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'Living & Loving in Diversity'

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AGMC Submission to the Legal and Constitutional Affairs Legislation Committee on the Inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation

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INTRODUCTION

The Australian GLBTIQ Multicultural Association Inc. (AGMC) is the peak body for individuals/groups from a gay, lesbian, bisexual, transgender, intersex and/or queer (GLBTIQ) multicultural background. The AGMC aims to represent the interests of Australian GLBTIQ individual/groups from a multicultural background. It does this primarily by raising their profile within the wider GLBTIQ and multicultural communities and encouraging their inclusion and active participation in these communities and Australian society in general. It promotes, enables and disseminates knowledge on issues relevant to GLBTIQ multicultural individuals/groups through public events, discussion, research, publications and other means. In addition the AGMC encourages and supports the formation and growth of GLBTIQ multicultural groups.

We welcome Government efforts to consolidate existing Commonwealth anti-discrimination law into a single Act that lifts differing levels of protections to the highest standards and enhances protections. We also welcome the consultation that has occurred with various sectors of the community in doing so, including targeted consultation with GLBTIQ groups.

Thank you for the opportunity to provide feedback on the resulting Exposure Draft legislation for the Human Rights and Anti-Discrimination Bill 2012.[1]

We strongly support the passage of this Bill in the current parliamentary term due to the fundamental protections that it provides for GLBTIQ Australians, including the reverse onus

[1] This submission has been prepared by Gabi Rosenstreich on behalf of AGMC, in consultation with members and other GLBITQ groups, in particular the NSW Gay and Lesbian Rights Lobby and the National LGBTI Health Alliance, of which AGMC is a member. We endorse the submissions of both of these organisations.

provisions. We do, however, have several recommendations for improvement as outlined below.

SCOPE OF PROTECTIONS

We strongly support the coverage of additional protected attributes including sexual orientation and gender identity. The importance of protecting the right to profess and embrace one's background and identity in federal laws is crucial to GLBTIQ multicultural groups. While we have the *Racial Discrimination Act* 1975 *(*Cth*)*, there is currently no federal Act protecting against discrimination on the grounds of sexual orientation (including people who are lesbian, bisexual, gay and those questioning their sexual orientation) or gender identity. The Bill will address this gap and significantly improve the ability of GLBTIQ people to participate fully and freely in Australian society. We particularly welcome the inclusion of protection from multidimensional discrimination (discrimination on the basis of a combination of attributes) in the Bill.

We do note, however, that the Exposure Bill does not adequately protect the attribute of sex identity (intersex status) and that some further improvements can be made in relation to the definition of gender identity and the protection from discrimination by association and from vilification.

Gender identity and the protection of intersex people

We strongly welcome that Exposure Bill aims to extend protection to intersex people and transgender people and the efforts within the Bill to be inclusive of sex and gender diverse people who do not identify with either of these terms, as is the case for many people with multicultural backgrounds.

The current definition of 'gender identity', however, requires strengthening. For example, it does not adequately address gender expression and inaccurately perpetuates the idea of two distinct sexes through use of language such as "characteristics of the other sex". This excludes transgender people who do not identify in terms of such a dichotomy.

It also inadequately and inaccurately addresses intersex people by subsuming them within this definition as a third "indeterminant" sex. Intersex people are a diverse group whose physicality does not fit in with traditional understandings of a male/female sex dichotomy in a wide range of ways. This relates to biological sex and is distinct from gender identity (which intersex people

also have). We refer to the submission made to the Committee by the Organisation Intersex International Australia.[2]

We also share the concerns voiced by the NSW Gay and Lesbian Rights Lobby in their submission that the term "genuine basis" potentially creates legal uncertainty and appears to contradict the stated purpose(s) of the Bill in regard to gender identity, where it is taken to include "…characteristics that people who have the attribute generally have or are generally assumed to have" (*17(2)(a)*).[3] As with sexual orientation, whether the person is or is not actually transgender (or lesbian) should not determine their protection under the law from transphobic (or homophobic) discrimination.

We note that the Tasmanian Anti-Discrimination Amendment Bill (No. 45 of 2012), currently before the Tasmanian lower house, appears to provide a useful model for the Human Rights and Anti-Discrimination Bill 2012 in relation to gender identity and intersex status as it includes gender expression/presentation and differentiates the two attributes. We also suggest that the National LGBTI Health Alliance's Diverse Sex and Gender Working Group is a nationally representative body whose expertise should be drawn upon in consideration of definitions included in the Bill and their implications.[4]

Recommendation: That the definition of gender identity be modified in consultation with the National LGBTI Health Alliance'sDiverse Sex and Gender Working Group to remove the implicit dichotomy of exclusively male or female sex

Recommendation: That a definition of intersex/sex identity as an attribute be incorporated in consultation with the National LGBTI Health Alliance's Diverse Sex and Gender Working Group and protection of intersex people be explicitly incorporated into the legislation

[2]Organisation Intersex International Australia (2012) *Submission to the proposed federal Human Rights and Anti-Discrimination Bill*.

[3]See NSW Gay and Lesbian Rights Lobby (2012) *Exposure Draft of the Human Rights and Anti-discrimination Bill 2012. Submission to the Senate Legal and Constitutional Affairs Committee*. Sydney.

[4] See for example National LGBTI Health Alliance (2012) *Diversity in Health: Improving the health and well-being of transgender, intersex and other sex and gender diverse Australians*. Sydney.

Multidimensional discrimination

We particularly welcome the recognition of discrimination on the basis of a combination of attributes in the Bill. The social sciences have long acknowledged the lived experience of intersections between different social identities/categories (e.g. sexual orientation and ethnicity) and the resulting specific discrimination sometimes faced by particular groups (e.g. lesbians of colour) that is qualitatively different to the experiences of people who share one or other aspect of their identity.[5] It is an interplay of various dimensions of discrimination and more than a mere addition of different forms of discrimination.[6] Multidimensional (also known as 'multiple'[7] or 'compounded') discrimination is the everyday experience of many AGMC members: the "doubled edged sword" of discrimination experienced on the grounds of a culturally and linguistically diverse background as well as being GLBTIQ, e.g. by a gay and Greek man.[8] The grounds on which the discrimination is based are not always clearly distinguishable from each other. Such complexity has not to date been adequately reflected in legislation, with existing laws requiring individuals to define their experience exclusively – and inaccurately - in relation to one attribute, often resulting in a lack of justice.

Discrimination by association

We strongly welcome the Bill's inclusion of discrimination on the basis of assumed attributes. This is an extremely important aspect of protection given that most discrimination arises from assumptions rather than any factual knowledge of a person's actual identity. We do, however, have concerns that the current draft of the Bill may not adequately protect people who are discriminated against on the basis of association. This has two dimensions:

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[5] See for example Young (1990) *Justice and the Politics of Difference*. Princeton.

[6] See Rosenstreich (2007) "The Mathematics of Diversity Training: Multiplying Identities, Adding Categories and Intersecting Discrimination" In Broden & Mecheril (ed.) *Re-Präsentationen: Dynamiken der Migrationsgesellschaft*. *[Re-Presentations: Dynamics of the Migration Society]* Duesseldorf. Online: http://bieson.ub.uni-bielefeld.de/volltexte/2007/1105

[7] The UN World Conference against Discrimination 2001 used the term 'multiple discrimination' to refer to unequal treatment related to discrimination on a number of grounds. www.un.org/WCAR accessed 18/12/12

[8] See for example two Australian special issues of *Gay and Lesbian Issues and Psychology Review, "*'Living and Loving in Diversity': Interweaving Sexualities, Genders and Ethnicities", Vol.4(1) 2008 and "Health in Difference: Doing Diversity" Vol.6(3) 2010 www.groups.psychology.org.au/glip/glip_review

1. Discrimination of people who are known to be heterosexual and/or cisgendered (not transgender) but who are also known to be or assumed to be associates of GLBTIQ people. Family members of GLBTI people are frequently subjected to harassment and discrimination related to the sexual orientation, sex or gender identity of their relative, e.g. children of same-sex couples being discriminated against in schools[9] or partners of transgender people who experience discrimination in employment or the provision of accommodation.

2. Homophobic and transphobic discrimination targeting people who are known to be heterosexual and/or cisgendered (i.e. not transgender) but who are perceived to be inadequately expressing their gender and are therefore associated with GBTIQ people.[10] For example, a heterosexual UK man who was subjected to homophobic bullying in the workplace was initially found to not be covered under the *Employment Equality (Sexual Orientation) Regulations 2003* because his colleagues knew that he was not actually gay. This ruling was overturned by the UK Court of Appeal in 2008, which granted that homophobic "banter" constitutes harassment regardless of the orientation of the victim.[11] AGMC is concerned that such a situation may not be covered in Australia under the current draft of the Bill.

Recommendation: inclusion of protection from discrimination on the grounds of association with one of the protected attributes

[9] While the 2007 relationships law reform removed most structural discrimination of children of same-sex parents on the basis of relationship status of those parents, other forms of discrimination persist. We are not aware of comprehensive research in Australia, however, overseas studies demonstrate discrimination of children with GLBTIQ parents. The situation is unlikely to be significantly different in Australia. See, for example, for the UK Guasp/Stonewall UK (2010) *Different Families: The experience of children with lesbian and gay parents*. http://www.stonewall.org.uk/documents/different_families_final_for_web.pdf accessed 21/12/12

[10] See Plummer (2001) "Policing Manhood: New Theories about the Social Significance of Homophobia" In Wood (ed) *Sexual Positions: An Australian View*. Melbourne.

[11] Stephen English v Thomas Sanderson Ltd 2008, see http://www.oldsquare.co.uk/news/1/?c=30094 accessed 21/12/12

Vilification

We are concerned that the current vilification provisions do not extend to sexual orientation, gender identity or sex identity/intersex status and suggest that this omission be remedied.

Recommendation: inclusion of protection from vilification on the grounds of sexual orientation, gender identity and sex identity/intersex status

EXCEPTIONS

We strongly support the removal of aged care from the available exceptions in the Bill compared to existing legislation. However, we note that exceptions also need to be reduced in relation to service provision in the areas of health, education and social services as these are areas that our members report most frequent experience of discrimination. There is now a strong evidence base revealing both the extent and the impact of discrimination against GLBTIQ people in these areas in Australia.[12]

There are still too many examples of organisations claiming exemption from antidiscrimination provisions on religious or other grounds and harming the wellbeing of vulnerable GLBTIQ people through ignorance and/or prejudice. [13] We know from our own experiences that this need not be the case. Within all religions and cultures there are diverse perspectives on homosexuality, gender identity and intersex status. AGMC works collaboratively with a range of faith-based and multicultural organisations and there are numerous examples in Australia of cultural such organisations working inclusively and respectfully with and for GLBTIQ people. For example the Jewish Community Council Victoria has established a GLBT reference group and in 2011 released a report on prejudice and mental health issues in Melbourne's Jewish GLBT community.[14] While discrimination within religious contexts remains a significant issue, there are also now

[12] See for example, Leonard et al. (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*. Melbourne; Hillier et al. (2010). *Writing Themselves in 3: The Third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*. Melbourne.
[13] Kassisieh (2012) *"We're family too": The effects of homophobia in Arabic-speaking communities in New South Wales*. Sydney.
[14] See www.jccv.org.au/news/614/59/Peak-Body-Releases-First-Ever-GLBT-Report.html

throughout Australia many explicitly openly gay or lesbian religious leaders, GLBTIQ-inclusive churches and synagogues and public support from religious organisations for people who identify as GLBTIQ and their specific concerns.[15] Indeed, assumptions that particular religious groups are inherently homophobic and transphobic contribute to the marginalization of GLBTIQ people from those communities in both the mainstream GLBTIQ community and broader secular society in general. Government should not be condoning such discrimination under the guise of religious tolerance but rather encouraging faith-based groups where necessary to promote their own dialogues about the inclusion of GLBTIQ people within their communities and constructively challenging such organisations where they contradict the spirit and the letter of laws such as the Human Rights and Anti-Discrimination Bill 2012.

Just as the Government as the representation of *all* Australian citizens would not accept arguments that homophobic discrimination is part of Australian sporting tradition and therefore its continuation should be enshrined in law, nor should it accept claims that cultural or religious groups should be granted the right to discriminate - as is the case if they are granted a general entitlement to exemptions from antidiscrimination legislation.

Individuals from cultural and religious groups that tend to be marginalized within broader Australian society will often seek support from within those communities in preference to mainstream organisations where they may fear discrimination and/or simply a lack of understanding of their lives and thus poorer quality support. The social support, health care and other services provided by these community-based organizations are often of great value. GLBTIQ people from multicultural backgrounds should not be forced to choose between potentially culturally inappropriate services and potentially homophobic or transphobic services.

Where groups are in receipt of public funding for the provision of services, we see no justification them to stigmatise and marginalize GLBTIQ people.

[15] See for example www.gaychurch.org/Find_a_Church/foriegn_nations/australia.htm; www.smh.com.au/nsw/gay-ministers-show-a-uniting-front-to-lead-congregations-20110821-1j4rf.html; http://www.dayenu.org.au/synagogues.htm All accessed 10 December 2012.

We strongly feel that exceptions should be granted only on a case-by-case basis and put through a high degree of scrutiny. They should be granted only where the applicant can provide a strong case for justification. As with the provision for temporary exemption granted in Section 55 of the *Disability Discrimination Act 1992*, any exceptions should not exceed 5 years. We also strongly recommend that no roll-over extensions be provided for – any organisation wishing permission to discriminate should be required to reapply, making a strong case why this continues to be in the public interest.

We also consider that any organizations acting on the basis of a granted exception should be required to publically disclose this.[16]

Recommendation: Reduction of exceptions in the areas of health, social service and education service provision and employment and requirements that any exceptions be case-by-case with a high level of scrutiny, temporary and fully disclosed

COMPLAINTS PROCESS

Many people face challenges in engaging with a legal mechanism such as the complaints process when they have experienced discrimination, so we welcome that the objects of the Bill include a complaints process that emphasizes alternative dispute resolution and is accessible to all (*Division 2,3(1)(f)*).

We note that barriers to accessing protection can be particularly high for GLBTIQ people with multicultural backgrounds. Language barriers for example, pose a significant challenge for those with first languages other than English, as well as others, for example with low literacy skills. It is essential not only that information is available in numerous languages and in plain, accessible English[17] but that interpreters are available at no cost and who are adequately trained to

[16] We refer to the 2012 submission made by the National LGBTI Health Alliance to the Attorney General's Department in response to the Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws. www.lgbtihealth.org.au/submisssions. Accessed 18/12/12

[17]Text adapted for people with learning disabilities are often also useful for people with low English language literacy and should be generally available, rather than being specifically framed as resources for disabled people.

sensitively and appropriately engage with topics such as sexual orientation and gender identity. This ranges from knowledge of non-stigmatising terminology in both English and the other language(s), through nonjudgmental body language etc, to proactively addressing concerns about confidentiality in what are often small communities with the potential for interpreters to know a complainant's family members.

Recommendation: The complaints process be carefully reviewed in relation to access by GLBTIQ people with multicultural backgrounds and identified potential barriers addressed, with adequate resourcing made available to enable equitable access

AGMC would be more than happy to assist in the review process.

Improvements in the complaints process is only one dimension of improved access to justice, however. The empowerment of GLBTIQ people to assert their rights and respond effectively to discrimination is a necessary complement to a complaints process. Some valuable work has been done in this area, for example, with support from a Commonwealth Human Rights Education Grant, the Gay and Lesbian Rights Lobby in NSW conducted workshops to inform GLBTIQ people of their legal rights in relation to discrimination. However, we note that these activities have a limited scope and only reach a very small proportion of GLBTIQ people in Australia, including very few people with multicultural backgrounds. A more concerted national project that based on a broad empowerment approach would be effective in both reducing discrimination and enabling those who do experience it to access justice.

Recommendation: That the legislation be accompanied by a government funded national action program to empower GLBTIQ people to assert their rights and respond effectively to discrimination, with specific targeting of GLBTIQ people with multicultural backgrounds

PROMOTION OF VOLUNTARY COMPLIANCE

We welcome that the objects of the legislation include:

"(d) to promote recognition and respect within the community for:

(i) the principle of equality (including both formal and substantive equality); and

(ii) the inherent dignity of all people"

(e) to recognize that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments" *Division 2, 3 (1)(d-e)*

We argue that the promotion of recognition and respect requires special measures that go beyond the scope of the current draft legislation.

We support the recommendation made by the National LGBTI Health Alliance in their 2010 submission to the Australian Human Rights Commission Consultation: "Legislation is crucial but will not change 'hearts and minds'. Federal anti-discrimination legislation must be accompanied by a targeted national action program that includes community education to reduce transphobia, homophobia and discrimination against intersex people and to empower LGBTI people to assert their rights and respond effectively to discrimination."[18]

The European Commission took this approach when it introduced antidiscrimination directives in 2000 requiring member states to introduce minimum standards of legislation. The directives were complemented by a range of other mechanisms including a comprehensive social action program, with the overriding approach acknowledging that combating discrimination is fundamentally linked with the promotion of respect for diversity (the motto was "Against Discrimination – For Diversity"). [19] This was a well-funded program that enabled community organisations already actively working in this area to utilise a range of strategies to promote compliance with both the letter and the spirit of the law. Supported projects included some working to combat multidimensional discrimination faced by, for example, lesbian migrants, addressing homophobia within multicultural communities and racism within GLBTIQ communities.[20]

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[18]National LGBTI Health Alliance (2010) *Discrimination on the basis of sexual orientation and sex and/or gender identity: Position of the National LGBTI Health Alliance*. Sydney. Page 1. www.lgbthealth.org.au/submissions Accessed 18/12/12

[19] See for example http://ec.europa.eu/justice/discrimination/index_en.htm. It has since been anchored within the PROGRESS Programme . See http://ec.europa.eu/justice/grants/programmes/progress/index_en.htm. Accessed 18/12/12

[20] See www.lesmigras.de Accessed 18/12/12

The current human rights education program within the Attorney General's Department is a step in the right direction to supporting compliance, but not sufficient.

Recommendation: That the legislation be accompanied by government-funded national action programs to combat transphobia, homophobia and discrimination against intersex people and racism, with a particular targeted component addressing the multidimensional discrimination faced by GLBTIQ people with multicultural backgrounds

FUNCTIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

AGMC is strongly supportive of the role of the Australian Human Rights Commission (AHRC) and welcomes the affirmation of the Commissioners positions in the Bill. We note, however, that the current position of Human Rights Commissioner includes GLBTIQ issues within their portfolio – the envisaged discontinuation of this position must be associated with the establishment of a new Commissioner position with responsibility for the area of sexual orientation, gender identity and sex identity/intersex status. Otherwise the AHRC will not be able to fulfil its mandate in relation to education and compliance. Such a position must be adequately resourced with staff and funds.

Recommendation: Establishment of a dedicated Human Rights Commissioner position in the Australian Human Rights Commission with responsibility for the area of sexual orientation, gender identity and sex identity/intersex status and appropriate resourcing

Melbourne, 21 December 2012

Alyena Mohummadally - Chairperson – AGMC Inc.

& Gabi Rosenstreich - Committee Member and Author, on behalf of AGMC Inc.