



## Submission

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### Consolidation of Anti-Discrimination Legislation

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February 2012

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## 1 National Children's and Youth Law Centre

- 1.1 The National Children's and Youth Law Centre ("**NCYLC**" or "**Centre**") is the only Australian national community legal centre for children and young people. NCYLC promotes the rights and interests of Australian children and young people through advocacy, information and education. Since its inception in 1993, NCYLC has made over 180 public submissions on law and policy affecting children and young people and handled over 150,000 inquiries. NCYLC seeks to increase access by children and young people to legal assistance and to improve the legal status of children and young people in Australia.
- 1.2 NCYLC provides information and advice to children and young people through the following services:
- a) *Lawstuff* ([www.lawstuff.org.au](http://www.lawstuff.org.au)) - a website that provides general legal information and referral options on a wide range of issues relevant to children and young people;
  - b) *Lawmail* ([www.lawstuff.org.au/lawstuff/lawmail](http://www.lawstuff.org.au/lawstuff/lawmail)) – a confidential legal advice and information service that allows children under the age of 18 years from all over Australia to seek legal advice, referrals and information via email; and
  - c) *What's Up CROC?* ([www.ncylc.org.au/croc/home.html](http://www.ncylc.org.au/croc/home.html)) and *Child Rights* ([www.childrights.org.au](http://www.childrights.org.au)) – websites that provide information about Australia's implementation of the United Nations Convention on the Rights of the Child ("**CROC**" or "**Convention**").

## 2 Australian Youth Affairs Coalition

- 2.1 The Australian Youth Affairs Coalition ('**AYAC**') is Australia's non-government youth affairs peak body, which seeks to represent young people aged 12-25 and the sector that supports them.
- 2.2 AYAC represents a growing membership of State and Territory Youth Peak Bodies, National Youth Organisations, researchers, policy makers and young people themselves, who are all passionate about creating an Australian community that supports and promotes the positive development of young people.

### 3 Overview

- 3.1 NCYLC and AYAC welcome the opportunity to comment on the proposed consolidation of anti-discrimination legislation.
- 3.2 In providing our comments, we take a child rights-based approach. This reflects the understanding that children and young people are the holders of human rights – including not only basic survival and development rights and the special rights associated with protection from harm, but also rights of participation including the right to be consulted and heard on issues affecting them.<sup>1</sup>
- 3.3 Current anti-discrimination legislation focuses primarily on adults, leaving children and young people amongst the most vulnerable and marginalised groups in Australia. A consolidation of anti-discrimination legislation presents a unique opportunity to improve protection of the rights and interests of children and young people.

### 4 Executive summary

- 4.1 NCYLC and AYAC believe that in order for children and young people to fully enjoy their legal rights, there needs to be increased support, accessibility, awareness, education, institutional training and legal protection in anti-discrimination legislation.

**Recommendation:** That the obligation to make reasonable adjustments as noted in the *Disability Discrimination Act 1992* (Cth) (**DDA**) becomes a standalone duty.

**Recommendation:** That education and training departments at both state and federal levels are enlisted to inform educational institutions of their duties under the *Disability Standards for Education 2005*.

**Recommendation:** That funding, additional to regular school budgets, should be made available to schools with a specific focus towards serving disadvantaged communities.

**Recommendation:** That a broad definition of gender identity and sexual orientation that incorporates both recognised sexual orientation and gender identity labels and individual behaviour be adopted.

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<sup>1</sup> CROC, Articles 6 and 12. This Convention has been almost universally ratified. The Australian Law Reform Commission notes: "Given the diversity of its States Parties and breadth of coverage, CROC is clear evidence of customary international norms regarding the rights and responsibilities of children. While CROC is not incorporated in its entirety into the domestic law of Australia, it is a strong statement of Australia's commitment to children's rights and their participation in the legal process." Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report No 84, *Seen and Heard: Priority for Children in the Legal Process*, Sydney, 1997, at [1.29].

**Recommendation:** That support programs, like the American "It Gets Better" campaign, are implemented to help deter youth suicide and address related health issues.

**Recommendation:** That Australia develops child and young people friendly methods of making an anti-discrimination complaint. This should include telephone, website, email, social media and face-to-face systems for receiving and dealing with complaints.

**Recommendation:** That Australia develops education programs discussing the nature of discrimination. These programs should be integrated into civics and citizenship classes in the national curriculum.

**Recommendation:** That Australia develops resources for discrimination education, available to youth support services for disadvantaged or disengaged young people.

**Recommendation:** That an informal and flexible dispute resolution procedure, either in the form of conciliation or mediation, remain an important and significant part of the Australian Human Rights Commission (**AHRC**) discrimination complaints resolution process. Compulsory conciliation or mediation undertaken by parties in good faith should be preferred over and precede proceedings in the Federal Court or Federal Magistrates Court.

**Recommendation:** That AHRC conciliators are made aware of, and trained for, the unique requirements of children and youth complainants and implement those requirements in the conciliation process.

**Recommendation:** That children and young people friendly conciliation mechanisms should be developed and implemented in consultation with children, young people, and the youth sector.

**Recommendation:** That AHRC provide independent mechanisms or advocates to support and assist vulnerable complainants in the conciliation process.

**Recommendation:** That AHRC conciliators ensure the conciliation process remains informal and flexible, in spite of increasing formalisation and legality. Furthermore, NCLYC recommends that, where possible, legal terminology and procedure be carefully explained to child and youth complainants.

**Recommendation:** That the Courts encourage and facilitate the participation of children and young people in the court process. With appropriate support, children and

young people respond positively to settings which encourage participation and consultation.

**Recommendation:** That further development of the court process is completed in consultation with children. The NCYLC and AYAC encourage the use of consultation procedures that are readily accessible and appropriate for children. Children should be engaged at the earliest possible stage in the consultation process so as to fully participate in the development of the policies and processes that affect them.

## 5 Child rights-based approach

5.1 NCYLC and AYAC believe that universally accepted human rights standards provide a clear normative framework to assess laws and policies with respect to children and young people.<sup>2</sup> CROC provides a universally accepted rights-based framework for addressing the treatment of children. The Convention has been adopted and ratified by Australia<sup>3</sup> and is now the most widely ratified international instrument. Rights contained in the Convention are interdependent and indivisible.<sup>4</sup>

5.2 The rights enshrined in the Convention should be used as the foundation and benchmark for considering issues raised by the call for submissions regarding the Consolidation of Anti-Discrimination Legislation. The relevant rights and provisions in the Convention include:

- a) all policies and law are made with the best interests of the child being the primary consideration in all actions concerning the child (Article 3);
- b) children who are capable of forming their own views have the right to express those views in all matters affecting them and children should be provided the right to participate in these decisions that affect them (Article 12); and
- c) State Parties shall take respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour,

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<sup>2</sup> J Tobin, "Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs" (2006) 14 *The International Journal of Children's Rights* 275 at pt 279.

<sup>3</sup> 17 December 1990.

<sup>4</sup> G Monahan & L Young, J Tobin (eds), *Children and the Law in Australia* (2008), Chapter 2, 'The Development of Children's Rights', pg. 39.

sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status (Article 2).

- 5.3 Assessing proposed policies and law that affect children from a rights-based perspective is not a novel idea.<sup>5</sup> Involving human rights considerations in legislative and policy evaluation processes is increasingly common since the former UN Secretary General Kofi Annan's directive in 1997,<sup>6</sup> which called for governments to uphold human rights regardless of their political, economic, social or cultural systems and notwithstanding their economic and social situation.<sup>7</sup>
- 5.4 Recognising and providing effective support for the rights of children and young people in dealing with the issues of discrimination will assist the Australian Government in meeting its obligations under the Convention.

## 6 What children tell us

- 6.1 Through the Centre's Lawmail service (see para 1.2), we have observed that children are concerned about the issues surrounding discrimination and have experienced difficulty in accessing relevant complaint mechanisms. The following are examples of queries received by the Centre:

*"I suffer from a mental illness. I have been suicidal a number of times. The police have been called out hundreds of times over the years. When I was sexually assaulted the police were called by the hospital and they refused to do anything to help me because I am mentally ill. Because the police have refused to help me it continued for years. The police have put it as False Reports even with all the medical evidence they were given. I need to get a police clearance so that I can do a course at TAFE. Will all the times the police have been called out be on there and my sexual assault reports be on there? If so what can I do?"*

**Female, 17, NSW**

*"Is it against the law for a shopkeeper to only let 2 students at a time into his shop? Is it discrimination?"*

<sup>5</sup> See e.g. J Tobin, *op. cit.*

<sup>6</sup> United Nations General Assembly, Report of the Secretary-General, *Reviewing the United Nations: A Programme for Reform*, A/51/950 (14 July 1997); see also United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23 (12 July 1993).

<sup>7</sup> K Annan, Report of the Secretary-General on the work of the Organisation United Nations August 1999.

**Indigenous Female, 16, VIC**

*"Is there a specific definition of bullying in NSW law? Is there a law that prohibits bullying? What is the difference between bullying and harassment Can be discriminatd again, or not be given an equal opportunity and yet call it bullying? Is trade union involvement one of the discrimination criteria? If I put in a complaint about my boss, can it be used against me as in slander/defamation/libel etc? Thanks"*

**Female, 16, NSW**

*"[...] After my class teacher only heard one side story and did not do more investgation, She spoke to me in a very loud voice in the class. she said to me" Why you speak Chinese, you can not speak Chinese in this school, this is an English school. [...] and also in front the whole class, the teacher said to the girl who reported something to her, " you can move your seat away from them, they are so horrible and nasty". [...]i don't know why i'm getting (punished) [...] Mum & Dad said i am allowed to speak Chinese at school break time. [...] I have been forced to transfer out from that public school after one month later the incident happened.[...]"*

**Female, 10, NSW**

*"a 14yr old fellow student was expelled from school today on the basis of his sexuality. it was put to him that other male students and teachers are not comfortable around a gay person. is this legal and can he fight this decision."*

**Male, 14, VIC**

*"I am a 17 yr old gay teen who attends a Catholic school, i was just writing to find out my rights in regard to discrimination if i were to \"come out\", what are my rights and what are the schools rights?"*

**Male, 15, NSW**

*"I have Type 1 diabetes and have lost my job [...] twice in 6 months, both times I had been in hospital the day before. Previously I have had hardly any time off and often have been working in excess of 42 hours per week. I think I have been unfairly discriminated against. Now I have no job and no money*

*coming in as I do not qualify for benefits, but I don't want to be on a benefits anyway. Can you help."*

**Male, 16, WA**

**7 Question 4: Should the duty to make reasonable adjustments in the DDA be clarified, and if so, how? Should it apply to other attributes?**

- 7.1 The duty to make reasonable adjustments is an important mechanism to prevent discrimination against disabled children and young people. NCYLC and AYAC believe in implementing the approach suggested at point 60 of the Discussion Paper – to make reasonable adjustments in the DDA a standalone duty – is the most appropriate way to provide equality and protection for all children and young people with a disability.<sup>8</sup> In order for this change to be effectively implemented, education and training departments at both state and federal levels should be engaged to ensure schools and universities understand their obligations under and comply with the Disability Standards for Education 2005.
- 7.2 In 2011, AYAC conducted a comprehensive consultation process to give a voice to young people with a disability and discuss their issues with regard to access to education. AYAC consulted directly with young people and parents of those with a disability via an online survey entitled *Your Views on Young People with a Disability and Education*. The poll surveyed 397 people and asked them about their perceptions on the Disability Standards for Education and whether young people with a disability experience equal opportunity to access and participate in education free from bullying and discrimination.
- 7.3 The results of AYAC's consultation, supplemented by evidence from NCYLC's Lawmail service, show that while education providers have a legal obligation to provide reasonable adjustments, there remain high levels of non-compliance or a lack of knowledge regarding the rights of children and young people with a disability. AYAC's consultation demonstrated that when it comes to schools and training institutions making reasonable adjustments to make sure that students with disabilities can enrol without difficulty, many parents (55%) reported that their child's school did not necessarily make changes to make enrolling easier, and many (52%) did not

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<sup>8</sup> Attorney General, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, Attorney General's Department, 2011, pt. 60

necessarily treat their child equally when deciding on enrolments.<sup>9</sup> When asked whether their child's school made reasonable adjustments to ensure inclusion and participation in learning, 42% of parents disagreed.<sup>10</sup>

7.4 Moreover, over 35% of parents said that the education provider did not even check with them about what kinds of adjustments and support their child required to effectively enrol. 45% of parents said that their child's school did not check with them throughout the school year to ensure their child had the support and equipment they needed to enable them to participate in learning activities.<sup>11</sup>

7.5 When asked about their child's right to participate in relevant supplementary courses and programs, 47% of parents said that their child's school did not consider whether their child's disability would affect their inclusion or involvement in these kinds of activities.<sup>12</sup>

"The current programs in primary and high schools are not adequate. There needs to be more time and money spent on testing, especially for exam conditions. In year 12 I had to do a test to see if I was able to get a scribe in the HSC but these tests were designed for young children. This made me feel very disabled."<sup>13</sup>

#### **AYAC consultation respondent**

"I was asked to leave several of my schools because the schools didn't think my needs could be accommodated. One was a private school, one a selective school. I had to hide my disability from TAFE in order to enrol. Later when I had proved that I was a good student, I told them about the extent of my disabilities and they said they wouldn't have let me enrol, but were glad that I had because I got the best

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<sup>9</sup> Australian Youth Advocacy Service (AYAC), Submission to Department of Education, Employment and Workplace Relations, *Review of Disability Standards For Education*, 2005, pg. 13.

<sup>10</sup> *Ibid*, pg. 13

<sup>11</sup> *Ibid*, pg. 13

<sup>12</sup> *Ibid*, pg. 13

<sup>13</sup> *Ibid*, pg. 13

results in the HSC that they'd ever had. It was a real struggle through the bureaucracy though.”<sup>14</sup>

**AYAC consultation respondent**

7.6 AYAC's consultation data emphasises how education providers either do not understand or are unwilling to act upon their duty to make reasonable adjustments. Clarification of the reasonable adjustments duty according to the DDA would facilitate better protection against discrimination and greater equality in schools for children and young people with a disability.

7.7 Moreover, NCYLC's Lawmail queries have also demonstrated that education providers and institutions, including individual teachers and school bus drivers, often fail to understand their legal duty to make reasonable adjustments. For example, one LawMail reads:

“I am a student at [deleted]. I suffer from chronic fatigue syndrome, which makes school difficult. My school has made no attempt to help me. Due to not knowing about having to attend a gat exam, when i am in year 11, i was late. The school knew that i was away and made no attempt to inform me. I was only told last minute by the co-ordinator, who now has my mobile number and was harrassing me to go to to the exam. I am writting this message on the way to the exam. I believe that the school is neglecting to help me by supporting me through my education. All off my teachers, principles and co-ordinators have been notified by my doctor about my illness and i am going to a speciallist next week. Also i am now having trouble with my back at the moment due to the seats that the school make us sit in. This is the same for a couple of other students. The person who i see about my back also attened my school and they have also said that the chairs that the school uses are not good for backs. Thanks for listening...”

**Female, 16, NSW**

7.8 Specifically, the development of a standalone duty would help young people with a disability to better access education and school programs. A standalone duty, enforceable by independent legal processes, would better ensure that children and

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<sup>14</sup> *Ibid*, pg. 13

young people with a disability have their rights to reasonable adjustments upheld. Legal enforceability independently requires education providers to have a comprehensive understanding of their duties to disabled children and young people. Simultaneously, it deters education providers from acting without consideration of the specific needs and requirements of their disabled students.

- 7.9 **Recommendation:** That the obligation to make reasonable adjustments as noted in the DDA becomes a standalone duty.
- 7.10 **Recommendation:** That education and training departments at both state and federal levels are enlisted to inform educational institutions of their duties under the Disability Standards for Education 2005.
- 7.11 **Recommendation:** That funding, additional to regular school budgets, should be made available to schools with a specific focus towards serving disadvantaged communities.

## 8 **Question 7: How should sexual orientation and gender identity be defined?**

### **Why sexual orientation and gender identity should be a protected attribute**

- 8.1 NCYLC and AYAC agree with the Discussion Paper on the complexity of defining gender identity.<sup>15</sup> Adolescence is a formative period of social development that provides the foundation for understanding adult sexual orientation and gender identity.<sup>16</sup> Young people may still be unsure of their sexual orientation or may choose to hide or resist their sexual orientation out of fear. This is due to numerous social considerations, such as negative connotations attached to non-heterosexual orientation or non-confirmative gender identities. For example, Australia's current marriage laws continue to discriminate against non-heterosexual marriages.<sup>17</sup>

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<sup>15</sup> Attorney General, *op. cit.*, pt. 74.

<sup>16</sup> M A Yarhouse and E S N Tan, 'Addressing Religious Conflicts in Adolescents Who Experience Sexual Identity Confusion', *Professional Psychology: Research and Practice*, Vol. 36 No. 5. 2005.

<sup>17</sup> *Marriage Act 1961* (Cth) s 5: "marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

- 8.2 The consequences of failing to determine sexual orientation and gender identity as a protected attribute are dire. Harassment and bullying of young people during this time on the basis of their sexual orientation is common.<sup>18</sup> A recent study on the wellbeing of same sex attracted and gender questioning youth found that 61% of participants had suffered verbal abuse, and 18% had suffered physical abuse because of their sexuality.<sup>19</sup> 80% of bullying or harassment because of gender identity or sexual orientation occurred in schools.<sup>20</sup>
- 8.3 Cause for further concern is the link between suicide and discrimination against same sex attracted or gender questioning children and young people. Suicide remains one of the leading causes of death for young Australians aged between 14 and 25.<sup>21</sup> Confusion and discrimination are directly linked to depression in young people who are same sex attracted and is a contributory factor in high youth suicide rates amongst same sex attracted young people. According to Rhonda Brown, "same-sex attracted young people are at greater risk of family conflict; rejection by family and friends particularly after 'coming-out'; attempted and successful suicide; mental illness; substance use and abuse; homelessness; victimisation at school; truanting and not completing school."<sup>22</sup>
- 8.4 Recent initiatives by organisations like "Tune In Not Out" promoted by radio station Triple J show ways to challenge this public health crisis. They have brought attention to these issues by bringing the American "It Gets Better" campaign to Australia. The campaign provides a platform for people of all sexual orientations to provide content designed for high school aged young people who are at risk of suicide and offers them a glimpse of life beyond the difficult high school years implicitly urging against suicide. Many celebrities and politicians have embraced the campaign in the US and it is starting to gain traction in Australia. These campaigns highlight the close link between gender and sex discrimination and youth suicide. In order to preserve the mental and physical health of Australia's children and young people, discrimination on the basis of

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<sup>18</sup> AHRC, *Addressing Sexual Identity and Gender Orientation Discrimination: Consultation Report*, 2011, pg. 15; Australian Research Centre in Sex, Health and Society, *Writing Themselves In: 3*, study prepared by L Hillier, T Jones, M Monagle, N Overton, L Graham, J Blackman, A Mitchell Australian Research Centre in Sex, Health and Society, La Trobe University, 2010 pgs. ix, 39.

<sup>19</sup> Australian Research Centre in Sex, Health and Society, *op. cit.*, pg. 39.

<sup>20</sup> *Ibid*, pg. 44.

<sup>21</sup> D Eldridge, *Transport accidents and suicide top causes of injury death among youth*, Australian Institute of Health and Welfare, 2008, retrieved Friday, 27 January 2012, <<http://www.aihw.gov.au/media-release-detail/?id=6442464753>>.

<sup>22</sup> R Brown, 'Self Harm and Suicide Risk for Same-Sex Attracted Young People: A Family Perspective', *Australian e-Journal for the Advancement of Mental Health (AeJAMH)*, Vol. 1, Issue 1, 2002, pg. 3.

gender identity or sexual orientation should be addressed through anti-discrimination legislation.

- 8.5 NCYLC and AYAC have explored two models of defining sexual orientation and gender identity for the purposes of anti-discrimination legislation below.

### **Label model**

- 8.6 Gender identity and sexual orientation could be defined through a model based on specific labels. This kind of model prohibits discrimination based on sexual orientation as identified by generally accepted labels such as heterosexuality, homosexuality, lesbianism and/or bisexuality. It could also prohibit discrimination based on gender identity as defined as feminine, masculine, trans and/or intersex.
- 8.7 This model has considerable benefits for protecting children and young people. In specifying sexual orientation and gender labels it clearly and succinctly offers protection to those with identified attributes. It formally acknowledges and normalises the use of these labels to define gender or sexual orientation. Increasing social acceptance of diverse sexual orientations and gender identity has led more adolescents and young people to comfortably identify themselves as gay, lesbian, bisexual or transgender.<sup>23</sup> But gender identity and sexual orientation remain diverse, non linear and difficult to ascribe a label to. Thus, under this model, the terminology used to define gender identity and sexual orientation should be as broad as possible to accommodate a wide range of sexual behaviours, attractions and identities. There must be a determination not to pass judgment or ascribe labels to sexual orientation where they could be detrimental to an individual's wellbeing.
- 8.8 Still, many young people are unsure or undecided of their sexual orientation or choose not to label themselves.<sup>24</sup> Young people's sexuality or gender identity is often not fixed or linear during key developmental phases. Experimentation and confusion are often part of children and young people's sexual development. Young people may feel uncomfortable to decisively label themselves a specific gender or sexual orientation if

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<sup>23</sup> J A. Cates, 'Identity in crisis: Spirituality and homosexuality in adolescence', *Child Adolescent Social Work Journal*, Vol 24, 2007, pg. 369.

<sup>24</sup> Australian Research Centre in Sex, Health and Society, *op. cit.*, pg. 27-32.

their behaviour was merely experimental. This notes the limitations of the label model in sufficiently protecting young people from discrimination.

- 8.9 While generally accepted definitions and labels of sexual orientation exist for those who identify as gay, lesbian, bisexual, intersex or trans, there are no commonly recognised categories for other sexual orientations, such as pansexuality and asexuality. These forms of sexuality are often excluded or left out from general definitions. Pansexuality is defined as an orientation that "encompasses all kinds of sexuality and expressing the full spectrum of desire."<sup>25</sup> Asexuality is defined as a lack of sexual attraction.<sup>26</sup> Hence use of specific labels can be restrictive for young people whose sexual attraction or gender identity does not conform to those commonly accepted labels.
- 8.10 NCYLC and AYAC's suggests that, if a label model is adapted, anti-discrimination legislation should use terminology which defines gender identity and sexual orientation as broadly, inclusively, and straightforwardly as possible. Definitions of sexual orientation or gender identity must take into account the complexity and ambiguity of sexuality amongst children and young people. Failure to do so will only contribute to the perpetuation of this ongoing public health crisis in same sex attracted young people. The terminology adopted should take into consideration the issues discussed in the Australian Human Rights Commission report which raised concerns with use of terminology such as sexual preference, sexuality, and homosexuality to be inclusive of lesbianism.<sup>27</sup>

### **Conceptual definition model: 'the alternative way'**

- 8.11 As suggested by the Discussion Paper,<sup>28</sup> the alternative way to define sexual orientation and gender identity is by using a conceptual definition. NCYLC and AYAC particularly noted in the Human Rights and Equal Opportunity Commission's 2011 consultation report on sex and gender identity discrimination,<sup>29</sup> the Freedom! Gender Identity Association proposes to define sexual orientation focusing on three dimensions

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<sup>25</sup> *Ibid*, pg. VII.

<sup>26</sup> Asexual Visibility and Education Network, *Overview*, retrieved on Thursday 15 December 2011, <<http://www.asexuality.org/home/overview.html>>.

<sup>27</sup> AHRC, *op. cit.*, pg. 22-23.

<sup>28</sup> Attorney General, *op. cit.*, pt. 74.

<sup>29</sup> Human Right and Equal Opportunity Commission hereafter referred to as HREOC.

of an individual's actions, rather than their chosen or assigned identity.<sup>30</sup> Sexual orientation and gender identity is not defined with reference to specific labels, but takes into consideration a person's behaviour, as well as their sexual attraction and identity. Young people who are discriminated on the basis of their gender identity or sexual orientation, but are unsure or unwilling to define themselves with reference to specific labels, may benefit from a broader conceptual definition. This may be particularly beneficial for young people who find it difficult to "come out" such as those in high school, where students feel there is often no escape from the labels and cliques of the schoolyard.<sup>31</sup>

- 8.12 Indeed, NCYLC and AYAC's research suggests that many children and young people are unsure, or find it difficult to conclusively define their sexual orientation or gender identity. For instance, a 2008 study into the sexual health of secondary students from years 10 to 12 found that 2% of young people were unsure about their sexual attraction. Other studies have found that 5% of young males and females were unsure of their sexual attraction or gender identity ('gender questioning') and 4% defined their sexual attraction as 'other.'<sup>32</sup> The same study also noted that sexual behaviour does not necessarily correspond with sexual attraction.<sup>33</sup> This renders the use of specific labels to describe sexual orientation and gender identity inappropriate or unsuited as a legal definition. Use of a conceptual definition in legislation removes the imposition of labels which may be contested, inappropriate, or which might add unnecessary difficulty in proving legitimate discrimination.
- 8.13 NCLYC and AYAC, however, recognise the limitations of this model in protecting young people from discrimination. The model only considers current legal sexual activity as relevant behaviour to be considered in defining an individual's sexual orientation. This is problematic as many young people that engage in sexual acts before they have reached the age of consent, thereby engaging in illegal sexual activity. For instance, a study has shown that one in two young people are sexually active before the age of consent.<sup>34</sup> The average age of commencing sexual activity in Australia is 15.2,<sup>35</sup> below the age of consent in every state and territory.<sup>36</sup> In order to

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<sup>30</sup> AHRC, *op. cit.*, pg. 23.

<sup>31</sup> E Shaw, *Australian Youth Representative to the United Nations Final Report*, 2008, pg. 24.

<sup>32</sup> Australian Research Centre in Sex, Health and Society, *op. cit.*, pg. 17.

<sup>33</sup> *Ibid*, pg. 37.

<sup>34</sup> M Short, 'Let's ,like, talk about sex', *The Age*, Opinion, May 16 2011.

<sup>35</sup> N Thomas, *The Talk*, retrieved Thursday 15 December. 11, <<http://thetalkdvd.com.au/>>.

meet the practical realities of adolescent sexual behaviour, NCYLC and AYAC suggest incorporating a broad definition of legal sexual activity. This could include kissing, touching or other signs of affection in the range of sexual behaviours to be protected by discrimination law. Consideration of kissing as a sexual practice has been affirmed in previous studies.<sup>37</sup> A more expansive conception of sexual activity would better protect children and young people who engage in same sex sexual activity before the age of consent.

- 8.14 Establishment of a conceptual definition may also allow heterosexuality to be considered as a protected attribute in the event of 'reverse discrimination'.
- 8.15 **Recommendation:** That a broad definition of gender identity and sexual orientation that incorporates both recognised sexual orientation and gender identity labels and individual behaviour be adopted.
- 8.16 **Recommendation:** That support programs, like the "It Gets Better" campaign, are implemented to help deter youth suicide and address related health issues.

## 9 Question 25: Are any changes needed to the conciliation process to make it more effective in resolving disputes?

- 9.1 The current system of bringing complaints and seeking remedies for breaches of anti-discrimination laws is difficult to access for many children and young people. A lack of information regarding how to lodge a complaint through the Australian Human Rights Commission and the absence of a clear pathway that young people from disadvantaged backgrounds can utilize are at the core of the problem.<sup>38</sup> Once a complaint is made, understanding alternative dispute resolution mechanisms is often difficult for young people. An outreach program for young people, both to institutions and to disadvantaged groups, could be a way to promote the existing mechanisms, while consultation of young people could offer solutions to the outreach gap.
- 9.2 Children and young people are dissatisfied with AHRC systems currently in place. These systems implicitly discourage engagement of children and young people by ignoring them. It is essential to reform systems so that they allow and encourage the

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<sup>36</sup> *Crimes Act 1900* (ACT) s 55; *Crimes Act 1900* (NSW) s 66C; *Criminal Code Act 1983* (NT) s 127; *Criminal Code Act 1899* (Qld) ss 208, 215; *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code Act 1924* (Tas) s 124; *Crimes Act 1985* (Vic) s 45; *Criminal Code Act Compilation Act 1913* (WA) s 321.

<sup>37</sup> Australian Research Centre in Sex, Health and Society, *op. cit.*, pg. 33.

<sup>38</sup> Australian Human Rights Commission hereafter referred to as AHRC.

voice of young people to be heard. A complaints system that is youth friendly, publicized, and understood is vital to a more effective discrimination process for young people. This system must be available to young people, the youth sector, and the institutions which serve them.

### **Complaints stage**

9.3 NCYLC and AYAC note that the Discrimination Paper fails to consider the possible barriers that children and young people face in the initial process of lodging a discrimination complaint. Yet the process of lodging a complaint to the AHRC can present considerable challenges for children and young people. NCYLC and AYAC identified issues with young people. NCYLC and AYAC identified issues with:

1. accessibility; and
2. complaints writing.

### **Accessibility**

8.1 Currently, there is a lack of information and support to ensure effective access of the complaints process by children and young people.

8.2 Increasing children and young people's accessibility can be achieved by advertising complaints mechanisms using child friendly media. This includes websites, flyers, and posters designed specifically with children and young people in mind. These mediums must inform children and young people of their right to complain, and explain the process clearly in ways that children and young people can understand. They should not be over-burdened with information so as to intimidate potential complainants or use complex language. Support services must be permanently and readily available to guide young people through the process. The discrimination complaints process should facilitate and accommodate the involvement of children and youth, and not present challenges.

8.3 Education regarding what discrimination is and how to lodge a complaint is vital for young people's inclusion in the process. Schools are essential agents in this process. They are the conduit between young people and the community and are crucial in their development as a contributing citizen. Schools hold a mandate to provide instruction

on civics and citizenship. This now includes the provision of information regarding discrimination from an early age. To ensure all young people are able to access and use AHRC complaints mechanisms, education resources should be designed and distributed to youth support services so that they can conduct outreach and education programs. This ensures the widest range of children and young people know about the AHRC complaints process.

### **Complaints writing**

- 8.4 From NCYLC's experience with LawMail queries, children and young people can have difficulty in writing a complaint that is specific and sufficiently detailed to meet the necessary requirements of the AHRC complaint form. NCYLC and AYAC acknowledges that the complaint form available on the AHRC website is useful in helping and directing child and youth complaint writing and assist in information gathering. However, the use of formal terminology (such as respondent, advocate and ombudsman), the length of the form and requirement for complainants to fill out personal information about the respondent can deter children and young people from making a complaint.
- 8.5 Furthermore, while children and young people can call a Complaint Information Officer for explanation and further guidance in completing the complaint form, they may not feel confident in telephoning for advice. NCLYC's experience with child and youth clients suggests that children and young people may feel more comfortable in asking questions and gathering information anonymously online. Therein lies the role of HREOC's website dedicated to youth and young people called 'Help for young people: Don't cop discrimination.' Although this website is useful and directed at young people, more information could be provided. NCLYC suggests making further explanatory information about lodging a complaint, including explanation of terms, accessible directly online as well as through the email/online inquiry service currently available.

### **Conciliation**

8.6 As noted in the Attorney General's report,<sup>39</sup> the conciliation process is a low cost, informal and flexible form of alternative dispute resolution. It is far less damaging to relationships and individuals than court processes. NCYLC and AYAC believe these attributes are crucial and can provide significant advantages for child and youth complainants who may be unfamiliar or intimidated with formal dispute resolution procedures. Ensuring that an informal and flexible form of dispute resolution remains and its use is encouraged, can benefit children and young people who are deterred by formal court procedures.

Nonetheless, systematic challenges exist within the current conciliation process which inhibits its functionality for child and youth complainants. Changes to the conciliation process are needed to ensure that the unique requirements of child and young people are recognised, understood and addressed. R. Black outlines some of the unique concerns of children and young people: "Young people are statistically 'less likely to volunteer, less likely to have faith in civic and political institutions, less likely to participate in their community.' They are less likely to have a sense of agency within their own lives (Benton et al. 2008), more likely to be excluded from opportunities to make key decisions in relation to those lives (Wierenga 2003), less likely to feel able to participate and less likely to believe that their participation will be taken seriously (Blanchard, Metcalf & Burns 2008)."<sup>40</sup>

8.7 As with the complaints system, AHRC conciliation services need to be developed that are designed specifically for working with young people in a variety of situations. Alternative dispute resolution mechanisms would assist in solving complaints prior to a stage where litigation becomes necessary. Basic conflict resolution skills, like examining root causes, should be part of this process. The development of such processes should be done in consultation with young people, the youth sector, and those qualified and experienced with dealing with young people.

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<sup>39</sup> Attorney General, *op. cit.*, pt. 187.

<sup>40</sup> R Black, 'Promise or practice? Student participation in low socioeconomic communities', *Youth Studies Australia*, Vol 29 no 2, 2010, p. 11.

1. Issues affecting the AHRC's conciliation process to effectively deal with child and youth complainants have been identified as: responsiveness;
2. adult orientation and power imbalances; and
3. increased legality

### Responsiveness

8.8 Responsiveness can be achieved by giving the commission the appropriate resources to respond to complaints in a timely manner. Current provisions under the Convention on the Rights of the Child allow six months between a complaint being made and a response being given.<sup>41</sup> It is the opinion of NCYLC and AYAC that this is inadequate. Given that young people are an extremely vulnerable group, it is essential that complaints be addressed with urgency if it is believed that their rights are being breached. On average it takes eight months to finalise a complaint from the time a complaint is lodged.<sup>42</sup> Where discrimination occurs within an institution where a child or young person frequently must attend, such as a school, this time delay may significantly hinder the child or young person's ability to develop with the institution.

### Adult orientation and power imbalances

8.9 Although informal and flexible, the conciliation process is generally catered towards adult complainants. No significant distinction is made between adult and child complainants in the conciliation process. As the NSW Ombudsman's *Guideline for Dealing with Youth Complainants* accounts,<sup>43</sup> child and youth complainants often have specific and unique concerns. These challenges include: power imbalances;

- age differences between complainant and respondent;
- feelings of embarrassment;
- concerns of complaints being lost or ignored; and
- hesitancy dealing with 'adult' procedures.<sup>44</sup>

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<sup>41</sup> *Conventions on the Rights of the Child*, United Nations, Treaty Series, vol. 1577, opened for signature 20 November 1989 (entered in to force 2 September 1990). Hereafter referred to as CROC.

<sup>42</sup> HREOC, *Frequently Asked Questions: Complaints*, HREOC, retrieved Friday 27 January 2012, <[http://www.hreoc.gov.au/complaints\\_information/complaints\\_faq.html#c4](http://www.hreoc.gov.au/complaints_information/complaints_faq.html#c4)>.

<sup>43</sup> Hereafter referred to as the 'the Guideline.'

<sup>44</sup> T Raymond and S Georgalis, *op.cit.*; NSW Ombudsman, *Discussion Paper: Complainant handling in NSW Universities*, 2004; K Toohey and H Hurwitz, *Alternative Dispute Resolution in education: case studies in resolving complaints of Disability*

- 8.10 Whilst parents or other concerned adults can assist children and young people at the conciliation stage the child or young person complainant should remain engaged, involved and aware of conciliation processes.<sup>45</sup>
- 8.11 NCYLC and AYAC endorse the Guideline's recommendations in handling child and youth complaints in the conciliation process. These recommendations include: in handling complaints from young people, complaints should be dealt with over the telephone, prompt action should be taken, regular updates given and holding a pre conciliation meeting in order for the young person to understand the role of conciliation.<sup>46</sup> The Guidelines distinguish between the needs of adults, children, and young people, and recognises the unique demands of child and youth complainants.
- 8.12 Specifically, Chapman argues that systems of inequity can be created due to differences between complaint and respondent capacities.<sup>47</sup> Complainants that reach the conciliation stage from children and young people commonly involve alleged discrimination by schools or employers.<sup>48</sup> That school authorities and employers operate to exercise control over their (often younger) students or young employees creates a unique relationship between the parties. Toohey and Hurwitz note that discrimination complaints between students and their schools can be like 'David and Goliath.'<sup>49</sup> More generally, Chapman notes that, compared with complainants, respondents were more likely to be 'repeat' respondents who had more experience with the AHRC discrimination complaints procedure.<sup>50</sup>

### Increased legality

- 8.13 Additionally, Toohey and Hurwitz raise concerns of increasing legality in the conciliation procedure.<sup>51</sup> For example, the increased presence of lawyers makes

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*Discrimination*, HREOC, 2002, retrieved Monday, 9 January 2012, <[http://www.hreoc.gov.au/complaints\\_information/publications/alternative\\_edu.html](http://www.hreoc.gov.au/complaints_information/publications/alternative_edu.html)>.

<sup>45</sup> T Raymond and S Georgalis, *Dispute resolution in the changing shadow of the law: a study of parties' views on the conciliation process in Federal Anti-Discrimination Law*, HREOC, 2002, retrieved Monday, 9 January 2012, <[http://www.hreoc.gov.au/complaints\\_information/publications/shadow\\_paper.html](http://www.hreoc.gov.au/complaints_information/publications/shadow_paper.html)>.

<sup>46</sup> NSW Ombudsman, *op. cit.*, pg. 80.

<sup>47</sup> A Chapman, 'Discrimination complaint handling in NSW: the paradox of informal dispute resolution', 22 *Sydney Law Review* 321, pg. 344.

<sup>48</sup> HREOC, *Conciliation Register*, HREOC, 2011, retrieved Monday 9 January 2012, <[http://www.hreoc.gov.au/complaints\\_information/register/index.html](http://www.hreoc.gov.au/complaints_information/register/index.html)>.

<sup>49</sup> K Toohey and H Hurwitz, *op. cit.*

<sup>50</sup> J Chapman, *op. cit.*, pg. 347.

<sup>51</sup> K Toohey and H Hurwitz, *op. cit.*

conciliation more adversarial.<sup>52</sup> Whilst increased legality may be beneficial to protect complainants generally, special care needs to be taken to ensure that child and youth complainants understand the procedure and how their rights are affected. Informal and flexible processes are more appropriate ways to deal with child and youth complaints.

- 8.14 In conclusion, NCYLC and AYAC believe the challenges of unresponsiveness, unequal capacities and experiences between parties, increased legality and adult bias confront children who encounter the conciliation process, limiting the effectiveness of the process to appropriately address the needs of child and youth complainants. A child friendly complaints system is needed because children and young people are amongst the most vulnerable and marginalised groups in Australia. They lack the direct power or agency that adults possess through the right to vote. Any representation they have is often made through adults, such as a parent, guardian, youth worker or other representative. For this reason, young people need to be provided with an age appropriate recourse, should they believe their rights have been infringed or they have been discriminated against.
- 8.15 **Recommendation:** That Australia develops child and young people friendly methods of making an anti-discrimination complaint. This should include telephone, website, email, social media and face-to-face systems for receiving and dealing with complaints.
- 8.16 **Recommendation:** That Australia develops education programs discussing the nature of discrimination. These programs should be integrated into civics and citizenship classes in the national curriculum.
- 8.17 **Recommendation:** That Australia develops resources for discrimination education, available to youth support services for disadvantaged or disengaged young people.
- 8.18 **Recommendation:** That an informal and flexible dispute resolution procedure, either in the form of conciliation or mediation, remain an important and significant part of the AHRC discrimination complaints resolution process. Compulsory conciliation or mediation undertaken by parties in good faith should be preferred over and precede proceedings in the Federal Court or Federal Magistrates Court.
- 8.19 **Recommendation:** That AHRC conciliators are made aware of, and trained for, the unique requirements of children and youth complainants and implement those requirements in the conciliation process.

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<sup>52</sup> J Chapman, *op. cit.*, pg. 233; T Raymond and S Georgalis, *op. cit.*

- 8.20 **Recommendation:** That children and young people friendly conciliation mechanisms should be developed and implemented in consultation with children, young people, and the youth sector.
- 8.21 **Recommendation:** That AHRC provide independent mechanisms or advocates to support and assist vulnerable complainants in the conciliation process.
- 8.22 **Recommendation:** That AHRC conciliators ensure the conciliation process remain informal and flexible, in spite of increasing formalisation and legality. Furthermore, NCLYC recommends that, where possible, legal terminology and procedure be carefully explained to child and youth complainants.

## 9 **Question 26: Are any improvements needed to the court process for anti-discrimination complaints?**

- 9.1 Should conciliation processes fail, the same issues of access and power inequality that exist for young people making complaints to the AHRC, exist for young people in accessing the legal services to bring their complaint to court. Effective legal protection against discrimination, vilification and harassment requires a court process that is suitable for use and access by children and young people. A support system through which young people could access support and legal services with regard to representation in court should be implemented to offer easier access to young people.
- 9.2 NCYLC and AYAC believe there are several barriers to court processes that marginalise children and young people prevent them from full enjoyment of their legal rights.<sup>53</sup> Presenting the biggest challenge is the continual marginalisation of children within the court process and child-inexperienced lawyers.

### **Marginalisation of children and young people**

- 9.3 The Inquiry revealed that a significant percentage of children and young people across Australia felt disconnected from the court process. The Inquiry found that 38% of youth respondents in detention did not think their lawyer had told the courts what they

<sup>53</sup> Australian Law Reform Commission ('ALRC'), *Seen and Heard: Priority for children in the legal process*, Report, No. 84 (1997) 4.4.

wanted them to say, and that in 70% of the cases, the judge or magistrate did not allow them to voice their concerns at all.<sup>54</sup> Although this statistic captures data specifically from the Children's Criminal Court, it reveals young people feel that current court procedures are inadequate or unsatisfactory method of voicing their needs and concerns. Indeed, that such a concern is present even in court processes specially designed to facilitate the involvement and understanding of children and young people emphasizes the marginalisation facing child and young complainants in adult-orientated court processes.

- 9.4 NCYLC and AYAC believe the development of a court process that caters to children and young people must account for the inability or unwillingness of children and young people to complain about violations of their rights. NCYLC and AYAC note that children and young people are concerned about their autonomy in court processes. Existing court processes are more likely to be initiated by a concerned adult on behalf of an individual child, rather than the child themselves. Civil litigation, for example, cannot be instituted by a child. It must be done by the child's next friend or a guardian *ad litem*. Current court rules also state that children do not enter and appear except by a guardian *ad litem*.
- 9.5 This empowers adults to control the court process and make decisions on behalf of children and young people, and undermines the child's right to be heard and to directly express their views on matters affecting them.<sup>55</sup> It also has the potential to undermine the role and involvement of the child or young person as the complainant. For children and young people who have been the victims of, sometimes traumatising and hurtful discrimination, it can be particularly important to have their voices heard.<sup>56</sup> Cashmore suggests that this is because it gives children and young people "some sense of being active agents...rather than powerless victims in the whims of adults".<sup>57</sup> Furthermore, procedural satisfaction "is directly related to the feeling that one has had a 'say' in the process and has been heard."<sup>58</sup>

### Inexperienced legal practitioners

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<sup>54</sup> ALRC, *op. cit.*, 4.24.

<sup>55</sup> CROC, Art. 12(2).

<sup>56</sup> J Cashmore, 'Promoting the participation of children and young people in care', *Child Abuse & Neglect*, 2002, Vol. 26, pg. 838.

<sup>57</sup> L A Weithorn, 1983 in *Ibid*, pg. 838.

<sup>58</sup> A E Lind and T R Tyler, 1988; G. B. Melton, 1983 in *Ibid*, pg. 838.

- 9.6 NCYLC and AYAC also recognise the involvement of legal practitioners that are not experienced in dealing with children and young people as a barrier to the voices of children and young people. Children and young people expect lawyers to advocate their views, or act as interpreters.<sup>59</sup> However, few of the lawyers who contributed to the Inquiry agreed with this perception.<sup>60</sup> As a result of the difference between the expectations of the child and the practitioners' self-perceived roles, children can feel that their voice is marginalised or ignored altogether.<sup>61</sup>
- 9.7 Cashmore notes the following practices are required in order for child and young complainants to have genuine and effective involvement in court processes:
- “the opportunity and choice of ways to participate, [e.g. face to face; videotaped; written accounts];
  - access to relevant information;
  - access to a trusted advocate or mentor;
  - policy and legislation that require children and young people to be consulted and informed;
  - ways to complain; and
  - ways for services to evaluate their performance and the way they encourage the involvement of children and young people.”<sup>62</sup>
- 9.8 Consideration of these principles would lead to greater facilitation of child and youth complainants.
- 9.9 **Recommendation:** That the Courts encourage and facilitate the participation of children in the court process. With appropriate support, children respond positively to settings which encourage participation and consultation.
- 9.10 **Recommendation:** That further development of the court process is completed in consultation with children. The NCYLC and AYAC encourage the use of consultation procedures that are readily accessible and appropriate for children. Children should be engaged at the earliest possible stage in the consultation process so as to fully participate in the development of the policies and processes that affect them.

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<sup>59</sup> ALRC, *op. cit.*, 13.57.

<sup>60</sup> J Cashmore & K Bussey 'Perceptions of children and lawyers in care and protection proceedings' (1994) 8 *International Journal of Law and the Family* 319, pg. 332–333.

<sup>61</sup> ALRC, *op. cit.*, 13.57-13.58.

<sup>62</sup> *Ibid.*, pg. 842.