



**Submission to:**

**Senate Legal and Constitutional Affairs  
Committee Inquiry into the Human Rights and  
Anti-Discrimination Bill 2012**

December 2012

## **About ACON**

ACON (formerly known as the AIDS Council of NSW) was formed in 1985 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Today, ACON is Australia's largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON provides information, support and advocacy for the GLBT community and people living with or at risk of acquiring HIV, including sex workers and people who use drugs.

ACON is home to the Lesbian and Gay Anti-Violence Project (AVP), the Community Support Network (CSN), and the Sex Workers Outreach Project (SWOP). ACON has its head office in Sydney as well as branches in the Illawarra, Northern Rivers, the Hunter region and the Mid North Coast.

## **Our interest in human rights**

ACON is a community based organisation that seeks to improve the health and wellbeing of the GLBT community, sex workers, people who use drugs, people with HIV, and to reduce HIV transmission. We do this with an understanding that good health can only be achieved when human rights are realised. Anti-discrimination protection is important as our communities, made up of rights holders, often find their rights not being upheld, and experience high rates of discrimination. The impact of discrimination on our communities is well documented<sup>1</sup>. It is for these reasons we strongly welcome the protections contained in the Human Rights and Anti-Discrimination Bill 2012 (HRAD) and through this submission seek to improve on the proposed legislation.

## **Our response to the exposure draft legislation**

ACON has focused on the issues that relate directly to our communities. While there are important issues in the HRAD, such as access to legal remedy and other technical issues, that impact on our communities, organisations including the NSW Gay and Lesbian Rights Lobby (GLRL) and the Human Rights Law Centre (HRLC) have the mandate to address some of these broader issues and we support their comments on these matters.

ACON fully supports the protection of intersex people in anti-discrimination legislation, and encourages the Commonwealth to consult with the intersex community to achieve this end. We believe that the current inclusion of "sex characteristics" under a definition of "gender identity" is a grave misunderstanding

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<sup>1</sup> Australian Research Centre in Sex, Health & Society, *Private Lives: a report on the health and wellbeing of GLBTI Australians*, (2006); L Hillier, T Jones, M Monagle *et. al.*, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010); NSW Gay and Lesbian Rights Lobby, *The Pink Ceiling is Too Low*, (2003); NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2001), Beyondblue, *Feeling Queer and Blue*, (2009).

of intersex. We understand that Organisation Intersex International Australia, amongst others, will be making a submission to this inquiry. Our submission however will be grounded in ACON's experience as a community health organisation working within the GLBT community. As a member of the Australian Federation of AIDS Organisations and the National LGBTI Health Alliance, we also support the submissions put forth by these organisations.

The importance of this legislation to our communities is very high. The protections that the HRAD will provide for GLBT communities are long overdue and for this reason the speedy passage of this bill is important.

**Recommendation 1:** That the HRAD is passed through the Commonwealth Parliament as soon as possible after the completion of this Senate inquiry.

## **Protected Attributes**

### **Sexual Orientation**

ACON welcomes the inclusion of sexual orientation that is contained in the exposure draft and does not seek any changes to it. The terminology is consistent with ACON's recommendations through the consultation on the development of the exposure draft. The definition used is a more contemporary definition than that used in some states, including NSW. The coverage of this protected attribute at the Commonwealth level is well overdue and will be a useful tool in providing protection from discrimination and recourse to remedy when discrimination does occur.

**Recommendation 1:** That the HRAD provides protection on the basis of sexual orientation with the current definition.

### **Relationship Status**

ACON welcomes the inclusion of a broad definition of relationship status as this provides coverage to the people in our community who are involved in relationships that are recognised in a variety of ways. We note that the inclusion of this protected attribute will not impact on the movement towards marriage equality in any way as these are separate issues that will need to be determined through separate debates and through separate legislation.

### **Gender Identity**

ACON welcomes the delivery of the commitment to providing protection from discrimination for Transgender people. ACON believes that the definition used under gender identity is problematic. As it is currently drafted the definition conflates issues of sex and gender into the one definition in an attempt to cover both transgender and intersex issues. We believe that this would be better understood if

there are separate definitions for the different issues that transgender and intersex people experience. For practical reasons we believe that the definition used in the Tasmanian Anti-Discrimination Bill 2012, which has passed the Tasmanian House of Assembly and due for debate in the Tasmanian Legislative Council imminently, is the most appropriate drafting of these definitions.

The HRAD currently states that gender identity must be 'on a genuine basis' and this raises many problems. It seems as though the inclusion of the term 'genuine basis' is meant to limit vexatious claims, yet 'genuine basis' isn't applied to other protected attributes and nor should it be. The inclusion of this test raises issues of how a genuine basis is established. It is also contradictory as protection is, correctly, provided to people who are assumed to be Transgender, whom the test of 'genuine basis' is not relevant. Protection is also provided to people who are associates of Transgender people.

Adopting the definition used in the Tasmanian Anti-Discrimination Bill 2012 will address this issue as well as clarifying the differences between issues of gender and sex discrimination that transgender and intersex people face. It is worth noting that the idea of vexatious claims is also dealt with elsewhere in the HRAD bill, in particular through the increased powers of the Australian Human Rights Commission to dismiss vexatious claims.

While ACON does not have a mandate to extensively comment on intersex issues, our recommendation needs to address the definition of intersex due to the interplay in the current definition. Changing the definition of gender identity alone in line with our recommendation would exclude protection for intersex people and this is not our intention. Our recommendation to include a new protected attribute of intersex with a definition from the Tasmanian Anti-Discrimination Bill 2012 is in line with the submission from Organisation Intersex International Australia, published submission number 12 to this inquiry, and that submission details the issues for intersex people in more detail.

**Recommendation 2:** That the definition of gender identity, which incorporates transgender and intersex issues together, is replaced with the following definition:

***gender identity*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism;

and that a separate protected attribute of intersex be incorporated into the bill with the following definition:

**intersex** means the status of having physical, hormonal or genetic features that are –

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male;

## **Sexual Harassment**

Harassment and vilification against members of the GLBT community has been shown to be widespread. Harassment, vilification, and abuse are experienced by the GLBT community at higher rates than the general community. According to a report by the NSW Attorney General's Department, 85% of the GLBT community in NSW have experienced homophobic abuse, harassment or violence in their lives.<sup>2</sup> Furthermore 56% of the GLBT community in NSW have experienced homophobic abuse, harassment or violence in the past 12 months.<sup>3</sup> A recent national study into young GLBT people reported that in their lifetime 61% experienced verbal abuse and 18% experienced physical abuse.<sup>4</sup>

Vilification and harassment is particularly severe for people in educational settings where 80% of abuses occur for young GLBT people.<sup>5</sup> The effect of pervasive abuse can be the development of significant mental health issues, which has been evidenced in high rates of anxiety, depression and suicidal ideation amongst GLBT people.

In this context ACON would like to see both gender identity and intersex specifically listed as a protected attribute in the definition of sexual harassment.

**Recommendation 3:** That 'gender identity' and 'intersex' be included in the list of protected attributes listed under 'sexual harassment'.

## **Profession, trade, occupation, or calling**

ACON calls for the coverage of 'profession, trade, occupation, or calling' as a protected attribute. This coverage is necessary to ensure that sex workers are afforded appropriate protection from discrimination. The United Nations, through UNFPA<sup>6</sup>, has called for anti-discrimination protection of sex workers as part of creating an enabling environment for HIV prevention, treatment and support.

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<sup>2</sup> NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2003), p. i.

<sup>3</sup> *Ibid.*

<sup>4</sup> L Hillier, T Jones, M Monagle *et. al.*, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010), p. 39.

<sup>5</sup> *Ibid.*, p. 39.

<sup>6</sup> Thematic Task Team on Creating an Enabling Legal and Policy Environment, 1st Asia and the Pacific Regional Consultation on HIV and Sex Work, *Creating an Enabling Legal and Policy Environment for Increased Access to HIV*

The International HIV/AIDS Alliance and the Commonwealth HIV and AIDS Action Group also made a similar call for all members of the Commonwealth of Nations to implement anti-discrimination protection<sup>7</sup>, and they use Queensland's Anti-Discrimination Act (1991) as an example.

The imperative for anti-discrimination protection is broader than creating an enabling environment for HIV prevention, treatment and support. It is a fundamental right to be able to live free from discrimination, harassment and vilification and this applies equally to sex workers as it does to a worker in any other industry. Unfortunately, sex workers face discrimination, harassment and vilification too frequently, impacting sex workers access to services, creating low self-esteem, which affects these sex workers' health, safety and wellbeing<sup>8</sup>.

**Recommendation 4:** That coverage of sex workers is included in the HRAD Bill through coverage of "profession, trade, occupation, or calling" as a category of unlawful discrimination.

## Exceptions

The right to freedom from discrimination is established in the Universal Declaration of Human Rights. Aspects of this right are expanded upon through the thematic human rights conventions such as the *Convention on the Elimination of all forms of Discrimination against Women*. The Yogyakarta Principles outlines how human rights apply explicitly to GLBT people.

Discrimination and its impacts on GLBT people are well documented. These impacts include poorer mental health outcomes, higher levels of suicide, higher rates of substance abuse, verbal and physical violence as well as economic disadvantage.<sup>9</sup> Discrimination violates the fundamental principle of equality and the human rights of the victims.

Exceptions in discrimination law amount to state sanctioned discrimination. As these exceptions are the denial of human rights for those affected, they should be minimal, temporary and specific. Current exceptions, as they exist in the HRAD Bill,

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& *AIDS Services for Sex Workers*.

<sup>7</sup> International HIV/AIDS Alliance and the Commonwealth HIV & AIDS Action Group, 2010, *Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth*.

<sup>8</sup> Michael L Rekart, *Sex-work harm reduction*, *The Lancet*, Volume 366, Issue 9503, Pages 2123 - 2134, 17 December 2005

<sup>9</sup> Australian Research Centre in Sex, Health & Society, *Private Lives: a report on the health and wellbeing of GLBTI Australians*, (2006); L Hillier, T Jones, M Monagle et. al., *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010); NSW Gay and Lesbian Rights Lobby, *The Pink Ceiling is Too Low*, (2003); NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2001), Beyondblue, *Feeling Queer and Blue*, (2009).

are too broad and indefinite. The impact of these exceptions, as well as the public statement that is made through their existence, demands that they be targeted and limited.

While ACON supports the freedom of religious belief guaranteed under the *International Covenant on Civil and Political Rights* as well as the limited freedoms contained in the Australian Constitution, this right is not interpreted to confer an unlimited prerogative to discriminate. Many instances of discrimination against GLBT people occur in institutions controlled by religious organisations that operate in the secular public sphere, for example, aged care facilities, disability supports, schools, hospitals and community services. With the receipt of public funding, and the implicit authority of the state to perform government functions, these organisations should be subject to the same obligations as the government, including the obligation not to discriminate. They should also be subject to the same regulatory framework as other NGOs operating in the same space; otherwise an unfair regulatory advantage is given to one type of provider over the other.

ACON understands that the government has made it clear that broad exceptions will exist. If this is the case, ACON is disappointed that the government will be undermining the universal, inalienable, interdependent and interrelated nature of human rights and anti-discrimination protection as well as its own Human Rights Framework. The existence of exceptions sends a message to the public that it is ok to discriminate against GLBT people. Freedom from discrimination in employment, education, and in transactions of goods and service should be protected for all people.

Experiences of discrimination from Commonwealth funded services such as aged care services<sup>10</sup> are well documented. These experiences of discrimination violate the human rights of GLBT people, especially their right to non-discrimination, their right to equality before the law and their right to health,<sup>11</sup> all rights guaranteed in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both of which Australia has signed and ratified.

Reports including *One Size Does Not Fit All*<sup>12</sup>, *Writing Themselves In 3*<sup>13</sup>, *Private Lives*<sup>14</sup>, and *Uncloseting Discrimination*<sup>15</sup> document the experiences of discrimination

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<sup>10</sup> C Barrett, *My People: A project exploring the experiences of Gay, Lesbian, Bisexual, Transgender and Intersex seniors in aged-care services*, Matrix Guild Victoria, (2008), pp. 13-14.

<sup>11</sup> See for example United Nations Committee on Economic Social and Cultural Rights, *General Comment number 14 The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (2000).

<sup>12</sup> Constable A, de Castro N, Knapman R and Baulch M, *One Size Does Not Fit All: Executive Gap Analysis of NSW domestic violence support services in relation to LGBTI communities' needs*, ACON 2011. NSW Gay and Lesbian Rights Lobby, *The Pink Ceiling is Too Low*, (2003).

<sup>13</sup> L Hillier, T Jones, M Monagle et. al., *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010)

<sup>14</sup> Australian Research Centre in Sex, Health & Society, *Private Lives: a report on the health and wellbeing of*

across a wide range of services, including domestic violence services, mental health services, schools, youth services, and disability services. Anecdotal information through ACON service provision suggests that the experiences documented in these reports are representative of the experiences of discrimination in other service settings as well. What is common to these experiences is that the discrimination often happens at particular points of vulnerability for those people – exactly the time when discrimination can have its most harsh impacts.

The Explanatory Notes and the Regulatory Impact Statement (RIS) accompanying the HRAD Bill looked at the exceptions to the HRAD in relation to Commonwealth funded aged care services. It supported the view that due to the vulnerability of some people receiving aged care that they should be able to live free of discrimination regardless of the provider of that service. ACON agrees with this assessment and strongly supports section 33 of the HRAD Bill.

The RIS also looked at extending this protection to people in receipt of any service that receives Commonwealth funding (Religious Organisations receiving Commonwealth funding Option 3: exemptions do not apply to religious organisations providing any services with Commonwealth funding, but permit discrimination in employment (if registered))<sup>16</sup>. While this option does not go as far as ACON has recommended in the past, in particular it does not extend to employment discrimination, this option is the best option of those put forward. The RIS said that the regulatory impact would not be great and the only impact would be on those organisations that currently discriminate. It also equalises the regulatory impact that currently exists for those services that are run by organisations that are operated by non-faith based services providers.

**Recommendation 5:** That no exceptions to the consolidated anti-discrimination legislation are available for any organisation receiving government funding when performing those government functions or when employing staff.

**Recommendation 6:** That if any exceptions are to be included in the HRAD, that Option 3 of the Regulatory Impact Statement be incorporated into the HRAD Bill.

### **HIV and the Migration Act**

Unfortunately discrimination against people with HIV, as well as other people with attributes covered by the current *Disability Discrimination Act* and carried into HRAD, is sanctioned within Australia's migration legislation. ACON urges the government to end its support for the current discriminatory immigration policy.

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*GLBTI Australians*, (2006)

<sup>15</sup> NSW Gay and Lesbian Rights Lobby, *Uncloseting Discrimination: Consultation Report on the Intersections of Discrimination*, (2012).

<sup>16</sup>Consolidation of Commonwealth Anti-Discrimination Laws Regulatory Impact Statement, Attorney-General's Department p.70

Currently the Migration Act is not subject to the protections available under the *Disability Discrimination Act 1992*. This is a serious impediment to people living with HIV to enter Australia under a range of different categories. The United Nations has called for strong and wide ranging anti-discrimination protection for people living with HIV in order to create the most enabling environment for HIV prevention, treatment and support. The current regime is a disincentive that must be fixed. It is also stigmatising.

ACON supports the calls of other HIV, disability and social justice organisations to make the provisions of HRAD apply to the *Migration Act*. In the past, the Australian Federation of AIDS Organisations, of which ACON is a member, the National Association of People Living with HIV/AIDS and other leaders in the HIV sector have called for this change. Equally, the National Ethnic Disability Alliance, People with Disability Australia and the Australian Federation of Disability Organisations and other leading organisations in the disability sector have called for this change. This would bring the Australian Government into line with the international obligations outlined in the *International Convention on the Rights of Persons with Disability*.

The Australian Government should then move to lift its formal reservation attached to the *Convention on the Rights of Persons with Disability* which will assist in improving Australia's reputation as a good international citizen and leader in disability rights.

**Recommendation 7:** That the Migration Act is subject to the HRAD.

## **Transparency**

Organisations that utilise any exceptions under the HRAD must make it known to relevant parties when they are utilising the exceptions. This will allow organisations who do not utilise them to show this and those that do will inform the public when they are being utilised. This would include statements in job advertisements, throughout enrolment processes, through applications for service as well as on websites and in official publications. This will limit any confusion by members of the public, as is currently the case when applying for jobs or seeking services with faith based organisations, and minimise the likelihood of negative consequences for all those involved. This statement should be formulated in a way that states that the organisation is utilising exceptions under the HRAD, which protected attributes they are discriminating against and in what way, such as employment or service delivery. A statement could be something as simple as "*Organisation X* utilises the exceptions to the Human Rights and Anti-Discrimination Act 2013, under section 33, allowing us to discriminate on the basis of sexual orientation when employing staff and providing services"

**Recommendation 7:** That any organisation utilising exceptions to HRAD must make these public, including when advertising for jobs or the provision of services.

## **Resourcing of the Australian Human Rights Commission**

To enable the Australian Human Rights Commission to be known to GLBT people as a place where they can seek redress from discrimination, an additional Commissioner with responsibilities over sexual orientation, gender identity and sex characteristics discrimination is required. The removal of the general Human Rights Commissioner through this process, which is unfortunate, makes the need for an identified commissioner with responsibility for GLBT people is now more important.

Additional staffing for the Commissioner as well as for complaints handling and community education would enable the Commission to deal with discrimination against GLBT people by providing alternative dispute resolution as well as conducting policy and advocacy activities. This model would be similar to the current arrangement for Sex Discrimination, Age Discrimination, Race Discrimination, Disability Discrimination and Social Justice Commissioners.

**Recommendation 8:** That the legislation provides for an additional Commissioner at the Australian Human Rights Commission with responsibilities for discrimination on the grounds of sexual orientation, gender identity and sex characteristics.

**Recommendation 9:** That the legislation provides for additional staff members at the Australian Human Rights Commission, including the establishment of a policy unit for the new Commissioner.