

21 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
COMMITTEE**

HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012 – EXPOSURE DRAFT

1. Introduction

The LGBTI Legal Service Inc. is a community legal centre based in Brisbane, Queensland. In addition to providing free legal advice to lesbian, gay, bisexual, transgender and intersex ('LGBTI') individuals, the centre also conducts legal research into areas affecting LGBTI individuals for the purpose of law reform.

The LGBTI Legal Service Inc. makes this submission to the Senate Legal and Constitutional Affairs Committee in its inquiry regarding the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 ('the Bill'). The structure of this submission is as follows:

1. Introduction
2. Summary of this submission
3. Changes introduced by the Exposure Draft supported by the LGBTI Legal Service Inc.
4. Recommendations to ensure greater protection for LGBTI individuals



2. Summary

The LGBTI Legal Service Inc. supports the introduction of the Human Rights and Anti-Discrimination Bill 2012 (Cth) and recommends that the Committee supports the passage of the Bill.

The LGBTI Legal Service Inc. welcomes a number of positive benefits of the Bill, including the following:

- The unification of Australian Anti-Discrimination law will provide a more structured and streamlined process for litigants;
- The stated objects of the Bill will give courts greater certainty and provide more consistency in making decisions under the Act;
- The shared burden of proof under s 124 for allegations of unlawful conduct under s 120 provides greater access to justice for applicants and recognises that the respondent is in a better position to adduce evidence against any allegations; and
- The definitions of 'sexual orientation' and 'marital or relationship status' under s 6 are sufficient in their scope to cover gay, lesbian, bisexual and the relationships between them.

The LGBTI Legal Service Inc. notes that there are a number of short-comings in the Exposure Draft that may adversely affect LGBTI individuals. Consequently, the LGBTI Legal Service Inc. provides the following recommendations:

- **Recommendation 1:** The recognition of sex characteristics or gender expression should be provided by changing the definition of 'gender identity' under s 6 that is the same or has same effect as the definition under the Anti-Discrimination Amendment Bill 45 of 2012 (Tas).
- **Recommendation 2:** The protection of intersex individuals by introducing 'intersex' as a protected attribute and introducing the definition of 'intersex' that is the same or has the same effect as the definition under the Anti-Discrimination Amendment Bill 45 of 2012 (Tas).
- **Recommendation 3:** Vilification based on sexual orientation, gender identity and sex expression, along with the other protected attributes, should be made unlawful in the same manner racial vilification is under the Bill.
- **Recommendation 4:** The exemption to unlawful discrimination for religious bodies should be removed and 'religious belief' should become a protected attribute in order to ensure it is not given greater protection and used to unjustly discriminate against the other protected attributes. Should the exemption remain, it should not apply to publicly funded aspects of the organisation (such as schools) and be limited to situations where a particular sexual orientation or gender identity is an inherent requirement of the position.

- **Recommendation 5:** A Commissioner in charge of Sexual Orientation and Gender Identity discrimination should be appointed. Alternatively, the Bill should be amended to state that the President of the Australian Human Rights Commission ('AHRC') or another Commissioner, such as the Sex Discrimination Commissioner, is responsible for the portfolio dealing with sexual orientation and gender identity matters.

3. Changes introduced by the Bill supported by the LGBTI Legal Service Inc.

3.1 Unification and simplification of Anti-Discrimination Law

The LGBTI Legal Service Inc. commends the decision to develop the Bill and the effect it will have in unifying a number existing anti-discrimination laws that aim to protect individuals on a number of grounds. The benefits of the unification include a more streamlined process and greater certainty for courts and individuals. This is particularly relevant in cases where an LGBTI individual may have faced discrimination on more than one ground, for example, discrimination based both on sexual-orientation and gender.

3.2 Inclusion of an objectives clause

The inclusion of the objects of the Act (s 3) is welcomed. The effect of this section is that it acknowledges the international obligations that are placed on the Australian Government not only in protecting against discrimination on a number of grounds, but also in promoting recognition and respect. It is envisage that this creates a positive culture for the inclusion of LGBTI individuals in the workplace, rather than one that is reactionary to particular instances of discrimination.

3.3 Introduction of a shared burden of proof

The introduction of a shared burden of proof under s 124 that places an evidentiary burden on applicants and requires respondents to produce evidence to the contrary is a positive development. Applicants may have difficulty in proving accusations of discrimination due to the fact that the respondent will be in possession of much of the evidence. This can prevent access to justice and applications without a remedy in actual instances of discrimination. Shifting the burden of proof recognises this discrepancy and places greater responsibility on organisations to ensure discrimination does not occur.

3.4 Definitions of 'sexual orientation' and 'marital or relationship status'

The LGBTI Legal Service Inc. commends the introduction of the attribute of sexual orientation and the definition as recommended by the Senate Standing Committee on Legal and Constitutional Affairs report on the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender

Equality. By excluding the use of specific labels for sexuality, a greater scope of protection for individuals and their respective sexualities will be provided for without the limitations and any connotations associated with such labels.

The definition of 'marital or relationship status' is also welcomed as it is envisaged that this definition is sufficient enough to provide protection for de-facto couples not in a heterosexual relationship, unlike the current legal position.

4. Recommendations to ensure greater protection for LGBTI individuals

Whilst the introduction of the Bill and the subsequent benefits outlined above are to be welcomed, there remain a number of shortfalls that may adversely affect LGBTI individuals that need to be addressed.

4.1 Vilification Law

A welcome inclusion in the Bill is that vilification on the basis of race is made unlawful under s 51, in addition to the elimination of racial vilification being an object of the Bill. However, the LGBTI Legal Service Inc. submits that there are no reasons why this should not be extended to all the protected attributes, including sexual orientation and gender identity. Such a change would not only be more consistent with the objects of the bill to promote recognition and respect for equality within the community as stated under s 3(1)(d), but also compliment the position in a number of State jurisdictions.¹

Consequently, it is recommended that such vilification should be considered a hate crime and dealt with in the same manner as under Part IIA of the Racial Discrimination Act 1975 (Cth), subject to the same exemptions.

4.2 Gender Identity and Expression

Currently the Exposure Draft protects against discrimination on the basis of 'gender identity' as defined in s 6. Whilst the inclusion of this ground is to be commended for recognising the difference between sexual orientation and gender identity, it does not adequately address discrimination against individuals whose gender expression does not conform to a particular gender; that is, the definition bases gender identity on the characteristics an individual assumes when in actual fact the dress and characteristics they assume may not conform to that identity. An example of this would be someone who identifies as a female but dresses in a way that might be considered masculine or 'butch'. The requirement that the identification is on a 'genuine basis' further complicates this definition and lacks certainty.

To rectify this, the LGBTI Legal Service Inc. recommends the definition be amended to be the same as or to have the same coverage as the definition of 'gender identity'

¹ See for example, Anti-Discrimination Act 1991 (Qld) s 124A.

that is currently being considered in Tasmania,² as this definition avoids these problems.

4.3 Intersex

The Explanatory Notes to the Exposure Draft state that the definition of ‘gender identity’ under s 6 is intended to cover intersex individuals. This definition provides for identification by a person of indeterminate sex as a member of a particular sex, however, some intersex individuals do not identify as any particular sex whereas others identify themselves as being intersex. Consequently, such individuals would not be afforded adequate protection under the definition as it stands.

It is therefore recommended that intersex individuals should be given express protection under the Act; a definition that is the same as or has the same coverage as the definition of ‘intersex’ under Anti-Discrimination Amendment Bill 45 of 2012 (Tas) in Tasmania would deliver this.

4.4 Religious Exemptions

The Bill exempts religious bodies from unlawful discrimination on a number of grounds, including sexual orientation. It is stated in the Explanatory Notes to the Draft Legislation that such an exemption is required due to the constitutionally protected right to freedom of religion. This right needs to be balanced with the rights to equality and non-discrimination; it is acknowledged that this was taken into account with the inclusion of the section 33(3) which does not allow the religious exemption to apply to the provision of Commonwealth funded aged care services.

4.4.1 Religious Exemption for Commonwealth Funded Services

As the Bill currently stands, there is no protection for other services that are delivered by religious organisations that are funded by the Australian Government. For example, Catholic schools, which are in receipt of substantial Commonwealth funding, may discriminate against young LGBTI individuals in accordance with religious doctrine (section 33(4) of the Exposure Draft). It is suggested that failing to address such discrimination that may occur in Commonwealth funded services not related to aged care does not assist in removing systemic and ingrained cultures of discrimination within these organisations. This stands in contrast to a purported object of the Bill to promote recognition and respect in the community for the principal of equality and inherent dignity of people. As such, the LGTBI Legal Service Inc. recommends that the exemption should be altered so that it does not apply to services that are substantially funded by the Australian Government.

As a more favourable alternative, it is recommended that instead of having religious exemptions, religious belief should be included as a protected ground. This will ensure equal footing with other protected grounds in line with the purported object

² Anti-Discrimination Amendment Bill 45 of 2012 (Tas) s 4.

of equality whilst upholding the protection afforded to the freedom of religion under s 116 of the Constitution.

4.4.2 Religious Exemption and Job Requirements

Should the exemption for unlawful discrimination by religious organisations remain, due to its broad application LGBTI individuals may suffer discrimination even where their sexual orientation or gender has no effect on their ability or eligibility for a particular position within the organisation.

In order to address this, should the exemption for unlawful discrimination be retained it should be limited to the circumstances where it is an inherent requirement of the position, and that position is directly involved in the administering of the religious duties (such as acting as a priest).

4.5 Commissioner Responsible for Sexual Orientation and Gender Identity

Whilst the Exposure Draft maintains the role and composition of the Australian Human Rights Commission, it is not stated which Commissioner is responsible for sexual orientation and gender identity cases. This is compounded by the fact that the new legislative scheme contains no generic role of the Human Rights Commissioner who can undertake these responsibilities and as stated in the Explanatory Notes, such a position has not been funded or filled since 2000.

It is therefore recommended that the role of a Commissioner responsible for Sexual Orientation and Gender Identity discrimination should be created in order to deal with these cases. If no such position is to be created, alternatively it is recommended that the Bill be amended to make it clear that either the President or another Commissioner (such as the Sex Discrimination Commissioner) is in charge of the portfolio for Sexual Orientation and Gender Identity matters.

Regards

per Matilda Alexander
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LGBTI Legal Service Inc.