**Australian Law Reform Commission**

**Traditional Rights and Freedoms – Encroachment by Commonwealth Laws Inquiry**

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To whom it may concern

**SUBMISSION TO TRADITIONAL RIGHTS AND FREEDOMS INQUIRY**

Thank you for the opportunity to provide a submission to the *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws Inquiry*.

The subject of human rights and freedoms, and how they should best be protected, both by and from Government, is an important one, and is worthy of substantive consideration.

In this submission, I will focus on three particular areas in which the rights of people are currently being breached as a result of Commonwealth Government action, or in some cases, inaction:

1. The Commonwealth Government’s failure to protect lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians from vilification
2. The Commonwealth Government’s tacit endorsement of discrimination, by religious organisations, against lesbian, gay, bisexual and transgender (LGBT) Australians, and
3. The gross violation of human rights of asylum-seekers and refugees, including LGBTI refugees, by the Commonwealth Government.

Before I move to these issues in more detail, however, I wish to express my concern about the Terms of Reference (provided by Attorney-General, Senator the Hon George Brandis) and therefore the overall direction of this inquiry.

The way in which the Terms of Reference have been formulated, and consequently the manner in which the Issues Paper has been drafted, appears to prioritise some rights above others, merely because they are older, or are found in common law, rather than being more modern rights or founded through legislation or international human rights documents.

This is an unjustified distinction, and makes it appear, at the very least, that property rights or ‘the common law protection of personal reputation’ (aka protection against defamation) are more important than other rights, such as freedom from vilification or discrimination.

My criticism of this inquiry is therefore similar to that of the *Rights & Responsibilities 2014* Discussion Paper released by the Human Rights Commissioner Mr Tim Wilson. From my submission to that inquiry[[1]](#footnote-1):

“Specifically, I would argue that the prioritising of certain rights above others potentially neglects and devalues the importance of those other rights which are no less essential to ensuring that all Australians are able to fully participate in modern society.

From my point of view, chief among these rights is the right to non-discrimination, or to put it another way (which may be more favourably received), to be free from discrimination, including unfair or adverse treatment on the basis of sexual orientation, gender identity and intersex status.

The right to non-discrimination is fundamental in international human rights law adopted immediately post-World War II. Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that:

“Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, property, birth or other status.”

Similarly, article 21 of the ICCPR establishes that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The United Nations Human Rights Committee has, in cases which both involved complaints by Australian citizens against actions by the Tasmanian and Commonwealth Government respectively, found that the wording of these articles includes the right to be free from discrimination on the basis of sexual orientation.[[2]](#footnote-2)

The Commonwealth Parliament has also recognised that the right to non-discrimination for lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians is worthy of protection, with the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

This historic legislation, providing similar rights to non-discrimination to those already enjoyed on the basis of race, sex, disability and age, was a significant, albeit long overdue, step forward for the LGBTI community. For this reason, I would not wish to see the right to be free from discrimination on these attributes to be diminished in comparison to other, more ‘traditional’ rights.

Unfortunately, that is the almost inevitable conclusion of a consultation process which aims to consider “how effectively we protect people’s human rights and freedoms in Australia”… but which then only focuses on a small number of freedoms, including the right to property, but which neglects others.”

*[End extract]*

Encouragingly, the ALRC at least acknowledges, on page 31, that “[f]reedom from discrimination is also a fundamental human right.” But the Issues Paper does not include a chapter on this right, nor does it include it within the list of “[o]ther rights, freedoms and privileges” in Chapter 19.

I believe that this imbalance, in examining and prioritising some fundamental rights, while essentially ignoring others, undermines the utility of this process – and is something which must be redressed in the Final Report, expected by December 2015.

I turn now to three particular areas in which the Commonwealth Government either itself breaches human rights, or authorises others to do so.

1. **The Commonwealth Government’s failure to protect lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians from vilification**

*[NB This topic relates to Chapter Two: Freedom of Speech, and its questions:*

* *What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?*
* *Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?]*

I acknowledge the importance of the right to freedom of expression, or freedom of speech. However, I also welcome the Issues Paper’s acknowledgement that there are possible justifications for encroachment on this right. In particular, the Issues Papers notes, at paragraph 2.2.4 on page 26:

“Similarly, laws prohibit, or render unlawful, speech that causes harm, distress or offence to others through incitement to violence, harassment, intimidation or discrimination.”

This obviously includes the prohibition on racial vilification contained in section 18C of the Commonwealth *Racial Discrimination Act 1975*[[3]](#footnote-3).

My primary question is why laws should be established to prohibit ‘advocacy of national, racial or religious hatred’ but not to prohibit advocacy of hatred on other grounds, including sexual orientation, gender identity or intersex status.

The impact of vilification on these grounds, and the negative influence of public homophobia, biphobia, transphobia and intersexphobia more generally, is just as harmful as racial or religious vilification, and therefore I can see no good reason why there should not also exist equivalent anti-vilification protections covering LGBTI Australians a Commonwealth level.

It is for this reason that I provided a submission last year in response to the Senator Brandis’ Exposure Draft Bill seeking to repeal section 18C, in which I argued that, instead of abolishing racial vilification laws, similar protections against vilification on the basis of sexual orientation, gender identity and intersex status should be added to the *Sex Discrimination Act 1984[[4]](#footnote-4)*.

In short, if there should be a law to protect against the incitement to discrimination, hostility or violence on the basis of race, then there should also be a law to protect people on the basis of sexual orientation, gender identity and intersex status.

The fact that there is no such Commonwealth law means that the Government is currently failing in its duty to protect LGBTI Australians from vilification.

Finally, I note that this answer is, in some respects, contrary to the intention of “Question 2-2: [w]hich Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?” because it instead proposes an additional area where freedom of speech should be limited.

I submit that such an answer is necessary to redress the imbalance contained in the Terms of Reference, and Issues Paper, because the right to freedom from vilification is equally worthy of recognition, and protection, in Commonwealth law. It is a right that should be extended to LGBTI Australians as a matter of priority.

1. **The Commonwealth Government’s tacit endorsement of discrimination, by religious organisations, against lesbian, gay, bisexual and transgender (LGBT) Australians**

*[NB This topic relates to Chapter 3: Freedom of Religion, and its questions:*

* *What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?*
* *Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?]*

I acknowledge the fundamental importance of the right to freedom of religion. However, just as importantly, I support the statement on page 31 of the Issues Paper that:

 “[f]reedom of religion is fundamental, but so too is freedom from discrimination on the grounds of gender, race, sexual orientation or some other protected attribute. Freedom from discrimination is also a fundamental human right.”

Indeed, the case at paragraph 3.20 on the same page, namely *R v Secretary of state for education and employment; ex parte Williamson* (2005) from the UK, provides a useful formulation:

“… there is a difference between freedom to hold a belief and freedom to express or ‘manifest’ a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest, is qualified. This is to be expected, because the way a belief is expressed in practice may impact on others.”

Unfortunately, I do not believe that Australian law currently strikes the right balance between respecting the right to freedom of religion, and protecting others from the harms caused by the manifestation of those beliefs, including through breaches of the right to non-discrimination on the basis of sexual orientation, gender identity and intersex status.

Specifically, I am concerned that the broad exceptions and/or exemptions which are provided to religious organisations under Commonwealth, state and territory anti-discrimination laws, including those protections added by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, are far too generous.

In practice, these exceptions provide Government approval and endorsement of the discriminatory treatment of lesbian, gay, bisexual and transgender (LGBT) Australians by religious bodies in a large number of areas of public life[[5]](#footnote-5).

For example, the combined impact of sub-section 37(1)(d) of the amended *Sex Discrimination Act 1984[[6]](#footnote-6)* and section 38 of the same law (which applies to educational institutions established for religious purposes), means that, according to Commonwealth law:

* Religious schools can freely discriminate against lesbian, gay, bisexual and transgender students, including expelling those students simply for being who they are;
* Religious schools can also freely discriminate against LGBT staff members, including by refusing to provide or terminating their employment, where sexual orientation and gender identity is completely irrelevant to the ability of that person to perform the duties of the role;
* Religious health and community services can similarly discriminate against both LGBT employees/potential employees, as well as LGBT individuals and families accessing these services, with impunity; and
* Religious aged care services can discriminate against LGBT employees or potential employees.[[7]](#footnote-7)

It is difficult to see how these exemptions, which allow LGBT people to be discriminated against simply as they seek to obtain an education, or access healthcare (which are themselves fundamental international human rights), and to be treated unfairly in employment in a large number of jobs across a wide range of areas, is not a gross breach of their human rights.

Religious exceptions and exemptions under Commonwealth, state and territory anti-discrimination laws allow serious harm to be caused to LGBT Australians, on a day-to-day basis and across multiple spheres of public life, and, I submit, should be significantly curbed.

To this end, I believe the religious exemptions which are included in sub-sections 37(1)(a),(b) and (c) of the *Sex Discrimination Act 1984*[[8]](#footnote-8), if supplemented by exemptions covering how religious ceremonies are conducted, are both more justifiable in being better targeted to protecting freedom of religious worship itself, and less likely to result in harm to LGBT people through the breach of their right to non-discrimination across broad areas of public life. These are the only religious exemptions that, I believe, should be retained.

This, much narrower, form of religious exemptions would, in my view, also be a more appropriate outcome of a system of human rights that seeks to both protect fundamental rights, and promote the responsibility not to infringe upon the fundamental rights of others.

Finally, as with my previous answer, I note that this discussion is potentially contrary to the intention of “Question 3-2: Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?” because it highlights an area where, arguably, freedom of religion should be further restrained.

I believe that providing this answer is nevertheless important because, in Australia, freedom of religion is *not* unduly limited. Instead, freedom of religion is unjustifiably *privileged*, including where it tramples upon the rights of others, and especially the rights of lesbian, gay, bisexual and transgender Australians not to be discriminated against in public life.

A mature discussion of rights and freedoms would recognise this serious imbalance and seek to redress it, by ensuring that religious exceptions to and exemptions from anti-discrimination law only protected genuine freedom of religious worship, not establishing a supposed ‘right’ to discriminate against people on the basis of sexual orientation and gender identity.

1. **The gross violation of human rights of asylum-seekers and refugees, including LGBTI refugees, by the Commonwealth Government**

I am not an expert in migration and refugee law, nor in the international human rights instruments that apply in this area.

Nevertheless, I know enough about this subject matter to submit that:

* Seeking asylum is a human right, and is not a criminal act, irrespective of the manner of arrival (whether by plane or by boat),
* Responding to people exercising their right to seek asylum by detaining them in offshore processing centres, indefinitely, in inhumane conditions, and without free and fair access to justice, is a fundamental breach of their human rights, and
* An inquiry into the encroachment by Commonwealth laws upon traditional rights and freedoms would be incomplete without a thorough examination of this issue.

As a long-term LGBTI advocate and activist, I also feel compelled to raise the specific issue of LGBTI asylum seekers and refugees being processed and ultimately resettled in countries that criminalise homosexuality, namely Nauru and Papua New Guinea.

As I have written to several Commonwealth Immigration Ministers, under both Labor[[9]](#footnote-9) and Liberal-National[[10]](#footnote-10) Governments, such a policy clearly abrogates the responsibilities that the Commonwealth Government has towards LGBTI asylum-seekers.

From my letter to then Minister for Immigration the Hon Scott Morrison MP:

“… the mistreatment of LGBTI asylum seekers and refugees raises particular problems, problems that do not appear to be recognised by the Australian Government. Nor does there appear to be any evidence the Government is taking action to remedy them.

Even if the offshore processing and permanent resettlement of refugees continues, this must not include the processing and resettlement of LGBTI asylum seekers and refugees in countries which criminalise homosexuality (which both PNG and Nauru currently do).

If you, as Minister for Immigration and Border Protection and therefore Minister responsible for the welfare of asylum seekers and refugees, cannot guarantee that sections 210 and 212 of the PNG Penal Code do not apply to detainees on Manus Island, then you cannot send LGBTI people there in good conscience.

If you, as Minister for Immigration and Border Protection, cannot guarantee that LGBTI asylum seekers and refugees will not be subject to homophobic bullying and harassment, and will be free to lodge claims for protections on the basis of persecution due to their sexual orientation, gender identity or intersex status, then you must not detain them in such facilities.”

*[End extract]*

As I indicated at the beginning of this section, I am not an expert in this area of law, and therefore am not in a position to provide a more thorough analysis of the (multiple) breaches of human rights law involved in the offshore processing and resettlement of asylum seekers and refugees. I am confident, however, that there will be a number of submissions from human rights and refugee organisations in coming weeks that will do exactly that.

Nevertheless, I felt obliged to include this issue in my submission, given both the severity of the human rights breaches involved, and because of their particular impact on LGBTI asylum seekers and refugees, whose only ‘crime’ is to have sought the protection of our Government.

In conclusion, I wish to thank the Law Reform Commission again for the opportunity to provide this submission, and consequently to raise issues of concern for LGBTI people, namely the absence of anti-vilification protection in Commonwealth law, the breach of our right to non-discrimination because of religious exemptions in the *Sex Discrimination Act*, and the mistreatment of asylum seekers and refugees, including LGBTI refugees, by the Commonwealth Government.

I look forward to these issues being addressed in the inquiry’s Final Report, to be released by the end of 2015.

Sincerely

Alastair Lawrie

1. Full submission at: <http://alastairlawrie.net/2014/10/27/submission-to-rights-responsibilities-2014-consultation/> [↑](#footnote-ref-1)
2. Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 and Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000. [↑](#footnote-ref-2)
3. “Offensive behaviour because of race, colour or national or ethnic origin.

It is unlawful for a person to an act, otherwise than in private, if:

the act is reasonably likely, in all the circumstances, to offend, insult, humiliate, or intimidate another person or a group of people; and

the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.” [↑](#footnote-ref-3)
4. Full submission at: <http://alastairlawrie.net/2014/04/24/dont-limit-racial-vilification-protections-introduce-vilification-protections-for-lgbti-australians-instead/> [↑](#footnote-ref-4)
5. Noting that the religious exemptions contained in the *Sex Discrimination Act 1984* do not apply to intersex status, only to sexual orientation and gender identity. [↑](#footnote-ref-5)
6. Which provides that “[n]othing in Division 1 or 2 affects… any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibility of adherents of that religion.” [↑](#footnote-ref-6)
7. Noting that the religious exemptions contained in the *Sex Discrimination Act 1984* do not apply to LGBT people accessing aged care services. [↑](#footnote-ref-7)
8. “Nothing in Division 1 or 2 affects:

the ordination or appointment of priests, ministers of religion or members of any religious order;

the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;

the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice…” [↑](#footnote-ref-8)
9. My letter to Labor Immigrations Ministers, the Hon Chris Bowen and the Hon Brendan O’Connor from 2012 and 2013: <http://alastairlawrie.net/2012/09/07/letter-to-chris-bowen-on-lgbti-asylum-seekers/> [↑](#footnote-ref-9)
10. My letter to then Immigration Minister the Hon Scott Morrison from February 2014: <http://alastairlawrie.net/2014/02/02/letter-to-scott-morrison-about-treatment-of-lgbti-asylum-seekers-and-refugees-sent-to-manus-island-png/> [↑](#footnote-ref-10)