



Submission: Inquiry into Australia's Human Rights Framework

29 June 2023

Thorne Harbour Health

Thorne Harbour Health is one of Australia's largest community-controlled health service providers for people living with HIV, and lesbian, gay, bisexual, trans and gender diverse, intersex and queer (LGBTIQ+) communities. Thorne Harbour Health primarily services Victoria and South Australia, but also leads national projects. Thorne Harbour Health works to protect and promote the health and human rights of LGBTIQ+ people and all people living with HIV.

Executive summary

Thorne Harbour Health (THH) welcomes the opportunity to provide feedback for the Inquiry into Australia's Human Rights Framework. While THH is supportive of the Australian Parliament enacting a federal Human Rights Act in principle, there are several issues with the Human Rights Commission's recent [Position Paper](#), namely:

- Protected attributes are not explicitly stated within the proposed Act;
- Freedom of religion is implicitly prioritised over freedom from discrimination on the basis of sexuality and gender identity; and
- Drawing on international treaties and covenants that actively exclude rights on the basis of sexual orientation, gender identity and intersex status undermines the importance of these rights.

Embedding LGBTIQ+ human rights into a national human rights framework is pivotal to protect all LGBTIQ+ in Australia, despite their jurisdictions, from discrimination. It is our overall recommendations that the first draft of the Act include legislative safeguards that address the issues raised.

Submission

Protected attributes need to be listed within a Human Rights Act

The protected attributes that form the basis of equality before the law and freedom from discrimination need to be explicitly listed in a Human Rights Act or otherwise it does not guarantee consistent implementation of the Act.

The AHRC's position paper states that "Discrimination in the context of the Human Rights Act has the same meaning as discrimination in federal discrimination laws (including any further discrimination legislation):

- *Age Discrimination Act 2004*
- *Disability Discrimination Act 1992*
- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Fair Work Act 2009*

The issue here is that any shortcomings, loopholes or exceptions in the above anti-discrimination legislation that permits discrimination in some form, therefore permits discrimination within the context of a Human Rights Act.

Shortcomings of existing anti-discrimination law

The AHRC's position paper acknowledges marginalised and vulnerable people and groups are often overlooked in legislative processes (p.86):

“Parliament’s willingness to ignore or impinge on human rights means that the [human rights] system only applies at the discretion of parliament, which is highly problematic when parliament is the organ of the law from which protection is needed.”

“... it was only in 2013 that federal law [the *Sex Discrimination Act*] made it unlawful to discriminate against a person on the basis of their sexual orientation, gender identity or intersex status...Prior to the amendments, a legal right to equality and non-discrimination in a Human Rights Act would have provided stronger protections for same-sex couples and families.”

However, there are exceptions in the *Sex Discrimination Act* that may permit discrimination in certain circumstances. For instance, religious educational settings maintain the right to discriminate against staff and students on the basis of sexuality and gender identity. While the Albanese Government requested the Australian Law Reform Commission (ALRC) to inquire into how to end discrimination against LGBTQ students and staff, reporting on the Inquiry into Religious Educational Institutions and Anti-Discrimination Laws has been delayed until 31 December 2023 – and removal of religious exceptions are not even guaranteed thereafter. If enacted now, the proposed Human Rights Act – by drawing on discrimination protections in other legislation – would subordinate protections on the basis of sexuality and gender identity *from* discrimination to religious rights *to* discriminate.

Risk of erosion of rights

In addition to existing shortcomings in anti-discrimination law is the risk of regressive government policy that undermines LGBTIQ+ human rights. For example, the Morrison Government attempted to undermine protections on the basis of sexuality and gender identity (and other characteristics) by privileging freedom of religion above other rights in 2021 – 22. Worryingly, the proposed Religious Discrimination Bill 2022 would have provided that certain statements of belief do not constitute discrimination for the purposes of certain Commonwealth, state or territory anti-discrimination law.

While ultimately abandoned by the government, these attempts make apparent the precarious nature of LGBTIQ+ rights. The fact that a federal human rights Act can be easily amended to enforce discriminatory practices against LGBTIQ+ people undermines its intention to rectify universal human rights.

Implicit prioritisation of freedom of religion over freedom from discrimination on the basis of sexual orientation, gender identity and intersex status.

Freedom of religion is embedded within a human rights act, but rights on the basis of sexuality and gender identity are not. This implicitly condones forms of discrimination against LGBTIQ+ people as long as it is masqueraded as 'exercising religious freedom'. As Australia currently sits, the definition of religious freedom is so loose that any behaviours that can be considered 'religious affiliated or "ethos"' can be interpreted as exercising such freedom. In fact, there have been multiple legislative attempts to define this, including the shelved NSW and federal religious freedom Bill, and all of these attempts have sought to sanction discriminatory behaviours against LGBTIQ+. Therefore, having religious freedom as the only protected attribute in the discussion paper can have incredibly deleterious implications for sexual and gender minorities.

Homophobia and transphobia within international human rights law

The AHRC's position paper draws on several international human rights covenants and conventions, namely:

- *International Covenant on Civil and Political Rights (ICCPR) 1948*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR) 1948*
- *International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965*
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984*
- *Convention on the Rights of the Child (CRC) 1989*
- *Convention on the Rights of Persons with Disabilities (CRPD) 2008*

The above covenants and conventions reflect the values of the constituent nations of the United Nations. However, many of these nations still criminalise homosexuality, perpetuate homophobic and transphobic social values, and do not mention freedoms or protections on the basis of sexuality,

gender identity or sex characteristics. Therefore, the domestic rectification of these human rights instruments requires the throughout consideration of other principles appropriate to the Australian context.

For example, The [Yogyakarta Principles](#) (YP) and [Yogyakarta Principles plus 10](#) (YP+10) provide principles and state obligations on the application of international human rights law to sexual orientation, gender identity, gender expression and sex characteristics. While both Principles have never been adopted by the United Nations, this does not diminish their relevance to Australia as a pluralistic nation that champions inclusivity and diversity. Therefore, the first draft of the national human rights Act needs to enshrine these Principles, instead of diminishing them. Rights and freedoms on the basis of sexuality, gender identity and sex characteristics must not be diminished or made subservient to religious rights as they do often are.

Conclusion

Thorne Harbour Health congratulate the Australian Government for taking the first step to establish a national human rights framework. As per the discussion paper, the proposed human rights framework neither identify LGBTIQ+ rights as a protected attribute, nor enshrine any principle to mitigate the violation of LGBTIQ+ rights in the name of religious freedom. As such, there is a substantial risk that LGBTIQ+ communities will continue to live in the state of injury. We highly recommend that the first draft of the Human Right Act can address these issues.