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21 December 2012

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

Via email: LegCon.Sen@aph.gov.au

Dear Ms Dennett

Inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation

We thank you for the opportunity to make this submission to the inquiry.

TransGender Victoria supports the submissions of The Victorian Gay and Lesbian Rights Lobby and Organisation Intersex Internationale Australia.

We wish to focus on areas of the draft relevant to our experience and our constituents.

Definition of Gender Identity

We would support the definition of gender identity currently before the Tasmanian Parliament, as per http://www.parliament.tas.gov.au/bills/pdf/45_of_2012.pdf namely:

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

We fully appreciate that processes for finalisation of the federal exposure draft took place at the same time as the development of the Tasmanian bill and that the Tasmanian definition was therefore not available for consideration when formulating the exposure draft.

We support the Tasmanian definition for the following reasons:

the definition has simpler and more concise language and is therefore easier for all parties to understand;
the inclusion in the draft of "genuine" creates unnecessary burden for those needing to comply with the law e.g. employers and where used in previous state and territory law has added no value for any party. Further, some of our constituents have stated

inclusion of genuine or similar words implies that the attribute is less valid, both in itself and in comparison to other attributes;
the Tasmanian definition, by eliminating the use of the words “a person of one sex”, eliminates any implication that the person protected by the attribute is always considered who they are based on their body/assignment at birth.

We support the submission of Organisation Intersex Internationale Australia (OII) and support inclusion of intersex as a separate attribute as a matter of general principle. On the basis that intersex is separate from gender identity we defer to OII for any detailed comment on intersex issues.

s14 – state and territory laws

We note our appreciation of s14 in that no existing state or territory laws will be excluded or limited by the passing of this bill into law, thereby increasing total levels of protection.

s33 – Exceptions for religious bodies and educational institutions

We believe this clause needs to be removed (we note that we are only discussing this in relation to gender identity, although the principles could apply generally). We believe any religious organisation wanting an exception needs to apply at the Administrative Appeals Tribunal on a case by case basis.

We also express concern that the section as drafted does not create transparency. For example, a trans person applying to use a service run by a religious organisation or applying for employment will not know whether they may face discrimination. An organisation that wants to discriminate needs to state expressly in writing, for example, in a job advertisement, on its website or at the start of an employment case management arrangement what their position is regarding religion and discrimination. A potential applicant or service user therefore has the ability to avoid potential distress caused by discrimination.

We also believe that no government-funded service should be able to discriminate in service provision as this is inherently contradictory to the aim of the act. While applauding s (33) 3 in relation to aged care which does not allow discrimination, other areas are equally important. To give specific examples, youth and homelessness are 2 groups who are extremely vulnerable. A homeless trans youth therefore faces likely vulnerability on 3 counts. Anecdotal evidence from the Melbourne-based social and support group Ygender fully confirms this vulnerability.

We also reject allowing discrimination in educational institutions. Research from the report Writing Themselves In 3 shows trans (and same-sex attracted) youth face rates of bullying of up to 79% in schools. This report, in combination with its 2 predecessors, shows a direct linkage between bullying and risk factors ranging from anxiety to suicide risk. We therefore believe keeping young people alive is of the utmost importance and that discrimination cannot be justified in these circumstances.

s36 – Sport

Exceptions for competitive sporting activities

Protected attributes to which these exceptions apply

(1) The exceptions in this section apply in relation to the protected attributes specified in the exceptions.

Exception for competitive sport: sex and gender identity

(2) It is not unlawful to discriminate against a person by excluding the person from participation in a competitive sporting activity if:
   (a) the discrimination is on the ground of sex or gender identity, or a combination of those attributes; and
   (b) the sporting activity is an activity in which the strength, stamina or physique of competitors is relevant; and
   (c) the person is aged 12 or over.

We would prefer to see this section eliminated completely. We believe that as per s (3) 1a the aim of this proposed law is to "eliminate discrimination" and this section contradicts this aim.

Our constituents often experience discrimination based on a stereotypical *perception* of what is right for the identity of the person. As an example, a trans woman (a person born with a male body needing to live as female) who is tall is instantly seen as having a so-called unfair advantage. This perpetuates discrimination on the stereotypical grounds that only men can be tall and muscular and that women must be petite. Even if this stereotype is overcome, there is doubt as to what constitutes unfair advantage.

This has happened to one of our constituents in relation to amateur golf. The person, a trans woman, had taken hormonal treatments for 2 years, which, according to research was more than enough time for her strength to be the equivalent of a non-trans woman. However, her height was deemed to be unfair. We have not heard of any non-trans women being barred from amateur golf simply for being tall. Further, this led to the ludicrous situation of her being allowed to play as female in a social round of golf but being barred from competing in amateur/pennant competitions as female. She was allowed to compete as female after surgery – although surgery does nothing to change the strength, stamina and physique of a trans person.

We also reject specifically the use of the words in 2(b) of the words "is relevant." We believe this in itself to be far too broad and that it is likely to create instant discrimination rather than any possible justification (if such a justification even exists) for invoking the exception.

We re-iterate that the simplest solution is to take every situation on its merits in line with the broad principle of equal opportunity law.

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Sexual harassment s 49 (2)

For the purposes of paragraph (1)b, the circumstances to be taken into account include (but are not limited to) the following:

(a) the other person's sex, age, marital or relationship status, sexual orientation, religion or race;
(b) any disability of the other person;
(c) any other relevant protected attribute of the other person;
(d) the relationship between the first person and the other person.

We would prefer that gender identity be included expressly in s (49) 2a. Our constituents have reported unacceptable experiences of "let's have a look" on returning to work after a surgery. This is blatantly discriminatory in that it implies a degree of "freak value" for trans people. Express inclusion of gender identity would emphasise the importance of treating trans people respectfully.

LGBTI commissioner s (160)

We note that other groups have a specific commissioner appointed. We believe the huge levels of discrimination still faced on the grounds of gender identity (and sexual orientation and intersex) warrant the appointment of a separate commissioner to ensure proactive investigation of discrimination in this area.

Please contact me with any query.

Yours sincerely

SALLY GOLDNER
Spokesperson
On behalf of the committee

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