Senate Committee on Legal and Constitutional Affairs Inquiry into Sex Discrimination Amendment Bill (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth)

To: Law Council of Australia

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Introduction

Who We Are

The Law Institute of Victoria (LIV) is the peak body for the Victorian legal profession. The LIV represents over 17,000 members. Through its Workplace Relations Section, the LIV currently represents 1,703 members. Through its Administrative Law and Human Rights Section, the LIV currently represents 2,413 members. This submission is based on the experiences of the above members.

What We Do

The LIV actively seeks to advocate justice for all and influence the development and implementation of policy and legislative reform through various submissions to State and Federal Government Ministers and Shadow Ministers, State and Federal Government Parliamentarians, Commonwealth Public Servants, regulatory bodies, statutory bodies, policy advisors and State and Federal agencies.

Anti-discrimination legislation was first introduced in Victoria in 1977. The LIV has an extensive history of contributing to shaping and developing effective legislation at both Federal and State level. We welcome the opportunity to provide comments to the Law Council of Australia on the Senate Standing Committee of Legal and Constitutional Affairs Inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth).

Background

This submission responds to a memorandum of 21 March 2013 from the Law Council to the Constituent Bodies (Law Council Memorandum) requesting comments on the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) (‘the Bill’). As described in the Explanatory Memorandum, the Bill amends the *Sex Discrimination Act 1984* (Cth) (‘SDA’) to insert measures to extend the protection from discrimination to the new grounds of:

1. Sexual orientation;
2. Gender identity;
3. Intersex status.
The key recommendations to the Bill include the following:

- Insert definitions for ‘sexual orientation’, ‘gender identity’ and ‘intersex status’, replace the definition of ‘marital status’ with ‘marital or relationship status’ and make related changes to the other definitions;
- Provide that discrimination on these grounds is unlawful in the same circumstances as for other grounds already covered by the Act;
- Amend existing exemptions as appropriate to include the new grounds, and introduce three new exemptions, for conduct in compliance with the Marriage Act 1961 (Cth), for conduct in compliance with prescribed Commonwealth, State or Territory laws, and for requests for information and keeping of records in relation to sex and/or gender, and
- Extend the functions of the Australian Human Rights Commission to include the new grounds.

A more detailed summary of the Bill based on the Explanatory Memorandum is contained in Annex 1.

The LIV welcomes the Bill. The LIV endorses the Law Council of Australia’s strong support for the protection against discrimination on the grounds of sexual orientation, gender identity and intersex status.

**Previous Submissions**

The LIV has undertaken extensive past advocacy relating to Victorian and Commonwealth anti-discrimination laws, highlighted below in our previous submissions. They are summarised in Annex 2.

**LIV Comments on the Bill**

Overall, the LIV:

- Supports the introduction of protections for lesbian, gay, bisexual, transgender, inter-sex (LGBTI) people through the Bill;
- Is concerned over the retention of the religious exceptions in the current form;
• Encourages the Government to continue with the Consolidation Project in relation to Commonwealth anti-discrimination laws as a priority before the Federal election.

The LIV’s comments on the proposed position of the Law Council are set out in bold below. Paragraph numbers are those used in the Law Council Memorandum, paragraph 10.

The Law Council proposes to:¹

a) Express strong support for the objects of the Bill and the need to take immediate legislative action to address the current gaps in protection against discrimination on the basis of sexual orientation, gender identity and intersex status at the Commonwealth level - the LIV endorses the support of the Law Council of Australia;

b) Support the elements of the Bill that give effect to past recommendations made by the Senate Committee, including recommendations made following its inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill (the HRAD Bill) and its 2008 inquiry into the effectiveness of the SDA - the LIV endorses the support of the Law Council of Australia;

c) Support the definitions of key terms such as ‘sexual orientation’, ‘gender identity’, ‘intersex status’ and ‘relationship status’ which are based on the definitions used in the Tasmanian Anti-discrimination Amendment Bill 2012 – the LIV endorses the support of the Law Council of Australia;

d) Support the extension of the protections against both direct and indirect discrimination to the new attributes of sexual orientation, gender identity and intersex status - the LIV endorses the support of the Law Council of Australia;

e) Address the approach taken to exceptions in relation to intersex status, which does not extend the existing religious organisation based exceptions in the SDA to discrimination on the basis of this attribute – the LIV confirms that it continues to have concerns about blanket exceptions for religious bodies and educational institutions that allow them to discriminate in their non-religious day to day activities (as opposed to in the ordination and training of priests and ministers of religion) on particular grounds. The balancing of freedom of religion with other important human rights, such as the right to equality and to be free from discrimination, requires thoughtful consideration. As we

¹ Law Council Memorandum to the Constituent Bodies, 21 March 2013. Paragraph numbers refer to those in the memorandum.
do not support a blanket exception on any ground, we support section 38 of the SDA not being extended to intersex status;

f) Raise concerns with some aspects of three new exceptions that will be applied with respect to discrimination in respect of the attributes of sexual orientation, gender identity and intersex status. These new exceptions would:

i. Permit discriminatory treatment by a person if this occurs in direct compliance with the Marriage Act 1961;

ii. Permit discriminatory treatment by a person if this occurs in direct compliance with a law of the Commonwealth, State or Territory that is prescribed in the regulations;

iii. Provide an exception relating to requests for information and keeping of records, that is designed to ensure that organisations do not have to make significant changes to their record keeping procedures in order to provide for a person to be identified as neither male or female. It is noted that the Government is also currently conducting a consultation in respect of draft Guidelines on the Recognition of Sex and Gender, which may also be relevant to this exception - the LIV endorses the approach of the Law Council of Australia

g) Urge the Senate Committee to recommend that the Government consider implementing other recommendations previously made by the Senate Committee as part of its 2008 inquiry into the effectiveness of the SDA, which included, for example, amending the test for discrimination in the SDA by removing the ‘comparator test’ and replacing this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the Discrimination Act 1991 (ACT) - the LIV endorses the approach of the Law Council of Australia; and

h) Express strong support for the consolidation of Commonwealth antidiscrimination laws and urge the Senate Committee to recommend that the Government introduce legislation based on an improved version of the HRAD as a matter of priority - the LIV endorses the approach of the Law Council of Australia.

**Conclusion**

The LIV is grateful for the opportunity to provide comment and we would appreciate the opportunity for further input as required.
Annex 1 – Summary of the Bill

Schedule 1 Part 1 of the Bill – Amendment to the Sex Discrimination Act 1984 (Cth)

The key effects of Part 1 of Schedule 1 to the Bill will be to:

- Amend the long title, preamble and objects of the Act to reflect the introduction of sexual orientation, gender identity and intersex status as separate grounds of discrimination, and the extension of the ground ‘marital status’ to ‘marital or relationship status’ to provide protection from discrimination for same-sex de facto couples;
- Repeal the definition of ‘de facto spouse’ in subsection 4(1) and replace it with the definition of ‘de facto partner’ used in subsection 4A(2);
- Repeal the definition of ‘de facto partner’ from subsection 4A(2);
- Insert a definition of ‘gender identity’, which is introduced in this Bill as a protected attribute at the Commonwealth level;
- Insert a definition of ‘intersex status’, which is introduced in this Bill as a protected attribute at the Commonwealth level;
- Repeal the definitions of ‘man’ and ‘woman’ from subsection 4(1);
- Repeal the existing definition of ‘marital status’ from subsection 4(1) and replace it with a definition of ‘marital or relationship status’;
- Replace the term ‘de facto spouse’ with ‘de facto partner’ in the definition of ‘near relative’;
- Insert a definition of ‘sexual orientation’, which is introduced in this Bill as a protected attribute at the Commonwealth level;
- Insert a definition of ‘surviving spouse or de facto partner’, for the purposes of the definition of ‘marital or relationship status’;
- Replace the reference to ‘the opposite sex’ in subsection 5(1) with ‘a different sex’;
- Insert three new definitions of discrimination, in relation to sexual orientation (section 5A), gender identity (section 5B) and intersex status (section 5C). Each of these definitions apply to both direct discrimination (eg subsection 5A(1)) and indirect discrimination (eg subsection 5A(2));
- Amend the definition of discrimination on the ground of marital status in section 6 to replace references to ‘marital status’ with ‘marital or relationship status’;

2 This summary is based on the Explanatory Memorandum that accompanied the Bill, see http://www.comlaw.gov.au/Details/C2013B00082/Explanatory%20Memorandum/Text
• Amend subsection 7B(1) as a consequence of the insertion of new grounds of indirect discrimination in relation to sexual orientation (section 5A), gender identity (section 5B) and intersex status (section 5B) by item 17. This amendment to subsection 7B(1) will ensure that indirect discrimination on the ground of sexual orientation, gender identity or intersex status cannot arise where the condition, requirement or practice complained of is reasonable in the circumstances;

• Amend provisions of Division 1 of Part II of the SDA to prohibit discrimination on the grounds of sexual orientation, gender identity, intersex status and marital or relationship status in the following areas of work:
  ➢ Employment and superannuation (section 14 of the SDA, item 27 of the Bill)
  ➢ Commission agents (section 15 of the SDA, item 29 of the Bill)
  ➢ Contract workers (section 16 of the SDA, item 30 of the Bill)
  ➢ Partnerships (section 17 of the SDA, item 31 of the Bill)
  ➢ Qualifying bodies (section 18 of the SDA, item 32 of the Bill)
  ➢ Registered organisations under the *Fair Work (Registered Organisations) Act 2009* (section 19 of the SDA, item 33 of the Bill), and
  ➢ Employment agencies (section 20 of the SDA, item 34 of the Bill).

• Amend subsection 14(4) to insert ‘sexual orientation’ and replace ‘marital status’ with ‘marital or relationship status’. This is to ensure that there is no discrimination between same-sex de facto couples and opposite-sex de facto couples in relation to the payment of a superannuation benefit, which is consistent with the Commonwealth same-sex reforms in 2008;

• Amend provisions of Division 2 of Part II of the SDA to prohibit discrimination on the ground of sexual orientation, gender identity, intersex status and marital or relationship status in the following areas of public life:
  ➢ Education (section 21 of the SDA, item 35 of the Bill)
  ➢ Goods, services and facilities (section 22 of the SDA, item 37 of the Bill)
  ➢ Accommodation (section 23 of the SDA, items 38–39 of the Bill)
  ➢ Land (section 24 of the SDA, item 40 of the Bill)
  ➢ Clubs (section 25 of the SDA, item 41 of the Bill), and
  ➢ Administration of Commonwealth laws and programs (section 26 of the SDA, item 43 of the Bill).

• Replace references in paragraphs 21(3)(a) and (b) (which relate to admission as a student at a single sex educational institution) and subsection 25(3) (which relates
to membership of single sex clubs) to ‘the opposite sex (to)’ with ‘a different sex (from)’;

- Amend the list of circumstances to be taken into account in paragraph 28A(1A)(a) as part of the test for sexual harassment to replace ‘marital status’ and ‘sexual preference’ with ‘marital or relationship status’ and ‘sexual orientation’, and to insert gender identity and intersex status;
- Amend the genuine occupational qualification exemption in section 30 to replace references to ‘the opposite sex’ with ‘a different sex’;
- Amend the exemption for residential care of children in section 35 as a consequence of protecting same-sex de facto couples against discrimination;
- Amend the exemption for educational institutions established for religious purposes in section 38 to insert the new grounds of sexual orientation and gender identity, and to replace ‘marital status’ with ‘marital or relationship status’;
- Amend the exemption for voluntary bodies in section 39. Consistent with other grounds in the SDA, it will not be unlawful for a voluntary body to discriminate against a person on the ground of sexual orientation, gender identity, intersex status or marital or relationship status, in connection with:
  - The admission of persons as members of the body, or
  - The provision of benefits, facilities, or services to members of the body.

- Introduce two new exemptions into subsection 40(2) to ensure there are no unintended consequences for Commonwealth, State and Territory laws as a result of the new protections;
- Amend the exemptions in relation to superannuation fund conditions in sections 41A and 41B as a consequence of extending protection against discrimination to same-sex de facto couples;
- Amend the exemption in relation to new superannuation fund conditions in section 41A to repeal paragraph 41A(2)(c);
- Amend the exemption for competitive sporting activity in section 42 to include gender identity and intersex status; and
- Insert a new exemption into Division 4 applying to requests of information and keeping of records that do not allow for identification as being neither male nor female.
Annex 2 – LIV Past Submissions

Equal Opportunity Act Review

On 25 January 2008, the LIV provided a submission to the Victorian Equal Opportunity Review of the *Equal Opportunity Act 1995* (Vic). In our submission, the LIV advocated for the following:

“The LIV considers that the law does need to be changed to address disadvantage and continuing discrimination in Victoria. The current system has been successful in raising awareness of the issue of discrimination in Victoria and providing access to remedies for certain individuals whose complaints fall within the parameters of the EO Act. The next steps must be to begin to address systemic discrimination in Victoria and promote the broader right to equality for all members of the community. The current EO Act is not designed to deal with systemic or organisational discrimination. The LIV submits that a focus on equality rather than discrimination as well as increasing the functions and powers of the VEOHRC could help to overcome this shortcoming”.

The Exceptions Review

On 24 April 2008, the LIV provided a submission to the Victorian Department of Justice regarding the Exceptions Review of the exceptions to and exemptions from the *Equal Opportunity Act 1995* (Vic). The submission responded to the questions posed in the Department of Justice *Exceptions Review Consultation Paper* (February 2008) (the Consultation Paper). In our submission, the LIV advocated for the following in respect of gender identity:

“Section 27B provides that an employer may discriminate against job applicants and employees on the basis of gender identity if the person does not give the employer adequate notice of the person’s gender identity or the person gives the employer adequate notice of the person’s gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person. In its submission to the Scrutiny of Acts Committee Discrimination in the Law Inquiry under s.207 of the *Equal Opportunity Act 1995* (Vic), the LIV made the following comments: [Section 27B] was inserted into the Equal Opportunity (Gender Identity and Sexual
Orientation) Bill ("the Bill") on 29 August 2000. The purpose of the Bill was to protect people from discrimination on the basis of gender identity and sexual orientation. It is our understanding that it was not originally the Victorian Government’s intention to exclude employers from these protections for transgender people, but that due to opposition from at least one Independent MP and the prospect of the Bill not being passed, the government had little choice but to introduce s27B. Section 27B was defended by one independent MP with the use of the example of a "country hardware store". He referred to the drop-off in business that could result from employing a transgender person. There is no equivalent of s27B in NSW or Queensland and yet there is no evidence in either of those states of any economic problems for businesses as a result of employing a transgender person. Furthermore, s27B endorses discriminatory attitudes in society and is contrary to Australia’s international obligations under Article 2 of the International Covenant on Civil and Political Rights. Since its enactment, s27B has not been referred to in any case law. An employer has never used it as a defence since its introduction. This section unnecessarily discriminates against transgender people and should not exist for the purpose of protecting businesses from the discriminatory attitudes of customers. Therefore it is submitted that s27B should be repealed in its entirety. In addition to these comments, the LIV considers that s27B is not a reasonable limitation to the right to equality, according to s7(2) of the Charter. We do not consider there to be a legitimate purpose to justify discrimination on the basis of gender identity and submit that the effect of the provision does not create any demonstrable benefit. Rather, it merely reinforces existing prejudices. The LIV recommends that the s27B exception be repealed”.

Equal Opportunity Review – Options Paper

On 13 May 2008, the LIV provided a submission to the Victorian Equal Opportunity Review in response to their issues paper. In our submission, the LIV advocated for the following:

“The LIV also supports the inclusion of a positive duty not to discriminate. It is noted that this duty exists in the Charter and is consistent with the EO Act as it currently stands. This would apply to both the public and private sector. The LIV also recommends a statutory review provision within the
EO Act similar to s44 of the Charter, providing for review of the EO Act in 3 years’ time to consider whether it would be appropriate to introduce a positive duty to promote equality in the terms set out in Option 3. The LIV considers that it may also be appropriate to recognise the need to take steps towards achieving substantive equality within the objectives of the EO Act. This would clarify that the EO Act is trying to achieve substantive equality and would provide a basis for any statutory review provision, as described above.

Inquiry Into Exceptions and Exemptions in the Equal Opportunity Act 1995 (Vic)

On 17 July 2009, the LIV provided a submission to the Victorian Scrutiny of Acts Regulations Committee regarding the exceptions to and exemptions from the Equal Opportunity Act 1995 (Vic). In our submission, the LIV advocated for the following in respect of gender identity:

“Section 27B provides that an employer may discriminate against job applicants and employees on the basis of gender identity if the person does not give the employer adequate notice of the person’s gender identity or the person gives the employer adequate notice of the person’s gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

Option 1: No change.

Option 2: This exception should be repealed

The LIV strongly supports Option 2 and we refer to our comments in our 2008 submission in this regard. We do not consider s27B to be a reasonable limitation to the right to equality and consider there is no legitimate purpose to justify discrimination on the basis of gender identity. The provision merely reinforces existing prejudices”.

Draft Equal Opportunity Bill 2009 (Vic)

On 4 February 2010, the LIV provided a submission to the Victorian Department of Justice regarding the draft Equal Opportunity Bill 2009 (Vic). In our submission, the LIV advocated for the following in respect of gender identity:
“The draft Bill adopts the definition of gender identity that is currently contained in subsection 4(1) of the Equal Opportunity Act 1995 (Vic) (EO Act). Sub-s 4(1) defines gender identity in relation to “a person of one sex” who identifies on a bona fide basis as a member of the other sex. The LIV is of the view that the definition of gender identity should be amended to better reflect the intention of provisions relating to non-discrimination on the basis of gender identity. Gender identity should not be defined according to the “birth sex” of a person because discrimination generally occurs due to the fact that the “birth sex” is imputed to the person and not their affirmed sex. The “birth sex” of a person is really the sex that a person has been raised as, compared with the sex which they identify to be on a bona fide basis. The LIV proposes that amendment to the definition should respect the gender identity that a person identifies as, without the suggestion that they are in fact of the other sex. It may be possible to affect this by the simple insertion of the words “raised as being” before “of one sex” in paragraph (a) of the definition”.

**Equal Opportunity Bill 2010 (Vic)**

On 18 March 2010, the LIV provided a submission to the Victorian Scrutiny of Acts Regulations Committee regarding the Equal Opportunity Bill 2010 (Vic). In our submission, the LIV reiterated its position in our previous submission to the Victorian Department of Justice regarding the draft Equal Opportunity Bill 2009 (Vic) in respect of gender identity.

**National Equality Act**

In February 2011, the LIV provided comments to the Law Council of Australia regarding the National Equality Act. In our comments, the LIV noted the following:

“List the bases on which people are diverse but equal, and upon which they are protected from unlawful discrimination – to include those protected attributes listed in the Equal Opportunity Act 2010 (Vic) as well as additional grounds such as homelessness, irrelevant criminal record, national extraction or social origin/socio-economic status. This non-exhaustive list should be complemented by a catch-all reference to ‘other status’ upon which a person is protected from unlawful discrimination to
reflect and allow for the fluid and developing nature of society and to comply with Art 26 of the ICCPR”.

**Human Rights and Anti-Discrimination Bill 2012 (Cth)**

In December 2012, the LIV provided comments to the Law Council of Australia regarding the Human Rights and Anti-Discrimination Bill 2012. The LIV submitted that Australia has obligations under international human rights treaties to take measures to eliminate discrimination including on the basis of age, race, sex, pregnancy, marital status and disability implemented through the Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth) and Australian Human Rights Commission Act 1986 (Cth). The Federal government recognised the need to look carefully at anti-discrimination laws, and the consolidation and harmonisation of Commonwealth anti-discrimination laws pursuant to the initiatives proposed in the Australia’s Human Rights Framework. The LIV endorsed the Law Council of Australia’s strong support for the consolidation and harmonisation of Commonwealth anti-discrimination laws. Specifically, the LIV’s response to the Human Rights and Anti-Discrimination Bill 2012 was that:

- The LIV strongly supports the Human Rights and Anti-Discrimination Bill 2012. It is a significant step towards improving protection against discrimination and making the laws more efficient and effective for businesses and people around Australia.
- We are also very pleased to see the Government did not intend any intrusion on free speech with the provision in the Draft Bill that sought to clarify that discrimination includes offensive, insulting and intimidating conduct.
- We welcome the Government’s options for addressing the concerns raised, including deleting the provision from the Draft Bill. We consider that it was an unnecessary provision that would have added complexity to what is otherwise a simple definition of discrimination.
- If Parliament does consider it necessary to elaborate on the meaning of discrimination, it could consider including a note under the general definition (currently in clause 19(1)) to the effect that discrimination includes harassment, as has already been established by the courts.
- The LIV continues to have concerns about the blanket exception for religious bodies that allows them to discriminate in their non-religious day to day activities against, for example, divorced or unmarried people or people in same-sex relationships. The balancing of freedom of religion with other important human
rights, such as the right to equality and to be free from discrimination, requires thoughtful consideration.

- The LIV looks forward to engaging in the discussions around exceptions at the time of the anticipated review 3 years after commencement.
- We are pleased to have contributed to the consultation on the Draft Bill, through our input to the submissions of the Law Council of Australia, and congratulate the Hon Nicola Roxon MP on this significant legacy of her tenure as Attorney-General.