

Friday 4 January 2013

Committee Secretary,  
Senate Legal and Constitutional Affairs Committee,  
Parliament House, Canberra A.C.T. 2600.  
Email: legcon.sen@aph.gov.au

**Re: Exposure Draft of Human Rights and Anti-Discrimination Bill 2012**

To whom it may concern,

I write today to make a personal submission in relation to the above bill and note that the comments made herein are my own opinion and not necessarily related to any organisation of which I may be a member.

I wish to note and in principle support the following submissions who discuss the issues I briefly touch on in my submission at greater length:

- Dr Jo Harrison (in relation to protection for older LGBTI Australians and whom I wrote a paper on discrimination for which I have attached to this submission for the committee's interest)
- Organisation Intersex International Australia (in relation to Intersex provisions)
- A Gender Agenda and Transgender Victoria (in relation to gender identity provisions)
- The Victorian Gay & Lesbian Rights Lobby (in relation to LGBTI provisions generally across the bill and in particular religious exemptions)
- the Human Rights Law Centre and the Discrimination Law Experts Group (in relation to the operations and technical aspects of the bill)
- Australian Federation of AIDS Organisations and ACON Health Ltd (in relation to the protection of people with HIV/AIDS within the bill)
- National LGBTI Health Alliance (in relation to general health provisions and aged care protections for older LGBTI Australians)

As a proud gay man, actively involved within the lesbian, gay, bisexual, transgender and intersex (LGBTI) communities and as an advocate of human rights for LGBTI people, I will limit much of my comments to those affecting LGBTI people and thank the committee for their time in considering my submission.

## Need for National Protections

As mentioned in the 2009 Policy Paper by the Australian Coalition for Equality<sup>1</sup> that I contributed to:

Studies show that—

- 84 per cent of lesbian, intersex, transgender, gay and bisexual people experience discrimination on the basis of their sexual orientation or gender identity;<sup>2</sup>
- up to 50 per cent of gay men and lesbians experience discrimination and harassment in the workplace;<sup>3</sup>
- 85 per cent of lesbians and gay men experience abuse, harassment or violence at some stage in their lifetime.<sup>4</sup>

Prejudice against lesbian, bisexual, intersex, transgender and gay people has a long history in our society and remains entrenched in a number of areas. Although significant gains have been made in recent decades to address prejudice and inequality, the evidence demonstrates there is a need for continuing and more robust interventions.

It is well documented that prejudice faced by intersex, transgender gay, lesbian and bisexual people contributes to—

- obstacles in accessing health care;<sup>5</sup>
- depression and other mental health problems;<sup>6</sup>
- youth suicide;<sup>7</sup>

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<sup>1</sup> Loader M, Equality (Gender Identity, Intersex and Sexual Orientation) Model Bill 2009—Policy Paper Adelaide: Australian Coalition for Equality 2009

<sup>2</sup> Victorian Gay and Lesbian Rights Lobby, *Enough is Enough* Melbourne: Victorian Gay and Lesbian Rights Lobby 2000 available at [www.vglrl.org.au](http://www.vglrl.org.au).

<sup>3</sup> Irwin J, *The Pink Ceiling is Too Low, Workplace experiences of lesbians, gay men and transgender people* Sydney: Gay and Lesbian Rights Lobby 2002 available from [www.glrl.org.au](http://www.glrl.org.au).

<sup>4</sup> NSW Attorney-General's Department, *You Shouldn't Have to Hide to be Safe—A report on homophobic hostilities and violence against gay men and lesbians in NSW* Sydney: Crime Prevention Division 2003.

<sup>5</sup> Up to 89 per cent of lesbian, gay and bisexual people experience health care professionals displaying negative attitudes towards them because of their sexual orientation. For more information see Ministerial Advisory Committee on Gay and Lesbian Health, *Health and sexual diversity—A health and wellbeing action plan for gay, lesbian, bisexual, transgender and intersex (GLBTI)* Victorians Melbourne: Department of Human Services 2003 available at [www.health.vic.gov.au/glbtimeac](http://www.health.vic.gov.au/glbtimeac).

<sup>6</sup> See Ministerial Advisory Committee on Gay and Lesbian Health, *'What's the difference?': health issues of major concern to gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians* Melbourne: Department of Human Services 2002 available at [www.health.vic.gov.au/glbtimeac](http://www.health.vic.gov.au/glbtimeac).

<sup>7</sup> For same sex attracted young people, the burden of homophobic social prejudices can be difficult to confront and, in a number of reports into youth suicide, anxiety about same sex attraction has had disproportionate representation as a significant factor in youth suicide. See Parliament of Australia, House of Representatives Standing Committee of Family and Community Affairs *Aspects of Youth Suicide* Canberra: Parliament of Australia 1997.

- higher rates of victimisation and violence;<sup>8</sup> and
- continuing unlawful discrimination and harassment.<sup>9</sup>

Fear of prejudice causes many intersex, gay, transgender, bisexual and lesbian Australians to modify their daily activities in particular environments. Almost all self-censor about their identity or suppress displays of public affection in some public situations.<sup>10</sup>

**A federal law addressing discrimination, harassment, inciting hatred and threatening violence is an important step in addressing prejudice and inequality faced by bisexual, intersex, transgender, lesbian and gay Australians.**

### **Community Support for LGBTI Provisions**

In 2009 the Australian Coalition for Equality released national polling showing that 85% of Australians (including 91% of ALP voters and 83% of Coalition voters) supported the inclusion of sexual orientation and gender identity protections in national anti-discrimination laws.<sup>11</sup>

Such high support shows the relatively comfortableness at which Australia has operated with similar provisions at state levels over the years and the general feeling that Australians believe everyone deserves a “fair go” and shouldn’t be treated unfavourably because of particular

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<sup>8</sup> In at least one study it is suggested that lesbians are six times more likely and gay men four times more likely to be victims of violent attack (NSW Police Service *Out of the Blue Report* Sydney: NSW Police Service 1995). Homophobic violence also tends to be more brutal and vicious (Mouzos J and Thompson S ‘Gay-Hate Related Homicides: An overview of major findings in New South Wales’ *Trends and issues in crime and criminal justice* No 155 Canberra: Australian Institute of Criminology 2000). Further reading may include Leonard W et al, *Coming Forward: The underreporting of heterosexual violence and same sex partner abuse in Victoria* Melbourne: Australian Research Centre in Sex, Health and Society 2008

<sup>9</sup> For example, the annual report of the Anti-Discrimination Commission of Queensland for 2007–2008 states that 3.1 per cent of complaints received related to sexuality discrimination, 2.1 per cent to gender identity vilification and 0.2 per cent to sexuality vilification.

<sup>10</sup> Up to 67 per cent of participants reported modifying daily behaviour in Pitts M et al, *Private Lives—A report on the health and wellbeing of GLBTI Australians* Melbourne: Australian Research Centre in Sex, Health and Society 2006.

<sup>11</sup> See Media Release:

[http://www.coalitionforequality.org.au/index.php?option=com\\_content&task=view&id=861&Itemid=1](http://www.coalitionforequality.org.au/index.php?option=com_content&task=view&id=861&Itemid=1)

## **Political Support for LGBTI Provisions**

The current federal government came to office promising to legislate to address discrimination and prejudice on the basis of gender identity and sexual orientation.<sup>12</sup>

In 2010 as part of a series of questions to major parties in the lead up to the election the three major parties in Australia supported reform.

The Australian Labor Party stated:

The Gillard Labor Government supports the enactment of legislation prohibiting discrimination on the basis of a person's sexual orientation or gender status, and the removal of such discrimination from Commonwealth legislation

As part of Australia's Human Rights Framework, Federal Labor is committed to combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly.

If re-elected, Labor will harmonise and consolidate anti-discrimination laws.

As part of this, Federal Labor will include protections against discrimination on the basis of a person's sexual orientation or gender status.

All States and Territories currently include sexual orientation and gender status as a grounds for discrimination, with various levels of protections. There is merit in harmonising protections under federal and state anti discrimination law. The Government will undertake consultation with stakeholders, including States and Territories, on the proposed single anti-discrimination law.<sup>13</sup>

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<sup>12</sup> Paragraph 15, Chapter 13, *Labor National Platform 2007* available at [www.alp.org.au](http://www.alp.org.au): 'Labor believes that people are entitled to respect, dignity and the opportunity to participate in society and receive the protection of the law regardless of their sexuality or gender identity. Labor supports the enactment of legislation prohibiting discrimination on the grounds of a person's sexuality or gender identity and will audit Commonwealth legislation to amend provisions that unfairly discriminate against any person on the grounds of sexuality or gender identity.'

<sup>13</sup> Australian Labor Party – National Campaign Headquarters (2010) *Response to Australian Coalition for Equality's Federal Election 2010 Party Survey. Questions 2.1-2.2*

Indeed, while in its most recent term of opposition the Labor party developed draft legislation to prevent discrimination, harassment and violence on the basis of gender identity and sexual orientation.<sup>14</sup>

The Liberal National Coalition in its response to ACE's survey stated in part that:

The Coalition condemns all forms of discrimination. We have no plans to conduct formal inquiries into Commonwealth or State anti-discrimination legislation, but we do plan amendments to Commonwealth legislation to address discrimination on the basis of sexual orientation and relationship status.

All States and Territories of Australia prohibit discrimination on the grounds of sexual orientation in a range of areas of public life, including education and employment. The majority of states and territories also prohibit harassment on grounds of sexual orientation. We support these existing statutes.<sup>15</sup>

And the Australian Greens in support for sexual orientation, gender identity and relationship status protections stated that "the Greens are the only party in the parliament committed to protecting the rights of LGBTI Australians in this way. The Greens believe that all relationships between consenting adult couples should receive equal legal and social status. We support legislation to achieve that end."<sup>16</sup> while also noting that "All Australians should be afforded equal protections before the law and membership of a private organisation or religious institution should not be basis to circumvent this."<sup>17</sup>

Given this tri-partisan support for the LGBTI provisions in this bill, and given the significant number of inquiries<sup>18</sup> since this matter was first considered by the Australian Parliament some 17 years ago, I am strongly of the view this bill is long overdue and must be passed in the current parliamentary term.

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<sup>14</sup> An exposure draft of Labor's *Sexuality Discrimination Bill 2006* was released by then shadow attorney-general Nicola Roxon MP.

<sup>15</sup> Brian Loughnane, Federal Campaign Director, Coalition Campaign HQ (2010) *Response to Australian Coalition for Equality's Federal Election 2010 Party Survey*. "Anti-Discrimination" response

<sup>16</sup> The Greens (2010) *Response to Australian Coalition for Equality's Federal Election 2010 Party Survey*. Response to Q2.1

<sup>17</sup> *Ibid*, response to Q2.2

<sup>18</sup> Democrat Senator Sid Spindler introduced the *Sexuality Discrimination Bill 1995* (which was the subject of a detailed parliamentary inquiry by the Senate Legal and Constitutional Affairs Committee in 1997). Subsequent Democrats bills included the *Sexuality and Gender Identity Discrimination Bill 2003* and the *Sexuality Anti-Vilification Bill 2004*. These matters were also considered by the 2009 Australian Human Rights Consultation (Brennan Report) and the Senate Legal & Constitutional Affairs Committee's 2010 inquiry into the *Effectiveness of the Sex Discrimination Act*.

I note however that there appears to be a concerted effort by opponents of this legislation to focus on a small number of areas needing improvement and use this as a catalyst to oppose the entire bill.

I note there has been much comments on the bill which I wish to comment on briefly and highlight why such comments should be taken as opportunities to **AMEND the bill**, rather than reject it entirely.

The first and perhaps most substantial issue focuses around the right for someone to offend. During the Human Rights Day Oration, a small part of the presenters comments focused on the bills inclusion of the word “offends” within the definition of discrimination. I wholeheartedly agree with the proposition that such terms should not be used in anti-discrimination laws and should NOT be included within the definition. As a human rights advocate I speak up for LGBTI Australians on a regular basis and I am sure, based on some choice comments the blogosphere on things Ive said, that the very fact I speak up for LGBTI people offends some Australians.

Likewise, I find myself offended when some people purporting to represent “family values” advocate for the abolition of same-sex families; or when leaders of various churches forget to remind their flocks to “love the sinner, condemn the sin” when commenting negatively about LGBTI people.

However, while these instances of offense may occur, I would not want to see Australia become a litigious society like America where such statements of free speech may result in unnecessary complaints being made and needing to be defended.

**Accordingly I support the removal of the word offends from the definition of discrimination.** I note that this simple amendment does not necessitate the bill being removed entirely or rejected by the committee. Rather I would urge members of the committee to improve the bill by proposing specific amendments for consideration.

#### **Recommendation 1 – That the bill be passed**

*That the committee notes the:*

- a. tri-partisan support for protection of LGBTI Australians within the Commonwealth Anti-Discrimination laws*
- b. 85% of Australians who support sexual orientation and gender identity anti-discrimination protections*

*c. unnecessarily high number of inquiries that have occurred over the past 17 years that have largely supported the inclusion of protections but have further delayed the enactment of such legislation with additional inquiries*

*and recommends that the bill be passed (with any amendments deemed necessary) within the current parliamentary term.*

### **Sexual Orientation**

I welcome the inclusion of sexual orientation within the bill that does not rely upon a definitional use of labels such as homosexual or bisexual. I commend this approach to the committee as an appropriate recognition that an individual's sexual identity is a personal matter that should not be required to be confined to broadly accepted categories of personal labels.

I note the Equality Law Project and Victorian Gay & Lesbian Rights Lobby's discussions on the expansion of this protected attribute to specifically state the inclusion of "behaviour, attraction and identity" to ensure clarity when reading the definition and to lessen the potential risks associated with relying upon "association" or "characteristic" basis of the protected attribute.

### **Recommendation 2: That the committee support inclusion of "sexual orientation"**

*That the committee recommend the bill retain the provision of sexual orientation, with any amendments it deems necessary.*

### **Gender Identity - Gender Expression/Presentation - Intersex**

I applaud the government's inclusion of protections for transgender and intersex Australians as outlined in the explanatory notes by the inclusion of gender identity definition within the bill.

However I refer the committee to the plethora of submissions from organisations such as the National LGBTI Health Alliance, A Gender Agenda, ACON Health Ltd, Victorian Gay & Lesbian Rights Lobby, Australian Human Rights Commission, Australian Council for Human Rights Agencies and the Human Rights Law Centre (amongst many many others) who all note their support for the inclusion of protections but draw the committee's attention to ways to improve the definition included.

They discuss how the current definition has significant issues with the use of the term “genuine basis”, the lack of explicit and broad inclusion issues pertaining to gender expression and the lack of appropriate recognition for all people who have intersex differences.

**Gender Identity – Proposed definition with current exposure draft**

The Human Rights & Anti-Discrimination Bill 2012 - Exposure Draft (HRADBED) currently defines gender identity as:

**gender identity** means:

- (a) the identification, on a genuine basis, by a person of one sex as a member of the other sex (whether or not the person is recognised as such):
  - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
  - (ii) by living, or seeking to live, as a member of the other sex; or
- (b) the identification, on a genuine basis, by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):
  - (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
  - (ii) by living, or seeking to live, as a member of that sex.<sup>19</sup>

HRADBED’s accompanying explanatory notes states:

**Gender identity:** gender identity is introduced in this Bill as a protected attribute at the Commonwealth level. Gender identity will cover people:

- born as one sex who identify as another sex, or
- born intersex who identify as either sex.

The introduction of gender identity as a protected attribute in this Bill matches the highest current standards in State and Territory anti-discrimination law and will be subject to exemptions in clauses 32 and 33 relating to religion.

This clause does not require recognition of, or provision of facilities for, people who do not identify as either sex. Protection against discrimination on the basis of gender identity implements recommendation 43 of the SDA report.<sup>20</sup>

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<sup>19</sup> HRADBED, Section 6, pg 15, Lines 15-30

<sup>20</sup> HRADBED Explanatory Notes, Page 23, Paragraphs 85-87



## Commentary on proposed Gender Identity definition

The proposed definition of Gender Identity appears to be based on the definition currently used in Victoria and is similar to definitions used by NSW, QLD, SA and ACT.

The test of “genuine basis” contained in the definition is problematic. There is no definition of genuine basis and this requirement contradicts the bill where the definition of protected attributes specifically states that the protected attribute is taken to include:

“characteristics that people who have the attribute generally have or are generally assumed to have”<sup>21</sup>

The test of “genuine basis” may also be found to be contradictory by the High Court, based on available interpretations - for example the decision in *AH & AB vs State of Western Australia (2011)* where the court held that

“for the purposes of the Act, the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable. Social recognition of a person's gender does not require knowledge of a person's remnant sexual organs.”<sup>22</sup>

As a matter of human rights the potentially evasive nature of the term ‘genuine basis’ is inconsistent with the international human rights principles of the Yogyakarta Principles. Principle 3 states

*“The right to recognition before the law” specifically discusses that people of diverse gender identity should be recognised in their “self-affirmed” gender without the need for medical procedures upon which to base their recognition.”*<sup>23</sup>

It is important to note that many transgender people may not be able to complete sex affirmation surgeries due to medical, social or financial barriers. **I therefore feel use of the term “genuine basis” is inappropriate and should be removed from any definition.**

The consolidation project has the dual role of reducing compliance on business. The proposed definition of “gender identity” is not easily understood by a lay person reading it. The Tasmanian definition however is likely to be more easily understood

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<sup>21</sup> See HRADBED, 17, 2 (a), pg 34 line 22-26

<sup>22</sup> See <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2011/hca42-2011-10-06.pdf>

<sup>23</sup> see [www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf)

by business, while maintaining the articulated objectives and constraints identified by Government in the explanatory notes.

The concept of “gender expression/presentation” is designed to protect both transgender people, cross dressers and people whose gender characteristics (mannerisms, appearances etc) are not consistent with a social interpretation of the gender with which they were born.

The proposed definition, while attempting to address the issue through use of language such as “by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise” still does not meet the necessary broad requirements sought by LGBTI communities to ensure that all sex and gender diverse Australians are protected under Federal Anti-Discrimination laws. The proposed amendments below are inclusive of these issues.

I believe that any definition of ‘gender identity’ should be inclusive of language that encompasses issues of ‘gender expression/presentation’ (which are distinct from ‘identity’), or listed as a separate personal attribute.

People who have diverse biological sex characteristics that may be characterised as either wholly male/female, a combination of male/female or neither male/female are referred to as intersex. Biological sex characteristics can include external genitalia; external or internal sex organs; hormones; and chromosomes (where medical professions interpret average levels of a particular hormone or chromosome as being associated with either a male person or a female person). While for most people experiencing intersex, their physical differences are not noticeable until a medical test identifies internal differences, for some external differences are known from an early age.

The proposed term of gender identity includes part B of “indeterminate sex” which the explanatory note outlines is designed to be inclusive of intersex people, while maintaining two sex categories of male or female. We note that OII Australia is supportive of the HRADBED not creating a third category of sex and affirm also our support of this position.

However, protection for Intersex Australians is not an issue of identity, it is an issue of protecting them on the basis of their biological differences that may result in discrimination occurring. Additionally issues of sex differences are not related to gender. Accordingly, inclusion of intersex people under the term “gender identity” is inappropriate.

It is also important to note that similar definitions in comparable jurisdictions (such as NSW) have identified that intersex has not been included in these definitions. OII Australia has referred to three cases that have been taken in NSW where discrimination on the basis of Intersex characteristics have been declined to be heard by the Anti-Discrimination Board. It is probable should the exposure draft definition continue to be adopted that the intended protection may not in effect be achieved.

Finally, it is important to note that in the Government programs that have been designed for LGBTI Australians, they have specifically understood that sex and gender are two distinct issues and that intersex people, while sharing similarities with other members of the LGBTI community, have their own specific differences that require protection from discrimination, stigma and prejudices.

**I believe that Gender Identity's definition part B, for indeterminate / intersex people be separated into its own protected attribute.**

#### **Proposed Definition: Gender Identity**

The preferred approach for the protected attribute of Gender Identity would be to ensure Gender Identity is broad and inclusive without arbitrary requirements of medical interventions. This is consistent with the recommendations of the Australian Human Rights Commission and the international Yogyakarta Principles.

The need to protect on the basis of gender expression/presentation can be achieved within a definition of gender identity that is broad, or through a separate protected attribute. In the preferred approach below, the definition of Gender Identity is inclusive of Gender Expression/presentation.

The preferred approach is derived from the Tasmanian Anti-Discrimination Amendment Bill 2012, which as at 4 December had been passed by the Tasmanian House of Assembly and is awaiting passage by the Tasmanian Upper House. It is important to note that the definitions of Gender Identity and Intersex contained within that bill have enjoyed multi-partisan support from the Coalition, the Greens and the Tasmanian Labor Party.

I recommend the adoption of the following definition of Gender Identity:

***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 believe the definition, when passed by the Tasmanian Parliament will meet the explanatory note's objectives of Gender Identity matching "the highest current standards in State and Territory anti-discrimination law".

Additionally, the definition will be inclusive of Gender Expression/Presentation, and is consistent with the Governments policy approach to matters for transgender Australians.

### **Recommendation 3 – Improved Definition of Gender Identity**

That the committee support an improved definition of gender identity that is inclusive of gender expression and is not reliant on particular labels:

***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 that the bill's explanatory memorandum specifically mention that the definition is inclusive of transgender and transsexual people.

### **Proposed Definition: Intersex (Biological Sex Characteristics)**

Intersex people have physical differences of sex anatomy. This may be differences in hormones, chromosomes or sex organs either internal or external of their bodies. In regards to the proposed definition, the term "biological sex characteristics" could be an alternative label to the proposed term to "intersex" if this were to be of preference to the Committee.

Regardless of the label used for the protected attribute, it is important to note that the proposal is not about identity or the creation of a third category of legal sex, rather it is an assurance that intersex people are protected for their physical differences.

The proposed definition also comes from the *Anti-Discrimination Amendment Bill 2012* in Tasmania and is a protected attribute that has also received multi-partisan support:

***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

The consolidation project's objective is to reduce burden on business. A key aspect of reducing regulatory burden is to ensure definitions are clear and understood. Including intersex people under gender identity does not achieve this objective. The EN's indication the government intends to be inclusive of Intersex people provides a justified ground of ensuring business clearly and simply understands its obligations through the specific definition of intersex people. This does not however mean that business will be required to consider alternative washroom facilities, or be required to record an individual's sex as something other than male or female. It simply ensures that in all areas of public life intersex Australians are protected from unfavourable treatment, harassment and discrimination.

**Recommendation 4: That the Tasmanian definition of “Intersex” be adopted**

*That the committee recommend the following protected attribute be included in the bill, as a preferred approach to the current definition of gender identity, part B*

***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

## **Aged Care – Religious Exemptions**

Over the past three years I have had the enormous pleasure of working in the area of LGBTI Aged Care in various roles, both as an educator of aged care staff and as an advocate for older LGBTI to Government and the aged care sector more generally.

During this time I have had occasion to hear a number of personal case studies which I wished to share with the committee. Due to the sensitive nature of these case studies I have had removed identification of the individuals involved.

I would also draw the committee's attention to the various stories shared as part of the Matrix Permission to Speak report<sup>24</sup>

### **Case Study 1 – Transgender Client in Residential Care setting**

*A friend of an elderly transgender woman during a consultation on discrimination issues recounted a story of her transgender friend not being adequately cared for by care staff. The transgender woman was a client of a faithbased residential service and complained to her friend of:*

- *Overhearing care staff outside her room saying "I don't want to wash 'that' " and jokes being made around her that she felt was at her expense*
- *Feeling that staff took longer to respond to her calls than others, including for requests for bedpans*
- *Being deliberately left without being washed on some days by particular staff*
- *Being roughly treated during bed washes by a particular staff member*

*She informed her friend that she didn't want to make a complaint because it would only make it worse and didn't want to cause a fuss and had no other choice to accept it and shut up because "church's have been like that for years to transgender people and they're still allowed to discriminate against us today".*

*The friend however felt this was unacceptable and spoke to the nurse in charge. She was informed that while providing care for residents, the friend need to appreciate that the organisation had a "certain philosophy and religious belief" that was often shared by its workforce. The nurse suggested her friend may be confronting to some staff and people are only human in their reactions. The Nurse in Charge stated that she never knew the staff member in question of being rough with clients and that denied it was possible that it was occurring. No investigation was known to have taken place.*

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<sup>24</sup> [http://www.matrixguildvic.org.au/docs/MyPeople\\_Exploring-Experiences-2008.pdf](http://www.matrixguildvic.org.au/docs/MyPeople_Exploring-Experiences-2008.pdf)

### **Case Study 2 – Implications of coming out in a residential aged care facility**

*One older gentleman living in a low care residential faith-based facility and approached an Alliance member about attending the recent conversations by COTA with Minister Butler on the Productivity Commission's report. In earlier discussions he identified that he was not "out" at the aged care facility, was concerned/fearful about coming out but felt that he would have to disclose his identity as he wanted to discuss being a gay man in a residential facility while at the conversation.*

*He initially chose to tell select staff members received a mix of responses from supportive, indifference through to disinterest. However when approaching the facility management to arrange transportation, and explaining that he wanted to speak about life as a gay man in a residential facility – managements response was that he should not talk "about that stuff" and refused to / "were unable" to arrange transportation for him to attend. He felt staff stopped speaking to him and those who seemed initially supportive were no longer.*

*Eventually transportation was organised by a local LGBTI organisation and the man attended the conversation to rapturous applause when he stood up and declared for the first time his sexual orientation and fears about aged care for older LGBTI people.*

### **Case Study 3 – Mental health treatment of 'gayness'**

*In rural Queensland, an 83 yo gay man was admitted to a small faith-based residential facility. After a period of pleasantly being a member of the facility a long-time friend visited and in the course of their discussion with staff the resident's sexuality was identified. The gentleman started to begin to notice he received less attention and two weeks later was visited by a social worker. Over a period of a few months various consultations related to his "mental health" were taken with a handful of professionals. He commented on a phone call to his friend that he was disturbed by the mental health professionals asking about his sexuality during each of the conversations. The gentleman was transferred from the residential facility to a psychiatric facility. To the friends knowledge he had no history of serious mental health illness and in conversations with the resident after being transferred, the resident indicated he felt his transfer was due to his sexuality and the prejudice of the management at the faith based provider.*

### **Case Study 4: Finding a welcoming environment**

*A gay man was seeking a residential facility for his partner. He went to two local facilities that happened to be faith-based. During the inspection of the facility he declared his same-sex relationship and inquired if this would be a problem for the*

facility. He was informed the facility was faith-based and many of its residents were of X denomination and asked if his 'friend' would feel comfortable in such an environment. He observed staff was physically uncomfortable after the disclosure. Discussion was initiated by the facility around concerned other residents might act poorly towards his partner if they were to discover he was gay. Both facilities suggested another facility in the area who might be more suited to "your particular needs". The partner inspected the third facility but felt the financial commitment would be challenging.

He settled on one of the faith-based facilities and his partner moved in. Over a number of months, the partner observed snide remarks, disapproving noises and comments from staff and less than supportive attitudes from the management. He also indicated that he felt he was not given the same information as a husband or wife would be and constantly had to ask probing questions to find out about what was happening with his partner. Eventually after feeling continually uncomfortable and unsupported the partner downsized their home to afford the necessary bond to secure a place in the private sector aged care facility in the area as there were no non faith-based providers in the not-for-profit aged care sector.

### **Case Study 5: Preaching in your home**

An extroverted transgender woman in her late 70s required help to remain in her home following a hip replacement. The local HomeCare provider was a faith-based provider and arranged for a staff member to attend her home three times a week to help with both domestic and personal support. After the first visit being told of the transgender woman's colourful history including prostitution and working in an illegal club, the faith-based provider returned for her second visit. Towards the conclusion of her second visit, the worker produced a pamphlet on Jesus Christ and handed it to the client telling her that she had lived a life of sin and should consider finding God. The transgender woman told the worker that she did not appreciate being preached to in her own home and did not believe in God. A colourful discussion bordering on argument ensued during which the worker was asked to leave and take her pamphlet with her. She did leave, but left her pamphlet behind.

The transgender woman's carer rang the provider to complain about the action of the woman and was initially told that the woman was "just doing her job" and as a devout Christian was kindly preaching the good word. The carer sought assistance from the local ACAT team to transfer to a secular provider but was informed that the faith-based provider was the only one in the area with available packages. An emailed complaint to the service provider was sent by the carer requesting that another



*worker would be assigned and this was agreed to by the service provider.*

*Things appeared to go smoothly for a few weeks until one day the new worker was unavailable and was replaced by a third worker on a temporary shift. The third worker was visibly aghast at the transgender woman's life as they talked and visibly disgusted. Towards the end of the shift she also suggested the transgender woman might like to attend the local church and repent for a lifetime of sin. Following this action, the carer was unable to convince the transgender woman to allow a worker back into her home and she did not receive assistance. A few weeks later an accident occurred at home resulting in the transgender woman being placed back into hospital and finally in a nursing home until she passed away a few months later.*

In my experience I believe it is important to note that the aged care providers I speak with who are from a faith-based background, do not wish to discriminate against LGBTI Australians. I note however, that some submissions have argued to the committee that they feel such a limitation on religious exemptions is tantamount to an attack on religious freedoms.

I would simply point out a few things for the committee to consider:

- 1) Many LGBTI people may be of the particular faith of the service and most are not noticeably LGBTI beyond same-sex touching with a partner in a discrete and appropriate manner that any shared environment would expect from two loving people.
- 2) The inclusion of LGBTI people being treated as equals to their residents does not infringe on other residents' rights.
- 3) All residents who enter aged care sign a residents charter of rights and responsibilities that ensure provide the starting point for resolving conflicts between residents.
- 4) In my opinion the aged care industry is very adept at addressing these issues, including when faced with a resident of Asian descent and a resident who is a returned veteran who is uncomfortable sharing facilities with a person of Asian descent.
- 5) Aged Care is more than simply residential care, which constitutes only a small portion of the services funded by government. It is necessary therefore to remember that such protections as those being proposed are inclusive of all services.

I note however the concerns raised by the National LGBTI Health Alliance and the Victorian Gay & Lesbian Rights Lobby in regard to technical aspects of the bill and support their call for the limitation to be placed across all exemptions to ensure no loopholes may be found at a later date.

**Recommendation 5: That the committee support aged care protections**

That the committee supports the limitation on exceptions and exemptions for aged care providers including religious organisation.

Further that the committee specifically state support for these provisions contained within s33(3) and amend the bill in the following manner to ensure consistent application across the bill:

- a. that the provision currently found within s33 (3) be applied across the entirety of division 4 to cover all exemptions/exceptions; in particular:
  - s 43 (domestic duties);
  - s 34 (club or member based associations) and
  - s30 (regulations)
- b. that the definition of 'Commonwealth-Funded Aged Care' be updated to specifically include reference to the Commonwealth HACC / Home Support program

I wish to thank the committee for considering this brief submission on the key concerns I have regarding the proposed legislation and I look forward to following the Committee's progress.

I am of course available, to discuss with the committee, should it wish, any further aspects of this submission

Kind regards

Corey Irlam

Encl. Harrison, J and Irlam, C B (2010) *The removal of same-sex discrimination: Implications for lesbian, gay, bisexual, transgender & intersex (LGBTI) aged care – Discussion Paper*. Adelaide Australian Coalition for Equality and Diversity Futures.