Australian Law Reform Commission

GPO Box 3708

SYDNEY NSW 2000

[freedoms@alrc.gov.au](mailto:freedoms@alrc.gov.au)

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To whom it may concern

**SUBMISSION RE ALRC FREEDOMS INQUIRY INTERIM REPORT**

Thank you for the opportunity to provide a submission in response to the Australian Law Reform Commission (ALRC) Freedoms Inquiry Interim Report.

This submission builds on my submission in response to the Issues Paper released in December 2014[[1]](#endnote-1).

As with my earlier submission, my primary focus is on the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians, including:

* The failure by the Commonwealth Government to protect LGBTI people from vilification and
* The Commonwealth Government’s tacit endorsement of discrimination, by religious organisations, against LGBT people.

However, before I turn to these issues in detail – and specifically how they relate to Chapters 3, 4 and 5 of the Interim Report – I reiterate my concern about the Terms of Reference for this Inquiry.

From my earlier submission:

*“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[[2]](#endnote-2):*

*“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.[[3]](#endnote-3)*

*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]*

Unfortunately, while the ALRC Freedoms Inquiry Issues Paper acknowledged that “[f]reedom from discrimination is also a fundamental human right”, in my opinion the Interim Report does not reflect this view and in fact further privileges some rights over the right to non-discrimination simply because they are ‘older’ in legal origin.

Nevertheless, in the remainder of this submission I will continue to focus on the important right to non-discrimination, including associated protections against vilification, as it relates to the freedoms of speech, religion and association that are discussed in Chapters 3, 4 and 5 respectively.

Chapter 3: Freedom of Speech

My first comment relates to terminology, namely the protected attributes referred to in paragraph 3.103 on page 80.

It is disappointing that the discussion of protections against breaches of human rights and discrimination under the *Sex Discrimination Act 1984* (and the *Australian Human Rights Commission Act 1986*) would refer to the out-dated term ‘sexual preference’, rather than the more inclusive and better practice term ‘sexual orientation’.

It is also disappointing that the two other grounds added by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* – ‘gender identity’, and ‘intersex status’ – are not included in this paragraph.

Turning now to the more substantive issue of anti-vilification laws generally, and the issue of section 18C of the *Racial Discrimination Act 1975* specifically (as discussed on pages 80 to 84).

Despite public controversy in recent years (at least in the eyes of some conservative commentators), I do not believe that there has been any real evidence that the racial vilification protections of the RDA have, in practice, operated inappropriately, or that they require significant amendment.

Moreover, rather than repeal Commonwealth racial vilification protections, I continue to believe there is a strong case for the introduction of similar laws against vilification on the basis of sexual orientation, gender identity and intersex status.

As I wrote in my earlier submission [edited]:

*“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 at Commonwealth level.*

*…*

*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.”*

*[End extract]*

Therefore, my response to the ‘[c]onclusions’ in paragraph 3.191 is to reject the suggestion that “[a]nti-discrimination law may also benefit from more thorough review in relation to implications for freedom of speech” but to instead submit that the Commonwealth Government should amend the *Sex Discrimination Act 1984* to include vilification protections on the basis of sexual orientation, gender identity and intersex status, as a matter of priority.

Chapter 4: Freedom of Religion

It is difficult to disagree with the opening paragraph of Chapter 4, where it asserts: “[g]enerally speaking, Australians enjoy significant religious freedom, particularly by comparison to other jurisdictions. Australians enjoy the freedom to worship and practise religion, as well as the freedom not to worship or engage in religious practices,” or this description in paragraph 4.39 on page 104:

“There are few Commonwealth laws that can be said to interfere with freedom of religion. The Law Council of Australia advised that “it has not identified any laws imposing any specific restriction on the freedom of religion” and “that any specific encroachment is likely to arise in balancing religious freedom with other protected freedoms, such as freedom of speech.””

In fact, I would go further to suggest that religious freedom is unnecessarily and unjustifiably prioritised, and provided with ‘special treatment’, within Australia.

This is because legal protections surrounding freedom of religion extend far beyond the right to worship freely (or not) to incorporate other ‘rights’, including the ‘right to discriminate’ against people on the basis of their sexual orientation or gender identity.

This so-called ‘right to discriminate’ applies outside places and celebrations of worship, to allow education, health and community services that are operated by religious organisations to discriminate against LGBT Australians both in employment, and in service delivery.

This is reflected in the variety of extremely broad exceptions and exemptions under Commonwealth, state and territory anti-discrimination law, which provide that the requirement not to discriminate on the basis of sexual orientation and gender identity does not apply to these organisations.

In the *Sex Discrimination Act 1984*, these exceptions are contained in sections 23(3)(b), 37 and 38, with sub-section 37(1)(d) revealing exactly how broad this freedom to discriminate is in practice:

“[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 susceptibilities of adherents of that religion.”

It should be noted that there is nothing inherent in the freedom of religion that automatically requires religious organisations to be provided with what is essentially a ‘blank cheque’ to discriminate against LGBT employees and LGBT people accessing services in a wide variety of circumstances.

There are two reasons for this:

1. These services, whether they are in the fields of education, health or community services, are located squarely in the public sphere, and their primary nature is related to the delivery of education, health or community services, not to the ‘celebration’ of religion.

This means that, while discrimination against ministers of religion or worshippers within a church, mosque or synagogue on these grounds might conceptually fall within freedom of religion, it is much more difficult to argue that discrimination within a school, hospital or aged care facility is as essential to enjoyment of the same freedom.

1. We accept that there are limits to religious freedom where it threatens public order, or causes significant harm to other people. It is clear that allowing religious organisations to discriminate freely in these settings causes considerable harm to LGBT Australians, including by:
   1. Denying employment to people who are eminently qualified to perform a role, with this discrimination based solely on their sexual orientation or gender identity, attributes which are irrelevant to the job at hand, and
   2. Discriminating against people who wish to access services on the same basis, the most egregious example of which is mistreatment of young lesbian, gay, bisexual and transgender students whose parents have chosen to send to schools operated by religious organisations (and where they are often unaware that their child is LGBT).

For both of these reasons, I reiterate the view from my earlier submission that the exceptions offered to religious organisations under Commonwealth, state and territory anti-discrimination law should be significantly curtailed.

As I wrote previously:

*“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[[4]](#endnote-4), 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.”*

*[End extract]*

Perhaps the most concerning part of the Interim Report is the stakeholder feedback from some religious organisations, lobbyists and lobby groups that, contrary to the above view, their rights to discriminate are currently too narrowly defined and they in fact demand a far greater ability to impose discrimination against LGBT Australians.

This includes submissions from the Australian Christian Lobby, Mr Patrick Parkinson, Freedom for Faith, Family Voice, the Wilberforce Foundation, Christian Schools Australia and the Presbyterian Church of Victoria. Their suggestions include replacing the existing, already overly generous exceptions to anti-discrimination law, with a positively-framed ‘right to discriminate’.

These groups are essentially arguing that religious freedom, no matter how broadly defined or how indirectly related to the actual celebration of religion, must always take precedence over the rights of others not to be discriminated against, even where such discrimination obviously causes significant harm.

I urge the ALRC to reject the views of these religious fundamentalists, and their attempts to impose the ‘supremacy’[[5]](#endnote-5) of religious freedom over any or all other rights in Australian society, including through Commonwealth law.

Finally, while on Chapter 4, I note the discussion regarding solemnising marriage ceremonies on pages 111 to 113 of the Interim Report.

While I do not propose to comment on the content which is included in this section, I would note that one issue which is not canvassed is the proposal by some that, when marriage equality is finally introduced in Australian law, it should be accompanied by the establishment of a new right for civil celebrants to refuse to solemnise wedding ceremonies of LGBTI Australians.

Such provisions have been included in the Freedom to Marry Bill 2014, introduced by Liberal Democratic Senator David Leyonhjelm, and similar rights to ‘conscientiously object’ have also been advocated for by the Australian Human Rights Commissioner, Mr Tim Wilson.

For reasons that I have outlined elsewhere[[6]](#endnote-6), such provisions should be rejected by the Commonwealth Parliament on the basis that this would set a concerning precedent whereby individuals would be able to discriminate in service delivery on the basis of their personal religious beliefs, and because a social reform which is based on love would be fundamentally undermined by provisions which legitimise hate.

Chapter 5: Freedom of Association

The issues which arise in this Chapter are similar to those raised in *Chapter 4: Freedom of Religion*. In particular, people like Mr Patrick Parkinson and Family Voice submit that freedom of association should allow religious organisations to discriminate against people who do not “fit with the mission and values of the organisation.”

To a certain extent I agree – churches, mosques and synagogues, indeed all formally and explicitly religious organisations, should be free to include or exclude whoever they want, on whatever basis they want, as ministers of religion and as worshippers or members of their respective congregations.

The ‘whoever they want, on whatever basis they want’ formulation is important – if the people making the case for freedom of religion, and freedom of association, to justify exempting religious organisations from anti-discrimination laws are philosophically consistent, they should be pushing for exceptions to be introduced into the *Racial Discrimination Act 1975* and other anti-discrimination schemes as much as they argue for the existing exceptions in the *Sex Discrimination Act 1984*.

If they do not, then it reveals that they are not genuinely motivated by the pursuit of these freedoms, but are in fact engaged in an exercise in prejudice specifically directed against lesbian, gay, bisexual and transgender people.

In a similar way to Chapter 4, I also disagree that the freedom of association should extend to allow education, health and community services operated by religious organisations to be able to discriminate against people on the basis of their sexual orientation or gender identity.

Any argument that might be raised that these schools, hospitals or aged care facility should have the freedom to include or exclude ‘whoever they want, on whatever basis they want’ is outweighed by the public interest in having education, health and community services provided on a non-discriminatory basis, and specifically by the harm caused to LGBT people by allowing such discrimination to occur.

Thank you again for the opportunity to provide a submission in response to the Interim Report. Please do not hesitate to contact me, at the details below, should you wish to clarify any of the above or to seek additional information.

Sincerely

Alastair Lawrie

503/9 Archibald Avenue

WATERLOO NSW 2017

[alawriedejesus@gmail.com](mailto:alawriedejesus@gmail.com)

1. <http://alastairlawrie.net/2015/02/15/submission-to-australian-law-reform-commission-traditional-rights-and-freedoms-inquiry/> [↑](#endnote-ref-1)
2. Full submission at: <http://alastairlawrie.net/2014/10/27/submission-to-rights-responsibilities-2014-consultation/> [↑](#endnote-ref-2)
3. 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. [↑](#endnote-ref-3)
4. “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…” [↑](#endnote-ref-4)
5. Indeed, it is especially concerning that the Australian Christian Lobby uses the language of ‘supremacy’ in its own submission: “Courts and legislatures need to acknowledge the supremacy of the fundamental rights of freedom of religion, conscience, speech and association… [it is] a freedom which must be placed among the top levels of human rights hierarchy” as quoted at paragraph 4.96 on page 116. [↑](#endnote-ref-5)
6. See: <http://alastairlawrie.net/2014/12/21/senator-leyonhjelms-marriage-equality-bill-undermines-the-principle-of-lgbti-anti-discrimination-should-we-still-support-it/> [↑](#endnote-ref-6)