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Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

***Re: Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill
2013***

Introduction

The Australian Christian Lobby (ACL) welcomes this opportunity to comment on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

The bill adds a number of new protected attributes to the *Sex Discrimination Act 1984* (SDA): sexual orientation, gender identity, and intersex status.

ACL believes in the inherent dignity of all humans. All people in a civil society should be given respect regardless of their sexual orientation, gender identity, or intersex status. However, ACL is concerned that this bill will go beyond this and will pose a threat to fundamental freedoms, in particular freedom of religion and freedom of conscience.

As ACL noted in both its submissions to the anti-discrimination consolidation process in the context of religious exemptions for employers, religious organisations do not seek to discriminate by exercising their freedom of religion. Rather they seek to employ staff most able to contribute to the religious ethos of the organisation, or to act consistently with their aims as an organisation and with their beliefs as an individual.

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or beliefs of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

So important is this right that Article 4 of the ICCPR states that is non-derogable even in times of public emergency. It is essential that anti-discrimination law strike the right balance between the right to non-discrimination and freedom of religion, thought, and conscience.

Protection of Individual Rights

While the amendment extends exemptions for religious organisations in most areas, it fails to acknowledge the right of individuals to freedom of religion. The right to freedom of religion in the ICCPR applies “individually or in community with others”. This right is acknowledged in and protected by the Victorian *Equal Opportunities Act 2010*, which states in section 84:

Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

This section acknowledges the rights of individuals to freedom of religion and belief and freedom of conscience, whereas the proposed amendments to the SDA do not. There is a danger that without expressly acknowledging these fundamental individual rights, such rights will be overruled by the right to non-discrimination.

In the UK, a number of cases demonstrate the danger that the right to non-discrimination may overrule an individual’s right to freedom of religion.

Relationship counsellor Gary McFarlane was sacked by his employer when he stated he would not be able to provide sex therapy to same-sex couples. He did not refuse to counsel any couples, but stated that he would struggle to do so if the issue arose. He lost his appeal to the High Court and his case was rejected by the European Court of Human Rights early in 2013.¹

In a related case, marriage registrar Lillian Ladele lost her job after she requested to be excused from performing civil partnerships between same-sex couples. Ladele also lost her case before the European Court of Human Rights, but the two dissenting judges condemned the “blinkered political correctness of the borough of Islington (which clearly favoured “gay rights” over fundamental human rights)”.²

These cases illustrate the dangers to individuals that anti-discrimination laws can have. Exemptions for organisations such as schools are essential, but they are not sufficient to protect the freedoms of individuals. Individuals must have their fundamental human right to freedom of conscience and religion explicitly protected as well.

ACL urges the Committee to acknowledge individual freedoms and expressly protect them in this bill. The Victorian *Equal Opportunity Act 2010* model is appropriate for this purpose.

¹ John Bingham (April 20, 2013), ‘Christians launch landmark human rights case’, *The Telegraph*, <http://www.telegraph.co.uk/news/religion/10007641/Christians-launch-landmark-human-rights-case.html>.

² Mark Hill (January 17, 2013), ‘Lillian Ladele is the real loser in Christian discrimination rulings’, *The Guardian*, <http://www.guardian.co.uk/commentisfree/belief/2013/jan/17/lillian-ladele-loser-christian-discrimination-rulings>.

Religious exemptions for aged care providers

The bill does not address the issue of exemptions for religious organisations who provide aged care services. However, the government has made clear its policy that religious exemptions will not apply to these organisations. The Human Rights and Anti-Discrimination Bill 2012 explicitly stated that exemptions for religious organisations would not apply in the provision of aged care services.³ Attorney-General Mark Dreyfus made clear in a press conference in March that there would be a change to religious exemptions in regards to aged care services.⁴

ACL is concerned about this move for several reasons. As noted above, those exercising their religious freedom do not seek to discriminate but rather to maintain a particular ethos of their organisation. Aged care providers are not generally concerned to question their clients about their sexuality, and ACL is unaware of any organisations which would positively discriminate against individuals based on their sexual orientation. Therefore this initiative seems unnecessary.

When the right to non-discrimination is made absolute, the right to religious freedom becomes secondary. The removal of the right for organisations to exercise their religious freedom in this way sets a concerning precedent for the removal of other exemptions. Once the principle that religious freedom may be subjected to the overriding right to non-discrimination in a particular situation is enshrined in law, it is difficult to argue against an expansion of this to cover all other instances of provision of services or employment of staff.

In the UK, an aged care home founded in 1807 by William Wilberforce had its funding removed by the Bright & Hove Council. The Council demanded that Pilgrim Homes question its residents every three months about their sexual orientation, use images of same-sex couples in its promotional material, publicise homosexual events to its residents, and force its staff to attend a presentation by homosexual lobby group Stonewall. When the home refused to do this its funding was removed, and only after a year of legal action costing £21,000 did the Council back down.

Pilgrim Homes said the demands were intrusive, and many of the residents had come to the home “because of its Christian ethos”.⁵ Pilgrim Homes also said “we have every reason to believe that we have given places to gay Christians, and no questions were ever asked.”⁶

Consistent expansion of existing exemption clauses to cover all new attributes

The exemptions in the bill should be extended to cover *all* the new protected attributes. If any attribute is excluded, should a clash between the rights to non-discrimination and religious freedom arise in relation to this attribute, the former will be considered absolute. This is not consistent with

³ Section 33 of the Human Rights and Anti-Discrimination Bill 2012.

⁴ Attorney-General's Department (20 March, 2013), 'Transcript of press conference – Canberra', <http://www.attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx>.

⁵ Jonathan Petre (28 December, 2008), 'Home for retired missionaries loses grant – because it won't ask residents if they are lesbians', *Daily Mail*, <http://www.dailymail.co.uk/news/article-1102206/Home-retired-missionaries-loses-grant--wont-ask-residents-lesbians.html#ixzz1jnEtcus3>.

⁶ Petre, 'Home for retired missionaries loses grant', *Daily Mail*.

the protection of the fundamental rights of religion as articulated in international human rights instruments.

Although existing exemption clauses are generally expanded to cover the new attributes, there are some concerning omissions:

- Section 30 does not extend exemptions for genuine occupational requirements to cover gender identity or intersex status.
- Section 35 does not extend exemptions in relation to the care of a child in the place where the child resides
- Section 38 does not extend exemptions for intersex status

Section 30 – Genuine Occupational Requirement and Gender Identity

Section 30 exempts discrimination when there is a “genuine occupational requirement” that an employee, commission agent, or contract worker be of a particular sex. This is not being amended to cover “gender identity” or “intersex”. This may result in, for example, an employer being forced to hire a person who is a biological male but who identifies as a female for a position for which it is a genuine occupational requirement that the employee be a woman, for instance, for positions which involve issues of female privacy such as anticipated by subsections (2)(c) through (2)(g) of section 30 of the Act.

Such an oversight surely cannot be the intention of the bill. ACL urges this be remedied.

Section 35 – Residential Care of Children

Section 35 allows discrimination in connection with employees whose duties include care of a child in the place where the child resides. This exemption has not been expanded to cover the new attributes.

By contrast, section 24 of the Victorian *Equal Opportunity Act 2010* has a blanket exemption for any attribute in relation to domestic or personal services, including the care of children. Section 25 also allows discrimination in relation to the “care, instruction or supervision of children” if it is “reasonably necessary to protect the physical, psychological or emotional wellbeing of the children”.

Section 38 – Intersex status and exemptions for religious schools

Section 38 provides exemptions for educational institutions established for religious purposes. The bill will expand this section so that faith-based schools are exempt with regards to the new attributes, except for intersex status. The explanatory memorandum explains that while religious organisations have expressed concern about sexual orientation and gender identity, there have been no such concerns raised about intersex status. This misunderstands the purpose of religious exemptions. There may be no “religious doctrines which require discrimination on the ground of intersex status”,⁷ but the bill must not presuppose a default position of non-discrimination rather than of religious freedom.

⁷ Explanatory Memorandum, p 20.

In Victoria, the equivalent protections in the *Equal Opportunity Act* do cover intersex status to the extent that discrimination on the basis of intersex status is prohibited by the Act's definition of "gender identity".

Section 38 only permits discrimination that is "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed", and only if it is done "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". Thus, the right to non-discrimination will still apply, and only genuine reasons of faith and the practice of faith will resolve any conflict in favour of the right to religious freedom.

For these reasons ACL urges the Committee to extend the existing exemptions consistently for all the new protected attributes.

Conclusion

The right to non-discrimination, while important, must not overrule the fundamental freedoms of religion, conscience, and belief. While the proposed amendments seek to remedy the lack of protection from discrimination on the basis of sexual orientation, gender identity, and intersex status in federal law, they go further than merely providing protection and threaten the religious freedoms of faith-based organisations and individuals.

Recommendations

ACL recommends that:

- Explicit protection of individual rights to freedom of religion, conscience, and belief be provided. Section 84 of the Victorian *Equal Opportunity Act 2010* is a good model.
- That exemptions for faith-based organisations providing aged care services be included in the bill.
- That exemption clauses be extended consistently and for all new clauses, including:
 - Section 30 exemptions for genuine occupational requirements cover gender identity and intersex status
 - Section 35 exemptions in relation to the care of a child in the place where the child resides be extended to cover the new attributes
 - Section 38 exemptions for religious educational institutions be extended to cover intersex status

Yours sincerely,

Lyle Shelton

Chief of Staff