



27 October 2010

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100 Parliament House
Canberra ACT 2600 Australia

Dear Committee Secretary

Please find below a submission of The ALSO Foundation ({also}), providing **support** for the enactment of the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 and the Human Rights (Parliamentary Scrutiny) Bill 2010, with further recommendations for improvement.

This submission expands upon that lodged by {also} and the Victorian Gay and Lesbian Rights Group (VGLRL) to the national human rights consultation process led by Father Frank Brennan. We thank the VGLRL for their assistance in the development of that initial submission.

About {also}

Established in 1980, {also} works to enhance the lives of Victoria's diverse gay, lesbian, bisexual, transgender, intersex and queer (**GLBTIQ**) communities. The {also} vision is the creation and celebration of a diverse, strong, safe and inclusive GLBTIQ community that contributes to and is respected by broader communities. We aim to realise this vision and improve the lives of GLBTIQ people by **celebrating** and acknowledging our communities' strengths and those of our supporters; **advocating** to secure equitable access to rights, entitlements and services; **leading** through building relationships and partnerships within and beyond our community; and **investing** in growing and developing individuals and groups within our diverse community.

As a peak body that advocate for the rights of GLBTIQ people in Victoria, {also} is in a unique position to offer a GLBTIQ perspective to the public debate on human rights protection in Australia. We hope that this submission will assist the Senate Legal and Constitutional Committee in its current inquiry.

Introduction

On 27 April 2009, {also} co-hosted a consultation forum with the Victorian Gay and Lesbian Rights Lobby to help inform a GLBTIQ perspective on the National Human Rights Consultation that was underway at that time. The forum provided an opportunity for GLBTIQ community members to discuss their views on the need for changes to human rights protections.

The key themes identified and discussed at the forum form the basis of this submission, which is primarily concerned with ensuring that federal protection of human rights (in whatever form) adequately protects and promotes the rights of GLBTIQ people in Australia.

In particular, we identify the broad range of rights we believe require specific legal protection, with an emphasis on the rights of particular importance to GLBTIQ people; the gaps in the protection of GLBTIQ people's rights at the federal level; and our views on the best mechanisms and strategies to fill these gaps.

Why do we need a national human rights instrument?

While we recognise that Australia is a relatively robust democracy that already ensures the protection of a range of rights through various means, and that there have been significant advances in the recognition of many rights of relevance to GLBTIQ communities in recent years, we believe that gaps in human rights protection continue to exist for our communities in a range of areas, including:

- Absence of federal laws prohibiting discrimination on the grounds of sexual orientation and gender identity;
- Lack of full relationship recognition federally, reinforced by the passage of the *Marriage Legislation Amendment Act 2004*;
- National inconsistencies in legislation relating to relationship recognition, adoption, access to assisted reproductive technology, gender affirmation and age of consent;
- Ongoing discrimination in employment, education, access to goods and services (including healthcare);
- Inconsistent application of exemptions and exceptions under State and Territory anti-discrimination laws;
- Ongoing experiences of physical and sexual violence, school and workplace-based harassment and bullying, and higher rates of suicide, early school leaving, and drug and alcohol use among GLBTIQ people of all ages, but particularly young people; and
- Poor access to mainstream services including in the family violence, aged care, housing and homelessness, and youth sectors.

What will a national human rights instrument achieve for GLBTIQ people?

{also} believes that the passage of the current Bills will assist in achieving a number of crucial outcomes for GLBTIQ people in Australia, such as:

- Correcting discrepancies in law and strengthening existing protections for GLBTIQ people;
- Ensuring that all legislation passed by the Federal Parliament is scrutinised for its consistency with basic human rights standards;
- Recognising and protecting universally agreed rights;
- Placing human rights above politics and arbitrary government action;
- Fulfilling Australian legal obligations under international law;
- Explicitly recognising the “fair go” spirit for GLBTIQ people that underpins and characterises society in Australia;
- Educating people about human rights and their system of government; and
- Promoting tolerance and understanding in the community.

Detailed discussion in support of the Human Rights (Parliamentary Scrutiny) Bill 2009 and the benefits it will deliver is provided below, followed by recommendations for the strengthening of the proposed human rights framework.

1. Protection of specific rights

{also} believes that all human rights recognised in international law should be protected at the federal level, and so welcomes the inclusion of specific reference to all covenants and conventions to which Australia is a signatory.

As stated in the preamble to the *Universal Declaration on Human Rights* (UDHR), “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Based on everyone’s inherent dignity, therefore, all human rights should be extended to all people, including GLBTIQ people.

Australia’s national human rights law should provide protection not only for civil and political rights, as contained in the *International Covenant on Civil and Political Rights* (ICCPR), but also for economic, cultural and social rights as set out in the *International Covenant on Economic Social and Cultural Rights* (ICESCR).

Economic, cultural and social rights, such as the right to health and housing, are fundamental in their own right but are also fundamental for GLBTIQ people to realise their civil and political rights and to live lives of dignity and value.

By their very nature, all human rights laid down in the international treaties are indivisible and interdependent. As such, it is impossible to protect civil and political rights without also protecting and promoting economic, social and cultural rights.

Limited resources should not be used as a justification for excluding economic, social and cultural rights from federal protection and promotion, as the inclusion of such rights need not oblige Government to realise those rights immediately where it is impracticable to do so. Instead, there is a continuum of options in relation to the inclusion of economic, social and cultural rights.

In addition to recognising civil, political, economic, social and cultural rights for everyone, {also} believes there is a need to specifically recognise the human rights of GLBTIQ people.

As discussed in part 2 of this submission, GLBTIQ people face widespread discrimination on the basis of their sexual orientation and gender identity and other personal characteristics, and current laws provide limited protection.

The key themes identified by GLBTIQ community members at the {also} and VGLRL community forum on 27 April 2009 included the need for:

- Federal anti-discrimination laws;
- Broader legislative recognition of the diversity of relationships in the GLBTIQ community;
- Quality access to services including housing, healthcare and education;
- Special recognition of issues related to privacy, families and children, and transgender people;
- Broad-based and targeted community education to increase awareness of rights and avenues for remedying breaches of rights; and
- An avenue through which human rights infringements may be effectively remedied.

In consultation with GLBTIQ communities, the Australian Human Rights Commission and the Human Rights Law Resource Centre have also identified specific, internationally-protected human rights of particular relevance to GLBTIQ people, including the right to:

- Equality and non-discrimination;
- Freedom of expression;
- Privacy;

- Family life (including marriage);
- The highest attainable standard of physical and mental health;
- Social security.¹

The most comprehensive examination of the relationship between internationally protected human rights and GLBTIQ people, including recommendations for State action, is contained in the *Yogyakarta Principles*.²

These principles were developed by an eminent group of human rights experts in 2007 that included, among others, Australians Dr Elizabeth Evatt, former Chair of the UN Committee on the Elimination of Discrimination against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists, and Professor Philip Alston, UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions and Professor of Law at New York University School of Law.

{also} wholly supports the spirit of the *Yogyakarta Principles*, and while recognising that the Principles are not legally binding, believe that an effective instrument of federal human rights protection should assist to realise these rights within Australia and to give effect to the recommendations contained within the Principles.

We also draw the Committee's attention to the UN General Assembly *Declaration on Sexual Orientation and Gender Identity*,³ which Australia signed in December 2008.

In signing this Declaration, Australia expressed its deep concern regarding violations of human rights and fundamental freedoms based on sexual orientation and gender identity; committed to promoting and protecting the human rights of all persons, regardless of sexual orientation and gender identity; and committed to ensuring that human rights violations based on sexual orientation or gender identity are investigated and that perpetrators of such violations are held accountable.

The Human Rights (Parliamentary Scrutiny) Bill 2009 contains within its definition at (2) that the reference to the rights and freedoms recognised or declared by an international instrument are to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.

{also} believes that this qualifier is ambiguous and is open to a wide variety of interpretations.

This submission does not propose to analyse the substance of, or issues raised by each of these rights in detail. This analysis is extensively canvassed in the documents referred to above and elsewhere, however the specific relevance of the right to equality and non-discrimination; freedom of expression; privacy; and family life to GLBTIQ people, are commented on below.

Equality and non-discrimination

Recognition of the right to freedom from discrimination is central to the operation of any democratic system, and to the protection and recognition of diversity and minority rights.

¹ Australian Human Rights Commission, *Factsheet: Human Rights and Gay, Lesbian, Bisexual, Transgender and Intersex People* (2009); Human Rights Law Resource Centre, *Factsheet: Human Rights and Gay, Lesbian, Bisexual, Transgender and Intersex Communities* (2009).

² *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (March 2007), available at <http://www.yogyakartaprinciples.org/principles_en.pdf>.

³ UN General Assembly, 70th and 71st Plenary Meeting (18 December 2008).

Consequently, {also} believes that the right to equality and non-discrimination should be *broad*. It should not be limited to equality and non-discrimination with respect to the enjoyment of other protected human rights. Instead, the right to equality and non-discrimination should extend to all aspects of public life.

Section 8 of the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Charter**) provides a model equality and non-discrimination provision and should be used as a basis for interpreting the federal provisions.

However, whereas the right to equality and non-discrimination in the Victorian *Charter* is defined by reference to the *Equal Opportunity Act 1995* (Vic), the federal provisions should not be limited by referring to current federal equal opportunity/anti-discrimination legislation, which currently prohibits discrimination on a few grounds only (namely sex, race, disability and age). Comprehensive federal protection from discrimination on the grounds of sexual orientation and gender identity is currently absent.

This absence is at odds with existing protections in human rights instruments at the international and State and Territory levels:

- The United Nations Human Rights Committee has been very clear that the principle of non-discrimination and equality before the law protects GLBTIQ people under international law⁴. These non-discrimination provisions are contained in the ICCPR, the ICESCR, the *Convention on the Rights of the Child* (**CRC**), the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of People with a Disability* (**CRPD**).
- The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), by defining discrimination as having the same meaning as that under the *Equal Opportunity Act 1995* (Vic), includes sexual orientation and gender identity as grounds upon which discrimination is prohibited.
- The Australian Capital Territory's *Human Rights Act 2004* (ACT) makes reference to sexual orientation as an example of discrimination under section 8 of that Act.

As well as interpreting the right to equality and non-discrimination broadly, the Bill should *specifically* protect the right to equality for GLBTIQ people and prohibit discrimination, including on the grounds of gender, sexual orientation and gender identity (as well as the combined attributes included in all State and Territory anti-discrimination laws).

A Galaxy Poll commissioned by GetUp! in 2007 revealed 71 per cent of Australian voters believed same-sex couples should have the same legal rights as heterosexual de facto couples, including 63 per cent of Coalition voters.

Even if this were not the case, or if it could not be said to extend to the protection of *all* GLBTIQ rights, such opposition would not provide an adequate reason to exclude such protection. Indeed, it would be a further reason to include such rights, as it indicates that GLBTIQ people are subject to continuing and widespread discrimination.

Interpretation of the right to freedom from discrimination for GLBTIQ people should also not be subject to inappropriate exemptions and *exceptions*. Exemptions and exceptions that allow discrimination to occur in particular contexts, such as in relation to the care of children or access to religious schools and private clubs,

⁴ For example *Toonen v Australia*, Communication, No 488/1992, UN Doc CCPR/C/50/D/488/1992 (4 April 1994), available at <<http://www1.umn.edu/humanrts/undocs/html/vws488.htm>>; *Young v Australia*, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (12 August 2003), available at <http://www.bayefsky.com/.html/australia_t5_iccpr_941_2000.php>.

would undermine the principle of equality, would be based on prejudicial assumptions, and would therefore not be justified.⁵ Any limitation on this right must be accompanied by rigorous and transparent processes for application and accountability.

{also} supports an interpretation of the right to equality that includes provision for similar scope as section 8(4) of the Victorian *Charter*, which states that:

Measures taken for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Freedom of expression

The right to freedom of expression is enshrined in the ICCPR. {also} considers it crucial that this right, be protected in broad terms at a federal level, but that it also be subject to reasonable limitations, for example as contained in section 15(3) of the Victorian *Charter*, which states:

Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons.

In addition, {also} believes that the right to express one's sexual orientation and gender identity, with freedom from fear or persecution, warrants specific protection. A positive right to express one's sexual orientation and gender identity would place a positive duty on those with human rights obligations to act in a way that would promote the rights of GLBTIQ people. For example, it might encourage the enactment of federal anti-vilification legislation, or the establishment/funding of programs to overcome homo/trans-phobia and homo/trans-phobic violence.⁶

Privacy

Privacy is a fundamental human right essential to one's sense of self and control of personal information, determining how it is used and disclosed, and for what purposes. Privacy is intrinsically important to human dignity, intimacy and the development of varied and meaningful interpersonal relationships.

Privacy differs from secrecy in that it can be described as having control over the access that others have to oneself, and one's information, whereas secrecy is the intentional concealment of information for another purpose.

While protection of personal information is an important element of privacy in and of itself, the right to privacy becomes even more important when considered in light of its broader relationship with individual choice and control, which are central to any understanding of broader human rights principles.

Privacy is a crucial aspect of GLBTIQ people's lives, and its protection is particularly important for a range of reasons. Protecting GLBTIQ people's privacy rights is particularly important because of the way in which we as sexual minorities relate to mainstream society and "come out" to the world.

⁵ The exceptions and exemptions contained in the *Equal Opportunity Act 1995* (Vic) are currently under review: see <http://www.parliament.vic.gov.au/SARC/EOA_exempt_except/default.htm>. (Refer to the submissions of {also} and the VGLRL for an analysis of the exceptions of particular concern to GLBTIQ communities.)

⁶ Melbourne Sexuality Law Reform Committee, *Submission to the Victorian Human Rights Consultation Committee* (August 2005), 48.

Most GLBTIQ people follow a process of discovering their sexuality or gender identity (often having first denied it, even to themselves), before becoming comfortable, confident and courageous enough to “come out” to others. “Coming out” is often a staged process that occurs to various degrees and at different times, dependant on a wide range of personal considerations, and fundamentally involves GLBTIQ people exercising their individual right to privacy.

Often, protection of privacy is an important preventative measure against abuse of other human rights, including at times, the right to life itself.

For transgender and intersex people, personal identity and related privacy issues are of fundamental importance for additional reasons⁷. Transgender and intersex people who personally affirm their identified gender often do so at great personal cost, and the privacy challenges associated with having their gender publicly affirmed can be enormous, particularly in an era of increased security and identity management, when production of birth certificates and other forms of identity papers is so often required.

The right to privacy is protected in many international instruments, including for example the UDHR (Article 12), the ICCPR (Article 17), the CRC (Article 16), and the *European Convention on Human Rights* (Article 8).

Finally, many of the most important judicial decisions affirming the human rights of GLBTIQ people have been couched in terms of the right to privacy.⁸

Family life (including marriage)

The right to marry and found a family is currently not protected at a federal level in Australia.

With the passage of the *Marriage Legislation Amendment Act 2004*, same-sex couples were explicitly excluded from marrying under Australian law. The passage of this law was contrary to Australia’s obligations under both the ICCPR which protects the right of all people to marry and to form a family, and the *Hague Convention on Celebration and Recognition of the Validity of Marriages*, which requires the recognition of certain valid foreign marriages.

As a consequence, Australia is out of step with a growing number of other jurisdictions that do recognise same-sex marriage, including Canada, South Africa, Spain, Belgium, the Netherlands, Norway, Sweden, and the American States of Massachusetts, Connecticut, Vermont, Iowa and most recently, New Hampshire.

The law is also out of step with changing popular opinion within Australia. In 2007 a Galaxy poll found that 57 per cent of Australians supported same-sex marriage, up from a Newspoll in 2004 that found only 38 per cent support. More recently, support for same-sex marriage had grown to over 60 per cent.

⁷ See Fiona David and Jake Blight, ‘Understanding Australia’s Human Rights Obligations in relation to Transsexuals: Privacy and Marriage in the Australian Context’ (2004) 9 *Deakin Law Review* 16; Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (2002); Kristen Walker, ‘Moving Gaily Forward? Lesbian Gay and Transgender Human Rights in Europe’ (2001) *Melbourne Journal of International Law* 4.

⁸ For example, *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, *Toonen v Australia*, see above n 4; *Croome v Tasmania* (1997) 191 CLR 119; *Lawrence v Texas*, 539 US 558 (2003); *Dudgeon v United Kingdom*, 45 Eur Ct HR (ser A) 14 (1981); *Smith & Grady v United Kingdom* (2000) 29 EHRR 413; *Lustig-Prean & Beckett v United Kingdom* (2000) 29 EHRR 548; *Rees v United Kingdom* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1991) 13 EHRR 622; *B v France* (1993) 16 EHRR 1; *Sheffield & Horsham v United Kingdom* (1999) 27 EHRR 163; *Goodwin v United Kingdom* (2002) 35 EHRR 447; *I v United Kingdom* (Unreported, European Court of Human Rights, Application 25680/94, 11 July 2002); *Bellinger v Bellinger* [2003] UKHL 21.

Even in Queensland, which is often regarded as one of Australia's more conservative states, 54 per cent of voters supported same-sex marriage in a Galaxy poll conducted there in 2008.⁹

Of further concern, access to assisted reproductive technology and adoption rights also remains inconsistent between the States and Territories.

{also} believes that the right to form a family and to choose to marry need to be protected at a federal level, without exception as to gender identity or sexual orientation.

Other rights of particular relevance to people who are sex or gender diverse

In addition to the rights outlined above, there are some further civil and political rights of particular relevance to people who are sex or gender diverse, including:

- The right to protection from torture, cruel, inhuman or degrading treatment or punishment, which in section 10(c) of the Victorian *Charter* includes a person's right to not be subjected to medical or scientific treatment without his or her full, free and informed consent – which may have implications, particularly with regard to decisions relating to medical treatment for infants with intersex conditions, as well as access to gender affirmation treatments for minors among others;
- The right of persons deprived of their liberty to be treated with humanity and dignity – with clear implications for example in relation to the treatment and accommodation of transgender people within prison populations;
- Freedom of movement and travel - including in relation to issuance of multiple forms of identification, for example passports and drivers licenses; and
- The right to recognition before the law.

There are also several human rights in the CRC that are specifically relevant to people under the age of 18 who are sex or gender diverse, including:

- the best interests of children should be a primary consideration in all actions concerning them
- the right to survival and development
- the preservation of identity
- the right of children to express views and have those views respected
- the right to protection from physical or mental violence, injury, abuse or exploitation
- the right to health
- the right to an adequate standard of living

For a thorough analysis of some of the issues faced by the sex and gender diverse community, and recommendations as to how these issues could be addressed, see the concluding paper of the Australian Human

⁹ Cited in Rodney Croome, 'Couples Are Not Couples Unless They Can Marry' *Online Opinion*, 15 April 2009, available at <www.onlineopinion.com.au/view.asp?article=8779&page=0>

Rights Commission's sex and gender diversity project entitled *Sex Files: The Legal Recognition of Sex in Documents and Government Records*.¹⁰

Specifically articulated human rights — Indigenous rights

{also} acknowledge the unique position of Indigenous Australians as the first custodians of this land, and observe with respect the resilience, survival and continuing contribution Indigenous Australians make as the oldest surviving culture.

We also recognise the appalling levels of disadvantage experienced by Indigenous communities and individuals throughout the country, noting the relationship to historical and continuing dispossession, disenfranchisement, dislocation and exclusion, firmly grounded in economic, social and cultural disadvantage, and denial of self-determination.

In response, it is the position of {also} that Indigenous rights should be specifically articulated in the Bill.

We take this position in the knowledge that Indigenous GLBTIQ people often experience compounded discrimination - that is, complex and distinct forms of discrimination on a number of combined grounds - and experience greater levels of disadvantage as a result.

The need to include specifically articulated rights to reflect the experience of Indigenous Australians, including GLBTIQ Indigenous Australians, is therefore paramount, and {also} applauds the specific inclusion of Indigenous cultural rights in section 19(2) of the Victorian *Charter*.

The Human Rights (Parliamentary Scrutiny) Bill 2009 provides an opportunity to embrace this important recognition at the national level and take it further in two ways.

The first is to recognise Indigenous cultural rights in such a way as to specifically include the rights of GLBTIQ Indigenous Australians to sexuality and gender diversity (as constituting a legitimate element of Indigenous culture).

The second is to recognise not only cultural rights, but also the right to self-determination. The recent intervention measures in the Northern Territory highlight the extent to which Indigenous Australians' right to self-determination may be undermined; a national human rights instrument that includes specific recognition of Indigenous cultural rights and the right to self-determination would go some way toward ensuring that such rights are more appropriately protected in the future.

2. *Is the Human Rights (Parliamentary Scrutiny) Bill 2009 required?*

As discussed in the opening of this submission, {also} recognises Australia's relatively robust democracy and the range of existing human rights protections within various Australian laws.

However, as we have also noted, there are significant gaps in existing human rights protections for GLBTIQ people.

¹⁰ Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (2009).

While recent federal reforms have implicitly acknowledged the existence of same-sex relationships by ensuring access to a range of federal benefits on the same basis as opposite-sex de facto couples, GLBTIQ people remain vulnerable to discrimination under the law.

Limited protection exists, in some form, in most states and territories; however, the lack of a federal anti-discrimination law covering sexual orientation and gender identity has left the GLBTIQ community without recourse in cases involving discrimination in the federal sphere.

Currently, avenues to address discrimination on the grounds of sexual orientation and gender identity only exist if the discrimination is perpetrated by the Federal Government itself, or by an entity acting on its behalf, and even then, only if the discrimination occurred in the context of the workplace. Further, the Australian Human Rights Commission is only empowered under the *Human Rights and Equal Opportunity Commission Act 1986* to investigate breaches of human rights and recommend remedies. It has no powers of enforcement.¹¹

This situation has left GLBTIQ Australians without any meaningful recourse to assert their basic human rights, exposing them to an increased vulnerability to discrimination and other human rights violations, which is not faced by their heterosexual counterparts. This vulnerability is borne out by a range of research findings.

Recent surveys by the Australian Research Centre in Sex, Health and Society (ARCSHS) at La Trobe University¹² and the Australia Institute¹³ show that GLBTIQ people continue to be subject to high levels of discrimination on the basis of their sexual orientation and gender identity, and a study by the VGLRL revealed that over 80 per cent of GLBTIQ people had felt insulted by negative public statements about same-sex relationships or families. The same study revealed that the majority of respondents (77.9 per cent) had felt unsafe to hold hands in public with their same-sex partner.¹⁴

Research undertaken by the Victorian Ministerial Advisory Council on Gay and Lesbian Health¹⁵, ARCSHS¹⁶ and VicHealth¹⁷ demonstrates a link between higher levels of self-reported discrimination and poorer health outcomes.

The ARCSHS study, for example, demonstrates that same-sex attracted and transgender young people (SSATYP) who are open about their sexuality or gender identity are subject to higher levels of discrimination and abuse than those who are not, are more likely to suffer from a range of mental health problems, and are at increased risk of drug and alcohol abuse and unsafe sex.

{also} is of the view that the Human Rights (Parliamentary Scrutiny) Bill 2009 has the potential to improve protection against discrimination and abuse on the basis of a range of attributes, by complementing existing discrimination laws and providing new protections to areas not currently protected, at least in the development and passage of new legislation.

It is also timely to remind ourselves that democracy and the protection and advancement of human rights are not synonymous, and that in fact a legislature operating outside the constraints of a set of standards or rules can be

¹¹ *Human Rights and Equal Opportunity Commission Regulations* (Cth) reg 4(a)(ix).

¹² Lynne Hillier et al, *Writing Themselves In Again: 6 years on,— The Second National Report on the Sexual Health and Well-being of Same Sex Attracted young People in Australia* (2005)

¹³ Michael Flood and Clive Hamilton, *Mapping Homophobia in Australia*, Australia Institute Webpaper 79 (July 2005).

¹⁴ Ruth McNair and Nikos Thomacos *Not Yet Equal: Report on the VGLRL Same Sex Relationships Survey* (July 2005)

¹⁵ W Leonard (ed), *What's the difference? Health Issues of Major Concern to Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Victorians* (2002)

¹⁶ Hillier et al, above n 12.

¹⁷ Victorian Health Promotion Foundation, *A Plan for Action 2005–07: Promoting Mental Health and Wellbeing* (2005).

harmful, not only for human rights but democracy itself.¹⁸

Given it is generally the human rights of minorities that are most vulnerable to abuse, but it is majorities that elect governments, issues concerning rights can easily vanish from the political landscape if the majority is unconcerned about the impact of legislation, policies or practices upon minority groups.¹⁹

Even with our relatively strong concern for human rights in Australia, recent history has demonstrated how the absence of a rigorous system for decision-making, benchmarking, identification and analysis can easily lead to serious incursions, without any meaningful avenue to question, debate and review whether those incursions are appropriate, or conform to the values we hold as a community.

Consideration of the human rights impact of discriminatory laws has tended to occur on an ad-hoc basis (if at all), in an environment in which human rights requirements are neither clear nor fully understood, and comprehensive assistance for politicians to consider and comply with their human rights obligations is absent.

Contrary to the position occasionally presented by advocates opposed to the enactment of a human rights instrument, the common law also offers little protection from these administrative and legislative shortcomings.

In 1973, the then Attorney-General, Senator Lionel Murphy, summarised the limits of the judiciary and common law protections in the course of introducing a Human Rights Bill in the Commonwealth Parliament in the following terms:

*Although we believe these rights to be basic to our democratic society, they now receive remarkably little legal protection in Australia. What protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights. The common law is powerless to protect them against the written laws and regulations made by Parliament, by Executive Government under delegated legislative authority, and by local government and other local authorities. The common law exists only in the interstices of statutory legislation.*²⁰

In 2001 the NSW Parliamentary Standing Committee on Law and Justice, in its inquiry into a bill of rights for NSW, whilst acknowledging the important role played by the common law, also recognised that many rights do not exist at common law, and those that do can be overridden by the legislature at any time.²¹

These deficiencies not only detract from the efficiency of the public policy process itself, but also gives rise to the greater risk of policies that have unforeseen human rights implications which then need to be rectified – when they have become a problem – rather than being addressed in the planning and development phase.

3. Will the Human Rights (Parliamentary Scrutiny) Bill 2009 in its current form sufficiently protect rights?

{also} believes the Human Rights (Parliamentary Scrutiny) Bill 2009 represents an important part of building a more open, diverse and respectful culture that ensures a human rights framework informs the legislative process.

However, a significant limitation of the current Bill is its application only to Parliament, and not to the conduct of federal public authorities or the judicial functions of the courts. The Bill's failure to require, as does section

¹⁸ Jamie Gardiner and Dominique Saunders, 'Human Rights: It's Time' (2004) 77(12) *Law Institute Journal*, 40.

¹⁹ D McGlone, *Investigating a Bill of Rights for Victoria* (2005) 29 *Criminal Law Journal* 169, 171.

²⁰ Commonwealth, *Parliamentary Debates*, 21 November 1973, page 1972 (Lionel Murphy, Attorney-General).

²¹ NSW Standing Committee on Law and Justice, *A NSW Bill of Rights*, (2001) 3. See also Vinoli Thampapillai, 'Why It's Time for a Bill of Rights – Law Society Urges Debate' (2005) 43(3) *Law Society Journal*, 67.

38 of the Victorian Charter of Human Rights and Responsibilities, that public authorities act compatibly with rights and give consideration to them, will do little to ensure good human rights practice, transparency and accountability are embedded in government policy and practice.

The Victorian experience, as articulated in the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) 2008 report on the Operation of the Charter of Human Rights and Responsibilities, *Emerging Change*, is that the *Charter* is having a subtle but nonetheless significant impact on the operations of government:

*In many instances, this progress is not dramatic or spectacular – but it is groundbreaking nonetheless. As this report shows, the Charter is having an impact on the operations of every government department in Victoria, on most local councils, on many public sector agencies and authorities, on our courts and legal system, and on a range of community organisations. The impacts range from invigorating existing practices through to substantial changes in the way organisations operate, make decisions, deliver services and deal with people. The Charter is also encouraging new ways of thinking about human rights, including exploring innovative approaches to giving people a say in decisions that affect them.*²²

The Bill's application to the operation of the parliament only, and not to public authorities and the role of the judicial system will only partially address the current *ad hoc* response to human rights concerns. It will continue to be the most marginalised and disadvantaged people in our community who will face the greatest challenges in having their issues addressed, including many within the GLBTIQ community.

As has been outlined earlier in our submission, we welcome the Bill's reference to Australia's existing obligations under the ICCPR, ICESCR, CRC, CEDAW and CERD, however we believe the obligations it creates should be extended to the role and function of all tiers of federal government.

This section will discuss the various means by which {also} believes the Bill could be strengthened, and includes:

- Operation of the Bill;
- Entities bound by the Bill;
- Role of the Australian Human Rights Commission;
- Complaints and remedies; and
- Education and community engagement.

Obligations and operation of the Bill

{also} believes the Victorian *Charter* provides appropriate guidance on the effective operation of a national human rights instrument in terms of the mechanisms it creates, as well as to whom its obligations should apply.

The Victorian *Charter* creates a positive duty on public authorities to give proper consideration to rights in all actions and decisions, and to act in a way that is compatible with the rights protected in the Charter.²³

Rights may only be limited if those limits are demonstrably justified in a free and democratic society that respects the rule of law, once all relevant factors are taken into account.²⁴

²² Victorian Equal Opportunity and Human Rights Commission (2009), *The 2008 report on the operation of the Victorian Charter of Human Rights and Responsibilities: Emerging change*, p.3.

²³ Victorian *Charter*, s 38

²⁴ Ibid s 7.

Finally, all parties bound by the *Charter* are required to interpret laws in a way that is compatible with protected rights, as far as is possible to do so consistent with the purpose of those laws.²⁵

These obligations are enforced through various mechanisms applied to the operation of parliament, courts and tribunals and public authorities.

{also} supports the Human Rights (Parliamentary Scrutiny) Bill 2009 insofar as it applies to the establishment of a Parliamentary Joint Committee on Human Rights and the requirement for Statements of Compatibility, but further recommends that it should:

- Require that Statements of Compatibility not only address issues of human rights compatibility, but should further articulate the impact proposed new laws will have on protected rights, and the extent of any limitations on rights. It should be incumbent upon a bill's proponent to demonstrate that any such limits are reasonable, necessary, justified and proportionate;
- Ensure any derogation from the duty to enact human rights-compliant laws (including those that reasonably limit rights) is conducted transparently, only in exceptional circumstances, and subject to an appropriate sunset clause;
- Include a provision similar to section 7 of the Victorian *Charter* that guides the circumstances in which rights can be reasonably limited;
- Require that all Federal laws be interpreted in such a way that is compatible with human rights, as far as is consistent with the statutory purpose of the subject legislation;
- Establish a process within the courts or elsewhere for drawing to the attention of Parliament and the community any human rights incompatibility within existing laws, that would require a public response by the Parliament (if not through a court referral power as exists in the Victorian *Charter*, then by other means); and
- Require all public authorities to act in a way that is compatible with protected rights, and to give proper consideration to those rights when making decisions, developing policy and delivering services.

Entities bound by the Bill

The Victorian *Charter* binds a range of public authorities as defined in section 4 of the *Charter*, and includes a range of entities across government (eg public officials, statutory bodies with functions of a public nature, Victoria Police, local government, Ministers and members of parliamentary committees, and any entity declared to be a public authority by regulation).

A key area of uncertainty within Victoria has been in relation to “functional” public authorities that provide services of a public nature on behalf of government.

Functional public authorities may include a range of education, healthcare and other social service providers, but their status as such, and therefore their attached obligations under the *Charter*, are far from clear.

Given that a number of the specific human rights concerns for GLBTIQ people relate to their treatment and access to services by non-government providers, many of which are in receipt of government funds, {also} believes a more certain and inclusive obligation should be created by the Bill in addition to “core” Federal public authorities.

A range of models exist that might include:

²⁵ Ibid s 32.

- An express obligation on government departments to ensure the human rights compliance of any entities they fund; or
- A direct obligation on any organisation in receipt of government funds; or
- An opt-in ability for non-government and private entities.

{also} believes all entities in receipt of government funds should be bound by the obligations created by an amended Human Rights (Parliamentary Scrutiny) Bill 2009.

Role of the Australian Human Rights Commission

{also} supports the view of VEOHRC in its submission to the national human rights consultation that the Australian Human Rights Commission, as Australia's independent statutory national human rights institution, is the logical body to take on certain key functions and responsibilities under new federal human rights legislation:

As an impartial and independent body that can focus solely on promoting the human rights principles contained in a National Charter, the Human Rights Commission can further consolidate and expand on the invaluable contribution it has already made to the development of a robust and balanced human rights dialogue in Australia.

As is the case in the Victorian context, {also} strongly supports inclusion in the current Bill of adequate provision of resources and jurisdiction to enable the Australian Human Rights Commission to fulfil the following functions, consistent with the views of VEOHRC:

- Provision of advice and conduct of both referred and own-motion inquiries concerning matters raising important issues of human rights;
- Monitoring and reporting on the operation of the Bill;
- Conducting a review of the instrument after a substantial period of operation, and the conduct of reviews on behalf of public authorities in relation to human rights compliance with the national human rights instrument;
- The power to intervene in court and tribunal proceedings that raise questions regarding the interpretation and application of the national human rights instrument;
- Handling of individual, representative or Commission-initiated complaints concerning alleged breaches of rights contained in the national human rights instrument; and
- Educative responsibilities.

In addition, {also} believes the Australian Human Rights Commission should be resourced to undertake a national human rights audit, and to develop a national human rights action plan, similar in scope to the work of the New Zealand Human Rights Commission.

Such an audit and action plan should be developed in consultation with representatives of marginalised and disadvantaged communities, including GLBTIQ communities, to ensure their views are properly canvassed.

Complaints and remedies

{also} is firmly of the view that if a national human rights instrument is to have a practical impact, and to be viewed by the wider community as being meaningful, then it must also incorporate capacity for individuals, groups and their representatives to raise human rights concerns, and to seek remedies.

Under the Victorian *Charter* remedy provisions are limited and complex. With the exception of complaints to Ombudsman Victoria (whose findings are recommendatory only), claims for a breach of human rights must be linked to existing causes of action.

The impact of this limitation is two-fold — firstly, that individuals with legitimate human rights concerns are not able to easily navigate government systems to have their issues addressed, and secondly, many community members remain cynical about the effectiveness of a *Charter* they regard as a “toothless tiger”.

Notwithstanding the fact that the *Charter* has already been shown to have had a beneficial impact on government law-making, policy development and service delivery, and has enabled advocates to achieve positive outcomes for individuals, these limitations on the operation of the Victorian Charter continue to present significant challenges.

In addition to meeting Australia’s clear obligations under Article 2.3 of the ICCPR to ensure that:

- (a) *any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) *any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) *competent authorities shall enforce such remedies when granted,*

a free-standing cause of action to remedy human rights breaches will serve to reinforce government commitment to protection of rights, consistent with the spirit of the Bill; enable more direct and timely resolution of claims on human rights; and help to ensure increased accountability among those entities with obligations.

In the experience of the GLBTIQ community, the absence of a national human rights instrument as well as an effective source of domestic remedy, has resulted in equality claims taking in excess of a decade or more to resolve, eg in both the cases of *Toonen* and *Young*, as well the long-running campaign to recognise same-sex couples in federal legislation. Addressing the issues of discrimination raised by these cases could have occurred more quickly if adequate domestic remedies for human rights protection were available.

Education and community engagement

As the only Western democracy without a federal system of human rights protection, Australia continues to be at a disadvantage in terms of community engagement with the international human rights “dialogue”.

While Australia prides itself on the notion of a “fair go for all”, few in the Australian community have a solid understanding of the substance or application of human rights, and even less of an understanding when it comes to civic and political engagement around human rights issues.

Observations made at a number of the national human rights consultation forums have also highlighted and reinforced that many within the community fail to understand the basic principle of the universal application of human rights, and wish to retain their own “right” to discriminate on a number of grounds, including on the grounds of sexual orientation and gender identity.

As with the British experience, the absence of adequate community education alongside the introduction of a national human rights instrument runs the risk that community members will continue to regard rights as falling purely within the legal domain, being largely indecipherable, having little relevance to their day-to-day lived experience, and as being only for the benefit of criminals and terrorists.

The successful introduction and operation of a national human rights instrument would therefore rely heavily on increased community understanding of the existence and application of rights, as well as the opportunities through which they can engage with the rights dialogue.

{also} strongly supports the provision of adequate resources to the Australian Human Rights Commission and other organisations representing “communities of interest” to enable them to raise the profile of rights and any national human rights instrument within the Australian community, as well as to develop sophisticated strategies to promote community engagement.

This work would be greatly aided if Australian taxation and charity laws were amended to introduce a deductible gift recipient category for human rights organisations, thereby enabling these organisations to engage in their advocacy and education work.

Finally, {also} believes that a significant site for the delivery of this education resides within the education system itself, and recommends the development of a comprehensive human rights curriculum starting at primary school age and continuing to secondary and tertiary education.

Conclusion

{also} **supports** the introduction of the Human Rights (Parliamentary Scrutiny) Bill 2009 insofar as it will increase parliamentary scrutiny of new legislation for human right compatibility.

{also} **calls for amendment** to the Bill to clarify the application of international conventions and covenants in the Australian context; provide greater rigor and guidance on the development of Statements of Compatibility; to extend the obligations for human rights compatibility to public authorities, government funded services and the courts; and to increase the level of oversight by the judiciary and the Australian Human Rights Commission.

As set out above, while we recognise that Australia is a relatively robust democracy that already ensures the protection of a range of rights through various means, and that there have been significant advances in the recognition of many rights of relevance to GLBTIQ communities in recent years, we believe that significant gaps in human rights protection will continue to exist for our communities in a range of important areas with the introduction of this Bill which is limited in its scope.

Being a peak body that advocates for the rights of GLBTIQ people in Victoria, {also} is in a unique position to offer a GLBTIQ perspective to the public debate on human rights protection in Australia. We hope that this submission will assist the Committee in its deliberations.

Yours sincerely

Jason Rostant
President, {also} Foundation