



**Submission to the
Attorney-General's Department
in response to the Discussion Paper
(September 2011) on the
Consolidation of Commonwealth
Anti-discrimination laws**

01 February 2012

Acknowledgements

The National LGBTI Health Alliance is the national peak health organisation for a range of organisations and individuals from across Australia that work in a range of ways to improve the health and well-being of lesbian, gay, bisexual, trans/transgender, intersex and other sexuality, sex and gender diverse (LGBTI) people and communities.

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The Alliance acknowledges the traditional owners of country throughout Australia, their diversity, histories and knowledge and their continuing connections to land and community. We pay our respect to all Australian Indigenous peoples and their cultures, and to elders of past, present and future generations.

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Introduction: Who we are

1. The National LGBTI Health Alliance was established by a number of organisations from across Australia that provide health-related programs, services and research targeting lesbian, gay, bisexual, transgender, intersex and other sexuality, sex and gender diverse people (LGBTI)¹.
2. Alliance members have come together to work collaboratively to improve the health and wellbeing of people of diverse sexuality, sex and gender:
 - advocating with a national voice on the health and wellbeing needs of lesbian, gay, bisexual, transgender, intersex and other sexuality, sex and gender diverse people and communities;
 - building the capacity of our members to work with and for lesbian, gay, bisexual, transgender, intersex and other sexuality, sex and gender diverse people and communities.
3. We work across a broad range of health areas, striving to improve LGBTI health in many different ways.
4. We welcome the opportunity to comment on the Commonwealth *Discussion Paper*.

Why we are interested in this Consolidation Project?

5. The proposed Consolidation of Commonwealth Anti-Discrimination Laws is of vital concern to the National LGBTI Health Alliance for two reasons.
6. The first, which we have in common with many groups, is the need for stronger, clearer, more effective laws against discrimination. So, as a body concerned about the health of LGBTI people, we are concerned that health service providers should not discriminate on the grounds of sexuality and/or diverse sex and gender in their employment practices and in their delivery of health services.
7. Secondly, however, discrimination is not just a problem at the level of the delivery of services. Discrimination, or the prejudice underlying and giving rise to it, is an important social determinant of health. It is well documented that LGBTI community prevalence of depression and other illnesses is higher than average. This excess morbidity is best ascribed to “minority stress.” This in turn is created by the climate of prejudice against lesbian, gay bisexual, transgender intersex, and other people of diverse sexuality, sex and gender, that may affect their childhood, adolescence and mature years.
8. An effective consolidated Anti-Discrimination Act, therefore, must be capable of dealing with discrimination at its source. To deal with the harm done by discrimination to individuals and communities is necessary, but it is not sufficient, however efficiently and effectively it is done. Both goals must be pursued for many years to come: eliminate the causes, and provide remedies against the consequences.

¹ The Alliance uses ‘LGBTI’ to cover lesbian, gay, bisexual, trans/transgender, intersex and other sexuality, sex and/or gender diverse people. Other groups and previous Alliance documents may use these and/or other initials in a different order.

“Minority stress” and LGBTI excess morbidity

9. In a recent submission the Alliance observed:²

“The elevated risk of suicide for LGBT people is not due to issues regarding sexuality or gender identity in and of themselves. The elevated risk is due to complex factors including mental illness and trauma suffered in response to exposure to heterosexism, homophobia and transphobia - all of which are pervasive and cause and contribute to social isolation, mental illness, substance abuse, poverty and homelessness for the victims.”

10. While the above submission concerned suicide, the problem of ill health caused by discrimination is much more widespread, as was discussed in Meyer, I H, 2003, ‘Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: conceptual issues and research evidence’. *Psychol Bull*, 129, 674–697.

11. The role of “minority stress” is summarized in *Well Proud* as follows:³

Discrimination is bad for your health

“The prevalence of ongoing discrimination and marginalisation on the basis of sexuality and gender identity directly affects the health and wellbeing of many GLBTI people. This has been called ‘minority stress’ (Meyer, 2003), and effects are well documented, including poorer health outcomes, reduced social participation and engagement, and avoiding or delaying seeking care because of actual or fear of prejudice (see, for example, Leonard, 2002). In addition, a recent survey of prejudice-motivated violence against GLBTI Victorians showed that GLBTI people experience higher rates of harassment and abuse than the general population and that the threat of heterosexist violence is part of many GLBTI people’s everyday lives” (Leonard et al., 2008).

12. Stigma and discrimination are a particular problem for people of diverse sex and gender. The *Tranznation Report*⁴ found that 87.4% of respondents had experienced at least one form of stigma or discrimination; half reported being verbally abused or socially excluded; and a third had been threatened with violence. A third had received lesser treatment due to their name or sex on documents, as well as being refused employment or promotion, and almost a quarter had been refused services in other areas (p.60). Not surprisingly, there was a clear relationship between experiencing stigma and discrimination, and depression (p.65).

13. Transgender people experience much higher rates of depression than the general Australian population, and than LGBTI communities generally (p.26), and one in four respondents reported suicidal thoughts in the two weeks before they completed the survey (p.7).

² LGBTI Health Alliance, *Submission to the Senate Community Affairs References Committee Inquiry into Suicide in Australia*, 4 December 2009, page 3.

³ Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing, 2009, *Well proud: A guide to gay, lesbian, bisexual, transgender and intersex inclusive practice for health and human services*, paragraph 1.2. <http://www.glhv.org.au/node/589> [Accessed 30/01/2012]

⁴ Couch et al (2007) *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand*, Australian Research Centre in Sex, Health and Society, Melbourne. <http://arrow.latrobe.edu.au:8080/vital/access/manager/Repository/latrobe:23974;jsessionid=7BDDE3D9F0BB2F97529D49CF8A21C9EC> [Accessed 30/01/2012]

14. It should also be recognised that definitions of discrimination must address sex as well as gender and recognise the fact that not all people are male or female. Fully inclusive language should be used so that intersex and gender-nonconforming people are also protected.
15. In its acute manifestations the response to minority stress affecting an individual is a matter for the primary care system, to manage the symptoms and build resilience. The real solution, of course, is to eliminate the discrimination that causes it. Eliminating discrimination requires an ability to deal with systemic discrimination, and a framework of powers and obligations which provides the Commission with the systemic tools to tackle the problem, and an Anti-Discrimination Act which creates a positive duty to eliminate discrimination and promote equality (see below, at Question 27.)
17. LGBTI older Australians are particularly vulnerable with regards to discrimination. At the National LGBTI Ageing Roundtable (held in October 2011), it was noted that older LGBTI people have experienced a lifetime of prejudice and discrimination (which may include bullying, harassment, verbal, physical, psychological and/or sexual abuse) from government, agencies, faith-based organisations, health providers, businesses, LGBTI communities, families, friends, and individuals. This includes a fear of prejudice and discrimination, which may or may not be warranted. These experiences cause LGBTI older people to: remain in or return to the closet; be reluctant to reveal their sexual orientation and/or sex and/or gender identity to government agencies and service providers; and be reluctant to make complaints when they experience prejudice or discrimination.
18. Measures suggested at the Roundtable to combat discrimination experienced by older LGBTI Australians, especially in aged care settings, include:
 - a. The comprehensive training of the aged care workforce in LGBTI cultural sensitivity
 - b. Incorporating non-discrimination into compulsory Accreditation Standards
 - c. No exemptions from Anti-Discrimination legislation for faith based organisations providing services
 - d. Educating older LGBTI people about their rights and means of redress open to them.

The Questions particularly significant for this submission

19. In the paragraphs that follow we comment on only a few of the Questions posed in the *Discussion Paper*. In relation to the others the Alliance has had the opportunity to view the submissions-in-progress of the Law Institute of Victoria and of the Human Rights Law Centre, and generally supports the direction of their recommendations.

Q7—How should sexual orientation and gender identity be defined?

Q8 – How should discrimination against a person based on the attribute of an associate be protected? (p22)

20. The Alliance has previously pointed out, in its 26 November 2010 submission⁵ to the Australian Human Rights Commission (AHRC) early in this project, how sexual orientation and gender identity should *not* be defined.
21. A possible source of words on these issues could be the Yogyakarta Principles⁶, with some important clarifications and augmentations.

⁵ Discrimination on the basis of sexual orientation and sex and/or gender identity: Position of the National LGBTI Health Alliance, 2010.

22. It is noted that the recent ALP National Conference adopted, as part of Chapter 11 - Australia's place in a changing world, in the section "Human rights", the commitment that "[u]nder Labor, Australia will support the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity." Domestically, the ALP National Conference adopted, as part of Chapter 10—Open and accountable government, in a section headed LGBTI place in a stronger democracy, the statement "Labor recognises that the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity provide a substantial guide to understanding Australia's human rights obligations in relation to LGBTI Australians and their families."

23. The Yogyakarta Principles explain that:

Sexual orientation is understood to refer to each 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.

24. This definition focuses on the gender of the person to whom someone is attracted or with whom they are having a sexual or affective relationship. This definition may limit the legislation by not covering some related areas of discrimination where such discrimination is not based on the gender of the sexual partner.

25. Health research, including but not limited to HIV research, makes a clear distinction between sexual attraction, sexual behaviour, and sexual identity.⁷ Sexuality can be defined as:

Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.⁸

For the purposes of health service delivery, and anti-discrimination laws, this term could be used to include all forms of consensual, lawful sexual activity.

Recommendation 1: Sexual Orientation should be defined in a broad way, such as the World Health Organisation definition of Sexuality. For the purposes of health service delivery, and anti-discrimination laws, this term could be used to include sexual orientation and all forms of consensual, lawful sexual activity.

26. The Yogyakarta Principles define gender identity as follows:

⁶ 'The Yogyakarta Principles: The application of international human rights law in relation to sexual orientation and gender identity'. http://www.yogyakartaprinciples.org/principles_en.htm [Accessed 30/01/2012]

⁷ For example, see Smith, Anthony, Chris Rissel, Juliet Richters, Andrew Grulich and Richard Visser (2003) 'Sexual Identity, Sexual Attraction and Sexual Experience Among a Representative Sample of Adults', *Australian and New Zealand Journal of Public Health* 27(2): 138-145.

⁸ World Health Organisation 2012, 'Sexual and Reproductive Health'. http://www.who.int/reproductivehealth/topics/gender_rights/sexual_health/en/ [Accessed 31/01/2012]

Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms.

27. **Intersex** is not solely a form of ‘Gender Identity’. Intersex applies to persons whose biological sex cannot be classified as clearly male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex is primarily about sex characteristics, although for some people it may also be a gender identity. Intersex should, therefore, constitute a separate protected attribute.
28. The legislation should not be based on binary constructs of sex and gender, ie one that requires an individual to identify as exclusively *either* male or female. It should apply regardless of the biological sex characteristics of an individual, either at birth or at any subsequent period of their lives, and regardless of the sex of the person by law, as the states and territories have different criteria for registering a change of sex.
29. In December 2011 the Australian Government demonstrated the value of this approach in making changes which allowed Australian passports to include references to persons other than “male” or “female”.
30. The term “**Expressions of gender**” is wider than gender identity, and would provide necessary anti-discrimination protection in additional circumstances. In November 2011, the state of Massachusetts added “gender identity or expression” to State laws against discrimination in employment, housing, insurance and credit.⁹
31. The term “**Diversity of sex characteristics**” should also be included. This term may include Intersex differences, chromosomal sex, endocrine activity, genitals and reproductive organs, menstruation, secondary sex characteristics (e.g. facial and body hair, musculature and bone structure, size of larynx and depth of voice, breasts, fat distribution, skin texture, stature, body proportions, etc.). While this particularly relates to intersex people, it may also be of relevance to others, such as pre- or non-operative trans people.
32. This understanding of gender identity does not mention intersex people by name, but the statutory definition should do so, as an express inclusion, both for the avoidance of doubt and for transparency.

Recommendation 2: Gender Identity should be defined as: “each person’s individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms”; *and should include:* Expressions of gender, and Diversity of sex characteristics.

⁹ ‘Mass, lawmakers pass transgender rights bill’, AP, 16 November 2011.

http://bostonherald.com/news/politics/view/20111116legislature_approves_transgender_rights_bill
[Accessed 23/11/2011]

Recommendation 3: Intersex is not solely a form of ‘Gender Identity’ and so should constitute a separate protected attribute, recognising the right of Intersex people to freely choose their own gender, and protecting intersex children from irreversible medical procedures without the full, free, and informed consent of the child.

33. In using these definitions it is vital that the usual extensions are expressly stated: that an attribute includes an assumption (whether or not accurate) that a person has the attribute, that it includes that a person had or is thought to have had the attribute, that a person is associated with a person who has the attribute, or that a person has characteristics associated with the attribute.

34. In the formulation of 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.

35. The Victorian Act also includes, as an attribute, in s. 6(q), “personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes”.

Recommendation 4: Extensions should be expressly stated: that an attribute includes an assumption (whether or not accurate) that a person has the attribute, that it includes that a person had or is thought to have had the attribute, that a person is associated with a person who has the attribute, or that a person has characteristics associated with the attribute.

Question 22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity? (p40)

36. This question, on page 40, concludes a brief discussion, headed “Exemptions for religious organizations,” which begins with paragraph 161: “The Government does not propose to remove the current religious exemptions, apart from considering how they may apply to discrimination on the grounds of sexual orientation or gender identity”.

37. The Alliance notes that many government-funded services are delivered by faith-based organisations, particularly in the health and aged care sectors. For example, nationally, the providers of residential [aged] care services are religious organisations (**28.5%**), private operators (27.9%), community-based providers (16.8%), charitable organisations (15.5%), local government (2.3%) and state government (9%)(p.10).¹⁰ Exemptions for such organisations from anti-discrimination legislation sends the message to LGBTI people that it is not safe for them to reveal their sex and/or gender identity, sexual orientation, or relationship status to *all* faith-based service providers, even if some of those organisations do not choose to discriminate. Most LGBTI people and organisations feel very strongly that organisations receiving taxpayer funds to provide services should not be allowed to

¹⁰ AIHW, 2009b. Residential aged care in Australia 2007–08: A statistical overview: Canberra: AIHW. <http://www.aihw.gov.au/publications/age/age-58-10709/age-58-10709.pdf> [Accessed: 18/12/2011].

discriminate. As one participant at the Sydney Multi-Stakeholder forum said, “This means that my taxes fund organisations that discriminate against people like me – and that’s just not on”(18/11/2011).

Religious exemptions

38. The Alliance acknowledges the Government’s position on the maintenance of existing religious exemptions to anti-discrimination laws.
39. The Alliance does not agree that blanket exemptions are appropriate. The human right to freedom of religion is not a peremptory norm of international law, and has the same status as other human rights. Like the human right to equality, it may be limited for legitimate purposes, by proportionate measures likely to be effective, and in the least restrictive way. The limitation on the human right to equality imposed by a blanket exemption of religious bodies is unjustifiable. For example, in December 2011, the daughter of a same sex couple was refused entry to a Catholic primary school in far western NSW because of her parents’ relationship. NSW MLC Dr John Kaye argued that a school that received 85% of its operational funds from the taxpayer should not be allowed to discriminate¹¹; and ANU senior law lecturer, Dr Wayne Morgan said the very broad exemptions that exist for religious entities should be amended, particularly when they are receiving public money to offer a service to the public¹². This view is strongly shared by most LGBTI people and organisations. The couple reported they were ‘shocked and hurt’ by the school’s decision¹³, a powerful example of ‘Minority Stress’, not only for the couple but also for their five-year-old daughter. Although the Bishop reversed the school’s decision, he is quoted as saying, “Blaming a child for her parents’ sins [sic] was not the attitude of the Catholic church”¹⁴, thus vilifying this couple and all same-sex couples in the national media.
40. The Alliance accepts, for the sake of argument, that the Government will allow religious bodies to be able to discriminate on the basis of sexual orientation or gender identity when to do so conforms with their “doctrines, tenets or beliefs,” or are “necessary to avoid injury to the religious sensitivities of adherents of” the religion. The latter test is impossibly vague, subjective and of uncertain meaning. It ought to be dropped, or at least made cumulative with the first, rather than alternative.
41. Many religious bodies, however, do not wish to discriminate on these (or other) grounds, and do not want to be tarred with the same brush of bigotry that the loudest lobby calls for. For example, Uniting Justice Australia’s Recommendation states: “We do not believe that religious organisations should be granted an exception for their activities *in the provision of services*, including education and accommodation services. As such we do not believe that

¹¹ ‘School rejects daughter of same-sex couple’, *The Australian*, 14/12/2011
<http://www.theaustralian.com.au/news/nation/school-rejects-daughter-of-same-sex-couple/story-e6frg6nf-1226221339567> [Accessed 18/12/2011]

¹² ‘Same-sex enrolment row prompts call for law change’, ABC news, <http://www.abc.net.au/news/2011-12-15/same-sex-enrolment-row-sparks-call-for-law-change/3732522> [Accessed 18/12/2011]

¹³ ‘Lesbian couple turn down enrolment offer’, ABC Radio National *PM*, 14/12/2011
<http://www.abc.net.au/news/2011-12-14/lesbian-couple-turn-down-enrolment-offer/3731388> [Accessed 18/12/2011]

¹⁴ ‘Lesbian parents reject Catholic primary school’, *The Australian*, 15/12/2011,
<http://www.theaustralian.com.au/national-affairs/state-politics/lesbian-parents-reject-school/story-e6frgczx-122622311363> [Accessed 18/12/2011].

exemptions such as those granted in Section 38 (c) of the Sex Discrimination Act should be included in a consolidated Act".¹⁵

42. The Alliance proposes therefore, in the interests of accountability and transparency, that the Government's intention would be best served by providing religious bodies the opportunity to claim, as of right, the licence to discriminate on the grounds and in the areas that they specify, and on the basis of the doctrines or beliefs they detail as necessitating the claimed licence to discriminate.
43. The claim would have to be lodged with the Commission in writing and be displayed on the claimant body's website and in other promotional material so that any potential employee, recipient of services or other person interacting with the body can be duly alerted to the body's intended discrimination practices.
44. Although raising this proposal in the context of discrimination on the basis of the new attributes, sexual orientation and gender identity, the Alliance recommends the process apply to all attributes where a religious exemption currently applies; this means the provisions of the SDA and ADA only. It should not be extended to race and disability, however, as this would be inconsistent with the Government's commitment not to reduce any current protections against discrimination.
45. The licence to discriminate so claimed would (within its terms, and subject to the *bona fides* of the claimed justification of necessitation by and conformity to doctrine) exempt the body from the operation of the consolidated Anti-Discrimination Act in relation to anything it does in its own activities with its own adult members and guests.
46. It should not, however, apply to anything done by the body in the carrying out of any activity or provision of services funded in whole or in part by commonwealth, state or local government, directly or through statutory authorities or other government funded entities.
47. The licence to discriminate should also not apply to permit discrimination against minor children, who do not have the capacity to assess the conditions represented by the licence and cannot give informed consent to them.
48. At the consultation held in Melbourne on 24 November 2011 it was also suggested that, instead of bodies that wish to discriminate needing to claim and specify their licence to do so, bodies wishing to disclaim discrimination could lodge a document specifying where a religious exemption would not apply to them. On balance the Alliance believes this is an inferior option. This is both for practical reasons, as it appears to be more cumbersome, as a matter of drafting, to create a process for invoking and recording a statutory exception to an exception, and more importantly for fundamental reasons, as the default position should be the upholding of the human right to equality, and the departure from that default position is what should require specific action.

¹⁵ Uniting Justice Australia (2011) 'Comments to the Attorney-General's Department on The Consolidation of Australia's Anti-Discrimination Legislation', p. 7 (emphasis added).
http://www.unitingjustice.org.au/images/stories/PDFs/1103_AntiDiscriminationConsolidation_UnitingJusticeAustralia.pdf [Accessed 18/12/2011]

Recommendation 5: Exemptions and Exceptions. Religious bodies should not be granted exemptions from anti-discrimination legislation for their activities in the provision of services, such as aged care, health services, and education. If, however, they are to be granted exemptions, they should have to lodge a claim in writing with the Commission which should be displayed on the claimant's website and in other promotional material so that any potential employee, recipient of services, or other person interacting with the body may be duly alerted to the body's intended practices of discrimination.

Question 5 Should public sector organisations have a positive duty to eliminate discrimination and harassment? p18

Question 6 Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed? p 19

Harassment and vilification

49. As the Discussion Paper acknowledges at paragraph 66 (page 18), in the limited areas of the anti-discrimination statutes "[h]arassment of a person based on their protected attribute is unlawful discrimination because it causes detriment to the person because of their protected attribute." Outside those areas harassment is not adequately dealt with.
50. The provisions in Part IIA—"Prohibition of offensive behaviour based on racial hatred" of the RDA, though using different language, do cover race-based harassment, but also limit their coverage by exemptions, as well as by not focussing on the harm or detriment that constitutes harassment.
51. Victoria and other jurisdictions have provisions which have some similarities to s18c of the RDA, with similar flaws, or worse. Victoria's equivalent is the *Racial and Religious Tolerance Act 2001* ("RRTA"), which uses the term "vilification" in an unhelpful and idiosyncratic way to seek to deal with harassment on the attributes of race and religion outside the usual "areas", but very differently, and ineffectively, characterized.

Vilification

52. The Alliance strongly recommends **against** provisions using the term "vilification" or emulating the substance of the Victorian *RRTA*.
53. In the first place the word "vilification" has a perfectly good and well understood dictionary meaning, derived from the verb "to vilify", which is also the common meaning.
54. For example, the *Oxford English Dictionary* gives for the verb "vilify":
"to deprecate or disparage in discourse; to talk slightly or contemptuously of; to depreciate with abusive or slanderous language; to defame or traduce; to speak evil of";
e.g. he has been vilified in the press.
Similarly the *Encarta World English Dictionary* (1999) defines "vilify" as "to make malicious and abusive statements about somebody."
55. The *RRTA*, on the other hand, uses "vilification" as if it meant "incitement to hatred etc". This causes endless confusion to members of the public, and is the very opposite of accessible legal drafting.
56. Quite apart from using the wrong word at its core, the *RRTA* is conceptually flawed. Its focus is on the words written or spoken, and the free speech rights of the speaker or writer, rather than on the harm that may be suffered by the person or group who is the object of the words used.

57. As a result of the political tussles over freedom of speech, the *RRTA* effectively exempts (subject admittedly to a useful “in good faith” claw-back) the four principal doers of harm by words, namely politicians, ministers of religion, academics and journalists, while abandoning the victims of harm (except perhaps in neighbourhood disputes between more-or-less equals) as a powerless afterthought.
58. This model does not protect ordinary victims of prejudice from the psychological harms caused by “malicious and abusive statements” or being spoken or written about “in an abusively disparaging manner,” as the ordinary person would expect its language to promise, nor does it function (as the Act probably was intended) to protect them against incitement to hatred, etc, by the powerful, as the barriers to making a complaint are so high, and the breadth of the exceptions so extensive.
59. Although the *RRTA* manifestly fails to do its job, it is nevertheless aimed at a real social problem, even if it focuses on the wrong aspect of it. The problem is that words can cause real harm, just as “sticks and stones” can; the old rhyme is wrong to assert that “names can never hurt me.”
60. Research clearly shows that the climate of homophobic prejudice in which most same-sex-attracted young people grow up, created and maintained by hurtful words written and spoken, casually or deliberately, leads to a significantly higher rate of mental illness—depression and anxiety disorders in particular—in this group. The casually homophobic and transphobic pronouncements of opinion leaders each cause harm, and add up to the high rates of illness and attempted and completed suicide among young people who are same-sex and both-sex attracted, as well as trans and intersex young people, in particular, and adults too.
61. In an open letter to ALP National Conference delegates, in November 2011, Paul Martin gave one example, as
- “ . . . a psychologist with 25 years experience working with same-sex attracted Australians—who are twice as likely to have a high or very high level of psychological distress and four times more likely to have attempted suicide.
- We can no longer pretend that institutionalised discrimination against same-sex attracted individuals does not contribute to this tragic problem. As such, I am asking you to use your power to end this discrimination.
- I’m asking on behalf of individuals like Robert*, 17, a young man who came to see me for counselling recently.
- After a courageous and difficult decision to come out to his family and father (who called gay people “bloody poofers”), he talked about feelings of gay relationships, and therefore gay people, being seen as unworthy. Hearing the message from our politicians that gay people “aren’t good enough to marry,” led him into even deeper depression, as he personally dreams of being with someone for his entire life.”
62. Participants in the Tranznation study reported high levels of fear, based on past experiences, the experiences of their friends, and an awareness of the general attitudes towards transgender people and the way they are portrayed in the media. They believe that society at large, and the media in particular, portray Trans people as “perverts or sex offenders, child predators, prostitutes and junkies” (p.64). Sex and gender diverse people experience

high rates of verbal and physical abuse, and thus of anxiety, depression, and poorer health outcomes overall, as a result of this vilification and related harassment.¹⁶

Harassment

63. In any of the areas covered by equal opportunity law, such as employment or education, the sorts of homophobic and transphobic writings and speech referred to above would be characterized as “harassment” and would constitute the sort of detriment, in employment or education, that would give rise to a complaint of unlawful discrimination on the ground of sexuality, sex characteristics and/or gender identity/expression in the relevant area. The employer, or school, that permitted, or failed to put a stop to, such harassment would be vicariously liable, even if the individual harassers could not be identified.
64. In the Alliance’s view the unlawfulness of such harassment should not be restricted to the named areas. The substantive harm that such harassment does, each time, and cumulatively, to lesbian, gay bisexual, trans and intersex people should be the issue, not where or when it happens. In the defined relationship areas, admittedly, the threshold for the actionable quantum of harm is fairly low. Harassment at large, with no prior relationship between the harasser and the persons harmed, would need to be qualified in some systematic way. By analogy with the law of negligence, we propose that the unlawfulness of attribute-based harassment should be based on the reasonable foreseeability of harm.
65. It may be necessary to qualify what is reasonable here by requiring the decision-maker to take into account the history of discrimination suffered by the class of persons of the relevant attribute. It is precisely this history of prejudice that makes members of the class more susceptible to harm by the harassment in question, and distinguishes their situation from that of those from groups not subject to a history of prejudice, for whom apparently similar insulting or contemptuous words, for example, would have no salience.
66. While an actionable instance of harassment in this formulation might also have been able to be described as “speech” in the RDA or RRTA formulations, when viewed as harassment causing harm the “free speech” and “religious freedom” objections and exemptions have little or no force. By focussing on demonstrable (research-validated) harm, the issues of legitimacy, proportionality and least restrictiveness have mostly been resolved.
67. Harassment in this formulation will be available to individual complaint, but in its most egregious forms, such as with young victims driven to depression, self-harm or suicide, the issue is much more one of systemic discrimination, and requiring pro-active measures by relevant authorities to prevent harassment in the future by education, social marketing and other appropriate social change mechanisms.

Recommendation 6. Harassment and Vilification. Consideration should be given to covering harassment on the grounds of sexuality, sex characteristics and/or gender identity/expression outside of defined relationship areas, such as employment or education.

¹⁶ Couch et al (2007) *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand*, Australian Research Centre for Sex, Health and Society, Melbourne.

Question 11. Should the right to equality before the law be extended to sex and/or other attributes? p 26

Question 12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies? p 27

68. Anti-discrimination law is about the human right to equality. It should say so, and should make that the primary guarantee, as the international treaties require. The restriction of anti-discrimination law to prescribed areas, such as employment, provision of goods & services, education and the others is artificial and leaves gaps. These traditional “areas” should be retained as elements in an inclusive list of situations where the human right to equality is imperilled. The Secretary General of the United Nations has stated, “. . . we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity . . . Where there is a tension between cultural attitudes and universal human rights, rights must carry the day. Together we seek the repeal of laws . . . that permit discrimination on the basis of sexual orientation or gender identity . . .”¹⁷
69. The Alliance favours the formulation of the Discrimination Law Experts’ Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, namely
- “Discrimination includes any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.”
70. This is both a definition of discrimination more general than, and subsuming, the somewhat artificial “direct” and “indirect” constructs, and also a definition whose scope is not limited to enumerated “areas”.
71. For practical reasons, the attributes and the areas traditionally set out in the various anti-discrimination laws should to be retained and set out, as noted above, as elements in inclusive lists. This should include Intersex by name, and define sex characteristics.

Question 19. Can the vicarious liability provisions be clarified in the consolidation bill? (pp 34–36)

72. The Alliance believes that the vicarious liability provisions should and could be clarified. Rather than merely taking the common law notions of vicarious liability and extending them a little, the provisions ought to be drafted as an express part of the elaboration of the positive duty to prevent discrimination and harassment, and to promote equality.
73. The question is not 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.
74. It is also important that the 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.

¹⁷ United Nations General Assembly, 17 November 2011, ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights’ (p.3).
http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf [Accessed 18/12/2011].

Specified relationships for vicarious liability

75. All the relationships currently covered in the RDA, SDA, ADA and DDA should be included in the provisions. In addition (especially in the context of the positive duty to eliminate discrimination and promote equality) any relationship where a person has the capacity and right to control or direct the conduct of others should also be included. A school, for example, should be liable for discriminatory bullying (or other harassment) by students on other students, or indeed on teachers or other members of the public.

Connection between unlawful act and employment relationship required to establish vicarious liability

76. The current RDA and SDA tests of “in connexion with” are clearly to be preferred over the ADA and DDA tests of “within scope of ...authority”.
77. The critical test, however, must be whether the employer or principal had the capacity or power to influence the conduct, including by training, directions, guidelines, supervision, etc.
78. If the terminology of taking “all reasonable steps” to prevent discrimination is used, it needs to be clarified that what is reasonable must consider the harm done to the person or persons who suffer the discrimination (harassment), and the positive duty, as well as the practical issues of cost etc. The onus 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 well-known and well understood process for doing so.
79. Mere words on a policy more honoured in the breach than the observance would clearly not satisfy the correct test.

Recommendation 7: Positive Duty. All public sector organisations should be required to actively prevent discrimination and harassment, and to promote equality.

Systemic discrimination

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? (p53)

80. As discussed above, it is essential that the consolidated Anti-Discrimination Act give the Commission the necessary powers and functions to deal with systemic discrimination. This is only briefly mentioned by name in the *Discussion Paper*, but it is a vital focus for the new Act.
81. The *Discussion Paper* does, however, canvas several additions to the Commission’s powers which are essential. The Alliance strongly supports the introduction of the sort of powers to deal with systemic discrimination given under the *Equal Opportunity Act 2010 (Vic)*, and indeed would favour the further powers recommended, but not taken up in the Act, by the Gardner Review.
82. The individual complaint model is doomed to failure if fulfilment of the human right of equality is the goal. It is vital that individuals who suffer discrimination have the right to seek redress, of course, but this is not enough. No system based on the initiative and guts of

victims of unlawful conduct, which is inherently disempowering to victims, can possibly deal with problems that affect many more than the one individual. All experience shows that pursuing an individual complaint is emotionally and financially costly, and the barriers deter most who contemplate it. This is why the consolidated Anti-Discrimination Act needs a positive duty, and the Commission needs powers to pursue discrimination without an individual complainant being a party, and to have powers such as, in part, in the new Victorian Act.

Recommendation 8. Roles and functions of the Australian Human Rights Commission.

The Commission should be given the necessary powers and functions to deal with systemic discrimination, without the necessity of an individual complainant being a party.

83. All the Conclusions and Recommendations of the UNHCHR's Report¹⁸ are salient, but the Alliance would like to highlight the following recommendations: (g) Implement appropriate sensitization and training programmes for police, prison officers, border guards, immigration officers and other law enforcement personnel, and support public information campaigns to counter homophobia and transphobia among the general public and targeted anti-homophobia campaigns in schools; and (h) Facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringement of other human rights (p.25). According to the Yogyakarta Principles, requiring medical and/or surgical treatment as a prerequisite to changes on documents is an infringement of human rights.

Recommendation 9: Information, sensitisation and training. There should be public information campaigns about the new legislation, particularly in relation to sexuality, and diverse sex and gender. Appropriate sensitisation and training programs should be mandated for all personnel involved in law enforcement and the provision of services.

84. The Yogyakarta Principles also confirm that surgery on infants who are intersex is a human rights issue. The rights of intersex people to freely choose their gender identity should be protected. The Yogyakarta Principles state that countries shall, among other things:

Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that, in all actions concerning children, the best interests of the child shall be the primary consideration.¹⁹

¹⁸ United Nations General Assembly, 17 November 2011, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights'.
<http://arc-international.net/wp-content/uploads/2011/09/HRC-Res-17-19.pdf> [Accessed 18/12/2011].

¹⁹ Australian Human Rights Commission, 2009. 'Surgery on intersex infants and human rights'.
http://www.hreoc.gov.au/genderdiversity/surgery_intersex_infants2009.html

Listing of Recommendations

- 1. Sexual Orientation** should be defined in a broad way, such as the World Health Organisation definition of Sexuality. For the purposes of health service delivery, and anti-discrimination laws, this term could be used to include sexual orientation and all forms of consensual, lawful sexual activity.

p.6

- 2. Gender Identity should be defined as:**
each person's individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms.

and should include:

 - a) Expressions of gender
 - b) Diversity of sex characteristics

p.7

- 3. Intersex** is not solely a form of 'Gender Identity' and so should constitute a separate protected attribute, recognising the right of Intersex people to freely choose their own gender, and protecting intersex children from irreversible medical procedures without the full, free, and informed consent of the child.

pp.7-8, 15

- 4. Extensions** should be expressly stated: that an attribute includes an assumption (whether or not accurate) that a person has the attribute, that it includes that a person had or is thought to have had the attribute, that a person is associated with a person who has the attribute, or that a person has characteristics associated with the attribute.

p. 8

- 5. Exemptions and Exceptions.** Religious bodies should not be granted exemptions from anti-discrimination legislation for their activities in the provision of services, such as aged care, health services, and education.

If, however, they are to be granted exemptions, they should have to lodge a claim in writing with the Commission which should be displayed on the claimant's website and in other promotional material so that any potential employee, recipient of services, or other person interacting with the body may be duly alerted to the body's intended practices of discrimination.

pp.8-11

- 6. Harassment and Vilification.** Consideration should be given to covering harassment on the grounds of sexuality, sex characteristics and/or gender identity/expression outside of defined relationship areas, such as employment or education.

pp.11-13

- 7. Positive Duty.** All public sector organisations should be required to actively prevent discrimination and harassment, and to promote equality.

pp.14-15

8. Roles and functions of the Australian Human Rights Commission. The Commission should be given the necessary powers and functions to deal with systemic discrimination, without the necessity of an individual complainant being a party.

pp. 15-16

9. Information, sensitisation and training. There should be public information campaigns about the new legislation, particularly in relation to sexuality, and diverse sex and gender. Appropriate sensitisation and training programs should be mandated for all personnel involved in law enforcement and the provision of services.

p. 16

Acronyms

ADA	<i>Age Discrimination Act 2004 (Commonwealth)</i>
AHRC	Australian Human Rights Commission.
AIHW	Australian Institute of Health and Welfare
ALP	Australian Labor Party
ANU	Australian National University
ARCSHS	Australian Research Centre in Sex, Health and Society
DDA	<i>Disability Discrimination Act 1992 (Commonwealth)</i>
DoHA	Department of Health and Ageing (Commonwealth)
MLC	Member of the Legislative Council
GLBT(I)	Gay, Lesbian, Bisexual, Transgender (and Intersex)
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
RDA	<i>Racial Discrimination Act 1975 (Commonwealth)</i>
RRTA	Racial and Religious Tolerance Act 2001 (Vic)
SDA	<i>Sex Discrimination Act 1984 (Commonwealth)</i>
UNHCHR	United Nations High Commissioner for Human Rights