

20 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

We thank the Australian Government and the Senate Legal and Constitutional Affairs Committee for welcoming submissions regarding the Draft Human Rights and Anti Discrimination Bill 2012. Anti-discrimination is an area of law in which the Inner City Legal Centre practices daily, and affects a large proportion of our clients. Because of our strong experience in this area, we encourage the Committee to consider our submission below. We also encourage the Committee to consider the submission put forward by our governing body, the National Association of Community Legal Centres (NACLC).

The Inner City Legal Centre (ICLC)

ICLC provides a unique, specialised legal service to anyone in New South Wales who identifies as lesbian, gay, bisexual, transgender or intersex (LGBTI). ICLC provides a wide range of legal advice, representation and education to LGBTI communities in areas such as family law, domestic violence, homophobic vilification, discrimination and employment.

While ICLC supports the submission to this inquiry by the National Association of Community Legal Centres (NACLC), we practice law in some specialised areas and provide services to some particularly marginalised client groups, and so we have prepared the following brief submission raising some key issues of concern.

Although we have some significant concerns about the exposure draft of the Human Rights and Anti Discrimination Bill 2012 (the 'Bill') there are some key aspects of the Bill, which ICLC strongly supports as important measures that promote access to justice. In particular we commend the government on:

- Inclusion of sexual orientation and gender identity as protected attributes;
- Change to the presumption for costs orders to sharing costs; and
- Shared burden of proof.

Sexual Orientation and Gender Identity

We strongly support the inclusion of sexual orientation and gender identity in the list of protected attributes. We see the protection of lesbian, gay, bisexual and transgender people against discrimination as a necessary next step in the Australian Government's process to create equality for LGBT communities.

The drafting of these laws has however created some profound gaps in coverage of the LGBTI communities. The exposure draft process and this Senate Inquiry provide an appropriate opportunity to rectify these gaps and shortfalls.

As discussed in detail below ICLC is particularly concerned about:

- The inclusion of heterosexuality in the definition of sexual orientation;
- The lack of gender non-conformity in the definition of sexual orientation;
- The lack of intersex as a protected attribute; and the need for provisions prohibiting homophobic, transphobic vilification

Costs sharing in the Federal Court

We support the reform provided for in the Bill that the general rule will be that parties bear their own costs. This promotes consistency with state and territory law and the Fair Work Act (Cth) 2009.

To promote access to justice for many applicants who have historically been deterred from appropriate access to the Federal court to enforce their rights we recommend a further amendment. Section 133(2) provides that in certain circumstances, the court has discretion to make orders as to costs providing that it has regard to a number of matters set out in section 133(3), including the financial circumstances of the parties to the proceedings. We recommend that section 133(2) be amended to limit the circumstances in which the court may award costs against a complainant to circumstances in which the making of the complaint was vexatious, frivolous or lacking in substance.

As a result of the risk of an adverse costs order, complainants are reluctant to even lodge complaints at the AHRC, preferring state-based tribunals

where parties bear their own costs. Where matters are contested at a federal level most cases settle – even very strong discrimination complaints. As a result, it is important to enable court proceedings to tie place in a range of discrimination complaints, particularly where the legislation has not been well tested.

Until now courts at the federal level have not developed robust jurisprudence in this area of law. Currently, even strong cases are settled because applicants are fearful of potential costs orders against them.

We also support the NACLC submission in relation to its recommendations designed to strengthen the Draft in relation to key access to justice issues, such as promoting fairness in the conciliation process, introducing a specialist division of the relevant courts, and expanding the powers of AHRC Commissioners.

Burden of proof

ICLC welcomes the provision for shared burden of proof in section 124 of the Bill. Current burden of proof requirements placed too great an evidentiary burden on the individual complainant. In our experience, the complainant, at the time of making a complaint, is already suffering extreme disadvantage and facing quite burdensome costs in terms of time, administration and development of new skills and knowledge. Further, the respondent often holds the relevant evidence.

Removal of comparator

ICLC strongly supports the removal of the comparator test from the definition of discrimination in the Bill. The requirement for a comparator has previously, too often required the court to construct a mythical person

with or without certain attributes against whom certain acts may or may not have been done. We believe this is an inappropriate test in legislation designed to protect basic human rights. In particular the comparator test creates an overly complex process for assessing incidents of intersectional discrimination.

Suggested amendments to the bill:

ICLC is particularly concerned about:

- The inclusion of heterosexuality in the definition of sexual orientation;
- The lack of gender non-conformity in the definition of sexual orientation;
- The lack of intersex as a protected attribute;
- The lack of protection on the grounds of occupation;
- The lack of protection on the grounds of irrelevant criminal record and
- The lack of provisions prohibiting homophobic, transphobic and intersexphobic vilification

Exemptions related to religion

While it seems that the inclusion of exemptions for religious organisations is an attempt to strike a balance between a perceived conflict in human rights, it is our submission that this approach is flawed. Most discrimination law focuses on discrimination in a public sphere – for example in employment or provision of services. Discrimination law does not seek to proscribe discrimination in a private sphere and so has little impact on the right to religious freedom. The bill needs to tackle, rather than tacitly approve, the circumstance where religious organisations tender and accept public money to provide services to the whole community but then seek to rely on religious orthodoxies or doctrine to deny service to

persons based on their sexual orientation and/or gender identities. This practice puts LGBTI communities in danger of continuing discrimination and vilification.

In our submission, if faith based organisations are providing services in the public sphere they ought to meet the standards of any other body or organisation. Further to this, if organisations are receiving public funding there ought to be an obligation for the organisation to adhere to public values. The acts of discrimination and vilification are deliberate and dangerous for people from the LGBTI communities. Particular religious beliefs ought not relieve individuals or organisations from compliance with legislative norms and other obligations of a civil society.

A further difficulty with the permanent and focused exemptions provided for in sections 33 (1), 33 (2) and 33 (3) of the Bill, is that this will entrench existing systemic disadvantage for an already marginalised group, as the effect of such an exemption will disproportionately affect community service users. A significant proportion of community services are run by faith based organisations, including crisis accommodation, disability support services, domestic violence services, drug and alcohol programs and youth programs. Service users of such programs number among the most disadvantaged members of society. It is contrary to the intention of this legislation to entrench disadvantage. Faith based exceptions will affect a large proportion of the LGBTI communities over their lifespan. In 2007, religious organisations accounted for 21.4% (8786) of all not-for-profit organisations¹.

ICLC case study:

B is a 56-year-old transgender women, B has been living in her affirmed gender since she was 17. B has a medical

¹ http://www.ourcommunity.com.au/funding/funding_article.jsp?articleId=103

condition that has prevented her from having sex reassignment surgery, and because of this does not have formal identification in her affirmed gender. B has been in a domestic violence relationship for a number of years. After a particularly violent incident B left. B attended the Salvation Army crisis accommodation for women and was turned away. The staff informed her that she was not a woman, as she did not have the identification to prove it.

As noted above, faith based organisations account for a significant proportion of not-for-profit organisations. If we consider potential employees and service users, providing faith based exceptions for 21.4% of not-for-profit organisations will leave a percentage of the most vulnerable members of LGBTI communities without legal protection from discrimination. In our submission, an amendment to the Bill to either remove s 33 (1) and (2) or significantly limit such exceptions would resolve these issues.

We note that we have endorsed the NACLC submissions and understand that these submissions advocate for a general limitations clause to replace all current exemption clauses that deem discriminatory actions or conduct to be lawful. While our first position is that permanent exemptions for religious organisations be removed, we can see merit in replacing specific exemptions with a general limitations clause. We do not support the approach of providing a mix of specific exemptions together with a general limitation clause as this is bound to add unnecessary confusion and complexity. If a general limitations clause is adopted it ought to be compliant with human rights standards by requiring the party seeking to limit a person's human rights to justify the limitation and that the limitation must be proportionate in the circumstances.

Sample drafting

We recommend that section 33 (3) be expanded to include:

(3) The exception in subsection (2) does not apply if:

- (a) the discrimination is connected with the provision, by the first person, of Commonwealth-funded aged care; or*
- (b) the discrimination occurs in an organisation or religious institution that receives government funding.*

Recommendations

The Inner City Legal Centre advocates for *no faith based exemptions*. We further recommend that an LGBTI Commissioner be appointed.

Protected Attributes

Discrimination on the Grounds of Occupation

In our experience providing legal advice to over 50 sex workers in the past 2 years, sex workers are likely to face discrimination when accessing mainstream services including doctors, education and accommodation. Social stigma surrounding the issue of sex work further contributes to these experiences.

ICLC Case study:

J is a sex worker. He consulted a medical practitioner about depression. The practitioner referred him to a counsellor who explained that sex work was an inappropriate occupation and was contributing to his depression. J stated that he had no intention

of changing jobs. As a result, he was refused medication for his illness whilst he continued to do sex work.

We submit that the consolidated Anti-Discrimination legislation should include protections against discrimination on the grounds of occupation. This is particularly important for the protection of sex workers who face significant discrimination and stigma. Sex workers who are from a non-English speaking background or identify as lesbian, gay, bisexual; transgender or intersex are particularly vulnerable groups who may face multifaceted discrimination.

Sex workers are likely to face barriers when accessing various government departments such as Centrelink, Medicare and the and also when seeking police assistance. These bodies are often not equipped with the requisite understanding or resources to provide appropriate services to sex workers. Whilst education may help to remove some of the stigmatisation that sex workers face, legislation is required to protect sex workers from unfair treatment and provide an appropriate legal remedy.

ICLC Case study:

L wants to rent a house in !. She has 2 kids and pays her rent on time with a perfect tenancy record. She works every alternate weekend when her kids are staying with their Dad. L does not want to use the home for the purposes of sex work. L applies for a house and is offered the property. She is asked to bring in her most recent pay slip when she comes in to sign the lease. The agent sees that the name of the employer is a brothel. After the agent makes a phone call to the owner, L is told that the house is no longer available.

QLD

The recent QLD case of *GK v Dovedeen Pty Ltd and Anor* [2012] and the legislative response to this case demonstrates the need to adequately protect sex workers' rights to access accommodation and services. The changes to the *Anti-Discrimination Act (QLD)* will give hotel and motel owners will have the right to refuse a sex worker accommodation or evict them and also includes homes which sex workers lease for the purpose of shelter. These provisions will apply even where workers are registered as required under QLD law. We submit that the right of sex workers to access accommodation is a basic need that must be protected under the consolidated legislation.

Sample drafting

Occupation is a protected attributed under the *Discrimination Act 1991* (ACT). The legislation is worded as follows:

(1) This Act applies to discrimination on the ground of any of the following attributes:

(m) profession, trade, occupation or calling;

The legislation includes the following exception:

Exceptions relating to profession, trade, occupation or calling

s.57N Discrimination in profession, trade, occupation or calling

Part 3 does not make it unlawful to discriminate against a person on the ground of the profession, trade, occupation or calling of the

person in relation to any transaction if profession, trade, occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances.

We submit that wording similar to the *Discrimination Act 1991 (ACT)* would be appropriate for inclusion in the consolidated legislation.

Protected attributes

We submit that the protected attributes should be expanded to include both irrelevant criminal record and the Intersex community.

Irrelevant criminal record

We note that whilst the Australian Human Rights Commission can currently receive complaints about discrimination in employment on the basis of criminal record, the absence of Federal laws regulating this area limits the Commission's powers to an inquiry only. Criminal record checks or declarations relating to criminal records continue to be increasingly commonplace in a wide range of jobs and housing.

Discrimination in employment on the grounds of an irrelevant criminal record can have a significant and detrimental effect on people seeking employment. The gravity of the direct and indirect effects from unemployment is well reported,

"There is strong evidence that unemployment increases the risk of poverty and contributes to inequality, and that it also gives rise to a series of debilitating social effects on employed people themselves,

*their families and the communities in which they live."*²

We submit that for offenders who are in the process of rehabilitation, these additional barriers to securing employment or housing may hinder the rehabilitation process or make reoffending more likely. We note that, "*a stable job and secure housing [are] major factors contributing to reduced re-offending and increased social and economic participation.*"³

The ability to discriminate on the grounds of an irrelevant criminal record increases the reliance of individuals on Centrelink and Community Housing and deprives the applicant of the opportunity to either rejoin the labour force or change their role.

We submit that there is significant evidence to support the inclusion of *irrelevant criminal record* as a protected attribute in the consolidated legislation.

Discrimination on the Grounds of Intersex

We endorse the submission of Organisations Intersex International Australia Ltd (Oii) and urge you to consider these submissions.

As informed by Oii we suggest that:

- The definition of intersex in the Tasmanian 2012 Anti-Discrimination Bill should be inserted: The definition of intersex is independent of a definition of gender identity.

² Saunders, P, '*The Direct and Indirect Effects of Unemployment on Poverty and Inequality*', in SPRC Discussion Paper. 118, University of New South Wales December 2002

³ *Human Rights Law Resource Centre Briefing Paper*, 'Reducing Offending and Strengthening Correctional Accountability for a Safer Victoria,' available at www.hrlrc.org.au.

- Gender Identity should be defined and listed as a protected attribute separate to Intersex. Gender identity should protect all binary and non-binary gender identities, including culturally specific genders, and not only those that are considered mainstream.
- "On a genuine basis" should be omitted. This criterion is not applied to other protected categories; selective application would constitute discrimination.

We submit that drafting similar or identical to the definitions included in the Tasmanian 2012 Anti-Discrimination Bill is appropriate. These definitions are as follows:

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism

Intersex means the status of having physical, hormonal or genetic features that are –

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male

Homosexual and Transgender Vilification

The need for national consistency

ICLC, on many occasions, has provided advice and representation for people who have been vilified on the basis of their sexual orientation or gender identity. While we have had some real success, there are often situations where a person has been harassed and vilified but falls outside of the scope of state legal protections. Whilst vilification is unlawful under NSW legislation, the test that is set is quite high. Gossip, humour, vindictive comments and actions and disclosure of someone's sexuality or gender history are not generally illegal.

Federal legislation, in our submission, needs to strengthen, not weaken, current state prohibitions against homosexual and transgender vilification. Although including dual protections from discrimination and vilification for the attribute of race, significantly, the draft fails to give the same amount of protection to the attributes of sexual orientation and gender identity, a dual protection already provided, although inconsistently, under state law.

In NSW, Queensland and Tasmania it is unlawful to engage in some forms of vilification on grounds associated with sexual orientation and gender identity.⁴ The language employed in the legislation to describe sexual orientation and gender identity, however, has been nationally inconsistent.

If drafted carefully, the proposed law could be an opportunity to cure inconsistency, strengthen state vilification laws and promote attitudinal change at a national level. Acting on these opportunities is instrumental to the proposed Act achieving its stated object of promoting recognition and respect within the Australian community for the principle of equality and the inherent dignity of all people.

⁴ See *Anti-Discrimination Act 1977* (NSW) ss 49ZT, 49ZTA, 38S, 38T; *Anti-Discrimination Act 1991* (QLD) ss 124A(1), 131A(1); *Anti-Discrimination Act 1998* (TAS) s 19.

Procedural outing

A significant issue for transgender people is having a person's previous name exposed. Procedural outing, as a result of government administrative practices, is a serious issue for the transgender community. Some examples of this include:

- a person has changed their name with Centrelink and Medicare but when receiving mail from federal government departments the honorific is incorrect – eg Mr Jane Smith, and
- if a person has had an ABN before transition, the ABN list on the ATO website will list previous names of the holder – this list is publicly available.

Procedural outing can occur in an employment context when a person is asked for a criminal record check. The current process in NSW, as we understand it, dictates that previous names must be disclosed to employers – as the record check includes previous names. This 'outing' may impact upon a transgender person in a particularly negative way.

Another example of procedural outing is the national database for criminal records (Crim Track). This database is accessible for both state and federal police. Our understanding is that once access moves outside state jurisdiction a federal law would protect discriminatory use of these cross jurisdictional database.

While these procedural issues will require agreement across Australian governments, in so far as this is a cross jurisdiction issue, the federal law could attach, as could the federal protections to LGBTI communities.

Social Outing

Social outing can be an issue for the gay and lesbian communities. Discrimination (or even the fear of discrimination) can act as a barrier to gay and lesbian people accessing existing protections under the law. To be clear, the fear of being outed can in some circumstances effectively block access to existing laws and protections. Without strong federal discrimination law existing rights will remain out of reach for particular communities.

Any definition of vilification ought to include a proscription against *needlessly and maliciously, without reasonable excuse, disclosing a person's previous gender identity*. Unnecessary disclosure of gender history is often the precursor to discrimination.

Equality before the law

Equality before the law ought to be extended to all protected attributes without exemption. In our view equality before the law is essential, not only to ensure that Australia's laws are non-discriminatory but also to offer the most basic of protections to those citizens victimised or discriminated against because of a protected attribute.

Although much of the Bill is dedicated to protecting individuals from unlawful treatment in the receipt of goods and services or in their daily life, a more fundamental power of any anti-discrimination law is to hold the state accountable in its role as duty bearer of rights for the whole society. This therefore requires that the laws of the Federal Government and its institutions be held up to at least the same standards that are provided for in the Bill.

Limiting the definition of sexuality

We do not support the broad definition of sexuality as a protected attribute in the Exposure Draft Legislation. ICLC supports the use of specific terminology in anti-discrimination legislation. That is, appropriate terminology that captures the whole of the LGBTI communities, and people perceived to be part of these communities.

We support the limitations in the NSW anti discrimination legislation that limit its use to 'male or female homosexual' meaning that heterosexuality is *not* covered by the legislation, and bisexuality is only covered to the extent that the discrimination relates to 'the homosexual aspects' of the person's life, or their assumed homosexuality. The reason for this is the well established evidence base that LGBTI communities are vulnerable to discrimination and vilification.

Inclusion of gender non-conformity

Gender non-conformity is a crossover issue for LGBTI communities. In the LGB communities, examples of gender nonconformity may include 'butch' women, 'femme' boys or gender queer expressions. Gender non-conformity is often a 'tell' or trigger for discrimination. However gender non-conformity may not fall under the definition of transgender in the NSW legislation, which requires living as or seeking to live as a member of the opposite sex. This means that remedies are not available to LGBTI communities until the violence has escalated.

Within transgender and intersex communities, appearing to have a characteristic from one gender can lead to a person being 'outed'. This 'outing' is often a precursor to actual discrimination. For these reasons it is important that federal protection is provided to those discriminated

against or vilified because of their gender non-conformity.

The ICLC supports the inclusion of special measures that are used to redress disadvantage experienced by LGBTI communities. The Tasmania model is of interest; it contains relatively few exemptions but does include 'genuine occupational qualification for a position that relates to gender' but also 'measures designed to promote equal opportunities'.

Thank you again for welcoming submissions regarding the Draft Human Rights and Anti Discrimination Bill 2012. We would be delighted to provide further comment.

Yours faithfully,

~~Daniel Stobbs~~

~~Director~~