

**Consolidation of Commonwealth
Anti-Discrimination Laws**

**Coalition Of Activist Lesbians
Australia Inc.**

**Submission to the
Attorney-General's Department**

January 2012

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COALITION OF ACTIVIST LESBIANS AUSTRALIA INC. (COAL)

A United Nations Accredited Non-Government Organisation.

Working for the human rights and participation of lesbian women.

COAL aspires to being part of Australian society where
respect for differences,
the rule of law,
the dignity of all humans and
the widest possible human rights observances are shared equally by all.

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COALITION OF ACTIVIST LESBIANS AUSTRALIA INC.

Submission Addressing

Consolidation of Commonwealth Anti-Discrimination Laws

EXECUTIVE SUMMARY – RECOMMENDATIONS

Q #1

COAL recommends the retention of the current two definitions encompassing direct and indirect discrimination and in reference to sexual orientation with the specific inclusion of lesbians and gay men.

COAL recommends that the Australian Human Rights Commission and/or their agents should undertake strategic education and evaluation of complaint outcomes relevant to lesbian sexual orientation discrimination.

Q #3

COAL recommends the provision of special measures in the bill that will contribute to the substantive rights of members of lesbian communities.

Q #4

COAL recommends that the concept of reasonable adjustments be widened to include social, cultural and sexuality-relevant factors and that it be applied to all protected attributes.

Q #5

COAL recommends that both public sector organisations and other workplaces employing more than 20 staff should have a positive duty to prevent and eliminate discrimination, harassment and vilification.

COAL recommends that a system of reporting should be implemented requiring all workplaces employing 20 or more persons to submit annual compliance reports with respect to their obligations

and affirmative action plans under legislation, at the least these to include the grounds of sex, sexual orientation, race, disability and age.

Q #6

COAL recommends that as well as the prohibition against harassment there should be a prohibition against vilification, and that both cover all protected areas.

Q #7

COAL recommends that sexual orientation and gender identity be defined as separate entities, not as a conflation of both, and that care be taken to avoid misapplication of these terms.

COAL recommends that the bill includes provision for recognition of groups with special needs relevant to their specific sexual orientation identity and that the focal reference be given to that group's articulation of their specific needs.

Q #10

COAL recommends that intersectional discrimination be recognised as a protected attribute.

Q #11

COAL recommends that the right to equality before the law be included for all protected attributes.

Q #13

COAL recommends that un-waged (voluntary) workers be afforded the same protections as people in the paid workforce.

Q #15

COAL recommends that fundamental right to association be explicitly recognised and a collective right to privacy introduced to allow special needs groups to exist without the problem of challenges from those whose interests are outside that group's held beliefs and philosophies.

Q #18

COAL recommends that the provision for protection against discriminatory requests for personal or organisational information covers both work-place and non-workplace areas and that this protection is specified rather than implied.

Q #21

COAL recommends that the single inherent requirements / genuine occupational qualifications exception should be extended to cover other areas besides the workplace.

Q #22

COAL recommends the complete removal of exemptions for religious organisations with regards to sexual orientation.

Q #27

COAL recommends that at the commencement of the consolidated law rigorous education programs should be provided for all sectors. Further, that such programs be developed in consultation with COAL, an autonomous lesbian group working to strengthen human rights, equality, dignity and participation of lesbian women.

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INTRODUCTION

The Coalition of Activist Lesbians Australia (COAL) works for the human rights and participation of lesbian women.

COAL aspires to being part of Australian society where respect for differences, the rule of law, the dignity of all humans and the widest possible human rights observances are shared equally by all.

The Coalition of Activist Lesbians Australia (COAL) was formed in 1994 to work towards ending discrimination against lesbians. COAL is a national community organisation that advocates on behalf of Australian lesbians to all levels of government. We work to identify and promote positive approaches in human rights, social inclusion, youth affairs, health, housing, workforce issues, ageing issues, education, anti-discrimination/equal opportunity and other areas. These core interests have been addressed through research papers, submissions to governments and others, community publications, action research, personal narratives, art and other cultural works, conference presentations, seminar participation, community education and participation in consultative, advisory and management structures.

We are an accredited non-government organisation (NGO) with the Economic and Social Commission of the United Nations. In this role COAL lobbied at the UN Fourth World Conference on Women, Beijing, 1995, and co-hosted the first international lesbian information space at the NGO Forum held conjointly with the Conference. COAL networks widely with national and international women's, lesbian and gay, and other community and/or service organisations. COAL has undertaken research on lesbian health; violence against lesbians; lesbophobia; lesbians and human rights, lesbian ageing issues and lesbian domestic violence. We promote best practice lesbian health care, producing training manuals on cultural competence for service providers in order to improve lesbians' access to these services. In addition, we produce trainer manuals for those running support groups for lesbians and have provided training for staff working in health, housing, education, youth, aged care and other specialist human services. COAL takes the responsible view that as a human rights organisation we must inform and educate not only service providers and the broader population, but also members of

lesbian and lesbian/gay communities concerning lesbians' rights, issues of discrimination and their remedies. This is done through community meetings, publications, conferences, digital forums and community networking.

Although COAL is not a service organisation as such, lesbians who have been subjected to harassment and/or discrimination and who are seeking information, guidance and support frequently contact us. We are able to refer inquirers to relevant legal assistance, community services and appropriate lesbian or lesbian/gay community support groups. For many years – even before COAL was formed – some members of COAL have been involved with researching, advocating on behalf of, and supporting lesbians experiencing discrimination and harassment.¹

It is well documented in academic, community and professional publications that for many decades lesbian women's lives and social situations were hidden from view ('closeted') and due to moral, religious, legal and social sanctions those lesbians who were visible were considered sinful, sick or sorry – or all three². Over the past four decades Australian society has begun to understand that diversity of sexual orientation is a fact of life, and that lesbians are indeed part of the normative spectrum of this facet of humanity. During this time there have been both silences and discussions of the necessity for positive inclusion and the end to discrimination, marginalisation, harassment, silencing and other detriments that have influenced lesbians' personal well-being, our public status and our experiences in the workplace, the community and other areas of life. The silences do not mean that these problems have not been alive, or remain so today. Rather they represent historical denials by society, enforced invisibility, fears of powerful opposition and despondency with not being heard and our voices falling into a void of silence. However at times lesbians have spoken of the issues and called for changes and they have been heard³ so it is with eager anticipation that COAL participates in this process of anti-discrimination law consolidation.

¹ For example workshop conducted at National Union of Australian University Students Conference, Melbourne, August 1983; Lavender, 'What is Lesbian Discrimination', Presentation at National Lesbian Conference, Adelaide, January 1989.

² Ettore EM, *Lesbians, Women and Society*, Routledge & Kegan Paul, London, 1980; NSW AntiDiscrimination Board, *Discrimination and Homosexuality*, ADB Sydney, 1982.

³ For example Lavender (ed.), *What is Lesbian Discrimination? Proceedings of Community Seminar, October 1987*, Anti-Discrimination Board of NSW, Sydney, 1990 & Coalition Of Activist Lesbians Australia, Submission to Human Rights and Equal Opportunity Enquiry about Same-Sex Rights, 2006.

COAL's Approach to the Consolidation of Commonwealth Anti-discrimination Laws.

For some years it has been problematic that the various state/territory protections against discrimination on the grounds of homosexuality/sexual orientation have not been matched in the federal jurisdiction. The *Human Rights (Sexual Conduct) Act 1994* (Cth) came into existence as the commonwealth's response to a 1992 complaint to the UN Human Rights Committee⁴ challenging the criminalisation of consenting sexual activity between gay men in a private home. The Committee's findings addressed a weak protection on the basis of the right to privacy per the *International Convention on Civil and Political Rights* (ICCPR) but did not address the ground of sexual orientation.

Therefore the current proposal to consolidate the federal discrimination laws and to include protections covering discriminations against lesbian women and others, referred to as sexual orientation, is welcomed by this organisation. Not only do we see that this will make this particular area of law more workable, but also have relevance to international human rights law. While current commonwealth protections relate to United Nations (UN) Conventions such as *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) no such convention exists that addresses sexual orientation. However the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*⁵ addresses a broad range of human rights standards and their application to issues of sexual orientation and gender identity. These were formulated in 2006 in response to well-documented patterns of discrimination and abuse, by a distinguished group of international human rights experts and affirm binding international legal standards with which all States should comply. COAL notes that while it is important that international law be reviewed and expanded to include sexual orientation, that it is silent concerning issues specific to lesbian women.

Concerning the recognition of lesbians COAL prefers the word lesbian as this unequivocally refers to women. We recognise that some women call themselves gay, queer, camp or bent and that

⁴ *Toonen v Australia* (488/92) UN Doc. CCPR/C/50/D/488/92

⁵ *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, 2006, <http://www.yogyakartaprinciples.org/index.html> (19.01.2012)

sometimes terminology such as sexual minority, GLBTI or same-sex attracted is used. At times other people use a number of euphemisms when actually they are referring to lesbians or to lesbians, gay men bisexual, transgender and intersex people collectively. While this could possibly be an attempt to be inclusive it actually places lesbians in a different social situation. We submit that it is more respectful to use *lesbian*, and this is what will be used for this submission. We also use the term lesbian women as this underpins that our approach is woman focused.⁶ Further it should be noted that regarding discrimination against lesbians there should be the recognition that this is a group of people that has **suffered double detriments – as women and as lesbians.**

As an autonomous lesbian organisation working for the human rights and participation of lesbian women COAL's submission will focus on lesbian issues whilst addressing the ground of sexual orientation. We can not speak for bisexual people, gay men, transgender persons or intersex persons and believe that organisations dedicated to each of those groups are best placed to speak about their rights. We maintain that it is of utmost importance to present lesbian-specific views rather than lesbians being considered part of the one conglomerate GLBTI entity. In fact this practice gives rise to two problems that must be considered by policy and lawmakers as well as service providers. These are briefly explained below and referred to in our discussion under Question Seven.

The Problem of Conflating Sexual Orientation and Gender Identity

Over recent years it has been fashionable to refer to all non-hetero sexuality by various terms that serve to both collectivise and de-identify lesbians and other groups. Such terms as queer, sexual minority, GLBTI, same-sex attracted or merely same-sex, sex variant, non-heterosexual or even just plain 'sexuality' do not speak specifically of a particular dimension of the human social condition. One dimension concerns a person's sexual orientation as a lesbian woman, a gay male, a bisexual person or a heterosexual person. Although they come under the rubric of sexual orientation the deciding factor is not merely the gender of one's sexual partner. Historically definitions have reduced lesbians to descriptions of sexual activity or as a woman with a deficit. However since the 1960s lesbians have been variously described e.g. as women giving primacy in their lives to other women personally, emotionally, sexually, economically and spiritually, or as women belonging to no man, or

⁶ Lavender, Oral Submission to Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, HREOC, Sydney, 2007.

as women-identified-women or as marriage resisters. Today women who identify as lesbians will describe themselves in various ways, many of which do not refer to sexual activity. Nevertheless mainstream media, fashion and entertainment descriptions of lesbian women frequently rest on sexualized depictions, innuendo and references. While such sexualisation through these limiting descriptions may be useful for marketing products and services, many lesbians consider it demeaning, uni-dimensional and even insulting. Use of language is an issue of human rights and COAL also sees that awareness of the conflating of lesbian sexual orientation with gender identity is problematic and ill conceived.

The frequently used collective term GLBTI brings sexual orientation and gender status into a commonality that has sometimes proved useful for political lobbying, social organising and commerce. However these are two different aspects of humanity, and most descriptions will be found wanting by someone or some people. Indeed such descriptions and definitions are generally reductionist and imperfect and use of generic language is also problematic in that it implies uniformity, unity and a shared purpose. We maintain that it is always desirable to speak respectfully of personal attributes whether of individuals or groups, and to avoid slick abbreviations.

The conflation of sexual orientation with gender identity or status is problematic as one refers to the enduring nature of the romantic and sexual expression of a person's sexuality, whereas the other refers to a person's identification with a socially accepted gender role or category. While this statement may give rise to contested meanings and reflects a large body of social, health, psychological and even philosophical study, the fact remains that sexual orientation and gender identity are distinct things. See also discussion under Question Seven below.

Sexual Orientation and the Problem of Gender Blindness

As indicated above the use of generic terms which obliterate gender render lesbians invisible. It is necessary to understand that **lesbians should be respected as fully autonomous and responsible women and not merely the female counterpart of homosexual men or bisexual or trans or intersex persons.** The social and cultural influences on the lives of lesbian women differ in many ways from those influencing gay men. COAL submits that lesbian women's rights, interests and needs should be more appropriately identified and respected as a group having similarities with and

differences from both gay men and heterosexual women. Sexual orientation and gender are two distinct aspects of humanity and should be responded to differently through social processes.

COAL especially commends the government and the Attorney-General's Department on their work to include sexual orientation in the consolidated bill. Our submission will address some of the questions as set out in the Attorney-General's Discussion Paper ⁷ as COAL considers appropriate to our objectives viz. -

- To lobby at all levels of government, i.e. federal, state and local, to ensure the rights of lesbians are presented from an Australian national perspective.
- To lobby for the inclusion of international covenants ratified by the Australian government, to be incorporated into domestic law.⁸

RESPONSES TO QUESTIONS IN ATTORNEY-GENERAL'S DISCUSSION PAPER⁹

QUESTION ONE: 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?

It is suggested in the Discussion Paper that a unified test may weaken understanding of discrimination and risk the diminution of protection. COAL considers that is something that may impact on the dealing with discrimination against lesbian women.

COAL recommends the retention of the current two definitions encompassing direct and indirect discrimination and in reference to sexual orientation with the specific inclusion of lesbians and gay men.

⁷ Attorney-General's Department, Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper, Barton ACT, September 2011.

⁸ Coalition Of Activist Lesbians – Australia, Constitution Article 2, 1994.

⁹ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, Barton ACT, September 2011.

COAL recommends that the Australian Human Rights Commission and/or their agents should undertake strategic education and evaluation of complaint outcomes relevant to lesbian sexual orientation discrimination.

QUESTION THREE: 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?

In understanding anti-discrimination laws to be a means to promoting the human values of equality, respect and dignity, it must also be understood that as a baseline or reference point that there is no such thing as a level playing field. Some groups suffer long-term systemic disadvantages. Therefore in seeking to further these three human rights objectives efforts should be made to provide the means by which special measures will enable those suffering systemic disadvantage to attain their equality rights. The presumption that all women are equal without understanding the existence of particular barriers faced by various sub-groups of women in addition to the general sex disadvantage reflects the limitations that a formal rights approach imposes.

As a historically disadvantaged group by virtue of both gender and homosexuality, lesbian women should be afforded substantive rights. This is of relevance to lesbian woman because, as explained earlier, we experience discrimination both as women and as lesbians (homosexuals). Therefore it is necessary to take into account the need for lesbian groups to lawfully assemble, convene and conduct their business as single sex organisations. See also discussion of intersectionality under Question Ten.

COAL recommends the provision of special measures in the bill that will contribute to the substantive rights of members of lesbian communities.

QUESTION FOUR: Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

Clarification of such a duty is necessary and should be understandable to a wide range of people, not restricted to those involved with people with a disability and others covered by the current DDA.

The application of reasonable adjustments should go beyond material provisions, and be informed by and sensitive to social, cultural and sexuality-relevant considerations. While recent federal legislation has removed many inequalities for same-sex couples¹⁰ there should be recognition and adjustments for lesbian women not in a recognised ‘same-sex’ relationship or who otherwise face unequal treatment or discrimination. For example the legal definition of next of kin should be extended where such circumstances warrant the choice by a lesbian for another to be so designated and recognised.

COAL recommends that the concept of reasonable adjustments be widened to include social, cultural and sexuality-relevant factors and that it be applied to all protected attributes.

QUESTION FIVE: Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Discrimination is the behavioural expression (including speech) of prejudicial attitudes or negative bias or stereotyping which in reference to lesbians is often referred to as lesbophobia or homophobia. Heterosexism is another expression of negative or unfair attitudes. It is the assumed superiority of one sexuality over another and the supposition that the overwhelming numerical frequency of heterosexuality and heterosexual culture is normal while homosexuality is not normal or at least not as desirable.¹¹

Discrimination and harassment against lesbians may take various forms: it may be blatant, purport to be a joke or a send-up, or through an omission. Over recent decades with anti-discrimination laws becoming part of the Australian socio-legal fabric, people have learned to clean up their language so as to not offend or appear to be discriminatory, yet they often retain prejudicial attitudes that are expressed implicitly or covertly. This is frequently seen in reference to race discrimination. In the past people were called names referring to their skin colour or slang terms for their racial or cultural

¹⁰ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth) and *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* (Cth).

¹¹ Lavender (ed.), *What is Lesbian Discrimination? Proceedings of Community Seminar, October 1987*, Anti-Discrimination Board of NSW, Sydney, 1990: see esp. pp ii- iv.

heritage. While unfortunately this may still occur, one hears more subtle expressions of discrimination, while also exclusion and marginalisation may occur with spurious reasons given.

For lesbian women similar situations may arise whereby there is no explicit speech referring to her lesbianism yet she may be harassed or bullied or suffer detriment e.g. will be exclusion from workplace social events because she does not have a male partner.

COAL recommends that both public sector organisations and other workplaces employing more than 20 staff should have a positive duty to prevent and eliminate discrimination, harassment and vilification. It is important that lesbian issues are included in such programs and measures. To this end some of the specific rights giving rise to a positive duty of prevention and elimination of discrimination against lesbian women, include:

1. The right to have single-sex services, including accommodation, aged services, health, youth support, on the basis of lesbian sexual orientation.
2. That the freedom of assembly and the right to maintain culture be accepted as reasons to allow lesbian-specific community, service and other activities.
3. The right of lesbians to be seen as distinct and different from the GLBTI conglomerate. (Just as laws were passed over a century ago allowing married women legal autonomy and the control of their own property, so too lesbians should not be presumed to be the female attachment to gay male politics and views.)
4. The right of all women to be independent and autonomous which includes financial, social and cultural provisions.
5. The rights of the individual parties in lesbian-couple relationships to opt out, so as to be recognised as separate and autonomous persons, ie. the dis-aggregation of couple relationships for the purposes of such things as taxation, social and financial benefits and provisions.
6. The right to privacy to ensure protections for lesbians on the basis of their lesbian sexual orientation.

COAL recommends that a system of reporting should be implemented requiring all workplaces employing 20 or more persons to submit annual compliance reports with respect to their

obligations and affirmative action plans under legislation, at the least these to include the grounds of sex, race, disability, sexual orientation and age.

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

COAL recommends that as well as the prohibition against harassment there should be a prohibition against vilification, and that both cover all protected areas. We also note that both sex based harassment and sexual harassment, as currently addressed by the SDA, should be included. These prohibitions should be expressed with reference to the negative impact on the human rights, dignity and equal participation of those people who are covered by the protected attributes. Any defences should be proved on the civil liability test for burden of proof akin to strict liability in tort law.

QUESTION SEVEN: How should sexual orientation and gender identity be defined?

As discussed above in the Introduction, definitions are frequently reductionist and problematic. Yet it is recognised that the law requires such things and despite clarity and presumed certainty legal debates will surely occur. It is fundamental to understanding social issues that relate to many aspects of life - both personal and collective - that sexual orientation and gender identity are understood as separate entities. COAL affirms the view that it is both undesirable and un-necessary to conflate sexual orientation and gender identity. While this practice is widespread both within the respective communities and more broadly, it is neither helpful nor accurate. Specifically discrimination on the ground of a woman's lesbianism will not be fully understood if she is viewed merely as merely a sexuality akin to male homosexuality. The convenience of rolling lesbians, gay males, bisexuals, transgender and intersex people into the acronym GLBTI (or less commonly LGBTI) does not give respect and identity to any of those groups. Such is the dismay and disarray that use of the acronym has resulted in the ironic term 'alphabetic soup' which is neither helpful nor respectful.

COAL proposes a return to certainty and greater respect with the specific use of the words lesbian, gay, bisexual, transgender and intersex. The generic terms sexual orientation, and the less frequently heard sexual preference, are used mostly in reference to non-heterosexual people. It is important that

the distinction is made so as to recognise that heterosexual privilege is a function of the dominant sexuality. COAL recognises that lesbians fall outside the ambit of hetero-normativity and this difference is useful in understanding the mechanisms of discrimination, marginalisation and other impacts on the rights and freedoms of lesbian women.

If groups of people suffer discrimination and harassment surely it is important that they are referred to correctly and respectfully. Just as we would be loath to refer to people from countries other than Australia by slang terms as so often happened in the past, so too it should be good enough for Australians to now accord dignity and human rights to lesbians by using the word lesbian.

The issue of competing rights of human rights/protected groups has come to light in recent years concerning the problems arising for rights of women including lesbians, with those of some transgender women.¹² In certain situations women born and raised as female have complained of inappropriate inclusion of, or attempted participation of transgender women.

Attempted resolution of competing and contested rights across human rights arenas should not give rise to a one size fits all response, nor should a less vocal group be overlooked or seen as a fringe minority. Recognition of and support for lesbians born and raised as females as a protected group should be seen as an important human rights issue. The issue of the rights of this group of lesbians should be considered to be about substantive justice of a minority group whose human rights have been challenged.

COAL recommends that sexual orientation and gender identity be defined as separate entities, not as a conflation of both, and that care be taken to avoid misapplication of these terms.

COAL recommends that the bill include provision for recognition of groups with special needs relevant to their specific sexual orientation and that focal reference be given to that group's articulation of their specific needs.

¹² *O'Keefe v Sappho's Party Inc.* [2009] SAEOT 50 (24 April 2009)

QUESTION TEN: Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

COAL strongly supports the inclusion of intersectional discrimination in the consolidation bill. We also suggest that this should include clear explanation/definition as the concept is not widely or fully understood. Discrimination on the basis of the intersectionalities of age, sexual orientation, gender, race and culture, location, ability and other attributes has been recognised and discussed variously for some years by those aware of the complexities of discrimination and rights.¹³ Frequently discussions omit references to sexual orientation. However COAL has addressed this in our activities as well as the necessity include lesbo/homophobia with racism, sexism, ageism and ableism as inter-connected discriminations. Unfortunately terminology relating to the discriminations on the basis of racism, sexism, ageism and ableism, with their implications of differential power relations, tends to be used less often than generic legal descriptors such as sex discrimination, race discrimination. The interplay of social and legal concepts of the grounds of discriminations is beyond the ambit of this submission, yet it appears that contemporary fashionable language eschews such terms as sexism for fear of being seen as doctrinaire.

Many lesbian women have had long involvement with lesbian and women's organisations and have frequently been challenged by their sisters to develop awareness of the issues and needs of lesbians beyond the more visible white northern European base that has been dominant in the past. While Australia espouses multiculturalism it is still the reality that race based discrimination is a frequent occurrence. For many lesbians of CALD background there is no word for lesbian thus rendering them invisible in their own culture. Indigenous women and those from cultural and linguistically diverse (CALD) backgrounds have spoken clearly of the multiple social and often legal oppressions they experience. Additionally Indigenous women have experienced profound systemic discrimination and denial of equality rights due to past colonial practices and attitudes; it is surely an indictment on

¹³ See for example Coalition Of Activist Lesbians Australia Inc., *Submission to Office of Aged Care Quality and Compliance: Complaints Investigation Scheme Review*, August 2009, Shaw Carole (ed) / Jera International, *Working Together for Equality: Beijing +15 Review 2009 – Australia*, Melbourne, 2010.

Australian society that such discriminations still linger and operate as entrenched systemic disadvantages.¹⁴

Women, including lesbians, with a disability frequently suffer intersectional discrimination and their issues have often been denied. The 2008 UN *Convention on the Rights of Persons with Disabilities* (CRPD) has brought greater awareness of the many areas and issues which are important in the attainment of human rights for persons with a disability where before there was reliance just on ICCPR or other general rights (international) law. Sexuality and disability is an area of human rights encompassing the combination of social, personal, workplace, legal and economic influences. It has been stated that rights discourses often set up hierarchies and for people with a disability this can erase their disability/ability issues.¹⁵ Both disability and lesbianism are frequently either erased or at the bottom of the supposed hierarchy of discriminations, showing the serious issue of intersectionality of discrimination experienced by lesbian women with a disability.

Although space does not permit, we could work through various other facets of intersectional discrimination affecting lesbians, noting that the issue of age and lesbians is also often ignored. COAL has spoken about some of these issues and urges both relevant human rights endeavours and the aged care sector to consult with old and ageing lesbians concerning their rights and needs.¹⁶ We note that the *Age Discrimination Act 2004* (Cth) is the last anti-discrimination statute to be introduced, although certain provisions concerning 'sexual preference' have been incorporated into labour law more recently.¹⁷ Age discrimination is an issue gathering traction¹⁸ and with the

¹⁴ NSW Anti-Discrimination Board: *Annual Report 2010-2011*, Percentage of Complaints Received Sex 23.9%, Disability 21.9%, Race + racial vilification 16.6%. – page 15.

¹⁵ Kumari Campbell Fiona, *Contours of Ableism: The Production of Disability and Abledness*, Palgrave Macmillan, 2009.

¹⁶ Coalition Of Activist Lesbians Australia Inc., *Submission to Office of Aged Care Quality and Compliance: Complaints Investigation Scheme Review*, August 2009; Davis Judith, 'The Construction of Family and Social Networks by Old Lesbians', *Journal of Australian Lesbian Feminist Studies* 4. 85-93, 1994.

¹⁷ *Fair Work Act 2009* (Cth) see sections 153, 195, 351, 578, and 772.

¹⁸ See for example Australian Human Rights Commission, *Age Discrimination – Exposing the Hidden Barrier for Mature Age Workers*, ISBN 978-1-921449-19-2, 2010, and Australian Human Rights Commission, News Report: 'Stats again highlight over 45s discrimination' 25 January 2012. http://www.humanrights.gov.au/about/media/news/2012/5_12.html (27.01.2012)

appointment of the AHRC Age Discrimination Commissioner it is hoped that recognition of and measures to deal with the combination of lesbian and age discrimination will become more widely understood.

COAL recommends that intersectional discrimination be recognised as a protected attribute.

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

COAL notes the comments in the Discussion Paper¹⁹ about this extension affecting “few” Commonwealth laws, however we respectfully submit that this should not be cause for its exclusion, nor the fact of coverage by state and territory laws. Both in the past and currently lesbians have received far too little attention in laws addressing sex discrimination, which has been to our detriment in relation to discrimination complaints.

COAL recommends that the right to equality before the law be included in the bill for all protected attributes.

QUESTION 13: How should the consolidation bill protect voluntary workers from discrimination and harassment?

Many NGOs rely on the work of unpaid volunteers, and nowhere could this be more evident than for lesbian and women’s community groups that are in the main unfunded. Often lesbians like many other women, participate as volunteers in community or service organisations including sporting, environmental, disability support, arts and cultural, and in all these situations may be exposed to harassment and/or discrimination. In fact it has been such a bone of contention in gay and lesbian groups in the past that lesbians withdrew their participation.²⁰ Despite the commonly held view that things are ‘not that bad’ in regards to discrimination, stigma and participation for lesbians and gay men in Australia as in yesteryear, there still remain social, financial and other disadvantages.²¹

¹⁹ Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, Barton ACT, September 2011 at [93] & [94].

²⁰ Wills Sue, ‘Inside the CWA: the Other One’, *Journal of Australian Lesbian Feminist Studies* 4. 6-22, 1994.

²¹ Coalition Of Activist Lesbians Australia Inc., *Submission to Human Rights and Equal Opportunity Enquiry about Same-Sex Rights*, 2006.

Where lesbians may be working as volunteers their differential treatment or exclusion will not only impact their rights to equal participation but also precipitate personal stress/distress that may then cause health problems.²²

COAL recommends that voluntary (un-waged) workers be afforded the same protections as people in the paid workforce.

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

Definitions of clubs and voluntary associations differ widely across the states/territories, as do exemptions from discriminatory actions and it is one of the facets of a federation that such differences co-exist within the nation. Regardless of such differences and allowances the purpose of exceptions is to enable groups to form and perform for the benefit of their members rather than merely fulfilling statutory obligations or purely commercial operations. Because lesbian women are a minority group with a range of unique interests and needs it is necessary that they can choose and maintain their membership as appropriate to their own interpretation of these interests and needs. COAL submits that protections for lesbian community associations and clubs be achieved through suitable exemptions.

COAL recommends that fundamental right to association be explicitly recognised and a collective right to privacy introduced to allow special needs groups to exist without the problem of challenges from those whose interests are outside that group's held beliefs and philosophies.

QUESTION 18: How should the consolidation bill prohibit discriminatory requests for information?

Under current discrimination laws workplace procedures prohibit gathering of information that relates to protected groups in order to prevent inappropriate and discriminatory use, but falls short of inclusion for non-workplaces.

²²Myers Helen & Lavender, *An Overview of Lesbians and Health Issues*, Coalition Of Activist Lesbians Research Paper, 1997.

COAL recommends that the provision for protection against discriminatory requests for personal or organisational information covers both work-place and non-workplace areas and that this protection is specified rather than implied.

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

Religious organisations are allowed through current state/territory and commonwealth regimes to discriminate on the basis of their belief systems and religious practices. An inherent requirement rationale based on lesbian organisations' belief systems and practices should be available in both employment and other areas such as community organisations. Lesbian organisations should be enabled to apply an inherent requirement rationale based on their specific belief systems and practices concerning single-sex operation and activities.

As regards lesbian community groups the inherent requirement should be based on prior involvement with lesbian community, positive identification as a lesbian, recognition by others members of the group and shared understandings of lesbians' and women's social and cultural status. The fuller enjoyment of human rights for Australian lesbian women will be possible only when lesbian groups can operate with impunity as single-sex and limited gender entities.

COAL recommends that the single inherent requirement / genuine occupational qualifications exception should be extended to cover other areas besides the workplace, such as lesbian-specific/single sex community organisations.

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

Recognition with impunity of the plurality of different religious beliefs systems is a feature of 21st century democratic states such as Australia; where it is noted that absence of belief should also be accepted. COAL and other lesbian and gay/lesbian organisations are aware of the churches' historical

unfair treatment of lesbians and gay men as their employees, participants or clients.²³ It is questionable that Christianity which promotes truthfulness expects lesbians and gays to be closeted in their churches thus keeping silent while the church follows the hypocritical ‘don’t ask, don’t tell’ rule. Of course it goes without explanation that the closet has a glass door, so the façade promoted by churches only serves to support their intention to continue discriminatory practices against lesbians and gay men. The systemic closeting of lesbians and gay men indicates hetero-oppression of their sexuality, exacerbating their fear of living in a heterosexist society. For many lesbians and gay men being closeted as a survival mechanism meant their hidden lives was a daily compromise with society’s all-pervasive homophobia.

Church organisations and participation in recognised religions represent particular sustainable interests such as social, economic, moral and personal, yet they also serve as powerful blocks impacting lesbians (and gay men and other non-heterosexual people). Granted there are churches, which take a tolerant view however, this has been a long time coming and toleration is not the most positive approach as it speaks of something to be endured and suggests inequality. Exceptions for religious organisations whether in connection with discrimination laws or taxation or local government rates rest on outmoded conceptions of the role and function of religious organisations in society. As Australia is a sectarian state with somewhat weak constitutional protections concerning religion it is time the special treatment afforded religious organisations is reviewed. COAL does not support the furtherance of exemptions for religious organisations. There should be no excuses for discrimination against lesbians or other groups. Religious organisations should conduct their affairs on the same basis as non-religious organisations that are without privileges and without exceptions to laws that should function to promote human rights, participation and equality.

COAL recommends the complete removal of exemptions for religious organisations with regards to sexual orientation.

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?

²³ Thompson Denise, *Flaws in the Social Fabric: Homosexuals and Society in Sydney*, Allen & Unwin, Sydney, 1985.

In commonwealth, state and territory laws the focus of dealing with unlawful discrimination is through complaints. The reactive nature of this mechanism has a limited effect in changing behaviours on a social and sustainable level and more far reaching approaches should be included in the bill. Granted in recent years there have been inquiries and consultations, however the bill should allow for a more proactive approach with investigative powers without the triggering through an individual complaint, and with the provision to enforce undertakings and pursue litigation if found appropriate.

COAL recommends that at the commencement of the consolidated law rigorous education programs should be provided for all sectors. Further, that such programs be developed in consultation with COAL, an autonomous lesbian group working to strengthen human rights, equality, dignity and participation of lesbian women.

CLOSING REMARKS

Currently there is no dedicated commonwealth law prohibiting discrimination on the grounds of sexual orientation, a fact that was commented on in the 2011 Universal Periodic Review by the UN Human Rights Council. The issue was addressed by the stated requirement to introduce a national legal provision prohibiting discrimination and harassment based on sexual orientation and gender.²⁴

COAL congratulates the Australian government for taking this initiative as the array of anti-discrimination laws available to date has limitations and the proposed consolidation will surely achieve greater facility for ordinary people and professionals alike. The importance of the UN human rights conventions has been given too little attention for too long. We also note that as regards to rights and sexual orientation, unlike other protected groups, for example race, sex and disability, there is no UN convention to offer guidance to states or protections to citizens. To this end COAL submits that the human rights elements that underlie all anti-discrimination and equal opportunity law and practice should be given stronger emphasis. Generally the ordinary Australian driving down High Street in a

²⁴ Human Rights Council, Working Group on the Universal Periodic Review: Tenth Session, Geneva, 24 January – 4 February 2011, *Draft Report of the Working Group on the Universal Periodic Review – Australia*. http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_InternationalHumanRights_UniversalPeriodicReview (19.01.2012)

Holden or Toyota has thought of human rights as something rather vague and for citizens of countries ‘over there’ that do not share our type of democracy. There is some coverage of human rights in the education sector however, it must be said that generally many Australians’ disinterest could be related to the paucity of human rights education. COAL has sought to include human rights understandings and information in our advocacy work and as consistent with our United Nations accreditation we look at the relevance of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), as well as federal, state/territory laws and best practice in services.

COAL recommends that there should be increased emphasis given to the importance of the relevant UN Conventions applicable to the protections provided by the law.²⁵

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²⁵ Byrnes Andrew, Graterol María Herminia and Chartres Renée, ‘State Obligation and *the Convention on the Elimination of All Forms of Discrimination Against Women*’, [2007] UNSWLRS 48 (14.01.2007)

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International

Convention on the Rights of the Child (CRD)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Convention on the Rights of Persons with Disabilities (CRPD)

International Convention on Civil and Political Rights (ICCPR)

International Convention on Economic, Social and Cultural Rights (ICESCR)

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 2006.

Domestic

Age Discrimination Act 2004 (Cth) (ADA)

Australian Human Rights Commission Act 1986 (Cth) (AHRCA)

Disability Discrimination Act 1992 (Cth) (DDA)

Fair Work Act 2009 (Cth)

Human Rights (Sexual Conduct) Act 1994 (Cth)

Racial Discrimination Act 1975 (Cth) (RDA)

Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (Cth)

Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008 (Cth)

Sex Discrimination Act 1984 (Cth) (SDA)

Case Law

O’Keefe v Sappho’s Party Inc. [2009] SAEOT 50 (24 April 2009)

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