

1. What is the LGBTI Network?

The Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) * Network is a network of the National Association of Community Legal Centres (NACLC). The Network is made up of people from community legal centres across Australia with an interest in legal issues affecting LGBTI people.

This submission will focus on legal issues affecting lesbian and gay people, or people in same sex relationships. The following submission is not exhaustive of the issues affecting lesbian, gay or bisexual people, nor transgender or intersex people. However, it does highlight some of the concerns over breaches of human rights, based on the experiences of our clients and what has been reported by people who work in community legal centres.

The LGBTI Network is happy for this to be a public submission.

2. Which human rights and responsibilities should be protected and promoted?

a. International Treaties

Australia is a signatory to many international covenants that expressly refer to sexual orientation and gender identity. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) include human rights for all people of all sexual orientations and sex/gender identities. Australia has also signed the UN Statement on Sexual Orientation and Gender Identity.

In order to meet Australia's international obligations under these instruments, the Articles should be ratified into domestic laws.

b. Yogyakarta Principles

The Yogyakarta principles are a comprehensive statement of principles of human rights law as they apply to sexual orientation and gender identity. These principles are adapted from the Universal Declaration of Human

* For the purposes of this paper, we refer to LGBTI to denote lesbian, gay, bisexual, transgender and intersex.

Rights and other instruments of international law, and are a useful guide to human rights issues for the LGBTI community.¹

c. Equality before the law

i. Historic discrimination against lesbian and gay people

Australian history is marred by breaches of the rights of lesbian and gay people. While lesbian relationships have never been illegal in Australia, gay male sexual relationships have been against the law in all states of Australia, and have only been legalised in the last thirty years. Lesbian and gay people have also experienced harassment, violence, discrimination and exclusion.

Additionally, many LGBTI people experience compounded discrimination, because of their gender, race or disability.

ii. Historic discrimination against transgender and intersex people

Transgender people, intersex people and sex and gender diverse people still experience significant discrimination under Australian law. The recent Sex Files report from the Australian Human Rights Commission noted some of these breaches of human rights.² Additionally, intersex people do not have protection under discrimination law in Australia.

iii. The importance of equality under the law

As Australian law has historically not treated lesbian and gay people equally under the law, we believe that it is important for there to be equality for LGBTI people under the law, in all areas of Australian law.

We submit that it is not only public authorities that should be bound by a Equality/ Human Rights Act but as human rights belong to all equally – all providers, persons and organisations should be bound by the human rights of non-discrimination and equality before the law found in a national Equality/ Human Rights Act.

iv. Young v Australia

We also note the decision of *Young v Australia* from the United Nations Human Rights Committee in 2003, indicated that the Australian

¹ The Yogyakarta Principles can be accessed at:

http://www.yogyakartaprinciples.org/principles_en.pdf

² Available at http://www.humanrights.gov.au/genderdiversity/sex_files2009.html

Government legislation and policy was discriminatory on the grounds of sexual orientation.

d. Privacy

The right to privacy is essential to upholding personal dignity. Privacy should be given as broad a definition as possible as per international jurisprudence. In Victoria, the section on 'privacy' in the Victoria Charter of Human Rights and Responsibilities Act 2006 has been used to prevent evictions (unlawful and arbitrary interference with the 'home') and to uphold human rights.

i. Sexuality and Sex/Gender Identity

Information about a person's sexuality or sex/gender identity should by its nature attract a right of privacy. This is particularly important as when a person's sexuality or sex/gender identity is disclosed, this can result in harassment and violence in some contexts.

ii. HIV status

A person's HIV status should also by its nature attract a right of privacy, given the potential for discrimination and stigmatisation. Privacy in this context is essential to the well-being of persons with HIV.

e. Protection of families and children

i. Relationship recognition

It is important that there be a system of relationship recognition for same sex couples in Australia. This is particularly important for lesbian and gay couples, as they can face discrimination within society as a result of their sexuality, and their relationships can be seen as 'less than' heterosexual relationships.

There is debate among lesbian and gay people about the best form for relationship recognition. Some people believe there should be equal marriage rights for all people, while others believe that a form of civil partnerships separate to marriage would be appropriate.

ii. Recognition of same sex couples who are parents

Many same sex couple are parenting children, including children conceived through co-parenting arrangements, donor insemination, surrogacy and children from previous relationships. Studies show that the sex/gender of parents is not important for the wellbeing of children, but the quality of the parenting is the important factor.

f. Security of the Person

i. Protection from harassment and violence

Many LGBTI people have reported that they experience harassment and violence, including in the workplace, from family members and from strangers. LGBTI people need to feel secure and protected from this harassment to be able to fully participate in society.

3. Are human rights sufficiently protected and promoted?

a. Equality before the law

i. No federal discrimination law on sexuality grounds

There is a clear need for a unified, Federal anti-discrimination law against discrimination on the ground of sexuality, as there are in other areas. The majority report of the 1997 Senate Legal and Constitutional Affairs Committee *Inquiry into Sexuality Discrimination* recommended that discrimination protection be implemented at a Federal level, yet reform has not yet taken place.

ii. No federal discrimination law on sex/gender identity

Additionally, there is no federal discrimination law to protect transgender or intersex people from discrimination.

iii. Exceptions to discrimination law

There are a number of exemptions or exceptions under state discrimination laws, including for charities, religious organisations and private schools. This means that lesbian and gay people have no remedies available under these laws if they are discriminated against by these bodies. Human rights of LGBTI people should be protected in their interactions with all bodies in the public and private sphere.

Case Study

Angela is employed as a teacher in a private school in NSW. She has been in a relationship with Catherine for six months, and they are planning on moving in together into Angela's house. Angela has not discussed her sexuality at work, because she knows that the school does not accept same sex relationships.

Angela is concerned about what may happen if the school discovers that she is a lesbian. She is worried that she may lose her job. She also knows

that there is no remedy under NSW law if she is discriminated against because of her sexuality, as private educational authorities have an exemption from discrimination law.

iv. Removal of discrimination

In the removal of discriminatory laws against LGBTI persons, it is important that they are implemented in a way that is fair and equitable. The Federal Government's removal of financial discrimination against same sex couples in 2008 was welcomed by many people in the community, however it also meant that many same sex couples are going to receive lower Centrelink benefits from 1 July 2009. Additionally, there is much law reform needed to ensure that transgender and intersex people are treated equally under the law.

Case Study

Ros and Rachel live in a small community town in NW Tasmania. Ros is on a disability pension and Rachel has been on age pension for 8 years. They have been together for 12 years and while Ros is out to her family, neither she nor Rachel are openly gay in the community. They travel to Burnie to socialise or otherwise entertain in their own home.

Both Ros and Rachel will lose \$92.60 each off their fortnightly payments. They will also lose a combined \$14 off their rental assistance, This has huge implications for them being able to afford Ros's medical treatments

Ros and Rachel know the staff at the Centrelink office. They are extremely distressed that their private life will be exposed and their safety compromised. They feel embarrassed and are particularly concerned about the effect this will have on Ros's health. Rachel does not want her ageing mother to know and is extremely depressed fearing it is out of her control now.

They have never had any of the benefits that other couples have, including tax and other benefits while they were working, and now have no way of preparing themselves for this huge loss in lifestyle, let alone their standing in the community.

b. Privacy

i. Importance of maintaining privacy of records

It is important that Government departments and private bodies recognise the need to maintain privacy of information about a person's sexuality or gender identity. While many organisations have policies that emphasise they protect a person's privacy, these policies may not be commonly known within the organisation or the importance of privacy might not be respected by individuals.

Case study

Monica is a transgender woman living alone in a regional town. Her neighbours and community do not know that she is transgender. She has recently been receiving letters from a government department that refer to her as 'Mr' and use her previous name.

Monica's community is small and close-knit. She is worried that the postman or one of her neighbours may see one of the letters and her background will be revealed. She feels that there is a real risk of violence if this was to occur.

Case study

Anne and Samantha are a lesbian couple who live together. Anne had a letter published in a newspaper criticising aspects of an article which was prejudiced toward homosexuality. In the letter Anne wrote positively of her relationship and referred to her partner as a woman. A fortnight later Anne received a letter which consisted solely of a published extract claiming that homosexuality was a sexual deviation. The envelope identified the sender as a doctor, who Anne and Samantha discovered is a registered medical practitioner in another state. The doctor was not mentioned in the article and was unknown to Anne and Samantha.

Anne and Samantha were disturbed and angered by the letter and particularly the fact that the sender knew where Anne lived. After the newspaper finally returned their calls and emails, they confirmed that although the newspaper publishes the name and suburb of letter writers, it did not provide any other details to the doctor. They contacted their equal opportunity commission who was unable to assist them. They also made a complaint to the medical board in the doctor's home state, requesting an apology from the doctor and an undertaking that he will respect the privacy and legally equal status of same-sex couples. This complaint was passed on to another entity which subsequently informed them that it would not pursue the complaint because the doctor's behaviour was not in the course of providing Anne with a health service. Three months after their complaint to the medical board, they are still leaving long distance telephone messages trying to ascertain whether any action will be taken.

c. Protection of families and children

i. Relationship recognition

Same sex couples can be recognised as 'de facto' couples or 'domestic partners' under the law, provided that their relationship fits the criteria of a number of different factors as outlined in the *Acts Interpretation Act*.

Being in a de facto couple however is not equal under the law. There are no mechanisms on a federal level for a formal system of relationship recognition. In 2004, the Federal Government passed the *Marriage Legislation Amendment Bill*, which specifically defined marriage as between a man and a woman, and refused to recognise same sex marriages performed overseas. Former Chief Justice of the Family Court Alistair Nicholson has repeatedly condemned the ban on same sex marriage, criticising both the government and opposition as having 'successfully turned the clock back 140 years'.

In the Australian Capital Territory, Victoria and Tasmania there are specific relationship recognition laws in the form of Acts of Parliament that create specific new and legal relationships. While this is beneficial to those domiciled in these states/territory, it does not mutually recognise relationships in other states nor countries for the purposes of that States Act (see *Relationships Act 2008 Vic*)

In order to move forward as a nation, marriage rights must be equal for all Australians. Same sex couples have the right to marry in numerous foreign jurisdictions, including Canada, Iceland, Belgium, Spain, Sweden, The Netherlands, Norway, South Africa and certain states in the USA.

Additionally, many state and territory laws require a transgender person to be single before they can amend their identity documents to reflect their true gender. This creates significant problems for transgender people who are happily married.

Case Study

Helen and Marc have been married for twenty-five years. Three years ago, Marc changed her name to Mary and affirmed her gender as a woman. Their relationship is still strong, and they do not want to get divorced. Mary has had her surgery, but she is not able to change the gender recorded on her birth certificate because she is still married.

This means that Mary won't be able to amend many of her identity documents, and will present as female in society but with identity documents that state she is male. This exposes her to a real risk of violence.

ii. Adoption

Same sex couples are currently unable to adopt under many state laws in Australia. This deprives children of a loving home which could be provided by a same sex couple.

Case Study

Mike and Carlos are a gay couple. They have been fostering Angie and Ben, through a foster care agency. Angie and Ben are in their late teens, and Mike and Carlos are the only parents they have ever known.

Mike and Carlos would like to adopt Angie and Ben, so they are legally recognised as their parents. Adoption is not available to same sex couple in NSW. This means that their family relationship is not recognised by the law.

iii. Surrogacy

Increasingly, gay men are choosing to become parents through surrogacy arrangements. At present, the law does not have a simple mechanism for a child born through these arrangements to have the intending couple recognised as the legal parents. The law needs to recognise that these arrangements can provide a secure and loving family for children to be raised in, and that they should be recognised in the same way as other families.

iv. Co-parenting arrangements

Additionally, some gay and lesbian couples are entering co-parenting arrangements, where three or four people are sharing parenting responsibilities for the child. The law should be able to recognise these families and ensure they are protected.

v. IVF

A woman's status as a lesbian should have no bearing on whether she is eligible for IVF treatment. Discrimination in access to medical treatment should be removed. The discrepancy between states approaches to assisted reproductive technology varies greatly from state to state but is absurd in its lack of common sense: for example a lesbian couple in South Australia cannot access assisted reproductive technology in the form of IVF but if they travel to Canberra they can. This has led to the coining of the phrase "reproductive tourism" which is a harsh but actual way to describe the money, time and effort that persons who want children have to go through if they do not live in a State which allows equal access.

Denial of equal treatment is a detriment to gay and lesbian persons that is arbitrary and unlawful and so a national Equality/Human Rights Act should cover equality before the law for all persons regardless of their sexual orientation.

d. Security of the Person

i. Vilification laws

NSW has vilification laws that make it unlawful to engage in a public act that incites hatred against people on the grounds of their homosexuality or transgender status. There are no laws that prohibit vilification against intersex people. Other states such as Victoria do not have these laws. There needs to be a nationally consistent approach to vilification or hate speech to ensure that LGBTI people can feel safe in their day to day lives.

ii. Hate crimes

Many of our clients have reported that they have been victims of 'hate crimes', that is, harassment or violence that is motivated by prejudice against them because of their sexuality or sex or gender identity. This can occur on the street, at their workplace or by family members. The law should recognise that these types of violence have a very serious impact on LGBTI people, and need to be dealt with appropriately by police.

Case Study

It's late on a Saturday night when Lucy and Cara leave their local "gay friendly" pub. They are seen leaving by a group of young men drinking in the nearby park. One of the youths call out homophobic abuse and threatens to "f*** them straight". Cara tells him to back off. In response, he throws a bottle which hits Cara across the face causing facial injuries. The young men run off and Lucy drives Cara to hospital for treatment. Lucy recalls that one of the bar attendants was watching the incident from the pub entrance.

Cara provides a statement to police, and is confident that she would be able to identify her attacker. She provides the contact details for the bar attendant but discovers after repeated calls, that the police have not pursued a witness statement. She is concerned that the police officer is uncomfortable with her sexuality, and minimised the impact of the threatened rape as a "stupid joke by a drunk". After lengthy delays, the assailant is found and charged but the police prosecutor does not emphasise the homophobic nature of the incident.

Cara obtains legal advice that under current laws, the police prosecutor does not have an obligation to raise the homophobic nature of the

violence, nor does the court have a duty to impose a penalty based on the homophobic nature of the crime. The solicitor also advises that under current laws, the police officer has no human rights obligations regarding his treatment of Cara but that any action would need to be pursued by way of a complaint to the police ombudsman.

iii. Bullying in schools

Research has consistently highlighted that same sex attracted children and teenagers are at an increased risk of being bullied in schools. Bullying is a common factor in youth suicide, particularly for same sex attracted youth. Currently schools lack clear guidelines for addressing the issue. In order to promote the human rights of same sex attracted teenagers and youth to feel safe, and the basic right to an education, a national standard should be implemented to assist schools in addressing homophobic bullying.³

4. How could Australia better protect and promote human rights?

a. Equality/Human Rights Act

We need a Federal Equality/Human Rights Act as there is no federal protection for persons of various sexual orientation or gender identity to have protection at a Commonwealth level. There are a multitude of state Acts that cover some area of protection for individuals and same sex couples but they do not automatically extend to the federal sphere. Inconsistency in treatment by the law further entrenches discriminatory practices and the outcome is absurd. For example, the age of consent differs in each state, as does access to reproductive services and even recognition of relationships.

b. Remove all discrimination against LGBTI people under Australian law

Laws that discriminate against LGBTI people send a message that discrimination and breaches of human rights are acceptable, as they are endorsed by the Australian government. As such, as part of any move to protect human rights in Australia, there should be a commitment to amending laws that discriminate against LGBTI people, and ensure that the law treats all people equally.

³ For further information, see Marian Pitts, Anthony Smith and Anne Mitchell (et al.), Private Lives: a report on the health and wellbeing of GLBTI Australians, Australian Research Centre in Health, Sex and Society, La Trobe University (2006) and Lynne Hiller, Deborah Dempsey and Lyn Harrison (et al.), Writing Themselves In: A National Report on the Sexuality, Health and Well-being of Same-Sex Attracted Young People, Australian Research Centre in Health, Sex and Society, La Trobe University (2001).

c. Public education

As there has been a long history of discrimination against LGBTI people, it is important that human rights laws include a strong component of public education.

Human Rights should also be an integral part of primary and secondary education to encourage and promote social harmony and facilitate active citizenship and participatory democracy.

d. Human Rights Commission

If an Equality/Human Rights Act is enacted, there is a need for a commission or agency to provide education on the new Act, to report back on its effectiveness and to intervene as amicus curiae in matters of the higher courts. In Victoria, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has been granted specific functions from the *Charter of Human Rights and Responsibilities Act 2006* and accordingly we would recommend that an independent body be given the powers similar to the VEOHRC.

Please contact Alyena Mohummadally on amohummadally@tuv.org.au or Yasmin Hunter on 02 9332 1966 if there is anything you would like to discuss.

Yours faithfully,

Yasmin Hunter and Alyena Mohummadally

On behalf of the LGBTI Network