



# **Gay & Lesbian Rights Lobby**

**SUBMISSION TO THE  
AUSTRALIAN LAW REFORM COMMISSION'S  
FREEDOM INQUIRY**

**February 2015**

## **About the NSW Gay and Lesbian Rights Lobby**

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the peak organisation for lesbian and gay rights in NSW. We provide referral and educative resources on gay and lesbian rights to the media, policy makers and the community.

Our mission is to achieve legal equality and social justice for lesbians, gay men and their families.

\* While bisexual, intersex, trans and gender diverse issues are not formally in the GLRL's mandate there are specific and ongoing issues for these communities in regard to SOGII rights. We welcome and recommend direct consultation with representative groups regarding the protection of the rights of bisexual, intersex, trans and gender diverse people.

This submission has been produced by the  
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# SUBMISSION TO TRADITIONAL RIGHTS AND FREEDOMS INQUIRY

## Introduction

The NSW Gay & Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide a submission to the Australian Law Reform Commission's Freedoms Inquiry public consultation, and in particular to provide feedback on the discussion paper, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*.

The GLRL acknowledges the importance of the rights, freedoms and privileges that are recognised by the common law and the need to uphold those "traditional"<sup>1</sup> rights where possible.

However, as was noted in the discussion paper, common law rights, freedoms and privileges cannot be absolute. Those rights can, and should, be subject to statutory encroachment in certain circumstances.

By this submission, the GLRL identifies a clear need to abrogate common law rights and freedoms in circumstances where they unjustifiably limit other rights or freedoms, in particular, where they undermine the rights or freedoms of lesbian, gay, bisexual, trans\* and intersex (LGBTI) Australians (primarily the right to be free from discrimination). A central principle or criterion to be applied in determining whether a law that interferes with a common law right or freedom is justified, therefore, must be whether that law is imposed to protect other rights, which are recognised as being of equal importance by modern liberal democracies.<sup>2</sup>

LGBTI Australians continue to experience inequality, vilification and discrimination before the law. The Australian Human Rights Commission's 2014 *Sexual Orientation, Gender Identity & Intersex Rights Snapshot Report* acknowledges that:

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<sup>1</sup> It may be noted that the Attorney-General, Senator the Hon George Brandis QC, has asked the ALRC to review Commonwealth legislation to identify provisions that unreasonably encroach upon *traditional* rights, freedoms and privileges. As is noted in Chapter 1 of the discussion paper, it appears that the terms 'traditional' and 'common law' are used synonymously in the terms of reference. The use of the term 'traditional' in that context is potentially problematic. Tradition implies customs or beliefs passed from generation to generation. As we know, law reflects societies' moral and ethical standards, and values, and these do and should change over time as societies adapt and evolve. There are many rights which should be seen as traditional in modern Australia, such as the right to be free from discrimination, which were not historically protected by the common law (and are not, unfortunately, particularised in the terms of reference).

<sup>2</sup> International human rights treaties that Australia has agreed to uphold. Namely these are –

- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*

*‘People of diverse sexual orientations, sex and gender identities in Australia still experience discrimination in a number of areas of public life and infringements of their human rights, including:*

- *discriminatory recognition of relationships before the law*
- *discriminatory access to surrogacy or adoption arrangements*
- *lack of consistency in legal recognition of sex and/or gender*
- *inconsistent protection in some state and territory anti-discrimination laws on the basis of sexual orientation, sex and/or gender identity status*
- *lower outcomes across a range of health and social determinant indicators*
- *documented higher rates of violence, harassment and bullying*<sup>3</sup>

That snapshot highlights that the protection of LGBTI rights is essential and, in that respect, a reasonable justification for encroaching upon common law rights where those rights are seen to be competing.

That principle may be demonstrated by a consideration of two particular chapters in the issues paper, namely, Chapter 2: Freedom of Speech and Chapter 3: Freedom of Religion, where such conflict is apparent.

### **Freedom of Speech**

**Question 2-1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?**

It is justifiable for a law to interfere with freedom of speech where the purpose of that law is the protection of the rights of LGBTI Australians.

As was noted in the issues paper:

*It is widely recognised that freedom of speech is not absolute. Conventions enshrining the freedom recognise that it may be subject to laws necessary to protect the rights or reputations of others.*<sup>4</sup>

In particular:

*‘Laws prohibit, or render unlawful, speech that causes harm, distress or offence to others through incitement to violence, harassment, intimidation or discrimination.’*<sup>5</sup>

One example of legislative encroachment into the freedom of speech is s 18C of the *Racial Discrimination Act 1975*, which prohibits “offensive behaviour because of race, colour, or national or ethnic origin”. Upon that provision, it is unlawful for a person to

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<sup>3</sup> See for example, Australian Human Rights Commission (2011); Inner City Legal Centre, *Outing Injustice: Understanding the legal needs of the lesbian, gay, bisexual, transgender and intersex communities in New South Wales* (2011). At: <http://www.iclc.org.au/outinginjustice/> in SOGII Rights – Sexual Orientation, Gender Identity & Intersex Rights Snapshot Report Background Paper, 2014 p10.

<sup>4</sup> 2.21, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* Chapter 2, Freedom of Speech, p 25. <https://www.alrc.gov.au/publications/justifications-encroachments>

<sup>5</sup> 2.24, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* Chapter 2, Freedom of Speech, p26.

do an act which is reasonably likely to “offend, insult, humiliate or intimidate” another person or group of people because of the aforementioned grounds.

No such law presently exists to protect the rights and freedoms of LGBTI Australians.

However, a substantial body of evidence reveals that the LGBTI community experiences such vilification in staggering numbers. A 2012 report by the Inner City Legal Centre noted, for instance, that 58.4% of respondents “reported having experienced mean, hurtful, humiliating, offensive or disrespectful comments from someone they didn’t know in a public place.”<sup>6</sup> Appallingly, a 2010 study by Drs Alan Berman and Shirleene Robinson<sup>7</sup> found that during the lifetime of the more than 1100 LGBTI respondents:

- 73% had been subjected to homophobic verbal abuse
- 41% had experienced threats of physical violence
- 26% had experienced written abuse, such as by email
- 23% had experienced physical violence and
- 15% had experienced wilful damage to their car.

Further, in the two years before the survey was carried out:

- 43% of respondents had been subjected to verbal abuse
- 25% had been spat on or subjected to harassment
- 18% had been subjected to threats of physical violence and
- 9% had been assaulted.

That evidence, which reveals that almost 1 in 4 LGBTI people have experienced physical violence over their lifetime and almost 1 in 10 had been assaulted in the previous 2 years, amply demonstrates that LGBTI vilification is a real and serious issue.

The protections offered under the *Racial Discrimination Act* should, therefore, be available to LGBTI people under the *Sex Discrimination Act 1984*. That reform would address the needs of LGBTI communities to feel safe in public spaces and also ensure that these communities have legal equality with respect to anti-vilification protections.

Whilst such a reform would, admittedly, interfere with the common law freedom of speech, such interference is justified for the purpose of protecting the rights of LGBTI Australians.

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<sup>6</sup> Outing Injustice Understanding the legal needs of the lesbian, gay, bisexual, transgender and intersex communities in New South Wales, Inner City Legal Centre (2012) p14.

<sup>7</sup> Dr Alan Berman and Dr Shirleene Robinson, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland*, 2010, Australian Academic Press. See more at: <http://www.acon.org.au/anti-violence/news/homophobic-violence-queensland#sthash.giLC1Up5.dpuf>

## Freedom of Religion

### Question 3-1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

It is justifiable for a law to interfere with freedom of religion where the purpose of that law is the protection of the rights of LGBTI Australians.

The issues paper acknowledged that “the external dimension – the freedom to manifest that belief in worship, observance, practice or teaching – may be limited by laws when deemed necessary to protect the public safety, order, health or morals, or the fundamental rights and freedoms of others”.<sup>8</sup>

Several Commonwealth laws that purport to protect the fundamental rights and freedoms of LGBTI Australian’s (with respect to anti-discrimination) contain exemptions for religious bodies or organisations.<sup>9</sup> Upon the basis of those exemptions:

- Religious schools can freely discriminate against LGBT students, including expelling those students simply for being who they are.
- Religious schools can freely discriminate against LGBT staff members, including by refusing to provide or terminating their employment (in circumstances where sexual orientation and gender identity is completely irrelevant to the ability of that person to perform the duties of the role).
- Religious health and community services can similarly discriminate against both LGBT employees and potential employees, as well as LGBT individuals and families who seek to access the subject services, with impunity.<sup>10</sup>
- Religious aged care services can discriminate against LGBT employees or potential employees.<sup>11</sup>

It is difficult to see why such exemptions, which allow LGBT people to be discriminated against as they seek to obtain an education, access healthcare (which are themselves fundamental international human rights), or find and maintain employment, are present in legislation seeking to protect rights.

The persistence of those exemptions may be explained by a desire to uphold the common law right to freedom of religion, despite the adverse impacts that the expression of that freedom may have of LGBTI Australians.

Those impacts are undeniably serious.

A representative Australian study conducted by Hillier *et al.* in 2010 documented the effects of discrimination, and physical violence, on young same-sex attracted and gender diverse young people. It found that 31% of same-sex attracted and gender questioning

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<sup>8</sup> Human Rights Commission’s Rights and Responsibilities Discussion Paper, (2014) p6.

<sup>9</sup> See, for example, s 351(2)(c) of the *Fair Work Act 2009* and s 37(1) of the *Sex Discrimination Act 1984* (It may be noted that some exemptions exist which are not provided upon the basis of religion).

<sup>10</sup> Noting that the religious exemptions contained in the *Sex Discrimination Act 1984* do not apply to intersex status, only to sexual orientation and gender identity.

<sup>11</sup> Noting that the religious exemptions contained in the *Sex Discrimination Act 1984* do not apply to LGBT people accessing aged care services.

young people have self-harmed, and 37% have considered self-harm, whilst 16% of same-sex attracted young people have attempted suicide and 37% have considered suicide (Hillier et al., 2010).<sup>12</sup> The same study revealed that ‘many young people were hunted out of their schools and driven to attempts at suicide’ (Hillier et al. 2010, p. 36).<sup>13</sup>

A 2013 report noted that the experiences of LGBTI Australians “highlight not only the widespread nature of bullying and discrimination on the basis of sexual orientation, gender identity or intersex status in educational contexts, spanning primary school right through to university, but also the manner in which acts of commission and omission in institutional environments exacerbate, and to some extent legitimate, discriminatory conduct”.<sup>14</sup>

However, the effects of discrimination are not confined to the classroom. Religions exemptions, “which operate in service provision and employment for example, are not limited to those areas at all, but impact on other areas of peoples’ everyday lives. For example, they shape if, when and, to some extent, how, people employed, or using the services of, a religiously affiliated organisations can act and show affection towards other people, including a partner, as well as what activities they can engage in in public spaces (for instance, marching in Mardi Gras, volunteering at a specific stall at a community event, or simply having breakfast with someone)”.<sup>15</sup>

The message sent by religious exemptions is also incredibly problematic.

*“The message that such exemptions can give is that discrimination is relatively minor in comparison to other forms of harm against which the law protects and from which most religious schools have no exemptions. Law has a legitimating as well as a regulating function and when religious schools are permitted to avoid discrimination laws it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value; something which can be avoided if desired.”<sup>16</sup>*

In that sense, the current approach presupposes that the common law right of freedom of religion takes precedence over all other rights and the law itself in the context of discrimination against the LGBTI community.<sup>17</sup> However, “freedom of religion cannot be considered more important than other fundamental rights,”<sup>18</sup> such as the right of LGBTI

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<sup>12</sup> Cited in Horner, J. (2013). In their own words: Lesbian, gay, bisexual, trans\* and intersex Australians speak about discrimination. Sydney: NSW Gay and Lesbian Rights Lobby, 7.

<sup>13</sup> Quoted in D Wilkinson, R Denniss and A Macintosh, ‘The Accountability of Private Schools to Public Values’ (The Australia Institute, 2004) Discussion Paper No 71, 35.

<sup>14</sup> Horner, J. (2013). In their own words: Lesbian, gay, bisexual, trans\* and intersex Australians speak about discrimination. Sydney: NSW Gay and Lesbian Rights Lobby, 15.

<sup>15</sup> Horner, J. (2013). In their own words: Lesbian, gay, bisexual, trans\* and intersex Australians speak about discrimination. Sydney: NSW Gay and Lesbian Rights Lobby, 21.

<sup>16</sup> C Evans and L Ujvari, ‘Non-Discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 42.

<sup>17</sup> Australian Human Rights Commission, Freedom of Religion and Belief in 21<sup>st</sup> Century Australia, 2011, 32.

<sup>18</sup> T Geigerich in C Evans and L Ujvari, ‘Non-Discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 55.

Australians to be free from discrimination.

The protections offered under the *Sex Discrimination Act* and the *Fair Work Act* should not, therefore, be constrained or limited by unjustifiable religious exemptions, particularly those that relate to the provision of services (such as education) and employment in non-religious roles. Reform in this area would address the LGBTI community's need to be free from discrimination and ensure that we have legal equality in access to services and employment.

Whilst such a reform would, admittedly, interfere with the common law freedom of religion, such interference is justified for the purpose of protecting the rights of LGBTI Australians.

### **Conclusion**

When considering the general principles or criteria which should be applied to determine whether a law that interferes with a common law right or freedom (in particular, freedom of speech and freedom of religion) is justified, it is necessary to consider whether that law seeks to protect the rights of LGBTI Australians.

This submission has demonstrated that there is currently an improper balance between the maintenance of certain common law rights and the protection of the LGBTI community. In both of the above discussed areas common law rights can, and should, be further abrogated for the purposes of ensuring that the rights and freedoms of LGBTI Australians are protected.

As indicated earlier, the GLRL welcomes the opportunity to contribute to the ALRC's Freedoms Inquiry and consultation. We are happy to provide further information on this topic, or to meet to discuss its contents, should you wish. If so, please contact our Policy & Projects Officer, Ms. Amanda Keeling, on 0409 070 013 or on [amanda.keeling@glrl.org.au](mailto:amanda.keeling@glrl.org.au).

Thank you for your consideration of this submission.

Sincerely,



Dr Justin Koonin

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