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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

BY EMAIL: legcon.sen@aph.gov.au

21 December 2012

Dear Ms Dennett,

Human Rights and Anti-Discrimination Bill 2012 Exposure Draft

I enclose a brief submission endorsing the Bill (and urging some improvements).

Liberty strongly supports the addition of the attributes of sexual orientation and gender identity (and intersex), and welcomes the resolute protection of aged care recipients against discrimination on these (and other) grounds by religious providers. Liberty commends the Bill's endorsement of case law holding harassment to be unfavorable treatment constituting unlawful discrimination.

In summary, Liberty Victoria congratulates the Government on this Exposure Draft, and strongly endorses its work in consolidating current Commonwealth anti-discrimination law. Liberty urges the Committee to recommend that the resulting Bill be introduced and passed into law in the first half of 2013.

Liberty would be pleased to give evidence to a committee hearing if requested.

Yours sincerely,

Jamie Gardiner,
Vice-President

Submission by **Liberty** Victoria
to the
Senate Standing Committee on
Legal and Constitutional Affairs
Human Rights and Anti-Discrimination Bill 2012
Exposure Draft

Contact person:

Jamie Gardiner
Vice-President

Introduction

1. The Victorian Council for Civil Liberties Inc—Liberty Victoria—is an independent non-government organization which traces its history back to Australia’s first civil liberties body, established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia’s compliance with the human rights and freedoms recognised by international law.
2. The human right to equality, necessarily including freedom from discrimination, is fundamental to human rights.
3. Australia, as a party to the main human rights treaties, has freely undertaken international legal obligations to respect the right to equality, to guarantee its protection and to pursue its fulfilment.
4. Liberty has welcomed the Consolidation Project, which is a vital part of the Australian Human Rights Framework, as an important opportunity to bring greater coherence and completeness to the current somewhat *ad hoc* implementation of Australia’s obligations to respect, protect and fulfil the human right to equality, and made a substantial submission to the Attorney-General’s Department on its *Discussion Paper* earlier this year.
5. In that submission we highlighted five issues: systemic discrimination; new attributes; religious exemptions; harassment and vilification; vicarious liability.
6. Apart from those issues Liberty commended and endorsed the submission of the Human Rights Law Centre. It does so again, both as to that original submission and the HRLC submission to the present inquiry. It also commends to the Committee (except as noted below) the submission to the present inquiry of the Discrimination Law Experts Group.
7. Another issue that has been the subject of public comment concerns the definition of discrimination and the burden of proof. Liberty strongly supports the Exposure Draft, cl.124, which follows the well-known principle of discrimination law, and other (non-criminal) areas, that once a *prima facie* case has been made out by a complainant the burden falls to the respondent to establish that the conduct was engaged in for a lawful reason or purpose.

Systemic discrimination, substantive equality

8. Liberty urges the Committee to recommend a more effective approach than the Exposure Draft adopts, such as recommended by the submission of the Discrimination Law Experts Group, to making clear the goal of substantive equality, and providing powers and pathways to achieving it.

New attributes

9. We welcome the Bill's inclusion of the new attributes of sexual orientation and gender identity, new to federal law but well-established in the States and Territories, and note that coverage of these attributes was an election commitment of both the Government and the Opposition parties in 2010.
10. In relation to sexual orientation we are firmly of the view that the terminology should remain "sexual orientation," contrary to the submission of the Discrimination Law Experts Group. As the Liberty Victoria submission to the Attorney-General's Department on the earlier *Discussion Paper* stated (footnotes omitted):
 16. Liberty welcomes the Government's commitment to extend anti-discrimination protection in the *Equality Act* to the attributes of sexual orientation and gender identity. In doing so it will be better implementing its obligations under the ICCPR and the other human rights treaties, as explained in some detail in the *Yogyakarta Principles*. As paragraph C of Principle 2 concludes, international law requires that "States shall ... adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity".
 17. Liberty Victoria notes that the 2011 ALP National Conference adopted the commitment that internationally "Australia will support the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*." Domestically, the Conference resolved that "Labor recognises that the *Yogyakarta Principles* ... provide a substantial guide to understanding Australia's human rights obligations in relation to LGBTI Australians and their families."
 18. Liberty recommends therefore, in answer to **Question 7** of the *Discussion Paper*, that the *Equality Act* terminology for the new attributes should be based on the *Yogyakarta Principles*.

They explain that in them:

"**Sexual orientation** is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

"**Gender identity** is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms."

19. This understanding of gender identity does not mention intersex people by name, but the statutory definition should do so, as an express inclusion, both for the avoidance of doubt and for transparency.
20. In using these definitions it is vital that the usual extensions are expressly stated: that an attribute includes an assumption (whether or not accurate) that a person has the attribute, that it includes that a person had or is thought to have had the attribute, that a person is associated with a person who has the attribute, or that a person has characteristics associated with the attribute.

In the formulation of the *Equal Opportunity Act* 2010 (Vic), s. 7(2):

Discrimination on the basis of an attribute includes discrimination on the basis—

- (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;

- (b) of a characteristic that a person with that attribute generally has;
 - (c) of a characteristic that is generally imputed to a person with that attribute;
 - (d) that a person is presumed to have that attribute or to have had it at any time.
21. The Victorian Act also includes, as an attribute, in s. 6(q), “personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes”. The *Equality Act* should do likewise.
 22. For the sake of transparency the *Equality Act* should state expressly that “a characteristic” etc includes its negative: discrimination on the basis of a characteristic includes discrimination because a person has, or fails to have, the characteristic.
 23. This explication is particularly necessary in a field where the focus of prejudice is often about a person’s failure to conform to a stereotype in some aspect, that is, not having one of the expected characteristics of, for example, the sex or gender or sexual orientation that the person identifies with.
11. In this respect we respectfully disagree with the Discrimination Law Experts Group, whose submission to the present inquiry recommends the terminology “sexuality” for this attribute.
 12. In 2000 Victorian Government amendments to the Equal Opportunity Act 1995 introduced the term “sexual orientation” to that Act, adopting advice which stated:

In its choice of “sexual orientation” as the primary term the Tasmanian model is preferred over those which use “sexuality.” Consider the dictionary definitions:

The Macquarie Dictionary (1981) defines sexuality as “1. Sexual character; possession of sex. 2. The recognition or emphasising of sexual matters.”

The Oxford Dictionary (2nd edition, 1989) gives “1. The quality of being sexual or having sex. 2. Possession of sexual powers, or capability of sexual feelings. 3. Recognition of or preoccupation with what is sexual; ... 4. Appearance distinctive of sex.”

Notwithstanding the use of the term in other Australian jurisdictions, it is hard to see any value in its use, given that it seems to emphasise sex, while the discrimination suffered by lesbians and gay men mostly relates to the *direction* of a person’s (perceived) emotional or sexual feelings. That is what *sexual orientation* emphasises, which is why it is preferable.
 13. We see no reason to revise that view, and strongly recommend to the Committee that the present Bill’s usage of “sexual orientation” ought to be retained.
 14. If sexual orientation needs to be defined, which we doubt, the definition should be less restrictive than in clause 6, and should be open rather than closed (that is, “includes” rather than “means”). Consistent with international law, as expressed in the *Yogyakarta Principles* referred to in the paragraphs quoted above, the definition should refer to “emotional, affectional or sexual” orientation and should avoid the binary term “opposite sex,” preferring, for example, “another sex.” The use of binary terms, when the whole point of the sexual orientation, gender identity and intersex discussion is that neither sex nor gender are truly binary issues, is completely wrong.
 15. We do not, however, contest the value of including, as the Discrimination Law Experts Group suggest, and indeed the above paragraphs, as well as the *Yogyakarta Principles*, support, the clarification that the attribute includes behavior and identity as well as feelings or attraction.
 16. In our view the principal definitions of “sexuality” in the dictionaries, while not dealing with the principal reason for including the new attribute in the Bill,

namely discrimination related to prejudice against lesbians, gay men and bisexual people, nevertheless refer to matters upon which discrimination should not be permitted, but which are likely to be covered by the general attribute extensions of cl.17(2) and 19(4).

17. In relation to the new attribute of “gender identity,” which Liberty wholly supports in principle, Liberty strongly disagrees with the Exposure Draft’s adoption of the 12 years old and out-of-date Victorian definition, and urges the Committee to follow the reasoning of the National LGBTI Health Alliance, the Victorian Gay and Lesbian Rights Lobby and other submissions, adapting the proposed Tasmanian definition, and (as we recommended in our earlier submission, see above) separating “intersex” out as a separate attribute from “gender identity.”

Religious exemptions

18. Liberty welcomes the Exposure Draft’s protection in cl.33(3)(a) of recipients of Commonwealth-funded aged care services against religious bodies’ discriminatory practices in relation to gender identity, relationship status, sexual orientation and other attributes.
19. We urge the Committee to endorse this provision wholeheartedly.
20. On the other hand, Liberty does not see how aged-care services can be provided in a non-discriminatory way by a workforce subject to unreasonable discrimination on precisely these attributes. The result will be either that LGBTI seniors will be delivered services by a resolutely heterosexual workforce, or more likely by a closeted workforce. While properly trained and empathetic heterosexual persons are perfectly able to deliver LGBTI-sensitive services, the absence of any possibility of open LGBTI workers sends absolutely the wrong message, and reinforces the homophobia that the residents are supposed to be being protected from. Clause 33(3)(b) should be omitted.
21. Liberty also recommends that the admirable protection intended for vulnerable groups by cl.33(3)(a) should be extended to all, and especially to vulnerable, recipients of services funded (wholly or partly) by the Commonwealth.
22. Liberty also welcomes, and urges the Committee to endorse, the Exposure Draft’s cl.47 provision for a review of exceptions in three years. (The review should also be required to consider the need for other attributes.)
23. While Liberty’s earlier submission accepted, for the sake of argument, the Government’s ruling out of any relaxation of the religious exemptions in the Acts being consolidated, it urged that their operation should be made open and transparent.
24. Clarity and transparency would enable the many religious bodies that are not discriminatory to avoid being tarred with the same brush of bigotry that some religious bodies are keen to brandish and to wear.
25. The Committee is referred to paragraphs 37 to 50 of Liberty’s earlier submission for a sketch of how clarity and transparency could be brought in.

Harassment and vilification

26. Liberty welcomes the Exposure Draft's acknowledgment, in cl.19(2)(a), that harassment is one form of the unfavorable treatment that discrimination law proscribes. As we noted before, this has been the case since at least the 1984 decision of the Victorian Supreme Court in *R. v. Equal Opportunity Board and Another; Ex parte Burns and Another* [1985] VR 317, 323 (per Nathan J—3, 4 May 1984). Making it explicit in the Bill assists the public to understand the law on its face. This is a good thing.
27. As various commentators have noted in recent days, however, the import into the following sub-clause 19(2)(b) of the words "other conduct that offends, insults or intimidates" has muddled the waters.
28. Mixing subjective, and potentially trivial, terms like "offends" and "insults" with objective, and serious, words like "intimidates" leads to uncertainty and potential interpretations quite at odds with the intent of the Bill, though probably not actually within the meaning that a Court would give cl.19. This is counter-productive, and in any case seems not to add anything useful to the provision.
29. Liberty recommends that cl.19(2)(b) be omitted, or at least replaced with words of objective harm and sufficient seriousness.

Conclusion

30. The Exposure Draft represents a significant simplification and clarification of the anti-discrimination law of the Commonwealth, together with an important and long overdue extension to sexual orientation and gender identity (and intersex), attributes hitherto barely covered except at the State and Territory level.
31. Liberty Victoria urges the Committee to recommend the improvements noted here and in the submissions mentioned above, and to recommend that the resulting Bill be introduced into parliament as soon as practicable, and enacted in the first half of 2013.
32. Liberty Victoria would be pleased to appear before the Committee to give evidence on this submission or any aspects of the Bill.
33. This submission and the covering letter are not confidential.

Jamie Gardiner
Vice President
21 December 2012