

***Submission by Erinyes Autonomous Activist Lesbians to the  
Review of the Victorian Charter of Human Rights and Responsibilities Act 2006***

30 June 2011

Mr Edward O'Donohue, MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

Via email: [charter.review@parliament.vic.gov.au](mailto:charter.review@parliament.vic.gov.au)

Dear Mr O'Donohue,

Please find below a submission by Erinyes Autonomous Activist Lesbians (Erinyes) to the *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter). Erinyes is an organisation which protects, and advocates for, lesbian-specific human rights. We thank the Scrutiny of Acts and Regulations Committee (the Committee) for the chance to offer feedback on the operation of the Charter.

It should be noted that lesbians, as women, often experience discrimination differently from gay men since they face two concatenating forms of discrimination, namely sexism (as women) and heterosexism (as lesbians). Heterosexual women, too, may face sexism but rarely have to contend with heterosexism or lesbophobia as well. This submission deals solely with lesbian-specific human rights.

As a sign of respect, and in acknowledgement of the specific human rights of all First Australians, Erinyes supports the calls of indigenous Australians for their human rights and self-determination to be acknowledged in the Constitution and in all Federal and State legislation, including the Charter.

Erinyes supports the submission to this Review of the Federation of Community Legal Centres.



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## ***Terms of Reference***

As stated above, Erinyes will address the Committee's Terms of Reference from the point of view not of people possessing in-depth legal skills and knowledge but rather as members of a community-based organisation who do have very detailed knowledge about Victorian lesbians' life experiences. Hence, we will leave discussion about effects of the Charter; overall costs of the Charter; further provisions with respect to legal proceedings/remedies; and options for reform/improvement of the regime for protecting rights and responsibilities in Victoria mainly to legal organisations who understand such issues.

## ***The Charter as we see it***

One of the most successful aspects of the Charter has been the requirement for a Statement of Compatibility with human rights of any proposed piece of Victorian legislation, so that citizens can evaluate what weight the government has attributed to different people's rights. In addition, Victorian Government agencies must evaluate their operations through a human rights lens (s38) to try to ensure that they respect their clients' rights.

We consider that more time is needed for the full effects of the current *Victorian Charter of Human Rights and Responsibilities* to be realised. It takes time to influence the cultures of the government and public service bureaucracy to take human rights into account when drafting legislation or providing services to citizens.

We understand that the Charter supports the full right of Parliament to take on advisement, without being bound by, any judicial recommendations on the degree of alignment with human rights defined in the Charter.

## ***Matters referred to in section 44(2) of the Charter***

Since the Federal government has largely failed to incorporate provisions of the UN Security Resolutions, Covenants, Conventions, and Statements into domestic law, these do not apply to Australian or Victorian lesbians. Therefore, lesbians must rely upon State-based legislation, such as the Charter or *Equal Opportunity Acts*, to protect their human rights.

Victorian women who are lesbians have no protection under the Federal *Sex Discrimination Act* based on their identity as lesbians, whereas heterosexual women do because they are women. There are no domestic Federal protections for lesbians' human rights, despite the fact that Australia is a signatory to the *Yogyakarta Principles* (2007) and the UN's *Statement on Human Rights, Sexual Orientation and Gender Identity* (2008). This is because, until and unless these commitments to international values are translated into domestic Australian legislation, rights attributable to lesbian women in international UN covenants have no jurisdiction in Australia.

The way in which legislation is drafted sometimes has unintended effects upon the groups of people to whom a law applies at grassroots level. Burris, Kawachi et al argue that 'Asking how law contributes to the creation, maintenance, and reproduction of social status and power offers a way to identify a role of law in health (and in improving health) at a "structural" level far removed from immediate health outcomes or specific legal mechanisms' (2002). For example, there may be a connection between legislation that has historically discriminated against lesbians and the fact that 'Lesbian and other

homosexually active women consistently show higher rates of depression than heterosexual women.... same-sex attracted young people, particularly women, are the group most susceptible to depression and suicide' (Corboz, Dowsett et al, 2008).

Victorian legislation such as the Charter, or the 114 pieces of Victorian legislation that discriminated against lesbians - which were changed in 2002 (Victorian Legal Aid et al, 2007) - can have remarkable effects upon what might be considered to be their economic, social and cultural rights, such as the right to health.

Incorporation of economic, social and cultural (ESC) human rights into the provisions of the Charter is absolutely essential for lesbians. Rights contained in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are so inextricably intertwined with those in the *International Covenant on Civil and Political Rights* (ICCPR) that it is often impossible for vulnerable and marginalised people to assert one without having the other.

For instance, a lesbian in a residential aged care facility was reported to the management by some workers, called into the Director of Nursing's office, and asked to explain herself because she was watching a gay video in her own room (Matrix Guild, 2008). This incident could be construed as a violation of her social and cultural rights, but she would have no recourse because ESC rights are not yet incorporated into the Charter. It is also a violation of her right to privacy as contained in the *Universal Declaration of Human Rights* and the ICCPR. This inability to assert her rights may well have an effect on her mental wellbeing.

As happens in the wider community, often staff in aged care and other services misunderstand sexual orientation and lesbian identity. They, therefore, have problems in comprehending the 'cultural isolation' (Matrix Guild, 2009) that may be experienced by lesbian residents who have been used to living their younger lives embedded within the lesbian community. If the ICESCR were incorporated into the Charter it would be necessary for staff to have had some education on these lesbian-specific issues and it might be easier for the resident to assert her human rights.

In her final report on the *Review of the Aged Care Complaints Scheme* Walton drew attention to problems for Victorian lesbians in community or residential aged care, stating that 'the issue for them is the reluctance to complain because they may be required to disclose their non- heterosexual identity, or the same sex relationship, for fear of victimisation' (Walton, 2009). Some submissions to the Review pointed out that, unlike current practice in government-run aged care facilities, it is necessary to provide for 'anonymous complaints, particularly as a safety mechanism to support complainants where there is genuine fear of retribution. This was specifically raised in relation to...lesbian...care recipients... Some care recipients have been threatened with "outing" by providers if they raise a complaint about service standards' (Walton, 2009). If these government agencies were aware that the Charter, and preferably their own organisations' policies, contained human rights provisions based on sexual orientation, their staff may not have behaved in such a threatening manner.

A positive stance on strengthening government legislation and policies on women and girls was recommended in the United Nations' March 2011 *Agreed Conclusions of the 55th Session of the Commission on the Status of Women*, to which Australia is a signatory. The *Agreed Conclusions* recommended mainstreaming of a gender perspective in all legislation, policies and programs in all governmental sectors; improving and systematising collection of sex-, age- and disability-disaggregated data; and improving the safety of girls... conducting violence prevention activities in schools and

communities and establishing and enforcing penalties for all forms of harassment and violence against girls (UN Economic and Social Council, 8 Mar 2011). While we believe that the incorporation of the provisions of the *Agreed Conclusions* into the Charter is desirable, they make no reference to lesbian women and girls. Thus they need to be read in conjunction with the *Yogyakarta Principles*, which must also be an integral part of the Charter.

Article 12 (1) of the ICESCR asserts that 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and 12(2)(d) guarantees 'The creation of conditions which would assure to all medical service and medical attention in the event of sickness'. For Victorian lesbians, interpretation of these provisions depends on whether one defines 'access' to healthcare as physical proximity to a medical facility, or as assurance that one will receive non-discriminatory care if one attends that facility. It is Erinyes' contention that discrimination affects access to healthcare. Therefore it is necessary, if Victorian lesbians are to achieve equitable health rights, for the ICESCR to be embedded within the Charter.

Below we provide some examples of how, in the past, these rights were not offered to Victorian lesbians.

Of Victorian lesbians surveyed 274% (n=355) had experienced active healthcare provider discrimination in medical settings because of their same-sex relationships (McNair and Thomacos, 2005). In a survey of some patients of the Royal Women's Hospital 'Several women participating in the LHIP Consultation reported that they had been refused Pap smears by treating practitioners because they were lesbian' (Brown, 2000), based on unsafe assumptions by those practitioners. Erinyes argues that these incidents reflect a lack of access to non-judgmental healthcare which, in turn, is likely to affect lesbians' health outcomes negatively, thereby violating their ESC rights and increasing Victoria's overall burden of disease.

In one community survey, 'Participants from rural areas or regional centres were more likely to report "Breach of confidentiality" than metropolitan dwellers (13% of overall lesbian participants in the survey reported breached medical confidentiality. This)...was particularly an issue for lesbian participants from rural areas, where it was perceived that less care was taken with the need for privacy' (Victorian Gay and Lesbian Rights Lobby, 2000). These findings are corroborated by those of Gottschalk (2007). If the health services in these rural and regional centres were aware that the behaviour of their practitioners - as representatives of a public authority/agency - would be measured against human rights benchmarks in the Charter and in their own organisations' policies and, moreover, that those patients whose confidentiality they breached had legal recourse against them for doing so, they might be motivated to act more ethically.

Discrimination in the form of heterosexism and lesbophobia lead to mental ill-health in lesbians, such as anxiety and depression. Corboz, Dowsett et al (2008) found that 'In particular, younger and older lesbians appear to be at a higher risk of depression than mid-age lesbians', but all of the government funding seems to be directed only at addressing the problems of younger lesbians. This might be construed as ageist discrimination, since it ignores high levels of morbidity amongst older lesbians. Some lesbians are left with nowhere to go, other than to self-medicate with alcohol, cigarettes, and illicit drugs much more than their heterosexual sisters. This must affect their health outcomes relative to heterosexual women. Lesbian women are almost 6 times more likely to report either self-harming or attempting to kill themselves in the last six months than heterosexual women (Corboz, Dowsett et al, 2008); hence the need for the ICESCR to be incorporated into the Charter.

The Preamble of the ICESCR guarantees people 'freedom from fear and want'. However, this is far from the lived experience of many Victorian citizens and residents and it is especially so for lesbians living in Victoria. *Coming Forward* defines heterosexism as, 'the complex social and psychological processes underpinning violence and discrimination against...lesbians....in its very ordinariness and taken-for-grantedness this everyday abuse has profound effects on (lesbians') lives...This everyday culture of harassment is supported by less visible but no less damaging forms of institutional violence. In this report institutional violence refers to the ways in which the beliefs, policies and practices of particular organisations devalue and marginalise (lesbian) people. Such violence maintains as it contributes to prejudicial and discriminatory attitudes and in so doing is part of the heterosexist machinery that sustains as it justifies harassment and abuse of (lesbian) people... it is this everyday culture of heterosexist harassment that provides the fuel for more violent acts of physical and sexual abuse' (Leonard et al, 2008). Enshrining the ICESCR in the Charter and requiring public authorities to examine *and report upon* how their organisations' policies and practice match up to a consistent human rights framework throughout Victoria is likely to increase their transparency of operation and also awareness of any discriminatory assumptions, values, and actions.

Research on prejudice-motivated discrimination and violence conducted at 5-yearly intervals by VGLRL (McNair and Thomacos, 2005; VGLRL, 2000) revealed discrimination in such institutions as medicine and the law were included. This prompted an examination of Victoria Police crime statistics and, later, a funded survey (Leonard, Mitchell, Patel and Fox, 2008) resulting in recommendations on how homophobia could be challenged. Some evidence also exists concerning the traumatising effect of this violence on lesbians and their mental health, as well as the lack of trust engendered in institutions, such as Victoria Police, which have not universally acted appropriately when the violence was reported.

Of 107 female research participants in a survey carried out on behalf of Victoria Police and the Law Institute of Victoria: 19% needed some form of medical treatment after heterosexist violence; 87% reported that the incident of violence in public was accompanied by lesbophobic language, so that there could be no mistaking its motivation; 29% said that their most recent incident of heterosexist violence was ongoing; 11% said that, in the past 2 years, their family members/children/friends had been subjected to heterosexist violence as a result of association with the lesbian research participant; 52% did not seek assistance after their most recent incident of heterosexist violence, many because they felt they would not receive a sympathetic hearing (Leonard et al, 2008) when reporting the violence. Actual experiences of some lesbians when they did report violence against them to a mainstream public authority, i.e. Victoria Police, proved these feelings to be well-founded. There was 'the implication in the majority of police responses that heterosexist harassment is a minor offence and difficult to prove (and in some cases) the police suggested that responsibility for ensuring an end to the harassment rested with the victim, rather than the perpetrator: "They advised me to sell my property" and "just lock your door"' (Leonard et al, 2008). This response would be deemed absolutely inappropriate were the complainant a heterosexual women. Even 25% of Victoria Police's specially-trained Gay and Lesbian Liaison Officers were found not to be supportive when lesbians reported violence.

Lesbians are not recognised as victims of violence in *Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children, 2009-2021* (Commonwealth of Australia, 2009). This is the 13-year national strategic plan for addressing domestic violence. This may stem, partly, from the fact that lesbians are not acknowledged as a group of women who experience violence by the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

Such comments as ‘I’m going to fuck you straight!’ made to a lesbian woman who was being gang-raped at the time (Clarke, 2004) demonstrate that ‘corrective rape’ does not only happen in South Africa. Whilst Erinyes firmly believes that the provisions of CEDAW should be embedded within the Charter, to protect heterosexual Victorian women’s rights, for the purposes of protecting Victorian lesbians’ rights this is not sufficient. Therefore the Charter needs, also, to incorporate provisions of the *Statement on Human Rights, Sexual Orientation and Gender Identity* (United Nations General Assembly, 2008) and the *Yogyakarta Principles* (2007) to which Australia is a signatory.

### **Conclusion**

Differential types of human rights for different groups of women can be confusing for those who are striving to assert their human rights. If they have one overall document concerning their rights to which they can refer, such as the Charter, it would be easier for them to understand and obtain their rights.

Although the full benefits of the *Victorian Charter of Human Rights and Responsibilities Act 2006* have yet to be realised, we firmly believe that it is an essential document for the preservation of the human rights of all Victorians. In fact, we believe that it enhance consistent service delivery of Victorian government authorities and agencies if further rights, such as those contained in the *International Covenant on Economic, Social and Cultural Rights*, the *Yogyakarta Principles*, *Agreed Conclusions of the 55th Session of the Commission on the Status of Women* and the *Convention on the Elimination of All Forms of Discrimination Against Women* were incorporated into the Charter.

It would be impossible to imagine every possible situation to which the Charter, in future, might need to be applied. Therefore Erinyes believes that it should be couched in general language, rather than trying to specify in detail the application of each human right.

Erinyes maintains that Statements of Compatibility of proposed legislation with definitions of human rights in the Charter must be retained.

As we have demonstrated with the examples provided above, Erinyes is of the firm opinion that routine, regular reporting of government authorities and agencies on how their training, practice, policies and procedures incorporate the human rights embedded in the Charter is most desirable. These reports should be available, for perusal, to all citizens of Victoria.

Erinyes supports legal enforceability of all Victorian citizens’ human rights in the event of breaches of the Charter by government authorities and agencies, although this should be seen as a measure of last resort.

Erinyes recommends that, for the proper operation of democracy, all Victorian citizens should be educated on human rights from school age upwards.

Members of Erinyes would welcome the opportunity to present further evidence before the Committee at a public hearing.

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