

Australian Law Reform Commission  
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10 May 2019

**Inquiry into Religious Exemptions in Anti-discrimination Legislation**  
**RE: Comments on the scope of the inquiry and issues relevant to the terms of reference**

Thank you for the opportunity to comment on the scope and terms of reference of this inquiry. I offer these comments out of my current doctoral research on the politics of religious freedom in Australia and my previous experience as National Director of the Uniting Church in Australia's national justice policy and advocacy unit. While I am an ordained Minister of the Uniting Church, I do not represent the Church and comment only as an individual with some experience in the issues relevant to this inquiry.

**Balancing Rights**

While the language of 'balancing rights' is entrenched in international human rights discourse, and extensively used in almost all reports from previous Australian public inquiries on religious freedom, it was not used in the Terms of Reference or the ALRC Background Paper relating to this inquiry. This is encouraging. The Religious Freedom Review Report, like many before it, presented the need to 'balance rights' as a key to solving the 'problem' of religious freedom in Australia, especially the problem as it is perceived to be exacerbated by anti-discrimination law.

My doctoral research is identifying that, in the context of religious freedom in Australia, the claim that rights are not balanced in favour of religious freedom is directly (not solely, but most significantly) related to the gradual improvement in the legal protections from harmful discrimination gained by LGBTIQ people. The resulting debate about how to best 'balance rights' has, therefore, served only to pit people against each other and led to arguments about which rights are more 'fundamental' - equality rights or religious freedom (and associated rights including freedom of speech and parental rights). This is unsurprising given that Australia does not have a comprehensive national human rights instrument, that rights are protected largely through anti-discrimination laws, and that religious freedom is 'protected' through exceptions and exemptions to those laws.

Chapter 5 of the ALRC's *Traditional Rights and Freedoms* report included consideration of 'balancing rights and interests'. I note that the Religious Freedom Review Terms of Reference referred to 'the intersections between the enjoyment of the freedom of religion and other rights' and that the Australian Human Rights Commission, in its submission to the Religious Freedom Review, avoided the use of 'balancing rights' language, referring instead to 'managing the intersections'. This may be a more fruitful way of framing the discussion about some of the issues inherent in anti-discrimination law.

## **LGBTIQ Rights, Religious Doctrine & the Law**

As highlighted in the Commission's Background Paper, the Religious Freedom Review report recommended reviewing (or abolishing) 'exemptions to anti-discrimination provisions that allow for discrimination on the basis of race, disability, pregnancy, or intersex status' (p. 2). That leaves sexual orientation, gender identity and relationship status, although the Recommendation 6 offers an additional note about marriage relationships.

The Religious Freedom Review Report and the Second Interim Report from the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into the status of freedom of religion and belief both state that while there is concern, particularly among Christians, about threats to freedom of religion (largely in relation to same-sex marriage), there is little evidence of harmful discrimination against people on the basis of religion. (There is, however, strong anecdotal and increasing research evidence of harmful discrimination and violence against Muslim Australians, Jews and other religious minorities.) It is clear then, that regardless of how broadly most (Christian) religious organisations, institutions and advocacy groups cast their concerns about the need for better protection of religious freedom, the primary issue is their ongoing desire to be able to lawfully discriminate against people on the basis of their sexual orientation, gender identity and relationship status.

As is becoming more widely acknowledged and understood in this context, every religion includes within it a diversity of theological traditions, including traditions that support the inclusion and equality of people regardless of their sexual orientation, gender identity and relationships status. In Australia, the Quakers and the Uniting Church in Australia have adopted positions that uphold marriage equality. The Uniting Church has authorised its ordained ministers to be able conduct same-sex marriages if they choose to.

Australia's anti-discrimination laws place the courts in the invidious position of having to determine what is an authentic doctrine, tenet or belief - how difficult this is in practice can be seen in the case *OV & OW v Members of the Board of Wesley Mission Council [2010] NSWCA 155*. The Religious Freedom Review recommendations use the language of 'discrimination founded in *the precepts* of the religion' (emphasis added). The language of 'precepts' is no less fraught than the language of 'doctrines, tenets and beliefs', and may be even more so. Regardless, in most cases, these matters (and the state rightly chooses not to make its own determinations about such things) will be determined as courts hear evidence from witnesses who hold power within religious institutions. No previous religious freedom inquiries or consultations have acknowledged the issues of institutional power inherent in the way the laws are written (from a Christian perspective, it is important to remember how long church institutions and institutional leaders stood against the movements within their own traditions for the liberation of slaves and women, for example). I am not suggesting the Commission address this matter, but raise it as an important issue for the Commission to remain cognisant of as the inquiry progresses.

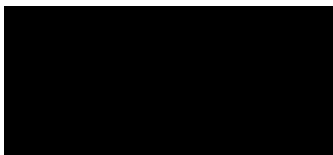
Recommendation 1 of the Religious Freedom Review strongly suggests that regardless of the doctrines, tenets and beliefs of a religion or the precepts of the religion, it should no longer be acceptable for any religious body to discriminate on the basis of race, disability, pregnancy or intersex status, 'having regard to community expectations'. I would expect that very few, if any, religious bodies or groups would argue against this recommendation. This does, however, carve out LGBT people as 'the issue' and continues to expose LGBT people, many of whom themselves hold religious beliefs and some of whom are leaders in their religious communities, to prejudice and abuse. It also allows some religious groups and bodies to continue using them to prosecute the case for religious freedom over equality rights. These is not an academic or rhetorical matter as a number of studies into the wellbeing of LGBTIQ people have shown.

The inherent difficulty in this for the Australian government, and for the Commission (as a result of how the terms of reference are drafted) is that in the face of changing community expectations, demonstrated most notably in the 2017 same-sex marriage postal vote, any exceptions to anti-discrimination law allowing religious bodies to discriminate against LGBT people are easily (and I would claim, should be) regarded as a form of state-sanctioned discrimination, and as such, serve to further entrench the ongoing discrimination of LGBT people in our society.

I understand that the role of anti-discrimination law is to protect people who are vulnerable to harmful prejudice, vilification and abuse because of various characteristics or attributes, or less legalistically, because of who they are. The law must equally protect people against discrimination on the basis of religion and on the basis of sexual orientation, gender identity and relationship status. Examining the possible reform of anti-discrimination laws from the perspective of how they can better *protect* people rather than how some forms of discrimination can be allowed, would, I believe, enable a different conversation.

I am happy to talk further about any of these issues and wish you all the best with the inquiry.

Yours sincerely,

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