EXPOSURE DRAFT OF THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012 (CTH)

NSW GAY & LESBIAN RIGHTS LOBBY SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

DECEMBER 2012

ABOUT THE NSW GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the leading organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families. The GLRL has a strong history in legislative reform.

In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and subsequent amendments. The GLRL was also successful in campaigning for an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report, *And Then … The Bride Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000* (NSW).

1. INTRODUCTION

The GLRL welcomes the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) (the Bill).

We commend the Government for developing this bill and for referring it to the Committee for review, noting that it is the result of years of consultation with representatives of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) organisations, as well as stakeholders from other sectors.

As an organisation that advocates on behalf of gay men, lesbians and their families, our remit is quite specific. However, while this submission focuses on reform for gay and lesbian people, we also note the important parallels, particularly with the sex and gender diverse communities. Therefore, in addressing the issues affecting gay and lesbian people, this submission also highlights overlapping issues affecting bisexual, transgender and intersex (LGBTI) communities, where appropriate.

2. SUMMARY

The GLRL recommends that the Committee support the passage of this Bill through Parliament, as well as recommending a number of improvements in protections for LGBTI people, which we outline for the Committee's consideration.

We make a number of recommendations which reduce the regulatory burden for Australian businesses, provide clarity for the broader Australian community and ensure that LGBTI people experiencing discrimination can access timely, appropriate and cost-effective remedies where their right(s) to non-discrimination under international, and domestic, law have been infringed.

These recommendations do not, however, detract from the GLRL's overarching recommendation that the Committee recommend passage of this Bill through Parliament, owing to the fundamental protections it provides for LGBTI Australians in a number of areas of public life. Despite the introduction of Commonwealth anti-discrimination legislation on a range of protected attributes, the LGBTI community has waited decades for fundamental protections from discrimination at a national level.

3. RECOMMENDATIONS

Recommendation One: The GLRL recommends that the Committee support the passage of the Human Rights and Anti-Discrimination Bill 2012 (Cth) through Parliament.

Recommendation Two: The GLRL recommends that the Committee support the insertion of a clause into the Bill that specifically addresses the concerns of intersex and other sex and gender diverse people.

Recommendation Three: The GLRL recommends that the Committee support the retention of the shifting burden of proof provisions in the Bill.

Recommendation Four: The GLRL recommends that the Committee support the exclusion of the provision of Commonwealth-funded aged care from the exceptions for religious bodies, and extend the scope of such exclusions to include service provision in the areas of health, education and social services.

Recommendation Five: The GLRL recommends that, where organisations seek to rely on exceptions, such reliance should be transparent and the reasons for reliance made publicly available.

Recommendation Six: The GLRL recommends that anti-vilification provisions in the Bill be extended to include sexual orientation, gender identity and biological sex characteristics, or intersex status.

Recommendation Seven: The GLRL recommends that a full-time funded position of 'Sexual Orientation and Gender Identity Commissioner', within the Australian Human Rights Commission, be established to give effect to the new protected attributes in the Bill.

4. SCOPE OF PROPOSED PROTECTED ATTRIBUTES

The GLRL welcomes the inclusion of sexual orientation, gender identity and relationship status as protected attributes under the Bill and notes the general alignment between these definitions and the Yogyakarta Principles, insofar as sexual orientation and gender identity are concerned.[1] We note with approval that the Bill addresses issues of intersectionality, or discrimination on multiple grounds or protected attributes, through enabling individuals to lodge a single claim, instead of multiple claims for discrimination in relation to each protected attribute.

As the GLRL is an organisation that deals primarily with gay and lesbian people, we are not able to comment in any detail on issues relating to sex and/or gender identity. As a result, while we strongly support the inclusion of comprehensive protections for sex and/or gender diverse people, this submission limits its comments on issues relating to sex and/or gender diverse people to general issues of definition and protection. We draw particular attention to the submissions made by the National LGBTI Health Alliance and Organisation Intersex International (Oii) Australia on this point.

However, we do note two key points below with respect to gender identity and intersex.

First, we are concerned, with the use of the term 'genuine basis' in clause 6 of the Bill. The GLRL suggests that the use of this terminology is problematic and potentially creates legal uncertainty.

Secondly, we are concerned that the provisions of the bill do not appear to provide adequate protection from discrimination for intersex Australians, through the use of the terminology of gender identity, rather than biological sex characteristics. As a result, we suggest intersex be included as a separate protected attribute and draw the Committee's attention to the Tasmanian Anti-Discrimination Amendment Bill (No. 45 of 2012) currently before the Tasmanian Parliament.

Recommendation Two: The GLRL recommends that the Committee support the insertion of a clause into the Bill that specifically addresses the concerns of intersex and other sex and gender diverse people.

[1] International Commission of Jurists (2007). *The Yogyakarta Principles: Principles On the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity.* http://www.yogyakartaprinciples.org/principles_en.htm.

5. BURDEN OF PROOF PROVISIONS

The GLRL supports the provisions on the shifting burden of proof contained in clause 124 of the Bill. The provisions provide that where a *prima facie* case of discrimination has been established on the part of a complainant, the burden of proof shifts to the defendant, who invariably has access to information directly relevant to the case and is in a position to respond to claims that have been made.

The GLRL notes that shifting burden of proof provisions exist in Australian criminal law, and they operate within the human rights regime of New Zealand, for example, including with regard to justified limits and exceptions. Section 92F of the *New Zealand Human Rights Act 1993* (NZ), which includes sexual orientation and gender as protected attributes, states:

> ***92F Proof of justified limits and exceptions***
>
> *(1) The onus of proving, in any proceedings under this Part, that an act or omission is, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limit on the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990 lies on the defendant;*
>
> *(2) The onus of proving, in any proceedings under this Part, that conduct is, under any provision of Part 2, excepted from conduct that is unlawful under any provision of Part 2 lies on the defendant.*

Shifting burden of proof provisions, like the one contained in the Bill, provide for procedural clarity and are likely to reduce the administrative, and therefore financial, burden on the part of bodies such as the AHRC, by not requiring them to obtain subpoenas to access information pertinent to a case of discrimination. Importantly, such provisions also reassure the public that complaints will be properly inquired into within a reasonable time frame, by effectively reducing administrative burden and delays, thereby ensuring timely access to justice for both complainants and defendants.

In light of the fact that the Bill provides additional powers to the AHRC to dismiss vexatious claims, or claims that have no merit, we are of the view that these provisions will not unduly burden businesses or individuals, but rather provide for timely and appropriate remedy in many instances, and thereby assist in achieving the overarching aims of the Bill.

Recommendation Three: The GLRL recommends that the Committee support the retention of the shifting burden of proof provisions in the Bill.

6. EXCEPTIONS

The GLRL considers the inclusion of a general limitations clause in the Bill is appropriate. Aside from the general limitations clause, the GLRL does not support the inclusion of permanent exceptions.

However, if specific permanent exceptions are to be retained in the form currently included in the Bill, the GLRL supports the approach taken with respect to the exclusion

of the provision of Commonwealth-funded aged care from the exceptions for religious bodies and educational institutions.

We are of the view that this is consistent with broader objectives articulated through government policy initiatives pertaining to inclusive aged-care service provision, such as the recently released LGBTI aged-care strategy[2], which are ostensibly aimed at ensuring that all Australians can age with dignity.

As a result, the GLRL recommends that the scope of such exclusions from exceptions be similarly expanded to include service provision in the areas of health, education and social services. We suggest this is appropriate in light of evidence suggesting that discriminatory treatment remains a pervasive part of life for many LGBTI Australians, including in the areas of education, healthcare and social services.

6.1 Health and Social Services

Exceptions are particularly problematic in the context of access to health and social services, where they impede an individual's right to access timely, appropriate and affordable services, sometimes in life-threatening situations. In a gap analysis of existing domestic violence services in NSW, conducted by the Lesbian and Gay Anti-Violence Project at ACON (formerly the AIDS Council of NSW), a respondent related an experience of accessing the services of a faith-based service, which resulted in referral to a 'conversion therapy' course:

> He had absolutely no knowledge about the relationship issues but he referred me to (generic community organisation) which is some sort of Christian therapy course to change people's sexual orientation. He was treating my sexuality as if it were the issue. I was very traumatised. When I went to him in very, very deep distress he interpreted that distress as an experience of guilt and shame (about my sexuality).[3]

The gap analysis identified other instances where faith-based services impeded an individual's ability to access appropriate support services, particularly in the context of domestic violence. It is important to note that there is evidence that where individuals seek assistance from faith-based service providers further victimisation on the basis of sexual orientation or gender identity may arise, with implications for mental health and wellbeing.[4] This, we believe, places on onus on law makers to proactively address this double-burden, particularly when it is faced by vulnerable population groups, including those seeking access to health and social services as well as children and young people.

6.2 Education

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[2] Department of Health and Ageing (2012). *Living Longer. Living Better:* National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy. Retrieved from: http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-lgbti-national-aged-care-strategy-html

[3] Constable, A. De Castro, N. Knapman, R., Baulch, M. (2011). *One Size Does Not Fit All: Gap analysis of NSW domestic violence support services in relation to gay, lesbian, bisexual, transgender and intersex communities' needs*. Sydney: ACON, p. 23

[4] Ibid.

In the context of education, exceptions work to legitimate the exclusion of LGBTI young people in an area where they already experience widespread discrimination. The *Writing Themselves In 3* report[5], a nationally representative survey of same-sex attracted and gender questioning young people, documented a rise in discrimination against LGBTI young people, represented by an increase in the proportion of young people reporting verbal and physical abuse. The report (2010) found that 61% of respondents reported verbal abuse, and 18% reported physical abuse. This represents an increase from the 2005 *Writing Themselves In* report[6], where 38% of participants reported unfair treatment on the basis of their sexuality, while 44% reported verbal abuse and 16% physical abuse. The *Writing Themselves In* reports have documented, over a number of years, how schools continue to be the site of significant exposure to verbal and physical abuse, all of which are manifestations of the way in which homophobia, bi-phobia and transphobia operate concurrently to produce climates that are not conducive to health and wellbeing and which work to promote the exclusion of LGBTI young people and a denial of their right to education.

A number of participants in the *Writing Themselves in 3* study recounted their experiences of discrimination on the basis of sexual orientation and gender identity, some of which were exacerbated by school environments that encouraged non-disclosure of sexuality and where exclusion on the basis of sexual orientation or gender identity was permissible by law, owing to the existence of exceptions.

Thalia (17 years) commented:

> Due to my mother's homophobia I was sent to a strict Catholic boarding school where I was forced to scrub floors and walls on my hands and knees and pray multiple times a day. I am not religious and it was an extremely homophobic environment. Within a month I was on anti-depressant and expelled after attempting suicide because 'Suicide is a sin and so it was not acceptable to take part in the school.'[7]

Reagan (17 years) commented:

> Homophobia, once again, didn't affect me as much as transphobia. I left school/let my grades slip because I truly believed I couldn't live in this world, and that I wouldn't need an education because I'd kill myself before it mattered. I suffered severe clinical depression (which still affects me, to a lesser extent) and self harmed constantly and to a physically dangerous extent - I stopped it a year and several months ago and I still have large, visible scars.[8]

Similarly, in a recent report prepared for the West Australian Equal Opportunity Commission on discrimination and bullying on the grounds of sexual orientation and gender identity, which drew on data from the *Writing Themselves in 3* report, the story of a 17 year old West Australian female-to-male trans student expelled for kissing his girlfriend was highlighted:

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[5] Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., Mitchell, A. (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: LaTrobe University.

[6] Hillier, L. Turner, A. Mitchell, A. (2005). *Writing Themselves in Again: 6 Years On - The 2nd national report on the sexuality, health & well-being of same sex attracted young people in Australia*. Monograph no. 50. Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University, p.35

[7] Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., Mitchell, A. (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: LaTrobe University, p. 52.

[8] Ibid, p.53.

> Jo was once suspended for 3 days for kissing his girlfriend. He has suffered verbal abuse and rejection from teachers, school counselling staff and students and was once cornered, beaten up and raped at his government school. Jo says 'I suffer from trauma related depression, that has a lot to do with homophobic acts that have happened to me.' He tried moving schools and avoiding using female bathroom facilities, but the situation got so bad he dropped out.

The GLRL submits that the existence and use of exceptions in the area of education, as in health and social service provision, legitimates, and often exacerbates, forms of discrimination on the basis of sexual orientation and gender identity. The existence of exceptions in areas such as health and education sends a powerful, but negative, message that discrimination against a person on the basis of their sexual orientation or gender identity is acceptable.

6.3 Employment

Employment continues to be an area of life where LGBTI people experience discrimination, often without recourse to legal remedy. A number of national studies and consultations on anti-discrimination law have documented the discrimination faced by LGBTI people in employment.

In a 2010 consultation report prepared by the AHRC, one respondent was reportedly vilified and harassed by her employer:

> Tania was employed by a church run disability service. After working for 18 months Tania attended work and found that the homepage on her work computer displayed a bible quote that said negative things about gay people. Tania assumed that this was a mistake and drew her team leader's attention to the quote. The next day the quote remained. Tania wrote a letter to the management explaining that she felt upset and unsafe having to look at that quote everyday and asked that it be replaced with a bible quote that did not vilify gay people. Three of Tania's colleagues also signed the letter. Tania was singled out and told that her gay agenda had no place in a Christian work place. Tania's professional reputation was then attacked, she was accused of poor work performance. Tania was also assigned shifts that she had previously indicated she would be unable to take or were inappropriate. Tania contacted the [Anti-Discrimination Board] to see if she could lodge a complaint and was told that her employer may be able to rely on the religious exception in the Act. Tania left her job due to ongoing harassment.[9]

This not only serves to illustrate the pernicious nature of workplace discrimination against LGBTI people, but also the way in which religious exceptions work to legitimate such discrimination, providing employers with the ability to dismiss employees who may be victims of discrimination themselves. This is not a generational issue. A recent survey on workplace diversity by *Pride in Diversity* found that young workers (or those between 16-24 years of age) were the least likely to be 'out' in the workplace[10], suggesting a reticence to identify as gay, lesbian or bisexual in the so-called 'post-closet' age and reminding us that the fear of discrimination against LGBTI people in employment, including in the workplace environment, remains pervasive.

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[9] Australian Human Rights Commission (2011). *Addressing sexual orientation and/or gender identity discrimination: Consultation report.* Sydney: Australian Human Rights Commission, p.9.

[10] Pride in Diversity. (2012). *Top Employers 2012: The Australian Workplace Equality Index.* Sydney: Pride in Diversity, p. 16.

6.4 General Comments

The GLRL is opposed to the widespread availability of exceptions proposed within the Bill in the context of service provision and employment, and particularly in the largely publicly-funded areas of healthcare, social services and education. We consider that exceptions function to legitimate discrimination, often lead to exclusion and impede LGBTI people's ability to realise other rights, such as the right to education or the right to access to timely, appropriate and acceptable healthcare services, all of which are largely publicly-funded in the Australian context, with contributions made by *all* taxpayers, including LGBTI Australians.

6.5 Transparency

Should specific permanent exceptions remain in the Bill, the GLRL strongly suggests that where individuals or organisations seek to rely on specific exceptions, there should be a requirement for full disclosure with respect to such reliance. We propose that bodies taking advantage of exceptions be required to lodge these with the AHRC prior to exercising any decision-making powers under these exceptions. In addition, the GLRL supports the publication of such reliance in other public forums including, for example, job advertisements. We note that there is public support for such measures. A recent survey by the Australia Institute, which included a question on discrimination against private school teachers on the basis of marital status or sexuality, found that, of the 1422 people surveyed, 1009 thought that such schools should be required to disclose their ability to discriminate on these grounds upfront to prospective job applicants and parents considering enrolling their children[11].

In this respect, we draw the committee's attention to the disclosure model contained in the *Equal Opportunity Act 1984* (SA) s 34(3), which provides that where:

> *(a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and*
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> *(b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and*
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> *(c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and*
>
> *(d) a copy of the policy is provided on request, free of charge—*
>
> > *(i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and*
> >
> > *(ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and*
> >
> > *(iii) to other members of the public.*

[11] The Australia Institute (2012). *Survey results – Choosing schools and teachers*. Retrieved from: https://www.tai.org.au/index.php?q=node%2F19&pubid=1065&act=display

Recommendation Four: The GLRL recommends that the Committee support the exclusion of the provision of Commonwealth-funded aged care from the exceptions for religious bodies, and extend the scope of such exclusions to include service provision in the areas of health, education and social services.

Recommendation Five: The GLRL recommends that, where organisations seek to rely on exceptions, such reliance should be transparent and the reasons for reliance made publicly available.

7. VILIFICATION

The GLRL notes with concern that, in its current form, the Bill does not extend vilification provisions beyond race. In our view this is a serious omission, insofar as LGBTI people are subject to some extreme forms of vilification, which extend beyond individual acts of discrimination and necessitate adequate legal provisions to ensure individuals have recourse to some form of remedy. A report by the NSW Attorney General's Department, for instance, found that 85% of LGBTI people in the State have experienced violence, harassment or abuse in their lives[12]. Similarly, in a report prepared recently by the Inner City Legal Centre on the legal needs of LGBTI people, it was found that 58.4% of respondents had experienced vilification from someone they did not know in a public space, with 10% experiencing physical violence[13]. These findings lend credence to the argument for strengthening anti-vilification provisions in the Bill, to include sexual orientation, gender identity and biological sex characteristics, or intersex status.

Recommendation Six: The GLRL recommends that anti-vilification provisions in the Bill be extended to include sexual orientation, gender identity and biological sex characteristics, or intersex status.

8. COMMISSIONERS

The GLRL welcomes the continuation of existing Australian Human Rights Commissioner's positions contained in the Bill. However, the GLRL calls for the creation of a new funded position of 'Sexual Orientation and Gender Identity Commissioner'.

In our view, this is necessary to give effect to the provisions contained in the Bill pertaining to sexual orientation and gender identity. As we have outlined, significant issues of homophobia, bi-phobia and transphobia exist in Australian society and would be usefully served by having a dedicated commissioner to deal with complaints on these grounds. A specific Sexual Orientation and Gender Identity Commissioner would also enable the AHRC to more effectively discharge its education and compliance-related roles and reduce the workload of existing Commissioners. Finally, it would send a strong message to the broader

[12] New South Wales Attorney General's Department (2003). *You Shouldn't Have to Hide to be Safe*. Sydney: NSW Government.
[13] Inner City Legal Centre (2012). *Outing Injustice: Understanding the legal needs of the lesbian, gay, bisexual, transgender and intersex communities in New South Wales*. Sydney: Inner City Legal Centre.

Australian community of the importance of non-discrimination concerning sexual orientation or gender identity.

In the event that a dedicated Sexual Orientation and Gender Identity Commissioner is not adopted, the GLRL calls for the retention of the general Human Rights Commissioner position under legislation to allow for these issues to be considered independently of the existing commissioners for Race, Sex and Disability, who already experience significant workloads and should be allowed to focus on their issues without the additional burden of dealing with issues relating to sexual orientation and gender identity.

Recommendation Seven: The GLRL recommends that a full-time funded position of Sexual Orientation and Gender Identity Commissioner, within the Australian Human Rights Commission, be established to give effect to the new protected attributes in the Bill.

Contact details:

For further information in relation to this submission, please contact Jed Horner, at: