

Submission by
the **Discrimination Law Experts**
to The Expert Panel on Religious Freedom

Inquiry: Religious Freedom Review

14 February 2018

Submitted to:
The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
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Discrimination Law Experts

The Discrimination Law Experts (DLE) group comprises researchers from universities across Australia with expertise in discrimination and equality law and policy. The group first met in Canberra in 2010 and has met annually thereafter. Its goal is to inform Australian human rights law and policy development, particularly in respect of discrimination and equality, by undertaking and disseminating research, and providing expert submissions to law reform processes. The members of the group who contributed to or supported this submission are listed below.

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Summary of submissions

1. We submit that the Panel make the following observation in its report:

that while the freedom to hold a religious belief is absolute, the freedom to manifest one's religious beliefs can properly be limited to protect the right to non-discrimination.
2. We submit that the Panel make the following observation in its report:

that it is appropriate that the freedom to manifest one's religious beliefs is limited by Australia's anti-discrimination laws that guarantee non-discrimination to historically marginalised and disadvantaged groups.
3. We submit that the Panel make the following recommendation, to ensure that, if religious exceptions are maintained, they operate in an objective manner referable to doctrine:
 - that religious exceptions in Australia's anti-discrimination laws continue to operate by reference to the religious purpose of a body; conformity of the conduct to doctrines, tenets or beliefs of a religion; and a reasonable need to avoid injury to religious susceptibilities of adherents of a religion
 - but that those matters be assessed in the circumstances of the particular case and in light of the harm caused by the discrimination that would be allowed by the exception.
4. We submit that the Panel make the following recommendation, to ensure recognition of the right to non-discrimination in the funding and provision of publicly funded services:

that adherence to the principle of non-discrimination be a condition of receiving public funds for the provision of public services, and that a person or entity that receives public funds for the provision of public services is excluded from being able to rely on a 'religious exception' in anti-discrimination legislation in respect of that publicly-funded activity.

Introduction

We are a group of legal academics with extensive expertise in the theory and practice of anti-discrimination and equality law. We make this submission in response to the Federal Government's Religious Freedom Review announced on 22 November 2017.

In drafting this submission, we focus on key elements of the anti-discrimination law framework. In particular, we draw on our shared understanding about the nature of discrimination, the harms it can cause and the role of law in addressing these harms. The following points outline the principles on which our recommendations are based:

- The right to non-discrimination is a fundamental human right;
- Discrimination harms society as a whole and every member, not merely the identified aggrieved persons. For this reason, an obligation to address discrimination should be shared widely across society, and the identified aggrieved person should not bear an onerous burden in driving change;
- Discrimination unfairly excludes women and members of particular social groups and limits their capacity to fulfil their potential in our society. It manifests in a wide variety of ways, ranging from blatant and intentional prejudicial conduct to the unintentional imposition of apparently neutral barriers. To address discrimination fairly and effectively in its many manifestations, anti-discrimination law needs to be wide in its coverage but also sophisticated and nuanced so that it can apply to the great diversity of human experiences, goals and needs;
- Simplicity should be a goal of regulatory reform but only to the extent that it serves to enhance both compliance and efficiency; and
- In designing effective anti-discrimination laws, it is important to appreciate and articulate connections between the definition of discrimination, the nature and scope of prohibitions and exceptions that justify or permit some forms of discrimination. A wide definition of discrimination provides a clear and simple message, but necessitates rules and mechanisms that enable fair and efficient identification of discrimination that is justifiable.

Our submission addresses the first of the Panel's three terms of reference – the intersections between the enjoyment of the freedom of religion and other human rights – and focuses on the human right to non-discrimination.

The right to non-discrimination

The right to non-discrimination is a fundamental human right, and ‘a basic and general principle relating to the protection of human rights’ (Human Rights Committee, *General Comment No. 18: Non-discrimination*).

Australia has repeatedly acknowledged the right to non-discrimination, and has taken extensive measures to ensure it is realised and respected in Australia. The right to non-discrimination is guaranteed by international human rights treaties to which Australia is a party. Australia has undertaken ‘to adopt such legislative or other measures as may be necessary to give effect’ to it and other fundamental human rights, and to ensure that any person whose rights are infringed has a legal remedy for that infringement (International Covenant on Civil and Political Rights, articles 2, 3, 26). We address below the right to right to freedom of thought, conscience and religion, which is also a fundamental human right.

Australia reports regularly on its performance in meeting its treaty obligations. In its 2015 report to the UN Human Rights Council’s *Universal Periodic Review* Australia stated that it ‘recognises that to enjoy [civil and political] rights, people need to be able to do so free from discrimination, enabling people to enjoy their rights on an equal basis with others’. In its most recent National Human Rights Action Plan (2012), Australia declared to the world its proposed action to secure ‘freedom from discrimination’ for its people.

The most significant commitment to non-discrimination in Australian law is in the federal, State and Territory statutes that prohibit discrimination and promote equality:

Age Discrimination Act 2004 (Cth)
Disability Discrimination Act 1992 (Cth)
Racial Discrimination Act 1975 (Cth)
Sex Discrimination Act 1984 (Cth)
Anti-Discrimination Act 1977 (NSW)
Anti-Discrimination Act 1992 (NT)
Anti-Discrimination Act 1991 (Qld)
Anti-Discrimination Act 1998 (Tas)
Discrimination Act 1991 (ACT)
Equal Opportunity Act 1984 (SA)
Equal Opportunity Act 2010 (Vic)
Equal Opportunity Act 1984 (WA)
Racial and Religious Tolerance Act 2001 (Vic)

Except in NSW and SA, these laws protect people from being discriminated against because of their religious belief or activity. That protection is important, but it is different from protection of the rights to have a religious belief and to manifest it. The rights to have and manifest a religious belief are what the Panel is concerned with, which we now address.

The right to ‘freedom of religion’

‘Religious freedom’ is unhelpful shorthand for the right in Article 18 of the *International Covenant on Civil and Political Rights* to ‘freedom of thought, conscience and religion’. Relevantly to the current debate in Australia this right (emphasis added):

- ‘shall include freedom to *have or to adopt* a religion or belief of [] choice’, and
- ‘freedom ... in public or private to *manifest [] religion or belief in worship, observance, practice and teaching*’.

The 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 ... the fundamental rights and freedoms of others*’ (Art 18(3)).

Relevantly to the Panel’s inquiry, three points must be made relating to the italicised text above. The first is that the freedom to have or to adopt a religion or belief is absolute and cannot be limited: people are free to hold whatever beliefs they wish; this is what is behind Senator Brandis’s infamous ‘right to be a bigot’ remark.¹ The second point is that the freedom to *manifest* one’s belief is treated separately and differently from the freedom to *hold* that belief. The third – of particular relevance to the Panel’s inquiry – is that freedom to manifest belief can be limited to protect others’ right to non-discrimination.

This is why ‘religious freedom’ is unhelpful shorthand. There are two distinct parts to religious freedom: (1) freedom to believe, and (2) freedom to manifest belief. The former is absolute, while the latter can be limited. The UN Human Rights Committee (*General Comment 22*) states this clearly:

3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief ...

8. Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others ... In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26.

Some proponents of ‘religious freedom’ tend to disregard the distinction between holding a religious belief and acting on it, and claim an absolute right to the latter. This overlooks the fact that holding a belief does not affect others, but acting on it can do. An absolute right to both hold a religious belief and manifest it is tenable only in a strict and narrow theistic society. In a religious pluralist society,

¹ Commonwealth, *Parliamentary Debates*, Senate, 24 March 2014, 1797 (George Brandis).

and more so in an ostensibly secular society, limits are necessarily imposed on the freedom to manifest one's belief, especially to protect everyone's right to non-discrimination. This is the point of intersection between the right to freely manifest one's religious belief, and the right to non-discrimination.

1. We submit that the Panel make the following observation in its report:

that while the freedom to hold a religious belief is absolute, the freedom to manifest one's religious beliefs can properly be limited to protect the right to non-discrimination.

The privileged treatment of religion in anti-discrimination law

When two fundamental rights come into conflict, it is necessary to deal with that conflict in a way that preserves and maximises both rights to the greatest extent possible in the circumstances. Neither right can simply override the other. But that is what the religious exceptions to Australian anti-discrimination laws do, over-riding the right to non-discrimination. The institution of religion, and its associated beliefs and practices, are uniquely privileged in Australian anti-discrimination law, and exempt in many respects from complying with our national commitment to equality.

Australia is a secular state. It has no established religion, and a Constitutional prohibition against there being one. The 2016 census data shows that the percentage of the population who reported as identifying as Christian has fallen from 96.1% in 1901 to 52% in 2016 (down from 68% in 2001). Nearly a third of Australians (30%) reported in 2016 that they have no religion.

Nevertheless, Christianity is privileged in myriad of ways. There are ever present reminders of this through the observance of Easter and Christmas, and the swearing of oaths. Thus, while Australian governments have responded to pressure to enact anti-discrimination legislation to improve the status of less powerful people, from women and Indigenous people, to people with disability and people of different sexual orientations, they have at the same time sought to recognise religious interests by providing exceptions from these laws. Those exceptions operate as blanket rules, without any means for taking account of the circumstances and issues raised in particular cases of conflict of rights. This often provides too wide an exception for religion, over-riding the right to non-discrimination.

The aim of anti-discrimination legislation is primarily to achieve equality of opportunity at the point of access, rather than equality of outcome. It sets out to ensure that individuals are not penalised in their life chances by virtue of a particular attribute over which they generally have little control, such as race, sex, disability, sexuality or age.

Manifestation of religious belief is often at odds with giving equal recognition to people without regard to, for example, their sex, sexual orientation or marital status. Rather than seeking accommodation of competing rights, or considering the extent to which non-discrimination actually conflicts with religious belief in given circumstances, the religious exceptions in Australia's anti-discrimination laws usually allow religious belief to trump a complaint of discriminatory treatment.

2. We submit that the Panel make the following observation in its report:

that it is appropriate that the freedom to manifest one's religious beliefs is limited by Australia's anti-discrimination laws that guarantee non-discrimination to historically marginalised and disadvantaged groups.

Religious exceptions that allow discrimination

Anti-discrimination legislation contains a religious exception for activities central to the religion, such as ordination. Even though the exclusion of women from ordination is clearly discriminatory on the ground of sex, the state has deferred to religious bodies and accepted that such activities should remain outside the purview of anti-discrimination law. In terms of the legislation's stated aim of equality between the sexes, the exception is regressive, compounding the normalised masculinity of religious leadership in our society. No other institution is so privileged that it can conduct itself in accordance with its self-declared principles despite their being inconsistent with Australia's commitment to equality.

Anti-discrimination legislation also contains a religious exception for non-core employment activities in, say, the operation of a welfare agency, a hospital or an educational institution. In those circumstances discrimination is permitted when it is 'necessary to conform with religious doctrine or to avoid injury to religious sensitivities'.

As we describe below, the precise wording of the exceptions differs from one statute to another, and the meaning and scope of the exceptions vary accordingly. Nevertheless, religion maintains its privileged status.² Religious schools illustrate the non-core employment coverage of the exceptions. A typical hypothetical school scenario involves a situation where a mathematics teacher, clerical officer or gardener, for example, is denied a position in a faith-based school because of 'lifestyle', a euphemism for their marital status, sexual orientation or gender identity.

Religious exceptions are structured similarly across federal, state and territory anti-discrimination legislation, and can broadly be categorised in the following three ways:

1. The first is a specific religious exception for the appointment and training of priests and ministers, which is provided for in all jurisdictions in Australia,³ subject only to very minor syntactical differences.
2. The second category is an educational religious exception for religiously-affiliated schools, which is provided for to different degrees in all jurisdictions in Australia,⁴ except Tasmania and Queensland.⁵
3. The third category, a general religious exception, is provided for in all Australian anti-

² See generally See Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 *Viewpoint: Perspectives on Public Policy* 41; Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149; Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392; John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian *Charter of Human Rights and Responsibilities Act* to Achieve the Right Balance' (2011) 36 *Monash University Law Review* 16.

³ *Sex Discrimination Act 1984* (Cth) s 37(1); *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) s 90; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) s 82(1); *Equal Opportunity Act 1984* (WA) s 72.

⁴ *Sex Discrimination Act 1984* (Cth) s 38; *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73; *Anti-Discrimination Act 1977* (NSW) ss 4, 49ZO(3); *Equal Opportunity Act 2010* (Vic) s 83(1); *Anti-Discrimination Act 1992* (NT) s 37A; *Equal Opportunity Act 1984* (SA) s 34(3). In South Australia the exception for religious schools only operates if the educational authority administering the school has a written policy stating its intention to discriminate, a copy of which is provided free of charge to individuals who are to be interviewed, and on request to employees, students, parents and members of the public.

⁵ See *Anti-Discrimination Act 1991* (Qld) s 109(2); *Anti-Discrimination Act 1998* (Tas) ss 16(o), (p), 52.

discrimination laws. The general religious exception typically allows a body that is ‘established for religious purposes’ to engage in otherwise unlawful discrimination if the conduct either:

- conforms to the doctrines, tenets or beliefs of the religion; *or*
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion.⁶

There are some variations to the third category of exception. Tasmania, the Australian Capital Territory and Queensland use ‘and’ not ‘or’, requiring a religious body to meet both tests.⁷ Victoria requires that the necessity to avoid injury to religious susceptibilities be ‘reasonable’.⁸ New South Wales requires that the body seeking the exception be one that is ‘established to propagate religion’,⁹ while the Northern Territory requires only that the conduct is ‘part of any religious observance or practice’.¹⁰ In Queensland the exception does not apply to employment or education.¹¹ The exception in the *Sex Discrimination Act* does not apply to Commonwealth-funded aged care facilities.¹²

These exceptions are concerned with the conduct of religious organisations and schools, rather than with individuals who have the fundamental and unlimited right to freedom of religious belief. Only Victoria and Tasmania give an individual, as well as a religious body, access to the general religious exception,¹³ but this is too broad an approach because it privileges one person’s religious beliefs over another’s non-discrimination rights regardless of the relative importance of the rights in any particular situation.

The effect of the religious exceptions is, effectively, to excuse religious bodies (and, in Victoria and Tasmania, people generally), from having to comply with anti-discrimination laws. Only in rare cases is the conduct of religious bodies challenged, in which case they have to meet the tests set out above. In *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*,¹⁴ for example, a youth camp associated with the Christian Brethren Church was not able to show that it was a ‘body established for religious purposes’ and so its discriminatory conduct was not excepted. Similarly in *Walsh v St Vincent de Paul Society Queensland*,¹⁵ the Society was not able to show that it is a religious body for purposes of the exception. In *OW and OV v Members of the Board of the Wesley Mission Council*,¹⁶ on the other hand, Wesley Dalmar Child and Family Care was allowed to discriminate, both because the discriminatory conduct complied with a belief of the Wesley Mission, and the discriminatory conduct was necessary to avoid injuring the religious susceptibilities of adherents.

⁶ *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Anti-Discrimination Act 1998* (Tas) s 52(d); *Equal Opportunity Act 1984* (WA) s 72(d).

⁷ *Discrimination Act 1991* (ACT) s 32(d); *Anti-Discrimination Act 1991* (Qld) s 109(1) (d); *Anti-Discrimination Act 1998* (Tas) ss 52(d)(i)–(ii).

⁸ *Equal Opportunity Act 2010* (Vic) s 82(2)(b).

⁹ *Anti-Discrimination Act 1977* (NSW) s 56(d).

¹⁰ *Anti-Discrimination Act 1992* (NT) s 51(d).

¹¹ This explains why Queensland has no educational religious exception, as religious exceptions are excluded from the broad field of education whether the school is religiously-affiliated or not. See *Anti-Discrimination Act 1991* (Qld) s 109(2).

¹² Excluding the employment of persons to provide such care: *Sex Discrimination Act 1984* (Cth) s 37.

¹³ *Equal Opportunity Act 2010* (Vic) s 84; *Anti-Discrimination Act 1998* (Tas) s 52.

¹⁴ (2014) 50 VR 256.

¹⁵ [2008] QADT 32.

¹⁶ [2010] NSWADT 293.

These cases illustrate how the existing anti-discrimination laws work to negotiate the intersection between the right to manifest religious belief, and the right to non-discrimination. The anchor points for the exception are the religious purpose of a body, and either or both of conformity to doctrines, tenets or beliefs of a religion, and avoiding injury to religious susceptibilities of adherents of a religion. These are matters that are objectively determined. However, even this approach fails to allow sufficiently for the particular circumstances of a case. For example, it fails to evaluate how central or important the belief is to the religion, how and to what extent any proposed action would infringe it, and how much harm might be done by defeating a discrimination claim in the particular facts of a case.

Two recent anti-discrimination law reform inquiries have recommended abandoning the use of exceptions, including those that presumptively favour religious conduct over non-discrimination.¹⁷ Both inquiries recommended relying instead on a general ‘rights limitation’ provision,¹⁸ under which the intersection of religion freedom and non-discrimination would be assessed on a case-by-case basis. Indeed, such an approach was recommended to the ACT inquiry by the Australian Christian Lobby.¹⁹ It is, however, outside the scope of the Panel’s inquiry to review the basic design of Australia’s anti-discrimination laws, and we make our recommendation on the basis that exceptions will for some time be the way in which the freedom of religious conduct is protected.

If, then, the privileged position of religious bodies in anti-discrimination law is to continue, then the existing anchor points for the exception are appropriate and must be maintained.

3. We submit that the Panel make the following recommendation, to ensure religious exceptions operate in an objective manner referable to doctrine:

- **that religious exceptions in Australia’s anti-discrimination laws continue to operate by reference to the religious purpose of a body; conformity of the conduct to doctrines, tenets or beliefs of a religion; and a reasonable need to avoid injury to religious susceptibilities of adherents of a religion**
- **but that those matters be assessed in the circumstances of the particular case and in light of the harm caused by the discrimination that would be allowed by the exception.**

Religious bodies providing public services

Religious organisations such as schools, welfare agencies and hospitals are often the recipients of substantial public funding to deliver public services. However, they have a privilege not enjoyed by other employers and service providers: the privilege of being able to discriminate. The willingness of religious bodies to provide public services is commendable, but it does not entitle them to be excepted from universal human rights precepts and the principle of non-discrimination.

¹⁷ ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT) Final Report*, LRAC 3 FP, 2015; Commonwealth Attorney-General’s Department, *Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes*, 2012.

¹⁸ ACT Law Reform Advisory Council, above n 17, 99-102; Commonwealth Attorney-General’s Department, above n 17, 33-35.

¹⁹ ACT Law Reform Advisory Council, above n 17, 100.

Adherence to the non-discrimination principle should be a condition of receiving money from the public purse. Given the secular nature of the Australia state and the political importance of the policy of avoiding discrimination against disadvantaged groups and minorities, public money should not be spent in any way that is discriminatory against any group. The receipt of public funds for the purpose of running a school or welfare agency should automatically disqualify a religious organisation from relying on the religious exception within anti-discrimination legislation in respect of that publicly-funded activity.

Human rights are vested in human beings, not in corporations. It is a logical fallacy to extrapolate from an individual's private beliefs to an impersonal for-profit corporation. Corporations run by religious bodies should not be privileged above other corporate employers, particularly when there is no sense in which religious belief can be said to be an inherent requirement of a non-core job.

4. We submit that the Panel make the following recommendation, to ensure recognition of the right to non-discrimination in the funding and provision of publicly funded services:

that adherence to the principle of non-discrimination be a condition of receiving public funds for the provision of public services, and that a person or entity that receives public funds for the provision of public services is excluded from being able to rely on a 'religious exception' in anti-discrimination legislation in respect of that publicly-funded activity.

We trust that this submission is helpful to the Panel, and we would be very happy to provide further assistance.

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