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Senate Legal and Constitutional Affairs Committee,
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Submission to the Inquiry:-
Exposure Draft of Human Rights and Anti-Discrimination Bill 2012.

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Introduction

The Explanatory Notes in the overview on Division 2: Meaning of discrimination (P.26) Clause 19 –When a person discriminates against another person, point 107 states: for avoidance of doubt, subclause 19(2) provides that unfavourable treatment includes harassment, and other conduct offends, humiliates, insults or intimidates the other person. This conduct imposes a detriment on a person because of his or her attribute and would therefore be discrimination under subclause 19(1). The harassment itself does not need to relate to the protected attribute. It is sufficient that the offensive conduct is targeted at the person because of their attribute.

In the Analysis (P.28), point 114 says that the new definition of discrimination in clause 19 is not intended to change the underlying policy that was expressed in previous Commonwealth anti-discrimination legislation. We think it does change the underlying policy because by introducing *offends or insults* a new dimension is added which allows a broadening of what constitutes *harassment* particularly in relation to the sentence in the previous paragraph: 'The harassment itself does not need to relate to the protected attribute.' Even this Analysis does a bit of broadening by adding *humiliates* which isn't in the draft Bill. Subclause 19(2) also includes *intimidates* which we find certainly defines harassment and therefore should remain.

Submission Comments

Division 2 –Meaning of discrimination: Section 19: Discrimination by *unfavourable treatment:* subclause2: To avoid doubt, *unfavourable* treatment of the other person includes (but is not limited to) the following: (a) harassing the other person; (b) other conduct that *offends, insults* or intimidates the other person.

≡ We find the words *unfavourable treatment* as *harassing* the other person in Section19 subclause 2a as less than sufficient to cover its most ugly form which is bullying. We therefore strongly recommend that subclause 2a should be revised to read: *harassing and/or bullying* the other person. By actually including the word bullying in the text as unlawful will draw attention to that form of harassment and allow teachers to use it as a tool to help reduce student bullying in schools, on the internet and on mobile-phones.

≡ We contend that 'offends' and 'insults' are too broad in application and should be deleted from Section 19 subclause 2b. Supportive arguments for this action are to follow.

An editorial in The Age, Thursday 13 Dec.2012, states that the bill could change the operation and scope of anti-discrimination laws so substantially that free speech suffers and "offensive" publications are liable to be banned. The Age believes it should not be unlawful to offend or insult and quotes Michael Pearce SC of Liberty Victoria as saying: "Hurt and offence are caused by all sorts of speech all the time." However, the bill extends this provision to all anti-discrimination law. Further, The Age comments on the Attorney-General's point that defence of justification, meaning conduct is lawful when "done for legitimate aim and proportionate to that aim" by saying: Australians should not have to meet such tests of legitimate expression and proportionality. Anyone who says or writes something intemperate –just about everyone—is liable to cause insult or offence.

We totally agree with The Age editorial writer in this instance. From our point of view we recognise that when same-sex and gender diverse people say publicly or write in letters or in their community magazines that particular religious fundamentalists are bigots or dispute the authenticity of religious beliefs, they are likely to and probably intend to insult and cause offence. As it stands, this bill is likely to allow whoever it is said of or written about to bring a lawful complaint of defamation.
On the other hand, if someone of high office states publicly that gay marriage is against human nature (Pope Benedict XV1, 16.12.2012 (Vatican) in his message for World Peace Day) or at a proposed picket (19.12.2012) outside the Sandy Hook Elementary School (US) where a shooter killed 20 children and 6 adults, Westboro Baptists are claiming "it's God's way of punishing the State of Connecticut for legalising same-sex marriage." Same-sex and gender diverse people who are insulted and offended would lose their right to complain or seek lawful withdrawal because of the religious protected attribute of those who made the statement. The same protection exists in the US as here in Australia. Of course, these religious examples are extreme but nevertheless they illustrate our point.

As further support, we quote from The Age, Tuesday 11 Dec.2012, from the very personal article by Michael Leunig in which he says that "as a cartoonist I am not interested in defending the dominant, the powerful, the well-resourced and the well-armed because such groups are usually not in need of advocacy, moral support or sympathetic understanding; they have already organised sufficient publicity for themselves and prosecute their points of view with great efficiency. The work of the artist is to express what is repressed … to give balance, particularly in situations of disproportionate power relationships such as we see in the Israeli-Palestinian conflict … My cartoons have also had me labeled a misogynist, a blasphemer, a homophobe, a royalist, a misanthrope and a traitor, to name but a few. I would sum it all up by saying: I am a cartoonist."

≡ So, how are cartoonists, who provide plenty of hurt egos, offence, insult, anger and humiliation as well as humour, to fare under the current unfavourable treatment Section 19 subclause 2b? It would seem that they will lose their political punch completely unless the Government recognises the need to revise this clause.

Is the bill restoring the balance?

Where religious institutions and organisations are concerned, this bill shows little change or difference from previous anti-discrimination law. It as usual gives religious institutions a broad licence to discriminate against those who don't share their faith-based beliefs or religious sexual morality. Their permanently protected attribute is extended to an incredible

number of individuals and organisations. It is not just anti-discriminatory laws either. Their largest discriminatory gift from the Australian Government, *Tax Exempt Status,* separates them from all Australian businesses and companies as well as all individual workers who pay income tax which exempts most of their priests, rabbis and pastors of their churches, mosques, synagogues or places of worship. Surely that tax exempt status is discriminatory on a colossal scale and may be seen to benefit adherents of a faith but discriminates financially against unbelievers and all business houses. So, no, this bill DOES NOT restore the balance and in addition affects same-sex and gender diverse people especially.

However, there is one grudgingly provided change for aged care. Commonwealth funded aged care providers of the three primary types of care (nursing homes and aged care facilities etc), of whom there are around 60 percent that are run by religious organisations (LGBTI Roundtable Sydney 18.10.11) throughout Australia, that will no longer be permitted to discriminate on the grounds of sexual orientation and gender identity if this change is passed into law. According to a media release from the Attorney-General, this change includes protection against sexual orientation and gender identity discrimination by aged care services provided in a person's home.
Here's what we mean by grudgingly provided. Why isn't the protected attribute extended to aged citizens not requiring aged care such as those renting accommodation or in hostels or boarding houses? In fact, why are there still religious exemptions against conforming to all those 80-plus federal laws that discriminated against same-sex couples which were equalised in December 2008 by the then Attorney-General and provided those Australians in same-sex relation ships with the status of *de facto.* This change to the Social Security Act authorised Australia's most powerful bureaucratic body to order pensioners in same-sex relationships to reveal their relationship to Centrelink and its database by July 1st 2009 including the name of their partner because her/his income was going to affect their pension rate. Apart from being forced out of the closet –an invasion of privacy—there was no *grandfather clause* to lighten the blow of their reduced interdependency rate of a wedded or unmarried defacto couple or face Centrelink's
invasive investigations on suspicion that you may be in such a relationship.

It must be fear of religious backlash which prevents governments from reducing faith based influence on the democratic system. Governments really don't know what the extent of that influence might be on the voting public. However, with here in Victoria the media telling us on a regular basis of huge reductions in church congregations and church buildings being sold at auction, it is rather difficult to see how maintaining religious exceptions reflects contemporary Australian values.
However, the Jesuit maxim: g*ive us a child until he is seven and we will show you the man,* although misogynous, seems to be behind the thinking of most politicians that it matters little that church attendance is falling because as the ABC news reported (20.12.2012), Catholic Education has announced the church plans to build 10 new catholic schools outside Melbourne. The expansion is supported by the Victorian state government and the federal government's support is also expected.
So, it's not surprising that neither major political party is prepared to take a chance on substantially reducing the exceptions. The fact that this current Prime Minister appears to be quite unsupportive together with some of her ministers in her attitude to lgbti lifestyles means that to have got even this grudging aged care reduction in religious exemption must have meant a lot of hard bargaining in caucus. Nevertheless, that doesn't mean that we should kowtow and refrain from further activity for greater acceptance. As Anna Brown of Victoria's Gay & Lesbian Rights Lobby has said: "Most ordinary Australians would be

appalled if they knew the extent to which our human rights framework privileges freedom of religion over and above our fundamental right to be free from discrimination." We dare the present government to come clean and tell the public exactly the extent of its *gifts* –all of them including the tax-free status—to the faith based religious lobby.

Aged Care, Religion and the Bill

Section 33: Exceptions for religious bodies and educational institutions;
Protected attributes to which these exceptions apply.
Subsection 1: The exceptions in this section apply in relation to the following protected attributes: (a) gender identity; (b) marital or relationship status; (c) potential pregnancy; (d) pregnancy; (e) religion; (f) sexual orientation.

Exception for conduct of body established for religious purposes.

Subsection 2: Subject to subsection (3), it is not unlawful for a person (the *first person)* to discriminate against another person if:- (a) the first person is a body established for religious purposes, or an officer, employee or agent for such a body; and (b) the discrimination consists of conduct, engaged in good faith, that (i) conforms to the doctrines, tenets or beliefs of that religion; or (ii) is necessary to avoid injury to the religious sensitivities of adherents of that religion; and (c) the discrimination is on the ground of a protected attribute to which this exception applies, or a combination of 2 or more protected attributes to which this exception applies.

Subsection (3): The exception in subsection (2) does not apply if:- (a) the discrimination is connected with the provision, by the first person, **of Commonwealth-funded aged care;** and (b) the discrimination is not connected with the employment of persons to provide that aged care.

Comment

≡We find Section 33 (2) a grudgingly small concession but pleased some same-sex and gender diverse aged people will benefit. Nevertheless, the fact that many others who aren't in aged care but are age pensioners or on very small retirement allowances live in rented accommodation, hostels and boarding houses need the same anti-discriminatory protection. This bill should include them and we urge the federal government to include them.
≡We still think that discrimination in age care for LGBTI will continue to occur because homophobia is entrenched in some faith based religions despite this concession. We would like the government to consider something like 'three strikes and you're out' kind of penalty for those religious aged care facilities that are found to continue instances of blatant discrimination. Reduce the amount of funding for each offence. That would show them that they may not flout an anti-discrimination law. Better still, too many offences and their tax-free benefit could be withdrawn.

≡We find that the care this bill takes to spell out the need for citizens to refrain in any way to offend the doctrines, tenets or beliefs and to avoid injury to the religious sensitivities of adherents of any religion, yet is not prepared to make it mandatory for educational institutions which provide courses in aged care nursing, training and education that their courses contain an explicit LGBTI culturally and gender diverse unit so that their students will understand there are other sensitivities, beliefs and rights to be treated with equal respect

that aren’t faith based religious. If subsection 3b is to allow discrimination to continue where employment of aged care staff for a religious institution or organisation is concerned, there needs to be some directive in this bill to educational institutions for training in aged care courses that a mandatory same-sex and gender diverse unit has to be included.

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