

21 September 2015

The Executive Director
Australian Law Reform Commission
via info@alrc.gov.au

Dear Sabina,

The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) and New South Wales Gay & Lesbian Rights Lobby (**NSWGLRL**) provide the following joint submission to the Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Interim Report.

This submission focuses on issues raised in the section of the Interim Report ‘laws that interfere with freedom of religion’, particularly anti-discrimination provisions in the *Fair Work Act* and *Sex Discrimination Act*, and how exemptions to these laws effect lesbian, gay, bisexual and transgender (**LGBT**) Australians.¹ It also briefly addresses the section of the Interim Report on burden of proof.

The VGLRL is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. The NSWGLRL is the peak organization for lesbian and gay rights in New South Wales. Both the VGLRL and NSWGLRL work constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our organisations’ respective mission and vision.

This submission can be made public and we would be pleased to make ourselves available to the Commissioner at any stage to discuss the matters therein.

We thank the Commissioner and her team for taking the time to review this submission. We would be pleased to make ourselves available at any stage to address further questions in relation to the matters raised herein.

Yours sincerely,



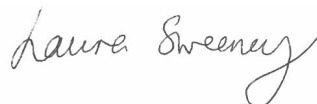
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¹ Religious exemptions under these Acts do not apply to people with an intersex variation.

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Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

VGLRL & NSWGLRL Submission to the Interim Report

Chapter 4: Religious Freedom

1. Human rights and interests protected

Equality and freedom from discrimination

- 1.1 Both the *Sex Discrimination Act* and *Fair Work Act* prohibit discrimination based on sexual orientation, amongst other human attributes.² Prohibition from discrimination based on one's sexual orientation is a human right protected under international law.³
- 1.2 The underlying interest underpinning the human rights to equality and freedom from discrimination is to protect people's personal dignity,⁴ sexual orientation – like other human attributes – being an innate part of a person's identity.⁵

Freedom of religion

- 1.3 As the Interim Report states, the right to freedom of religion is protected both under international law but there is some doubt as to whether it is protected under common law.⁶
- 1.4 Like freedom from discrimination, freedom of religion is an important part of personal identity.⁷
- 1.5 Freedom of religion is accepted as embracing two distinct aspects:
 - freedom of thought, conscience and religion, which includes the freedom to choose a religion and adopt a belief; and
 - freedom to manifest religion or belief in practice.

² *Sex Discrimination Act 1984* ss 5-7A; *Fair Work Act 2009* s 351(1).

³ *Toonen v Australia*, CCPR/C/50/D/488/1992, United Nations Human Rights Committee, 4 April 1994.

⁴ *Lifestyle Communities (No 3) (Anti-discrimination)* [2009] VCAT 1869 [108] per Bell J: "That bedrock value is that everybody without exception has a unique human dignity which is their birthright."

⁵ *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [193] per Hampel J: "Sexual orientation, like gender, race and ethnicity, are part of a person's being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who or what they are. That carries with it the enjoyment of the right to equal treatment, or freedom from discrimination, as people with a different sexual orientation, gender, race or ethnicity have."

⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.1]-[4.19], [4.32]-[4.35].

⁷ Mark Durie, 'Religious liberties under threat in Victoria' (2009) 4 *Life News*.

Limitations of freedom of religion

- 1.6 A distinction can be made between the freedom to choose and hold a religious belief, which is regarded as absolute and thus not capable of any limitation, and the freedom to manifest one's belief, which may be legitimately subject to reasonable limitation.
- 1.7 The Issues Paper acknowledges that:
*The freedom to manifest that belief in worship, observance, practice or teaching may be limited by laws when deemed necessary to protect the public safety, order, health or morals, or the fundamental rights and freedoms of others.*⁸
- 1.8 Limitation is permissible where the manifestation of belief has the capacity to impact upon the rights and freedoms of others and the State has a role in resolving this conflict of rights. As such, both the *Sex Discrimination Act* and the *Fair Work Act* seek to give effect to the conflicting human rights, namely the right to equality and freedom from discrimination and the right to manifest religious beliefs. In our view, the religious exemptions contained in both Acts do not appropriately balance these conflict rights.

2. Legislative objects

- 2.1 The legislative object of the *Sex Discrimination Act* is “to eliminate, so far as is possible, discrimination against persons on the ground of... sexual orientation.”⁹ Similarly, the legislative object of the *Fair Work Act* is “enabling fairness... at work and the prevention of discrimination by... protecting against unfair treatment and discrimination.”¹⁰
- 2.2 At the same time, both the *Sex Discrimination Act* and *Fair Work Act* provide specific exemptions to the general prohibition on discrimination ostensibly to accommodate the freedom of religion.¹¹
- 2.3 The statutory formulation of the exemptions protecting religious freedom include:
- an exemption in connection with the ordination, appointment, training or education of members of a religious order;¹²
 - an exemption in connection with the selection or appointment of persons to perform functions or participate in religious observance or practice;¹³
 - for educational institutions established for religious purposes, an exemption in connection with employment of staff, appointment of contractors or provision of education where the action is taken “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion”;¹⁴

⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Issues Paper 46 (2014) 6.

⁹ *Sex Discrimination Act 1984* s 3(b).

¹⁰ *Fair Work Act 2009* s 3(e).

¹¹ *Sex Discrimination Act 1984* ss 37(1), 37(2)(b), 38; *Fair Work Act* s 351(2)(c).

¹² *Sex Discrimination Act 1984* ss 37(1)(a), 37(1)(b).

¹³ *Sex Discrimination Act 1984* s 37(1)(c).

¹⁴ *Sex Discrimination Act 1984* s 38.

- for religious bodies, an exemption in regard to conduct that either “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”;¹⁵
- an exemption in regard to action that “is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion” where the action is “taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion”.¹⁶

2.4 On the basis of these exemptions:

- religious schools are permitted to discriminate against LGBT students, including expelling those students on the basis of their sexual orientation or gender identity;
- religious schools are permitted to discriminate against LGBT staff members by refusing to hire or terminating their employment, including in circumstances 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 are permitted to discriminate against LGBT employees and potential employees as well as LGBT individuals who seek to access the subject services; and
- religious aged care services are permitted to discriminate against LGBT employees or potential employees.

3. Issues for consideration

Negative effects of religious exemptions on LGBT people generally

3.1 Despite significant positive changes and shifts in societal attitudes over the past few decades, LGBT people continue to experience disadvantage in the form of harassment and violence, as well as structural and institutional discrimination in areas such as employment, housing, education, access to human and social services; adoption and foster care services; placement and residential services for children in state care; services for vulnerable children turning 18 and leaving state care; disability services; aged care; and health services, including crisis prevention.¹⁷ Laws that either actively discriminate against LGBT people or fail to protect their basic human rights are one of the key mechanisms for enforcing this oppression.¹⁸ Further, religious exemptions within such laws are one specific element of these mechanisms. They are of particular concern for the psychological, emotional and physical wellbeing of LGBT people.

3.2 It is evident from a vast number of studies that religious exemptions have a profound impact, including immediate and negative effects, on LGBT people:

¹⁵ *Sex Discrimination Act 1984* s 37(1)(d).

¹⁶ *Fair Work Act 2009* s 351(2)(c).

¹⁷ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 14; Lyn Irwin, ‘Homophobia and Heterosexism: Implications for Nursing and Nursing Practice’ (2007) 25(1) *Australian Journal of Advanced Nursing* 70, 71.

¹⁸ Gary Harper and Margaret Schneider, ‘Oppression and Discrimination among Lesbian, Gay, Bisexual, and Transgendered People and Communities: A Challenge for Community Psychology’ (2003) 31(3-4) *American Journal of Community Psychology* 243, 246.

Direct and unjustified discrimination has both a legal and social impact on LGBTI people. When law is used to sanction discrimination it legitimises institutional and interpersonal discrimination. State-sanctioned discrimination can facilitate an environment in which discrimination towards LGBTI people is normalised. This has adverse consequences for the health and wellbeing of LGBTI people. [In addition, state-] sanctioned discrimination can also confuse social norms.¹⁹

- 3.3 Such discrimination has significant human consequences, including both personal harm and societal cost: specifically lower enjoyment of health and wellbeing for LGBT people (from acute pathologies such as clinical depression, self-harm and general anxiety disorder, to experiences of episodic low self-esteem and self-worth, and high rates of suicide), as well as significantly limiting an individual's sense of security to publicly participate in activities such as employment and sports.²⁰
- 3.4 Further, the psychological and social impact of externalised homophobia and heterosexism through oppression, rejection, discrimination, harassment and violence on LGBT youth and adults can (re)inforce internalised homophobia and heterosexism, keep people 'in the closet' and can influence how well individuals adjust to their LGBT identity;²¹ such impact can be grouped under the term "minority stress." Indeed, the Australian Human Rights Commission found that, as a result of such stress, LGBT people also experience a higher prevalence of other risk factors associated with mental ill-health and suicidality than the rest of the population, such as more harmful and frequent levels of alcohol and other drug misuse; homelessness and poverty; disengagement from schooling; and chronic health conditions.²²

Negative effects of religious exemptions in educational institutions

- 3.5 Religious exemptions within the education system, in particular in the treatment of LGBT students, have clear and far-reaching consequences. Indeed, the findings of the Australian Human Rights Commission 2015 report are conclusive:
- Many submissions outlined fear for the safety of young LGBTI people in schools exempt from unlawful discrimination towards students on the basis of SOGI status. While it was acknowledged that freedom of religion requires a level of protection, it was strongly emphasised*

¹⁹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 14.

²⁰ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 17-8; Brian Feinstein et al, 'The relationship between experiences of discrimination and mental health among lesbians and gay men: An examination of internalized homonegativity and rejection sensitivity as potential mechanisms' (2012) 80(5) *Journal of Consulting and Clinical Psychology* 917.

²¹ Lorene Gottschalk, 'Coping with stigma: Coming out and living as lesbians and gay men in regional and rural areas in the context of problems of rural confidentiality and social exclusion' (2007) 12(2) *Rural Social Work and Community Practice* 31; Gary Harper and Margaret Schneider, 'Oppression and Discrimination among Lesbian, Gay, Bisexual, and Transgendered People and Communities: A Challenge for Community Psychology' (2003) 31(3-4) *American Journal of Community Psychology* 243.

²² Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011) 5.

that in resolving a conflict of rights it is imperative to prioritise the physical safety and emotional wellbeing of young people.²³

- 3.6 At this crucial time of development, LGBT children and young people are at heightened risk of suicidal ideation, self-harm, depressive symptomatology and emotional distress.²⁴ However, it is also important to note that religious exemptions in the education system can have ongoing negative effects for society as a whole, through developing and encouraging intolerance and a lack of respect for human rights and fundamental freedoms, which can thereby contribute to discrimination and harassment in adult settings later on in life.

Negative effects of religious exemptions in employment

- 3.7 Employees also fall foul of religious exemptions in the *Sex Discrimination Act* and *Fair Work Act*. The inconsistent implementation and arbitrary application of religious exemptions – as a result of a lack of certainty regarding what constitutes “the doctrines, tenets, beliefs or teachings of a particular religion”, as well as varying interpretations of religious doctrine across religious denominations – is a particular cause of stress and anxiety for LGBT employees in any workplaces with a religious affiliation.²⁵ Indeed, “something as arbitrary as a change of superior, or a casual remark by a colleague or student can result in loss of livelihood for these individuals, simply on the grounds of their sexuality.”²⁶
- 3.8 The uncertainty with which LGBT individuals in these settings must live, the trauma of having to live a closeted lifestyle (and, in many cases, having to at least be seen to uphold religious doctrine), the fear of being uncovered and the potentially devastating consequences of being uncovered (including, but not limited to, forced resignation, personal and professional humiliation, relationship breakdown, financial loss, and the experience of discrimination, rejection and exclusion) and the negative impact of cognitive dissonance in trying to reconcile two core aspects of identity, all have clear and demonstrable negative effects on physical, emotional and mental health, as well as undermining LGBT employees’ capabilities and diminishing their potential.²⁷

²³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 41.

²⁴ Joanna Almeida, ‘Emotional distress among LGBT youth: The influence of perceived discrimination based on sexual orientation’ (2009) 38(7) *Journal of Youth and Adolescence* 1001.

²⁵ LGBT people in many professions are impacted by religious exemptions, with unjust discrimination being raised by the Australian Human Rights Commission as a significant factor affecting employment and a barrier to equal participation in the workplace: Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 19. Recent studies have found that 10-7% of LGBT people have been refused employment or denied a promotion based on their sexuality, and that 52% of gay and lesbian employees have experienced discrimination in their current employment because of their sexual orientation: Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011) 9. See also Carolyn Evans and Leilani Ujvari, ‘Non-discrimination Laws and Religious Schools in Australia’ (2009) 30(1) *Adelaide Law Review* 31, 52; Tania Ferfoljaa, ‘Institutional Silence: Experiences of Australian Lesbian Teachers Working in Catholic High Schools’ (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 51, 53.

²⁶ Jim Woulfe, ‘An end to the right to discriminate’ *ON LINE opinion*, 16 March 2009.

²⁷ Carolyn Evans and Leilani Ujvari, ‘Non-discrimination Laws and Religious Schools in Australia’ (2009) 30(1) *Adelaide Law Review* 31, 42; Tania Ferfoljaa, ‘Institutional Silence: Experiences of Australian Lesbian Teachers Working in Catholic High Schools’ (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 51, 52-3, 60-3.

3.9 Consequentially, LGBT employees often have to contend with the constant threat and fear of discrimination, abuse, harassment, rejection and ridicule from their colleagues, as well as the potential negative impact on their career and job prospects, resulting in many LGBT people feeling unsafe and undervalued in the workplace.²⁸

Choice is not always an option

- 3.10 One policy justification for the religious exemptions advanced by some is the ability of individuals to choose from available services, including both religious and non-religious providers.²⁹ However, the luxury of choice is simply not available in many areas and in many settings. LGBT people living in regional, remote or rural areas may have access to limited service delivery options. As the VGLRL has previously stated, “a number of public hospitals are run... by a faith based organisation in regional ad rural areas around Australia.”³⁰
- 3.11 Vulnerable people accessing crisis, emergency or other vital social services do not often find themselves with a field of potential providers to choose from. Often the market for these services is extremely scarce and those individuals accessing services are extremely vulnerable. It is grossly inappropriate for individuals experiencing mental illness or those with an intellectual or other disability to be subjected to the prospect of discrimination on the basis of their sexual orientation.

Faith-based service providers do not necessarily want to discriminate

- 3.12 Many religious organisations do not discriminate in practice and a number have publicly stated their intention not to take advantage of the broad exceptions available anti-discrimination laws.³¹ Indeed, some religious organisations resent the existence of exemptions, seeing the exclusion of one particular group as inconsistent with their faith.³²
- 3.13 Jewish Care, Wesley Care Mission, BapCare and UnitingCare all have explicit policies of non-discrimination on the grounds of sexual orientation or gender identity. A number of Jewish and Christian schools are members of Safe Schools Coalition and thus support same-sex attracted and gender diverse students, staff and families.
- 3.14 Unfortunately, the fear and apprehension of discrimination due to historical experiences is very real in the minds of LGBT people, regardless of whether the provider in question intends to discriminate or not.

²⁸ Lyn Irwin, ‘Homophobia and Heterosexism: Implications for Nursing and Nursing Practice’ (2007) 25(1) *Australian Journal of Advanced Nursing* 70, 74.

²⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.58].

³⁰ Senate Standing Committee on Legal and Constitutional Affairs, ‘Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012’ (2013) [5.55].

³¹ Senate Standing Committee on Legal and Constitutional Affairs, ‘Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012’ (2013) [5.25].

³² Senate Standing Committee on Legal and Constitutional Affairs, ‘Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012’ (2013) [5.23].

4. Alternative options

Remove religious exemptions and replace with a general limitations clause

- 4.1 We acknowledge the importance of the rights, freedoms and privileges that are recognised by the common law and the need to uphold those “traditional” rights where possible. However, our strong view is that blanket exemptions for religious exemptions fail to balance the human right of freedom of religion with freedom from discrimination. Indeed, such wide-ranging exemptions give priority to religious freedom at the expense of the freedoms of LGBT Australians and allow LGBT people to be discriminated against as they seek to obtain an education and access healthcare, themselves fundamental human rights.
- 4.2 This position does not reflect the current practices of religious organisations or the views of the vast majority of Australians. We are also concerned about the impact of the exemptions on LGBT Australians. The protection of LGBT rights is essential and, in that respect, a reasonable justification for encroaching upon freedom of religion where those rights are seen to be competing.
- 4.3 We believe that broad permanent exemptions for educational institutions and religious bodies should be removed and replaced with a general justification defence or general limitations clause.³³ Such a clause should set out criteria for evaluating circumstances in which religious rights and interests should take precedence over the right to freedom from discrimination, and how these competing rights should be balanced.
- 4.4 The model proposed ascribes value to all human rights, including the right to freedom of religion and the right to equality. Neither of these rights is absolute in law or in practice and, in cases of conflict, neither should automatically prevail. Instead, competing interests should be considered and balanced. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination would be allowed. Such an approach would, for example, most likely permit discrimination in circumstances such as the ordination of priests.
- 4.5 The Attorney-General’s Department Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Law identified three key benefits in favour of adopting a general limitations or exemptions clause. These included:³⁴
1. a ‘case-specific approach’ to resolving anti-discrimination claims, and an increased scope for judicial consideration;
 2. a reduction in the number of inconsistent protections under Commonwealth anti-discrimination legislation; and
 3. the flexibility of an exemptions regime to be able to adapt to changing standards and community expectations.
- 4.6 Furthermore, the Senate Standing Committee on Legal and Constitutional Affairs Inquiry ‘Effectiveness of the Sex *Discrimination Act 1984* in Eliminating Discrimination and Promoting

³³ This position would appear to be supported by the Australian Christian Lobby: Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.60].

³⁴ Attorney-General’s Department, ‘Consolidation of Commonwealth Anti-Discrimination Laws’, Discussion Paper (2011) 37 [147].

Gender Equality' made reference to a number of submissions on the benefits of a move towards a general exemption provision, including:³⁵

1. a more 'detailed and considered approach to balancing human rights';
2. working examples in other international jurisdictions such as Canada, New Zealand and South Africa;
3. a widened scope for 'duty holders'; and
4. a flexibility to adapt to 'ever-changing conditions'.

4.7 Further, we wish to draw the Commissioner's attention to the strong recommendations of the Senate Standing Committee on Legal and Constitutional Affairs following its inquiry into the draft Human Rights & Anti-Discrimination Bill 2012. In their recommendations the Committee suggested removing blanket religious exemptions.³⁶ Further, the Committee suggested that where organisations retain the legal right to discriminate, they must proactively publish their intention to rely upon the exemption up front.

Transparency and accountability

4.8 If the religious exemptions in the *Sex Discrimination Act* and *Fair Work Act* are to remain, we support the Senate Standing Committee on Legal and Constitutional Affairs' view that, in the interests of transparency, religious organisations intending to discriminate by reliance on available exemptions should be required to notify prospective employees or any other users of their service.

4.9 If religious organisations are to be granted permanent exceptions from discrimination laws, members of the community are entitled to be informed of risk of discrimination before they make a decision to purchase goods and services or apply for a job. Imposing such a notice requirement would also enable those organisations that do not discriminate to be free from any suspicion of discriminatory conduct or intent.

4.10 The *Sex Discrimination Act* and *Fair Work Act* should include a requirement that religious organisations publish statements on their websites, position descriptions for job advertisements and brochures or other promotional or informational material relating to the provision of goods or services, education or accommodation.³⁷

4.11 Religious organisations should also be required to register a notice of their intention to discriminate with the Australian Human Rights Commission or Fair Work Commission and a searchable public record should be maintained of these notices.³⁸

4.12 This would serve to forewarn potential victims of discrimination.³⁹ Whereas:
Without a notice provision, individuals may choose an employer or school with no knowledge or

³⁵ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Effectiveness of the *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting General Equality' (2008) [7.10]- [7.16].

³⁶ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013).

³⁷ See, e.g. *Equal Opportunity Act 1984* (SA) s 34(3).

³⁸ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.60].

*warning that they are thereby sacrificing their right to protection from discrimination. This can be a serious matter for a teacher choosing in which educational system to pursue their career, or a student making a choice of school.*⁴⁰

- 4.13 We encourage the Commission to support requiring educational institutions, religious bodies and employers to publicly document and advertise when and why they intend to rely on these exemptions.

Extending limitations to all publicly funded service delivery

4.14 As part of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act*, amendments were introduced to restrict religious exemptions in the delivery of aged care services.⁴¹ In the absence of the removal of permanent exemptions for religious organisations, this change represented a sensible compromise for a number of reasons. Firstly, there was clear support for the change by a number of service providers who took the view they wanted their service to be known as not discriminating. In many cases these providers may have had differing views to the Church hierarchy. Secondly, providers could remove themselves from being effected by the changes by ceasing to receive Commonwealth funds for its services. Finally, the change only affected vulnerable people in the delivery of their service. It did not affect an organisation's choice of who could be employed to deliver those services.

4.15 These existing protections to the area of aged care should be extended to prevent any organisations in receipt of government funding from relying on the exemptions.⁴² This would ensure that public funding is not utilised to perpetuate discrimination and disadvantage. It is particularly offensive for LGBT taxpayers to find themselves faced with public service delivery options that they may be unable to access or that may be delivered in a manner inappropriate for their needs.

4.16 We strongly support a limitation on discrimination in publicly funded services including:

- mental health services;
- homelessness and housing services;
- disability services;
- health services;
- youth services;
- schools; and/or
- social, community and welfare services.

4.17 These settings deal with minors and potentially other people lacking legal capacity due to mental illness or intellectual disability, further evidencing their vulnerability. Considering the

³⁹ Greg Walsh, 'An opt-in approach to regulating the employment decisions of religious schools' (2014) 14 *Macquarie Law Journal* 163.

⁴⁰ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.58].

⁴¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.71].

⁴² Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.68].

adverse mental and physical health impacts of discrimination, the Government have a moral duty to ensure the delivery of these services is regulated so as to prevent or limit discrimination.

5. Religious exemptions and marriage equality

5.1 The preceding discussion has focused on the existing religious exemptions within the *Sex Discrimination Act* and *Fair Work Act*. Recent debates about marriage equality in Australia have, however, raised the possibility of the introduction of new religious exemptions to accompany amendments to the *Marriage Act* to provide for marriage equality. These proposed exemptions have focused on three key issues:

- the capacity of religious celebrants to refuse to marry same-sex couples;
- the capacity of civil celebrants to refuse to marry same-sex couples;⁴³ and
- the capacity of providers of marriage-related services to refuse to provide services to same-sex couples.⁴⁴

⁴³ See, for example, Heather Aston and Judith Ireland, 'Civil celebrants to have right to say 'I won't' under same-sex marriage bill', *Sydney Morning Herald*, 11 September 2014. <<http://www.smh.com.au/federal-politics/political-news/civil-celebrants-to-have-right-to-say-i-wont-under-samesex-marriage-bill-20140912-10flyi.html>>.

⁴⁴ See, for example, Tim Wilson, 'Religious Freedom and Same-Sex Marriage need not be Incompatible', *The Australian*, 6 July 2015 <<http://www.theaustralian.com.au/opinion/religious-freedom-and-same-sex-marriage-need-not-be-incompatible/story-e6frg6zo-1227429558684>>. Commissioner Wilson proposed a model in which providers of marriage-related services could, on the basis of their religious beliefs, advertise what types of marriages they provide services to and then only provide services to those types of marriages, without breaching anti-discrimination laws.

Exemptions for religious celebrants

- 5.2 Section 47 of the *Marriage Act* makes it clear that ministers of religion who are authorised celebrants are not bound to solemnise any marriage and may impose additional conditions or requirements to those required by the Act. As noted above, one of the questions raised in the marriage equality debate is whether religious celebrants would be bound to solemnise a marriage between same-sex couples or else be subject to a complaint under anti-discrimination law.
- 5.3 In response to this concern, the *Marriage (Same Sex Couples) Act 2013* (UK) explicitly states that no religious organisation cannot be compelled to marry same-sex couples,⁴⁵ and the *Equality Act 2010* (UK) was amended to make it clear that it is not unlawful for a religious organisation or its representative to be refuse to marry a same-sex couple.
- 5.4 In our view, provisions to make it clear that religious celebrants cannot be compelled to marry same-sex couples would strike an appropriate balance between religious freedom and equality before the law and freedom from discrimination.

Exemptions for civil celebrants

- 5.5 The Freedom to Marry Bill 2014 proposed amendments to the *Marriage Act* that would permit civil celebrants to refuse to marry same-sex couples.
- 5.6 In our view, permitting civil celebrants, as distinct from religious celebrants, to discriminate on the basis of sexual orientation would constitute an unjustifiable encroachment on the right to freedom from discrimination and undermine the principles upon which the Australian anti-discrimination law regime is based.

Exemptions for providers of marriage-related services

- 5.7 In an opinion piece in *The Australian* published on 6 July 2015, Human Rights Commissioner Tim Wilson expressed the view that:
*Preserving religious freedom is greater than exempting religious celebrants, such as priests, rabbis and imams, from being bound to marry all couples. It can also require that some people of faith are not forced to act against their conscience and participate in a marriage they disagree with, from hosting a ceremony to providing services.*⁴⁶
- 5.8 We strongly oppose any proposal that would permit service providers to rely on freedom of religion to discriminate on the basis of sexual orientation in the provision of marriage-related services. In our view, such an approach would represent a significant and unjustified extension of the current exemptions on the basis of religious belief.
- 5.9 More broadly, we submit that permitting discrimination against minorities on the basis of a minority religious belief can only be logically consistent if such discrimination is permitted in any

⁴⁵ *Marriage (Same Sex Couples) Act 2013* (UK) s 2.

⁴⁶ Tim Wilson, 'Religious Freedom and Same-Sex Marriage need not be Incompatible', *The Australian*, 6 July 2015 <<http://www.theaustralian.com.au/opinion/religious-freedom-and-same-sex-marriage-need-not-be-incompatible/story-e6frg6zo-1227429558684>>.

and all circumstances in which it accords with the minority religious belief. So, for example, it would be logically inconsistent to permit providers of marriage-related services to discriminate against same-sex couples on the basis of religious beliefs, whilst making it unlawful for providers of marriage related-services to discriminate against people who have divorced and remarried, when such discrimination is similarly based on religious beliefs. The refusal of service to people on grounds of certain attributes, such as sexual orientation and sex, cannot logically be justified on the basis of religious freedom when other attributes remain protected despite their potential conflict with religious beliefs.

Chapter 11: Burden of Proof

6. Civil provisions that reverse the burden of proof

- 6.1 It is a common law principle that the prosecution bears the burden of proof.⁴⁷ However, a number of civil provisions reverse the burden of proof, including the adverse action provisions the *Fair Work Act*⁴⁸ and the indirect discrimination provisions in the *Sex Discrimination Act*.⁴⁹
- 6.2 Further to the comments on this issue made by the Australian Council of Trade Unions in its submission to the Issues Paper and by Ms Adriana Orifici, Professor Beth Gaze and Associate Professor Anna Chapman in their submission to the Interim Report, we support the retention of the reverse onus of proof in the *Fair Work Act* and the requirement in indirect discrimination claims under the *Sex Discrimination Act* that respondents show that a particular requirement or condition which has a differential impact is reasonable.
- 6.3 In both of these circumstances it would be near impossible for the claimants to meet the respective burdens due to their lack of access to information held by the respondent and the pre-existing power imbalance between complainants and respondents.⁵⁰ The difficulties faced by complainants in discharging the existing evidentiary burden in the *Sex Discrimination Act*, in particular, have been canvassed extensively in available literature and previous parliamentary and other inquiries.⁵¹

⁴⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [11.1]-[11.5].

⁴⁸ *Fair Work Act 2009* s 361(1).

⁴⁹ *Sex Discrimination Act* s 7C.

⁵⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [11.99], [11.102].

⁵¹ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013); Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Effectiveness of the *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting General Equality' (2008); Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws', Discussion Paper (2011).