



Anglican Church Diocese of Sydney

10 May 2019

The Hon Justice Sarah Derrington
President
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
via email to religion@alrc.gov.au

Dear Justice Derrington

Inquiry into the Framework of Religious Exemptions in Anti-discrimination Legislation.

This letter is written in response to the ALRC's invitation to interested stakeholders to provide comments on the scope of the inquiry and any issues relevant to the terms of reference. Our comments are cognisant of the ALRC background briefing paper dated 1 May 2019. We also note that the ALRC has announced that it plans to release a Discussion Paper on 2 September 2019 for public comment, with submissions on this paper due by 15 October 2019, and the final report due by 10 April 2020.

The Anglican Church Diocese of Sydney strongly supports this inquiry. We note that both the terms of reference and the ALRC briefing paper recognise that this inquiry calls for an appropriate balancing of the right to freedom of thought, conscience and belief with the right to equality and non-discrimination. Given that the ALRC has been asked to recommend reforms to all relevant anti-discrimination laws and other laws, it is not sufficient to limit the focus of the inquiry to existing Commonwealth legislation that prohibits discrimination on the basis of sex, age, race and disability. It will also be necessary to give due consideration to the prohibition of discrimination on the basis of religion (including the difficult task of balancing the religious freedom rights of persons of different religions, and the appropriateness or otherwise of "religious exemptions" in a Religious Discrimination Act). We note that the Coalition has proposed a Religious Discrimination Act, and that the Labor National Platform promises a consolidation and harmonisation of anti-discrimination laws

and procedures, including the appropriate protection of the religious freedom of all people. Given the potential for new anti-discrimination laws recognising religion as a protected attribute in the near future, it will be necessary for this ALRC to include these matters within the ambit of its proposals.

The Anglican Church Diocese of Sydney, like other faith groups and organisations, is concerned about comments by the Shadow Attorney-General in a letter dated 7 May 2019 (attached as Appendix 3). This letter was written to faith leaders, who had sought assurances from the Labor Party that, should it win government, it would not amend the *Sex Discrimination Act* until after the ARLC report had been received in April 2020, so that the ALRC would be able to consult widely with stakeholders on these important issues. In reply, the Shadow Attorney-General has indicated that Labor will ask the ALRC to expedite its review “with a view to the ALRC providing advice to government in a timelier manner”, and for the ALRC to prioritise a response on the single issue of “exemptions from discrimination against LGBTIQ students and teachers”.

We are very concerned that this will have the effect of curtailing the consultation process stipulated in the terms of reference and limiting the scope of the ALRC Inquiry, and so we write to indicate our strong support for the process and timeline which the ARLC has already announced, and for the Inquiry to have the full scope as set out in the terms of reference, allowing for holistic and balanced reform.

Process and Timeline

We support the process and timeline that has been announced by the ALRC, which gives the ALRC three months (June-August) to prepare a Discussion Paper on proposed legislative reforms, a six week period for public submissions, leaving the period from November 2019 to March 2020 for the ALRC to produce its final report. In our view, it would be a grave mistake to curtail or dispense with a public consultation process which engages with a Discussion Paper. The ALRC has often followed this process of inviting public comment on proposed reforms in the past, and has served the process of law reform well. There is no compelling reason to depart from ALRC best practice in this case. There is no epidemic of students being expelled or teachers being sacked that must be addressed as a matter of extreme urgency. In multiple Senate inquiries held recently, there was no evidence that any LGBTIQ student had been expelled in reliance on the exemptions in the *Sex Discrimination Act 1984*. The range and depth of submissions to the Senate Committee which examined the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* demonstrate that this is a complex area of law which will need wide consultation, in order to avoid unintended consequences.

Scope of the Terms of Reference – “religious institutions”

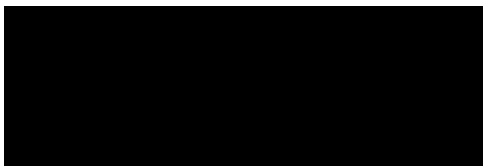
We note that the terms of reference ask the ALRC to recommend legislative reform to “limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination,

while also guaranteeing the right of **religious institutions** to conduct their affairs in a way consistent with their religious ethos”, and further that the phrase “religious institutions” is defined to include “bodies established for religious purposes (including faith-based institutions) and educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.”

In our view, it is extremely unwise to narrow the focus to, or prioritise reporting on, reforms relating only to **religious educational institutions**. The reason why both the Religious Freedom Review and the Parliament have not been able to settle the issues in relation to faith-based schools and anti-discrimination law is the limited scope of the solutions that have been proposed to date. These matters involve a complex balancing of competing human rights, which will impact not just faith-based schools but also faith-based hospitals, public benevolent charities, adoption agencies, aged-care providers, youth camps and so on. The deficiency of the current provision of the *Sex Discrimination Act* is that religious freedom is framed negatively, as an exemption to another right. A better approach would be to use a form of a General Limitation Clause (adapted from Parkinson and Aroney), which has been included as an appendix (Appendix 1) to this letter. An alternative approach, which seeks to reframe s.38 of the *Sex Discrimination Act*, has also been included for your consideration (Appendix 2).

We thank you for the invitation to stakeholders to comment at this early stage, and look forward to further engagement with the Commission through the Inquiry process. The Sydney Diocese of the Anglican Church has proposed legislative amendments on these matters in submissions to a range of inquiries and reviews, and would be very happy to provide this to the ALRC on request.

Yours sincerely



The Right Reverend Dr Michael Stead
Chair, Religious Freedom Reference Group
Anglican Church Diocese of Sydney

Appendix 1 – “General Limitations Clause” (following Parkinson/Aroney)

- (1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.
- (2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:
 - (a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
 - (b) it is made because of the inherent requirements of the particular position concerned; or
 - (c) it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
 - (d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
- (3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection (2)(a).
- (4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a body established for religious purposes, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:
 - (a) it is consistent with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
 - (b) it is because of the religious sensitivities of adherents of that religion or creed; or
 - (c) in the case of decisions concerning employment or volunteers, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.
- (5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

Appendix 2 – New version of Section 38 of the Sex Discrimination Act.

s.38 Faith-based educational institutions

(1) The object of this section is to contribute to giving effect to Australia's international obligations under the International Covenant on Civil and Political Rights, including Articles 18, 19, 22 and 27 and other relevant international instruments.

(2) This section applies to an educational institution that is conducted in accordance with religious doctrines, or otherwise established for religious purposes.

(3) This section has effect notwithstanding Division 1 or 2 of Part II of this Act.

(4) It is lawful for an educational institution to which this section applies, or a person acting on behalf of such an institution, to –

(a) employ or engage a particular person, or allocate particular duties or responsibilities to that person, on the ground or condition that the person adheres to or conducts himself or herself in accordance with the religious doctrines or religious purposes of the institution, or abides by or agrees to abide by a code of moral conduct;

(b) not employ or engage a particular person, terminate the employment or engagement of a particular person, or not allocate particular duties or responsibilities to a particular person, on the ground that the person does not or no longer adheres to or conducts himself or herself in accordance with the religious doctrines, tenets, beliefs, teachings or religious purposes of the institution or has breached a code of moral conduct of the institution of the type described in paragraph (a);

(c) do acts ancillary or incidental to the acts referred to paragraphs (a) and (b), such as advertising for a position that requires the appointee to adhere to or conduct himself or herself in accordance with the religious doctrines or religious purposes of the institution or to abide by a code of moral conduct of the type described in paragraph (a);

provided that the educational institution has a publicly available policy outlining its expectations of employees and others engaged by the institution, and explaining how the policy will be enforced.

(5) In this section –

(a) an educational institution includes any association, body, corporation, entity or organisation whether or not incorporated under any Commonwealth, State or Territory law;

(b) religious doctrines include religious beliefs, codes of moral conduct, practices, principles, teachings and tenets;

(c) the employment or engagement of a person includes the employment or engagement of that person as an employee, contract worker or volunteer, whether paid or unpaid.



**Shadow Attorney-General
Shadow Minister for National Security
Federal Member for Isaacs**

7 May 2019

I write to clarify Labor's position on the rights of religious schools to operate in accordance with the doctrines, tenets and beliefs of their religious faith.

As I hope Labor's numerous statements on these and related matters have made clear, Labor respects the right of all Australians to practise their religion freely.

As you may be aware, the very day before calling the election the Morrison Government directed the Australian Law Reform Commission (ALRC) to inquire into the framework of religious exemptions in Commonwealth, State and Territory anti-discrimination legislation, with a reporting date of 10 April 2020. I note that the Terms of Reference for this inquiry are open to public comment until 10 May 2019.

If elected, a Shorten Labor Government would consult with the ALRC about the most efficient timeframe in which they can complete this review, with a view to the ALRC providing advice to government in a timelier manner. Specifically, Labor would request that the ALRC work to provide its recommendations on how best to remove the exemptions from discrimination against LGBTIQ students and teachers contained in Commonwealth legislation as a priority.

In the ALP's National Platform we declare, "Labor supports the appropriate protection of the religious freedom of all people." The Deputy Leader of the Opposition, Tanya Plibersek, made our position on the rights of religious schools very clear in Parliament when she stated, "Schools are also entitled to have rules that ensure staff - and I'm quoting one of the organisations that wrote to me - don't 'deliberately and wilfully behave contrary to the values of the school.'" (Hansard, 16 October 2018, p.35).

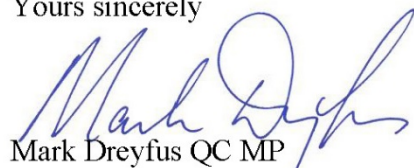
I would add that Labor is not proposing to amend the indirect discrimination provisions of the Sex Discrimination Act that allow educational institutions to impose reasonable conditions, requirements or practices in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

At the same time, Labor is committed to reducing discrimination in Australian society where it can be done in a considered way that respects freedom of belief and conscience.

We do not believe that freedom of religion and freedom from discrimination are mutually exclusive.

Consistent with our respect for religious freedom and commitment to remove discrimination, we would ask that the ALRC consult on and provide recommendations for legislative amendments to remove discrimination in a manner that continues to allow educational institutions to impose reasonable conditions, requirements or practices in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Mark Dreyfus', written in a cursive style.

Mark Dreyfus QC MP
Federal Member for Isaacs