

10 May 2019

Commissioner
Australian Law Reform Commission
PO Box 12953
BRISBANE QLD 4003

Dear Sir/Madam

Review into the Framework of Religious Exemptions in Anti-discrimination legislation

The Institute of Public Affairs (IPA) welcomes the opportunity to provide comments on the scope of the Australian Law Reform Commission's *Review into the Framework of Religious Exemptions in Anti-discrimination legislation*. It is the view of the IPA that the terms of reference and the title of the review itself prejudge the outcome, and its direction regarding freedom of speech is overly narrow, omitting several important issues that should be addressed by any review into the legal framework affecting religious freedoms in Australia.

Background

On 10 April 2019, the Attorney-General commissioned the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the framework of religious exemptions in anti-discrimination legislation across Australia. The review is part of the Commonwealth government's response to the Religious Freedom Review carried out by the Expert Panel led by The Hon. Philip Ruddock, appointed in December 2017 and released in December 2018.

In December 2017 the Commonwealth government directed the Expert Panel to "consider the intersections between the enjoyment of the freedom of religion and other human rights." The Expert Panel presented the Commonwealth government with 20 recommendations, 15 of which the government committed to implement, and five that were accepted in principle. The latter relate to existing faith-based exemptions in anti-discrimination laws, and form the basis of this Review. In particular, the Attorney-General has asked the ALRC to consider legislative reforms that would:

- "limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos."
- "remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise."

Freedom of speech should not be narrowly construed

We commend the Attorney-General for explicitly including the issue of freedom of speech, and the restriction of freedom of speech through laws such as section 18C of the *Racial Discrimination Act 1975*. Freedom of religion is a bundle of complementary rights, which includes freedom of speech. Indeed, the freedom to hold a religious worldview is meaningless if the ability to express it is prohibited.

Freedom of speech is not only fundamental to religious freedom, but is a cornerstone of Australia's liberal democracy. Any law that curtails freedom of speech affects the ability of an individual to participate in the democratic process. This can have an obvious effect on religious communities, which was most explicitly illustrated in 2015 when the Tasmanian Anti-Discrimination Commissioner decided the Most Rev Julian Porteous, the Catholic Archbishop of Hobart, had a case to answer following a complaint made under state anti-discrimination laws for the publication and circulation to the parents of students of Catholic schools a booklet outlining the Church's position on the legal definition of marriage.

It also diminishes human dignity and social cohesion. As the IPA explained in 2016, "free speech also contributes to solidarity by limiting the frustration that people may feel if they are unable to express themselves,"¹ and this is no less true for people who are expressing views based on a religious belief. Even where that belief is deemed an "unpopular" view – such as the belief that marriage should be defined as being between a man and a woman to the exclusion of all others – it is better for society if it fosters an environment where people are able to voice those thoughts, rather than be silenced and become resentful.

However, freedom of speech should not be limited to mere written or verbal communication. The expression of a religious belief can also influence which associations individuals decide to form. These associations can include commercial relationships, particularly in the case of service providers, and employment decisions. While the terms of reference given to the ALRC are restricted to the freedom to express a particular view of the legal definition of marriage, to restrict its inquiry in this way would be absurd and inconsistent. To secure the right to express this particular belief, freedom of speech in general must be secured for all Australians.

The terms of reference assume exemptions are the only way to protect religious freedoms

It is not a settled question that exemptions embedded within anti-discrimination and other laws are an effective or ideal method of protecting religious freedoms. However the terms of reference not only assume the exemption framework will remain central to protecting religious freedom, but is actively directing the Commission to investigate how to diminish the

¹ Chris Berg et al, *The Case for the Repeal of Section 18C* (Institute of Public Affairs, 2016) 23-24.

existing exemptions further. In reality, the existing exemptions are a deeply flawed legal framework for protecting religious freedoms.

A common source of conflict for religious freedoms arise in anti-discrimination laws, which give legal rights to individuals to lodge complaints to a government agency for alleged violations of anti-discrimination laws that arise from the exercise of genuine religious belief and practices. Most Australian anti-discrimination laws include provisions that, in a limited number of circumstances, exempt churches and faith-based organisations, such as schools or welfare organisations, rather than individuals or businesses that are not affiliated with a church but wish to operate in accordance with a particular set of religious beliefs.

Exemptions are usually limited to the extent the alleged discriminatory activity of the church or faith based body is “reasonable” to comply with the doctrines of that religion. For instance, educational and other bodies established for a religious purpose are exempt under section 37 and 38 of the Commonwealth’s *Sex Discrimination Act 1984* where the body’s acts or practices conform to the “doctrines, tenets or beliefs” or “teachings” of that religion or is “necessary to avoid injury to the religious susceptibilities of adherents of that religion”. This language is emulated in the anti-discrimination laws of the states.²

Inevitably, the nature of the exemptions as drafted invite the judiciary to make theological determinations from a secular perspective. Since most exemptions in anti-discrimination laws are limited to the reasonable acts and practices that conform to certain religious doctrines and beliefs, it requires the courts to make determinations on what legitimate religious beliefs are. In *Christian Youth Camps v Cobaw Community Health Service* [2014] VSCA 75, the majority of the Supreme Court of Victoria did just this, applying an exceptionally narrow meaning of both “conformity” and “doctrines”. The dissenting judge, Redlich JA, noted how improper this was:

Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety. The tribunal was neither equipped nor required to evaluate the applicants’ moral calculus.³

In the absence of broad protections for freedom of religion, it is entirely appropriate to analyse the framework of exemptions. However, the Commission would be in error if it not only ignored the fundamental inadequacy of exemptions to protect religious freedoms, but sought to diminish them further.

² *Anti-Discrimination Act 1977* (NSW) s 56; *Equal Opportunity Act 2010* (Vic) ss 80-84; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (WA) s 73; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) ss 50, 52.

³ *Christian Youth Camps v Cobaw Community Health Service Limited* [2014] VSCA 75 [574].

The terms of reference distort the review in favour of reducing exemptions

Defending exemptions in the law is a politically and morally difficult exercise. In the context of anti-discrimination laws, the structure of the legislation forces advocates for religious freedom to instead defend “loopholes” or “privileges” for churches. Likewise, since anti-discrimination laws make a sweeping declaration that broad categories of conduct are unlawful, the onus is placed on the allegedly discriminating parties to justify why their conduct should enjoy the benefit of an exemption.

Many commentators and activists view the exemptions as loopholes that confer an unfair legal privilege to religious institutions. This is an unfair characterization. A legal privilege refers to a special right in the law created for the benefit of a particular class or group of people. The special right created for classes of people in anti-discrimination laws to initiate litigation against others would be more appropriately regarded as a privilege, rather than the exemptions under those laws. The partial retention of a freedom via exemption under illiberal laws – being freedoms that existed prior to the creation of such laws – cannot be properly regarded as an unfair privilege.

Regardless, the narrative that churches and faith-based organisations benefit under anti-discrimination laws has been accepted as part of public debate. As a consequence, the remaining exemptions are more vulnerable to retain. The Ruddock Review’s first recommendation to the federal government was to urge the federal and state governments to initiate a new set of reviews into the framework of exemptions in anti-discrimination laws once again puts advocates for religious liberty on the back foot. The terms of reference given to the Australian Law Reform Commission for the purposes of this review make the same error.

The IPA thanks the ALRC for the opportunity to give these comments and hopes they will be of assistance as the ARLC prepares its discussion paper.

Yours faithfully,

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