

9 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

RE: Inquiry into Religious Exemptions in Anti-discrimination Legislation

Thank you for inviting interested stakeholders to provide comments on the scope of the inquiry and any issues relevant to the terms of reference. Our comments are detailed below.

Understanding the needs of religious institutions

We recognise that the Inquiry 'will not re-agitate issues already considered in the Religious Freedom Review' as indicated in the Background Paper dated 1 May. We also acknowledge the extensive number of submissions to that Review, over 15,500 and the more technical nature of the Inquiry proposed.

However, we also understand that the first objective of the Inquiry is to consider possible legislative reforms 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'.

We suspect that in order to ensure any proposed amendments are also *'guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'* that there will be the need to consider, if not to re-examine, at least some of the issues considered by that Review. We understand that the requirement to be *'guaranteeing'* the rights of religious institutions sets a high bar for the Inquiry and this necessitates a deep understanding of the needs of these institutions. It may be necessary for the Commission to be at least open to the issues considered by the Review in order to ensure that this level of understanding is achieved.

Ensuring adequate time for the Inquiry

It became very evident in the discussions around the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* which preceded the establishment of this Inquiry that this

is a complex area of law needing careful attention to avoid unintended consequences. The terms of reference for the Inquiry also make the broad scope of the Inquiry clear, involving not merely Commonwealth but also State and Territory law. While we again acknowledge that you do not intend to re-agitate the issues considered by the Religious Freedom Review, the volume of responses to that Review very clearly demonstrate the importance many Australians across the country place on this issue.

In this light, **we would be gravely concerned if the Inquiry was to be rushed and provide anything less than advice of the highest standard to government.** We would strongly support the extension of the timeframe for reporting for the Commission to properly complete its work, over any claimed need for an urgent response. The existing exemptions have been in place for an extended period of time and any there is no evidence of any requirement for urgency in making amendments.

The essential 'holistic' nature of the inquiry

We have also seen in the discussions last year, around the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, the consequences of considering the removal of exemptions in isolation from the broader issues of balancing rights. In addition to extensive public discussion and debate this Bill was the subject of two separate Senate inquiries with detailed reports in each case and quite contradictory recommendations.

Once again, **we would be concerned if the removal of existing exemptions was to be considered separately** and not part of the broader Inquiry. The two elements of the objective of the Inquiry demand a holistic response 'guaranteeing' religious freedom. This will by its very nature require extensive consideration of the means of balancing equal and indivisible rights.

Suggested additional material for consideration

This need for extensive consideration of the means of balancing equal and indivisible rights will require, we suggest, careful consideration of Recommendations of the Review beyond those noted for particular regard in the Scope of Reference. Recommendation 2, relating to the Siracusa Principles, and Recommendation 3, referring to the objects and purpose clauses of anti-discrimination legislation, both go directly to the balancing of human rights. We suggest that **it is essential that these Recommendations are carefully considered in the Inquiry.**

The Human Rights Sub-Committee of the House of Representatives Joint Standing Committee on Foreign Affairs, Defence and Trade has also extensively considered religious freedom protections in Australia. Their *Inquiry into the status of the human right to freedom of religion or belief* has produced two interim reports published in November 2017 and April 2019. We encourage the Commission to consider the important material within these reports during the course of the Inquiry.

Request for an interim report

As we have indicated above, and is widely acknowledged, these are complex issues before the Commission which will require detailed and carefully drafted legislative responses.

It would obviously be premature for the initial discussion paper to reflect draft legislation. Until proposed legislation can be considered, however, it is extremely difficult to obtain any certainty in relation to proposals for change. Certainly, it would see to be impossible for the Commission to fulfil

its objective of 'guaranteeing the right of religious institutions' until those institutions were able to review and comment upon specific legislative proposals.

We are calling on the Commission to consider providing an **interim report with specific legislative proposals** to allow consideration and comment on the specific legislative amendments being recommended.

Once again, thank you for the invitation to stakeholders to comment at this early stage. We look forward to further active engagement with the Commission through the Inquiry process and are more than willing to meet with yourself and Commission staff as desired.

Yours faithfully



Mark Spencer
Executive Officer Policy, Governance & Staff Relations