



# MONASH University

## Castan Centre for Human Rights Law

### **Submission to the Expert Panel to examine religious freedom protection in Australia**

16 February 2018

**Prepared by:**

Professor Paula Gerber  
Deputy Director  
Castan Centre for Human Rights Law  
Monash University

Associate Professor Julie Debeljak  
Deputy Director  
Castan Centre for Human Rights Law  
Monash University

Eleanor Jenkin  
Policy Manager  
Castan Centre for Human Rights Law  
Monash University

Marius Smith  
Manager  
Castan Centre for Human Rights Law  
Monash University

**With research assistance from:**

Luca Cherubin

Troy Maher

The Department of Prime Minister and Cabinet has established the Expert Panel to examine the protection of religious freedom in Australia. The Panel seeks views on whether Australian laws (Commonwealth, State and Territory) adequately protect the human right to freedom of religion.

We welcome the Government's interest in the protection of freedom of religion, and the implicit recognition that Australia's legislative protection of human rights should be strengthened. However, we are concerned that this inquiry reflects a desire to prioritise the right to religious freedom over other human rights.

## **1. Background: Marriage equality, LGBTIQ rights and religious freedoms**

The Expert Panel was assembled in the aftermath of the 2017 marriage equality postal survey and the subsequent passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) ('*Marriage Amendment Act*'). During both the survey phase and the parliamentary debate prior to passage of the *Marriage Amendment Act*, religious based organisations made calls for stronger protection of religious freedom.

In particular, religious based organisations demanded protections that would permit their organisations, as well as other businesses, to freely discriminate against people on the basis of their sexual orientation or gender identity. The *Marriage Amendment Act* includes strong protections for religious bodies. For example, section 47B(1) states that

*a body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if the refusal:*

*(a) conforms to the doctrines, tenets or beliefs of the religion of the body; or*

*(b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*

In addition to the protections afforded religious based organisations in the *Marriage Amendment Act*, other more expansive protections were proposed and rejected by Parliament during the debate over the Bill. Significantly, Parliament expressly rejected proposed amendments that, would have allowed service providers such as bakers and venue owners, to discriminate against LGBTIQ people in relation to same-sex weddings.<sup>1</sup>

The result of the marriage equality survey is evidence that the Australian people do not support discrimination against LGBTIQ people. It would be inappropriate, so soon after Parliament rejected amendments that would have given license to businesses to discriminate against LGBTIQ people's weddings, for the Expert Panel to now recommend that Parliament enact legislation to sanction further discrimination against LGBTIQ people on the basis of their sexual orientation, gender identity or intersex status.

---

<sup>1</sup> "Same-sex marriage: Push to let florists and bakers discriminate against gay weddings dropped" ABC News, 28 November 2017 <http://www.abc.net.au/news/2017-11-27/push-dropped-to-let-florists-and-bakers-discriminate-ssm/9197448>.

## 2. Marginalisation of LGBTIQ people and legal protection of religious based organisations

During the protracted national debate on marriage equality, human rights organisations, civil society groups and many individual Australians made it clear that those most at risk of discrimination in this country are not persons opposed to marriage equality on the basis of their religious beliefs, but rather the LGBTIQ Australians who marriage equality is intended to protect.

Even after the legalisation of marriage equality in this country, it is LGBTIQ people, rather than religious bodies and adherents, who remain marginalised. For example:

- Religious schools may terminate the employment of teachers, and refuse to support or enrol students, on the basis that they identify as LGBTIQ;<sup>2</sup>
- Birth certificate laws do not recognise modern LBGTQI family, by allowing for the recording on a child's birth certificate of more than two parents all of whom who are involved in the conception and raising of a child;<sup>3</sup>
- "Conversion therapies" to "cure" someone of being LGBTIQ continue to be used in Australia<sup>4</sup> without adequate laws to prevent them; and
- Intersex infants continue to be subjected to non-essential surgical and/or hormonal interventions to "fix" their sex to appear male or female.<sup>5</sup>

Religious organisations are already well protected by discrimination laws around Australia. The *Sex Discrimination Act 1984* (Cth) ('SDA') allows religious bodies to discriminate against people on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in relation to acts or practices that:

- conform to the doctrines, tenets or beliefs of that religion; or
- are necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>6</sup>

Anti-discrimination laws in most states provide broad protections for religious bodies in similar terms.<sup>7</sup>

---

<sup>2</sup> *Sex Discrimination Act 1984* (Cth) s38; Father Peter Norden "Not So Straight: A national study examining how Catholic Schools can best respond to the needs of same sex attracted students" (2006); <sup>2</sup> Brian Greig "You're gay? You're out! Gay teacher sacked due to WA law loophole" *WA Today*, 22 November 2017 <http://www.watoday.com.au/wa-news/youre-gay-youre-out-gay-teacher-sacked-due-to-wa-law-loophole-20171122-gzqe1o.html>.

<sup>3</sup> Paula Gerber and Phoebe Lindner "Modern Families: Should Children be Able to Have More than Two Parents Recorded on Their Birth Certificates?" *Victoria University Law and Justice Journal* (2015) 5(1).

<sup>4</sup> "Praying to be straight: Gay Conversion therapy" (aired 18 November 2017) <https://www.sbs.com.au/news/video/1090980419989/Praying-to-be-straight-Gay-Conversion-therapy>.

<sup>5</sup> *Darlington Statement: Joint consensus statement from the intersex community retreat in Darlington* (March 2017) <https://oii.org.au/darlington-statement/>.

<sup>6</sup> *Sex Discrimination Act 1984* (Cth) s37. The Act also contains specific exemptions relating to the appointment and training of persons of a religious order, or to perform duties connected to religious observance (s37), and relating to educational institutions established for religious purposes (s38).

<sup>7</sup> *Equal Opportunity Act 2010* (Vic) s82(2); *Anti-Discrimination Act 1996* (NT) s 37A, s51; *Anti-Discrimination Act 1991* (QLD) s 41, s90, s109(c); *Anti-Discrimination Act 1977* (NSW) s56; *Discrimination Act 1991* (ACT) s 32, s33; *Equal Opportunity Act 1984* (SA) s34, s50, s85Z, s 85M; *Equal Opportunity Act 1984* (WA) s72, s73.

Moreover, these exemptions tend to apply to a wide range of organisations and institutions. Under the *SDA* a religious body is one ‘established for religious purposes.’<sup>8</sup> This may include not only religious orders and places of worship, but also associated schools, hospitals, and social services. Critically, many of these services receive public funds in order to deliver services.

These exemptions have significant adverse impacts on the wellbeing and lives of LGBTIQ people. They send the message to LGBTIQ people that they are not entitled to equality and do not deserve the same respect and right to live free from discrimination as heterosexual and cisgender people. In Australia, LGBTIQ youth are five times more likely to attempt suicide than other Australians; transgender people are nearly 11 times more likely, and people with an intersex variation are nearly six times more likely. LGBTIQ people are also more likely to self-harm, and suffer depression, anxiety and other mental health disorders.<sup>9</sup>

### **3. International Law Requires the equal protection of all human rights**

The right to freedom of thought, conscience and religion, including the right to manifest one’s religion or belief in teaching, practice, worship and observance, is protected under international law.<sup>10</sup> However all human rights are equal and indivisible, and religious freedom must be balanced against other human rights, including the right to equality and non-discrimination. Recognising that such a balancing process may necessitate appropriate restrictions on the right to freedom of religion, the International Covenant on Civil and Political Rights (ICCPR) provides that:

*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.*<sup>11</sup>

This Inquiry’s exclusive focus on religious freedoms fails to take into account the interdependency of rights. Indeed, the right to freedom of religion cannot be fully implemented or realised without fully realising all other rights, including the rights to freedom of expression, association, freedom from discrimination, and freedom from interference in privacy, family and the home. A proper balance between rights can only be achieved when every right is afforded equal protection, subject to the proper limitations set out in international human rights instruments.

The Expert Panel must consider how current protections for religious freedom (and any further protections it may propose) affect other human rights in Australia, including the rights of LGBTIQ people to live lives of dignity and equality, free from discrimination. To the extent that this requirement is beyond scope of this Inquiry, this limitation should be acknowledged prominently in the Panel’s report.

---

<sup>8</sup> S37(1)(d). Religious purposes ‘being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’

<sup>9</sup> Delaney M. Skerrett, et al “Are LGBT Populations at a Higher Risk for Suicidal Behaviors in Australia? Research Findings and Implication” *Journal of Homosexuality* (2015) 62(7).

<sup>10</sup> International Covenant on Civil and Political Rights, art 18.

<sup>11</sup> ICCPR, art 18(3).

#### 4. A better way

The preferred way to balance religious freedom and other human rights is to limit exemptions from anti-discrimination laws for religious organisations to those that truly protect their religious practices. To this end, we make the following three recommendations:

##### A. Introduce a ‘valid purpose’ requirement

The *Equality Act 2010* (UK) (*‘UK Equality Act’*) requires religious organisations to have a valid purpose for undertaking the discriminatory act or practice. Generally, this will be ‘because of the purpose of the organisation, or to avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.’<sup>12</sup> In relation to sexual orientation, the valid purpose is slightly narrower — that is, the act or practice is necessary to comply with the doctrine of the organisation, or to avoid conflict with strongly held convictions of a significant number of the religion’s followers.<sup>13</sup>

The benefit of this approach is that it more closely ties any discriminatory action to the religious freedom at risk. In effect, it facilitates a balancing exercise by ensuring that any discriminatory act is properly justified by the need to protect religious freedom in each case.

Under the SDA and other anti-discrimination legislation in Australia, a religious body may rely on an exemption even in cases where the purpose of its employment has nothing to do with the protection of religious freedom. We therefore recommend that federal anti-discrimination legislation be amended to include a ‘valid purpose’ requirement, modelled on the requirement contained in the *UK Equality Act*.

##### B. Introduce a ‘public authority’ exception

Under the *UK Equality Act*, an organisation cannot lawfully discriminate in the provision of goods and services on the grounds of sexual orientation, where it is done on behalf of a public authority, and under the terms of a contract between the organisation and the public authority.<sup>14</sup> This means, in effect, that religious service providers may not lawfully discriminate on the basis of sexual orientation, if the services they provide are delivered using public money.

We recommend that the SDA and other anti-discrimination legislation in Australia be amended to include similar exceptions. This will ensure that all Australians – including LGBTIQ Australians – have equal access to, and derive equal benefit from, public funds and the services they support.

##### C. Further limit exemptions for religious bodies

We recommend that any exemptions to non-discrimination legislation granted to religious bodies be narrowly drawn to encompass only discrimination for reasons of religious belief or affiliation, where such belief or affiliation is relevant. For example, the *Anti-Discrimination Act 1998* (Tas) (*‘the Tasmanian Act’*) limits religious bodies’ right to

---

<sup>12</sup> *Equality Act 2010* (UK) Sch23 s2(6).

<sup>13</sup> *Equality Act 2010* (UK) Sch23 s2(7).

<sup>14</sup> *Equality Act 2010* (UK) s 29, Sch23 s2(10).

discriminate in employment or education for reasons of religious belief, affiliation or religious activity.<sup>15</sup> The *Tasmanian Act* contains an additional limitation in regards to employment, allowing a person to discriminate against another on the ground of religious belief, affiliation or religious activity only if the participation of the person in the observance or practice of a particular religion *is a genuine occupational qualification or requirement in relation to the employment*, or in the case of educational institutions, if the discrimination is *in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices*.<sup>16</sup>

These limits serve to protect the rights of all Australian to live free from discrimination. They also enhance the protection of freedom of religion by ensuring the law takes into account the actual tenets, beliefs, teachings, principles or practices of a religion, and contains measures to ensure their protection in a targeted, precise, and proportionate manner.

## **5. The urgent need for a Human Rights Act for Australia**

Religious freedom intersects frequently with the rights of LGBTIQ people, women and others, and for this reason, cannot be considered in isolation from other human rights. Indeed, the subject of this Inquiry illustrates the need for stronger rights protections in a comprehensive and considered manner, consistent with Australia's international human rights obligations. A federal human rights Charter or Act is the best way to achieve a free, fair and just Australia, in which all human rights are properly realised and balanced.

The 2009 National Human Rights Consultation Committee conducted a comprehensive study of Australians' views on human rights laws. The review found that only 14% of Australians were opposed to legislative human rights protections.<sup>17</sup> The Committee recommended that the Australian government implement a *Human Rights Act*. Doing so would help to fulfil Australia's international obligations, particularly under the International Covenant on Civil and Political Rights. It is timely for this Government to take steps to now implement that recommendation, which would provide an opportunity for strong legislative protection for religious freedom while recognising the importance and indivisibility of all human rights.

---

<sup>15</sup> S51,s51A, s52.

<sup>16</sup> S51.

<sup>17</sup> National Human Rights Consultation Committee Report (September 2009) Appendix B, Figure 6.