



31 May 2019

Victor Madrigal-Borloz

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Office of the United Nations High Commissioner for Human Rights

By email: [ie-sogi@ohchr.org](mailto:ie-sogi@ohchr.org)

Dear Mr Madrigal-Borloz,

### **Marginalisation and exclusion from socio-cultural environments**

I refer to your invitation to provide input to your thematic report. The Australian Human Rights Commission provides the following written responses, including highlighting relevant, recent research. This information should be read in conjunction with my letter of 5 June 2017 to your predecessor, Professor Vitit Muntarbhorn, and my previous letter to you on 21 June 2018, both of which contain the Commission's previous input on these matters.

The Commission's response is structured by reference to your specific requests for input. We have included information only where we consider it to be particularly useful for your work, and so we have not responded to all of your requests for input. Our responses primarily refer to federal legislation, though we note that there is overlapping state and territory legislation as well.

Please do not hesitate to contact me if you would like further information or if I can be of further assistance.

Yours sincerely

A handwritten signature in blue ink that reads "Edward Santow".

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## Response to Call for Input

**1. Key areas in which people (in your country, region or worldwide) suffer socio-cultural and economic exclusion as a result of violence and discrimination on the basis of sexual orientation and/or gender identity; in particular,**

**b) How are individuals, groups or communities differently affected, based on their sexual orientation and/or gender identity?**

There is evidence that as a result of violence and discrimination on the basis of sexual orientation and/or gender identity, Lesbian, Gay, Bisexual and Transgender (LGBT) people experience significantly worse socio-cultural and economic outcomes<sup>1</sup>. According to the NSW Council of Social Services report, *Beyond the myth of 'pink privilege': Poverty, disadvantage and LGBTI people in NSW A scoping review of the evidence*, the 'literature highlights how LGB people, and transgender people, are more likely to find themselves unemployed, earn less or have slower career progression, often in spite of higher levels of tertiary education, as well as to experience harassment and discrimination in the workplace. It also reveals, beyond the averaging effect of some studies, how sub-population groups, including lesbian and bisexual woman, bisexual men, and transgender people are more likely to experience both disadvantage and poverty.'<sup>2</sup>

It cites a 2015 Australian study by Sabia and Wooden, in which they state 'that a labour market penalty existed for sexual minorities and gay males in particular.'<sup>3</sup> Gay males were more likely to have 'multiple non-working spells', and face an 'annual earnings penalty of approximately 20 percent,' even after controlling for family and individual characteristics, including personality, religiosity, and risky health behaviours. Moreover, the average earnings growth rate for gay males, over a 10-year period, was found to be substantially smaller than for their heterosexual counterparts.' This report cites multiple data sources demonstrating inequalities of socio-economic outcomes across the range of lesbian, gay, bisexual, trans and gender diverse populations.

**c) What are the main barriers in ensuring equal access to education, health care, employment and occupation, housing and other relevant sectors?**

Under the *Sex Discrimination Act 1984* (Cth), it is generally unlawful to discriminate on the basis of SOGI status in specified areas of public life. However, there are exemptions – under s37 – that allow discrimination by religious bodies in certain circumstances.<sup>4</sup> In Australia, under federal law, it is lawful for religious schools to discriminate against students and employees on the basis of their sexual orientation

or gender identity, where the discriminatory conduct is in accordance with the doctrines, tenets, beliefs or teachings of a religion or creed or is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Human rights are universal, inalienable, indivisible, interdependent and interrelated. As such, where it is claimed that various human rights may be in tension, the law must accommodate all the human rights that are engaged. Particularly relevant in the context of education in religious schools are the rights of the child, the right to be free from discrimination, and the right to freedom of religion. As stated in the Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, the most effective way for Australia to adhere to its obligations under the Convention on the Rights of the Child, including the requirement to give primary consideration to the best interests of the child, would be to prohibit discrimination on the basis of sexual orientation or gender identity against children in a school context.<sup>5</sup> The Commission has also recommended repeal of the general exemption that allows this form of discrimination against employees of a religious schools.

## **2. Root causes and structural factors responsible for marginalisation and socio-cultural and economic exclusion, such as laws, public policies, institutional practices, organizational behaviours, and prevailing ideologies, values and beliefs?**

Two pieces of recent academic research have shed light on the causes and extent of mental health issues for people in lesbian, gay and bisexual communities in Australia.

In the largest study of bisexual people in the world to date, *Who I am* examined the reasons bisexual people experience higher rates of psychological distress than heterosexual and homosexual people.<sup>6</sup> The study's aim was to identify the reasons for poor mental health in bisexual people and found significant links between poor mental health and the following factors:

- Bisexual people who are in heterosexual relationships;
- Bisexual people perceiving their sexuality to be bad or wrong;
- Bisexual people thinking their partner's support or understanding of their sexuality is low.

*Minority stress, social support, and the mental health of lesbian, gay, and bisexual Australians during the Australian Marriage Law Postal Survey* examined the relationship between minority stress, social support and the mental health of lesbian, gay and bisexual Australians during the Australian Marriage Law Postal Survey (the Postal Survey).<sup>7</sup> The Postal Survey was a voluntary postal survey of all eligible voters. It

asked whether same-sex marriage should be legalised across Australia, and was conducted between 12 September and 7 November 2017 by the Australian Federal Government.

In the study that analysed the Postal Survey, 1305 respondents reported the frequency of exposure to negative and positive media messages about same-sex marriage, perceived personal support, and psychological distress during the postal survey. It confirmed public health concerns that more frequent exposure to stigmatising media messages was associated with increased psychological distress though this association was significantly weaker amongst participants who perceived greater personal support for same-sex marriage from their immediate social network. Significantly, being exposed to positive messages via public and social media was not associated with psychological distress, and did *not* moderate the association between negative media message exposure and psychological distress.

### **3. State efforts to address socio-cultural and economic exclusion through legislation, policies, data gathering, and other means, for example:**

#### **b) Current efforts by States to address bullying and exclusion of LGBT people from education, including in education curricula teacher training, measures to promote continuing education or reinsertion in education settings and vocational training;**

See comments at 1c.

#### **d) Coverage by social security and benefits, as well as public and private health insurance (Taking into account survivor's pensions for same-sex couples, insurance coverage for gender affirming care, social housing for LGBT youth and older persons etc.);**

In the Australian Human Rights Commission's 2015 report, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, affordability of accessing healthcare for trans and gender-diverse people was raised as a key barrier to wellbeing, by both people with lived experience and by clinicians.<sup>8</sup>

As a group, trans and gender diverse people report comparatively poorer outcomes across a range of health performance indicators. This is particularly true for mental health and wellbeing.<sup>9</sup> Extensive research confirms a strong link between access to therapeutic treatment, such as hormones and surgical interventions, and better health outcomes for trans and gender diverse people.<sup>10</sup> In particular, necessary pharmaceutical and surgical procedures are not listed on the Medicare schedule.<sup>11</sup> Hence these procedures are substantially or entirely privately funded and can cost upwards of \$50,000. Clinicians have argued that an urgent need for improved access to publicly funded

specialist outpatient healthcare in both paediatric and adult settings is required in order to provide trans and gender diverse people with adequate and comprehensive care.<sup>12</sup>

**e) Equal access to health (including through training and sensitisation of health care personnel), regardless of sexual orientation, gender identity or expression;**

While the health system does not systematically discriminate against individuals on the basis of sexual orientation, gender identity or expression, some people from these communities report negative experiences when engaging with healthcare professionals. According to *From Blues to Rainbows*, a 2014 report on trans and gender diverse people aged 14-25, 30% of respondents indicated that negative past experiences with healthcare professionals had prevented them from seeking mental healthcare.<sup>13</sup>

As per regulations of the Australian Therapeutic Goods Administration, the Australian Red Cross Blood Service rejects male donors who have had sex with another man in the past 12 months.<sup>14</sup> 'Sex' in this context means oral and anal sex with or without a condom.<sup>15</sup>

**4. Complaints mechanisms available and accessible to LGBT people facing discrimination.**

The Australian Human Rights Commission is an independent agency that investigates and resolves complaints about discrimination and breaches of human rights. Following the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), which amended the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act)<sup>16</sup>, it is unlawful under federal law to discriminate against a person on the basis of sexual orientation, gender identity and intersex status in specified areas of public life. Same-sex couples are also protected from discrimination under the definition of 'marital or relationship status'. However, as noted above, these provisions are subject to certain exemptions. People can make complaints to the Australian Human Rights Commission if they believe they have been discriminated against on the basis of these grounds. The Commission has a function of inquiring into, and attempting to conciliate these complaints. Where a complaint cannot be resolved through conciliation, the Sex Discrimination Act provides a mechanism for complainants to commence proceedings in court to seek a remedy.

Most of Australia's sub-national or provincial jurisdictions – known as 'states and territories' – prohibit discrimination on the basis of sexual orientation and gender identity; however, the jurisdiction under the Sex Discrimination Act is more inclusive and addresses gaps such as a lack of coverage for acts or practices of the federal government and includes the ground of intersex status.<sup>17</sup>

There are also specific protections in the *Fair Work Act 2009* (Cth) for people who experience discrimination on the basis of sexual orientation in employment.

## **6. Actions taken to raise public awareness and sensitisation on issues of sexual orientation and gender identity, in order to promote the meaningful socio-cultural and economic inclusion of LGBT people.**

The Commission is aware of a range of training programs led by civil society that promote inclusion of LGBT people, either as service-recipients or employees. An extensive list is provided by the National LGBTI Health Alliance are here:

<https://lgbtihealth.org.au/trainingpackages/>

One such program by the non-government organisation, ACON (previously the AIDS Council of NSW), is Pride in Diversity – an Australian national not-for-profit employer support program for all aspects of LGBTI workplace inclusion. Pride in Diversity specialises in Human Resources, organisational change and workplace diversity dedicated to improving the health and wellbeing of LGBTI people by reducing exclusion, invisibility, homophobia and stigma in the workplace. Pride in Sport is an Australian sporting inclusion program specifically designed to assist National and State sporting organisations and clubs with the inclusion of LGBTI employees, players, coaches, volunteers and spectators. Pride in Sport Index (PSI) benchmarks and assesses the inclusion of LGBTI people across all sporting contexts. Pride in Health + Wellbeing is a national membership program that provides year-round support in the provision of LGBTI inclusive services for those working within the health and wellbeing sector. It provides subject-matter experts with whom to build ongoing relationships who can furnish expert advice, training and help. More information on Pride in Diversity is available here:

<http://www.prideinclusionprograms.com.au/>

## **7. Services provided by civil society to excluded and marginalised LGBT people**

The Commission is aware of a range of national and local services to help support excluded and marginalised LGBT people. One such resource is the website run by ReachOut — Australia’s leading online mental health organisation for young people and their parents — <https://au.reachout.com/articles/lgbtqi-support-services>. While these are framed as services for young people, many of the organisations listed provided services to any LGBT person who is need of support.

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<sup>1</sup> We note that the evidence indicates that is true also for intersex people, though the question is framed in a way that doesn’t include that cohort.

<sup>2</sup> NSW Council of Social Services, ‘Beyond the myth of ‘pink privilege’: Poverty, disadvantage and LGBTI people in NSW A scoping review of the evidence’, (October 2015). NSW Council of Social Services. Also available at: [https://www.ncoss.org.au/sites/default/files/public/policy/LGBTIPovertyNCOSSLaunch\\_FINAL.pdf](https://www.ncoss.org.au/sites/default/files/public/policy/LGBTIPovertyNCOSSLaunch_FINAL.pdf)

<sup>3</sup> Sabia, J.J. & Wooden, M. Sexual Identity, Earnings, and Labour Market Dynamics: New Evidence from Longitudinal Data in Australia (2015). *Melbourne Institute Working Paper Series* no 8/15.

<sup>4</sup> *Sex Discrimination Act 1984* (Cth), s 37.

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<sup>5</sup> Australian Human Rights Commission, Policy Submission 171 to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018. Available at: <https://www.humanrights.gov.au/our-work/legal/submission/sex-discrimination-amendment-removing-discrimination-against-students>

<sup>6</sup> Julia Taylor et al, 'Bisexual mental health: Findings from the 'Who I Am' study' (2019) 48 (3), Australian Journal of General Practice. Available at: <https://www1.racgp.org.au/ajgp/2019/march/bisexual-mental-health>

<sup>7</sup> Verrelli S, White FA, Harvey LJ, Pulciani MR. 'Minority stress, social support, and the mental health of lesbian, gay, and bisexual Australians during the Australian Marriage Law Postal Survey' (2019). *Australian Psychologist* 1–11. Also available at: <https://doi.org/10.1111/ap.12380>

<sup>8</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, 2015. Also available at <https://www.humanrights.gov.au/our-work/lgbti/publications/resilient-individuals-sexual-orientation-gender-identity-intersex>

<sup>9</sup> See for example H Mulcare, S Croy, A Mitchell and S Patel, *Tranznation, A Report on the health and wellbeing of transgender people in Australia and New Zealand*, (Australian Research Centre in Sex, Health & Society, La Trobe University, 2007); Z Hyde, M Doherty, PJM Tilley, KA McCaul, R Rooney, J Jancey, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014); E Smith, T Jones, R Ward, J Dixon, A Mitchell and L Hillier, *From Blues to Rainbows: Mental health and wellbeing of gender diverse and transgender young people in Australia* (The Australian Research Centre in Sex, Health and Society, 2014).

<sup>10</sup> See for example H Mulcare, S Croy, A Mitchell and S Patel, *Tranznation, A Report on the health and wellbeing of transgender people in Australia and New Zealand*, (Australian Research Centre in Sex, Health & Society, La Trobe, 2007); Z Hyde, M Doherty, PJM Tilley, KA McCaul, R Rooney, J Jancey, *The First Australian National Trans Mental Health Study: Summary of Results* (School of Public Health, Curtin University, 2014); E Smith, T Jones, R Ward, J Dixon, A Mitchell, L Hillier, *From Blues to Rainbows: Mental health and wellbeing of gender diverse and transgender young people in Australia* (The Australian Research Centre in Sex, Health and Society, La Trobe University, 2014).

<sup>11</sup> The Royal Australasian College of Physicians, public submission 19 to the Australian Human Rights Commission, National SOGII Consultation, 2 February 2015. Also available at: <https://www.humanrights.gov.au/our-work/sexualorientation-sex-gender-identity/projects/sogii-rights>

<sup>12</sup> *Ibid.*

<sup>13</sup> Smith, E., Jones T., Ward R., Dixon J., Mitchell A., Hiller L. 2014. *From Blues to Rainbows: Mental health and wellbeing of gender diverse and transgender young people in Australia*. Melbourne. Australian Research Centre in Sex, Health and Society, page 73.

<sup>14</sup> Therapeutic Goods Order No. 88 - Standards for donor selection, testing, and minimising infectious disease transmission via therapeutic goods that are human blood and blood components, human tissues and human cellular therapy products. Also available at: <https://www.legislation.gov.au/Details/F2013L00854/Explanatory%20Statement/Text>

<sup>15</sup> Australian Red Cross Blood Service, *LGBTQI donors*, Web Page <<https://www.donateblood.com.au/lgbtqi-donors>>.

<sup>16</sup> *Sex Discrimination Act 1984* (Cth), ss 5A, 5B, 5C.

<sup>17</sup> *Ibid.*