

With respect: A strategy for reducing homophobic harassment in Victoria

**A discussion paper for the consideration of the
Victorian Attorney General**

**Joint Working Group of the Attorney-General's and Health
Minister's Advisory Committees on Gay, Lesbian, Bisexual,
Transgender and Intersex (GLBTI) Issues**

**In a society where some people are oppressed, nobody can be
free and equal.¹**

¹ *Declaration of Montreal* (August 2006) First Outgames Montreal 2006: International Conference on LGBT Human Rights, p.7.

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Executive summary

Introduction

This paper presents for the consideration of the Victorian Attorney General a comprehensive strategy for reducing homophobic harassment in Victoria. The strategy combines legislative reform with community education and awareness campaigns.

The paper is in response to research showing that gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians continue to be subject to high levels of homophobic harassment, violence and abuse. A number of recent state and national surveys show that levels of harassment against GLBTI people have remained constant over the last 10 years. Harassment takes a number of forms from acts of physical violence to verbal abuse and personal insults.

A 2005 Victorian survey of GLBTI people found that:

- 80 per cent of respondents had experienced public insult;
- 70 per cent had been publicly abused;
- 20 per cent had experienced explicit threats; and
- 13 per cent had been physically assaulted.²

A NSW survey indicates that lesbians are six times more likely than other Sydney women to be assaulted over a 12-month period while the ratio for gay to heterosexual men is 4:1.³ A national assessment of the needs of transgender people in Australia indicates that up to 50 per cent of transgender people were sacked after gender reassignment and 38 per cent of respondents consider they are subject to reportable levels of discrimination at least once a week.⁴

Studies show a direct link between people's experience of discrimination and abuse and poorer health outcomes.⁵ For GLBTI people the health implications include increased rates of smoking, substance abuse, depression, anxiety and suicidal ideation.⁶ Recent Canadian research (a country with similar demographics to Australia) indicated that GLBTI people were almost twice more likely than heterosexuals to have unmet health needs, translating into a cost of \$8 billion a year

² McNair, R., Thomacos, N. *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey*. 2005. Victorian Gay and Lesbian Rights Lobby.

³ Sanroussi, J., Thompson, S. *Out of the Blue: A Police Survey of Violence and Harassment against Gay Men and Lesbians*. 1995. New South Wales Police Service and Price Waterhouse Urwick, Sydney.

⁴ *National Transgender Needs Assessment and Conduct*. 2004. School of Sociology, University of New South Wales. P 29.

⁵ Krieger, N. *Discrimination and Health*. 2000. In: Berkman, L., Kawachi, I., Eds. *Social Epidemiology*. Oxford: Oxford University Press.

⁶ Pitts, M., Smith, A., Mitchell, A., Patel, S. *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians*. Australian Research Centre in Sex, Health and Society. 2006 La Trobe University. P. 51.

due to premature deaths.⁷ Included in these economic costs are the reduced workforce participation and performance due to homophobia in the workplace and at large. Homophobia also results in GLBTI people being over represented in a range of community services, with the criminal justice system bearing the largest of these costs.

This paper argues that the most effective strategy for reducing the amount of homophobic harassment in Victoria involves the implementation of two major strategies: Reform of the *Equal Opportunity Act* to protect GLBTI people from forms of harassment in public spaces, and community awareness and education campaigns.

Reform of the Equal Opportunity Act

New South Wales, Queensland, the ACT and Tasmania have all dealt with homophobic harassment through the implementation of incitement to hatred provisions in their Anti-Discrimination Acts. However the requisite requirement of incitement has proved to be a major stumbling block in successfully defending claims as a strict interpretation of the requirement involves a level of proof almost impossible to satisfy. In contrast, this paper builds on the harassment model currently operational in the UK and proposes that homophobic harassment be defined as:

Conduct that offends, humiliates, intimidates, insults or ridicules another person which is directed at an individual or group on the basis of their actual or perceived sexual orientation or gender identity.

This approach responds to the more common types of abuse and violence that GLBTI people experience on a day to day basis, to which they currently have no civil redress. It does not expressly include acts of violence against GLBTI people: existing criminal law provisions deal with violence. The inclusion of protection from harassment for GLBTI people in the *Equal Opportunity Act* is consistent with the intentions of the Charter of Human Rights and Responsibilities, which will come into force on 1st January 2007.

Community awareness and education campaigns

The paper also argues that legislation must be part of and supported by coordinated long-term education and awareness campaigns, which include a variety of approaches that target different sections of the community. These should be more than one-off initiatives notifying Victorians of changes to legislation and of their new obligations and penalties. They should include broad, government-led campaigns that send a strong and unequivocal message to the whole community that harassment of GLBTI Victorians is unjust, at odds with the Human Rights Charter and against the law.

Public education campaigns seek to reduce homophobia by changing community attitudes and by initiatives that target the most likely perpetrators of homophobic harassment. Targeted campaigns, which include strategies aimed at increasing the capacity of GLBTI people to respond to and encourage reporting of homophobic incidents, will provide police and other government agencies with much-needed

⁷ *Social Justice Framework for GLBTT-SQ Wellness* (2005) Canadian Rainbow Health Coalition. Saskatoon, Canada.

incidence and perpetrator data which they can use to design and implement more effective anti-homophobia initiatives.

The paper argues that legislative reform alone is not sufficient to generate and maintain behavioural change and that public education is needed to achieve the broader cultural shifts on which changes in individual and community attitudes and behaviours depend. This is consistent with world standard social marketing techniques and practices. It also identifies that the Government is best placed to take a leadership role in overseeing the development and implementation of such a strategy in partnership with a diverse range of key stakeholders.

Below is a summary of the key recommendations.

Summary of recommendations

Statement of principle

Recommendation 1:

That the Victorian Government adopt an anti-homophobia policy which:

- *recognises and celebrates diversity of sexual orientation and gender identity*
- *acknowledges the level of homophobic harassment in Victoria*
- *takes a zero-tolerance approach to homophobia.*

Strategic response – coordinated legislative and social reform

Recommendation 2:

That the Victorian Government's anti-homophobia policy include the development of a coordinated legislative reform and community awareness agenda consistent with the Victorian Charter of Human Rights and Responsibilities and the government's social policy objectives.

Recommendation 3:

That the government create an administrative and advisory structure responsible for:

- *developing and promoting its anti-homophobia policy*
- *overseeing the development of the legislative reform and community awareness agenda and monitoring its implementation.*

Recommendation 4:

That the government ensure that relevant GLBTI community organisations are adequately funded to fulfil their missions and play key advocacy and leadership roles in the development and implementation of anti-homophobia initiatives.

Education and awareness campaigns

Recommendation 5:

As part of its legislative reform and community awareness agenda, the government fund and develop a community education and awareness strategy consisting of two strands:

- *broad-based and targeted public initiatives that seek to minimise homophobic harassment*
- *initiatives that target GLBTI communities that seek to increase their capacity to deal with the threat and effects of homophobic harassment.*

Recommendation 6:

That Victoria Police's Gay and Lesbian Liaison Officers' manual be updated to include information about the government's anti-homophobia policy.

Recommendation 7:

That the government – in conjunction with relevant external agencies – improve data collection on the incidence and types of homophobic harassment. This may include:

- *engaging with Victoria Police to ensure their data collection system has the capacity to collect accurate and comprehensive data*
- *engaging with GLBTI community organisations to gather incidence data on harassment against GLBTI people.*

Recommendation 8:

That the Department of Justice give specific consideration to GLBTI issues in developing guidelines for government employees to fulfil their obligations under the Charter of Human Rights and Responsibilities.

Recommendation 9:

That the Equal Opportunity Commission give specific consideration to GLBTI issues when providing assistance to government departments to comply with Section 38 of the Charter of Human Rights and Responsibilities.

Legal reform

Recommendation 10:

That the Equal Opportunity Act 1995 be amended to address homophobic harassment against GLBTI people.

Recommendation 11:

That provisions to address homophobic harassment be included in a separate part of the Equal Opportunity Act 1995.

Recommendation 12:

That the harassment provisions should operate as broadly as possible and should not be confined to the areas of public life identified in Part 3 of the Equal Opportunity Act. The approaches warranting further consideration include:

- *Applying the harassment provisions to public acts;*
- *Excluding private acts from the operation of the provisions;*
- *Limiting the operation of the provisions to circumstances where the harm done is reasonably foreseeable; and*
- *Applying the provisions to harassment wherever it occurs.*

Recommendation 13:

That the Equal Opportunity Act 1995 be amended to make it unlawful to harass another person on the basis of their sexual orientation or gender identity.

Recommendation 14:

That, in the Equal Opportunity Act 1995, harassment be defined as ‘conduct that offends, humiliates, intimidates, insults or ridicules another person’.

That other features of the definition include:

- *that harassment be assessed against an objective standard, requiring that a reasonable person (having regard to all the circumstances including the history of discrimination or otherwise against persons of that sexual orientation or gender identity) would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed*
- *that, consistent with existing Victorian provisions, harassment be capable of being constituted by a single act.*

Recommendation 15:

That limited exceptions be made in relation to the new harassment provision, to include:

- *the fair reporting of a harassing communication*
- *circumstances which would be subject to absolute privilege in proceedings for defamation*
- *statements made in good faith for academic, artistic, scientific or research purposes; or in the public interest.*

1. Introduction

1.1 Purpose and principles

The purpose of this paper is to present for the Attorney General's and Minister for Health's consideration a strategy to reduce homophobic harassment in Victoria. The paper argues that the most effective strategy to achieve this goal would combine legislative reform with awareness and education campaigns.

The paper also argues that the success of such a strategy depends on:

- engagement with members of communities at risk of homophobic harassment
- consultation with the broader Victorian community
- government leadership and action.

1.2 Structure

The paper has four chapters.

Chapter 1 (this chapter) provides a background to the process of developing this paper.

Chapter 2 explains the need for a strategy to reduce homophobic harassment and provides information about the incidence, effects and social and economic costs of homophobia.

Chapter 3 outlines the types of education and public awareness approaches needed to address homophobic harassment.

Chapter 4 proposes the inclusion of homophobic harassment provisions in equal opportunity legislation, so as to address some gaps in current Victorian law.

1.3 Process

1.3.1 Terms of reference

This paper has been developed by the Joint Working Group of the Attorney-General's and Health Minister's Advisory Committees on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI)⁸ issues⁹. The joint working group was established to develop

⁸ Over the last decade there has been pressure, particularly from young people, to add 'queer' to the acronym GLBTI (GLBTIQ). Queer is taken as an umbrella term to include alternative sexual orientations and gender identities including gay, lesbian, bisexual, transgender and transsexual. It is also used by some same-sex attracted young people who are not comfortable with what they see as the impulse to label and fix individual identities implied by 'gay' and 'lesbian'. However, this paper uses the term GLBTI because it is widely used by members of these constituencies and is the term used in a range of government documents.

⁹ In this paper, the term 'transgender' is used to describe all those whose gender identity is at odds with the sex in which they were raised. This includes transsexuals and cross-dressers. Intersex refers to a medical (genetic) condition where an infant is born with reproductive organs and/or sex chromosomes

proposals and provide advice to government on legislative and social reforms aimed at reducing harassment of sexual and gender identity minorities in Victoria.

The joint working group's brief is consistent with the terms of reference and key tasks of both advisory committees and with the recommendations of *Health and Sexual Diversity: A Health and Wellbeing Action Plan for Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Victorians*,¹⁰ and with the Attorney-General's Justice Statement: *A New Direction for the Victorian Justice System 2004 – 2014*.¹¹

1.3.2 Information seeking process

Individual and group information-seeking meetings were held with key stakeholders during July and August 2006 in New South Wales, Queensland, Tasmania and the Australian Capital Territory. These jurisdictions were chosen because their legislative and/or social approaches address a range of homophobic behaviours not covered by current Victorian legislation. Other jurisdictions within Australia fell outside the scope of the process because their approach to the issue is similar to Victoria's.¹² A review of relevant literature and case law was also undertaken as part of the process.

Over the six weeks a total of 35 meetings were conducted, including discussions with: staff and commissioners from anti-discrimination commissions; policy makers; lobby groups; anti-violence workers; legal, education and police officers; health care workers; representatives from GLBTI communities; individuals who had relied on anti-vilification legislation for a legal remedy; advertising consultants, designers and academics. Individual consultations were also held with key stakeholders in Victoria to ensure that the process was responsive to local needs. A list of those consulted is at Attachment 1.

that are not exclusively male or female. For further information, see <http://home.vicnet.net.au/~victrans/definitions.htm>.

¹⁰ *Health and Sexual Diversity: A Health and Wellbeing Action Plan for Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Victorians*. Prepared by W. Leonard, Victorian Ministerial Advisory Committee On Gay and Lesbian Health. 2003. Victorian Department of Human services, Victoria

¹¹ *A New Direction for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement*. 2004. Department of Justice, Melbourne, Victoria.

¹² The benchmark for this assessment was an analysis of legislative regimes. In Victoria, South Australia, Western Australia and the Northern Territory sexual orientation and gender identity are protected attributes under anti-discrimination legislation in areas of public life. However none of these jurisdictions include any specific protection for GLBTI communities from homophobic harassment.

2. The need for change

2.1 Overview of Victorian GLBTI legislative and social reform

The diversity of the Victorian population is one of our greatest assets. It enriches and enlivens the social, cultural and economic life of the State and provides a springboard for greater understanding between individuals and communities. Victorian anti-discrimination and equal opportunity legislation acknowledges this diversity by providing protection from discrimination on the basis of characteristics such as age, impairment, marital status, race, religious belief or activity.

However, it is only recently that the Victorian Government has acknowledged alternative sexual orientations and gender identities as part of the State's diversity mix. Although sex between men was decriminalised in Victoria in 1980, it was not until 1995 that the *Equal Opportunity Act* was amended to include 'lawful sexual activity' as a protected attribute.¹³ The Act was further amended in 2000 to include 'sexual orientation' and 'gender identity'. It was only in 2001 that legislation was enacted that extended to same-sex couples many (but not all) of the rights and responsibilities afforded married and de facto heterosexual couples.¹⁴

These legislative reforms have been accompanied by a number of Victorian Government GLBTI social policy and program initiatives. They include the establishment of expert ministerial advisory bodies in the Departments of Justice and Human Services to provide advice on GLBTI legislative and health care reforms respectively; the development of Australia's first GLBTI health and wellbeing action plan; and the development of a range of departmental GLBTI initiatives.¹⁵

2.2 Naming the problem

Despite recent legislative and social reforms GLBTI people continue to be subject to harassment as a consequence of prejudice against their sexual orientation or gender identity. While a recent national survey showed that acceptance of GLBTI people is increasing across the country with Victoria the least homophobic State and Melbourne the most GLBTI-friendly city,¹⁶ nonetheless, 35 per cent of Australians believed homosexuality was immoral.¹⁷ Furthermore, a number of recent Victorian

¹³ This reform was first introduced in 1983 by Premier Cain but was rejected by the upper house.

¹⁴ The *Statute Law Amendment (Relationships) Act 2001 (Vic)* and the *Statute Law Further Amendment (Relationships) Act 2001 (Vic)*.

¹⁵ See *Initiatives developed for GLBTI Victorians*. (2006). Victorian Government Department of Justice. Melbourne, Victoria.

¹⁶ Flood, M. and Hamilton, C. (2005) *Mapping Homophobia in Australia*. The Australia Institute.

¹⁷ This compares with evidence in the UK, France and Germany, where 20 per cent of those surveyed see homosexuality as 'not wrong at all'. 'International extremes' are the US where 75 per cent of the population are homophobic and the Netherlands where only 10 per cent of the population hold similar beliefs. See Terrence Higgins Trust: Homophobia Campaign: Astors. 2004

and national surveys of GLBTI health and wellbeing show that levels of harassment against GLBTI people have remained constant over the last 10 years.¹⁸

Social theorists have suggested that ongoing harassment directed against GLBTI people is the result of the systemic nature of homophobia and the cultural and religious beliefs of certain segments of the population. Such a system has been described as ‘heterosexist’.¹⁹ The term refers to a world in which social norms assume and require men to be masculine, women to be feminine and sexuality to be the attraction between male and female. Those who don’t conform to these norms are subject to various forms of homophobic harassment ranging from acts of physical violence to less direct processes of social exclusion and isolation.

Douglas Scott *et al* define homophobia as ‘the unreasonable or irrational fear and hatred of homosexuals because of their sexual identity’.²⁰ However, according to the model of heterosexism being proposed here²¹, what appears as irrational to Douglas Scott and her colleagues is experienced as rational and reasonable by the holders of those beliefs. For example, although it is generally understood that violence is a crime and is not acceptable behaviour, abuse and violence directed towards GLBTI people is often not understood in the same way.²² Rather than being seen as criminal, these acts are often viewed as a form of ‘group policing’ aimed at perpetuating dominant masculine identities.²³ Continued derogatory and insulting remarks by prominent media personalities serve to reinforce intolerance and have the effect of endorsing discriminatory behaviour.²⁴

Regardless of the forms of harassment a member of the GLBTI community might be subjected to, all are experienced as violating. The effects of harassment are magnified because of the possibility that even low-level types of harassment (such as verbal abuse) could potentially escalate into more hostile or violent acts, establishing a continuum of interconnected dangers.²⁵ The impact of harassment is significant: not only must individuals deal with the immediate emotional and physical pain it causes,

¹⁸ Victorian Gay and Lesbian Rights Lobby (June 2000) *Enough is enough: A report on discrimination and abuse experienced by lesbians, gay men, bisexual and transgender people in Victoria*. VGLRL Melbourne; and Attorney General’s Department of NSW (December 2003) *‘You shouldn’t have to hide to be safe’: A report on homophobic hostilities and violence against gay men and lesbian in NSW*. Prepared by urbis: keys young: NSW AG’s Department, NSW.

¹⁹ Wilton, T. *Towards an Understanding of the Cultural Roots of Homophobia in Order to Provide a Better Midwifery Service for Lesbian Clients*. Midwifery. 1999. Vol 15(3) P. 156.

²⁰ Douglas Scott, S., Pringle, A., Lumsdaine, C. *Sexual Exclusion – Homophobia and Health Inequalities: A Review*. 2004. London, UK Gay Men’s Health Network.

²¹ The model of heterosexism proposed here includes *homophobia* and *transphobia*, a fear of or prejudice against alternative sexual orientations and gender identities respectively. It also includes fear of or prejudice against intersex people who do not fit into one of the binary categories of male or female. However the paper uses “homophobia” as a generic term to include a fear of or prejudice against any or all of these three groups.

²² Mason, G. *Violence Against Lesbians and Gay Men*. 1993. Violence Prevention Today, Australian Institute of Criminology, Canberra.

²³ Connell, R. *Masculinities*. 1995 Allen & Unwin, Sydney.

²⁴ See n. 16.

²⁵ Mason, G. *Body Maps: Envisioning Homophobia, Violence and Safety*. Social and Legal Studies. 2001. Vol 10(1). P. 30.

but also with the long-term psychological distress and trauma.²⁶ Collectively, the result of any homophobic attack is that violence is a tangible, if not an always immediate threat to a person's safety.²⁷

The systemic nature of heterosexism and the belief by some segments of the population that homophobia is reasonable, might explain the high and constant levels of harassment against GLBTI people.

2.3 Current levels of homophobic harassment

In 2005, a major study of GLBTI people found that:

- 80 per cent of respondents had experienced public insult
- 70 per cent had experienced verbal abuse
- 20 per cent had experienced explicit threats
- 13 per cent had experienced physical assault.²⁸

Although police data suggest that the incidence of homophobic harassment is low in comparison to other reported crimes, one study has indicated that less than twenty per cent of violence committed due to a person's actual or perceived sexual orientation or gender identity is ever reported.²⁹ Further, it has also been suggested that GLBTI people are often seen as 'soft targets' for robbery, extortion and blackmail because they are less likely to report it, and the authorities are less likely to arrest and prosecute the perpetrators.³⁰

NSW Police Service data indicate that lesbians are six times more likely than other Sydney women to experience physical assault over a 12-month period.³¹ The ratio for gay compared to heterosexual men is 4:1.³²

Transgender people are even more vulnerable to harassment. One USA study indicates that for the general population the probability of being murdered is 1:18 000, but for transgender people it is 1:12.³³ One Australian study indicated that up to 50 per cent of transgender people were sacked after gender reassignment and 38

²⁶ Ibid. P. 25.

²⁷ Ibid. P. 29.

²⁸ McNair, R., Thomacos, N. *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey*. 2005. Victorian Gay and Lesbian Rights Lobby.

²⁹ *A National Survey Examining Levels of Homophobic Crime and Community Confidence Towards the Police Service*. 1999. National Advisory Group on Police Issues. NAG, London.

³⁰ Tomsen, S. *Hate Crimes and Masculine Offending*. Gay and Lesbian Law Journal. 2001. Vol 10. P. 32.

³¹ Sanroussi, J., Thompson, S. *Out of the Blue: A Police Survey of Violence and Harassment against Gay Men and Lesbians*. 1995. New South Wales Police Service and Price Waterhouse Urwick, Sydney.

³² Ibid.

³³ Brown, K. *Twentieth Century Transgender History and Experience*. 1990. Harvey Milk Institute, San Francisco.

per cent of respondents consider they are subjected to reportable levels of discrimination at least once a week.³⁴

National and international surveys also show that the incidence and types of harassment against GLBTI people vary markedly according to differences in age, linguistic and cultural background, racial identity and geographic location.³⁵ For example, US and UK studies suggest that GLBTI people from ethnic minorities are subject to higher levels of harassment and discrimination than GLBTI people from Anglo-Celtic, English-speaking backgrounds.³⁶

The traditional perception of violence against GLBTI people is that it takes the form of bashings at night and in public places (such as parks, streets, car parks or beats). The perpetrators are perceived to be gangs of young men in their late teens or early twenties who are either unemployed or are unskilled manual labourers.³⁷ Whilst this type of violence does occur, it is the least frequent type of harassment experienced by GLBTI people. Also, it is far more likely to be directed towards gay men or women of transsexual background who frequent gay strips or beats.³⁸

The most common form of harassment experienced by GLBTI people in major cities is verbal abuse and personal insults, whilst threats of physical violence or attack are more common in outer urban and remote Australia.³⁹ A significant proportion of harassment against lesbians occurs in private spaces, although they are still at risk of being attacked by gangs of young men. The harassment is often ongoing and is more likely to be perpetrated by an older man who is acquainted with the woman and who acts alone.⁴⁰

Local data suggests that levels of harassment have not improved over the last decade, and that experiences of verbal abuse appear to be higher now than were reported in 2000.⁴¹

³⁴ *National Transgender Needs Assessment and Conduct*. 2004. School of Sociology, University of New South Wales. P 29.

³⁵ See n. 10. P. 5-7.

³⁶ Hickson, F., Weatherburn, P., Ried, D., Stephens, M. *Out and About: Findings From the United Kingdom Gay Men's Sex Survey*. Sigma Research 2002. London. www.sigmaresearch.org.uk/downloads/report03f.pdf.

³⁷ See n. 30. P. 35.

³⁸ Cox, G. *The Count and Counter Report: A Study into Hate Related Violence Against Lesbians and Gay men*. 1994 Lesbian and Gay Anti-Violence Project, Sydney.

³⁹ Pitts, M., Smith, A., Mitchell, A., Patel, S. *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians*. Australian Research Centre in Sex, Health and Society. 2006 La Trobe University. P. 51.

⁴⁰ Mason, G. *The Spectacle of Violence: Homophobia, Gender and Knowledge*. 2002. London, Routledge.

⁴¹ See n. 28.

2.4 The social and economic costs of homophobic harassment

2.4.1 GLBTI health and wellbeing

Community and population level studies have consistently shown a connection between higher levels of self-reported discrimination and poorer health outcomes.⁴² The Victorian Health Promotion Foundation's mental health action plan identifies discrimination as a major risk factor for mental illness.⁴³

A number of recent research studies have documented the effects of homophobic harassment on the health and wellbeing of GLBTI Victorians. These effects include increased rates of smoking, substance abuse, depression, anxiety and suicidal ideation.⁴⁴ Research from the UK suggests that patterns of ill-health and psychological morbidity specific to GLBTI people have less to do with their sexual identity than confusion about how to express it openly for fear of harassment.⁴⁵

According to a UK study:

- 55 per cent of gay men and lesbians had contemplated self-harm as a direct result of bullying
- 40 per cent had attempted self-harm or suicide on at least one occasion
- 30 per cent had done so more than once.⁴⁶

According to a US study:

- 64 per cent of non-operative transgender people had contemplated suicide on at least one occasion in their lives
- 37 per cent had made at least one attempt.⁴⁷

A national survey of the health and wellbeing of same-sex-attracted young people (SSAYP) found that three quarters of respondents had experienced homophobic bullying at school which resulted in 60 per cent of them harming themselves.⁴⁸ The

⁴² Krieger, N. *Discrimination and Health*. 2000. In: Berkman, L., Kawachi, I., Eds. *Social Epidemiology*. Oxford: Oxford University Press.

⁴³ Victorian Health Promotion Foundation (2005) *A Plan for Action 2005-2007: Promoting Mental Health and Wellbeing*. Carlton.

⁴⁴ See n. 39.

⁴⁵ King, M., McKeown, E., Warner, J., Ramsay, A., Johnson, K., Cort, C., Davidson, O., Wright, L. *Mental Health and Quality Of Life of Gay Men, Lesbians and Bisexuals in England and Wales – Controlled Cross-sectional Study*. *British Journal of Psychiatry*. 2003 Vol 183. P557.

⁴⁶ Rivers, I. *The Bullying of Sexual Minorities At School: Its Nature and Long Term Correlates*. *Educational and Child Psychology*. 2001 Vol 18. P39.

⁴⁷ Studies by Singer et al 1997, Xavier 2000, Kenagy & Bostwick 2001, Nemoto et al 2001, Clements-Nolle et al 2001, Risser & Shelton 2002. Cited from www.nctequality.org (accessed on 16/05/06)

⁴⁸ Hillier, L., Turner, A., Mitchell, A. *Writing Themselves In Again*. ARCSHS. La Trobe University 2005

trauma of bullying is strongly associated with depression, low self-esteem, poor self-concept, loneliness and anxiety.⁴⁹ The survey demonstrated that SSAYP who had experienced physical and verbal abuse fared worse on almost every health and wellbeing indicator than SSAYP who had not.

According to several Australian studies:

- SSAYP are three times more likely to attempt suicide than heterosexual youth⁵⁰
- rural SSAYP are six times more likely to attempt suicide than the population as a whole⁵¹
- 30 per cent of all homeless young people identify as gay or lesbian⁵².

GLBTI people are underrepresented as users of health services, presenting later for treatment of common illnesses.⁵³ This is as a result of homophobia experienced whilst accessing health services: 67 per cent of doctors surveyed knew of instances where GLBTI patients had either been refused care or received substandard care as a result of their sexual orientation or gender identity.⁵⁴

2.4.2 Broader social effects

The social costs of homophobic harassment are widespread. They include the reduced participation and visibility of GLBTI people in the social, political and cultural life of the State.⁵⁵ As delegates to the Montreal conference noted, many GLBTI people remain closeted in their public lives for fear of recrimination and abuse.⁵⁶ This not only decreases their professional effectiveness but also contributes to the invisibility of alternative sexual orientations and gender identities and the positive difference they make to society as a whole.⁵⁷

Inconsistencies in the law's treatment of homophobic harassment have reinforced the perception that this harassment is less serious than similar offences against members of other minority groups. The Victorian Law Reform Commission's discussion paper

⁴⁹ Hawker, D., Boulton, M. *Twenty Years of Research on Peer Victimization and Maladjustment: A Meta-analytic Review of Cross-Sectional Studies*. Journal of Child Psychology & Psychiatry. 2000. Vol 41. P. 441.

⁵⁰ Howard, J. et al, *Same Sex Attracted Youth in Mental Health Promotion and Young People: Concepts and Practice*. 2002. Eds Rowling, L, Martin, G., Walker, L. McGraw Hill, Australia.

⁵¹ Quinn, K. *Rural Youth and Same Sex Attracted Youth: Issues, Interventions and Implications for Rural Counsellors*. Rural and Remote Health. 2003 Vol 3.

⁵² *As long as I have my doona: A report on lesbian and gay youth homelessness* (1995). 2010 Gay and Lesbian Youth Service and the Australian Centre for Lesbian and Gay Research.

⁵³ Thomacos, N. *Enhancing and Promoting the Health and Wellbeing of all Gay Men and Lesbians in Victoria*. Lecture: University of Melbourne, Sept 2006.

⁵⁴ Thomacos, N. ARCSHS, LaTrobe University. Interview conducted 14th September 2006.

⁵⁵ Banks, C. (2003) *The Cost of Homophobia: Literature Review on the Human Impact of Homophobia in Canada*. Rochon Associated Human Resource Management Consulting Inc. for Gay and Lesbian Health Services. Saskatoon. Canada, pp.16-17.

⁵⁶ See n. 1. p.7.

⁵⁷ See n. 55.

Defences to Homicide documented how the defence of ‘homosexual panic’ has been used to gain reduced sentences for men who commit acts of violence, and in some instances murder, in response to non-violent, allegedly unwanted homosexual advances.⁵⁸ Furthermore, limited exemptions from equal opportunity legislation which allow media personalities, politicians and religious leaders to make derogatory and insulting remarks about GLBTI people without fear of prosecution only serve to reinforce intolerance and may have the effect of endorsing discriminatory behaviour.⁵⁹

2.4.3 Economic costs

Recent Canadian research indicated that GLBTI people were almost twice as likely as heterosexuals to have unmet health needs, translating into a loss of \$8 billion a year due to premature deaths.⁶⁰ Pitts et al have argued that given the demographic similarities between Australia and Canada the economic impacts are likely to be similar in Australia.⁶¹ Included in these economic costs are the reduced workforce participation and performance of GLBTI people due to homophobia in the workplace and at large.⁶²

Homophobia also results in GLBTI people being over represented in a range of community services. This has an economic cost both for GLBTI people and for the community. For example, 30 per cent of all homeless young people identify as gay or lesbian; and homelessness is associated with many personal, social and economic problems and costs. As a consequence, homeless people use (by cost) an average 33 per cent more health care, criminal justice and social service services than do housed people, with criminal justice the largest of these costs.⁶³

Richard Florida’s⁶⁴ influential text *The Rise of the Creative Class*⁶⁵ argues that there are also systemic, long-term economic effects of homophobia. Florida’s research suggests that in the new global economy, markets depend on flexibility and attracting

⁵⁸ Victorian Law Reform Commission (2003) *Defences to Homicide: Options Paper*. Melbourne, Victoria. See also Tomsen, S. (2002) ‘Hatred, murder and male honour: Anti-homosexual homicides in New South Wales, 1980-2000’. *Research and Public Policy Series* 43. Australian Institute of Criminology, Canberra. It should be noted that this defence has been abolished in Victoria by default as part of the removal of the defence of provocation.

⁵⁹ See n. 16.

⁶⁰ *Social Justice Framework for GLBTT-SQ Wellness* (2005) Canadian Rainbow Health Coalition. Saskatoon, Canada.

⁶¹ See n. 39.

⁶² See n.55. In particular see page 24, which refers to the Calculation of Human Costs Estimates, where he talks of increased unemployment due to drug and alcohol issues for GLBTI people. On Page 36 he notes that thirteen per cent of the national American sample had lost their jobs because of anti-gay discrimination.

⁶³ Eberle, M., Kraus, D., Serge, L., Hulchanski, D. *The Relationship Between Homelessness and the Health, Social services and Criminal Justice Systems: A Review of Literature*. Homelessness Cause and Effects. Vol 1. Ministry of Community, Aboriginal and Women's Services. Vancouver and British Columbia. 2001.

⁶⁴ Professor of Social Policy at George Mason University, USA.

⁶⁵ Florida, R. (2002) *The Rise of the Creative Class: Why Cities Without Gays and Rock Bands are Losing the Economic Development Race*. Washington Monthly. 2002.

what he terms “the creative class”.⁶⁶ They constitute a class who are young, imaginative and flexible in their work practices and are attracted to organisations that offer both an open work environment and a diversity of lifestyle options. In an effort to attract members of the creative class, companies are locating to regions with a high degree of social and cultural diversity. Florida found a direct correlation between a region’s degree of diversity and its concentration of gay people. He proposes using what he terms the “gay index” as a measure of a region’s social and cultural diversity. Clearly, according to Florida’s analysis a homophobic culture is one that encourages neither diversity nor the economic growth that comes with attracting members of the creative class.

Recommendation 1:

That the Victorian Government adopt an anti-homophobia policy which:

- *recognises and celebrates diversity of sexual orientation and gender identity*
- *acknowledges the level of homophobic harassment in Victoria*
- *takes a zero-tolerance approach to homophobia.*

2.5 Current legislative and policy context

*Two of our greatest strengths are the commitment of Victorians to giving everyone a fair go, and our rich cultural and social diversity.*⁶⁷

The Victorian Government has recently reaffirmed its commitment to valuing and encouraging diversity with the development of its human rights and social policy agenda. The *Human Rights Charter* (due to take effect on 1 January 2007) will better protect individual human rights and strengthen Victoria’s democratic processes.

A Fairer Victoria is the government’s social policy blueprint for the next ten years. It aims to promote diversity while tackling the disadvantage and discrimination that underpins entrenched population and place-based inequality.⁶⁸

The development of a human rights culture in Victoria provides government with new opportunities and obligations for ensuring that all Victorians can live their lives free from discrimination. *The Charter* holds government accountable for ensuring minimum standards of protection against discrimination. In particular, Section 38 of *The Charter* places a positive obligation on public authorities to ensure that their

⁶⁶ Ibid.

⁶⁷ *A Vision for Victoria to 2010 and Beyond: Growing Victoria Together* (2005) Department of Premier and Cabinet: Murrumbidgee, Victoria, p.18

⁶⁸ *A Fairer Victoria: Creating Opportunity and Addressing Disadvantage* (2005) Department of Premier and Cabinet: Melbourne, Victoria.

policies and procedures are consistent with human rights.⁶⁹ As a result, efforts to protect the rights, safety and dignity of GLBTI people (or those of any other group) can no longer be mislabelled as a demand for special treatment but must be seen as part of government's responsibility to ensure the basic rights of all Victorians.⁷⁰

The Attorney-General's *New Directions for the Victorian Justice System 2004-2014* includes in its 10-year plan the modernising of the state's anti-discrimination laws. The plan is consistent with the Government's social justice and human rights agenda and argues that legislative reforms must be accompanied by public education and awareness campaigns as part of a whole-of-government strategy aimed at reducing systemic discrimination.

2.6 Where to from here

*Whilst it is clear that legislation cannot on its own effect social change it can operate at both instrumental and symbolic levels in changing actual practices and social understandings.*⁷¹

Given the deeply entrenched nature of homophobia and the complex investments that individuals and groups have in dominant understandings of sexual orientation, gender identity and relationships, the Victorian Government's reform agenda over the last seven years has been courageous. However, more needs to be done to address Victoria's high levels of homophobic harassment, including addressing incidents of harassment not covered by current legislation. Furthermore, there is a need to review current exemptions from equal opportunity legislation that tacitly condone homophobic harassment by enabling the promotion of homophobic stereotypes and beliefs.

This paper proposes the following strategy as the most effective way of reducing homophobic harassment:

- including provisions against homophobic harassment in equal opportunity legislation
- supporting such provisions with public education and awareness campaigns.

This paper also recommends a definition of homophobic harassment which aims to capture the range of abusive behaviours directed against GLBTI Victorians. It does

⁶⁹ Section 38 of the *Charter of Human Rights and Responsibilities 2006 (Vic)* states: "Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or in making a decision, to fail to give proper consideration to a relevant human right." The UK provides an example of how the implementation of a charter of human rights impacts on the day to day work of Government. See attachment 2.

⁷⁰ For example: S. 8. *Charter of Human Rights and Responsibilities 2006 (Vic)*: Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination; S 10: A person must not be treated or punished in a cruel, inhuman or degrading way; S. 13: A person has the right not to have his or her reputation unlawfully attacked.

⁷¹ Lustgarten, L. *Equality and the Limits of the Law*. Modern Law Review. 1986. Vol 49. P 73.

not expressly include acts of violence against GLBTI people: existing criminal law provisions deal with violence. The proposed definition of homophobic harassment is:

Conduct that offends, humiliates, intimidates, insults or ridicules another person which is directed at an individual or group on the basis of their actual or perceived sexual orientation or gender identity.

The paper also argues that legislation must be part of and supported by public education and awareness campaigns. These should be more than one-off initiatives notifying Victorians of changes to legislation and of their new obligations and penalties. These should include broad, government-led campaigns that send a strong and unequivocal message to the whole community that harassment of GLBTI Victorians is unjust, at odds with the *Human Rights Charter* and against the law. As many of those providing us with information argued, which social marketing and health promotion research confirms, legislative reform alone is not sufficient to generate and maintain behaviour change. Rather, public education is needed if we are to achieve the broader cultural shifts on which changes in individual and community attitudes and behaviours depend.

Recommendation 2:

That the Victorian Government's anti-homophobia policy include the development of a coordinated legislative reform and community awareness agenda consistent with the Victorian Charter of Human Rights and Responsibilities and the government's social policy objectives.

Recommendation 3:

That the government create an administrative and advisory structure responsible for:

- *developing and promoting its anti-homophobia policy*
- *overseeing the development of the legislative reform and community awareness agenda and monitoring its implementation.*

3. Education and awareness campaigns to address homophobic harassment

3.1 Overseas and Australian anti-homophobia campaigns

Few jurisdictions, national or international, have developed a comprehensive, long-term strategy for reducing the causes and effects of homophobic harassment. In Australia, Tasmania has made the greatest progress in developing a long-term approach to homophobic harassment through the development of a coordinated, whole of government approach that has been benchmarked against attainable goals.⁷² (See attachment 3)

In the UK, the Terrence Higgins Trust has conducted several anti-homophobia education and awareness campaigns.⁷³ The trust has funded its anti-homophobia initiatives from its HIV/AIDS prevention budget,⁷⁴ and such ongoing funding has allowed it to develop a range of community interventions as part of a coordinated approach to tackling homophobia. However, the trust is a philanthropic organisation and its public education campaigns have not been tied to UK (or European Union) legislative reforms.

In Australia only a limited number of anti-homophobia initiatives have been undertaken. These have been run by GLBTI community organisations with varying degrees of government financial support. Major campaigns have been run in NSW and Victoria by their respective anti-violence projects (AVP NSW and AVP VIC). Both were established as independent bodies, AVP NSW in 1990 and AVP VIC in 2000.⁷⁵ AVP NSW became part of the AIDS Council of NSW in 2001 and receives limited funds through the South Sydney Area Health Service.⁷⁶ In contrast, AVP Vic receives no ongoing government funding and this has limited its ability to develop a coordinated, long-term strategy and to engage GLBTI community organisations and representatives.

Both AVP NSW and AVP VIC have modelled their anti-homophobia initiatives on the work of the Terrence Higgins Trust. They have used a two-tiered approach comprising broad-based public education and awareness campaigns (aimed at changing community attitudes) and campaigns that target GLBTI communities (aimed at increasing their capacity to deal with the threat and effects of homophobic harassment).

⁷² However, we note that while Tasmania has taken a whole-of-government approach to reducing homophobic motivated abuse and violence, it has stopped short of implementing social marketing initiatives.

⁷³ www.tht.org.uk/informationresources

⁷⁴ Personal communication from David Hiles, Project Manager Terrence Higgins Trust, September 2006

⁷⁵ AVP Vic's mission is to "Prevent and eliminate violence and hate speech against GLBTI communities".

⁷⁶ The NSW government also provides additional funds for GLBTI community anti-homophobia initiatives through the GLBT Strategic Responses to Violence Grants Program managed by the Attorney General's Crime Prevention Division.

Recommendation 4:

That the government ensure that relevant GLBTI community organisations are adequately funded to fulfil their missions and play key advocacy and leadership roles in the development and implementation of anti-homophobia initiatives.

3.2 Social marketing principles and approaches

Both AVP NSW and AVP VIC have used social marketing principles and approaches in the design and implementation of their anti-homophobia campaigns. Social marketing principles and approaches have informed most of Australia's successful health promotion and behaviour change initiatives including the TAC's road safety campaigns, QUIT's antismoking initiatives and HIV/AIDS prevention.

'Social marketing' refers to a range of techniques that are used to influence the behaviours of a specific target audience. These include all forms of marketing and public relations activities from workshops and limited distribution of printed materials to mass-marketing campaigns. The strength of social marketing techniques is their consumer focus, tailoring individual campaigns to the needs, values and practices of the target audience.⁷⁷ The use of targeted interventions recognises that strategies that affect behaviour change in one social group may be ineffective or even counter-productive in affecting similar change in another.

Social marketing relies on up-to-date demographics and market segmentation to identify potential target audiences. It also relies on engaging members of the target group at all levels of campaign design, delivery and evaluation. Focus group testing is the major technique used in social marketing to clarify the attitudes, concerns and reactions of the target population as well as to gauge the effectiveness of proposed and completed initiatives.⁷⁸

3.3 Case studies: broad-based public education and awareness campaigns

3.3.1 *It's Homophobia that's Queer* (Terrence Higgins Trust)

In 2000 the Terrence Higgins Trust ran a campaign titled *It's Homophobia that's Queer*. The campaign challenged individual and institutionalised homophobic behaviours and was in response to research showing that homophobic harassment was the major cause of low self-worth amongst gay men and lesbians.

⁷⁷ Nutbeam, D. & Harris, E. *Theory in a Nutshell: A Practitioner's Guide to Commonly used Theories and Models in Health Promotion*. 1998. National Centre of Public Health and Community Medicine, University of Sydney. NSW.

⁷⁸ *Making A Difference: The Impact of the Health Promotion Directorate's Social Marketing Campaigns: 1987 – 1991*. Communications, Marketing and Consultations Branch, Health Canada. www.hc-sc.gc.ca/socialmarketing

“My son is homophobic, but I hope it’s just a phase.”



Homophobia is prejudice or discrimination against lesbians or gay men.

Most of us react with horror at the extreme cases like the bombing of a gay pub in London, but homophobia is around us every day: jokes, discrimination, insults, even refusing to accept that gay people exist.

But they do exist, and it's rarely a phase.

Most families have a gay story to tell. What about yours? If not, then imagine one of your own children turns out to be gay. Think, for a moment, how you would react? Would you still laugh at those anti-gay jokes if they were directed at your son or daughter?

Reject a gay son or daughter and you can end up losing them forever. Fortunately many

families are strong enough to face up to issues like this and remain firmly intact. It can often make them stronger.

Remember gay or straight, young people need your love and support. They also need your guidance. Through your everyday behaviour, show them that homophobia - like other forms of prejudice - is fundamentally wrong.

It's prejudice that's queer



The campaign developed three posters, each depicting a different social setting, which cleverly reworked common homophobic statements to make homophobia and not homosexuality the problem. The campaign targeted the general community and aimed to encourage discussion about homophobia. Research had identified that women were less likely to be homophobic than men, and that young men in particular take note of their girlfriends' opinions about homophobia. The posters were widely distributed in women's and youth magazines, the tabloids, the London underground,

pre-movie advertising at cinemas and the teaching press. The campaign ran for 6 months and also produced beer coasters and matchbooks.

Focus groups responded positively to the posters, seeing them as realistic and educative. The test audience demonstrated a high degree of empathy for the message and found the humour engaging.

3.3.2 *Degrassi Junior High* (Health Canada)

In 1992, Health Canada worked with the producers and scriptwriters of the hit TV show *Degrassi Junior High* (Canada's most popular show for young people) to raise awareness of a range of public health and social justice issues. Together, they produced a series of six, thirty-minute episodes which addressed the topics of sex, alcohol and drug abuse, depression and sexuality.⁷⁹

The *Degrassi Junior High* fan website provided further information synchronised with the televised episodes. In its first 8 months of operation, over 54,000 fans registered on line as 'virtual students.'⁸⁰ These students could visit the guidance office and get online advice and support from a counsellor around a range of topics (such as gossip or gay parents).⁸¹ This approach used social marketing techniques that had identified young people's desire for approval from significant others and from role models.⁸² It also used quantitative data that found that young people rely on television and the internet for information.⁸³

3.3.3 Homer's phobia (*The Simpsons*)

In 1990, the popular animated television series *The Simpsons* (and has since presented a range of GLBTI characters) introduced its first gay character when the Simpsons joined in Springfield's annual gay pride march.

In 1997 an episode titled "Homer's Phobia" became the most controversial episode of the series, as it dealt directly with homophobia. In this episode, Homer refuses to see a family friend after he finds out his friend is gay. Directly confronting homophobic attitudes the show concludes with Homer accepting his gay friend and telling his son Bart that any way he lives his life is "okay" by him. On first airing, FOX network was flooded with angry letters, however the network stood behind the show and the episode was aired on every station as scheduled. The episode was praised by several gay communities of America, and received public recognition winning an Emmy award in the same year for outstanding animation program.⁸⁴

⁷⁹ Ibid.

⁸⁰ 92 per cent of teens watch television daily spending more time watching television than any other activity, and that 71 per cent use the internet to access information. Willms, J.D., Corbett, A.B. *Tech and Teens: Access and Use*. Canadian Social Trends. 2003 (Summer) P 15 – 20.

⁸¹ The Health Communication Unit: www.thcu.ca June 2005.

⁸² See n. 77.

⁸³ 92 per cent of teens in Canada watch TV daily, spending more time watching television than any other activity, and that 71 per cent use the internet to access information: Willms, J.D., Corbett, A.B. *Tech and Teens: Access and Use*. Canadian Social Trends. 2003. (Summer). P 15-20.

⁸⁴ Episode No 168, Season No 8. First aired Feb 1997.

It is not uncommon in Australia for media to defy anti-homophobia laws,⁸⁵ reinforcing hostile stereotypical beliefs about the lives GLBTI people live.⁸⁶ Displaying positive images of GLBTI people (and attitudes toward them) in popular TV shows like *The Simpsons* is a powerful way of challenging heterosexism in the media. It not only sends a positive message to the community at large but also to GLBTI people. *The Simpsons* social satire is also indicative of the private sector's desire to be seen as a responsible corporate citizen.⁸⁷

3.4: Case studies: Targeted homophobia campaigns

3.4.1 Homophobia: What are you scared of? (NSW Anti-Violence Project)

In 1998, AVP NSW ran a school-based campaign titled *Homophobia: What are you scared of?* The campaign was developed in partnership with the NSW Education Department and aimed to challenge homophobia in schools. The campaign strategy was to mobilise classroom support for GLBTI students in order to pressure potential perpetrators of homophobic harassment to change their behaviour. The campaign involved prominent figures including members of Indigenous and ethnic communities and representatives from the arts and sports, speaking out against homophobic harassment. Posters, stickers, postcards, a comic and a fact sheet were produced and the Director General of the Department of Education sent a memo to school principals. Campaign information and products appeared in education journals, youth publications and were distributed in some 15 community languages.

A campaign evaluation found it had facilitated discussion among young people and youth workers about homophobia and its effects. There was 80 per cent recall of those surveyed, the poster featuring the Sydney Swans being the most memorable.

⁸⁵ Cowan, K. & Valentine, G. *Tuned Out: The BBC's Portrayal of Lesbian and Gay People*. 2006. Stonewall, UK

⁸⁶ In a research study conducted in the UK in 2005, gay lives were represented positively for just six minutes during 168 hours of prime time programming, representing 0.06% of programming. Where they were included in storylines, the characters were perceived as one dimensional, with their sexuality completely defining their identity or role. GLBTI people are 5 times more likely to be described or portrayed in negative terms, with lesbians barely in existence. There was an overwhelming reluctance to show to present lesbians or gay men in everyday scenarios, such as stable relationships or family life. The study also found that GLBTI people were often used as the subject of jokes, with over half of all gay references designed for comic effect. Most of these revolved around stereotypes of sexually predatory or camp and effeminate gay men. Homophobia and heterosexist preconceptions were not challenged in TV programming; it was far more usual to see implied gay sexuality used as an insult or as a way of undermining someone: Cowan, K. & Valentine, G. *Tuned Out: The BBC's Portrayal of Lesbian and Gay People*. 2006. Stonewall, UK.

⁸⁷ See also the role of the AFL in developing acceptable standards of behaviour by players and officials on and off the field that respond to racist and sexist behaviours. Initially developed out of a duty of care concern, it has had a wider impact due to the development of the education strategy *Play by the Rules*. A partnership between the Australian Sports Commission, all State/Territory sport and recreation Departments and Anti Discrimination Agencies, it provides information and on-line learning about how to prevent discrimination and harassment for the sport and recreation industry. In some states funding agreements are linked to an active participation in the program.

HOMOPHOBIA

IT DOESN'T SCORE POINTS WITH US.



Some people think it's OK to hassle someone just because they're gay or lesbian. We think it's gutless. If you've got a problem with gays and lesbians, it's time you got over it.

If you want more information about how you can make a child against homophobic violence, contact the Discrimination Complaint Office at your local High School, or your local Youth Centre, your local Health Centre, the Police and/or Lesbian/Lesbian Office or Police Youth Liaison Officer at your local police station. 1800 Australia Discrimination or Homophobia 24/7.

This advertisement developed by the Lesbian and Gay, Anti-Homosex Prejudice Unit funded by the Chief Executive, Division of the NSW Attorney-General's Department.

This campaign is supported by NSW Department of Health, NSW Department for Women, NSW Department of Education and Training, NSW Police Service, NSW Youth Affairs Council, NSW Teacher's Professional, Federation of Parents and Citizens Associations of NSW, Public Service Association of NSW, Youth Action Party Association, Youth Action Australia Association, LGBT Community Support Association, Anti-Discrimination Board of NSW, Family Planning NSW, the Human Rights and Equal Opportunity Commission and Amnesty International Australia - World Women.

Photography: Andrew Reed, Design: Designation, Special Thanks to Michael O'Laughlin, Tony Cook and Matthew Neale from the Sydney Storm

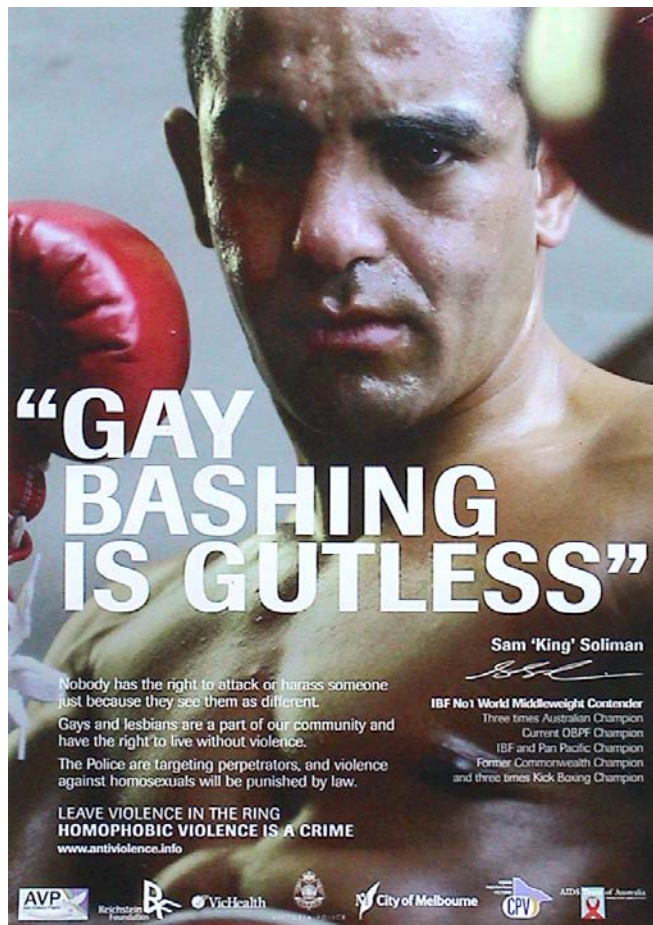


WHAT ARE YOU SCARED OF?

3.4.2 *Gay Bashing is Gutless* (VIC Anti-Violence Project)

In 2004, the AVP VIC ran its *Gay Bashing is Gutless* campaign. The campaign produced a poster targeting young men aged 19-25 years who were part of the bodybuilding culture, research having showed that members of this group were the most likely to commit acts of physical homophobic violence. The campaign was funded by the Lance Reichstein Foundation, Crime Prevention Victoria, VicHealth and the AIDS Trust of Australia. The poster featured the face and hands of a prominent Australian boxer with accompanying text in which he called homophobic violence cowardly. The poster was focus tested on men aged 24-36 years who were likely to have experienced a homophobic environment in the past.

Due to a lack of ongoing funding, the project was not formally evaluated.



3.5 Case studies: Campaigns targeting GLBTI people

3.5.1 *Violence can happen on any street* (NSW AVP)

In 2002, AVP NSW ran its *Violence can happen on any street* campaign.⁸⁸ The campaign consisted of fact sheets for GLBTI people with information about how to avoid homophobic violence, what to do during an attack, where to seek help after a homophobic incident, and how and where to report an incident. Materials were

⁸⁸ <http://avp.acon.org.au/aboutus.htm>

produced in conjunction with the South Sydney City Council anti-violence project and distributed through the Aids Council of NSW, the NSW police force and at the Sydney Gay and Lesbian Mardi Gras.

3.5.2 *Make some noise* (AVP VIC)

As part of its *Make some noise* campaign, AVP VIC produced an online reporting template to enable and encourage victims and witnesses of homophobic violence to report it to police. The template was publicised through GLBTI media and community groups. The template was produced in consultation with Victoria Police with the data recorded being made available to police through the Gay and Lesbian Liaison Unit. Again, due to the lack of ongoing funding, the resource was not evaluated.

3.6 An effective education and awareness strategy

A comprehensive education and awareness strategy to combat homophobic harassment relies on a combination of the two approaches outlined above.

One element of the strategy should include broad-based public education and awareness campaigns that seek to reduce homophobia by changing community attitudes and initiatives that target the most likely perpetrators of homophobic harassment. These are consistent with the Government's social justice and human rights agenda that aim to combat prejudice and discrimination of all kinds.

The second element of the strategy aims to increase the capacity of GLBTI people to respond to homophobic harassment and encourage reporting of homophobic incidents. In addition, increased reporting of harassment provides police and other government agencies with much-needed incidence and perpetrator data which they can use to design and implement more effective anti-homophobia initiatives. Furthermore, an improved environment for reporting also helps build supportive relationships between GLBTI people and the police and other government authorities.⁸⁹

The case studies show that no single approach is sufficient to reduce homophobic harassment and its effects. While valuable and useful initiatives, they also show the limitations of campaigns conducted in isolation and aimed at only one target audience, where effects are local, limited, and not cumulative.

What is needed is a coordinated long-term strategy which includes a variety of approaches that target different sections of the community. This is consistent with best practice social marketing techniques and practices.⁹⁰

Furthermore success depends on strategic partnerships among a diverse range of stakeholders. In the case of anti-homophobia initiatives key stakeholders include

⁸⁹ In 2000 Victoria Police employed a State Coordinator for its Gay and Lesbian Liaison Unit. The unit is currently drafting a handbook to help police in gay and lesbian liaison roles to work sensitively with GLBTI people and specifically with the victims of homophobic crime.

⁹⁰ Marcus, A. & Craine, L. *A Review of Cervical Cancer Screening Interventions Research: Implications For Public Health Programs and Future Research*. Preventative Medicine. 1998

(among others) governments, government departments, GLBTI organisations, Victoria Police, the Victorian Equal Opportunity and Human Rights Commission, the media and private corporations. The Joint Working Group believes that the Government is best placed to take a leadership role in overseeing the development and implementation of such a strategy.

Recommendation 5:

As part of its legislative reform and community awareness agenda, the government fund and develop a community education and awareness strategy consisting of two strands:

- *broad-based and targeted public initiatives that seek to minimise homophobic harassment*
- *initiatives that target GLBTI communities that seek to increase their capacity to deal with the threat and effects of homophobic harassment.*

Recommendation 6:

That Victoria Police's Gay and Lesbian Liaison Officers' manual be updated to include information about the government's anti-homophobia policy.

Recommendation 7:

That the government – in conjunction with relevant external agencies – improve data collection on the incidence and types of homophobic harassment. This may include:

- *engaging with Victoria Police to ensure their data collection system has the capacity to collect accurate and comprehensive data*
- *engaging with GLBTI community organisations to gather incidence data on harassment against GLBTI people.*

Recommendation 8:

That the Department of Justice give specific consideration to GLBTI issues in developing guidelines for government employees to fulfil their obligations under the Charter of Human Rights and Responsibilities.

Recommendation 9:

That the Equal Opportunity Commission give specific consideration to GLBTI issues when providing assistance to government departments to comply with Section 38 of the Charter of Human Rights and Responsibilities.

4. Legal reform

4.1 Introduction

Anti-discrimination laws were introduced in Victoria almost thirty years ago to provide protection against discrimination on the grounds of sex and marital status.⁹¹ Since then, community attitudes and social structures have changed significantly and the *Equal Opportunity Act* has been amended (and expanded) on several occasions.

The inclusion of sexual orientation and gender identity as prohibited attributes was a long overdue inclusion in the *Equal Opportunity Act*. Nonetheless as Section 2 of this paper shows, GLBTI people continue to experience unacceptable levels of homophobic harassment. Legal sanctions may be available in some circumstances (for example, the criminal law would apply in relation to assault). However, it remains the case that in many situations legal mechanisms do not effectively support GLBTI people to live their lives free from homophobic harassment.

Attempts to regulate harassment of GLBTI people have been initiated in other jurisdictions in Australia and beyond. If Victoria is to continue to keep pace with developments in other jurisdictions then further legal reform is necessary. This chapter considers the most appropriate legislative approach to respond to homophobic harassment within the Victorian context. As in other Australian jurisdictions, the Joint Working Group considers that existing legislation should provide the foundation for dealing with such conduct. Historically, amendments to existing legislation have been better received by the community than the introduction of new legislation.⁹² While this chapter does not examine in detail stand alone legislative responses, Attachment 4 provides some example of such approaches taken overseas.

This chapter focuses on forms of civil redress for GLBTI people who experience homophobic harassment. Serious instances of abuse and violence may warrant criminal sanctions AND the general criminal law would apply in those cases. Specific consideration of the criminal law is outside the scope of this paper.

4.2 Why change the law?

Legislation can operate both instrumentally and symbolically to change practices and social understandings.⁹³ When New South Wales amended its anti-discrimination legislation to protect GLBTI people from ‘vilification’ in 1993, the emphasis was as much on the symbolic nature of the legislation in recognising the human rights of GLBTI people as on creating an instrument to deal with the conduct. The amendment was a statement of values, a formal condemnation of homophobia and a powerful

⁹¹ An express reference to sexual harassment was not included until the 1984 Act. In the same year and consistent with the view expressed in this paper about the general notion of harassment, the Supreme Court held that sexual harassment was in fact already comprehended within the definition of sex discrimination: *R v Equal Opportunity Board Anor; ex parte Burns & Anor* (1984) EOC 92-112 [1985] VR 317.

⁹² Report 92 – Review of the Anti-Discrimination Act 1997 (NSW). Law Reform Commission. 1999.

⁹³ See n. 71. P 73.

expression by the people of New South Wales, through their government, that ‘vilification that lies behind violence is intolerable in a civilised community’.⁹⁴

Legislation also supports other strategies aimed at reducing the harassment of GLBTI people, and reducing homophobia more generally. It sets public standards that tell people what social practices are now acceptable (and not acceptable).⁹⁵ For example, in the 30 years since sexual harassment became unlawful, attitudes towards it have changed dramatically.⁹⁶ Legislative amendments that reflect society’s evolving values provide a platform for educating the public and particular sections of it (such as the media).⁹⁷

The *Charter of Human Rights and Responsibilities* provides a framework for supporting legislative reform that addresses harassment of GLBTI Victorians. As argued in chapter 2, *The Charter* places a positive requirement on authorities to prohibit conduct which promotes prejudice or unfair treatment undermining fundamental human rights.⁹⁸ Clearly the enhancement of other laws to protect vulnerable members of the community from harassment—including GLBTI Victorians—is consistent with the terms and spirit of *The Charter*.

4.3 Current legal position

Victorian law contains a number of mechanisms designed to respond to discrimination and reflect the ideals of equality and inclusion. Most notably, the *Equal Opportunity Act 1995* has played a major role in reflecting (and changing) community aspirations and attitudes over almost 30 years. More recently, the state’s *Racial and Religious Tolerance Act 2001* has addressed the incitement to hatred based on race or religious belief.

4.3.1 *Equal Opportunity Act 1995*

The *Equal Opportunity Act 1995* (EOA) was enacted to promote equality of opportunity by providing protection from unlawful discrimination, sexual harassment and victimisation.⁹⁹ To do this, it prohibits direct and indirect discrimination¹⁰⁰ on the basis of various attributes, where such discrimination occurs in identified areas of public life.

⁹⁴ Marr, D. *How Can We Square Freedom With Anti-Vilification Laws?* Australian Centre for Lesbian and Gay Research Annual Public Lecture. University of Sydney. 1998.

⁹⁵ Gaze, B. *Context and Interpretation In Anti-Discrimination Law*. Melbourne University Law Review. 2002 Vol 18. P. 27.

⁹⁶ Ibid.

⁹⁷ Hennessey, N. & Smith, P. *Have We Got It Right? NSW Racial Vilification Laws Five Years On*. Australian Journal of Human Rights. 1994. Vol 1.

⁹⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁹⁹ The enactment of the 1995 *Equal opportunity Act* replaced the 1984 *Equal opportunity Act*.

¹⁰⁰ Direct discrimination occurs if a person with a listed attribute is treated less favourably than someone without the attribute in similar circumstances (section 8). Indirect discrimination occurs if a person imposes an unreasonable requirement or condition that someone with an attribute cannot comply with (section 9). Motive is irrelevant in both instances.

Section 6 of the Act lists a range of characteristics or personal attributes on the basis of which discrimination is prohibited. These include race, sex, impairment, political belief, gender identity and sexual orientation.

Part 3 of the Act describes areas of public life which fall within the operation of the EOA. These include employment, education, the provision of goods and services, the provision of accommodation, clubs and club members, sport and local government.

The EOA is an accepted part of the Victorian legal landscape, having been in place in various forms since 1977. The number of claims made each year to the Equal Opportunity Commission is indicative of widespread public acceptance of the ideals of non-discrimination, and of the forum established to respond to allegations of discrimination. The model for resolving such complaints is designed to be as accessible as possible – for example, there is no cost to bring a claim, complaints are resolved quickly and the Commission provides assistance to complainants – and is based on conciliation between the parties in the first instance. A matter may be referred to the Victorian Civil and Administrative Tribunal (VCAT) for hearing only if a complaint cannot be or has not been successfully conciliated.

In such cases, VCAT may make a range of orders if a complaint is found to be proven. These include ordering any amount the tribunal thinks fit to compensate the complainant, or ordering any other thing with a view to redressing any loss, damage or injury to the complainant. VCAT's power in respect of monetary orders is uncapped, providing much greater flexibility to respond to different instances of discrimination in Victoria than exists in some other jurisdictions in Australia.¹⁰¹

We note that recent amendments to the EOA enable representative complaints to be made in certain circumstances¹⁰². We expect that the ability to make representative complaints will be of particular interest to GLBTI people, because it provides an alternative means of having a complaint heard which does not require an individual to bear the burden of the complaint alone. More broadly, the representative complaint provisions acknowledge that unlawful behaviour based on personal attributes is often

¹⁰¹ In comparison in NSW damages are capped at \$40,000. This has limited the effectiveness of damages as a remedy under the NSW anti-vilification provisions, for example in relation to statements in the media. Various media outlets have consistently breached anti-vilification laws by making humiliating and degrading comments that reach audiences across the country. While the Australian Communications and Media Authority (ACMA) is responsible for the regulation of broadcasting, radio communications, telecommunications and online content – and is empowered to deal with inappropriate use of these mediums for harassment purposes – it does not provide for individuals to seek a personal remedy against a broadcaster.

¹⁰² The inclusion of representative complaints came into effect on 11 October 2006. They allow for a representative body with sufficient interest in a complaint to complain to the commission on behalf of a named person if the commission is satisfied that:

- each person named in the complaint has consented to the complaint being made by the body on the person's behalf
- the representative body has a sufficient interest in the complaint
- the alleged contravention arises out of the same conduct.

A representative body has sufficient interest in a complaint if the conduct that constitutes the alleged contravention is a matter of genuine concern to the body. Genuine concern is demonstrated if the conduct adversely affects or has the potential to adversely affect the interests of the body or the interests or welfare of the persons it represents.

aimed at a particular group rather than at an individual, and that discrimination and harassment is not only harmful to the individual but to society as a whole.¹⁰³

While the provisions of the EOA apply to GLBTI people in the areas of public life identified in Part 3 of the Act¹⁰⁴, the confinement of the provisions to those identified areas means that the EOA does not address all instances of homophobic harassment experienced by GLBTI people in their day-to-day lives. Nevertheless, the EOA provides a starting point for considering how best to enhance the responsiveness of Victorian laws to the needs of GLBTI people, so as to provide protection from such harassment.

4.3.2 Racial and Religious Tolerance Act 2001

The only other Victorian statute touching on the broad issue of non-discrimination, harassment or vilification is the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA). The RRTA aims to prevent racial and religious vilification that damages the cohesion and harmony of Victoria's diverse community.¹⁰⁵ It contains provisions that prohibit vilification of people on the grounds of their race or religious beliefs.

The term 'vilification' describes any conduct that 'incites feelings of hatred against, serious contempt for, or revulsion or severe ridicule of another person or class of persons'.¹⁰⁶ The Act's explanatory memorandum states that this could include communications that malign, abuse or seriously denigrate groups of people because of their racial or religious practices and beliefs. It could include intimidation, damage to property, graffiti and expressions of hatred or contempt by messages over the internet.¹⁰⁷

The RRTA has a narrower scope than the EOA in two ways. It focuses, only on actions based on the grounds of a person's race or religion, and it deals with incitement of others to hatred rather than harms to people discriminated against. On the other hand, the RRTA is not confined to identified areas of public life. Any conduct which is found to amount to vilification and which occurs in a public place is regulated by the RRTA.

The joint working group considers that the much narrower focus of the RRTA on race and religion, and its confinement to incitement, limits its suitability as a means of responding to the harassment experienced by GLBTI people. We also note that there have been a range of controversies raised in relation to the provisions of the RRTA, notably flowing from the case of *Islamic Council of Victoria v Catch the Fire Ministries*.¹⁰⁸

¹⁰³ ACT Human Rights Issues Paper: *Racial and Religious Vilification in the ACT*. ACT Human Rights Office, Canberra. 2006.

¹⁰⁴ These areas include employment, education, the provision of goods and services, accommodation, sport, clubs, municipal councils and the transfer of land.

¹⁰⁵ Explanatory Memorandum, *Religious and Racial Tolerance Act*. Assented to 6 June 2001.

¹⁰⁶ S 7 & 8, *Racial and Religious Tolerance Act 2001*

¹⁰⁷ See n. 105.

¹⁰⁸ *Islamic Council of Victoria v Catch the Fire Ministries* [2003] VCAT 1753 (21 October 2003).

Accordingly, while the RRTA may contain some useful lessons in considering how best to tackle legal reforms applicable to homophobic harassment, it does not provide a suitable legislative vehicle or appropriate model for the reforms discussed in this chapter.

4.3.3 Preferred legislation

The EOA reflects the Victorian community's commitment to non-discrimination and equality of all people. The RRTA, while seriously limited as a legislative tool, also reflects a commitment to tolerance and diversity. There can be no doubt that the verbal and physical abuse experienced by minority groups seriously undermines these principles of equality and diversity, and that GLBTI people are confronted with harassment of this nature at unacceptable levels.

The joint working group considers that the EOA is the preferred legislation to enhance protections for GLBTI people, due to:

- its existing operation in relation to the protected attributes of gender identity, sexual orientation and lawful sexual activity;
- its well-established and accessible complaints model; and
- the flexibility it provides to VCAT to order remedies in relation to conduct which is proven to be unlawful.

However, there are a number of issues that will arise in extending the operation of the EOA to address the specific problems of homophobic harassment and these are discussed below.

Recommendation 10:

That the Equal Opportunity Act 1995 be amended to address homophobic harassment against GLBTI people.

4.4 Nature of the reform: general or specific?

The next question that arises is how any amendment to the EOA should operate. Existing provisions dealing with discrimination apply to all listed attributes in the areas of public life identified in Part 3 of the EOA. In contrast, the prohibition of sexual harassment is contained in a separate part of the Act (Part 5).

The joint working group considered whether a general provision responding to homophobic harassment should be included in the Act. Such a provision could apply in relation to all of the personal attributes identified in Section 6. However, we were aware that the group's terms of reference related only to the experience of GLBTI people. The extensive research we identified about the experiences of GLBTI people provides a strong foundation for our conclusion that legislative reform is required in this area. However, it may well be that other groups identified by attributes listed in Section 6 also experience unacceptable levels of harassment. If so, we would suggest that the recommendations in this chapter could provide a model for other groups to consider when responding to their particular needs.

The joint working group therefore considers that any amendment to the EOA should address the harassment of GLBTI people only. A separate part could be included in the EOA making such harassment unlawful, reflecting a similar approach in Part 5 of the Act that deals with sexual harassment.

Finally, we note that this approach will have an additional benefit, as it allows us to bypass the numerous exceptions which apply generally in relation to the non-discrimination provisions contained in Part 3 of the Act.¹⁰⁹ There is also a substantial list of exceptions which apply to particular areas of public life (see Part 3 of the Act). In contrast, Part 5 of the EOA which prohibits sexual harassment contains a much more limited series of exceptions which are designed having regard to the specific nature of the sexual harassment provisions. In a similar way, creating a new part of the Act specifically to address the situation of GLBTI people who experience homophobic harassment will ensure that these specialised provisions are not inadvertently blunted by inappropriate exceptions and exemptions. Rather, if exceptions are required, they can be suitably tailored to the circumstances and devised in light of the operation of the provisions.

Recommendation 11:

That provisions to address homophobic harassment be included in a separate part of the Equal Opportunity Act 1995.

4.5 Legal reform models

Many jurisdictions (within and beyond Australia) have attempted to deal specifically with harassment and violence directed towards GLBTI people. They have used various models, and each provides valuable lessons for Victoria to consider.

4.5.1 Model 1: Public acts that incite hatred

Public acts that incite hatred against GLBTI people are now prohibited in New South Wales, Queensland, the ACT and Tasmania.¹¹⁰ The provisions are contained within pre-existing anti-discrimination laws rather than in stand-alone legislation. The provisions are still in their infancies: in most cases, less than 15 years old.¹¹¹

Whilst there are differences in the construction of each of these State and Territory laws, they all perform the same function: of prohibiting conduct in public spaces which incites hatred towards, serious contempt for, or severe ridicule of a person or

¹⁰⁹ For example, general exemptions and exceptions apply where a discriminatory act is done with statutory authority; to comply with the order of a court; in certain circumstances relating to pensions and superannuation; in relation to charities; in relation to religious bodies or schools; or private clubs, amongst others. Notably, the non-discrimination provisions do not apply to discrimination by a person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

¹¹⁰ Section 49ZT (1) of the *Anti-Discrimination Act 1977* (NSW); Section 66 of the *Discrimination Act 1991* (ACT); Section 19 of the *Anti-Discrimination Act 1998* (Tas); Section 124(a)(1) of the *Anti-Discrimination Act 1991* (Qld).

¹¹¹ Asquith, N. *In Terrorem: With Their Tanks and Their Bombs, and Their Bombs and Their Guns In Your Head*. *Journal of Sociology*. 2004. Vol 40(4) P. 403.

group of persons on the ground of the sexual orientation or gender identity of the group or members of the group.¹¹²

With the exception of Tasmania, each of these jurisdictions has created a criminal offence of serious vilification.¹¹³ However, it is important to note that no prosecutions have been brought under these provisions in any jurisdiction in Australia.¹¹⁴

Aside from complaints of serious vilification, complaints of ‘vilification’ or ‘inciting hatred’ are investigated by the relevant anti-discrimination commission which attempts to resolve the matter through conciliation. If conciliation is ineffective, the matter is then referred to the relevant board or tribunal for hearing. Most matters are successfully conciliated, and only a small percentage proceed to the hearing stage.

4.5.2 Model 2: Offensive behaviour unlawful

Laws that protect GLBTI people from harassment and discrimination have drawn heavily on racial tolerance legislation. The Commonwealth *Racial Discrimination Act 1975* (RDA) was amended by the *Racial Hatred Act 1995* to prohibit offensive behaviour based on race. It makes unlawful behaviour that is likely to offend, insult, humiliate or intimidate a person or group of people, because of their race, colour, descent or national or ethnic origin.¹¹⁵ The behaviour must have occurred either within the sight or hearing of other people or in a place to which the general public is invited or has access.¹¹⁶

Under the RDA, it is necessary to establish only that a person would be reasonably likely to be offended, insulted, intimidated or humiliated by the words or conduct on the ground of race: the element of ‘incitement’ is not required. Any person aggrieved may lodge a complaint.

4.5.3 Model 3: Harassment

As the social context continues to change, the emphasis in other jurisdictions has shifted towards the development of harassment as a discriminatory harm.¹¹⁷

In the United Kingdom, the *Protection From Harassment Act* (PFHA) was enacted in 1997. Although it was initially introduced to deal with stalking, it now covers a wide range of conduct and behaviours. These include racial or religious harassment; gay, lesbian and transgender harassment; as well as particular anti-social behaviours amounting to harassment (such as playing loud music, having barking dogs and doing noisy house repairs). The PFHA makes harassment both a crime and a civil wrong,

¹¹² Section 49ZT (1) of the ADA (NSW); Section 66 of the ADA (ACT); Section 19 of the ADA (TAS); Section 124(a)(1) of the ADA (QLD).

¹¹³ Section 49ZTA of the ADA (NSW); Section 67 of the ADA (ACT); Section 131 A (1) of the ADA (QLD).

¹¹⁴ In the case of *R v D & E Marinkovic* the applicant was given the option of pursuing the matter under either provision as the respondent could have been charged under S 49ZTA, however he opted for civil redress only.

¹¹⁵ Section 18C (1) *Racial Discrimination Act 1995* (Cth).

¹¹⁶ *Ibid.*

¹¹⁷ See n. 95. P. 27.

and forbids anyone to pursue a course of conduct which amounts to the harassment of another.¹¹⁸

Harassment is not defined in the PFHA but is understood to include actions which cause anxiety or distress.¹¹⁹ Commentators consider that this may include nuisance telephone calls, abusive behaviour, uninvited visits to a person's home and threats to cause damage¹²⁰. The Act does not catch isolated incidents but rather a course of conduct, which is defined to mean conduct on at least two occasions.¹²¹

A similar approach has been considered at the Commonwealth level in Australia through the recent proposal for a private members bill (the proposed Sexuality Discrimination Bill¹²²) which attempts to deal with GLBTI violence and harassment. Harassment is defined broadly in the Bill as conduct which offends, humiliates, intimidates, insults or ridicules.¹²³

4.6 Other gaps in *Equal Opportunity Act 1995*

Looking beyond the general suitability of the *Equal Opportunity Act 1995* to address homophobic harassment, it is clear that some of the assumptions in the existing EOA provisions will need to be challenged if the new provisions are to truly take account of the experiences of GLBTI people.

4.6.1 Expanding the scope of the EOA

The most notable gap in the EOA for GLBTI people is its inability to deal with forms of harassment that occur in areas of public life not currently identified in Part 3 of the Act. As a result, acts that occur in public spaces (such as parks, shopping precincts and suburban streets) do not fall within the scope of the non-discrimination provisions unless those acts occur in the context of a relationship arising in the areas of public life regulated by the EOA (such as employment, education or the provision of goods and services).

Yet it is in just these kinds of environments that GLBTI people frequently experience homophobic prejudice, which commonly intimidate them or cause damage to their property, and where expressions of hatred can escalate into acts of violence. At the most extreme, this kind of abuse and violence would contravene the criminal law and could be prosecuted. However, the difficulties with successfully prosecuting such abuse and violence are well known, and as a result even the worst examples of such abuse and violence can go unreported. As stated previously, this paper does not address criminal legal sanctions as a means of responding to homophobic harassment other than to observe that the general criminal law, in isolation, does not provide a

¹¹⁸ *Protection From Harassment Act 1997* (UK) S 1(1)(a).

¹¹⁹ *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.

¹²⁰ See www.together.gov.uk

¹²¹ *Protection From Harassment Act 1997* (UK) S 1(3)(c).

¹²² This Bill is yet to be introduced to Parliament: it is an exposure draft open to community consultation.

¹²³ Clause 35, *Sexuality Discrimination Bill*.

sufficient means of responding to this unacceptable conduct. Nor does it deal with its causes.

The approach of the EOA – to confine the provisions dealing with non-discrimination to those areas of public life identified in Part 3 of the Act – does not take account of the public benefit associated with ensuring that all members of the community are able to access public spaces equally and safely.

Applying provisions of the EOA to areas beyond those currently identified in Part 3 of the Act raises a number of issues, and these are discussed further below. What is clear, however, is that GLBTI people experience harassment in many aspects of their lives not contemplated by the current Act.

To illustrate this point, we offer the following case study.¹²⁴

Guido has recently moved to a small rural town in Gippsland. While walking through a park from work one evening, he encounters a group of young men aged 16 to 23. One of the young men who knows Guido whispers to the others that Guido is a homosexual. Another of the young men yells out, ‘I hope you have a terrible life you sleazebag faggot poofter, you are a child molester, you fucking poofter, you should be ashamed of yourself you fucking poofter faggot. All you fucking poofters are the same. You’re all child molesters.’

Under the *EOA*, actions are covered only if they occur in the context of an area of public life identified in Part 3 of the Act. The Equal Opportunity Commission would not entertain Guido’s complaint because the harassment, although in a public space, is not related to an area identified in Part 3.

The joint working group recommends that provisions in the EOA to address homophobic harassment should not be confined to the areas of public life identified in Part 3 of the EOA. This is vital if the EOA is to reflect the experience of GLBTI people as well as the benefit to the entire community of providing for inclusiveness and diversity.

A number of options may be available to consider the most appropriate mechanism for providing for a wider operation of the harassment provisions. The joint working group considers that the harassment provisions should operate as broadly as possible. This will be consistent with recent changes to the legal and policy landscape, most particularly the Charter, and will reinforce the importance of inclusiveness and tolerance in all aspects of life. The following approaches warrant further consideration to assess their practical workability as well as the technical issues that may arise in their application.

Public Act

The expansion of the Act beyond the identified areas of public life is not a new concept. Similar laws dealing with vilification and incitement to hatred (both in Victoria and elsewhere in Australia) have tackled this issue by extending the

¹²⁴ All case studies included in this paper are based on the lived experiences of GLBTI people.

operation of these kinds of provisions beyond identified areas of public life to cover public acts. In general, public act provisions cover conduct that involves communicating to the public, conduct that is observable by the public and the distribution of material.¹²⁵

Such definitions of public acts have created difficulties of interpretation. For example, the case law indicates that these provisions have in some cases provided victims of vilification, as well as potential respondents, with little certainty as to what behaviour will be caught, with the definition being applied more widely than might have been anticipated.¹²⁶

Private Act Exception

A different approach is taken by the Victorian RRTA, which instead of attempting to define public act, provides an exception for clearly defined ‘private acts.’¹²⁷ This provision sets an objective test of reasonableness that requires an examination of all the circumstances of the case.¹²⁸ This demonstrates a clear balancing of private activities with the benefit of applying the laws to public acts.

Similarly, the *Racial Discrimination Act 1975* (Cth) (RDA) provision makes clear that private acts are not covered, and then defines what will not amount to a private act for the purposes of the legislation. Indeed, the RDA may provide a particularly suitable model, given that it prohibits conduct similar to ‘harassment’ as proposed in this paper (and does not include the incitement element as is required under the RRTA and the New South Wales provisions).¹²⁹

¹²⁵ Section 49ZS of the *Anti Discrimination Act 1977* (NSW) states that a public act includes:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

¹²⁶ For example in the New South Wales case of *Kimble & Souris v Orr*, which dealt with racial vilification, the flow of abusive language that occurred at a BBQ occurring on the respondent’s property constituted a public act as it could be heard by the neighbours. It was held in *Patten v NSW* [1997] EOT (NSW) 90-91) that language used whilst sitting in a car or in a person’s home could potentially also be caught under the provision if they are heard by passers-by (although this was not the fact situation in that case).

¹²⁷ Section 12 provides a private conduct exception which states:

- (1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.
- (2) Sub-section (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

¹²⁸ ACT Human Rights Office Issues Paper: *Racial and Religious Vilification in the ACT. Investigating the Effectiveness of Part 6 of the ACT Discrimination Act 1991*. Human Rights Office, Canberra. 2006.

¹²⁹ For example, section 18C of the RDA, which provides:

- (2) “It is unlawful for a person to do an act, otherwise than in private, if:

Focus on Reasonableness of Conduct

A third approach is to concentrate on the harm done by the act, rather than on the physical location. This would involve an objective test determining if the harm done by the conduct was reasonably foreseeable by the respondent. This approach avoids casting the net too widely, unfairly catching those who could not reasonably have anticipated that their conduct might cause harm. These concepts of reasonableness and objectivity are familiar to the law and again require an examination of all the circumstances of the case.

No limitation on location of harassment

A further model, which has not yet been applied in Australia, but has been applied in the *Protection from Harassment Act 1997* (UK) (PFHA) is to prohibit such harassment wherever it occurs. This approach would extend the operation of the provisions into places regarded as private, and would make a clear and open-ended statement about the unacceptability of harassment in all parts of life. In short, it would expand the operation of the law beyond parks, shopping precincts and streets, and bring the law squarely into people's homes. A review of the PFHA, has identified that practitioners view the Act as a welcome piece of legislation that has enabled intervention in cases of harassment where little could be done before.¹³⁰

Recommendation 12:

That the harassment provisions should operate as broadly as possible and should not be confined to the areas of public life identified in Part 3 of the Equal Opportunity Act. The approaches warranting further consideration include:

- *Applying the harassment provisions to public acts;*
- *Excluding private acts from the operation of the provisions;*
- *Limiting the operation of the provisions to circumstances where the harm done is reasonably foreseeable; and*
- *Applying the provisions to harassment wherever it occurs.*

-
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.
 - (3) For the purposes of sub-section (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public;
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place;
 - (4) In this section, *public place* includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.”

¹³⁰ Harris, J. *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997*. Research, Development and Statistics Directorate Home Office. 2000.

4.7 Preferred model for Victoria

The range of legislative models provides information that is useful in assessing possible Victorian approaches. However, while the various approaches have had significant positive impacts, it appears that none of the models has entirely achieved its intended objectives.¹³¹ In particular, it appears that GLBTI people only rarely rely on legal remedies.¹³²

4.7.1 What is to be prohibited – incitement, offensiveness or harassment?

4.7.1.1 Requirement of ‘incitement’

In NSW, Queensland, the ACT and Tasmania, the expression of hatred, ridicule or contempt for a person is not unlawful under the anti-vilification laws unless the objective element of incitement is established. The relevant principles were established in *Burns v Dye*.¹³³

- the word ‘incite’ is to be given its ordinary meaning, which is to urge, spur on, stimulate or prompt action¹³⁴
- merely conveying hatred towards a person or the expression of serious contempt or severe ridicule is not unlawful¹³⁵
- proof of intention to incite – or proof that anyone was in fact incited – is not required. It is the likely effect, rather than the actual effect of the public act, which is significant¹³⁶
- the audience or potential audience of the public act should be assumed to be the ordinary reasonable person.¹³⁷ The test to be applied is objective and is best described as the ordinary reasonable person not immune from susceptibility to incitement, nor holding prejudiced views.¹³⁸

Considering the nature and purposes of anti-discrimination laws in managing victim-initiated discrimination complaints, a strict interpretation¹³⁹ of the requirement of incitement involves a level of proof almost impossible to satisfy.¹⁴⁰

To illustrate this point, we offer the following case study.

¹³¹ See n. 111. P.403.

¹³² Rubenstein, W. *Do Gay Rights Laws Matter?: An Empirical Assessment*. Southern California Law Review. 2001 vol 75. P 67

¹³³ *Burns v Dye* [2002] NSWADT 32

¹³⁴ *Burns v Dye* [2002] NSWADT 32 at 19 – 23.

¹³⁵ *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701 at 78-266.

¹³⁶ *Western Aboriginal Legal Service Ltd v Jones & Anor.* [2000] NSWADT 102 at 93.

¹³⁷ *Harou –Sourdon v TCN Channel Nine Pty Ltd* [1994] EOC 92-604.

¹³⁸ *Collier v Sunol* [2005] NSWADT 261.

¹³⁹ It is important to note that case law in this area is still in its infancy, with few settled principles.

¹⁴⁰ ACT Human Rights Issues Paper: Racial and Religious Vilification in the ACT. ACT Human Rights Office, Canberra. 2006.

Tania, a transgender woman, moves into a new neighbourhood with her partner of 5 years. The neighbours appear to take an instant dislike to her and insist on finding any opportunity to upset her. Incidents include encouraging friends to scream out abuse as they leave after visits, throwing rubbish on her lawn and finally making a banner that is hung from the roof of their house so that it is clearly visible to all neighbours that reads 'My neighbour has no brain and no dick. I hate trannies'.

Under the *Anti-Discrimination Act* (NSW), this matter would be declined. The claim would fail because the necessary requirement of incitement cannot be demonstrated. The words sprayed on the banner only express a personal opinion about transgendered people, but do not encourage the wider community to act on the sentiments expressed.

It is worth noting that in a similar case in Tasmania, the Anti Discrimination Commission held that the conduct fell within the scope of the anti-discrimination provisions. This was on the basis that the conduct was found to be in connection with residential accommodation, bringing the activity within the identified areas of public life and hence the anti-discrimination provisions (rather than the incitement to hatred provisions). Consequently, the incitement element was not required to be established.¹⁴¹

The requirement to establish the element of incitement creates an additional barrier to resolving complaints about vilification. The joint working group considers that leaving aside the incitement requirement and reframing the test in terms of offensive behaviour or harassment has a number of advantages. It would remove the additional barrier to the resolution of harassment complaints, and it would be consistent with community expectations of the role of anti-harassment laws (which is to control expressions of prejudice and abuse where they are objectively considered offensive).¹⁴²

By focussing on the words used, rather than attending to the harm done, attention is diverted to freedom of speech issues, which fail to engage public sympathy for those harmed. Freedom of speech is, of course, an important human right, but it is subject to necessary limitations to protect the rights of others, both in international law and in the Victorian *Charter*.¹⁴³ To this end a range of laws are already in existence that restricts a person's freedom of speech. These include laws regulating defamation, confidentiality, copyright, contempt, incitement, official secrecy, sedition and noise pollution.¹⁴⁴ The 'incitement to hatred' model obscures that necessary balance, and hence tends to detract in the public arena from the symbolic value it is intended to have.

¹⁴¹ *Houston v Burton* 2003 TASADT 03.

¹⁴² See also ACT Human Rights Office Issues Paper: Racial and Religious Vilification in the ACT. ACT Human Rights Office. 2006.

¹⁴³ Article 19 of the *International Covenant on Civil and Political Rights* recognises that the right to freedom of expression may be subject to certain restrictions if law provides these and are necessary for respect of the rights or reputations of others or for the protection of national security or of public safety.

¹⁴⁴ Tibbey, M. *Developments in Anti-Vilification Law*. Australian Bar Review. 2001. Vol 21. P. 205.

4.7.1.2 ‘Offensive behaviour’ or ‘harassment’

It would be good lawmaking for the terminology used in any amendment of the EOA to be, so far as possible, consistent with existing provisions, and for any amendment to use concepts familiar to the Victorian legislative environment. The EOA has for many years contained provisions dealing with sexual harassment and the concept of harassment is now well understood as a form of discrimination more generally under the Act. The Victorian sexual harassment provisions also invoke concepts of conduct reasonably anticipated to offend, humiliate or intimidate.¹⁴⁵

In contrast to the UK’s PFHA, there is no requirement under Victorian law for harassment to be constituted by more than one act. Rather, all of the circumstances of the conduct are taken into account in determining whether conduct amounts to harassment. This is consistent with other Australian jurisdictions.

It is also significant that developments beyond Victoria’s borders have increasingly looked to the concept of harassment. The UK developments (as well as the Sexuality Discrimination Bill) demonstrate that this concept is now widely understood by the community. Indeed, in considering the alternative language, it is instructive to note that the RDA test is based squarely on the pre-existing sexual harassment provisions contained in the Commonwealth’s *Sex Discrimination Act 1984*(Cth).¹⁴⁶

For these reasons, the joint working group considers that the legislative model for Victoria should be based on a concept of harassment which is defined as conduct that offends, humiliates, intimidates, insults or ridicules.

In considering the definition of harassment, we noted that legislation in all jurisdictions establishes an objective standard of what conduct constitutes harassment.¹⁴⁷ Incorporating a ‘reasonable person’ test is consistent with common law principles which have been well-developed through case law in all jurisdictions; it is also consistent with the EOA’s sexual harassment provisions.

The joint working group also considers that the formulation of such an objective test should provide for all of the circumstances to be taken into account in considering whether a reasonable person would have anticipated that the other person would be offended and that this should include the history of discrimination experienced by people of that gender identity or sexual orientation.

Recommendation 13:

That the Equal Opportunity Act 1995 be amended to make it unlawful to harass another person on the basis of their sexual orientation or gender identity.

¹⁴⁵ S 85, *Equal Opportunity Act 1995* (Vic).

¹⁴⁶ Second Reading Speech 15 November 1994, Attorney-General M. Lavarch.

¹⁴⁷ The only real distinction in how the test is defined lies in Clause 35 of the private member’s Sexuality Discrimination Bill, which includes the following paragraph: For the avoidance of doubt, in assessing whether a reasonable person would have so anticipated, regard must be had to the history of discrimination or otherwise against persons of that sexual orientation or gender identity.

Recommendation 14:

That, in the Equal Opportunity Act 1995, harassment be defined as ‘conduct that offends, humiliates, intimidates, insults or ridicules another person’.

That other features of the definition include:

- *that harassment be assessed against an objective standard, requiring that a reasonable person (having regard to all the circumstances including the history of discrimination or otherwise against persons of that sexual orientation or gender identity) would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed*
- *that, consistent with existing Victorian provisions, harassment be capable of being constituted by a single act.*

4.7.2 Exceptions

Each of the legislative models described above – whether couched in terms of anti-vilification, incitement to hatred, offensive behaviour or harassment – provides for limited exceptions. These exceptions seek to balance the right of GLBTI people to be free from homophobic harassment with the right to freedom of expression.

In general terms, exceptions are provided for:

- a fair report of the public act
- a communication or the distribution or dissemination of any matter on an occasion that would be subject to absolute privilege in proceedings for defamation
- anything done reasonably and in good faith for academic, artistic, scientific or research purposes or for other purposes in the public interest.

4.7.3 Extension to religious instruction

Each of the NSW, Queensland and ACT laws also extend the final exception above to cover acts done reasonably and in good faith for religious instruction purposes. No such expanded exception applies under the Tasmanian law, nor does this exception appear in provisions dealing with racial hatred.¹⁴⁸

Through their actions, religious institutions have the power to reach a far greater audience than individual acts of harassment, and undoubtedly have the capacity to influence the behaviours of those who hear the words written or spoken. The joint working group does not consider that a specific exemption is warranted for religious institutions. However, if such an exemption is under consideration, it should be confined to religious instruction.

¹⁴⁸ See Section 18D(b) *Racial Discrimination Act 1995* (Cth), exempts anything said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest.

The joint working group considers that the Tasmanian exceptions model provides an appropriate basis for the Victorian reforms, reflecting an appropriate balance between the rights of GLBTI people to live free from homophobic harassment and the right of all people to freedom of expression.

Recommendation 15:

That limited exceptions be made in relation to the new harassment provision, to include:

- *the fair reporting of a harassing communication*
- *circumstances which would be subject to absolute privilege in proceedings for defamation*
- *statements made in good faith for academic, artistic, scientific or research purposes; or in the public interest.*

Attachment 1: Consultations

NSW

Person	Organisation
Stevie Clayton	Aids Council of NSW
David Scammell	Gay and Lesbian Rights Lobby
Ian Down	Anti- Violence Project
Guy Noble	Inner City Legal Service (ICLS)
Alison Cooke	Older Tees
Patricia	ICLS
Somali Cerise	Dept of Attorney General
Jackie Braw	Dept of Police
Murray Bourke	Anti Discrimination Commission
Fiona Kerr	Legal Officer - ADC

QLD

Person	Organisation
Daryl Scott	Walksafe
Paul Guilfoyle	Anti Discrimination Commission - Mediator
Paul Martin	QLD Aids and Health Council
Sharon Seargent	Dept of Justice
Rod Goodburn	Action Reform Change
Kate McCormack	ADC – Education Officer

TAS

Person	Organisation
Gemma Misrachi	Anti discrimination Commission
Rod Croome	Gay and Lesbian Rights Lobby
Susan Ditter	Co- ordinator Working it Out
Baden Phillips	Counsellor – Working it Out
Martine Delaney	Transgender Community
Kelly Tall	Transgender Community
Leisa Wagner	Dept of Premier and Cabinet
Julian Punch	Social Action Group

Mark Adams	TAFE Clarence Campus
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VIC

Person	Organisation
Tony Briffa	Genetic Support Network
Ben Rice	Equal opportunity Commission
Scott Davies	Dept of Police
Alan Young	Swinburne University
Alex Stitt	Designer
Jennifer Anne	DIIRD
Kate Broun	Cancer Council of Victoria

ACT

Person	Organisation
Helen Watchlis	Human Rights Commission
Kevin Shamburg	AIDS Action Council
Mandy Sharplin	Good Process

Attachment 2: The UK experience

“The National Health Service (NHS) must provide services that are fair to everyone and recognise the needs of each individual. Our population is diverse and needs to be dealt with equally. Our challenge is to make this happen. We are striving to deliver a patient-led NHS where services are the best they can be. To do this we must be a model employer and recruit and retain a workforce from all sections of the community.

We must develop our services to meet the needs of all groups. Lesbian, gay, bisexual and transgender people need to be treated with respect both the service users and employees. (We need to) ensure that they do not experience discrimination and prejudice in service delivery. Only by working together can we maintain the fundamental principles on which the NHS was founded: access for all and a commitment to improving the health of the whole nation.”

*Sir Ian Cruthers, Chief Executive of the NHS*¹⁴⁹

Between March and June 2006 the Department of Trade and Industry (DTI) in the UK, consulted on Regulations, to take effect in October 2006, on prohibiting sexual orientation discrimination in the provision of goods, facilities and services, in education and in the execution of public functions.

The commitment to outlaw sexual orientation discrimination in the provision of goods and services has important implications for health services. In particular, it was expected that it would lead to an improvement in the level of healthcare and uptake of health services by lesbians, gay men and bisexual people.¹⁵⁰

Adopting a client centred approach, the challenge was to create a health service that sees hundreds of thousands of people on a day to day basis and being able to find the time and the energy to consider each person as an individual. Tailoring services to make sure they're inclusive of GLBTI communities means that NHS will be treating “the right people at the right time in the right place”.¹⁵¹

Consideration was given to determining what makes a good training package, enabling staff to understand and serve GLBTI people more appropriately; looking at evidence based research that told the dept what GLBTI people want the NHS to provide; and looking at what was needed to ensure and monitor that the sexual orientation of staff and patients so that the services could respond adequately and appropriately to their needs.

¹⁴⁹ Cruthers, I.

<http://www.dh.gov.uk/PolicyAndGuidance/EqualityAndHumanRights/SexualOrientationAndGenderIdentity/fs/en>. 2006.

¹⁵⁰

<http://www.dh.gov.uk/PolicyAndGuidance/EqualityAndHumanRights/SexualOrientationAndGenderIdentity/fs/en>. 2006.

¹⁵¹ Rushcock, G.

<http://www.dh.gov.uk/PolicyAndGuidance/EqualityAndHumanRights/SexualOrientationAndGenderIdentity/fs/en>. 2006.

To encourage the development of this work, the NHS has instituted the following initiatives:

- A series of resources and good practice examples for health care professionals, to assist them in understanding what GLBTI people want from the NHS, and how it can be achieved.
- The development of the Sexual Orientation and Gender Identity Advisory Group to work with the Department of Health on strategies to promote equality and eliminate discrimination in health and social care as both service users and employees. Alongside external stakeholders, GLBTI employees who use and deliver health care services were encouraged to be involved in the project to ensure opportunities for their experiences to inform service development and improvement.
- Development of a national meeting which invited a wide-ranging group of stakeholders who had an interest in the agenda. This included participation from national, regional, local groups from statutory, voluntary and the private sector.
- Supporting a GLBTI summit drawing together speakers and the NHS to consider issues around GLBTI health needs and service provision.
- In the annual staff survey, an optional question on sexual orientation was included to assist in analysing equality issues within the department.
- The development of work around equality impact assessment to cover all equity strands including sexual orientation and gender identity.
- The development of a system that identifies homophobic reporting within NHS.
- Through the DH human resources policy framework, the NHS policies are being reviewed and checked to ensure that they are fit for the purpose and non-discriminatory.
- Organising an annual GLBTI in house event that celebrates the past and present day GLBTI champions in the Department and outlining some of the work being undertaken to improve GLBTI people's access to health services. In 2006, the event launched an exhibition of LGBTI people who have added their images to the DH image bank to help increase the representation of GLBTI people in health literature and policy documents across health services.
- Participation in annual pride marches, showing support for GLBTI communities.¹⁵²

The work is underpinned by a commitment to equality, human rights and social justice, a respect for diversity, and a commitment to challenge discrimination and

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<http://www.dh.gov.uk/PolicyAndGuidance/EqualityAndHumanRights/SexualOrientationAndGenderIdentity/fs/en.2006>.

exclusion within organizations and communities on behalf of whom the department works for. The Department of health is a leading employer of GLBTI people and was recently placed 18th in Stonewalls 2006 equality index.¹⁵³

The approach has financial benefits for the NHS, but more importantly it has health benefits for the people using the services allowing them to take greater control of their choices they make around their lifestyle.

¹⁵³ Surinda. S.

<http://www.dh.gov.uk/PolicyAndGuidance/EqualityAndHumanRights/SexualOrientationAndGenderIdentity/fs/en.2006>.

Attachment 3: The Tasmanian experience

Understanding the cultural context which allowed for law reform to take place in Tasmania, provides us with an insight into understanding why their reform package has flowed through into strongly articulated Government policies and procedures. Up until 1997, homosexual sex in Tasmania was illegal, even though in 1994 the United Nations Human Rights Committee (UNHRC) found that the laws violated articles of the International Covenant on Civil and Political Rights (ICCPR).¹⁵⁴ The first ruling to be made since Australia acceded the first optional protocol of the ICCPR, Tasmania's laws were interpreted to include a proscription against sexuality discrimination.¹⁵⁵

This decision triggered a chain of events that saw the development of federal legislation entrenching the right to sexual privacy for all Australians, which in turn prompted an appeal to the High Court asking that Tasmanian laws be invalidated under these new Federal laws.¹⁵⁶ The combination of grass roots campaigning, community education, direct action, high media visibility and embarrassment over the international exposure of Tasmania's human rights violations finally lead to a collapse of resistance from the Tasmanian Parliament, allowing for the laws to be repealed long before a determination from the High Court was received.¹⁵⁷

As a result, sweeping reform took place in Tasmania signalling a change in community values and expectations.

“The Office of the Anti-Discrimination Commissioner was created in an effort to bring about a world where discrimination, prejudice, bias and prohibited conduct are indicators of a history that is no longer with us. (It is time to envisage a) Tasmanian community, which recognises that all people are entitled to respect, dignity and appreciation for their contributions, and where all are honoured for their diverse abilities and strengths.”¹⁵⁸

Established in 1998, the Anti- Discrimination Commission heralded a change in direction for Tasmania, embracing acceptance of GLBTI people within the broader Tasmanian community. Drawing from similar Anti Discrimination legislation operational in other States, the *Anti Discrimination Act* 1998 (Tas) is arguably affords the strongest protection for GLBTI people from forms of harassment than any of its Australian counterparts.

Having clearly articulated a change in Government thinking, and having put a legislative safety net in place ensuring compliance with anti-discrimination principles, the Tasmanian Government then set about considering how these broader principles of anti discrimination and inclusivity might impact on how they conduct their own

¹⁵⁴ Croome, R. *Do Lesbian, Gay, Bisexual and Transgendered People Need A Bill Of Rights?* Australian Journal of Human Rights 2003, Vol 9(1) P. 59.

¹⁵⁵ Ibid. P. 59.

¹⁵⁶ Ibid. P. 59.

¹⁵⁷ Ibid. P. 59.

¹⁵⁸ www.antidiscrimination.tas.gov.au/about_us.

business. This also came about from recognising that the Government has the responsibility for delivering services to all Tasmanians, including GLBTI people across a range of areas.¹⁵⁹ This had a significant impact on the administration of Government through the development of their policies, procedures and long term goal setting within mainstream services and in the development of specialist services.¹⁶⁰ Following through on the promise to break with recent history, it was important that these words were not seen as hollow by the international community, lacking in substance for GLBTI Tasmanians.

Forming partnerships with GLBTI people, a number agency specific reference groups were established to provide advice to relevant departments about GLBTI issue aimed at making existing and future services more relevant to GLBTI people. These include reference groups for the health, education, police and tourism portfolios. Agencies working with Non-Government service providers began reviewing and if necessary amending service agreements to ensure that the providers considered how to include the participation of GLBTI people in their program development.¹⁶¹ Diversity awareness training plans are being developed by each agency, in consultation with the Division of Industrial relations, the State Services Management and DPAC, in accordance with S7 of the *State Services Act 2000* (Tas)¹⁶². Educating employees on diversity issues was seen as an important strategy in improving awareness, ensuring the delivery of appropriate and relevant services. A checklist has been developed by the Department of Health and Human Services LGBTI reference group to assist Government Departments in this work.

Lobby groups were funded including the establishment of *Working It Out*, to facilitate educational and community development strategies that assist young people and their families as they question and acknowledge their sexual identity.

Most importantly, the issues of GLBTI Tasmanians have been considered and included in the Government's twenty year blue print, *Tasmania Together*, which articulates the shared vision of Tasmania's immediate future.

Tasmania Together

Tasmania Together is the Tasmanian Government's twenty year social, environmental and economic plan, which lays the foundations for a fair and just Tasmania. The result of extensive community consultations, the plan is based on shared ideas and aspirations. The principles guiding the blue print are equity, inclusiveness, access,

¹⁵⁹ *A Whole of Government Framework for Tasmania's Gay, Lesbian, Bisexual, Transgender and Intersex Communities*. Department of Justice, Tasmania. December 2004.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Section 8 of the *State Services Act* states: Heads of agencies must uphold, promote and apply the State Services Principles that are found in Section 7 of the Act. The following principles are especially relevant to the diversity policies of agencies: merit based employment; non-discrimination and diversity; provision of a fair, flexible, safe and rewarding workplace; and equity in employment.

autonomy, recognising and supporting diversity, non-discrimination and prioritising resources.¹⁶³

The development of a whole-of-government policy framework has led to the development of goals, standards and targets that guide the Government and community in achieving better outcomes for the Tasmanian community. Drilling further into understanding how to achieve identified goals, each target has attached to it a series of benchmarks that can be used to evaluate the effectiveness of initiatives using an evidence based approach. For GLBTI communities, the Government committed to improving the lives of GLBTI people through *Tasmania Together* in the following ways.

Goal	Foster an inclusive society that acknowledges and respects our multicultural heritage, values diversity and treats everyone with compassion and respect.	
Standard	To support and encourage a diverse, compassionate and socially just society that provides for the rights of Tasmanians, including people from minority, disadvantaged and stigmatised groups.	
Targets	<p>A reduction in the number of complaints to the Tasmanian Anti-Discrimination Commission;</p> <p>A decrease in the percentage of lesbian and gay people who experience verbal abuse and physical assault on the basis of sexual orientation;</p> <p>An increase in the percentage of teachers who have received professional development training in racial, gender, disability and sexuality related discrimination and harassment; and</p> <p>A reduction in the number of breaches of the Anti Discrimination Act.</p>	
Benchmark	Percentage of lesbian and gay people who experience verbal abuse and physical assault on the basis of sexual orientation:	
	Year	Target
	2005	22%
	2010	11%
	2015	6%
2020	3% ¹⁶⁴	

Having developed a clear and comprehensive strategy for the inclusion of GLBTI people within the broader community, the Government has now also started to consider the effectiveness of their processes. Whilst the framework articulates the concerns that GLBTI people want to have addressed as priority issues, and identifies

¹⁶³ *Tasmania Together*. Department of Premier and Cabinet, Tasmania. 2001.

¹⁶⁴ *Tasmania Together*. – *Progress Board*. Department of Premier and Cabinet, Tasmania. 2005.

what change needs to take place, it has become apparent that the mechanisms for measuring change were not in place. In response to this, a re-evaluation of the targets and benchmarks identified was undertaken. In partnership with *Working it Out* and the Police department, a process for monitoring and measuring possible decreases in violent crimes against GLBTI people is presently being established.

Attachment 4: Other jurisdictions

Anti Harassment Act 1997 UK

In the UK, the *Protection from Harassment Act* was enacted in 1997. Primarily introduced to deal with stalkers, it now covers a wide range of conduct and behaviours, including racial or religious motivated harassment, gay, lesbian and transgender harassment, through to certain types of anti social behaviour where these amount to harassment, such as playing loud music, barking dogs and noisy house repairs. The Act makes harassment both a crime and a civil wrong and forbids anyone to pursue a course of conduct, which amounts to the harassment of another.¹⁶⁵ Harassment isn't defined in the Act, but is understood to mean: "unwanted conduct that violates people's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. It includes nuisance telephone calls, abusive behaviour, uninvited visits to your home and threats to cause damage. The Act does not catch isolated incidents, only a course of conduct, which is defined to mean conduct on at least two occasions."¹⁶⁶

The *Protection from Harassment Act* works in conjunction with two other major pieces of legislation that tackle discrimination in the UK. The *Sex Discrimination Act 1975* (SDA) makes sex discrimination unlawful in employment, vocational training, education, the provision and sale of goods, facilities and services and premises. In employment and vocational training, it is also unlawful to discriminate against someone on the grounds that a person is married or a civil partner, or on the grounds of gender reassignment. The SDA prohibits direct and indirect discrimination, victimisation, and discrimination on the grounds of pregnancy or maternity leave, sexual harassment and harassment on the grounds of sex.

The *Equal Pay Act 1970* makes it unlawful for employers to discriminate between men and women where they are doing the same or similar work; work rated as equivalent; or work which is of equal value though different in nature.

It covers both pay and other terms and conditions such as piecework, output and bonus payments, holidays and sick leave. European law has confirmed that the concept of equal pay prevents discrimination in relation to redundancy payments, travel concessions, employers' pension contributions and occupational pension benefits.

Canada

The Canadian Charter of Rights and Freedoms was introduced into Canadian law in 1982, provides the back drop for the Canadian Human Rights Act¹⁶⁷ and includes a provision for equal protection and benefit before and under Canadian law.¹⁶⁸ Whilst

¹⁶⁵ *Protection From Harassment Act 1997* (UK) S 1(1)(a).

¹⁶⁶ *Protection From Harassment Act 1997* (UK) S 1(3)(c).

¹⁶⁷ Canadian Human Rights Act (R.S., 1985. c H-6).

¹⁶⁸ S15 of the Canadian Charter of Rights and Freedoms states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

the ground of sexual orientation is not named in the Anti discrimination section of the Canadian Charter of Rights and Freedoms, the Courts have accepted that Section 15 is to be interpreted broadly and that ‘analogous’ grounds may also form the basis for discrimination against a group or individual.¹⁶⁹ In 1995, in *Egan v Canada*, noting the significance historical and ongoing disadvantage faced by gay and lesbian people, the Supreme Court unanimously found that sexual orientation was an analogous ground similar to the grounds in S 15.¹⁷⁰

In Canada, anti- discrimination laws have been treated as having a higher status than other legislation because their subject matter, which ensures the most fundamental basic rights: the right to be treated equally and not be subjected to discrimination.¹⁷¹ All grounds on which discrimination are proscribed should also be subject to anti-vilification provisions.¹⁷²

In 2003, the Hate propaganda section of the Canadian criminal code was amended to add homosexuals to the list of groups legally protected from incitement of hatred and genocide. The hate propaganda law, passed in 1970, banned incitement of hatred on the basis of colour, race, religion and ethnic origin, but not sexual orientation.

S 139 states:

1. If it can be shown that the speech was so abusive that it was likely to incite listeners or readers to violent action against an identifiable group, and if the speech was made in a public place, then a person could be convicted.
2. If the speech promoted hatred against an identifiable group, but was not likely to incite a listener to violence, then a person could still be convicted. However there are safe guards that give a person immunity. A person could not be convicted if:
 - (a) The hate speech was expressed during a private conversation
 - (b) If the person can establish that the statements made are true
 - (c) If in good faith he expressed or attempted to establish by argument an opinion on a religious subject. This would provide clergypersons immunity from conviction for a hate based sermon
 - (d) If the statements were relevant to any subject of public interest and if on reasonable grounds, the person believed them to be true
 - (e) If he described material that might generate feelings of hatred for an identifiable group for the purpose of removal of that hatred
 - (f) If the Attorney-General refused to give permission, as the Attorney-General’s consent is required before charges can be laid.

Sweden

In 2003, the Swedish Parliament passed a bill to criminalize hate speech, which targeted individuals or members of groups who fall into certain protected classes. The

discrimination and in particular without discrimination based on race, national or ethnic origin, colour, race, sex, age or mental or physical disability.

¹⁶⁹ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

¹⁷⁰ *Egan v Canada* [1995] 2 SCR 513.

¹⁷¹ *Ontario Human Rights Commission v Simpsons-Sears Ltd* [1985] 2 SCR 536.

¹⁷² Tibbey, M. *Developments in Anti-Vilification Law*. Australian Bar Review. 2001. Vol 21. P. 216.

bill now forms part of the Swedish Constitution. The law protects persons of all sexual orientations equally: heterosexuals, bisexuals and homosexuals. Unlike the *Hate propaganda law* in Canada, it offers no exclusions for religiously motivated hate speech, and specifically criminalizes hate speech in church sermons.

United States

There is no federal law prohibiting discrimination based sexual orientation, however the United States Court of Appeals for the ninth circuit ruled that discrimination, even if motivated by sexual orientation bias, constituted gender stereotyping and is therefore illegal under title VII of the 1964 Civil Rights Act.¹⁷³

13 states within the US, have enacted their own legislation anti discrimination legislation for GLBTI people, the most recent enacted in 2002, is The *Sexual Orientation Non-Discrimination Act* in New York (SONDA). This Act protects people from sexual orientation-based harassment and discrimination in employment, housing, education, and public services. However it does not legislate behaviour in public spaces.

South Africa

South Africa became the first nation in the world to explicitly prohibit discrimination based on sexual orientation in its Constitution. Since its commencement in 1996, a number of acts has been passed that protect GLBTI people from discrimination in areas of public life.¹⁷⁴

While the Constitution and legal system in South Africa theoretically ensure equality, South Africa has no specific hate crime legislation. Public opinion tends to view homosexuality as a taboo topic, especially in the townships outside of the Cities.

New Zealand

Under the *Human Rights Act* and the *Race Relations Act* it is unlawful to discriminate on the basis of race, colour, national or ethnic origin, sex, sexual orientation, religious or ethical beliefs, marital status, disability, political opinion, employment status, family status and age.

¹⁷³ *Rene v MGM Grand* 2002.

¹⁷⁴ Employment Equity Act 1998 (South Africa); Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa) protects GLBTI people in public accommodation and services.