

9 May 2019



Australian Law Reform Commission
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Dear Commissioners

Inquiry into Religious Exemptions in Anti-discrimination Legislation – Terms of Reference

Thank you for the opportunity to provide comments on the Terms of Reference for the Australian Law Reform Commission's *Inquiry into Religious Exemptions in Anti-discrimination Legislation*, as published on the ALRC website.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

The right to be free from discrimination has been a particular focus of PIAC's work. Over the past 18 months PIAC has made submissions to the Religious Freedom Review, and multiple Senate inquiries looking at the issue of discrimination against lesbian, gay, bisexual and transgender (LGBT) students and teachers by religious schools. We have consistently called for significant amendments to the religious exceptions contained in both the *Sex Discrimination Act 1984* (Cth) and *Fair Work Act 2009* (Cth) to ensure an appropriate balance is achieved between the right to non-discrimination and the right to manifest religious belief.

Our work informs the following three main comments about the Terms of Reference for the current inquiry:

1. National consistency should not override best practice approaches

We note the inclusion of the following dot point in the preamble to the Terms of Reference to this inquiry:

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

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While we acknowledge there may be benefits to achieving greater consistency in the approach to religious exceptions under Commonwealth, State and Territory anti-discrimination laws, we caution that such consistency must not come at the expense of best practice approaches.

In PIAC's view, national consistency is only 'desirable' when it works to elevate the standard of rights protection.

Specifically, we express our concern that this Inquiry should not be seen as a catalyst to impose the flawed approach to religious exceptions of the *Sex Discrimination Act 1984* (Cth) on jurisdictions such as Tasmania, with that state's *Anti-Discrimination Act 1998* (Tas) adopting a much preferable balance between respecting religious freedom and the right to be protected against discrimination.

2. Religious exceptions should not be replaced by positive rights to discriminate

Throughout the Religious Freedom Review process, and the more recent Senate inquiries into discrimination against LGBT students and teachers by religious schools, PIAC has supported the removal of exceptions that allow religious organisations to discriminate on the basis of protected attributes such as sexual orientation, gender identity and intersex status/sex characteristics. Instead, where discrimination is permitted, it should be on the protected attribute of religious belief, or lack of belief, only.

Consequently, we cautiously welcome the first substantive term of reference asking the ALRC to report on possible reforms to 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right to religious institutions to conduct their affairs in a way consistent with their religious ethos.'

Our caution derives from the use of the word 'guaranteeing' which may suggest that the right to manifest religion is to be privileged over the right to be free from discrimination. Such an approach is not consistent with human rights principles. Instead what is required is that an appropriate balance be struck – something that, as PIAC's substantive submission to the inquiry will articulate, can be achieved under the law without specific exemptions that permit discrimination against LGBT students.

PIAC would be particularly concerned if existing exceptions were replaced, and thereby undermined, by the introduction of 'positively-framed' rights to discriminate.

3. There is limited evidence of discrimination against people on the basis of expressing 'traditional' views about marriage

We note that the second substantive term of reference asks the Commission to consider whether the law should be amended to:

- 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 again may appear to privilege one human right (freedom of expression) above others (most particularly the right to live free from discrimination, including vilification). The right to freedom of expression is not an absolute right. Accordingly, the language of removing 'any legal impediments' is inapt. We urge the Commission to approach this term of

reference as requiring consideration of whether impediments that are unjustifiable or disproportionate exist, such that legislative amendment may be warranted.

In engaging in this aspect of its inquiry, the Commission should also consider what evidence exists that limitations on speech are having a practical impact. This necessarily must be weighed against evidence of the harm caused by that speech. PIAC is not aware of any evidence of widespread discrimination against people expressing views against marriage equality. We are, on the other hand, aware of evidence of significant discrimination by religious organisations on the basis of sex, relationship status, sexual orientation and gender identity.

We also note that, as with our concerns above at (1), this term of reference risks undermining best practice approaches to anti-discrimination such as those in the *Anti-Discrimination Act 1998* (Tas), which includes prohibitions on vilification on the basis of sexual orientation, gender identity and intersex status, as opposed to the *Sex Discrimination Act 1984* (Cth) which includes no such protections.

Thank you for considering the above comments as the ALRC commences its work on this inquiry. Please do not hesitate to contact me, at the details provided, should the Commission require additional information.

Yours sincerely

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