

To: Committee Secretary,  
The Senate Standing Committee  
On Legal and Constitutional Affairs,

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Parliament House,  
Canberra, A.C.T. 2600.

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## Inquiry into the Sex Discrimination Amendment (SO, GI & IS) Bill 2013.

We find the Government's objective, as stated in the Regulation Impact Statement (RIS), to prohibit discrimination against people on the basis of their sexual orientation, their marital or relationship status, their gender identity, and whether they are intersex and further, to provide an accessible remedy when such discrimination occurs, is very much to be applauded. However, we are doubtful that this bill will provide a genuine, positive change in the status quo.

The Government's recognition of the existence of intersex, that attracts its own form of discrimination, is a positive step. Also the Government has decided that sexual attraction is much more complex and diverse than between a woman and a man and prefers more inclusive terms for conciliation purposes when it comes to matters of discrimination. It has chosen to run with grounds of *sexual orientation, gender identity and intersex status*.

The Government had already recognised that sexual attraction had produced coupling of two people of the same sex who weren't married but were living together so it decided to create a *de facto* status which would include different sex couples as well as same sex couples living in relationships outside marriage. By so doing, the Government's human services agency, Centrelink, was able to treat them as married couples without the benefits of marriage. We note that this Bill is also meant to amend an existing *marital* ground of protection from discrimination to include those in de facto relationships. So, this Bill changes the ground to *marital or relationship status*, which is another positive step.

There's a problem though which is going to keep the status quo pretty much without any real change.

### ***The Standout Key is missing***

This Bill leaves religious exemptions in place. These 'permanent' exceptions set religious institutions and organisations apart from commerce, industry, government agencies, non-religious schools, colleges, childcare centres, aged care facilities, community services and many more enterprises. This was the opportunity for religious bodies to be required to justify any differential treatment to be fair and reasonable.

If this Bill had included the one singularly progressive change that so distinguished the Human Rights and Anti-Discrimination Bill 2012 –Exposure Draft Legislation (now withdrawn) out of which this bill was extracted, then we could have believed the Government was prepared to *lift the differing levels of protections to the highest current standard to resolve gaps and inconsistencies*. (Government Media Release, 20.11.2012).

In relation to these new grounds, the Government did not include in this Bill the lifting of the religious exemption from aged care which was the key change in the shelved 2012 Bill: "whereby Commonwealth funded aged care providers will no longer be permitted to discriminate on the grounds of sexual orientation and gender. This change is consistent with the introduction of protection against sexual orientation and gender identity discrimination and in recognition that aged care services become a person's home." (Attorney-General Nicola Roxon & Senator Penny Wong Joint Media Release, 20.11.2012.)

The lifting of that religious exemption and the manner in which it was done was no small change because we understand that approximately 60 per cent of residential aged care facilities are run by religious organisations. (Star Observer 10.11.2011: Barbary Clarke, VGLRL's Policy Working Group.) If that important change had been found in this Bill, we would have been able to believe that the Government was in earnest about recognising the vulnerability of elderly LGBTI people who have lived mostly as exiles in hiding with a same-sex partner for much of their 70 or more years and should not have to put up with more discrimination in their old age by religious care groups receiving Commonwealth funding. It's time taxpayers were made aware of the size of that funding.

With no mention in this Bill of that important key change regarding aged care and Commonwealth funding, we are concerned that it will have been deleted from the Human Rights and Anti-Discrimination Exposure Draft Legislation Bill when and if it is re-presented to Parliament by the Attorney-General.

These new grounds for protection to be added to the SDA could have made history by bringing with them a proviso of the lifting of the religious exemption in relation to Commonwealth funding and aged care providers. It could have been extended also to cover young LGBTI people for instance who are known to be vulnerable to depression, bullying and suicide. Students in religious schools, too, can be expelled if found to be lesbian or gay, as can teachers and employees in religious workplaces when 'outed' by colleagues and by other means. It's no big deal this relaxing of the religious exemptions because earlier this month (April 2013) a Melbourne radio news broadcast announced that the major religious aged care providers --Anglicare Victoria, Uniting Care and Catholic Health-- had said they "do not discriminate against LGBTI people either in employment or in service delivery, and think the exemptions should go."

### ***Major disappointment***

It seems Attorney-General Dreyfus is unaware of the above public statement by the three major religious aged care providers that they do not discriminate in employment or service delivery and think the religious exemptions should go.

In his statement of compatibility with human rights in the Explanatory Memorandum, he said that the Bill "will extend the exemption at section 38 of the Sex Discrimination Act (SDA), so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity."

However, in relation to intersex he goes on to say "the Bill will not extend the exemption to cover the new ground of *intersex status*. During consultation, religious bodies raised doctrinal concerns about sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status.' As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief."

It seems to us that two people both of intersex status could fall in love with one another and physically form a same-sex relationship. Therefore, that's sufficient reason to declare the religious concerns about sexual orientation and gender identity, despite being doctrinal, to not be valid in the modern world and therefore must be accepted on the same basis of intersex status as not limiting the right to freedom of thought, conscience and religion or belief.

### ***Injuries, susceptibilities and other concerns***

Doesn't that decision about 'intersex status' raise a genuine query about it being such a modern comprehension to be beyond the present understanding of the ancient, faith based beliefs of adherents as their leaders have yet to work out how to give it doctrinal invalidity? Therefore, how will the Attorney-General react to a demand that the religious exemption be invoked when they come back at a later time, as they surely will, to show cause of an injury to the susceptibilities of adherents by the intersex status?

How is it because religious bodies raised doctrinal concerns about *sexual orientation* and *gender identity* that was sufficient excuse for any person exhibiting those characteristics to be refused employment, for a student to be expelled from a religiously run educational institution? On the other hand, someone of *intersex status* had the inalienable right to work or study if they wished at the same religious institution because there had been no similar concerns raised by religious bodies.

It may well be time for this Inquiry to query how prohibiting discrimination of sexual orientation or gender identity limits the right to freedom of thought, conscience and religion or belief and a person's ability to perform their job of work. Injury to susceptibilities could also be said to apply to those who hold different concepts of life and their origins and could claim to be injured by those of faith-based adherents.

### ***The anomaly with Commonwealth funding***

This Bill quite obviously is informing the lesbian, gay, bi, and transgender citizens of Australia that they are going to have to continue living with the threat of discrimination from religious organisations. Aren't they and the rest of the taxpayers of the Commonwealth entitled to know the full extent of the deal their governments, Labor or Liberal Coalition, intend to continue with the purveyors of religion in this country?

We think Australians would be astounded if they knew the extent of the amount of money the federal government alone gives in funding to religions. However, it is only the icing on the cake. Religious institutions pay no tax on their income and profits like commerce and industry. Their hierarchies are not required to submit their income for assessment like the rest of us. Mostly, religious properties don't pay rates either. Of course, the public sees them as charities and of course they do deliver many social services and that's where the government funding assists them. Here's an interesting piece of information which appeared on the front page of the Melbourne Age Newspaper as recently as Friday, 19.04.2013. "*Prime Minister Julia Gillard has promised Catholic schools they will retain their share of total public funding after the sector raised fears that the money it had been allocated for the next six years was \$1billion short.*" In the article inside the paper on page 4, the PM explained that the \$1.4 billion was 9.6 per cent of the total \$14.5 billion of extra school funding promised

under federal reforms. Remember that the Catholic faith is only one of a large number of religions conducting their own schools in this country; add the very many other organisations they all run and for which they receive funding from the Commonwealth plus their tax exemption status. It's obvious that a government that prides itself on being a model to the rest of the world for democracy must remove religious exemptions to discrimination law to support its claim. (Otherwise why are we in Afghanistan?)

There's the anomaly, the huge funding the religious institutions receive and yet they can demand and receive from our governments freedom to ignore the law that applies to everyone else and to continue to discriminate with impunity. This Inquiry needs to recognise the unfairness of the situation and be prepared to point out to the Government that if the religious institutions accept Commonwealth funding their exemption status should be withdrawn completely on the protected grounds of sexual orientation and gender identity.

### ***Recommendations***

1. Because the Government has accepted that sexual attraction is much more complex and diverse than simply between a woman and a man, it should withdraw the religious exemption in relation to all these new grounds covered in the Bill;

The government in recognising the vulnerability of lesbian, gay, bi, transgender and intersex people, should set up a position of Commissioner to oversee the operation of the anti-discrimination grounds in relation to sexual orientation, gender diversity and intersex status and to have the power to conciliate and refer complaints for legal decision when necessary. Such a Commissioner, distinct from the existing sex commissioner and from the race commissioner, would support the federal government's new landmark funding for Australia's five volunteer-based LGBTI telephone counseling service