

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VICTORIA) INC, IN CONSULTATION WITH MEMBER CENTRES

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Australian Human Rights Commission Consultation: Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity



Federation of
Community Legal Centres
VICTORIA

Level 3
225 Bourke Street
Melbourne
Victoria 3000

Tel: 03-9652 1500
Fax: 03-9654 5204
administration@fclc.org.au
www.communitylaw.org.au

Inquiries to:

Chris Atmore
Policy Officer
Federation of Community Legal Centres (Victoria) Inc
03 9652 1506
policy@fclc.org.au

Federation of
Community Legal Centres
(Vic) Incorporated
Registration A0013713H
ABN 30 036 539 902

About the Federation of Community Legal Centres (Victoria) Inc

The Federation is the peak body for fifty one community legal centres across Victoria. A full list of our members is available at <http://www.communitylaw.org.au>.

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

Involvement of the Federation in anti-discrimination law reform

The Federation draws on its recent experience in making detailed submissions concerning reforms to Victorian anti-discrimination legislation,¹ and its ongoing collaborative work with Victorian LGBTI peak organisations.

Preliminary terminology

We endorse the view of some participants at the Round Table held in Melbourne, 9 November 2010, that the term 'sex and/or gender identity' does not adequately include people who have intersex characteristics but do not see themselves as having an intersex 'identity'. We urge the AHRC to consult further with intersex organisations in order to add to 'sex and/or gender identity' a definition along the lines of 'intersex status'.

Harmonisation must entail best practice

Federal reform must ensure that the best practices from each state and territory become the benchmark, so that the quality of federal protection from discrimination enhances rather than reduces that available in any and every state or territory jurisdiction, and so that inconsistencies and gaps in protection are rectified.

Key issues

In our Victorian experience, key issues for federal reform are likely to concern the question of exceptions and exemptions, and how protection from discrimination should be framed, including the definition of discrimination. We address these issues under #3 and #10.

1. What benefit would there be in federal anti-discrimination laws prohibiting discrimination on the basis of sexual orientation and sex and/or gender identity?

The Federation endorses the detailed responses made by various LGBTI organisations at the Round Table held in Melbourne, 9 November 2010.

2. What benefit would there be in federal law prohibiting vilification and harassment on the basis of sexual orientation and sex and/or gender identity?

The Federation endorses the responses made by various LGBTI organisations at the Melbourne Round Table.

The Federation also participated in a consultation concerning the recent Review of Identity-Motivated Hate Crimes in Victoria. While that Review is yet to report, one of the preliminary conclusions, supported by the majority of participants, is that community education such as anti-homophobia and anti-transphobia programs is vital to preventing and reducing vilification and harassment.

¹ The Federation made detailed submissions on the *Equal Opportunity Act 1995* (Vic) to the Victorian Attorney-General's Independent Review of the *Equal Opportunity Act 1995* (Vic); the Department of Justice Review of the Exceptions and Exemptions in the *Equal Opportunity Act 1995* (Vic); and the Scrutiny of Acts and Regulations Committee Review of the Exceptions and Exemptions to the *Equal Opportunity Act 1995*, available at <http://www.communitylaw.org.au/lrs.php#Discrimination>

3. Can you provide examples of situations where federal protections from discrimination on the basis of sexual orientation or sex and/or gender identity are needed because state and territory laws do not provide adequate protections?

The Federation endorses the responses made by various LGBTI organisations at the Melbourne Round Table.

The continued existence of a large number of exceptions means that anti-discrimination legislation in Victoria retains exceptions on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

The reforms removed attributes such as race, employment activity and breastfeeding from the domain of lawful exceptions. While this is to be applauded, it means that Victoria has a two-tiered approach to discrimination, in which discrimination on the basis of certain selected attributes remains lawful if it is done, for example, in accordance with religious doctrines. This clearly has a significant impact on the protections available to LGBTI communities.

4. Have you experienced discrimination because of your sexual orientation or sex and/or gender identity for which there is no legal protection?

The Federation endorses the responses made by various LGBTI organisations at the Melbourne Round Table.

5. Have you experienced vilification or harassment because of your sexual orientation or sex and/or gender identity for which there is no legal protection?

The Federation endorses the responses made by various LGBTI organisations at the Melbourne Round Table, and also refers the Commission to the recent Review of Identity-Motivated Hate Crimes in Victoria.

6. What terminology should be used in federal anti-discrimination legislation if protection from discrimination on the basis of sexual orientation is to be included?

We believe that sexual orientation, defined as including attraction and lawful sexual behaviour, is the most appropriate term.

We also support the extension of grounds to presumed and past, associates, and characteristics, as summarised in the Research Paper (pp 11-12).

7. What terminology should be used in federal anti-discrimination legislation if protection from discrimination on the basis of sex and/or gender identity is to be included?

- What are the advantages or disadvantages of the terms used in state and territory laws, including: gender identity; chosen gender; gender history; a gender reassigned person; or a recognised transgender person; or transexuality?

- Should protection from discrimination be provided if a person has or appears to have the characteristics of any gender?

The Federation believes that the appropriate terminology is 'gender expression and gender identity', or perhaps better, 'sex/gender expression and sex/gender identity' in order to acknowledge the fluidity of the terms 'sex' and 'gender' in common parlance.

The 'gender identity' component should mean the definition referred to in the Discussion Paper (p 10): covering a person who lives, or seeks to live, as a member of their preferred gender, and/or has assumed characteristics of that gender (whether by way of medical intervention or not).

We also support the definition being as broad in its protective ambit as possible, and therefore suggest, consistent with the spirit of the SA, NSW and WA provisions iterated in the Discussion Paper (p 10), that consideration should be given to specifying protection for persons in situations where they have had their gender identity officially recognised (eg after gender reassignment surgery or via official document change) but they are then deliberately treated as having a gender identity with which they do not identify.

This broader definition of gender identity is also importantly different from that in several state and territory jurisdictions where gender identity is attributed only to those persons who are of 'one sex' or of 'indeterminate sex', and who identify as 'the other sex'. The latter approach wrongly assumes a simplistic binary framework of 'opposite' sexes, which not only fails to match some transgender and intersex persons' self-identification;² but also can then present potential framing difficulties for anti-discrimination legislation, as well as reinforcing the very system which produces discrimination and which legislative protection aims to address.

Further, international human rights law, social science, popular culture and common sense take the view that all human beings have a gender identity (even if it is a refusal to be bound by conventional gender concepts).³ An analogy may be made with notions of ethnicity or 'race', where white people or those of Anglo-Celtic origin often do not regard themselves as having an ethnic or racial identity. As this analogy demonstrates, more powerful social groups are able to remain ostensibly 'race-less' or lacking in gender identity, whereas those groups experiencing discrimination, disadvantage and marginalisation are ascribed membership of the 'marked' category, often to their cost, by those who remain 'unmarked'.⁴

The 'gender expression' component, which should encompass the US example's (Discussion Paper, p11) concepts of 'appearance, mannerisms or other gender-related characteristics', highlights our view that a broad protection for all persons is required. This emphasises both the continuum of sex/gender in human realities, and benefits us all as a society. As one example, people can currently be subject to prejudice and discrimination for expressing their sex/gender identity even though they are not transgender in any clear way eg a 'masculine' woman, or a 'feminine' man. While these examples might be covered by provisions proscribing discrimination on the basis of imputed sexual orientation, this could be more difficult to prove without a broadened ground of sex/gender expression.

² See eg Joel Gibson, 'Sexless in the City: A Gender Revolution', 12 March 2010 at <http://www.smh.com.au/nsw/sexless-in-the-city-a-gender-revolution-20100311-q1i2.html>; ninemsn staff, 'NSW Person Becomes Officially Genderless', 13 March 2010 at <http://news.ninemsn.com.au/national/1028220/nsw-person-becomes-officially-genderless>

³The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (at http://www.yogyakartaprinciples.org/principles_en.htm) affirm binding international legal standards with which all States must comply. The Preamble understands 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. See also Suzanne Kessler and Wendy McKenna, *Gender: An Ethnomethodological Approach* (1978).

⁴ See eg Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness* (1993).

We also support the extension of grounds to presumed and past, associates, and characteristics, as summarised in the Research Paper (pp 11-12).

8. What terminology should be used to ensure that people who identify as intersex are protected from discrimination in federal law? Should the term 'intersex' be used? Should protection from discrimination on the basis of 'sex' include people who are of 'indeterminate sex'?

As discussed in the Introduction, terminology should be along the lines of 'intersex status', and perhaps also 'including of indeterminate sex'. The meaning of 'sex and/or gender identity' should also include 'identifying as having no sex or gender identity'.

10. What other actions would you like to see the Australian Government take to better protect and promote the rights of LGBTI people in Australia?

Exceptions/exemptions

The Federation believes that there should be no exceptions or exemptions enshrined in legislation. Instead, exemptions should only be granted on a case-by-case basis, and legislation should include a balancing test as to whether particular differentiation is unlawful discrimination.

This approach would not mean that a person could never lawfully discriminate; rather the person would have to apply for an exemption. The application process would require the person to justify why they should be allowed to discriminate in the manner proposed.

Guidelines should be developed in order to outline the nature and scope of permissible limitations under federal anti-discrimination law.

The Federation also believes that exceptions and exemptions designed to address existing disadvantage - special measures - are not discrimination, and therefore do not belong in an exceptions regime.

Defining and framing discrimination

The onus should be on the respondent to prove that they did not discriminate.

The comparator test as currently exists in anti-discrimination law needs re-evaluation before being applied in the context of potential discrimination against LGBTI persons.

There should be a positive duty to eliminate discrimination, harassment and victimisation.

Enhanced powers of Australian Human Rights Commission

The Federation believes that the key to more effective anti-discrimination protection lies with not only a robust legal framework, but also an enhanced capacity of the Commission to achieve structural, institutional and systemic change.

This must accord with the move in many jurisdictions away from a predominant individualist conciliation mode and toward multiple strategies to prevent discrimination, vilification and harassment, including flexible and enforceable remedies for complainants, together with a greater focus on systemic discrimination consistent with international and domestic human rights obligations.

Legal advice and representation

Independent and genuinely accessible legal advice and representation is critical in ensuring the prevention of discrimination through individual complaints.

Representative and class action complaints should also be an option.

Marriage equality

While this Consultation is not directly concerned with the question of whether same-sex marriage should be permitted in Australia, the Federation believes that for full protection from discrimination to be realised, same sex marriages must be legally recognised. The present *Marriage Act 1961* (Cth) conveys the message that despite significant shifts in public attitudes, same sex relationships are still somehow less worthy of legal recognition.

While federal and state/territory reforms giving equal status to all de facto couples, whether heterosexual or otherwise, are important, the crucial distinction remains that de facto heterosexual couples have the legal right to marry if they choose. This state of affairs is inconsistent with various recent federal law reforms in areas such as superannuation, taxation, Medicare and social security; and is incompatible with Australia's human rights obligations to promote, respect and fulfil all persons' rights to equality and to be free from discrimination.

Other actions

- Government funding for gender reassignment surgery if that is the person's wish (ie not simply to fulfil a legal requirement for gender recognition)
- Implementation of the recommendations of the *Sex Files* Report
- Training of government and government-funded service staff so that staff are competent in LGBTI community issues eg family support (including family violence services), Births Deaths and Marriages, social security
- Public education campaigns by both AHRC and adequately funded LGBTI peak bodies, including human rights education concerning the Yogyakarta Principles
- Funding for LGBTI peak bodies to undertake systematic data collection and research concerning experiences of LGBTI communities
- A constitutional referendum on the right to equality
- Implementation of a federal Human Rights Act