SUPPLEMENTARY SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS STANDING COMMITTEE INQUIRY INTO THE EXPOSURE DRAFT OF THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

FEBRUARY 2013

1. INTRODUCTION

The NSW Gay and Lesbian Rights Lobby (GLRL) thanks the Senate Legal and Constitutional Affairs Legislation Committee for publishing its submission to the inquiry into the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (submission number 387 on the inquiry website). The NSW GLRL also thanks the Committee for inviting it to appear at the hearings held at NSW Parliament House on Thursday 24 January 2013.

This short submission is intended to supplement our broader submission, as well as to address in more detail some of the questions that were raised at the hearings. This includes questions asked by Senators Brandis, Ryan and Humphries regarding school students, school teachers and exceptions granted to religious organisations, as well as a question by Senator Furner concerning the scope of the protected attribute 'sexual orientation'.

2. RELIGIOUS EXCEPTIONS

The NSW GLRL reiterates its general support for the Human Rights and Anti-Discrimination Bill 2012. This is an important piece of legislation that will finally provide anti-discrimination protections to lesbian, gay, bisexual, transgender and, should suggested amendments to the Bill be adopted, intersex Australians under Federal law. The GLRL also supports the scope of the areas of public life within which these protections will apply.

It is the position of the GLRL that exceptions to the obligation not to discriminate against LGBTI people should only be granted in limited circumstances. There must be a clear, publicly articulated as well as rationally-based, policy reason to abrogate the right not to be discriminated against.

Further, the NSW GLRL agrees that the right or freedom to practice religion is important. However, as with most human rights, the right or freedom to celebrate religion is not absolute. It is and must always be balanced against other competing rights.

For this reason, the right to practice one's religion is recognised as a potential excuse not to vote, but not accepted as a reason for an individual to avoid their obligation to pay taxation. Or, to choose another example, religions are free to apply sanctions like 'ex-communication' from their church for breaches of the rules of their faith, but are not legally allowed to impose physical penalties or punishments as this would be in breach of the criminal law.

The NSW GLRL acknowledges that, in pursuance of their right or freedom to celebrate their faith, religious organisations should be granted an exception to discriminate when they are appointing ministers of religion, or other office-holders who hold explicitly religious positions within their church or religious organisation.

While we do not agree that discrimination against LGBTI people is acceptable or desirable in any form, we concede that the freedom to celebrate one's religion means that the religion should legally be allowed to select their ministers based on whatever criteria they may choose.

At the same time, we do not agree that this exception to what is an otherwise lawful obligation to not discriminate should be extended to cover schools that are administered by religious organisations. Instead, the Human Rights and Anti-Discrimination Bill 2012 should offer protection to LGBTI students from discrimination in terms of the educational services that are provided, as well as protecting teachers and other employees who are employed to work within those schools.

We do not accept that discrimination against either LGBTI students or school staff is essential to the practice of religion. As such, granting anti-discrimination protections in these circumstances cannot reasonably be construed as a breach of the right to freedom of religion. The provision of educational services, and the appointment of people to provide those services, is clearly distinguishable from the appointment of religious ministers. Educational services and employment within schools involves the fulfilment of a fundamental human right (the right to education), within a public setting or within a key sphere of public life (education).

The government has a key interest in how this service is provided, and regulates it accordingly. In contrast, the appointment of religious ministers is an internal church process, to a large extent having no consequences for wider society, and it is hard to imagine a justification for Government 'interference' in such appointment processes.

As discussed at the Committee hearing, and made clear through our original submission, when balancing the right of LGBTI students to be protected from discrimination versus an argued right of religious schools to discriminate against them, another factor which must be considered is the wellbeing of those students.

There is substantial evidence of LGBTI students at religious schools being bullied, harassed and/or abused on the basis of sexual orientation, transgender and intersex status[1]. The NSW GLRL, together with the Victorian Gay and Lesbian Rights Lobby and AllOut, recently collected personal stories detailing this kind of discrimination. The experience of one respondent testifies to issues of discrimination, harassment and bullying faced by LGBTI students and is merely the tip of the iceberg:

> "When I was at school I had to change schools because I was asked in front of my class by my teacher if I was gay. At my next school I came out and then was made to attend a meeting with my coordinator. She told me I could attend school only if I was not open or obviously gay. She explained I could not hold hands with any girl or be outwardly gay. All of the girls in the change rooms would then hide in cubicals once they found out. I was made to sit through three back to back lessons on the sin of homosexuality, and shortly after left school. I spent the next few years suicidal and in and out of psych wards. I attempted to end my life multiple times, one of which I jumped into traffic and fractured my head. No one protected me."

It is clear that homophobic, bi-phobic, trans-phobic and anti-intersex discrimination has a serious detrimental effect on the mental health and wellbeing of LGBTI students and young people, as we stressed in our original submission. Committee members should already be aware that rates of suicide and self-harm are significantly higher amongst young LGBTI people than their non-LGBTI counterparts, and that discrimination on the basis of these attributes is the major cause.

[1] This is not to suggest that anti-LGBTI bullying, harassment and abuse does not happen at Government schools – however, they would already be covered by the proposed anti-discrimination protections.

We maintain that, when balancing the right not to be discriminated against with freedom of religion, protecting young and vulnerable people from harm is a powerful argument to not extend or offer an exception in such circumstances.

This is particularly important given that in 2011, of the 7,617 schools that served primary school students, 2,266 (or 29.7%) were non-government schools[2]. Of the 2,701 schools that served secondary students, 1,174 (or 43.5%) were non-government schools, and it must be noted that the vast majority of non-government schools are operated by religious organisations.

As outlined at the Committee hearing on Thursday 24 January, the welfare of vulnerable LGBTI students is also an argument to protect teachers and other staff at religious schools from discrimination on the basis of sexual orientation, transgender and intersex status. This is because it would be difficult to create an environment in which LGBTI students were not treated differently, and were indeed welcomed and made to feel safe, when LGBTI staff are not allowed to be employed in the same environment (or, if they are employed, are compelled to themselves be invisible).

Illustrating the issues prospective employees face in these same educational contexts, one respondent to our aforementioned survey recounted the difficulties they encountered merely becoming qualified and gaining teaching experience:

> "When I was a student teacher….[o]ne of the staff members I was working with directly asked me if I was gay and made it very known to me if I was gay I wouldn't be welcome in the school. I also found out a student had come out in the school and had consequently been expelled for it. For the month I worked there my mental health was in a terrible place. No one should have to go through the experience I went through. Particularly a prac student who is dependent on the school / staff to pass the course."

There are, however, additional reasons why LGBTI teachers and staff should not be discriminated against in schools run by religious organisations that are independent from the welfare of LGBTI students. LGBTI teachers and staff themselves have a direct and legitimate interest in not being discriminated against on the basis of attributes which are not relevant to their ability to perform the tasks involved in that position.

As indicated above, the NSW GLRL views education as both a fundamental human right and as a service that is provided within the public sphere. We further submit that employment contracts that operate in relation to education should also be located firmly within the public sphere. As such, teachers and other staff in schools should be granted protections under anti-discrimination legislation, unless there is a compelling reason to provide an exception.

We do not believe that freedom of religion is a sufficient justification in these circumstances. The basic activity, or inherent requirement, of teaching mathematics is the ability to teach mathematics – we do not accept that it is a legitimate inherent requirement that that teacher be heterosexual. The basic activity or inherent requirement of a health and physical education teacher is the ability to teach health and physical education, not that the teacher not be transgender. Equally, it is not an inherent requirement of the role of any teacher or staff member that an employee not be intersex.

The GLRL is aware of multiple instances of discrimination by schools run by religious organisations against teachers and other staff who are LGBTI. Indeed, some examples of this discrimination have

[2] Australian Bureau of Statistics, Schools, Australia 2011 4221.0 March 21 2012, figures exclude special schools.

received coverage by the media during the course of this inquiry. Granting an exception to religious organisations to allow discrimination in these circumstances would have real-world, negative consequences for many LGBTI people.

The consequence of granting exceptions to schools run by religious organisations to discriminate on the grounds of sexual orientation, gender identity or intersex status would be that a LGBTI primary school teacher could be refused employment or terminated by more than a quarter of their possible employers, for no reason other than their LGBTI status.

The situation for LGBTI secondary teachers is worse – roughly 2 out of every 5 schools could refuse to employ a LGBTI teacher solely due to their sexual orientation, gender identity or intersex status. It is difficult to conceive of another profession where parliament would allow, explicitly and with legislative coverage, up to 40% of employers to discriminate against potential employees on the basis of attributes which have no impact on their ability to perform the task at hand, which is, in our opinion, simply to teach.

3. DEFINITIONS - SEXUAL ORIENTATION AND SEXUALITY

We acknowledge the submissions of others (notably the Discrimination Law Experts Group) to this inquiry that advocate for the adoption of the broader, and more expansive, term 'sexuality' in relation to protected attributes, to include specific acts that are considered central to a person's sexual identity and lived experience. The NSW GLRL has no objections to the use of such a definition, but re-iterates its position, as stated in our original submission, that the terminology 'sexual orientation', which accords with the Yogyakarta Principle and international best practice, is the most appropriate way to protect same-sex attracted people from discrimination. As such, the terminology "sexual orientation" should be retained, and not in any way diminished, in the Bill.

4. CONCLUSION

For these reasons, the GLRL reiterates its original submission that, while it supports the Human Rights and Anti-Discrimination Bill 2012 in general, we believe that it should be significantly improved and strengthened by limiting the scope of religious exceptions to apply only to matters which are fundamental to the practice of that religion, such as the appointment of ministers of religion.

We do not support exceptions that allow schools administered by religious organisations to discriminate against LGBTI students in the context of education service provision, or to discriminate against LGBTI teachers and other staff in their employment.