



16 February 2024

The Secretary
Social Development Committee
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By email

Submission re: Inquiry into the potential for a Human Rights Act for South Australia

To the Social Development Committee of the Parliament of South Australia,

Thorne Harbour Health welcomes the opportunity to provide a submission to the Social Development Committee's inquiry into the potential for a Human Rights Act in South Australia.

Thorne Harbour Health is one of Australia's largest LGBTIQ+ community-controlled health services for sexual and gender minority communities, and all people living with, and affected by HIV. Thorne Harbour Health works primarily across South Australia and Victoria, but also leads on national projects.

In this submission, we affirm our support for a Human Rights Act for South Australia. We also lend support to the submission made by the South Australian Rainbow Advocacy Alliance (SARAA).

LGBTIQ+ South Australians face inequities and rights violations based on sexual orientation, gender identity and gender expression, and innate variations of sex characteristics (SOGIESC). These violations affect the health and wellbeing, safety and inclusion of our communities. In this submission, we discuss effectiveness and deficiencies in current laws, and how they can be improved. We further discuss benefits of enacting a Human Rights Act, potential human rights in any act, and implications for making of laws.

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Executive Summary

Thorne Harbour Health welcomes the opportunity to provide a submission to the Social Development Committee's inquiry into the potential for a Human Rights Act in South Australia (the Inquiry). We are supportive of the development of a Human Rights Act for South Australia.

This submission will address the Inquiry's focus on:

- a) The effectiveness of current laws and mechanisms for protecting human rights in South Australia and any possible improvements to these mechanisms;
- c) The strengths and weaknesses of adopting a Human Rights Act in South Australia;
- d) The potential human rights protections in any act;
- e) The potential implications of any act for the making of laws, courts and tribunals, public authorities and other entities; and

Marginalised and vulnerable people, including LGBTIQ+ individuals, are often overlooked in legislative processes. 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.

A Human Rights Act will strengthen protections for South Australia's LGBTIQ+ communities, including addressing gaps and deficiencies in existing legislation. Further, any act holds the potential to:

- Ensure that human rights are considered when government designs new laws, policies or regulations.
- Make government considerations and decisions easier and more consistent.
- Improve pathways to resolve disputes or find remedies where human rights have been breached.
- Remove the binary and ideological nature of issues and favour a rights-based approach.

However, when considering the potential for a Human Rights Act, we urge the Committee to:

- Explicitly include protections on the basis of sexual orientation, gender identity and expression and innate variations of sex characteristics (SOGIESC).
- Draw on international human rights principles beyond those enumerated in ratified covenants and conventions, particularly with respect to SOGIESC, and Indigenous peoples, and the environment.
- Acknowledge that all human rights are universal and inalienable, indivisible, interdependent and interrelated – that religious rights are not prioritised over SOGIESC rights.

Embedding rights related to sexual orientation, gender identity and expression, and sex characteristics is pivotal to protect all LGBTIQ+ South Australians from discrimination.

a) The effectiveness of current laws and mechanisms for protecting human rights in South Australia and any possible improvements to these mechanisms.

Discrimination

There are shortcomings in existing anti-discrimination law in South Australia that can be addressed and improved, particularly with a Human Rights Acts.

It was only in 2013 that South Australian law (the *Equal Opportunity Act*) made it unlawful to discriminate against a person on the basis of 'sexuality' or 'chosen gender'. (This language was updated in 2016 to 'sexual orientation' and 'gender identity'). However, prior to these amendments, a legal right to equality and non-discrimination in a Human Rights Act would have provided stronger protections for LGBTIQ+ individuals, same-sex couples and their families.

Deficiencies in protection from discrimination for LGBTIQ+ South Australians is evident in Section 50(1)(c) of the *Equal Opportunity Act*, which provides broad exceptions allowing religious bodies to discriminate:

any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Of particular note have been recent cases of discrimination by faith-based schools including:

- South Vales Christian College releasing a policy to not hire LGBTIQ+ staff.¹
- Findings of faith-based schools treating LGBTIQ+ students unfairly, including tolerating bullying and harassment documented by the Commissioner of Children and Young People.²

More recently, religious exceptions were explicitly highlighted to the United Nations Human Rights Council in June 2023 by the UN Independent Expert on Sexual Orientation and Gender Identity. The report stated, "it is not permissible for individuals or groups to invoke 'religious liberty' to perpetuate discrimination against LGBTI persons when it comes to the provision of goods or services in the public sphere."³

Freedom of religion is typically embedded within any human rights act or charter, but rights on the basis of sexuality, gender identity and innate variations of sex characteristics are not. This implicitly condones forms of discrimination against LGBTIQ+ people as long as it is masqueraded as 'exercising religious freedom'. As South Australia currently sits, the definition of religious freedom is so loose that many behaviours can be considered "injury to religious susceptibilities," and thus exempt from anti-discrimination law.

¹ Star Observer, 1 September 2021, Adelaide Christian School Defends Policy Not To Hire Gay Staff, available at: <https://www.starobserver.com.au/news/adelaide-christian-school-defends-policy-not-to-hire-gay-staff/205470>

² Commissioner for Children and Young People (2021), *No Exceptions – creating safer schools for LGBTIQ+ Students*, available at: <https://www.ccp.com.au/every-lgbtqia-student-has-the-right-to-feel-safe-at-school-no-exceptions/>

³ United Nations Office of the High Commissioner for Human Rights, 'Freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity'.

There have been multiple legislative attempts to expand these exceptions, including the shelved NSW Religious Freedom Bill, and the Federal Religious Discrimination Bill, which sought to sanction discriminatory behaviours against LGBTIQ+ communities. Therefore, including religious freedoms but not explicitly including SOGIESC rights in a Human Rights Act can have incredibly deleterious implications for sexual and gender minorities.

Exemptions from the *Equal Opportunity Act* for religious bodies and schools, allows them to discriminate based on religious principles in specific circumstances. The Act includes provisions that permit religious institutions, including schools, to discriminate on the basis of sex, sexuality, or marital status in employment, education, and the provision of services if such discrimination is in accordance with the doctrine of the religion or necessary to avoid injury to the religious sensitivities of adherents of that religion. This is the case even where religious doctrine is irrelevant to the position, e.g., teaching mathematics.

Example: Tightening exceptions to anti-discrimination law in Victoria.

In December 2021, the Victorian Parliament passed the *Equal Opportunity (Religious Exceptions) Amendment Act 2021*. The reforms narrowed and removed exceptions to discrimination in the *Equal Opportunity Act 2010* that permitted religious bodies or schools to discriminate against people based on sex, sexual orientation, lawful sexual activity, marital status, parental status and gender identity.

From 14 June 2022, religious bodies and schools can only discriminate against employees or potential employees where:

- conformity with the beliefs, doctrines or principles of the body or school's religion is an inherent (i.e. core, essential or important) requirement of the job.
- the other person cannot meet that inherent requirement because of their religious belief or activity.
- the discrimination is reasonable and proportionate in the circumstances.

Religious bodies providing goods and services funded by the Victorian Government are only able to discriminate on the basis of a person's religious beliefs, in limited circumstances, when it is reasonable and proportionate. They are not able to discriminate when providing goods or services (unless another exception applies) because of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status and gender identity.

Vilification and hate speech

There are no protections for LGBTIQ+ South Australians from vilification, that is, to incite hatred, revulsion, serious contempt or severe ridicule of a person or group of people.

Recent examples of anti-LGBTIQ+ vilification in South Australia include:

- anti-LGBTIQ+ protesters at the 2023 South Pride March yelling abuse and accusing attendees of being "paedophiles", "child molesters", and "child traffickers", while SA Police were present but failed to intervene.
- Aldinga tourist beach being spray painted with homophobic messages including, "F**k gays" in March 2023.⁴

⁴ News.com.au, 24 March 2020, 'Anti-LGBTQI vandals target popular South Australian tourist beach,' available at <https://www.news.com.au/national/south-australia/antilgbtqi-vandals-target-popular-south-australian-tourist-beach/news-story/8983f4f736ffca660a371e68ccec3ee>

- Adelaide’s Pride Walk, celebrating LGBTIQ+ diversity, was defaced with religious vandalism in 2019 and 2021.⁵
- A pride flag in Mallala flown during Pride Month being graffitied with “F**k the faggots.”⁶
- Homophobic religious pamphlets placed in Adelaide letterboxes.⁷

A Human Rights Act that recognises freedom from discrimination would provide legal impetus and guidance in specific anti-vilification law reform.

c) The strengths and weaknesses of adopting a Human Rights Act in South Australia.

A Human Rights Act affirms the human rights of all South Australian, not only minority or marginalised groups. It will place human rights at the centre of decision-making by requiring governments to consider human rights when drafting laws, developing policies, funding and delivering services, and making decisions. It will give every day South Australians the chance to have their say about new laws and policies that impact their rights *before* they are implemented. A Human Rights Act would also help make sure people with the on the ground knowledge are involved in service design and delivery and provide a safeguard to ensure everyone is treated with dignity, regardless of their situation in life.

Importantly, an Act will improve avenues for people to make complaints about human rights violations and seeks remedies for those violations.

Finally, a Human Rights Act will foster respect for human rights in Australia, so we can work toward a future where everyone, everywhere understands their rights, and the rights of others.

We support a legislated Human Rights Act, like those in Victoria, Queensland, and the Australian Capital Territory. Unlike these acts, however, we recommend the explicit reference to SOGIESC (and other characteristics) protected from discrimination.

d) The potential human rights protections in any act.

A Human Rights Act should draw on established international covenants and conventions, as well as other declarations, resolutions and principles that establish rights relating to sexuality, gender identity and sex characteristics (SOGISC), Indigenous peoples, and the environment, 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

⁵ QNews, 11 October 2021, ‘Adelaide’s Rainbow Walk defaced with religious vandalism – again,’ available at <https://qnews.com.au/adelaides-rainbow-walk-defaced-with-religious-vandalism-again/>

⁶ ABC News, 12 November 2020, ‘Mallala community celebrating ‘Pridevember’ has rainbow flag vandalised in homophobic attack,’ available at <https://www.abc.net.au/news/2020-11-12/rainbow-flag-vandalised-in-homophobic-attack-at-mallala/12877362>

⁷ InDaily, 24 January 2020, ‘Homophobic pamphlet ‘disturbing’ but not illegal,’ available at <https://www.indaily.com.au/news/local/2020/01/24/homophobic-pamphlet-disturbing-but-not-illegal>

- *Convention on the Rights of the Child (CRC) 1989*
- *Convention on the Rights of Persons with Disabilities (CRPD) 2008*

In additions to the above covenants and conventions, a Human Rights Act should also draw on:

- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007)*
- *The Yogyakarta Principles (2006)*
- *The Yogyakarta Principles plus 10 (YP+10) (2017)*
- *The Malta Declaration (2013) and The Darlington Statement (2017)*
- *The United Nations Resolution on the Human Right to a Clean, Healthy and Sustainable Environment (2022)*

It is important to note that the above covenants and conventions reflect the values of the constituent nations of the United Nations, particularly at the time they were written. Many of these nations still criminalise homosexuality and perpetuate homophobic and transphobic social values. As such, these human rights instruments do not mention or affirm freedoms or protections on the basis of sexual orientation, gender identity and expression or sex characteristics.

The Yogyakarta Principles (YP) and Yogyakarta Principles plus 10 (YP+10) provide principles and state obligations to 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 South Australia as a pluralistic state that champions inclusivity and diversity. Rights and freedoms on the basis of sexual orientation, gender identity and sex characteristics must not be diminished or made subservient to religious rights, as is often the case. The Malt Declaration and the Darlington Statement specifically address the human rights of intersex people.

The UNDRIP, while overwhelmingly supported by the international community, was opposed by Australia at the United Nations. The Declaration nonetheless serves as an important resource for affirming the rights of First Nations peoples in South Australia.

More recently, the United Nation General Assembly passed a resolution affirming the human right to a clean, healthy and sustainable environment. More than 150 countries expressly recognise the right to a clean, healthy and sustainable environment through their constitution, national laws, judiciaries or ratifications of international instruments. Australia is one of the few countries – at federal, state and territory levels – that does not recognise this right.

Explicitly including SOGIESC rights in a Human Rights Act – rather than referring to flawed anti-discrimination legislation – is essential to avoid loopholes, as well as ensure these rights are not made subordinate to religious rights.

There exist human rights acts, bills of rights and covenants that do explicitly list protected characteristics.

South Africa’s Bill of Rights, the right to equality specifies protected attributes:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The UK Human Rights Act, while not specifically mentioning SOIESC rights, does list protected attributes, rather than referring to other legislation.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This is similarly the case in Article 26 of the International Covenant on Civil and Political Rights:

In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

These examples highlight listing specific grounds for protection, rather than referring to laws that maybe be more difficult to interpret, subject to change, or somehow deficient.

e) The potential implications of any act for the making of laws, courts and tribunals, public authorities and other entities.

We need a framework that requires the South Australian government to consider everyone's basic rights when it designs new laws, regulations or policies.

South Australians also need accessible pathways to resolve any disputes about their rights and achieve effective remedies if their rights have been unjustifiably breached. We want dispute resolution and rights protection that is focused on delivering practical solutions, without involving people in expensive litigation.

We support the enactment of a Human Rights Act, also known as a Human Rights Charter, in South Australia. The act of considering human rights is about putting people at the heart of government decision-making and recognising rights and responsibilities within our community. It is about acknowledging that everyone deserves to be treated with dignity, equality and respect.

South Australians want to help build a society based on a culture of respect for human rights across government, parliament, the courts and our communities.

Recommendations

1. That a Human Rights Act for South Australia be developed.
2. That any Human Rights Act explicitly include sexual orientation, gender identity and gender expression, and innate variations of sex characteristics as protected attributes, rather than referring to antidiscrimination external to the Human Rights Act.
3. That any Human Rights Act draws upon human rights principles beyond those enumerated in international covenants and conventions, to ensure protections for LGBTIQ+ communities, Indigenous peoples and the environment.