



26 November 2010

The Hon Catherine Branson QC
President and Human Rights Commissioner
LGBTI Discrimination Consultation
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

By email: lgbti@humanrights.gov.au

Dear Ms Branson,

**Consultation on federal protection from discrimination on the basis of sexual orientation
and sex and/or gender identity**

1. Women's Legal Services NSW (**WLS NSW**) welcomes the opportunity to contribute to the current consultation by the Australian Human Rights Commission (**AHRC**) on federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity.
2. WLS NSW has had the opportunity to see a draft of the Inner City Legal Centre (**ICLC**) comments to this Consultation and we fully endorse the contents and recommendations of that submission. However, we would like to take this opportunity to make some additional comments in relation to some of the discussion questions.
3. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

Discussion Question 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?

Discussion Question 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?

4. WLS NSW supports the proposal to develop national protections from discrimination on the basis of sexual orientation and sex and/or gender identity. However, we are concerned that any



new legislation extends, and does not reduce, existing protections under state and territory legislation.

5. WLS NSW believes that it is a fundamental human right that all Australians are equal before the law. As such we submit that there is no logical reason to discriminate against any Australian because of their sexual orientation or their sex and/or gender identity.
6. WLS NSW notes that although federal law presently protects against discrimination on the basis of age, disability, race and sex, there is little protection from discrimination against lesbian, gay, bisexual, trans and intersex (LGBTI) people.
7. WLS NSW submits that the failure of federal law to provide legislative protections from discrimination, alongside inequalities in marriage law and industrial law, sends a message to the Australian people that it is acceptable to discriminate against LGBTI people. Given the high rates of discrimination and violence towards LGBTI people, as outlined in the background papers, enactment of federal anti-discrimination legislation is vital to redress current inequalities and to promote the human rights of LGBTI people.
8. However, WLS NSW is concerned that existing state and territory anti-discrimination protections are not eroded by less beneficial federal legislation, particularly if the new legislation is not drafted to maintain anti-discrimination laws, since any inconsistent federal law would override state and territory laws.
9. WLS NSW is very concerned that the parliamentary process could result in laws reflecting the "lowest common denominator" of the existing state and territory laws. WLS NSW submits that any new federal legislation should strengthen anti-discrimination protections for LGBTI people beyond the current anti-discrimination laws. At a minimum, we submit that any new laws should provide at least as much protection as the most beneficial of the current state and territory anti-discrimination laws.

Discussion Question 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?

10. WLS NSW notes the protections afforded to LGBTI people under existing state and territory laws are varied and inconsistent, as Anna Chapman usefully outlined in the research paper prepared for this Consultation.
11. Accordingly, WLS NSW submits that it is vital that federal legislation is enacted to protect LGBTI people from discrimination across the country. We note that federal legislation could extend protection to forms of discrimination not presently covered in state and territory legislation, afford better protection to people who live near state borders, and protect employees of the Commonwealth or federal government agencies.

Discussion Question 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?

12. WLS NSW supports the ICLC comments on this question and further submits that if terminology along the lines of that used in the *Anti-Discrimination Act 1984* (NSW) is to be adopted, we recommend that the term "lesbian" should be specifically included in the

definition. As Chapman explained “the word “homosexuality” has been, and continues to be, commonly interpreted to refer to same sex sexual activity between men”, with the result that lesbians have reported being “unsure of whether the homosexuality ground applies to them and of feeling devalued by the wording of the ground.”¹

13. WLS NSW also notes that definitions that focus on “lawful sexual activity” have an effect of reducing lesbian and gay people to sexual acts, excluding broader notions of identity and community.

Discussion Question 9: What special measures designed to benefit specific groups based on sexual orientation and sex and/or gender identity should be allowed by federal anti-discrimination law?

14. WLS NSW submits that the human rights of LGBTI people to equality under the law should be upheld without exceptions or exemptions. We also submit that measures designed to redress existing disadvantage and promote the equality of LGBTI people should properly be considered to be “special measures” not “exceptions” or “exemptions” as these positive measures are not discrimination. WLS NSW would support any special measures that are designed to enhance equality for LGBTI people such as specialist legal services, police liaison officers and health services targeted at LGBTI communities.
15. We are particularly concerned that the broad exemptions and exceptions in some state and territory laws should not be imported into any new federal legislation. WLS NSW opposes exceptions or exemptions on the basis of religious beliefs or principles, business size, or provision of reproductive services and adoption services. We are particularly concerned that many religious organisations that receive public funding to provide services such as family relationships services, counselling services, adoption services and housing services are then able to discriminate against LGBTI people in employment and service provision. WLS NSW submits that the objective of any anti-discrimination legislation should be the elimination of all forms of discrimination against members of the minority groups to be protected. We believe that allowing people to lawfully discriminate under exemptions or exceptions would undermine the ability of the legislation to fulfil this purpose.
16. If exemptions or exceptions (other than those designed to allow positive measures) are to be included in any new legislation, WLS NSW submits that such exemptions be as limited as possible. We also submit that any exemptions should be drafted such that an organisation or employer cannot discriminate unless they have applied for, and been granted an exemption, along the lines of temporary exemptions granted by the AHRC under the Age, Sex and Racial Discrimination Acts.² This process is preferable to an automatic exception because no person should be automatically able to lawfully discriminate and it avoids the situation where an aggrieved person must make a complaint and then go through a potentially difficult conciliation process only for the respondent to successfully claim an exemption.

Discussion Question 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?

¹ Anna Chapman, “Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope” (1996) 3(3) *E LAW: Murdoch University Electronic Journal of Law*, accessed on 25 November 2010 at: <<http://www.murdoch.edu.au/elaw/issues/v3n3/chapman.html>>

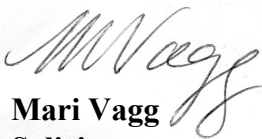
² *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Age Discrimination Act 2004* (Cth)

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17. WLS NSW notes the need for exploration of ways to adequately recognise and protect people from discrimination where there are intersections of different forms of discrimination. For example, in 2005 the ADB explored issue of ageing and discrimination for people in the LGBTI communities.³
18. Intersectional discrimination refers to the compounding effect of discrimination where a person experiences multiple forms discrimination. We note that these multiple identities interact and intersect so that the discrimination experienced is a new and unique experience of discrimination that cannot be simply separated into its constituent elements. We also note that intersectional discrimination may be difficult to prove and may not be adequately recognised.
19. WLS NSW therefore submits that there is a significant need to consider ways that discrimination claims can be brought on combined multiple grounds.

If you would like to discuss any aspect of this submission, please contact Janet Loughman, Principal Solicitor or Mari Vagg, Solicitor on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW



Mari Vagg
Solicitor

³ Anti-Discrimination Board of NSW, *Forum on ageing and discrimination in the gay, lesbian, bisexual, transgender and intersex communities - working paper*, 2005, accessed on 26 November 2010 at:
<http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_glbti_consultation>