour based on racial hatred, sexual harassment, and harassment of people with disabilities.³⁵

There is limited protection against discrimination on the grounds of sexual orientation in employment under Divisions 2, 3 and 4 of Part II of the *Australian Human Rights Commission Act 1986* (Cth) and the *Fair Work Act 2009* (Cth).³⁶ The AHRC can inquire into complaints of discrimination by the Commonwealth or its agents or discrimination in employment and can make recommendations to Parliament however the recommendations are not enforceable.

There is no anti-discrimination act at a federal level that covers discrimination on the basis of sexual orientation. Every state and territory anti-discrimination act covers discrimination on the basis of 'sexuality', 'sexual orientation', or 'homosexuality', alongside 'transsexuality' or 'gender identity' (the terminology varies across state legislation). Some states also cover 'lawful sexual activity'.

Federal industrial law also prohibits unfair dismissal and adverse action on the basis of a person's 'sexual preference', however, sex and/or gender identity is a notable omission.³⁷

There is a need for Commonwealth anti-discrimination legislation that offers protection on the grounds of sexual orientation and sex and/or gender identity due to the high levels of discrimination, harassment and violence towards gay, lesbian, bisexual, transgender and intersex persons. Often, this discrimination is experienced in the workplace, in schools, and other areas of public and social life.

The extent of the discrimination shows that existing state protections are insufficient. The Gay and Lesbian Rights Lobby and University of Sydney's *The Pink Ceiling is Too Low* report, found that workplace discrimination and harassment towards gay men and lesbians is significant: over 50% of respondents had experienced harassment or discrimination in their current workplace; 21.7% of participants had been 'outed' in the workplace against their will; and over 17% of participants felt that their careers had probably been restricted because of their non-heterosexual identity.³⁸

http://www.yogyakartaprinciples.org/principles_en.htm.

³⁵ Federal Discrimination Law 2005, Human Rights and Equal Opportunity Commission.

³⁶ *Australian Human Rights Commission Act 1986* (Cth), Divisions 2-4 and the *Fair Work Act 2009* (Cth), s351.

³⁷ *Fair Work Act 2009* (Cth), ss 153, 186(4), 194, 195, 342, 351, 772(1)(f).

³⁸ Irwin, J., 'The Pink Ceiling is Too Low, Workplace experiences of lesbians, gay men and transgender people,' 2002.

Recommendation 13: A Consolidated Act should provide comprehensive and inclusive terminology, including imputed or associated characteristics, relating to sexual orientation. Protections should also extend to sex and/or gender diverse persons in consultation with these communities.

Question 10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

Discrimination is rarely specific to one particular identity status or attribute. The Australian Human Rights Commission has noted that ‘discrimination is rarely based on one ground...experience is compounded by other characteristics such as gender, disability, age, religious beliefs and sexuality’.³⁹ Kimberle Crenshaw, a legal academic from the US, notes that developing effective anti-discrimination legislation, identities and/or experiences must not be thought about in single category terms.⁴⁰ In this respect, it is important for any new pieces of legislation to consider the intersectional or multidimensional nature of how an individual may experience discrimination.

For example, a gay man living with HIV may experience discrimination on the basis of his sexuality and HIV status. Alternatively, an Aboriginal intersex elder, who is unable to access employment, may experience discrimination on the basis of their sex characteristics, race and age.

It is also important to recognise the distinct discrimination faced by sex and gender diverse persons as an urgent area of inquiry. We believe that Commonwealth anti-discrimination legislation on the basis of ‘sexuality’ only does not adequately cover sex and gender diverse people or the distinctive issues they face.

The discrimination that a person faces because they are transgendered relates to the expression and recognition of their gender identity and/or sex rather than their sexuality. Including transgender or intersex protections within sexuality anti-discrimination legislation may produce assumptions that all sex and/or gender diverse people are gay, lesbian or bisexual, which is not the case.

While we strongly support the inclusion of comprehensive protections for sex and/or gender diverse persons, this submission should not be taken as representative of intersex, transgender and other sex and gender diverse communities.

Recommendation 14: A Consolidated Act must provide a framework that acknowledges the potential of simultaneous and intersectional forms of identity-based discrimination. Claims ought to be brought on the basis of either one, or more, protected ground of discrimination.

³⁹ Federal Discrimination Law 2005, Human Rights and Equal Opportunity Commission, p. 29.

⁴⁰ Crenshaw, K., ‘Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *The University of Chicago Legal Forum* 139, p. 143.

Steven, NSW said:

I am an Australian citizen, I pay my taxes and I vote. I want to be treated with the same respect and consideration as the wider community. I do not want the government to discriminate against me because of my sexuality.

Question 11. Should the right to equality before the law be extended to sex and/or other attributes?

A number of Australian laws have been introduced to incorporate elements of international human rights law, but none have been incorporated in their entirety.

Section 10 of the *Racial Discrimination Act 1975* (Cth) provides a general right to equality before the law, implementing Australia's obligations under article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* to 'guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.'

The purpose of s 10 is not to make acts, omissions or practices of individuals unlawful, but rather is 'concerned with the operation and effect of laws.'⁴¹ To make a successful claim under s 10, the applicant must be able to show that:

(d) by reason of a law of the Commonwealth or of a State or Territory (or a provision of the law);

(e) persons of a particular race, colour or national or ethnic origin:

i. do not enjoy a right that is enjoyed by persons of another race; or

*ii. enjoy a right to a more limited extent than persons of another race.*⁴²

Accordingly, the applicant must be able to establish that the discrimination complained of arises by reason of the terms or practical effects of a statutory provision.⁴³

However, in assessing whether particular legislation limits the enjoyment of the rights of a particular racial group, the courts have acknowledged that the enjoyment of rights in most cases is not absolute, but may involve a balancing against competing rights and interests.

⁴¹ *Mabo v Queensland* (1988) 166 CLR 186, at 230 (Deane J).

⁴² *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, 523 [35] (Goldberg and Hely JJ). See further GLRL, *Federal Discrimination Law* (2008), at 35-6.

⁴³ See *Gerhardy v Brown* (1985) 159 CLR 70, at 81 (Gibbs CJ), at 92-93 (Mason J) and at 119 (Brennan J); *Mabo v Queensland* (1988) 166 CLR 186, at 198 (Mason CJ), at 204 (Wilson J), at 216 (Brennan, Toohey and Gaudron JJ) and at 242 (Dawson J); *Western Australia v Ward* (2002) 213 CLR 1, at 98 and at 107 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho v Western Australia* [2008] FCAFC 100, at [73]; *Sahak v Minister for Immigration & Multicultural Affairs* (2002) 123 FCR 514, at 523 (Goldberg and Hely JJ); *Bropho v Western Australia* [2008] FCAFC 100, [64], [73].

For example, in the case of *Bropho v Western Australia* [2008] FCAFC 100, the Full Federal Court held that, in applying s 10, it is necessary to recognise that some rights, such as property rights, are not absolute in their nature. Accordingly, actions that impact upon the ownership of property may not necessarily invalidly diminish the right to ownership of property. The Court held that ‘no invalid diminution of property rights occur where the State acts in order to achieve a legitimate and non-discriminatory public goal.’⁴⁴

The Court noted, however, that its reasoning was not ‘intended to imply that basic human rights protected by the *Racial Discrimination Act 1975* (Cth) can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory’.⁴⁵

Legislation prohibiting discrimination on the grounds of sexual orientation, gender identity and expression and intersex differences should include a right to equality before the law to ensure the implementation of Australia’s international obligations under article 26 of the ICCPR, which guarantees equality before the law and the right to non-discrimination.

Recommendation 15: A Consolidated Act should provide for equality before the law on the basis of sexual orientation, sex and/or gender identity. Section 10 of the *Racial Discrimination Act 1975* (Cth) provides a useful example.

Question 12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

Ideally, legislation prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity would be based on best practice local and international examples, such as the UK *Equality Act 2010* and the *Convention on Eliminating All Forms of Discrimination Against Women*.

Article 1 of CEDAW introduces a freestanding prohibition against discrimination in the enjoyment or exercise by women of all ‘human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’ Accordingly, the scope of CEDAW is not confined to specific areas of public life, but operates more generally.

The language of Article 1 of CEDAW follows closely the equivalent Article 1(1) of *International Convention on the Elimination of All Forms of Racial Discrimination*, which finds expression in s 9 of the RDA and contains a freestanding prohibition in s 9 against racial discrimination in all areas of public life.⁴⁶

⁴⁴ *Id.*, at 83. See generally [80]-[83].

⁴⁵ *Id.*, at 82. In *Bropho*, the *Reserves (Reserve 43131) Act 2003* (WA) (‘Reserves Act’) and actions taken under it were said to have limited the enjoyment of the property rights of the Aboriginal residents of the Swan Valley Nyungah Community (Reserve 43131) by, in effect, closing that community. The Court held that any interference with the property rights of residents was effected in accordance with a legitimate public purpose, namely to protect the safety and welfare of residents of the community. It therefore did not invalidly diminish the property rights of the residents.

⁴⁶ The specific provisions do not limit the generality of s 9: *Racial Discrimination Act 1975* (Cth), s 9(4).

See further *Gerhardy v Brown* (1985) 159 CLR 70, at 85 (Gibbs CJ).

The RDA is a more complete and faithful implementation of Australia's international obligations in relation to prohibiting discrimination.

CEDAW, as well as the ICCPR and ICESCR, imposes an obligation on Australia to take appropriate and positive steps to ensure that individuals who have been discriminated against have access to an effective remedy.⁴⁷

Indeed, the Human Rights Committee has stated that the failure to provide an effective remedy is itself a breach of a person's human rights.⁴⁸

GLRL considers that when individuals have been discriminated against in circumstances in which CEDAW (and other relevant international conventions) applies, they should be entitled to an effective remedy.

For the above reasons, GLRL considers that the inclusion of a free-standing prohibition against discrimination, along the lines of s 9 of the RDA, may be required to ensure compliance with Australia's obligations under CEDAW. GLRL also notes that the experience under the RDA has not shown this to present impracticalities or excessive burdens on the community.

Furthermore, the GLRL is of the view that a blanket prohibition against discrimination in all areas of public life could represent an important statement of principle. It would make clear that discrimination offends against fundamental human rights in any area of public life and should not be tolerated.

This point was noted by both the Australian Law Reform Commission (ALRC) and the House of Representatives Standing Committee on Legal and Constitutional Affairs in their respective reviews on equality before the law, which each recommended the enactment of a free-standing prohibition against sex discrimination along similar lines as the RDA.⁴⁹

A blanket prohibition against discrimination in all areas of public life would clarify any new legislation clear and simple. It would minimise the need for complex litigation in interpreting the various provisions giving coverage to specific areas of public life and would operate largely as a 'catchall' provision.

Recommendation 16: A Consolidated Act should include a general prohibition against discrimination in all areas of public life. Section 9 of the *Racial Discrimination Act 1975* (Cth) provides a useful example.

⁴⁷ CEDAW art 2; ICCPR art 2(3); and ICESCR art 2.

⁴⁸ Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), [15]-[17].

⁴⁹ Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), Recommendation 3.1; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992), Recommendation 60. For example, the Committee noted (at 260 [10.3.7]): 'As discrimination against an individual on the basis of race or sex should be regarded as a contravention of a basic right, the Committee believes that it is desirable to bring the Sex Discrimination Act in line with the general prohibition contained in the Racial Discrimination Act'.

Question 13. How should the consolidation bill protect voluntary workers from discrimination and harassment?

We recommend that any consolidated legislation protect voluntary workers against discrimination and harassment under the areas of public life relating to work or employment, including domestic work.

Recommendation 17: A Consolidated Act should provide volunteers with the same protection as employees.

Question 14. Should the consolidation bill protect domestic workers from discrimination? If so, how?

Discrimination against sexual and gender minorities is unacceptable in domestic contexts, and protections should extend to cover domestic workers.

Recommendation 18: A Consolidated Act should provide domestic workers with the same protection as employees.

Question 15. What is the best approach to coverage of clubs and member-based associations?

All clubs and associations (regardless of size) should be included and be made compliant with all anti-discrimination laws.

Where clubs or associations are designed to further the interests of a minority or disadvantaged group, they should be entitled to special measures.

Recommendation 19: A Consolidated Act should apply to all clubs and membership-based associations regardless of size.

Question 16. Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

In a similar vein to Recommendation 19, a Consolidated Act should apply to all partnerships regardless of size.

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

We do not support permanent discrimination exceptions, and any exceptions for sport should be determined by whether they achieve a proportionate and legitimate, non-discriminatory objective.

There should be no discrimination in relation to sexual orientation in sport.

Moreover, any proposed exceptions to discrimination in sport on the basis of sex or gender should not exclude sex and/or gender diverse persons, and should be developed in consultation with these communities.

Recommendation 20: There should be no discrimination exception on the basis of sexual orientation in sport.

Question 18. How should the consolidation bill prohibit discriminatory requests for information?

The consolidation bill should protect the privacy of individuals.

Requests for information must be specific and not disclose important personal details relating to a person's sexual orientation, sex, gender or gender history without the individuals free, prior and informed consent.

Recommendation 21: There needs to be further discussion of legislative approaches to requests for information.

Question 19. Can the vicarious liability provisions be clarified in the consolidation bill?

As the National LGBTI Health Alliance have noted in their submission, rather than merely reproducing the common law notions of vicarious liability and simply elaborating on them slightly, these provisions ought to be drafted as an express part alongside the positive duty to prevent discrimination and harassment, and to promote equality.

Legal tests for vicarious liability should not hinge on whether the employee (in the term's most general sense, including volunteer) or other agent was acting in the scope of their duties, or conversely acting on a 'frolic of their own', but whether the employer or principal could have prevented the discriminatory (or harassing) conduct, which under the positive duty they are required to do.

Liability should extend not merely to unlawful conduct by employees and agents, but to conduct that would be unlawful if the employer or principal engaged in it.

An aged care provider, for example, should be liable for discriminatory bullying (or other harassment) by residents, or indeed to staff members or other members of the public who use the facilities.

The burden of proof should be on the principal to establish that they have discharged their duty to prevent discrimination and promote equality. This would include evidence of how well the principal responded to other complaints of discrimination, and whether it had a robust and clearly understood process for doing so.

Recommendation 22: Vicarious liability provisions should place positive duties on employers to take all reasonable steps to guard against discrimination and harassment perpetrated by employees.

EXEMPTIONS AND EXCEPTIONS

Karen, NSW said:

Basic human rights should not be subject to the whims of religious organisations. I believe in freedom of religion, however, that right should not overshadow the right to be treated fairly and with dignity. I should be able to access the same social welfare services as everybody else, without having to hide who my partner is.

Question 20. Should the bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

Exemptions and exceptions are a problematic feature of anti-discrimination law. Essentially, exemptions or general limitations clauses exist to prevent undue hardship on particular parties in adhering to anti-discrimination laws. If a general limitations clause were to be introduced, it should only apply to conduct that is that is seen to be a proportionate means of achieving a legitimate, non-discriminatory, end or objective.

Unsurprisingly, there exists a great diversity of opinion about exemptions, especially in relation to those provided for religious organisations.

It is important to note, that while religious groups and faith-based services are given a blanket exemption from adhering to anti-discrimination law, many choose not to make use of these exemptions. Some even resent the existence of exemptions, seeing the exclusion of one particular group as antithetical to their faith.

The GLRL would like to make clear that this should not apply to ‘special measure’ activities which have the primary objective of promoting of the social and cultural identity of sexuality, sex and gender diverse people.

Recommendation 23: Excluding special measures, there should be no religious exemptions or exceptions to Commonwealth anti-discrimination laws.

Recommendation 24: The introduction of a general limitations clause under a Consolidated Act should be circumscribed by a 'proportionate means of achieving a legitimate end or purpose.'

Question 21. How should a single inherent requirements/genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

Any exceptions for particular areas of employment or industry should be strictly circumscribed by what is proportionate to achieve a legitimate, non-discriminatory objective.

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

Aside from a general limitations clause, a Consolidated Act should not make provision for any permanent exemptions or exceptions.

As stated previously, we do not support the existence of religious exemptions. However, we recognise that the current proposal will not remove, but seeks to clarify how such exemptions will be used in relation to sexual orientation and gender identity.

Whether at a Commonwealth or state level, there are numerous inconsistencies in the use of exemptions and exceptions. In particular, one of the most significant deficiencies with existing provisions in state and territory anti-discrimination legislation is the wide-ranging discretionary exemptions and exceptions which allow discrimination on the basis of sexuality and sex and/or gender identity in some areas.

Often, this issue is construed as a debate between freedom of religion and the rights of sexual and gender minorities. However, this polarisation is misleading. Rather, exemptions should be understood through the lens of public administration. Due to the complex nature of modern government, services historically provided for by government agencies, are often contracted to non-government organisations.

The most noteworthy of these areas include: private or religious schools and educational authorities⁵⁰; religious institutions⁵¹; religious beliefs and principles⁵², working with children⁵³, work in small businesses⁵⁴; work in a private household⁵⁵; and the provision of accommodation services in certain circumstances.⁵⁶

For example, last year, the daughter of a lesbian couple galvanised intense public interest when she was denied entry to attend a Catholic primary school. Her exclusion was ascribed to the fact that her parents were in a same-sex relationship.

During the debate, it was noted that the school received most of its operational funding from the government and ANU senior law lecturer, Dr Wayne Morgan argued these very broad exemptions that exist for religious entities should be amended, particularly when they are receiving public money to offer a service to the public.⁵⁷

Combined, these exemptions mean that numerous areas exist where it is legal for sexuality, sex and gender diverse people to be treated differently.

The private and religious school exemption allows non-government schools to refuse to employ, or dismiss, gay and lesbian teachers; and it allows these schools to refuse to admit, or expel, students who identify as gay or lesbian.⁵⁸

Whilst exemptions for private or religious schools and educational authorities are problematic, the exemption for 'genuine religious beliefs or principles' is more insidious. It exempts discriminatory conduct where it is necessary to comply with particular religious doctrines.

⁵⁰ *Anti-Discrimination Act 1997* (NSW), s 49ZQ(3); *Equal Opportunity Act 1995* (Vic), s 38(a); *Discrimination Act 1991* (ACT), s 27, s 46; *Anti-Discrimination Act* (NT), s 37A, s 30(2).

⁵¹ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1)(d) of the definition of discrimination; *Equal Opportunity Act 1995* (Vic) s 75 and s 76; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1991* (Qld) s 29, s 109; *Equal Opportunity Act 1984* (SA) s 50; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1992* (NT) s 51. Note that the wording and scope of these provisions varies considerably from statute to statute; many of the provisions do not apply to all the grounds listed in the relevant statute.

⁵² *Equal Opportunity Act 1995* (Vic), s 77.

⁵³ *Anti-Discrimination Act 1991* (Qld), s 28(1). NB, this provision relates to gender identity rather than sexual orientation.

⁵⁴ *Equal Opportunity Act 1995* (Vic), s 21(1); *Anti-Discrimination Act* (NT), s 35(2).

⁵⁵ *Anti-Discrimination Act 1977* (NSW), s 49ZH(3)(a).

⁵⁶ *Anti-Discrimination Act 1977* (NSW), s 49ZQ(3)(a) and (b).

⁵⁷ 'Same-sex enrolment row prompts call for law change', ABC news, 15 December 2011,

<http://www.abc.net.au/news/2011-12-15/same-sex-enrolment-row-sparks-call-for-law-change/3732522>

⁵⁸ *Public Attitudes to Discrimination in Private Schools*, The Australia Institute, May 2004.

Anna Chapman identifies:

[T]his religious beliefs exemption operates on a number of different levels. It significantly curtails the scope of the Victorian Act, it suppresses the visibility of lesbians and gay men in all aspects of life covered by the Victorian Act and it is a factor dissuading potential gay and lesbian complainants from lodging a complaint of discrimination under the lawful sexual activity [and sexual orientation] ground[s] in the Victorian statute.⁵⁹

Ideally, no individual or organisation or institution should be able to discriminate against anyone on the grounds of his or her sexuality under any circumstances. From a practical perspective, however, it would be unrealistic to expect the creation of an act without any exemptions. If a religious organisation seeks to rely on an exemption, they should be temporary and made by application where the onus is on the organisation to prove why it is in the interest of fairness and their doctrine that they be allowed to discriminate.

The reliance on doctrine or creed is also problematic because it assumes religions are homogenous and static entities. For example, the Uniting Church has broad views relating to same-sex couples, some faith-based groups for example support marriage equality, while others do not. The divergence in religious opinion should signal the need, at a minimum, to narrow exemptions.

This need was exemplified in recent administrative decisions concerning foster care in NSW, faith-based or religious bodies were given broad license to discriminate against a same-sex couple.⁶⁰ Wesley Mission recently denied a gay couple consideration to foster because same-sex parenting was inconsistent with their doctrine of "Wesleyanism", rather than the teachings of the Uniting Church (of which it is affiliated). While a semantic difference, the legal implications of this decision are extremely significant. Broadly speaking, this decision effectively allows a publicly funded body broad discretion to define the parameters of their faith in terms that excluded gay men and lesbians.

Moreover, the automatic permanent exemptions shape a broader social message that faith-based organisations necessarily want to discriminate against sex, sexuality and gender diverse people. Such a message creates a false dichotomy between sexuality and religion.

Exemptions should not extend to the discrimination of minor children, under any circumstances.

In a similar vein to the UK, religious organisations could not be considered exempt if they perform secular services funded by the government. Currently, a vast range of public social and welfare services, such as adoption and aged-care services, are contracted out to non-government bodies. As such a condition of public funding or contracting with NGOs, compliance with anti-discrimination legislation is essential.

⁵⁹ Chapman, A., 'Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope', Murdoch University Electronic Journal of Law, Volume 3, Number 3, September 1996. <http://www.murdoch.edu.au/elaw/issues/v3n3/chapman.html>.

⁶⁰ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

Question 23. Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

While we do not support the use of exemptions, to ensure greater accountability in anti-discrimination law, where exemptions exist, they should be temporary.

Individuals seeking to rely on exemptions must provide a rigorous justification as to why it is in the interest of fairness and justice to rely on an exemption. These exemptions should be made public.

Applications for temporary exemptions could be made to the Australian Human Rights Commission. Criteria for granting exemptions should be made public, along with the outcomes of the decisions.

Recommendation 25: Aside from a general limitations clause, a Consolidated Act should not make provision for any permanent exemptions or exceptions.

Recommendation 26: The Australian Human Rights Commission should continue to grant temporary exemptions upon application under a Consolidated Act. There should be both substantive and process criteria for temporary exemptions across all grounds; a consistent process for considering and granting temporary exemptions across all grounds; clear and publicly available guidelines which are consistent with the objects of a Consolidated Act; and a public register of exemptions granted and refused.

Recommendation 27: Organisations with exemptions should be required to publicly state their reliance on a particular exemption to improve transparency and accountability.

COMPLAINTS AND COMPLIANCE FRAMEWORK

Question 24. Are there any other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

While anti-discrimination legislation is remedial in character, it should actively promote equality while redressing acts of discrimination.

Specifically, as part of a human rights education program, specific modules on sexuality, sex and/or gender diversity guidelines and action plans should be developed and implemented to address harassment and discrimination.

Recommendation 28: We recommend that compliance with a Consolidated Act require the development education and training programs, guidelines, and action plans, for public authorities, workplaces, schools, and other service providers to prevent discrimination and harassment.

Question 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

The GLRL supports any attempt to create low cost, early resolutions of disputes under a Consolidated Act.

However, in light of power imbalances between the parties, the GLRL notes that conciliation may not always be the most appropriate means of dispute resolution for complaints of discrimination.

As a result, the GLRL considers that the introduction of a model that allows complainants to elect to take their complaint straight to a decision making body, in circumstances where a face to face or informal mode of dispute resolution may be inappropriate may be an appropriate approach.

Question 26. Are any improvements needed to the court process for anti-discrimination complaints?

As the Discrimination Law Experts' submission elucidates, the lack of incentive to enforce the law, and its unpredictability, poses a considerable problem to the current scope of litigation. In order to be effective, discrimination law must be easily accessible. Given the lack of financial resources of most complainants, we support reforms to improve access to justice for marginalised groups and individuals. Therefore, for the complaints process to be accessible, greater emphasis should be placed on low cost resolution methods.

Damages should not be confined to monetary compensation. In a similar vein to remedies made available under the *NSW Anti-Discrimination Act*, the courts and tribunals should be able to issue orders for apologies, changes to policy, and action plans to rectify the systemic, as well as individual, experience of discrimination.

Given the anxieties mentioned above for individuals seeking timely and secure dispute resolution, complaints should not require an individual complainant. In order to promote greater accountability, concerned organisations or other individuals should be able to make complaints for investigation, in addition to the aggrieved person(s).

Recommendation 29: With the exception of vexatious complaints, it should be a no cost jurisdiction.

Recommendation 30: In addition to aggrieved persons, concerned organisations and individuals should be allowed to initiate complaints for investigation.

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?

Legislative change, though important, is not sufficient to deal with all identity-based discrimination targeted and sex, sexuality and gender diverse people.

Alongside the units for sex, age, race and disability within the Australian Human Rights Commission (AHRC), a new unit targeted at inquiring into complaints and reporting to parliament on sexual orientation, gender identity and expression and sex identity should be established.

In order to address the systemic causes of discrimination and ensure substantive equality, the AHRC should be able to initiate investigations and report on matters without requiring a specific individual complainant. Individuals often lack the security, time or desire to pursue discrimination complaints. This, however, should not impede the AHRC's broader mandate to hold organisations accountable for the protection of human rights.

The AHRC must be provided with additional resourcing to fund a specialist commissioner, education programs, and the collection, audit and publication of data.

Recommendation 31: The Australian Human Rights Commission should be provided with an 'own-motion' ability to investigate instances of discrimination without complaint by an individual.

Recommendation 32: A specialist Commissioner with responsibility for issues regarding sexual orientation, sex and/or gender identity should be appointed. This appointment and associated support staff must be resourced appropriately.

INTERACTIONS WITH OTHER LAWS

Question 28. Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

The GLRL supports the Commonwealth's objectives, as expressed in the Discussion Paper, to consistently manage and balance the interactions of Commonwealth anti-discrimination laws with other anti-discrimination frameworks, so as not to diminish any existing protections. For example, a Consolidated Act and industrial legislation ought to be consistent.

Question 29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

As an overarching principle, the GLRL submit that a Consolidated Act should not result in the diminution of any present protections, including those afforded by existing state and territory discrimination laws.

There are gaps and deficiencies in Commonwealth, state and territory anti-discrimination legislation. The current situation in which Commonwealth anti-discrimination legislation does not 'cover the field' has resulted in uncertainty and inconsistency in protection and decision-making. As a result, the GLRL supports a transition to a comprehensive Commonwealth system of anti-discrimination legislation, comparable to the coverage provided by the *Fair Work Act 2009* in relation to employment.

In the interim, provided the Commonwealth legislation does not diminish existing state and territory protections, all States and Territories should comply with Commonwealth anti-discrimination laws.

Question 30. Should the consolidation bill apply to State and Territory Governments and instrumentalities?

As noted in response to Question 29, the GLRL supports a transition to a comprehensive Commonwealth system of anti-discrimination legislation, comparable to the coverage provided by the *Fair Work Act 2009* in relation to employment.

A Consolidated Act should aim, as far as possible, to be consistent with state and territory instrumentalities, and in particular should aim to avoid the diminution of any protections provided by State or Territory Government instrumentalities.

The GLRL is not in a position to comment on the legality of such a move, but notes potential constitutional issues.

FURTHER INFORMATION

For further information, contact Senthorun Raj, Senior Policy Advisor, at (02) 9571 5501 or s.raj@glrl.org.au.

APPENDIX: LIST OF RECOMMENDATIONS

MEANING OF DISCRIMINATION

Recommendation 1: The comparator element should be removed from the definition of direct discrimination.

Recommendation 2: If direct and indirect discrimination are to remain separate concepts, they must not be construed as mutually exclusive.

Recommendation 3: A Consolidated Act should provide for a shared onus of proof with a rebuttal presumption. That is, where a prima facie case of discrimination has been established, it is up to the duty holder to rebut the claim, and prove their impugned practice or action is not discriminatory.

Recommendation 4: A single ‘special measures’ clause should be introduced in a Consolidated Act to not make unlawful any activity that has a primary objective of promoting the social and cultural identity relating to any protected attribute. These special measures should be defined in accordance with international law.

Recommendation 5: We reiterate the proposal raised by the Australian Human Rights Commission’s submission on this issue, which notes that the reasonable adjustment provision in the *Disability Discrimination Act 1992* could be improved and simplified.

Recommendation 6: In a Consolidated Act, positive duties should be placed on public sector employers, educational institutions and other service providers and organisations to promote equality and eliminate discrimination against sex, sexuality and gender diverse people.

Recommendation 7: In a Consolidated Act, positive duties should extend to private sector employers, educational institutions and other service providers and organisations to ensure comprehensive protection against discrimination.

Recommendation 8: Prohibition against harassment and vilification should cover all protected attributes and areas, including sexual orientation. Protections should extend to sex and/or gender diverse people in consultation with these communities.

PROTECTED ATTRIBUTES

Recommendation 9: With respect to gay and lesbian people, proposed anti-discrimination legislation should use the broad terminology of ‘sexual orientation’, including characteristics associated or imputed to it. This is to be interpreted in reference to the *Yogyakarta Principles*.

Recommendation 10: Protection should extend to individuals who are perceived to have the protected attributes and associated or imputed characteristics.

Recommendation 11: Terminology to be used in a Consolidated Act relating to sex and/or gender identity should be developed in consultation with transgender and intersex communities. We draw particular attention to the submission of the National LGBTI Health Alliance and OII Australia as a useful guide on these issues.

Recommendation 12: A Consolidated Act should incorporate a definition of ‘relationship status’ and ‘family responsibilities’ that uses gender-neutral terminology to protect all non-married couples and families from relationship-based discrimination.

Recommendation 13: A Consolidated Act should provide comprehensive and inclusive terminology, including imputed or associated characteristics, relating to sexual orientation. Protections should also extend to sex and/or gender diverse persons in consultation with these communities.

Recommendation 14: A Consolidated Act must provide a framework that acknowledges the potential of simultaneous and intersectional forms of identity-based discrimination. Claims ought to be brought on the basis of either one, or more, protected ground of discrimination.

PROTECTED AREAS OF PUBLIC LIFE

Recommendation 15: A Consolidated Act should provide for equality before the law on the basis of sexual orientation, sex and/or gender identity. Section 10 of the *Racial Discrimination Act 1975* (Cth) provides a useful example.

Recommendation 16: A Consolidated Act should include a general prohibition against discrimination in all areas of public life. Section 9 of the *Racial Discrimination Act 1975* (Cth) provides a useful example.

Recommendation 17: A Consolidation Act should provide volunteers with the same protection as employees.

Recommendation 18: A Consolidation Act should provide domestic workers with the same protection as employees.

Recommendation 19: The Consolidated Act should apply to all clubs and membership-based associations regardless of size.

Recommendation 20: There should be no discrimination exception on the basis of sexual orientation in sport.

Recommendation 21: There needs to be further discussion of legislative approaches to requests for information.

Recommendation 22: Vicarious liability provisions should place positive duties on employers to take all reasonable steps to guard against discrimination and harassment perpetrated by employees.

EXEMPTIONS AND EXCEPTIONS

Recommendation 23: Excluding special measures, there should be no religious exemptions or exceptions to Commonwealth anti-discrimination laws.

Recommendation 24: The introduction of a general limitations clause under a Consolidated Act should be circumscribed by a ‘proportionate means of achieving a legitimate end or purpose.’

Recommendation 25: Aside from a general limitations clause, a Consolidated Act should not make provision for any permanent exemptions or exceptions.

Recommendation 26: The Australian Human Rights Commission should continue to grant temporary exemptions upon application under a Consolidated Act. There should be both substantive and process criteria for temporary exemptions across all grounds; a consistent process for considering and granting temporary exemptions across all grounds; clear and publicly available guidelines which are consistent with the objects of a Consolidated Act; and a public register of exemptions granted and refused.

Recommendation 27: Organisations with exemptions should be required to publicly state their reliance on a particular exemption to improve transparency and accountability.

COMPLAINTS AND COMPLIANCE FRAMEWORK

Recommendation 28: We recommend that compliance with consolidated anti-discrimination legislation require the development education and training programs, guidelines, and action plans, for public authorities, workplaces, schools, and other service providers to prevent discrimination and harassment.

Recommendation 29: With the exception of vexatious complaints, it should be a no cost jurisdiction.

Recommendation 30: In addition to aggrieved persons, concerned organisations and individuals should be allowed to initiate complaints for investigation.

Recommendation 31: The Australian Human Rights Commission should be provided with an ‘own-motion’ ability to investigate instances of discrimination without complaint by an individual.

Recommendation 32: A specialist Commissioner with responsibility for issues regarding sexual orientation, sex and/or gender identity should be appointed. This appointment and associated support staff must be resourced appropriately.