



**VICTORIAN GAY &  
LESBIAN RIGHTS LOBBY**

PO Box 21305, Little Lonsdale St MELBOURNE  
VIC 8011

Ph: 0417 484 438

Web: <http://www.vglrl.org.au>

Email: [info@vglrl.org.au](mailto:info@vglrl.org.au)

ABN: 85223439635

20 February 2015

Mr Tim Wilson  
Human Rights Commissioner  
Australian Human Rights Commission  
via [sogji@humanrights.gov.au](mailto:sogji@humanrights.gov.au)

Dear Commissioner Wilson

Thankyou for the opportunity to discuss with you a wide range of issues at the recent LGBTI Rights Roundtable Discussion held in Melbourne on Tuesday 25 November 2014.

Further to the issues raised verbally, the election survey that we provided to you outlining current LGBTI issues in Victoria and the joint submission we have prepared with the Human Rights Law Centre and other LGBTI community groups regarding the state and territory laws that are inconsistent with the *Sex Discrimination Act 1984 (Cth)*, we wanted to provide you with this specific submission on the issue of religious exemptions to put a range of solutions on the table for future consideration.

Our strong view is that blanket exemptions for religious exemptions fail to balance the human right of freedom of religion with freedom from discrimination. "Indeed, such wide ranging exemptions give priority to religious freedom at the expense of the freedoms of the LGBTI population. This position does not reflect the current practices of religious organisations or the views of the vast majority of Australians.

We understand from our discussions with faith based service providers that the current law does not represent an accurate reflection of their standard operating procedures and policies. However many LGBTI Australians do not see a distinction between a service delivery ethos of care and the church hierarchy's view of LGBTI people. Accordingly the threat of discrimination may lead them to not access or be uncomfortable when forced to access such services. In fact, a number of faith based organisations actively oppose religious exemptions because of the negative perceptions created for their organisations.

May we reiterate our deep appreciation to you and the Commission for undertaking this important consultation. We look forward to the outcomes of the consultation and stand ready to work with you on implementing any recommendations that may arise.

Kind regards

Anna Brown  
Co-Convenor

Corey Irlam  
Co-Convenor

# Australian Human Rights Commission Consultation - Sexual Orientation, Gender Identity & Intersex Rights

## VGLRL Submission

### 1. Exemptions for religious bodies and schools

---

#### Case Study: employment by a religious organisation

Kathy is a teacher in a Catholic school and identifies as a lesbian. However, Kathy lives in fear that her sexual orientation will be discovered by her employer because she is aware that the Catholic church does not accept homosexuality and understand there is a policy in place to only employ teachers who subscribe to certain values. Kathy does not talk about her personal life with her colleagues or students and avoids social settings which are known to be frequented by same sex attracted patrons. Kathy had heard of lesbian teachers being discovered holding hands with other women on the street and being sacked.

Kathy's relationships have broken down in the past because her partners do not accept her closeted lifestyle and wish to be able to hold hands in public.

Kathy felt very lucky to secure a teaching role at the school given the difficult employment market for teachers and the long waiting list for jobs in the public school system. She intends to continue to sacrifice her personal life in favour of employment.

\*Kathy's name has been changed to protect her privacy.

- 1.1 The recently amended *Sex Discrimination Act 1984* (Cth) (SDA) contains permanent statutory exemptions for religious bodies under section 37 that permit discrimination on the basis of ALL protected attributes (including the new attributes of sexual orientation, gender identity, marital or relationship status and intersex status). The exemption applies where the action 'conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'. There is no known doctrine, tenant or belief opposing intersex people and accordingly it does not appear that this clause would enable to be relied upon to justify discrimination on the basis of intersex status. However, this would need to be tested in Court to confirm our understanding.
- 1.2 The permanent exemption for religious schools provided for by section 38 applies to only a select number of protected attributes. It permits within it discrimination against a person on the grounds of the person's sex or pregnancy in addition to the new grounds of sexual orientation, gender identity, marital or relationship status (but not intersex status).
- 1.3 The VGLRL is extremely disappointed that the broad religious exceptions have been retained by successive Governments and concerned about the impact of the exemptions on LGBTI Australians

- 1.4 These ‘permanent statutory exceptions’ set religious groups apart from other groups, who need to justify that any differential treatment is fair and reasonable. As stated by the Human Rights Law Centre in another inquiry, on their face these exceptions are ‘manifestly inappropriate and inconsistent with Australia’s human rights obligations’.<sup>1</sup>
- 1.5 It is incongruous for the Government to take the positive step of introducing protections on the basis of sexual orientation and gender identity, yet entrench discrimination against these groups through broad permanent exceptions.
- 1.6 We also note that the Federal provision for religious exemptions ‘lowers the bar’ in some states, notably Tasmania where no religious exemptions exist and in Queensland where a limited exemption is available where necessary to meet the inherent requirements of a particular job. We are concerned that LGBTI people living in these states have faced increased discrimination as a result of the Commonwealth reforms.
- 1.7 The VGLRL reiterates its position from its submission to the exposure draft of the *Human Rights & Anti-Discrimination Bill 2012 (HRAD Bill)* that broad permanent exemptions for educational institutions and religious bodies should not be permitted and that sections 37 and 38 should either be removed and replaced with a general justification defence or general limitations clause, or narrowed significantly. Such an approach would, for example, most likely permit discrimination in circumstances specifically enumerated in s 37, such as the ordination of priests.<sup>2</sup>
- 1.8 If such an approach was adopted, religious organisations would also retain the ability to apply for temporary exemptions under s 52 of the SDA. This is a process by which each individual application may be considered on its merits.
- 1.9 Further, we wish to draw the AHRC’s attention to the strong recommendations of the Senate Legal and Constitutional Affairs Committee following its inquiry into the draft HRAD Bill.<sup>3</sup> In their recommendations the Senate suggested removing blanket religious exemptions. The Committee suggested that the Australian Government adopt the approach taken by the *Anti-Discrimination Act 1998 (Tas)* (Recommendation 11). Further, the Committee suggested that where organisations retain the legal right to discriminate, they must proactively publish their intention to rely upon the exemption up front. (Recommendation 12)

### Recommendation 1

The exemptions for religious bodies and schools in sections 37 and 38 of the SDA and equivalent exceptions in state-based anti-discrimination laws should be either be removed and replaced with a general justification defence or general limitations clause, or narrowed significantly.

<sup>1</sup> Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, p 46.

<sup>2</sup> Human Rights Law Centre, *A Simpler, Fairer Law for All*, 2012, p 47.

<sup>3</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (2013) Recommendations 11 and 12  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/index)

## 2. Alternatives to removing religious exemptions

---

- 2.1 If the AHRC does not agree with our recommendation above, a number of alternatives are outlined below for your consideration. These options could be adopted either in part or whole.
- 2.2 Before the alternative proposals are outlined, we first detail a number of important issues for consideration when considering policy formulation in this area.

### Choice is not always an option

- 2.3 One policy justification for the religious exceptions may be premised on the ability of individuals to choose from available services, including both religious and non-religious providers. However, the luxury of choice is simply not available in many areas and in many settings.
- 2.4 LGBTI people living in regional, remote or rural areas may have access to limited service delivery options. For example, specialist services such as Cancer treatment may only be available from faith based hospitals in particular geographical areas.
- 2.5 Vulnerable people accessing crisis, emergency or other vital social services do not often find themselves with a field of potential providers to choose from. Often the market for these services is extremely scarce and those individuals accessing services are extremely vulnerable. It is grossly inappropriate for individuals experiencing mental illness or those with an intellectual or other disability to be subjected to the prospect of discrimination on the basis of their sexual orientation or gender identity.

### Case Study: employment services

David\* was a young university graduate in receipt of Newstart allowance. He had grown up in a Baptist family and following negative experiences relating to his sexual orientation he now feels uncomfortable in this type of religious settings.

David was referred by Centrelink to an employment service run by a Christian organisation with similar beliefs to the Baptist church. He did not feel comfortable utilising this service given his negative experiences relating to his upbringing. He spoke of his discomfort with the Centrelink officer and was told that he had no choice.

David was young and not very confident so he was not open about his life and circumstances with the Christian service provider because he feared discrimination. This inhibition meant that David didn't receive the help that he needed.

\*David's name has been changed to protect his privacy.

## Faith base service providers do not necessarily want to discriminate – do they?

- 2.6 The VGLRL recognises that many religious organisations do not discriminate in practice and a number have publicly stated their intention not to take advantage of the broad exceptions available under state and federal anti-discrimination laws. Indeed, some religious organisations resent the existence of exemptions, seeing the exclusion of one particular group as inconsistent with their faith.<sup>4</sup>
- 2.7 Unfortunately, the fear and apprehension of discrimination due to historical experiences is very real in the minds of LGBTI people, regardless of whether the provider in question intends to discriminate or not. Removing the ability of religious organisations to discriminate against LGBTI people as of right (that is, without justification) will go some way to increase the comfort levels of LGBTI people in dealing with religious service providers.

### Case Study: Skipping local accident and emergency for fear of discriminatory treatment

Tony is a trans-man who take daily doses of testosterone. He lives in the outer west of Melbourne where his local accident and emergency department is Werribee Mercy Hospital. This A&E department is run my Mercy Health who presents itself prominently as a “Catholic organisation grounded in a 2,000-year tradition of caring for others, founded by the Sisters of Mercy”.

When Tony requires medical treatment he chooses to travel an additional 25km to Sunshine Hospital’s Accident and Emergency Department (the next closest) because he is aware Mercy would legally be able to decline to provide him with his daily testosterone as they are a religious organisation. Tony has told his family and friends if anything happens they are to instruct the Ambulance to drive the extra 25minutes to Sunshine, which could endanger Tony’s health outcomes.

\* Tony’s name has been changed to protect his privacy.

<sup>4</sup> See, for example, public statements made by the Salvation Army in response to criticisms regarding their policy on homosexuality. See Siobhan Duck, ‘Angry Response to Salvation Army’s Gay Stance’, *The Herald Sun*, 18 June 2012 (accessed at <http://www.heraldsun.com.au/news/victoria/angry-response-to-salvation-armys-gay-stance/story-fn7x8me2-1226398031984>).

## Proposal 1: Transparency and accountability

- 2.8 The VGLRL also supports the Senate Legal and Constitutional Affairs Committee's views discussed in its Report into the draft HRAD Bill that in the interests of transparency, religious organisations intending to discriminate in employment should be required to notify prospective employees.
- 2.9 If religious organisations are to be granted permanent exceptions from discrimination laws, members of the community are entitled to be informed of risk of discrimination before they make a decision to purchase goods and services or apply for a job. Imposing such a notice requirement would also enable those organisations that do not discriminate to be free from any suspicion of discriminatory conduct or intent.
- 2.10 The SDA and state-based discrimination laws of general application (that contain exceptions for religious organisations) should include a requirement that religious organisations publish statements on their websites, position descriptions for job advertisements and brochures or other promotional or informational material relating to the provision of goods or services, education or accommodation.
- 2.11 Religious organisations should also be required to register a notice of their intention to discriminate with the Australian Human Rights Commission (**Commission**) or the relevant state-based equal opportunity regulator and a searchable public record should be maintained of these notices. This would not only serve to forewarn potential victims of discrimination but ensure accountability to the wider community.
- 2.12 The VGLRL encourages the AHRC to support requiring educational institutions and religious bodies to publicly document when and why they intend to rely on these exemptions.

### Recommendation 2

Religious organisations and schools intending to rely on the religious exemptions (sections 37 or 38 of the SDA) or the religious exceptions in state-based anti-discrimination laws be required to publish a notice on their websites and in literature provided to potential applicants/customers/patients/students or others potentially affected by their intended discrimination and register a notice with the relevant equal opportunity regulator.

## Proposal 2: Extending the limitation of discrimination from Commonwealth Funded Aged Care Services to all other publicly funded service delivery, particularly to vulnerable groups

- 2.13 As part of the Sex Discrimination Act's amendments to introduce LGBTI protections in 2013, a restriction to clause 37 was introduced<sup>5</sup>. In effect this restriction meant that regardless of whether an aged care service was privately owned or owned by a religious organisation, the service delivery would be provided in a non-discriminatory manner. This was a sensible compromise for a number of reasons:
- a) There was clear bipartisan support for the change by a number of service providers who took the view they wanted their service to be known as not discriminating. (In many cases these providers may have had differing views to the Church hierarchy)
  - b) Providers could remove themselves from being effected by the changes by ceasing to receive Commonwealth funds for its services.
  - c) The change only affected vulnerable people in the delivery of their service – it did not affect an organisation's choice of who could be employed to deliver those services.

### Case Study: Crisis assistance for young people\*

Lee was a young university student who had just come out to his family and was kicked out of home. He approached Centrelink and was referred to the Salvation Army for assistance. The problem was that Lee was from a Salvation Army family and the Salvation Army religious beliefs were the reason he was asked to leave home and the church. He was too embarrassed to tell anyone at Centrelink and was unaware that there were other options available to him.

\* Lee's name has been changed to protect his privacy.

- 2.14 These existing protections to the area of aged care should be extended to other areas of service delivery. It is particularly objectionable that public funding be provided to organisations that are given broad licence to discriminate against LGBTI people and other vulnerable groups such as LGBTI children in schools, users of welfare agencies, homeless people, people in unstable housing or agencies for people with disabilities. The national roll out of Disability Care in states and territories has also resulted in a shift towards the contracting out of disability services previously delivered by government agencies.
- 2.15 Additionally, the VGLRL strongly believes the religious exemptions should be amended to achieve protection of both employees and service recipients. While we acknowledge that the above 'compromise' provided protection to the most vulnerable and least equipped to redress any discrimination they faced, such protection should also be extended to the workplace.

---

<sup>5</sup> Commonwealth of Australia 'Sex Discrimination Act 1984' s4, s23 (3A) and s37 (2). Available from <http://www.comlaw.gov.au/Current/C2014C00002>

- 2.16 The VGLRL strongly supports a limitation on discrimination in publicly funded services including:
- mental health services;
  - homelessness and housing services;
  - disability services;
  - health services;
  - youth services;
  - schools; and/or
  - social, community and welfare services.
- 2.17 If the religious exceptions are to be maintained, they should be restricted to prevent any organisations in receipt of government funding from relying on the exceptions. This would ensure that public funding is not utilised to perpetuate discrimination and disadvantage. It is particularly offensive for LGBTI taxpayers to find themselves faced with public service delivery options that they may be unable to access or that may be delivered in a manner inappropriate for their needs.
- 2.18 These settings deal with minors and potentially other people lacking legal capacity due to mental illness or intellectual disability, further evidencing their vulnerability. Considering the adverse mental and physical health impacts of discrimination, the Federal Government has a moral duty to ensure the delivery of these services is regulated so as to prevent or limit discrimination.

### **Recommendation 3**

The SDA and equivalent state-based anti-discrimination laws should be amended to prohibit discrimination by publicly funded service providers, including religious organisations and schools.

Alternatively the SDA Bill and equivalent state-based anti-discrimination laws should be amended to prohibit discrimination by publicly funded service providers delivering services to vulnerable groups, such as the homeless, children and young people, older people, people experiencing mental illness, people with disabilities, refugees and/or people experiencing poverty or other disadvantage.