



13 December 2010

Australian Human Rights Commission
submitted via email –

KINGSFORD
LEGAL CENTRE

Dear Madam/Sir,

Submission from Kingsford Legal Centre

Protection from discrimination on the basis of sexual orientation and sex / gender identity

Kingsford Legal Centre welcomes the Australian Human Rights Commission's (AHRC) Discussion Paper on whether there should be federal discrimination protection on the basis of sexual orientation and sex/gender identity.

Kingsford Legal Centre (KLC) is a community legal centre that provides specialist discrimination law advice and representation to people in New South Wales. We also provide employment law advice to people who live, work or study in the Botany and Randwick local government areas.

Last financial year Kingsford Legal Centre gave x number of advices in the area of discrimination.

The need for federal protection

Protection from unlawful discrimination on the basis of sexual orientation and sex/gender identity is currently a significant gap in federal discrimination law coverage. KLC believes that this is an area which should be protected federally as there is disparate coverage across state legislation.

Federal legislation would provide national standards and would resolve the patchy state based coverage. It would also recognise the importance of federal discrimination law reflecting Australia's international human rights obligations and setting important national standards in relation to discrimination. KLC believes Australia should take this action to realise the Yogyakarta Principles as Australian law.

As a matter of practicality such protection would also recognise that a person's protection from discrimination in this area should not be reliant on the state in which they live, and should not change if they move states. KLC considers this an important opportunity to expand the protection afforded by federal discrimination law and is important in reducing discrimination for people on the basis of sexual orientation or sex/gender identity.

The benefits of federal law prohibiting discrimination on the basis of sexual orientation, sex/gender identity, vilification and harassment

There is significant evidence to suggest that discrimination on the basis of sexual orientation and sex/gender identity is a part of everyday life for some people. The current inadequate protection within federal discrimination law does not provide redress for this discrimination and sends a message that discrimination against people on the basis of sexual orientation or sex/gender identity is not unlawful. Unfortunately this can have significant impacts on people's lives, and can lead to further marginalisation. The inadequate protection often leads people who experience this discrimination to leave employment or surrender their own situation, such as their housing because there is inadequate protection. KLC strongly believes that the lack of legal protection in this area costs the community in that people who experience discrimination or vilification often have to move away from the discrimination or harassment. This results in disrupted careers and social isolation and exclusion.

KLC also believes that federal legislation could also offer wider coverage than the *Anti-Discrimination Act* (NSW). The NSW Act uses the term "male or female homosexual" and limits protection for people who are bisexual. Likewise the homosexual vilification provisions in the NSW Act are subject to this limitation, and have been in practice very difficult to utilise. KLC believes the NSW legislation in relation to homosexual and transgender vilification has set the threshold too high and has failed to adequately deal with clear instances of vilification.

Case Study – Homosexual Vilification the problems of the NSW Act

Mr D was an older gay man who lived in public housing. He came to KLC for assistance as he was very distressed by the actions of a neighbour that had been terrorising him. He told us that whenever he left his home he was confronted with verbal abuse about his homosexuality. It had got to the stage that Mr D had changed his behaviour and rarely left the house. Because of the definition of vilification in the NSW requiring a public act and the way in which Mr D had been abused KLC told him it was not clear that this type of behaviour was unlawful. Mr D decided not to lodge a homosexual vilification complaint.

KLC would recommend that the AHC should look to definitions of vilification/inciting hatred in the *Race Discrimination Act* (section 18C), rather than the definitions in NSW.

The other benefits of federal protection in this area would be to provide clearer redress for Commonwealth employees, as well as provide the specialist conciliation process of the AHRC in these matters.

Inadequate state and territory coverage

As raised earlier the NSW *Anti Discrimination Act* does not provide clear coverage to people who are not homosexual. Likewise NSW legislation does not adequately deal with the situation of intersex people who do not wish to be identified as belonging to either sex and does not deal with the issue of gender identity broadly apart from transgender people.

As also raised earlier, the homosexual and transgender vilification provisions in NSW have made taking action in relation to vilification very difficult, with many actions not even commenced because of the high legislative threshold for showing vilification. There is also inadequate protection from harassment on the basis of sexuality.

Terminology

KLC would recommend the use of the term sexual orientation to cover people who identify as lesbian, gay, transgender or intersex. The definitions should refer to how the person self identifies and should include discrimination on the basis of perceived or imputed sexual orientation and include association provisions. We do not believe an exhaustive definition should be included, to ensure maximum coverage for a whole range of identities.

KLC would recommend the use of gender identity to reflect the gender by which the person self identifies with. The legislation should also provide coverage to people who do not identify as being of either

Exemptions

KLC is of the view that exemptions should have a limited role in discrimination law and should be balanced against the need to provide freedom from discrimination and to protect human rights. There should not be blanket exemptions and they should be provided on a limited basis. They should be publically listed and reviewable.

KLC is of the view that where an organisation is in receipt of public funding to provide a service the function of the organisation should be subject to anti-discrimination provisions in this area, whether or not the services are provided by a religious organisation or a religious charity. The test should be whether they are exercising a public function.

Special Measures

Due to the significant disadvantage people of diverse sexuality and gender identities experience in the community, KLC is of the opinion that special measures are desirable in this area. Special measures would in our view reduce discrimination and promote the advancement of human rights in the Australian community.

Reduction of discrimination in federal laws

KLC also wishes to raise the importance of ensuring that there is non-discrimination in federal legislation on the basis of sex orientation and gender identity. KLC notes that the *Marriage Act* excludes marriages not between a man and a woman. Marriage is not available to same sex couples and remains a significant area of ongoing discrimination.

Social security grandfathering?

KLC also notes that the Yogyakarta principle 3 (emphasises that all necessary administrative measures need to be taken to ensure that state documents reflect a person's self-defined gender identity

General Comments

We note that the Federal Attorney General has recently announced that there will be a consolidation of federal discrimination law. We support the development of a federal *Equality Act* and believe that protection on the grounds of sexual orientation and gender identity should also be included in that Act.

We will be providing more extensive submissions to the Attorney in relation to that consolidation process but also raise that increasing protection in this area should also recognise:

- intersectional discrimination – that is where an individual experiences multiple forms of discrimination;
- increasing the simplicity of the tests for direct and indirect discrimination;
- a systemic approach for this type of discrimination with a specific Commissioner;
- a no costs jurisdiction in which matters can be litigated;
- limited use of exemptions.