



formerly known as Tasmanian Gay and Lesbian Rights Group

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Australian Law Reform Commission
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Re: comments on the terms of reference of the inquiry into religious exemptions in anti-discrimination legislation

Dear Commissioner,

Please accept the following comments regarding the terms of reference of the Australian Law Reform Commission's inquiry into religious exemptions in anti-discrimination legislation.

Equality Tasmania was established as the Tasmanian Gay and Lesbian Rights Group in 1988 and is Australia's oldest existing LGBTI advocacy organisation. We have been intimately involved in Tasmania's transformation from the state with the worst LGBTI human rights to the state with the best. This includes the enactment of the Anti-Discrimination Act 1998

which does not include any exceptions for religious organisations in regards to discrimination and hate speech on the grounds of sexual orientation, gender identity, intersex status or relationship status.

Our comments focus, in part, on our desire to protect our world-class Act from diminution, and to urge the adoption of its high standards across the nation. This is because some of the terms of reference appear to target our Act, and in a way which is quite biased against it. In this submission we also raise other ways in which the terms of reference appear biased.

National consistency

We note with concern the following term of reference:

The interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws

We are concerned by the term “national consistency” because it is often used to mean the watering down of best-practice state and territory laws to a lowest common denominator. It has certainly been used that way by critics of the high standards set in the Tasmanian Anti-Discrimination Act.

We urge the Australian Law Reform Commission (ALRC) not to interpret the term “national consistency” to only mean diminishing the discrimination protections currently available in Tasmania and other states to the compromised and unsatisfactory level of national legislation like the Sex Discrimination Act.

Instead, we urge the ALRC to interpret the term “national consistency” to also mean raising up the standards set in the discrimination statutes of the continental states and the Commonwealth to those which prevail in Tasmania.

Expression of a view on marriage

We are also concerned about the following term of reference:

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.

This term of reference seems even more biased than the term of reference about national consistency. At least "national consistency" can be interpreted to mean upgrading all laws, as well as downgrading them all.

The term of reference regarding marriage seems to be framed to return a finding detrimental to the protections currently available in the Tasmanian Anti-Discrimination Act, particularly sections 17 and 19 which prevent hate speech and offensive conduct without religious exception on the basis of sexual orientation, gender identity, intersex status, or relationship status. These are the Australian discrimination provisions most "analogous" to section 18C of the Racial Discrimination Act.

In order for the ALRC not to carry this bias into its inquiry, we urge you to inquire very specifically into whether any provisions of the Tasmanian Anti-Discrimination Act have in fact imposed an unreasonable restriction on public comments about marriage. We urge you to consider the long history of discrimination complaints under sections 17 and 19 and the public good that has come from these complaints. We urge you to consider the benefits of our Act, and not only the anxieties it seems to give rise to among a vocal but tiny number of powerful people. We urge you to critically examine these anxieties and whether they have any basis in reality.

Remaining terms of reference

The remaining terms of reference also raise concerns about bias:

The rights and freedoms recognised in the international agreements to which Australia is a party, in particular:

The rights to freedom of speech, association and thought, conscience and religion, including the right to manifest one's religion or belief in worship, observance, practice and teaching (including in community with others) and the liberty of parents and guardians (where applicable) to ensure the religious and moral education of their children in conformity with their own convictions; and

The rights of equality and non-discrimination

The first sub-term of reference regarding freedom of speech, religion and conscience etc, fails to mention the strict limits that apply to those rights in international human rights law.

The second sub-term of reference fails to mention Australia's treaty obligation to guarantee the right to privacy and to personal autonomy. It also fails to reference Australia's treaty obligations in regards to respecting privacy, personal autonomy, equality and non-discrimination on the basis of sexual orientation, gender identity, intersex status and relationship status.

In short, one set of rights seems overly-detailed and the other minimised. We urge the ALRC to ensure that these sets of rights are appropriately balanced.

The importance of protecting the rights of all people, and children in particular, to be free from discrimination in education

Given the Government's immensely detailed list of rights and freedoms it feels are threatened, including freedom of speech, religion and conscience etc, it seems odd that it has failed in this term of reference to explicitly refer to freedom from discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status. We urge the ALRC to make this explicit. This is important not only because discrimination on the basis of these attributes has, in part, brought about this inquiry. It is also important because making

Australia's obligations in regard to these attributes explicit ensures evidence about the impact of discrimination against LGBTI people is an essential element of the Inquiry.

The importance of allowing religious institutions both to teach and otherwise conduct themselves in a manner consistent with their religious ethos

We urge the ALRC to carefully define what a religious institution is. Those discrimination laws which might apply to a church or mosque would be different to those which apply to a commercial, public or government-funded service provided by a faith-linked body. For the ALRC not to make this important distinction puts Acts that do make it, like Tasmania's, at an immediate disadvantage.

This distinction is also important because it allows for all the rights and obligations that apply to faith-linked services to be considered, and not just their religious rights and obligations. For example, faith-linked schools and hospitals that receive government monies have an obligation to taxpayers to provide services that meet certain service-delivery standards, and to provide choice for all those people who do not wish, or are not able, to access state-owned schools and hospitals. These obligations are not mentioned in the above term of reference but they must be taken into account in any balanced assessment of religious exceptions in discrimination law.

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

A common demand of those who feel their freedom of speech, religion or conscience are under threat is for a positive right of religious freedom to be made law, instead of the plethora of religious exceptions currently in place in the laws of continental states and federally.

We believe there is no evidence of freedom of speech or religion being undermined by Australia's discrimination laws, including

Tasmania's. So, we urge the ALRC to focus instead on the discrimination suffered by LGBTI people because of the religious exceptions currently in place.

However, if the ALRC does feel the need to consider the issue of a positive right to freedom of speech, religion and conscience, we urge it to consider this issue in two key contexts.

The first context is the protection of all human rights through a national Charter of Rights or Human Rights Act. Rights and freedoms are interconnected, including freedom of speech, freedom of religion and freedom from discrimination. If these and other rights and freedoms are to be protected, there should be protected altogether.

The second context is the religious freedom movement which demands the protection of religious freedom as a way to diminish the discrimination protections provided to LGBTI people. This movement, which arose in the US and is establishing itself in Australia, conceives of religious freedom not as freedom to worship and freedom from discrimination on the ground of faith, but as freedom to shun and disadvantage LGBTI people. To understand the push for a positive right of religious freedom, it is vital to understand the movement that seeks to discriminate against LGBTI people under cover of "religious freedom".

Scope of research

When considering religious exceptions in state law, the ALRC should have regard to the history of complaints under the Tasmanian Anti-Discrimination and the positive outcomes sought and achieved from those complaints.

It should also have regard to the research that has been conducted into the wellbeing of LGBTI staff, students, clients and patients in Tasmanian faith-based services, including schools and hospitals, and the relationship between their wellbeing and their protection from discrimination under Tasmania's uncompromised Anti-Discrimination Act.

Finally, it should have regard to the inclusive cultures that have been fostered in Tasmania's faith-linked services, the relatively low level of anti-LGBTI hate speech in Tasmania, and the positive transformation of social attitudes in Tasmania because of the high standards set by our Anti-Discrimination Act.

Without this evidence it will be much harder for the ALRC to arrive at an informed conclusion about the impact of the absence from Tasmanian discrimination law of religious exceptions targeting LGBTI people.

Yours Sincerely,
Rodney Croome