

December 21, 2012

Submission on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012

The exposure draft of the Human Rights and Anti-Discrimination Bill (HRAD) 2012 represents a historic step towards making Australia the fair and just country it aspires to be, where all people are treated as equal before the law. I commend the efforts of all involved to date for their work towards this important goal. Accordingly, I am writing to express my support for the HRAD Bill and to ask that the Committee recommend it be passed in this parliamentary term.

There are, however, a number of aspects in the exposure draft that must be revised, or it will leave some of Australia's most vulnerable groups unprotected. A summary of recommendations is provided at the end of this letter. These are grounded in concerns that the draft bill does not adequately protect intersex people and other individuals who do not identify and/or present their gender in conventional binary terms of either 'male' or 'female'. This lack of protection is deeply concerning given that these particular groups endure discrimination, harassment and violence more often than any other population in Australia.

Providing adequate protection against discrimination is not only a fundamental human right, but critical to attaining and maintaining mental health and wellbeing. It is perhaps unsurprising then, that these groups therefore suffer poorer health outcomes than their heterosexual, cisgender peers, with much of these disparities attributed to experiences of discrimination. Over 36% of transgender Australians have experienced a major depressive episode (cf. 6.8% of the general population), and up to 50% have attempted suicide at least once in their lives¹. Intersex adults report levels of psychological distress at levels that are comparable with traumatized non-intersex women (e.g. those with histories of severe physical or sexual abuse)². A comprehensive discussion of these health disparities and their relationship with experiences of discrimination was tabled during the Senate Inquiry into Suicide in Australia and is summarised in Suicide Prevention Australia's³ and Beyondblue's position statements⁴ on these populations. Removing discrimination is cited as a necessary requisite to improving health outcomes and reducing suicide in these populations.

As a transgender Australian, I too have experienced discrimination, harassment and threats of violence first-hand. Since transitioning from my birth sex (female), I go about daily life as a pretty regular looking twentysomething year old guy, affirmed by visibly obvious and conventional male gender characteristics (e.g. facial hair, flat chest and deep voice, paired with masculine mannerisms and clothing). Although I personally view myself as simply 'transgender', rather than exclusively 'male' or 'female' per se, my gender identity and sex goes unequivocally unquestioned by the rest of the community as male. Generally, this affords me a degree of protection from discrimination, violence or harassment, since my transgender status is pretty much invisible. Unless of course, I am asked to present identification papers bearing my birth sex or am required to disclose my previous name (for

¹ Couch, M. et al. (2007) *Tranznation – a report on the health and wellbeing of transgender people in Australian and New Zealand*. Australian Research Centre in Sex, Health and Society, LaTrobe University. Melbourne

² Schutzmann, K. et al (2009) Psychological distress, self-harming behaviour, and suicidal tendencies in adults with disorders of sex development. *Archives of sexual behaviour* 38(1):16-33

³ Suicide Prevention Australia (2009) *Position Statement Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities*, SPA. Sydney

⁴ Corboz, J. et al. (2008) *Feeling Queer and Blue: A Review of the Literature on Depression and Related Issues among Gay, Lesbian, Bisexual and Other Homosexually Active People*. A Report from the Australian Research Centre in Sex, Health and Society, LaTrobe University, prepared for beyondblue: the national depression initiative. Melbourne

example, when opening a bank account, applying for a rental home or when purchasing a home, applying for a job, accessing healthcare or applying for a passport or driver's license). Needless to say, the incongruence between what my paperwork says and the person I am and perceived as by the rest of the world, has led to some unpleasant experiences. In situations like these I can expect, at best, a raised eyebrow and an awkward, invasive conversation (usually in a public space) about deeply a deeply personal aspect of my life with an ignorant stranger. At worst, a humiliating confrontation, unequal treatment and threats of violence can arise. Suffice to say, for as long as visibility and awareness of gender diversity remains low, the need for adequate legal protection against discrimination is heightened.

Fortunately, I have a supportive employer and so, at least on the employment front, I have not yet been disadvantaged because of my transgender status. However, as I have not amended my Western Australian birth certificate, legal protections against discrimination in any future employment matters are not guaranteed under current legislation or the proposed HRAD Bill, particularly given the rigid definition of Gender Identity outlined, and more specifically, the use of the term "genuine basis" in the exposure draft. This term is uncertain in legal effect, and the test of "genuine basis" may also be found to be contradictory by the High Court, based on available interpretations – such as was demonstrated in the case of *AH & AB vs State of Western Australia* (2011).

However, employment is just one of many domains where the right to equal treatment is uncertain. For instance, I, like many others, have encountered numerous difficulties accessing healthcare. After being referred to a specialist in 2011 to undergo routine screening for uterine and ovarian cancer, I was informed by the receptionist that the doctor may not agree to see me because she felt that the other patients in the waiting room might feel uncomfortable with me there. I asserted that I didn't think that it was legally permissible to refuse treatment, and ultimately was seen by the specialist after finally arranging to speak with them directly (though I now understand, I may not have been protected by what was then current anti-discrimination legislation or even the HRAD Bill being proposed now, should they have refused to treat me).

More recently, another doctor refused to provide a referral to a physiotherapist out of concern that they wouldn't see me because the physiotherapist might be "confronted" by my body. This doctor told me that she was operating from the "do not harm" principle (inferring that putting me in the care of a potentially transphobic specialist would be harmful). Perhaps if the legislation was more clear and comprehensive, people like me could rest assured that under no circumstances could we be refused healthcare – or at the very least could feel more confident in asserting this right when challenged. Moreover, it would go some way in helping to offset the psychological frustration that comes with having to constantly explain and justify one's identity as well as lend some support for the expectation of being treated with dignity and respect.

Experiences like these (and worse) are all too frequent for many Australians like me, and especially those who, unlike me, have not, cannot or desire not to undergo medical transition for any number of personal, social, financial, religious or medical reasons. I particularly highlight that people who do not identify as male or female (e.g. genderqueer people), people who cross dress and other individuals whose gender mannerisms or appearances are not consistent with a social interpretation of the gender with which they were born, will not be protected by the proposed HRAD bill if the definition of gender identity provided in the exposure draft is not amended to be more inclusive. I note that in my own experience, instances of discrimination and harassment peaked during and prior to transition, as my gender was not perceived as clearly male or female at that time. This, I believe, underscores the importance of removing the term "genuine basis" (especially as this would be difficult to establish for someone in the early stages of transition) and defining 'Gender Identity' in terms that are more inclusive of Gender Expression/Presentation in order to protect those individuals who may be perceived as having 'ambiguous' or non-binary gender expressions. These individuals are also often the most visible and vulnerable members of sex and/or gender diverse communities.

For abundant clarity: **as long as policy, law and legislation are framed in terms of sex**

binary absolutes – male and female – people who have physical differences of sex characteristics, or express their gender identity in ways that fall outside of those binaries, will have no protection. Given that the proposed definition of Gender Identity in the exposure draft uses binary terms, it therefore falls short of providing adequate protections for such individuals. The proposed definition of Gender Identity is also problematic for people who are intersex, for intersex is conflated with 'gender identity' in the exposure draft. Intersex is not a matter of identity - rather it is a biological fact that in many cases is determined prenatally. Intersex Australians currently have little recognition at law, no recognition in federal legislation, and only partial recognition in some states and territories, as outlined in OII's submission on the Consolidation of Commonwealth Anti-Discrimination Laws⁵.

Accordingly, it is imperative that the bill be revised to ensure a more inclusive and comprehensive approach to protections for Intersex people and those with non-binary gender identities or expressions. While I support the proposed definitions of 'Sexual Orientation' and 'Relationship Status' I ask that the committee:

- Recommend using the 2012 Tasmanian definition of "Gender Identity" (which is inclusive of Gender Expression/Presentation)
- Recommend the inclusion of "Intersex" as a protected attribute, using the 2012 Tasmanian Definition
- Recommend that the position of Commissioner responsible for Sexual Orientation and Gender Identity discrimination be established in the legislation.

Finally, there are several other areas in the exposure draft that require strengthening, more broadly speaking. While I also support the prohibition on discrimination for Commonwealth-funded aged-care services administered by faith based organisations, I ask that the committee:

- Recommend all Government funded services are restricted from discriminating, including faith based organisations
- Recommend faith based organisations, including in aged care, should not be allowed to discriminate against employees
- Recommend faith based organisations wishing to discriminate must publish a statement in position descriptions, on their website and in any brochures about their service, so that people know in advance what the organisation is about

Many thanks for taking the time to consider my submission about this important bill. I request that the committee withhold publishing my name and contact details, particularly given the personal nature of some aspects of my submission.

Yours sincerely,

⁵ OII's submission can be viewed here:
<http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%202014%20-%20OII%20Australia%20-%202011%20January%202012.PDF>