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Ms Julie Dennett
Committee Secretary
Standing Committee on Legal & Constitutional Affairs
The Senate
AUSTRALIAN PARLIAMENT

Dear Ms Dennett

Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

I am responding to your letter of 25 March last inviting a submission in respect of the above Inquiry.

At the outset, I must express my disappointment as a member of the Discrimination Law Experts Group that the Government did not proceed with the Human Rights and Anti-Discrimination Bill 2012. A great deal of very positive and constructive work was carried out on this Bill and I think it regrettable that the misconceived and vociferous attacks on the Bill through particular organs of the media, including the view that it represented a constraint on freedom of speech, were permitted to carry the day.

I am nevertheless pleased to see this amendment to the *Sex Discrimination Act 1984* (SDA), which I endorse, but make the following brief observations.

1. I am somewhat discomfited by the inclusion of an amalgam of mainly socially constructed attributes which is already problematic in the case of the sex/gender distinction. A change of name to the *Gender Discrimination Act* might be a more appropriate umbrella term.

2. The protected attribute should be 'sexuality' not 'sexual orientation' as the former is broader and more inclusive as it includes sexual attraction and behaviour.

3. I am particularly concerned that religious institutions, which receive substantial moneys from the state for the conduct of schools, hospitals and retirement homes, as well as welfare agencies, continue to the privileged above the general law.

It is totally unacceptable that the hierarchisation of attributes will now be even more skewed in anti-discrimination legislation. This is because neither the *Racial Discrimination Act* nor the *Disability Discrimination Act* include the exception in the case of non-core employment, but religious organisations are permitted to discriminate in respect of employment on the ground of sex, pregnancy, marital status and age. The exception in the SDA is most commonly used against women who are pregnant and unmarried. Even women who are known to have sought the services of IVF have been dismissed as teachers by faith-based private schools. The fact that sexual orientation and the other new attributes allow the exception to be expanded underscores the distasteful moralising dimension to the operation of the exception.

While the exception is supposed to conform to the tenets or beliefs of the religious body, lodging a complaint places a heavy burden on a complainant after being refused employment at the outset, dismissed from a position or denied access to a service. Even the HRAD Bill s33(3)(a) made clear that the religious exception did not apply in the case of access to a Commonwealth-funded aged care facility. I recommend that the same provision be included in the SDA Amendment bill

A fair approach overall would be to make the provision of public funds generally conditional on the development by a religious organisation of a non-discriminatory policy. This could be done by regulation or by attaching a condition to the appropriation. No religious body should be privileged above the general law when it embarks upon activities in public life, particularly when those activities are contingent upon the receipt of public moneys.

Yours sincerely

(Prof) Margaret Thornton