

Submission

to the

Religious Exemptions in Anti-discrimination Legislation Inquiry

by the

Australian Law Reform Commission

Email: religion@alrc.gov.au

Website: www.alrc.gov.au/inquiries/review-framework-religious-exemptions-anti-discrimination-legislation

By

FamilyVoice Australia

4th Floor, 68 Grenfell Street

Adelaide SA 5000

Telephone: 1300 365 965

Fax: 08 8223 5850

office@fava.org.au

www.fava.org.au

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1. Introduction

On 10 April 2019, the Attorney-General issued Terms of Reference requesting the Australian Law Reform Commission (ALRC) to conduct an Inquiry into the Framework of Religious Exemptions in Anti-discrimination Legislation.

Submissions are due by 10 May 2019 and the ALRC is due to report its findings on 10 April 2020.

FamilyVoice Australia is a national Christian advocacy – promoting family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families flourish, Australia’s Christian heritage is valued, and fundamental freedoms are valued and enjoyed.

We work with people from all mainstream Christian denominations. We are independent of all political parties and engage with parliamentarians of all political persuasions.

1.1 Terms of reference

The ALRC is to give consideration to what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order 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
- 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.¹

2. Parental Rights

The heart of Australian democracy is our commitment to a free and just society. Democratic freedom then commands respect for parental choice in the style and type of education for their children.

This principle of choice in education is reflected in both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 26 (3) of the UDHR states:

*Parents have a prior right to choose the kind of education that shall be given to their children.*²

Similarly, ICCPR Article 18 (4) states:

*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*³

These internationally agreed statements acknowledge the importance of parental choice in education and the right of parents to pass on their religious beliefs and moral values.

The right of parents to choose their children's education has also been affirmed in the South Australian Supreme Court.

A small South Australian Christian school was deregistered in the 1980s because its low numbers were deemed to provide insufficient social interaction and hence an unsatisfactory education. Yet the school's academic standards were very high and this was not contested in the court case appealing the deregistration. The full bench of the SA Supreme Court upheld the appeal. In his judgment, Chief Justice King said (emphasis added):

*The family is generally recognised in our society as the basic unit of the society and that general recognition is reinforced in the International Covenant on Civil and Political Rights to which this nation is a party. **The primary role of parents in choosing the education which their children are to receive is a feature of free societies** which distinguishes them from those which are founded on totalitarian notions of the role of the state.⁴*

Thus an Australian court has upheld the right of parents to choose the kind of education their children are to receive.

3. Freedom of Religion

The concept of *freedom of religion* arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct or compulsion. Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief. As Augusto Zimmermann, a senior law lecturer at Murdoch University has stated:

...religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.⁵

Princeton University Professor of Law Robert P. George has described the broad nature of religious freedom in this way:

The US Commission on International Religious Freedom has stood for religious freedom in its most robust sense. It has recognized that the right to religious freedom is far more than a mere "right to worship." It is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship. Moreover, the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one's conscience leads. And respect for the right strictly excludes the use of civil authority to punish or impose civic disabilities on those who leave a faith or change faiths.⁶

The High Court of Australia has confirmed in its judgement on the “Scientology case” that the legal definition of religion involves both belief and conduct.⁷ Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...”⁸ Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

The most pressing issues associated with freedom of religion in Australia today are the increasing denial of religious conscience and religious practice. The denial of religious freedom in these areas is often due to the application of anti-discrimination laws.

Some parts of anti-discrimination law represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs. Religious beliefs have a significant bearing upon freedom of conscience - informing moral distinctions between right and wrong, between good and bad, whereas anti-discrimination laws may declare conduct giving effect to such distinctions of conscience to be unlawful.

The International Covenant on Civil and Political Rights recognises these rights in Article 18:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*⁹

The Australian Constitution, section 116, enshrines the principle of non-interference by government in religious belief or practice:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the **free exercise** of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*¹⁰

Consequently, the Commonwealth Parliament:

- cannot establish a State church;¹¹
- cannot enforce religious observance;^{12, 13, 14}
- cannot prohibit religious observance;¹⁵ and
- cannot impose a religious test for public office.¹⁶

4. Sex Discrimination Act & the Marriage Act

Some of the grounds on which discrimination is prohibited in the *Sex Discrimination Act 1984* directly contradict the moral conscience of the Christian faith and other faiths.

- In particular, sections 5A, 5B and 6 prohibit discrimination on the grounds of *sexual orientation, gender identity and marital or relationship status* respectively. Yet different sections of the community possess strongly held, mutually contradictory beliefs about their moral acceptability or otherwise. The religious exemption for educational institutions set out in section 38 of the *Sex Discrimination Act* applies only to educational institutions established for religious purposes in limited circumstances.
- During the postal survey in 2017, supporters of man-woman marriage were assured that there would be no adverse consequences to redefining marriage. But the *Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)* failed to protect the religious sensibilities of the nation. In keeping with promises that there would be no adverse consequences to redefining marriage, anti-detriment provisions should be enacted.
- This issue impacts not only educational institutions, but churches and gatherings where marriage is being conducted or taught. It may also adversely affect situations in which a person of faith is asked about their opinion in relation to marriage. To require them to accept a definition of marriage not in keeping with conscience will mean they cannot remain faithful to their religion.
- The exemptions generally apply only in relation to “an act or practice that conforms to the doctrines, tenets or beliefs of that religion”. The consequence of this provision is that:
 1. Anti-discrimination tribunals and courts are required to determine the “religion” in question and its “doctrines, tenets or beliefs”, which may be understood by adherents but not carefully defined in writing;
 2. Exemptions are further restricted to actions done “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”;
 3. The “doctrines, tenets or beliefs” of a religion and the “susceptibilities of adherents” are matters more theological and traditional than judicial;
 4. Courts, tribunals and judges are not equipped as a matter of course to determine such matters.

No exemptions are provided for other corporate bodies or natural persons who adhere to religious beliefs and practices. This is a failure to understand the nature of religious belief. Religious exemptions should be recognised for any legal person – natural or corporate – who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

The Act is commonly interpreted to give freedom from discrimination a wide scope but only a narrow scope to exemptions. The result is that fundamental freedoms are suppressed.

The consequence is that anti-discrimination tribunals and courts are required to determine “religious purposes”, “precepts” of a religion and “religious susceptibilities” of adherents – matters which are more theological and traditional than judicial. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: “In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.”¹⁷

Anti-discrimination tribunals have an unflattering record when determining such things as “religion”, “precepts” and “susceptibilities of adherents”. In the *Catch the Fire* case in the Victorian Court of Appeal, Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.¹⁸ In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Anti-discrimination Tribunal had wrongly identified the “religion” (at 41), wrongly determined the question of “doctrinal conformity” (at 45) and was wrong about “religious susceptibilities” (at 46).¹⁹

The huge costs incurred by respondents in seeking to defend their religious freedom are grossly unjust and reflect very poorly upon a government that fails to protect a party that may well prove to be innocent from a malicious charge.

Courts and tribunals should not be asked to determine such things as the “precepts” or “injury to the religious susceptibilities of adherents” of a religion or creed.

That the exemption does not apply to natural persons who adhere to religious beliefs and practices is a failure to take religious belief seriously. Religious exemptions should be recognised for any person who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

A Commonwealth example again highlights the inadequacy of such exemptions. In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant’s classification as a teacher because of her “high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles”.²⁰

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary to the “doctrines, tenets, beliefs and teachings of the Church”, which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant, Jacqui Griffin. In its ruling, the AHRC went so far as to say:

*If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.*²¹

Such arbitrary use of anti-discrimination provisions demonstrates how severely restricted freedom of religion has become.

A general religious exemption from provisions of the Act should be modelled on the provision in the *Defence Act* for exemption from military service:

- (1) *The following persons are exempt from service in the Defence Force in time of war...*
- (h) *persons whose conscientious beliefs do not allow them to participate in war or warlike operations;*
 - (i) *persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations;*²²

Relevant sections of the Act should be replaced by a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

In the case of a complaint, the role of a tribunal or court would then be limited to determining whether the person held conscientious beliefs that did not allow them to comply with the Act.

Recommendations

The Sex Discrimination Act 1984 unjustly interferes with freedom of religion. It should be amended by replacing sections 37 and 38 with a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

In keeping with promises that there would be no adverse consequences to redefining marriage, anti-detriment provisions should be enacted in the Marriage Act.

5. Conclusion

We have demonstrated that religious freedom is a principle enshrined in the Australian Constitution's restriction on the government making laws which prohibit the free exercise of any religion (s 116).²³ The High Court decision in the "Scientology case" defines religion to include both belief and conduct – making clear that freedom of religion involves more than mere private worship.²⁴ The *Sex Discrimination Act* directly interferes with freedom of religion by prohibiting conduct that is required to give effect to religious beliefs.

We have also demonstrated that parents have a right to decide the type of education their children receive in conformity with their religious beliefs and values. This right of parents is a feature of a free society and one which the state must not trample on.

Further we have demonstrated that religious bodies have the same right to determine the nature of their tenets and practice – the courts being not equipped to make these judgements.

We have further demonstrated that the provisions apply equally to all persons who hold conscientious beliefs ought also to be given the same provisions.

Legislating to water down already inadequate exemptions in anti-discrimination legislation would further infringe upon religious freedom and the rights of parents. If there is any move to change the anti-discrimination exemptions, it should be to strengthen rather than weaken the very limited protection that presently exists.

Further, anti-detriment provisions should be enacted in the *Marriage Act* to ensure that man-woman marriage supporters suffer no adverse consequences, as was promised.

Endnotes

- ¹ “Review into the Framework of Religious Exemptions in Anti discrimination Legislation”, <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>
- ² The Universal Declaration of Human Rights, *United Nations*, <http://www.un.org/en/documents/udhr/>
- ³ International Covenant on Civil and Political Rights, <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>
- ⁴ *Fountain Centre Christian School Incorporated v Harrington*, South Australia Supreme Court, 1990
- ⁵ Augusto Zimmermann, “The Secular Challenge to Freedom of Belief”, *News Weekly*, 28 February 2015.
- ⁶ Robert P. George, ‘What is religious Freedom?’, *Public Discourse*, Witherspoon institute, July 24, 2013.
- ⁷ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120
- ⁸ *Ibid.*, para 17; their judgement was qualified by also holding that “though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.”
- ⁹ International Covenant on Civil and Political Rights, Article 18: 1-4 <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- ¹⁰ *Commonwealth of Australia Constitution Act 1900*, s116
- ¹¹ Countries that have established a religion include: the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece and the Roman Catholic Church in Argentina
- ¹² Religious observance is enforced in Saudi Arabia, including five daily prayers, fasting during Ramadan and the modesty of women’s dress under *sharia* law by the religious police, or *mutawwiin*; see “Saudi Arabia Law Enforcement”, *Encyclopedia of the Nations*, Illinois, Advameg, 2007–2013.
- ¹³ Religious observance is enforced in the West Bank: Eric Westervelt, “Police Enforce Ramadan Fasting Rules in West Bank”, *NPR*, Washington, DC, 11 October , 2007.
- ¹⁴ Religious observance is enforced in parts of Indonesia: Jane Perlez, “Spread of Islamic Law in Indonesia Takes Toll on Women”, *The New York Times*, New York, 27 June , 2006.
- ¹⁵ Prohibition of house churches in the People’s Republic of China has been reported. See “China—Son of Christian Leader Beaten Unconscious”, *Barnabas Fund Prayer Focus* Update, No 145, November 2008.
- ¹⁶ A religious test for public office in Pakistan was imposed on Pakistan-born Daniel Scot, who had to pass an exam on Islam before gaining a lectureship in mathematics at the University of Punjab. See Roslyn Phillips, “Religious Vilification: The Daniel Scot Decision”, resource paper in *Light* , Adelaide, May 2005, 8–11.
- ¹⁷ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), para 36: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>
- ¹⁸ *Catch the Fire Ministries*, paras 38-61: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>
- ¹⁹ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010): [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title\(Wesley%20\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title(Wesley%20))
- ²⁰ “Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference”, *Human Rights and Equal Opportunity Commission*, HRC Report No. 6, 1998, http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

²¹ “*Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference*”, Human Rights and Equal Opportunity Commission, HRC Report No. 6, 1998, http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

²² *Defence Act 1903 (Cth)*, section 61A

²³ *Commonwealth of Australia Constitution Act 1900*, s116

²⁴ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120