CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

SUBMISSION BY:

THE ANU COLLEGE OF LAW "EQUALITY PROJECT"

Introduction

This Submission is in response to the exposure draft *Human Rights and Anti-Discrimination Bill 2012*. It is an amended version of a submission originally made to the Attorney General's department on the consolidation. While the Equality Project is largely supportive of the draft Bill, we do not support the Bill's approach to sexual orientation, gender identity and certain exemptions. This submission addresses those issues. With respect to other aspects of the Bill, the Equality Project generally accepts and supports the Submission made by the Discrimination Law Experts Group (except where it may conflict with this submission.

Who is the ANU "Equality Project"?

The Australian National University College of Law has a Law Reform and Social Justice program, coordinated by Professor Simon Rice. A number of different law reform projects are engaged in by students as a part of this program. The "Equality Project" is one such group of students.[1] The group is mentored by Senior Lecturer in Law, Mr Wayne Morgan.[2]

The Need for Sexuality and Gender Identity Anti-Discrimination Laws at the Commonwealth Level

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Whilst it is true that all states and territories in Australia have anti-discrimination laws covering sexuality and gender identity at the state and territory level, there is dire need for protection at the Commonwealth level for two main reasons. These are first, national consistency and secondly, to provide protection in areas where the state and territory legislation is incapable of doing so.

1. *National consistency:*

The state and territory legislation uses a variety of different terminology when addressing sexuality and gender identity. With respect to the latter in particular, much of the state and territory legislation is out of date and places heavy restrictions on when these grounds can be relied on by complainants. Further, there is no consistency in the exceptions that apply to these grounds under state and territory legislation.

2. *Protection in areas where the state and territory legislation is incapable of providing protection:*

As a result of our Constitutional structure and decisions of the Federal Court of Australia, Commonwealth entities (for example CentreLink) cannot be a respondent to complaints lodged under state and territory legislation. In *Commonwealth of Australia v Anti Discrimination Tribunal (Tasmania),*[3] the Full Court of the Federal Court decided that CentreLink, as a manifestation of the Commonwealth, could not be subjected to the jurisdiction of the Tasmanian anti-discrimination tribunal and further (by majority) that the Commonwealth was not a "person" under the Tasmanian Act and thus could not be a respondent.

Given this decision, and given that Commonwealth legislation currently does not protect against discrimination on the basis of sexuality or gender identity, people who are discriminated against on the basis of their sexuality or gender identity by a Commonwealth entity have **no remedy at all** under anti-discrimination law. This is an unjust and unfair situation, and a breach of the

human rights of Australians who may not be heterosexual and whose gender identity may not conform to the norm.

This problem has actually been exacerbated by the (very welcome) reforms enacted by the Commonwealth in 2008, recognising same-sex de facto relationships for the purposes of Commonwealth law.[4] Same-sex couples now have an *obligation* to "come out" to Commonwealth agencies such as CentreLink, yet if they are discriminated against after complying with this obligation, they have no remedy under anti-discrimination law. This is an unacceptable situation in dire need of law reform.

The Equality Project therefore strongly submits that Commonwealth legislation must include protection from discrimination on the basis of sexuality and gender identity.

Sexuality/Sexual Orientation as a Protected Attribute

In relation to the inclusion of sexuality/sexual orientation as a protected attribute in the consolidated federal anti-discrimination legislation, the Equality Project submits that:

1. *"Sexuality" should be the term employed rather than "sexual orientation."*

The Equality Project acknowledges that the enactment of federal anti-discrimination legislation relies (partly) upon the Commonwealth's external affairs power,[5] and that under international law, the term "sexual orientation"

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[3] *Commonwealth of Australia v Anti Discrimination Tribunal (Tasmania)* [2008] FCAFC 104 (13 June 2008).

[4] See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act* 2008 and related legislation.

[5] *Commonwealth v Tasmania* (1983) 158 CLR 1, 127 (Mason J). Mason J stated 's 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs'; *Constitution* s 51(xxix).

is employed with a higher frequency than "sexuality".[6] As such, the Department is likely to favour the former term over the latter in the drafting of the new Act to ensure its constitutional validity.

However, the Equality Project submits that the term "sexual orientation" implies a static and immutable conception of sexual attraction in which a person is either exclusively gay or straight for the duration of their life. It risks excluding those whose sexuality is more fluid, such as those who were once married to a partner of a different sex but are now in relationships with people of the same sex.

In the opinion of the Equality Project, the High Court is unlikely to uphold a challenge to the legislation on the basis of the term "sexuality". Relying upon its external affairs power, the legislature is not bound to use the exact wording of the relevant international instrument. If that instrument were a treaty, '[i]t does not mean there must be any rigid adherence to the terms of that treaty'.[7] Further, as in the present case, 'if the subject of external affairs is some other circumstance [not a treaty], the legislative power will extend to laws which could reasonably be regarded as appropriate for dealing with that circumstance.'[8]

The legislature is thus free to legislate in relation 'to all aspects of Australia's participation in international affairs'[9] in a legislative language tailored for domestic application. It follows that the term "sexuality" would not jeapardise constitutional validity and should be favoured over "sexual orientation" for the policy reasons outlined above.

2. "*Sexuality" should be defined using a three-pronged approach referring to attraction, identity and behaviour.*

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[6] See, for example, Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, HRC Res 17/19, 17th sess, Agenda Item 8, UN Doc A/HRC/17/L.9/Rev.1 (15 June 2011).
[7] *Commonwealth v Tasmania* (1983) 158 CLR 1, 172 (Murphy J).
[8] Ibid (Murphy J).
[9] Ibid 127 (Mason J).

In State and Territory legislation, sexuality is often conceived solely in terms of various identities such as “homosexual”, “lesbian” and “bisexual”.[10] However, the flaws of such an identity-based model are easily exposed through a consideration of debates surrounding identity politics and “labeling”. In reality, men who have sex with men, for example, may not identify as “gay”. Same-sex attracted women, for example, may not identify as “lesbian” and may not, for that matter, engage in same-sex sexual activity. It thus becomes clear that sexuality might imply attraction, identity, or behaviour.

Further, attempts to define sexuality using a label-based approach can be due to a profound misunderstanding of sexual identities, resulting in offensive misrepresentations. For example, the Tasmanian *Anti-Discrimination Act* includes transsexuality as a sexual orientation.[11] Transsexuality is clearly a form of gender identity, a separate attribute deserving of its own distinct protection from discrimination.

It is for these reasons that the Equality Project supports the Freedom! Gender Identity Association’s tripartite conception of sexual orientation, applying equally to our preferred term sexuality, which refers to attraction, identity and behaviour.[12]

The definition of sexuality in the consolidated legislation should thus be modeled upon the following definition:

> ‘Sexuality, as a protected attribute, refers to:

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[10] See *Anti-Discrimination Act 1977* (NSW) s 4, which defines ‘homosexual’ as ‘male or female homosexual’; *Equal Opportunity Act 2010* (Vic) s 3, which defines ‘sexual orientation’ as ‘homosexuality (including lesbianism), bisexuality or heterosexuality’; *Anti-Discrimination Act 1991* (Qld) Schedule, which defines ‘sexuality’ as ‘heterosexuality, homosexuality or bisexuality’; *Equal Opportunity Act 1984* (WA) s 4, which defines ‘sexual orientation’ as ‘heterosexuality, homosexuality, lesbianism or bisexuality’; *Equal Opportunity Act 1984* (SA) s 5, which defines sexuality as ‘heterosexuality, homosexuality, or bisexuality’; *Anti-Discrimination Act 1998* (Tas) s 3 which defines ‘sexual orientation’ as ‘(a) heterosexuality; or (b) homosexuality; or (c) bisexuality); or (d) transsexuality’.

[11] *Anti-Discrimination Act 1998* (Tas) s 3.

[12] Freedom! Gender Identity Association, cited in Australian Human Rights Commission, ‘Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination’ (Consultation Report, Australian Human Rights Commission, 2011) 23.

- Sexual Attraction: for example whether a person is same-sex attracted, other-sex attracted, both-sex attracted, or all-sex attracted; and/or

- Sexual Identity: for example whether a person identifies as gay, lesbian or bisexual; and/or

- Sexual Behaviour: so long as the behaviour is lawful sexual activity.'

Such a definition is favoured because it avoids relying solely upon an identity-based conception of sexuality, which excludes and offends members of our sexually diverse society. In short, the tripartite definition ensures the greatest level of protection for the largest number of people.

3. *An extended definition section should be included to protect those who are discriminated against due to perceived rather than actual sexualities.*

The Equality Project supports the inclusion of an extended definition section or interpretative provision, such as those present in the current state, territory and federal legislation,[13] to ensure the protection of those who are discriminated against on the basis of a perceived rather than actual sexuality. That is to say, a heterosexual woman, for example, should be protected from discrimination on the basis of perceived lesbianism regardless of the fact that she does not identify as a lesbian, is not attracted to women and does not engage in sexual activity with women.

Gender Identity and Presentation as Protected Attributes

In relation to the inclusion of gender identity as a protected attribute in the consolidated federal anti-discrimination legislation, the Equality Project

[13] See, for example, *Anti-Discrimination Act 1977* (NSW) s 49ZF; *Equal Opportunity Act 1984* (WA) s 4; *Equal Opportunity Act 1984* (SA) s 6(4); *Equal Opportunity Act 2010* (Vic) s 7(2); *Anti-Discrimination Act 1991* (Qld) s 8; *Anti-Discrimination Act 1998* (Tas) ss 14-15.

submits that broad and inclusive definitions must be used that focus on gender *presentation* as well as identity. This is because most people who experience this form of discrimination, experience it because of how they *present* themselves to others in their daily lives. They are discriminated against because their gender *presentation* does not accord with the male/female binary.

The Equality Project submits that the basic term used in federal legislation should be "gender identity". As noted above, the enactment of federal anti-discrimination legislation relies partly on the external affairs power giving the Government capacity to enact legislation based on international law. Under international law the phrase used is "gender identity",[14] and there is no policy reason to depart from that term. It is the understanding of the Equality Project that this is also the preferred term in the opinion of transgender and intersex people and groups who lobby on their behalf.

The current definitions of "gender identity" in state and territory anti-discrimination legislation are too narrow. They restrict gender identity to the male-female binary.[15] For example, most of the definitions are based on a person "living or seeking to live as a member of the *opposite* sex". Many members of the gender-diverse community reject the notion that "male" and "female" are opposites.

As acknowledged by the discussion paper, gender identity is a complex concept, [16] thus any definition must be broad and aim to protect all forms of gender identity and presentation. The Equality project submits that the gender identity of a person not be restricted to the male-female binary. Practically this means that a person should be able to elect their gender identity as unspecified, or as neither male nor female.

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[14] See above n.6. See also International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) available at <http://www.unhcr.org/refworld/docid/48244e602.html>
[15] See, eg, *Anti-discrimination Act* 1977 (NSW) s 38 A.
[16] Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, Discussion Paper (2011) 22.

The Equality Project proposes that the legislation should avoid a definition solely based on identity categories. This will ensure that the legislation is as inclusive as possible. We submit that the definition in Australian law should be modeled on a provision proposed in the United States Employment Non-Discrimination Act in 2011:[17] Our modified version of that provision is outlined below:

Gender Identity refers to:

- *the gender related identity of a person,* (for example, being a transgender person, being a transsexual person, being an intersex person, being a person who does not identify as either male or female),
- *the gender presentation of a person,* (for example, a person who looks male but whose biological sex is female, or a person who looks female and whose biological sex is male, or a person who does not present as either male or female),
- *the mannerisms or other gender related characteristics of a person, with or without regard to the individual's designated sex at birth.*

This definition intends to cover those people who do not conform to the male-female binary, and also those who choose to identify as nothing at all other than as a person.

The Equality Projects submits that prohibiting discrimination on the basis of gender identity should also extend to discrimination on the basis of attributes that the person had in the past but no longer has. This must be reflected in the legislation to ensure that people who are discriminated against based of their previous gender identity or presentation are protected. For example, a transgender person may be accepted in their workplace as their affirmed gender, but may be discriminated against if their employer/workmates discover that they previously identified and/or presented differently.

The Equality Project acknowledges that our proposed definition of gender identity is broader than any current definition. However, we argue that it is

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[17] United States. Cong. Senate. 112th Congress. *S 811, Employment Non-*

very important to ensure anti-discrimination laws protect people whose presentation is unrelated to their gender identity. This definition would mean that people who do not necessarily *identify* as a gender, but *present* as this gender are protected. For example, it would ensure coverage of a masculine presenting woman or a feminine presenting man whose gender identity accords with their biological sex, but whose presentation differs.

The Equality Project also submits that it is important to use terms such as 'transgender' and 'intersex' in the legislative definition by way of explicit example. This is because it makes it easier for people to understand that they are included under the definition and because these identity categories are important to many in the gender-diverse community. Thus we have included those terms as examples under the 'identity' aspect of the definition.

Legislative Exceptions related to the Sexuality and Gender Identity Grounds

The Equality Project submits strongly that there should be no permanent exceptions or exemptions in any anti-discrimination law. The purpose of anti-discrimination law is to provide protection to individuals who suffer severe psychological and financial damage because of discrimination. In light of these costs, any person or entity seeking to discriminate on the basis of a protected attribute should be required to justify that discrimination. The consolidated legislation should include a single provision stating that any person seeking to discriminate must apply to the Human Rights Commission for a specific exemption and must be able to justify their discrimination as both reasonable and necessary.

Bearing in mind the above primary submission, the Equality Project makes the following submissions with respect to religious exceptions (relevant to both sexuality and gender identity) and sporting exceptions (relevant to gender identity).

Discrimination Act of 2011.

1. Religious Exceptions

Most state, territory and some federal anti-discrimination legislation include exemptions for religious institutions, allowing them to discriminate on the basis of sexuality or gender identity. Some go further and include an exemption for *anyone* – not just institutions – based on their religious beliefs.[18]

For the reasons stated above, The Equality Project rejects permanent exemptions on religions grounds for institutions or individuals. Any requests for exemptions should be brought before the Human Rights Commission for consideration and appraisal.

If there is to be a permanent exemption regime, the Equality Project submits it should be limited only to the appointment, ordination and admission of ministers of religion.

Existing federal anti-discrimination law allows religious institutions to discriminate in order to conform to the doctrines, tenets or beliefs of the relevant religion or if such discrimination is "necessary" to avoid injury to the religious sensitivities of adherents of that religion. The Equality Project strongly submits such an exemption should not be present. Maintaining religious belief never requires discrimination, belief and action being separate things.

The Equality Project submits that broad religious belief exemptions should be avoided at all costs. For example, in Victoria, there is an automatic, permanent exemption for any religious believer allowing them to discriminate if it is necessary to comply with their religious beliefs.[19] Exemptions this broad provide those with a track record of discrimination on the grounds of sexual orientation or gender identity carte blanche to ignore what society has deemed appropriate limits on unacceptable behaviour.

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[18] See, for example s.84 of the *Equal Opportunity Act* 2010 (Vic)
[19] Ibid.

Finally, the Equality project strongly submits that any permanent religious exceptions must not apply to religious-based organizations when they provide services to the community that are funded by government. When providing services to the public that have been funded by government, for example adoption, child protection services, shelters, employment services etc… - all religious institutions should be required to conform with anti-discrimination law, with no relevant exceptions applying.

2. Sporting Exceptions

The Equality Project acknowledges that the issue of transgendered and intersex people in sport has always been a controversial issue under anti-discrimination law. Current state and territory anti-discrimination legislation includes exemptions for sporting clubs, permitting discrimination against the gender-diverse community when the strength, stamina or physique of the competitor is relevant to the sporting activity.[20]

The Equality Project submits that there should be no permanent exemptions for sporting activity. Types of sporting activity vary considerably and the degree to which the strength, stamina and physique of a competitor is relevant is overly subjective. Therefore, any sporting club or organisation that wants to discriminate against the gender-diverse community should have to apply to the Human Rights Commission and justify their reasons for the need to discriminate.

As a fall back position, if the legislation is to include a permanent exemption for sporting activity, it should be as narrow as possible, and must be drafted in terms of the discrimination being "reasonable and necessary" to protect the integrity of the sport.. The Equality Project submits that the "reasonable and necessary" phrasing allows a Tribunal or Court to closely scrutinize the reasons put forward by the sporting club, and thus should be adopted.

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[20] See, eg, *Anti-Discrimination Act 1991* (QLD) s 3 (1)

Conclusion

The Equality Project welcomes the Government's consolidation of anti-discrimination laws and strongly submits that, in such a consolidation, the primary objects of anti-discrimination legislation must be borne in mind. Those primary objects are to protect vulnerable people who are members of groups historically discriminated against. For this reason, sexuality and gender-identity must be included as protected attributes. The drafting of sexuality and gender-identity grounds must be broad and inclusive. For the same reasons, there should be no permanent exceptions. If permanent exceptions are to remain, they must be drafted in the narrowest possible way.

Submitted by the ANU Equality Project

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