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26 April 2013

**Liberty Victoria Submission to the
Senate Legal and Constitutional Affairs Committee Inquiry
into the
*Sex Discrimination Amendment (Sexual Orientation,
Gender Identity and Intersex Status) Bill 2013***

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This is a public submission and not confidential.

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1. Introduction

- 1.1 Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.
- 1.2 Liberty Victoria welcomes the opportunity to contribute to this inquiry. In doing so we refer the Committee to our submission to the inquiry into the *Human Rights and Anti-Discrimination Bill 2013 (Exposure Draft)* ("the HRAD Bill") and reiterate what we said there, in so far as it may be applicable to the present Bill.
- 1.3 Liberty welcomes the present Bill because it seeks to implement a very important feature of the HRAD Bill, namely the extending of federal anti-discrimination protection on the basis of sexual orientation, gender identity and intersex status, while deeply regretting the delay to the HRAD Bill itself announced by the Attorney on 20 March 2013.
- 1.4 **We urge the Committee to recommend that the Bill be enacted without delay, with the minimal amendments discussed below.**

2. Aged Care

- 2.1 Liberty Victoria is particularly disturbed by the failure of the present Bill to include the protection of persons needing Commonwealth-funded aged care services from discrimination by service providers, including by religious bodies.
- 2.2 This provision was an important innovation, particularly relevant to elderly LGBTI persons. They have lived most of their lives suffering legal and social discrimination, and at a time of increasing vulnerability it is unconscionable that they should once again be subjected to discriminatory treatment, and the pervasive fear of discriminatory treatment, even in their own homes, in effect.
- 2.3 With much of the aged care services funded by the Commonwealth being provided by religious bodies, and with little choice in many areas, LGBTI seniors may feel pressured into retreating into the closet for fear of being ill-treated by such service providers.

- 2.4 Case studies of such treatment and its effects are given by Corey Irlam in his submission, number 540, to the Committee's HRAD Bill inquiry. Liberty refers the Committee to those case studies, and will not repeat them, given the Committee already has them.
- 2.5 Aged care and related services are provided to elderly people in their homes, or indeed become their homes, towards the end of life. The fear and reality of discrimination in such circumstance must be avoided by making such discrimination unlawful, whoever does it.
- 2.6 Liberty is pleased to note that major religious providers of aged care, such as Catholic Health Australia, AngliCare Australia and UnitingCare Australia, are already publicly committed to not discriminating against LGBTI seniors in their services and facilities.
- 2.7 UnitingCare, for example, described the HRAD Bill proposal as follows:¹

UnitingCare Australia

National Director UnitingCare Australia, Lin Hatfield Dodds said UnitingCare Australia and the UnitingCare National Network on Ageing support action to further protect people in the Australian community from discrimination.

Ms Hatfield Dodds said the Australian Government's Draft Exposure Bill on Human Rights will should simplify and strengthen existing legislation to further protect, among others, people who identify as gay, lesbian, bisexual, transgender or intersex.

"The draft Bill consolidates Commonwealth laws covering discrimination on the basis of race, sex, disability and age. It adds new protections from discrimination on the basis of sexual orientation and gender identity. It also strengthens protections against workplace discrimination on the basis of other attributes, including religion and political opinion.

"These are very welcome developments. We deliver aged care services to people regardless of their age, gender, sexuality, ability, class, race, creed or cultural origin.

"Our position is informed by the Uniting Church's belief that every person is entitled to live with dignity, and we support efforts that further protect these rights."

- 2.8 In *Eureka Street*, 18 February 2013, law professor Fr Frank Brennan SJ writes:²

Catholic Health Australia (CHA) has made it clear that Catholic health providers pride themselves on non-discrimination on the grounds of sexual orientation and gender, in both employment and service delivery.

...[When] I visited Gorman House at St Vincent's in Darlinghurst, a live-in facility for alcohol and drug dependent persons[t]he manager showed us some new single rooms with the observation: 'At last we are able to accord transgender people the dignity and respect they deserve.' That sentence summed up for me the tenor of health care informed by gospel values — without intervention by the nanny state.

CHA has recommended to its constituent members seeking any written policy on these matters:

Catholic hospitals and aged care services do not discriminate in who they employ, provide care to, or accommodate as residents within their facilities. People who identify as lesbian,

¹ <http://www.seniorau.com.au/index.php/more-seniorau-news/3287-changes-to-anti-discrimination-laws> (viewed 24 April 2013)

² <http://www.eurekastreet.com.au/article.aspx?aeid=35014> (viewed 24 April 2013)

gay, bisexual, transgender, or people of indeterminate gender will be cared for within Catholic hospitals and aged care services with respect, compassion, and sensitivity.

2.9 Similarly, in a comment welcoming the HRAD Bill, Anglicare states:³

The Anglicare Australia network seeks to engage with ALL Australians to build communities of resilience, hope and justice. Our members provide services right across Australia, and do not discriminate on the basis of culture, religion, sexuality or gender.

2.10 We note that these religious bodies would also not discriminate in the employment of people whom they engage to provide these aged-care services, as the CHA expressly states in the remarks quoted above. Given the nature of homophobia and other modes of sexual prejudice affecting LGBTI people it is impossible, in Liberty Victoria's view, to deliver services in a non-discriminatory manner with a workforce selected in a discriminatory manner and subject to ongoing discrimination. We would not, therefore, support any version of the HRAD Bill's clause 33(3)(b), which is, without question, an oxymoronic nonsense.

2.11 The Committee can be confident that in urging the Government to amend the present Bill to include the extra protection against discrimination in Commonwealth-funded aged care set out in the HRAD Bill it is not doing anything to threaten religious freedom. Rather it is endorsing and confirming best practice exhibited by the major religious bodies that already provide such services without discrimination.

2.12 Liberty Victoria further notes that the full protection of elderly people receiving Commonwealth-funded aged care and aged care services from discrimination in the provision of those services was stated by the Attorney-General on 20 March 2013 to be, and remain, Government policy. Unlike many of the improvements that Liberty would wish the Committee to recommend,⁴ therefore, the reassertion in the *Sex Discrimination Act 1984* of the limitation of the religious exemption proposed in the HRAD Bill in relation to Commonwealth-funded aged care and aged-care services will actually give effect to existing Government policy.

2.13 Liberty urges the Committee to recommend that the present Bill be amended to implement that reassertion.

2.14 To be precise, and incorporating paragraph 2.10 above, Liberty Victoria urges the committee to recommend the amendment of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* by

2.14.1 inserting a definition such as in section 6 of the HRAD Bill, namely

Commonwealth-funded aged care means:

(a) aged care, within the meaning of the *Aged Care Act 1997*:

(i) that is provided by an approved provider, within the meaning of that Act; and

(ii) in relation to which the approved provider has responsibilities under that

³ http://www.anglicare.asn.au/site/latest_news.php?task=detail&id=43 (viewed 24 April 2013)

⁴ Liberty's submission to the HRAD Bill Inquiry continues to apply, *mutatis mutandis*, to the present inquiry, and need not be repeated at length.

Act; or

(b) care or services in relation to which a grant has been paid under Chapter 5 of the *Aged Care Act 1997*; or

(c) care or services of a class prescribed by the regulations for the purpose of this paragraph.

2.14.2 and inserting in Part 1 of Schedule 1 of the Bill, after item 49, an item to amend subsection 37(d) by omitting the expression “that religion.” and substituting the expression “that religion, but not including any act or practice connected with the provision of Commonwealth-funded aged care.”

2.15 Liberty Victoria urges the Committee to recommend the prompt passage into law of the Bill, amended as recommended in the preceding paragraph.

3. Other matters

3.1 In recommending a minimal amendment of the Bill, and its urgent passage into law, Liberty does not resile from the recommendations made in its submission on the HRAD Bill. Liberty is particularly disturbed that its recommendation that religious exemptions, to the extent they are not abolished, should at least be made open and transparent has been disregarded in the present Bill, where it could surely have been accommodated without breaching existing policy or upsetting religious sensitivities.

3.2 Liberty accepts, however, that sometimes the perfect is the enemy of the good, and looks forward both to the amendment of the *Sex Discrimination Act 1984* to protect against discrimination on the basis of sexual orientation, gender identity and intersex status, and also to the further work promised by the Attorney to review and respond to the Committee’s recommendations on the HRAD Bill and to introduce a more complete and effective bill in coming months.

3.3 It is 40 years since the Commonwealth, in implementing the International Labor Organization’s *Convention on Discrimination in Employment and Occupation* (ILO Convention 111), acknowledged that discrimination on the basis of homosexuality is wrong. Under the later (but unsatisfactory) rubric of “sexual preference” this acknowledgment was placed into the HREOC Regulations. With the passage of the present Bill its long overdue acknowledgment, under the far preferable terminology of “sexual orientation”, together with gender identity and intersex status separately spelt out, will finally have full status in law.

3.4 This is indeed something to celebrate. It is long overdue.

3.5 If the Committee’s report assists that worthy outcome to eventuate in coming weeks, its members can feel justly proud.