Senate Legal and Constitutional Affairs Committee

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

Submission by Alastair Lawrie

Monday 22 April 2013

I am writing this submission to make three main recommendations:

i) That the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, which introduces federal anti-discrimination protections for lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians for the first time, should be supported.

ii) That the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* should be passed as a matter of priority by the Commonwealth Parliament; and

iii) That the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* should be amended to remove all religious exceptions which would otherwise allow discrimination against LGBTI Australians, outside of appointments of religious office-holders (such as priests) and religious ceremonies.

I was born in 1978. That is three years after the passage of the *Racial Discrimination Act 1975*. In the year I turned 6, the Commonwealth Parliament supported the *Sex Discrimination Act 1984*. The *Disability Discrimination Act* was passed in 1992, about three years before I first came out as gay at age 17. Even the most recent stand-alone Commonwealth anti-discrimination law, the *Age Discrimination Act 2002*, has already been in operation for more than a decade.

In 2013, I am 34 years old, and I have still never enjoyed the protection of federal anti-discrimination laws on the basis of my sexual orientation. Discrimination on the basis of race has been prohibited for my entire life, and on the basis of sex for almost as long. But up until now, successive Governments have not seen fit to legislate to prohibit discrimination on the basis of sexual orientation, gender identity and intersex status.

Which means that the reforms contained in the Labor Government's *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* are both incredibly welcome, and long overdue. Lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians deserve the right to be employed, to access services, indeed to simply go about their everyday lives, without the threat of being discriminated against on these grounds.

If and when this Bill is eventually passed, it will be another key milestone on the long journey towards full equality for our LGBTI citizens. Which is why my first recommendation is that this legislation should be supported.

My second recommendation is that the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* should be passed by the Commonwealth Parliament as a matter of priority.

There are now only five Parliamentary sitting weeks left before the end of this term, ahead of the federal election which is currently expected to be held on September 14th. Having waited so long –

decades, in fact – it would be a devastating blow to the LGBTI community were this legislation to be delayed yet again because the current Parliament simply ran out of time.

The future is always unknowable: it may be that, should these reforms not be passed now, a new Parliament or even Government introduces similar legislation later this year, or early next year. That would obviously be a welcome development. But it may also be that, after the upcoming election, LGBTI anti-discrimination reforms are delayed for several more years.

The current Bill fulfils the general objective of signalling that discrimination on the basis of sexual orientation, gender identity and intersex status is no longer tolerated, by society and by the Parliament. It is already drafted, and (leaving aside the amendments suggested in my third recommendation) it is ready to go.

That is why all serving Parliamentarians, from all political parties and independents, should pass the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* as soon as possible.

My third and final recommendation is that the Bill should be amended to ensure that religious exceptions from LGBTI-anti-discrimination requirements are narrowly drafted, only covering religious appointments, such as priests, and religious ceremonies.

The justification for this position involves my personal experience. Like many, indeed probably most, LGBTI Australians I have been discriminated against in a wide variety of different situations. I have been abused on the street, and threatened with violence, simply for holding my boyfriend's hand. I have received sub-standard treatment from different service-providers simply because of my sexual orientation, or at least because of their perceptions of me.

I have likely been discriminated against in terms of employment, because I have always been upfront about who I am, including through my job applications. But I will probably never know for sure,

because discrimination like homophobia is insidious, and its victims can never know all of the different ways in which they are mistreated.

But by far the activity in which I have been discriminated against the most was the education I received during the five years that I attended a religious boarding school. There was, from memory, a school rule against homosexuality, I was bullied on the basis of my (perceived) sexual orientation and this was effectively condoned by the school which was aware of it but failed to take any action, the sex education that was provided completely ignored homosexuality (including omitting essential safe sex/HIV-prevention messages), and I had a pastor intimate that killing yourself because you were gay was not the worst possible outcome.

It distresses me to think that, if religious organisations are granted wide-ranging exceptions under anti-discrimination laws, they will lawfully be able to (mis)treat future students in this way.

No student should be subject to prejudice, from their schools as well as from other students, because of their sexual orientation, gender identity or intersex status. No teacher should have to fear for their job simply because of who they are, or who they are attracted to.

This principle extends far and wide across a range of different activities. Patients receiving hospital and other health or community services should not have to consider whether disclosing their identity will compromise the standard of care they receive. LGBTI doctors, nurses and other employees in the health and community sector should be able to be confident in talking about who they are without fearing possible repercussions.

This principle obviously also includes aged care services. And I welcome the Labor Government's commitment that they will legislate to protect people accessing aged care services from discrimination on the basis of sexual orientation, gender identity and intersex status.

However, I question why these protections are not included in the current Bill – the drafting of such provisions is not overly complicated, and I would like to believe that no Parliamentarian could argue, or vote, against such a basic proposition.

I also question why such protections should not equally apply to the employees of aged care services. If we are going to have truly inclusive aged care services, then neither the service recipients nor the employees should be subject to discrimination simply because they are LGBTI.

But, for the reasons outlined above, I do not believe that even 'carving out' the aged care sector from the operation of religious exceptions goes far enough. There is no justification for allowing religious organisations to discriminate against service recipients or employees in any activity which is carried on in the public sphere. For further discussion of this, please see **Appendix A**, which I provided to the Senate Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 in December last year on this very topic.

In conclusion, I would like to thank the Committee for the opportunity to comment on the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.* As I have indicated, I think this Bill could be significantly improved by limiting the operation of religious exceptions which undermine protections that would otherwise cover LGBTI Australians.

However, even if these exceptions are not removed by the current Bill, the fact that some LGBTI anti-discrimination protections will finally be enacted federally is sufficient justification to recommend both that the Commonwealth Parliament support the Bill, and that it be passed as a matter of priority. The Australian LGBTI community has waited long enough for these reforms. It's time to just get it done.

Appendix A

Extract from my submission to the Senate Inquiry into the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 re religious exceptions

One of the most controversial elements of any anti-discrimination regime, and the one that regularly receives the most attention, is the topic of exceptions. In particular, there is usually significant focus on the question of whether religious organisations should be granted exceptions from the obligation not to discriminate on the basis of sexual orientation, gender identity and intersex (and, it must also be noted, on the basis of sex and relationship status). As a result, I will devote the largest section of this submission to addressing these questions, firstly on a philosophical basis and, secondly, on a more personal level.

To begin with, I think it is important to remember the justification for implementing anti-discrimination protections in the first place. These laws are designed to publicly state that some forms of prejudice are not acceptable and to prohibit discrimination on illegitimate grounds (such as race, sex or religion), thereby protecting people from these groups against discrimination in a range of public areas, such as employment, education, healthcare and other forms of service delivery.

By introducing anti-discrimination protections covering sexual orientation, gender identity and intersex in this Bill, parliament would be effectively saying that discrimination on these grounds is no longer acceptable, and that all LGBTI people should be protected from discrimination in all areas of public life. Exceptions from this principle, if they are to be introduced, must therefore have a clear rationale and must be adopted only where it furthers the public interest.

The argument for providing exceptions to religious organisations from obligations under anti-discrimination law is based on the separation of church and state, and respect for religious freedoms for people of all faiths. That is, religious exceptions are intended to allow the free celebration of religious beliefs, even if these beliefs include discrimination against other groups that would not otherwise be acceptable.

This argument potentially has some merit in terms of public policy. Religion is an intensely personal matter, and something which individuals and groups should be allowed to pursue however they so choose. This would apply to all matters within that religion which have no impact on the rest of society – such as determining who may join that religion, who may be a minister within that religion, and how the religion is celebrated.

As a result, philosophically, this approach would allow anything which occurs entirely within that religion to be free from anti-discrimination obligations – so, for example, the religious exception would allow religions to discriminate when determining who to employ as ministers, who is admitted as a member of the religious community, who is provided with a funeral, even who is married within that religion (although obviously not who can marry through a civil ceremony).

As a consequence, if religions wanted to discriminate against any group in any of these areas (for example, by excluding LGBTI people) then that right would be allowed through a religious exception

in these narrow or confined circumstances. [Of course, it should be noted at this point that state and territory parliaments have in fact legislated to restrict this right – so that, while religions can discriminate on sex, relationship status and LGBTI grounds, they are not allowed to discriminate on race. But that inconsistency is an argument for another day.]

The problem comes when religious organisations seek to broaden that exception to cover a wide range of scenarios which are not primarily based on the celebration of that religion. So, for example, some religions seek to use the religious exception to cover anything that is done in connection with a school where it is run by a religious organisation. They argue that they should be able to discriminate in terms of what may be taught within that school, who may be employed (including not employing LGBTI staff) and even being able to directly discriminate against LGBTI students.

This is an inappropriate extension of the principle of respecting religious freedom. The main function of a school is to provide education. This is a service or transaction which occurs primarily in the 'public sphere', which is why it is subject to many levels of government regulation, in terms of teacher qualifications, starting and finishing ages, and agreed state and territory (and soon to be federal) curricula. Even home-schooling by a parent is strictly regulated by the state because the provision of education services is in and of itself a 'public good'.

Just because a school is run by a religious organisation, does not automatically mean that school education suddenly becomes primarily concerned with 'celebrating religious freedom' and thereby removed from the public sphere. The day-to-day provision of classes, by teachers to students, is not in its very nature or essence a religious sacrament. Even where there is direct religious instruction offered by a religious-run school, it is usually only a very small component of their curriculum, the vast majority of which is the same no matter who is offering it, religious or non-religious.

As a result, I submit that providing education services is not at its core about 'celebrating religious freedom' but, rather mundanely, is actually mostly just about providing education services. The service provision within those schools, and the employment contracts which they enter into, are not fundamentally religious in nature, meaning that the state has a legitimate interest in regulating both areas. Consequently, it is not an inappropriate restriction of fundamental religious freedom to rule that a religious school cannot discriminate against LGBTI teachers, and cannot exclude LGBTI students.

In short, the rationale of respecting religious freedom is not sufficient to allow a religious-run school to be granted an exception from lawful obligations with which it would otherwise have to comply, including anti-discrimination obligations. The proposition put forward by religious organisations, to exclude religious-run schools from anti-discrimination law, does not have sufficient weight to pass the public interest test.

I am aware that I have chosen what is perhaps the most hotly-contested area of service-delivery to make my case. The basic argument is even clearer if we examine other services which may be provided by a religious-run organisation. Take, for example, the case of a 'for-profit' business, which is purchased by a religious organisation to make money to divert back into its religious activities. In this example, it doesn't actually matter what the business makes, sells or provides, just that the process involved is not religious, and that the product or service is not religious.

Philosophically, there is no justification to allow the for-profit business to discriminate against employees on the basis of their LGBTI status because the business at its core is not religious – and this applies irrespective of the fact it is owned by a religious organisation. Further, people would be outraged, quite legitimately, if the business was allowed to discriminate in its service-provision (for example, by not serving certain people because of sexual orientation, gender identity or intersex, or even sex or relationship status) simply because it was owned by the religion involved.

The same arguments can in fact be made with respect to all employment contracts and service-provision which is not inherently about religious celebration. This would include healthcare services, education services, other community services, and employment as anything other than religious ministers or religious office-holders. In each of these cases, the service provision or employment contract is part of the public sphere and the fact that it merely involves a religious organisation is not enough to justify the transaction being excluded from the operation of the law.

There is another popular argument why religious-run schools, and other religious-run services, should not be provided with exceptions from anti-discrimination obligations. This is the fact that nearly all of these services are in receipt of public funding, and often significant sums. As a matter of fairness, everyday taxpayers – including, it must be highlighted, LGBTI taxpayers – should not be subsidising the religious freedoms of others, especially the so-called religious 'freedom' to not hire a gay doctor in a religious hospital, to fire a lesbian teacher, or to expel a transgender student from a high school. If religious organisations want to exercise these 'rights', then they should not be using public funding to do so.

While this argument is morally attractive, I do not think it goes far enough in practice. That is, even if a religious-run high school received no public funding, the fact that it is a high school, which is primarily concerned with providing education services and is firmly in the 'public sphere', is sufficient to attract government intervention, including the requirement to comply with anti-discrimination legislation.

After all, an LGBTI student who might be discriminated against by the school should, philosophically, have the same right to be treated fairly irrespective of the funding breakdown for that particular school. The discrimination is no less egregious, and the homophobia no more acceptable, where no money comes from public funding, rather than if 10, 40 or even 70 % of the school's funding is provided by the government. It genuinely doesn't matter who funds the discrimination against that student, only that the student has a legitimate public interest in being protected from it.

Which brings me to the much more 'personal' argument for why exceptions for religious organisations should be narrow in scope. I mentioned earlier that, like most LGBTI Australians, I have been subjected to numerous instances of homophobic discrimination and harassment over the course of my life (I am now 34 years old). Well, I experienced the vast, *vast* majority of that prejudice during my time as a boarding student at a religious school in Queensland in the early to mid-1990s.

I have chosen not to include the name of the school here because I don't think it actually matters – only the instances of homophobic discrimination which I experienced matter for the purposes of this inquiry. And, sadly, I don't think what I experienced sets me apart from what many other students have experienced over the years, at many different schools.

During my time at his particular school, being gay was either not mentioned at all, or was mentioned in a negative context. This tyranny of silence extended to sex education, which, over the course of five years, made not one mention of same-sex attraction, or even of anal intercourse.

Imagine that, at the peak of the HIV/AIDS epidemic, while it was still very much a matter of life and death (before protease inhibitors and combination therapies), actively ignoring a major risk factor of HIV transmission simply because it didn't fit within the religious philosophy of the school. That is not a celebration of religious freedom; that is criminal negligence.

Homophobic bullying was also common – including regular taunts of 'faggot', 'poofter', graffiti-ing of those words on books and bags, physical confrontations such as pushing and shoving – and was never actively discouraged by the school. In fact, at one end of year boarding house awards ceremony, I was given the 'big fat poof' award, which I was expected to get up and accept in front of everyone, including in the presence of school authorities, and to take in good humour (but, of course, which caused great personal anguish and distress).

An even worse example: in year 11, I was twice held down by a large group of students and had my chest hair shaved off. This was done because I was academic, non-sporting, basically an outsider who was not interested in girls – and, I suspect, because some of the students had correctly assumed I was gay (based on the award described above, some obviously had). The school was aware of both of these assaults and yet, within a few days of the second attack, appointed one the boys responsible school captain, and another as boarding house captain.

But the worst example of homophobic bullying at the school came during a speech by a pastor. He talked about a student at a former parish, who had struggled with his 'identity' for some time, and how it did not fit within god's plan. Ultimately, he said, the student had committed suicide. The pastor made it clear that this was not the worst thing which could have happened (the former student was now at 'peace' and no longer struggling).

This pastor was clever – he did not use the exact words, but through his intimations he made it clear that killing yourself could be a better option than growing up and adopting a 'homosexual lifestyle'. To be honest, I am not even sure that the heterosexual students who were present would have known the full import of what was being said – but the LGBTI students certainly would have, and they were the real 'target' of his hate speech.

And that is the fundamental nature of homophobic (and bi-phobic, trans-phobic and anti-intersex) discrimination. It can be insidious, and subtly but harmfully pervade everyday life. At a religious school like mine, these instances do not happen in isolation either – they are allowed to happen, cultivated and even nurtured, because the school adopts an active policy of not tolerating homosexuality or bisexuality (I am not sure they would have even understood transgender or intersex – if they did, I am sure they would have been actively against those too – but through their silence they would have seriously harmed any transgender or intersex student there as well).

Of course, I am not saying that my experience of discrimination at school is unique. There are thousands, probably tens or perhaps even hundreds of thousands, of other people with horror stories of their own from their school days, and their accounts relate to both government and

religious schools. You just have to ask your LGBTI family members and friends about what their experiences were like to begin to understand.

But, in doing so, always remember that these stories are just from the adults who have survived their ordeals – sadly, some LGBTI students do not survive, and instead take their own lives along the way. Sexual orientation, gender identity and intersex-related youth suicide in Australia remains disproportionately high, and it is fair to point the finger at school-based silence, exclusion and prejudice as one of the key factors involved.

Unfortunately, the evidence is clear that discrimination against LGBTI students is still occurring in our schools today. As indicated earlier, the 2010 *Writing Themselves In 3* report found that 60% of same-sex attracted and gender questioning young people had experienced some form of physical or verbal abuse. More pertinently here, the same report found that 80% of all harassment, discrimination and abuse actually happened in school settings.

This is a major national scandal. Anti-LGBTI prejudice in schools is something which all levels of government should address, in all states and territories, and in all types of school, government, non-government, religious and non-religious. There is indeed some work which is being done in different jurisdictions, such as the NSW Proud Schools initiative, and the efforts of Daniel Witthaus through his 'Beyond That's So Gay' projects (www.thatssogay.com.au). But this work, without the support of every government and every school system, will never reach each and every student who needs support and protection.

More importantly, any campaign to address prejudice based on sexual orientation, gender identity and intersex is fatally undermined if we provide religious schools with exceptions from anti-discrimination obligations. We cannot in good conscience say that we support the rights of LGBTI students if, at the same time, we allow schools which are run by religious organisations to continue to actively discriminate against or marginalise students because of their sexual orientation, gender identity or intersex.

To apply this to my own experiences, providing that school with an exception under anti-discrimination legislation would mean that everything they did (with the exception of the chest shaving incidents, because, after all, assault is still assault) would have been legally protected. Not including homosexuality in sex education would be acceptable because they would claim they have a religious objection to teaching about 'sinful' activities.

Allowing students to denigrate other students because of their apparent homosexuality would be fine because the abusers would simply be following the teachings of their religion. And a pastor implying that killing yourself rather than lead a 'gay lifestyle' would be protected because they would argue that their religion included proclamations against the 'abomination' of homosexuality.

This situation – allowing religious schools to hide behind religious exceptions to commit acts which essentially amount to child abuse – is no longer acceptable in 2013 (if it ever was).

Thus, for both philosophical and intensely personal reasons, I submit that if the Human Rights and Anti-Discrimination Bill 2012 is to include exceptions for religious organisations, these exceptions should only apply to religious appointments or celebrations.