To the Senate Standing Committee on Legal and Constitutional Affairs,

Please find attached my submission regarding the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

Sincerely,

Alastair Lawrie

Exposure Draft Human Rights and Anti-Discrimination Bill 2012

Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs

Submission by Alastair Lawrie

Friday 21 December 2012

Thank you for the opportunity to make a submission on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012. This submission reflects my personal views on the Bill, and makes a number of recommendations for improvements to the draft legislation to ensure that it provides adequate protection to lesbian, gay, bisexual, transgender and intersex Australians from – what will hopefully be – unlawful discrimination. Nevertheless, these recommendations for improvements do not change my primary recommendation; namely, that the Parliament should pass this Bill as a matter of priority in 2013.

Recommendations:

1. The Parliament should pass the Human Rights and Anti-Discrimination Bill 2012 as a matter of priority in 2013.
2. The Bill should retain the exposure draft definitions of 'sexual orientation' and 'relationship status' so that discrimination on these grounds is prohibited under Commonwealth law.
3. The Bill should amend the definition of 'gender identity' to reflect the Tasmanian Anti-Discrimination Bill 2012 definition, so that it removes the phrase 'genuine basis' and includes gender expression and presentation.
4. The Bill should include the definition of 'intersex' as used in the Tasmanian Anti-Discrimination Bill 2012, so that anti-discrimination protections adequately cover this protected attribute.
5. Exceptions from anti-discrimination requirements should only be provided to religious organisations where it relates to religious appointments or celebrations (for example, appointment of ministers of religion, admission to membership of the religion or celebrating sacraments within the religion).
6. Religious organisations should not be provided with exceptions in terms of service-delivery, including service delivery in schools and education, healthcare, aged care and other community services.
7. If Recommendation 6 is not agreed, the existing provisions of the Human Rights and Anti-Discrimination Bill 2012 which preclude the application of exceptions with respect to aged care service delivery by religious organisations should be retained.
8. Religious organisations should not be provided with exceptions in terms of employment, in any area outside appointment of ministers of religion or other appointments which are essentially religious in nature.
9. If either or both recommendations 6 or 8 are not accepted, or if recommendation 7 is accepted, then wherever religious organisations are provided with exceptions with respect to either service delivery or employment, they must publish a statement outlining their

intention to discriminate in position descriptions and job advertisements, on their website and in any brochures or advertisements of their service.

10. The Bill should expand anti-vilification protections to cover sexual orientation, gender identity and intersex.
11. The Bill should provide for the appointment of a dedicated Sexual Orientation and Gender Identity Commissioner.

The draft Human Rights and Anti-Discrimination Bill 2012 covers subject matter which is close to my heart, and which is also an important issue of public policy; namely, providing legal protections to lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians against unjust discrimination, harassment and abuse.

These legal protections are long overdue. By the time this legislation is (hopefully) passed in 2013, it will be 38 years since the passage of the *Racial Discrimination Act 1975*, 29 years since the *Sex Discrimination Act 1984*, more than two decades since the *Disability Discrimination Act 1992* and almost a decade since the *Age Discrimination Act 2004*. These Acts were passed to address major problems of discrimination within society on each of these grounds.

Discrimination on the basis of sexual orientation, gender identity and intersex is no less offensive, and tackling this discrimination is no less urgent. It is a failing of successive Commonwealth Governments that they have not introduced anti-discrimination legislation covering these attributes before now, but happily this is something that the current Parliament can address in this term.

There is abundant evidence that discrimination against LGBTI Australians is both serious and widespread. The 2003 NSW Attorney-General's Department report *You Shouldn't Have to Hide to be Safe*, found that 56% of respondents had been the victims of homophobic abuse, violence or harassment in the previous 12 months. 85% of respondents had experienced abuse, violence or harassment at some point in their life. That fact alone is sickening: 5 out of every 6 LGBTI Australians have suffered some form of homophobic abuse, violence or harassment simply for being themselves.

This discrimination can particularly target, and have the most damaging effects on, young people. The *Writing Themselves In 3* report found that 60% of young same-sex attracted and gender questioning young people had experienced some form of physical or verbal abuse. Homophobic, bi-phobic and trans-phobic discrimination, and discrimination against intersex people, can have a lasting, negative impact on their mental health, and limit their ability to fully participate in society. LGBTI youth should not have to suffer because of the prejudices of others.

But you do not need to consult these reports to understand that discrimination against LGBTI people is rife. Instinctively, we all know, simply as ordinary members of Australian society, that homophobia is an unacceptably widespread phenomenon, and that it has the potential to affect almost every facet of life. As individuals, we have likely seen it, heard about it, felt its impact on family members or friends.

For those of us who are LGBTI, we have been on the receiving end of this abuse, this violence, this harassment. As a gay man, I have been the victim of numerous counts of homophobic

discrimination. I have been 'moved on' by police officers simply for kissing another man. I have been yelled at on the street for holding my boyfriend's hand, and called 'faggot' more times than I care to remember. I have been subjected to multiple instances of prejudice and exclusion by my school. And I have probably been discriminated against in other ways which I didn't even know at the time, because discrimination can be insidious.

My fiancé Steve has similar stories. His lesbian sister and her partner have been discriminated against too, both as individuals, and as mothers in a rainbow family. Steve's best friends, another lesbian couple, have their own stories of prejudice, as do many of our other gay and lesbian friends. Sadly, each and everyone one of us has our own story of how discrimination has affected our everyday lives, in so many different situations.

What we have not had, until now, is any protection under Commonwealth law against this discrimination. Federal anti-discrimination legislation, covering LGBTI Australians, is essential to complement existing protections under state and territory law, and ensure that there are no holes or gaps in this coverage.

Even more importantly, the passage of this bill would be a statement by our elected leaders that prejudice and discrimination on the basis of sexual orientation, gender identity and intersex will no longer be tolerated. I urge the Commonwealth parliament to pass this law, and do so as quickly as possible.

Recommendation 1: The Parliament should pass the Human Rights and Anti-Discrimination Bill 2012 as a matter of priority in 2013.

The exposure draft Bill already features a useful and inclusive definition for 'sexual orientation' which will ensure that lesbians, gay men and bisexuals are afforded anti-discrimination protection. The amendment of the previously protected ground of 'marital status' to 'relationship status' will also ensure that all relationships are covered, irrespective of the sex or gender of the participants. Both of these definitions should be retained in the final Bill.

Recommendation 2: The Bill should retain the exposure draft definitions of 'sexual orientation' and 'relationship status' so that discrimination on these grounds is prohibited under Commonwealth law.

I am also supportive of the inclusion of anti-discrimination protection for transgender people. However, I understand that the definition of 'gender identity' in the exposure draft Bill requires significant improvement. In particular, it is unclear why the definition includes the additional test of living on a "genuine basis" for transgender people. The definition also does not appear to adequately capture and protect gender expression, including mannerisms and appearance. A much better definition is contained in the Tasmanian Anti-Discrimination Bill 2012, which is currently before their state parliament. That definition should be used in the Commonwealth's Human Rights and Anti-Discrimination Bill 2012.

Recommendation 3: The Bill should amend the definition of 'gender identity' to reflect the 2012 Tasmanian Anti-Discrimination Bill definition, so that it removes the test of 'genuine basis' and includes gender expression and presentation.

An even larger drafting problem concerns the definition of, and therefore protection for, intersex people. The exposure draft Human Rights and Anti-Discrimination Bill 2012 appears to try to include intersex under part (b) of gender identity. This is incorrect, because intersex is not a matter of identity, instead it is a biological fact.

It should also be noted that similar definitions which have been included previously under state and territory laws have either operated to provide only limited protection from discrimination to intersex people, or provided no protection at all.

It would be tragic if, 38 years after the *Racial Discrimination Act 1975*, the Commonwealth parliament finally acted to extend anti-discrimination protection to lesbian, gay, bisexual and transgender people, but, at the same time, failed to cover intersex people and instead further entrenched rather than remedied discrimination on this ground.

Once again, the definition of intersex which has been used in the Tasmanian Anti-Discrimination Bill 2012 appears to offer a better and more inclusive basis for this protected attribute, and one that should be included in the Human Rights and Anti-Discrimination Bill 2012 as a stand-alone attribute, rather than inappropriately subsumed within gender identity.

Recommendation 4: The Bill should include the definition of 'intersex' as used in the Tasmanian Anti-Discrimination Bill, so that anti-discrimination protections adequately cover this protected attribute.

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.

Recommendation 5: Exceptions from anti-discrimination requirements should only be provided to religious organisations where it relates to religious appointments or celebrations (for example, appointment of ministers of religion, admission to membership of the religion or celebrating sacraments within the religion).

This means that, in practice, these exceptions should not apply to any other area of service-delivery where it is provided by a religious organisation, including service delivery in schools and education, healthcare, aged care and other community services.

Of course, I am realistic enough to know that campaigning by religious organisations to maintain their 'religious freedom' (or, in other words, to retain their right to exercise prejudice on the basis of sexual orientation, gender identity and intersex) will be successful, and that, shamefully, religious schools will continue to be able to discriminate against and marginalise LGBTI people for a long time to come.

In this case, I would submit that, at a minimum, the existing provisions of the Human Rights and Anti-Discrimination Bill 2012 which remove the ability of religious organisations from discriminating in aged care service delivery should be retained.

This is a positive move by the federal government, and complements their work in releasing the *National LGBTI Ageing and Aged Care Strategy* on 20 December 2012. The removal of the exception

from this area also recognises the very personal nature of aged care services, and the fact that LGBTI people, and their families and carers, should not be discriminated against in accessing these services.

Recommendation 6: Religious organisations should not be provided with exceptions in terms of service-delivery, including service delivery in schools and education, healthcare, aged care and other community services.

Recommendation 7: If Recommendation 6 is not agreed, the existing provisions of the Human Rights and Anti-Discrimination Bill 2012 which preclude the application of exceptions with respect to aged care service delivery by religious organisations should be retained.

The same arguments which dictate that religious organisations should not be able to discriminate in terms of service delivery, also mean that the religious exception should not apply to employment. After all, employment as anything other than a minister of religion (or other internal religious appointments), is a contract or transaction undertaken in the 'public sphere', and is not something which is so fundamental to the 'celebration of religious freedom' that it should be excluded from lawful obligations not to discriminate.

In practical terms, there is nothing fundamentally religious about the role of a doctor in a public hospital, meaning a religious hospital should not be able to sack someone from this role simply for being gay. Nor is there anything inherently religious about teaching maths in a secondary school, hence a lesbian teacher should not be able to be dismissed on that basis. And an employee in an aged care facility is there to provide services to the elderly – provided they do their job well, it is irrelevant that the employee may be transgender or intersex.

Recommendation 8: Religious organisations should not be provided with exceptions in terms of employment, in any area outside appointment of ministers of religion or other appointments which are essentially religious in nature.

Once again, I am realistic enough to know that it is highly likely at least some of the exceptions which are currently provided to religious organisations – in either or both service delivery and employment – will be retained when the Human Rights and Anti-Discrimination Bill 2012 is eventually passed.

In this case, I submit that religious organisations should be required to actively disclose any and all situations where they intend to use their 'religious freedoms' in ways which discriminate on the basis of sexual orientation, gender identity and intersex. This disclosure should be included in positions descriptions and part of job advertisements, should be included in the organisation's websites (including at individual school or healthcare service level), and in brochures advertising the services which they provide.

This is a minimum level of public accountability and transparency, and is not a significant regulatory burden if we are allowing an organisation to evade what are otherwise lawful obligations. It will also mean that everyone is clear on the situations in which a religious organisation intends to exercise its prejudice against LGBTI people.

For example, a gay teacher would be able to take into consideration the fact that the school could reject him for no other reason than his sexuality. Parents of a lesbian daughter would be able to choose an alternative and more inclusive environment for their child. And citizens who do not support homophobia, bi-phobia, trans-phobia and anti-intersex discrimination will be able to boycott discriminatory services if they so desire.

Obviously, this is not an ideal situation – and clearly it is far removed from my preferred model. But if we are to allow religious organisations the 'right' to be excepted from their obligations under anti-discrimination legislation, at the very least the potential victims of this discrimination equally have the right to know and be forewarned.

Recommendation 9: If either or both recommendations 6 or 8 are not accepted, or if recommendation 7 is accepted, then wherever religious organisations are provided with exceptions with respect to either service delivery or employment, they must publish a statement outlining their intention to discriminate in position descriptions and job advertisements, on their website and in any brochures or advertisements of their service.

There is one area which the Bill has essentially ignored – despite reproducing the existing ban on racial vilification, the Human Rights and Anti-Discrimination Bill 2012 does not extend these protections to the grounds of sexual orientation, gender identity or intersex.

This is a significant shortcoming in the exposure draft legislation. As outlined earlier, the majority of LGBTI Australians have experienced homophobic, bi-phobic, trans-phobic and anti-intersex abuse, violence or harassment.

The level of this abuse – and its corollary, the legitimate fear of it – means that I am not at all surprised by the findings of the *Private Lives* survey, which showed that 67% of participants' fear of prejudice or discrimination caused them, at least sometimes, to modify their daily activities in particular environments. This same survey revealed that 90% of participants had at some time avoided expressions of public affections and disclosure of their sexual orientation or gender identity.

My fiancé Steve and I have made the conscious decision to ignore the abuse which we might receive and behave in exactly the way we choose – including kissing, holding hands and expressing our affection in public. This is a right which every couple should have. As a result of merely exercising our 'rights', we have been yelled at, with 'faggot' an all-too-common word in the bigot's vocabulary. We are also aware that in a couple of situations things have had the potential to turn violent, with an unspoken level of threat present. And we have had nails put through all four tyres on our car, we suspect simply because we were the neighbours of someone who disagreed with our sexual orientation, and our relationship.

Of course, others do not have the ability to make a conscious decision – they may be more easily identifiable as LGBTI simply because of how they appear, or certain sex or gender characteristics which they may have. This means they are exposed to the risk of violence, abuse or harassment irrespective of how they behave, solely for having the temerity of being in a public space.

It shouldn't be this way. LGBTI people should not be forced to accept a threat of verbal and sometimes physical violence simply for being themselves in a public space. Commonwealth law should embrace the approach already adopted by some states and territories and prohibit vilification on the basis of sexual orientation, gender identity and intersex.

This could be based on anti-vilification measures contained in the NSW *Anti-Discrimination Act 1977*, which outlaws public acts which "[i]ncite hatred towards, serious contempt for, or ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group."

Such anti-vilification measures should also be adopted because there is no intellectual distinction between vilification on the basis of race, and vilification on the basis of sexual orientation, gender identity and intersex. Both are abhorrent, and both should be banned – as such both should be included in the Human Rights and Anti-Discrimination Bill 2012.

Recommendation 10: The Bill should expand anti-vilification protections to cover sexual orientation, gender identity and intersex.

The final recommendation of this submission relates back to the justification for the Commonwealth legislating to protect LGBTI Australians in the first place: and that is, to address the significant problems of homophobia, bi-phobia, trans-phobia and anti-intersex discrimination which exist across our society.

If that is our goal, then simply providing a legal remedy for some individuals to take action against the individual or organisation that has directly discriminated against them will not be sufficient to achieve it. That is why the existing Commonwealth Acts which have prohibited discrimination on the basis of race, sex, disability and age, have also created specific commissioners within the Australian Human Rights Commission to take primary responsibility for these issues (namely the Race, Aboriginal and Torres Strait Islander, Sex, Disability and Age Commissioners).

These Commissioners, in addition to overseeing the disputes which arise under their respective portfolio, can take on a wider role to redress discrimination more broadly across society. The appointment of a specific commissioner, together with proper resourcing, is also a powerful statement of the significance which the Government places on combating discrimination in a particular area. Conversely, not appointing a commissioner, and instead subsuming it within an existing, completely unrelated portfolio, would demonstrate that the Government does not believe these issues warrant any particular attention.

For all of these reasons, I believe that the Bill should provide for a dedicated or stand-alone Sexual Orientation and Gender Identity Commissioner. This Commissioner would not only assist with implementation of the range of new attributes under Commonwealth legislation, but would also be able to take an active role in fighting the homophobia which I, my fiancé, and all of our LGBTI family members and friends know all-too-well.

Recommendation 11: The Bill should provide for the appointment of a dedicated Sexual Orientation and Gender Identity Commissioner.