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**NACLC LGBTIQ NETWORK**

Mr Tim Wilson  
Human Rights Commissioner  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
SYDNEY NSW 2000

6 February 2015

By Email: [sogii@humanrights.gov.au](mailto:sogii@humanrights.gov.au)

Dear Mr Wilson

### **Sexual Orientation, Gender Identity and Intersex (SOGII) Rights Snapshot Report Consultation**

This submission is made by the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Network of the National Association of Community Legal Centres (NACLC) as part of the Australian Human Rights Commission's Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report Consultation.

NACLC is the peak national body of Australia's community legal centres (CLCs). CLCs are not-for-profit, community-based organisations that work to achieve social justice through the provision of legal advice, information, casework and community legal education. NACLC's members are the eight State and Territory Associations of Community Legal Centres. The LGBTIQ Network is a NACLC endorsed National Network of community legal centres (CLCs) with expertise and interest in legal issues of relevance to, and the rights of, LGBTIQ people and communities.

This submission is not exhaustive and focuses on a number of key areas in which the rights of LGBTIQ people are not adequately respected and protected in Australia that are of particular concern to the Network.

#### **1. Change of legal sex on birth certificates**

In all Australian State and Territory jurisdictions, except for the Australian Capital Territory (ACT), a person must be unmarried and provide evidence of a surgical procedure to alter the legal record of their sex.<sup>1</sup>

The Network is concerned about such requirements and considers that these requirements compromise rights to equality, freedom of expression, autonomy and dignity. Such legislation also entrenches a medical model of gender that pathologises gender identity and de-legitimises the experiences of people who cannot or elect not to have surgery as part of their exploration or assertion of gender identity.

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<sup>1</sup> *Births, Deaths and Marriages Registration Act 1995* (NSW), s 32A-32J; *Births, Deaths and Marriages Registration Act 1996* (Vic) and *Births, Deaths and Marriages Registration Regulations 2008* (Vic); *Births, Deaths and Marriages Registration Act 2003* (QLD), ss 22-24; *Sexual Reassignment Act 1988* (SA) s 8; *Gender Reassignment Act 2000* (WA); *Births, Deaths and Marriages Registration Act 1999* (Tas), ss 28A-28J; *Births, Deaths and Marriages Registration Act* (NT), ss 28A-28J.

Following amendments in 2014, ACT legislation provides that ‘appropriate clinical treatment’ is a sufficient basis upon which to seek change of sex on birth certificates.<sup>2</sup> The 2014 amendments also had the effect of introducing a third option for recording sex on birth certificates for those who identify outside the male/female binary.<sup>3</sup>

The Network encourages the Australian Human Rights Commission (AHRC) to consider this issue in the course of the Report, and work towards encouraging other states and territories to examine the potential for legislative reform in this area. In doing so, the Network suggests that self-identification be considered a sufficient basis upon which to apply for change of sex on legal records, and that the concerns expressed by the ACT Standing Committee on Justice and Community Safety with respect to the age at which alteration of birth certificates should be permitted be considered.<sup>4</sup>

## **2. Forced surgery on intersex children**

Surgical intervention on intersex infants for psychosocial reasons continues to take place in Australia, despite the inability of the infant to provide free, full and informed consent.<sup>5</sup> The ‘normalising’ surgical procedures can have serious health implications such as sterilisation,<sup>6</sup> and contravenes a number of rights enshrined in international human rights treaties.<sup>7</sup>

The Network would support the inclusion of this issue within the SOGGI Snapshot Report, and hope the Report would provide impetus to the Government to implement Principle 18 of the Yogyakarta Principles, and adopt the recommendations put forward in the Community Affairs Committee report, specifically recommendations 3, 5, 9 and 11.<sup>8</sup>

## **3. Weaknesses in protections from discrimination**

The LGBTIQ Network supports the 2013 amendments to the *Sex Discrimination Act 1984* (Cth) to extend anti-discrimination protections under Commonwealth law to discrimination that occurs on the basis of sexual orientation, gender identity, and intersex status. However, the Network does acknowledge the concerns regarding the unfairness and ineffectiveness of current federal discrimination laws, which have been raised by community legal centres and discrimination law experts in multiple consultation processes and reviews.

In addition, a number of permanent statutory exceptions and exemptions in discrimination laws continue to undermine the effectiveness of anti-discrimination laws at both the state and federal level, which negatively impact on LGBTIQ people. For example, the Network remains concerned about the application and operation of exemptions under the *Sex Discrimination Act* for religious bodies (s 37), educational

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<sup>2</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT), ss 24-25. Under s 25(1)(a), the treatment may be provided by a Doctor or Psychologist.

<sup>3</sup> Birth Registration Statements in the ACT now enable a child’s sex to be recorded as “Unspecified/ indeterminate/ intersex”. People who wish to alter the birth register to record a change of sex may record their sex as “Male”, “Female”, “Unspecified”, “Indeterminate”, “Intersex” or “Unspecified / indeterminate / intersex”.

<sup>4</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), ACT Legislative Assembly, *Scrutiny Report 14* (18 February 2014) 3.

<sup>5</sup> Senate Community Affairs References Committee, Parliament of Australia, ‘The involuntary or coerced sterilisation of intersex people in Australia’ (2013) 93.

<sup>6</sup> *Ibid*, 57.

<sup>7</sup> See, eg, Convention on the Rights of the Child, arts 3,6,8,12,13.

<sup>8</sup> Senate Community Affairs References Committee, Parliament of Australia, ‘The involuntary or coerced sterilisation of intersex people in Australia’ (2013) 57.

institutions established for religious purposes (s 38), voluntary bodies (s 39), certain acts done under statutory authority (s 40) and sport (s 42).

In particular, the right to freedom of religion is of vital importance, however it is not an absolute right and can be limited in certain circumstances and must be balanced with the right to equality before the law. The Network considers that the Act as it stands does not strike the appropriate balance between these rights. Such exemptions permit faith-based institutions and organisation, including those in receipt of public funding, to discriminate against LGBTIQ people. As a result, the Network encourages the AHRC to consider the application and operation of exemptions under anti-discrimination law and the way such exemptions affect LGBTIQ people. As a matter of principle, the Network suggests that any exemptions should be only available upon application, minimal, temporary (with a requirement to reapply), reviewable, public and transparent (with a requirement to proactively declare them).

#### **4. Expunging homosexual sex-related convictions**

The Network strongly supports, and some CLCs have been actively involved in, advocating for the passage of legislation in Victoria and NSW to erase the criminal records of homosexual men who were convicted for having consensual sex at a time it was illegal, as well as similar moves in the ACT and Tasmania. Consideration of this issue is also underway in Queensland.

However, in the ACT, Tasmania, Queensland, Western Australia, and the Northern Territory, no mechanism currently exists by which people convicted of consensual homosexual related offences can apply to have their criminal convictions expunged. While South Australia added homosexual sex offences to the spent conviction scheme in 2013, there is no method for expunging such records.

The Network highlights the importance of such schemes in removing the stigma and practical consequences of such convictions. We suggest that the AHRC advocate for the adoption of expungement schemes in the remaining jurisdictions, and encourage the design, development and implementation of schemes that are confidential, accessible and fair, and enable decision-makers to consider all relevant evidence to the benefit of applicants.

#### **5. Domestic/family violence in LGBTIQ communities**

CLCs are increasingly providing services to clients experiencing family violence in LGBTIQ relationships, including lesbians, gay men and bisexual people in a same-sex relationships, as well as bisexual, trans and intersex people in either same-gender or opposite gender relationships.

As in heterosexual relationships, family violence in these relationships includes a pattern of controlling behaviour, which causes fear in the other partner and encompasses physical, emotional, sexual and financial abuse. The family violence experienced by LGBTIQ people may also involve particular actions such as the use of homophobia as a mechanism for abuse.

There is a need for a holistic approach and response to reducing and eliminating family violence in LGBTIQ communities. As NACLC has outlined in its previous submissions on this issue, some of the key challenges in reducing and eliminating family violence include: system fragmentation and the need for an integrated and consistent approach; inadequate funding; gaps between legislative and policy intent and implementation in practice; and inadequate monitoring and reporting. It is also important to recognise that

policy decisions in related areas such as housing, health and welfare, have flow on effects for family violence and the need for legal assistance.<sup>9</sup>

## 6. Marriage equality

NACLC has consistently supported and advocated for marriage equality in Australia. In its current form, the *Marriage Act 1961* (Cth) legalises and entrenches unacceptable discrimination against LGBTI people. The exclusion of LGBTI people from the Marriage Act denies them a right that is afforded to all other Australians, and contributes to higher levels of discrimination and stigma experienced by these communities. Given overwhelming public support for marriage equality, and the fact that there are no legal barriers to marriage equality,<sup>10</sup> the Network encourages the AHRC to highlight this crucial issue in the Report and advocate for reform.

## 7. Conclusion

Should you wish to discuss this submission further, please do not hesitate to contact the Co-Convenor's of the LGBTIQ Network, Alex O'Donnell on (08) 8982 1111 or [info@dcls.org.au](mailto:info@dcls.org.au), or Julie Howes on (02) 9332 1966 or [iclc@iclc.org.au](mailto:iclc@iclc.org.au).

Yours sincerely



LGBTIQ Network  
National Association of Community Legal Centres

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<sup>9</sup> NACLC, *Submission to Senate Finance and Public Administration References Committee Domestic Violence Inquiry*, (July 2014), 6.

<sup>10</sup> In light of the decision of the High Court of Australia in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 which confirmed that the federal parliament has the power under the Constitution to legislate same sex marriage.