

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

20 December, 2012

Dear Senators

Thank you for providing the opportunity to make submissions regarding the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

I am writing to express my strong support for the overall intent and content of the Bill, in particular the broadening of protected attributes, and the removal of exemptions allowing government-funded religious organisations to discriminate against their gay, lesbian, bisexual, transgender or intersex (LGBTI) aged care residents. I also write urging that changes be made to the Bill to better protect transgender and intersex Australians, and to encourage the Parliament to move further to remove exemptions for any organization delivering government-funded services in Australia.

Comments in Support

I note that the introduction of a consolidated Human Rights and Anti-Discrimination Act has been a long-standing commitment of the current government, and that there have to date been extensive consultations conducted with business, religious groups, peak bodies and community members regarding its development.

I further note that, as demonstrated by submissions provided to this Committee, key stakeholders including the Department of Finance and Deregulation have expressed satisfaction that the Bill strikes the right balance between protection of the individual and reducing the regulatory burden on business.

Given this long genesis, detailed consultation, and general stakeholder approval I therefore urge Members and Senators to move swiftly to read and pass this Bill during the life of the current Parliament.

I also wish to make particular mention of the proposed expansion of protected attributes to include “sexual orientation” and “relationship status”, and to express my strongest support for these changes. I do not believe that such changes should be at all controversial, noting that all major parties within the current Parliament – the Coalition, the Greens, and the ALP – have previously indicated their support for the inclusion of these attributes.

I further wish to respond to objections that have been made to the removal of exemptions for organisations delivering government-funded aged care, particularly in relation to provision of services to LGBTI people.

I strongly support the removal of these exemptions and note that aged care providers themselves have – so far as I can see from the submissions received to date – voiced no objection to this change. Many LGBTI people are already receiving aged care, however due to either the experience or fear of discrimination they are forced to hide who they are and essentially “go back in the closet.” During what should be a peaceful time of their life, but one that can also be highly vulnerable, being forced to live out one’s days in these circumstances is not only deeply tragic, but can have a very deleterious effect on an individual’s mental health.

Accordingly, I was encouraged to hear Senator Simon Birmingham express support for the removal of these exemptions when appearing on Capital Hill immediately following the release of the exposure draft, and so sincerely hope that the Parliament acts to remove these exemptions

Recommended Changes – Removal of Exemptions

Whilst the removal of exemptions for organisations that provide government-funded aged care are to be applauded, it is my respectful submission that this should be broadened to encompass ALL organisations providing government-funded services.

Religious freedom is very important, and no government should seek to impose on that. Nevertheless there are times when a conflict between religious beliefs and practices and the views of wider society may emerge and it is not correct to always accommodate religious freedom at the expense of other principles or people. Female genital mutilation is one such example where, despite it being claimed by a very small group of people as being an important religious practice, we, as an Australian society do not accept the harm that it does to individuals and thus limit religious freedom in order to protect the individual.

So too the provision of government-funded services. Government-funded services are provided as a public good, to benefit all Australians. In many instances, religious organisations may be the only organisation, or else the primary organisation, that is contracted to deliver those services. Their refusal to accommodate some individuals on religious grounds therefore results in those people receiving no service at all, which in some cases (including homelessness services and education provision) can result in immense harm to that individual. We should therefore not accept, in circumstances such as this, that religious freedom must be protected at the expense of vulnerable individuals. Religious groups are free to discriminate in terms of who they will provide religious service too or admit into their congregation, but they should not be allowed to let their beliefs impact on other’s access to services,

specifically when such services are being provided on behalf of the Australian government for the stated benefit of all Australians.

Recommended Changes – Gender Identity and Intersex

I strongly commend the intent evident in this bill to extend protections to transgender and intersex Australians. Australian research has repeatedly found that transgender and intersex Australians experience high levels of discrimination, and this all too often takes a terrible toll on the health and happiness of the individuals experiencing it. Shockingly, 1 in every 2 trans people in Australia has attempted suicide at some point in their life.

However, I have deep concerns about the wording of the provisions as they currently are formulated.

Of most concern in the definition of gender identity is in the inclusion of the words “*on a genuine basis.*” This seems to be a test for ‘authenticity’ that does not apply to any other protected attribute in the Bill, nor is it found in other State-based anti-discrimination legislation. I would argue that the inclusion of these words is unnecessary, and may in fact make it harder for some trans people to access protections – particularly during the process of transition from one sex to another.

By way of example – it is not uncommon for some people to “switch” between presenting as male and female whilst in the early stages of transition. They may dress and behave in a way that is aligned with the gender they are transitioning too around friends, family and other safe contexts, but may continue presenting as their assigned sex when at work or in other social settings until such time as their physical transition is sufficiently advanced for them to safely present differently. This in no way reflects on the authenticity or constancy of their identity, rather it is a way of managing their safety and wellbeing during a complex process in a largely unaccommodating world. It is the most vulnerable time of life for many trans people, the time when they are most likely to experience discrimination, and I fear that the wording of ‘genuine basis’ may be problematic.

I would therefore strongly encourage the Parliament to consider adopting the wording contained in Tasmania’s Anti Discrimination Amendment Bill, wording which has, I understand, been welcomed by the communities it concerns, been uncontroversial and received tri-partisan report -

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;

I also note that 'intersex' has been included within the definition of gender identity in the draft exposure bill and this is the final issue that I would like to address this submission too.

Whilst, like all human beings, intersex people have gender identities, intersex is not a form of gender identity. It is, rather, a term that describes a range of natural biological traits or variations that lie between "male" and "female". An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be clearly defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations and in many cases, can be determined prenatally, via amniocentesis. It is therefore not appropriate that intersex be grouped underneath the heading of gender identity.

More significantly, I am firmly of the view that including intersex in the legislation in this way will not enable intersex people to access discrimination protection. In this regard, I refer to the submissions provided by both Organisation Intersex International and the Anti-Discrimination Board of NSW, both of whom draw attention to significant problems with the inclusion of intersex in the legislation in its current form, and wholeheartedly endorse the suggested changes to wording that they present.

In summary then, it is my submission that:

1. This draft Bill should be introduced into, and passed by Parliament without delay.
2. The inclusion of "sexual orientation" and "relationship status" as protected attributes should be strongly supported.
3. The removal of exemptions for organisations providing government-funded aged care should be strongly supported.
4. The removal of exemptions should be broadened to ALL organisations providing government-funded services.
5. The definition of 'gender identity' should be amended to be in line with the wording contained in the Tasmanian Anti Discrimination Amendment Bill.
6. The wording related to the protection of intersex people as outlined in the Tasmanian Anti Discrimination Amendment Bill should be adopted.

I thank you again for providing this opportunity to make a submission.

Sincerely,

Aram Hosie

Secretary: WA Gender Project

Member: National LGBTI Health Alliance Diverse Sex & Gender Working Group

Member: MSM Global Forum International Trans Reference Group