

Equality Australia  
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## ACT LGBTIQ+ Legal Audit Submission

29 March 2019

The AIDS Action Council (the Council) is pleased to make this submission to Equality Australia. The Council supports the law reform to remove direct and indirect discrimination against LGBTIQ people in the Australian Capital Territory. In considering the key questions we think it is important to frame our response around six priority areas relevant to the issues and communities we support and represent. These are:

1. Representation
2. Intersex
3. Religious exceptions
4. Sex worker rights
5. Discrimination
6. Families

### 1. Representation

Over recent years there have been a number of legal and policy reforms that have benefitted the lesbian, gay, bisexual, transgender and intersex community (not the least of which was the passage of marriage equality). However, many of these changes have been piecemeal in nature, and too often they have been unnecessarily compromised by limitations or religious exceptions.

In part the reason for the ad hoc and incomplete nature of these reforms is the lack, or insufficient amount, of representation of the LGBTIQ community in decision-making, policy development and program design. Without the representation and involvement of people of diverse sexuality and gender the default policy making and legislative position is heteronormative, with LGBTIQ people “othered” both by the default assumptions of the law and the interpretations of the bureaucracy and the courts.

*Recommendation: That there be legislation which makes it mandatory to consult with lesbian, gay, bisexual, transgender and intersex people when laws are made or amended, which have an impact on these communities.*

## **2. Intersex**

After Amendments to the *Sex Discrimination Act*, Australia became one of the first jurisdictions in the world to explicitly protect people born with variations in sex characteristics against discrimination.

However, since then intersex advocates have expressed concerns about this wording, including that it may not adequately protect all intersex people (for example, potentially conflating or confusing issues of biology and identity). There is significant work to do regarding law reform in this area of intersex recognition, identity and inclusion.

The Council affirmed the [Darlington Statement](#) demonstrating its commitment to the rights and agency of people born with an intersex variation.

The primary consideration must be the right of the individual to self-determination with the allied protections against medical treatment or experimentation without explicit and informed consent, the right to form families and communities and the right to live in peace with the same human rights as all. This also includes the deferral of non-critical medical procedures until such time as a person can provide implicit and informed consent.

This is made challenging by the broad acceptance in policy making and practice of a gender binary as a default. This profoundly affects thinking and service delivery. Gender is usually collected as male/female/other. As it is the default for government entities to collect gender information as part of the demographic basic dataset- the assumptions around how this is best done, and whether it should be done, would profit from robust examination of the experience of people born with an intersex variation.

*Recommendation: That there be specific legislation which gives effect to the right to individual self-determination to people born with variations in sex characteristics.*

## **3. Religious Exceptions**

While we consider the exceptions allowing discrimination against LGBTIQ students deserve special attention, it is also important to reform the broader religious exceptions contained in discrimination legislation.

There are only four jurisdictions in which LGBT students are clearly protected against discrimination by religious schools: Tasmania, Queensland, the Australian Capital Territory and the Northern Territory. So we are ahead of the game but there is more work to be done.

While legislation passed in 2013 prohibited aged care services run by religious organisations from refusing care to LGBTIQ people, many older LGBTIQ people are still fearful of accessing aged care services or facilities, and are disempowered in the complaints process. Their previous

experiences of discrimination by religious authorities, who considered them as sinful and immoral combined with current mainstream narratives by those same organisations lead them to view services provided by religious organisations as inherently unsafe. Where individuals have little choice, for example where the only suitable place is in a service with a religious foundation, there is no protection against resident to resident homophobia or support for the complaint making process.

LGBTIQ people are less likely than the non-LGBTIQ population to have a close family to advocate for them, and can see their family of choice and community excluded from their care. For those that are dependent on aged care services, many feel the need to conceal their sexual orientation and/or gender identity to avoid discrimination, and this can lead to social isolation.

While aged care is a Commonwealth function, increasing use of care in the home combined with other supports means that the dominance of the religious providers is problematic. An increase in access to the homes of LGBTIQ people, and combination with ACT funded services means there is a need to appropriate regulation and advocacy with the Commonwealth to ensure the safety of LGBTIQ people when receiving services from organisation owned or associated with religious organisations.

It is a factor of the development of the ACT over the past 100 years that religious organisations still provide many outsourced health and community services on behalf of the ACT Government under contract. There is a concern that this government funding is sometimes used to promote religious causes rather than being solely focussed on the provision of discrimination-free health and community services. This indirect discrimination against LGBTIQ people could be alleviated through conditions attached to government funding or legislative change. All ACT Government funding to service providers and through its grant programs should contain a requirement that funds are not be used to promote religious practice nor that a service user should be a member of a religion in order to access services.

*Recommendation: That standard contracts for the ACT Government funded services and/or the ACT Government Procurement Act be amended to specifically restrict government funding being used for religious purposes or membership of a religious codes or doctrines being used a criteria for access to services.*

#### **4. Sex Workers**

The Council strongly advocates that sex worker law reform is included in this scope of this legal audit for the ACT. Sex work and LGBTIQ rights battles are about the liberation of bodies, sexual identities and expressions. Many sex workers identify with the 'Q' in LGBTIQ.

The ACT has recently taken great steps towards decriminalisation as the best practice model for sex work. There are some minor areas of further law reform that require amending to ensure that sex worker rights to autonomy, safety and freedom of trade are upheld.

These are:

- The right for sex workers to work privately in pairs or small groups to ensure their safety and control of their working environment
- The right for sex workers to provide the services the market requires without onerous legislation or moral policing

*Recommendation: That further law reform be undertaken to protect sex workers from discrimination and exploitation.*

## **5. Discrimination and Human Rights**

The ACT's discrimination legislation was once the most progressive and modern in Australia, but has fallen significantly behind in the past decade, in particular with regard to exceptions for religious organisations and issues relating to vilification. In addition, the structure and resources of the ACT Human Rights Commission have similarly fallen behind other jurisdictions, in that the Commission's resources have been reduced when discrimination, particularly against LGBTIQ people, has been on the rise. If the ACT is to regain its status as the most inclusive and progressive jurisdiction in Australia, it must address these issues.

*Recommendation: That there be a full review of the Discrimination Act and human rights legislation, in particular as it applies to lesbian, gay, bisexual, transgender and intersex people, and the scope of any exemptions and exceptions, with a view to modernising its provisions.*

Recommendation: That the functions structure, resources and purpose of the ACT Human Rights Commission be reviewed to ensure the organization can regain and maintain its position at the forefront of Australian human rights protections. The review should take into consideration relevant developments in other jurisdictions such as the establishment of the Victorian Commissioner for Gender and Sexuality.

## **6. Families**

While the ACT was the first jurisdiction to legalise adoptions by same sex couples, it has lagged behind in other areas of family development and composition, in particular surrogacy and access to IVF. In addition, the providers of adoption and IVF services have applied their own 'criteria' around access to these services, which often follow moral or religious views and restrict access to these services by same sex couples and single lesbians.

*Recommendation: That legislation relating to family and parenting be reviewed to ensure that it doesn't discriminate against lesbian, gay, bisexual, transgender and intersex people.*

## **Conclusion**

These six factors seek to address areas of direct and indirect discrimination as well as stigma. While the law can make discrimination unlawful, the way legislation is constructed, interpreted and made real in programs and services can either contribute to, or diminish, stigma. It is the view of the Council that legislation should be drafted in such a way, and interpreted to the greatest extent possible, to see LGBTIQ people as part of the population of the ACT rather than as an exception to be managed.