



Australian Government

Australian Law Reform Commission

Wednesday, 1 May 2019

Background Paper: Inquiry into Religious Exemptions in Anti-discrimination Legislation

The Australian Law Reform Commission (ALRC) has prepared the following summary of the [Religious Freedom Review](#) and the [Government's response](#) to that review in order to assist stakeholders interested in contributing to the ALRC's Inquiry into Religious Exemptions in Anti-discrimination Legislation. The ALRC inquiry will not re-agitate issues already considered in the Religious Freedom Review, but rather will assess legislative options that align with the specific recommendations that have been referred to the ALRC.

Context

In November 2017, Prime Minister Malcolm Turnbull appointed an Expert Panel to examine whether 'Australian law ... adequately protects the human right to freedom of religion'.¹ The review followed the enactment of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), which amended the definition of marriage to include same-sex marriage. A key concern of Parliament following the amendment was that religious bodies that maintain the view that marriage can only be between a man and a woman be afforded adequate protections.² However, the Terms of Reference for the Panel were framed broadly to 'consider the intersections between the enjoyment of the freedom of religion and other human rights'.³

Religious Freedom Review

In its report to Government in May 2018, the Panel made 20 recommendations to improve protection of religious freedom. The recommendations ranged from clarifying when a marriage celebrant may decline to perform a ceremony to abolishing the offence of blasphemy. A number of recommendations focussed on legislative drafting, including the use of objects clauses.⁴ The Panel concluded that 'by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law'.⁵

The Panel's report set out a broad conception of the right to religious freedom—one that reflects international human rights law, and emphasises that freedom of thought, conscience, and religion protects the religious and non-religious alike.⁶ The Panel noted that as a party to the *International Covenant on Civil and Political Rights*, Australia has a legal obligation under international law to protect freedom of religion.

¹ Expert Panel, *Religious Freedom Review* (2018) iii.

² Expert Panel, *Religious Freedom Review* (2018) [1.3].

³ Expert Panel, *Religious Freedom Review* (2018) iii.

⁴ A full list of recommendations can be found at: Expert Panel, *Religious Freedom Review* (2018) 1–7.

⁵ Expert Panel, *Religious Freedom Review* (2018) [1.419].

⁶ Expert Panel, *Religious Freedom Review* (2018) [1.31], [1.33].

Key among the Panel's recommendations was the call for a Commonwealth legislative framework to protect against religious discrimination. In outlining existing protections, the Panel noted the absence of comprehensive Commonwealth legislation protecting freedom of religion. The panel recognised the pivotal role played by exemptions to anti-discrimination law, which allow religious institutions to discriminate in specific circumstances. The Panel made recommendations that would change the existing legislative framework by:

- including freedom of religion as a protected attribute in Commonwealth anti-discrimination legislation; and
- encouraging Commonwealth, state, and territory governments to consider the appropriateness of a number of the exemptions.

Government Response

In the Australian Government's Response to the Religious Freedom Review, the Government accepted the Panel's central conclusion that there is an opportunity to better protect, promote, and balance the right to freedom of religion.⁷ Moreover, the Government indicated it would implement 15 of the 20 recommendations.

With regard to the five remaining recommendations (Recommendations 1, 5, 6, 7, and 8), the Government accepted the underlying principles and referred these issues to the ALRC for consideration of specific legislative drafting options. These recommendations focus on the existing framework of exemptions for religious bodies in anti-discrimination law. The Panel recommended that Australian jurisdictions review (and in some circumstances abolish) exemptions to anti-discrimination provisions that allow for discrimination on the basis of race, disability, pregnancy, or intersex status. However, it also recommended that some exemptions remain to permit religious schools to discriminate in relation to staff and students on the basis of sexual orientation, gender identity, or relationship status provided that certain conditions are met.

The Government has asked the ALRC to review these issues and consider legislative reforms that would

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.

Further, the Government requested the ALRC consider what reforms are necessary 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.

The full Terms of Reference for the ALRC's Inquiry into Religious Exemptions in Anti-discrimination Legislation can be viewed [here](#). Interested stakeholders will be able to contribute to the ALRC inquiry by making formal submissions to a Discussion Paper, and by participating in consultations and public seminars. For more details, see the ALRC [website](#) or email: religion@alrc.gov.au.

⁷ *Australian Government Response to the Religious Freedom Review* (2018) 4.