

6 October 2015



Mr Tim Wilson
Human Rights Commissioner
Australian Human Rights Commission
By email: rights@humanrights.gov.au

Dear Commissioner,

Submission on religious freedom

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to contribute to the religious freedom roundtables being held by the Australian Human Rights Commission (**AHRC**), which are due to commence in November 2015. PIAC hopes these roundtables will allow for a constructive, co-operative and supportive dialogue, with the aim of identifying how better to accommodate, in Australian law and policy, the freedom of religion with other rights and legitimate interests, such as equality, that sometimes come into friction with freedom of religion.

PIAC is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on issues in the public interest. PIAC has extensive casework and policy experience in the areas of anti-discrimination and human rights, and this submission is informed by that experience. PIAC recently made a submission to the AHRC Rights and Responsibilities 2014 consultation; this short submission builds on its submission to that Discussion Paper.

Statement of purpose and guiding principles

PIAC broadly supports the guiding principles for the forum that set down sensible parameters to ensure a respectful discussion. PIAC notes, however, that the statement of purpose provides that the Roundtable(s) will provide a forum 'for representatives of religious and spiritual communities to have ongoing engagement and dialogue about freedom of religion, conscience and belief' and understands that the inaugural forum scheduled for later this year will include only religious leaders.

If the roundtables are to achieve the second limb of its purpose, to engage those leaders with 'public policy in 21st century Australia', it will be vital that participants from the human rights sector be included in the roundtable process alongside religious leaders in order to debate views and find areas of common ground.

Government laws and regulation that limit the right to religious freedom

Without a federal charter or bill of rights, the right to religious freedom has limited protection in Australian domestic common law and under the Australian Constitution. Despite these limitations, there are, however, few laws and regulations in Australian law that directly infringe the right to religious freedom.

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The comprehensive audit of possible infringement of the right to freedom of religion by Australian laws recently undertaken by the Australian Law Reform Commission (**ALRC**) established that, in general, ‘Australians are not constrained in the exercise of religious freedom’.¹

Having said that, there are federal laws that, while not directly infringing upon the right to religious freedom, have had that impact in practice and effect. The large amount of counter-terrorism legislation passed in recent years and the approach taken by governments to the so-called ‘war on terror’, for example, has led to the alienation and stigmatisation of minority Muslim communities.²

Further, while they may be small in number, where issues in relation to religious freedom arise they tend to receive widespread attention and analysis. The right to religious freedom is undeniably of paramount importance in Australian society, with debate and discussion stretching far beyond the parliamentary chambers, as has been evident in recent debates in relation to same-sex marriage.

In PIAC’s experience, such debates can over-emphasise the extent to which freedom of religion comes into conflict with other human rights legitimate interests. In Australia, as in many other liberal democracies, it has proven both possible and beneficial to accommodate the protection of religious freedom without compromising other rights and interests that operate in overlapping territory. Such accommodation requires, of course, meticulous work and a genuine willingness by all sides in the debate to understand the value of others’ perspectives. PIAC hopes that the roundtable discussions being conducted by the AHRC will be able to reframe this often divisive debate and help to achieve a better accommodation of religious freedom with other rights and interests.

Protection of religion in anti-discrimination legislation

As submitted to the AHRC *Rights and Responsibilities 2014* Discussion Paper, PIAC accepts that exercising one’s right to religious freedom sometimes can involve conduct that would otherwise be seen as unlawful discrimination. PIAC also accepts that some, perhaps much, of that conduct should not be unlawful – and that to do otherwise would give insufficient protection to freedom of religion.

For example, it is central to the doctrine of some religions that particular activities be undertaken by only men or only women. If that activity were undertaken outside of a religious context, the law might require that the activity be open to either men or women, but the law nevertheless allows this otherwise discriminatory decision to be made in order to protect the free exercise of religion by the adherents of the faith in question. There must, however, be limitations; indeed it is recognised in Article 18 of the International Covenant on Civil and Political Rights that the right to religious freedom can be limited in order to protect the fundamental rights and freedoms of others.

A long-standing concern of PIAC’s is the broad permanent exemptions for religious organisations in federal anti-discrimination legislation. There is also no real procedure by which

¹ Australian Law Reform Commission, *Traditional rights and freedoms – encroachment by Commonwealth laws*, Interim Report 127, July 2014, at [4.115].

² See, for example, Cherney, A and Murphy, K ‘Being a ‘suspect community’ in a post 9/11 world – The impact of the war on terror on Muslim communities in Australia’ *Australian and New Zealand Journal of Criminology* (May 2015), DOI: 10.1177/0004865815585392.

the appropriateness of such exemptions is considered – either by way of general principle or in terms of their breadth. The absence of any process by which such questions are considered leaves a legitimate question as to the democratic underpinning of the exemptions in question. To be clear, there may be a convincing argument that supports a broad exemption, but in the absence of any process by which such arguments are considered, opposition to the extraordinary breadth of these exemptions is understandable.

Under the *Age Discrimination Act 2004* (Cth), for example, the religious bodies exemption is not limited to discrimination on the basis of age in relation to ordination or appointment of religious members. The exemption applies to employment, education, access to premises, goods, services and facilities, accommodation, land and requests for information.

Under international human rights law, which binds Australia, discrimination on the ground of religion can occur if it is a proportionate means of achieving a legitimate aim. PIAC argues that the policy of blanket exemption in anti-discrimination legislation should be replaced by a proportionality test that would require religious organisations to justify why they should be able to discriminate in certain circumstances. This would ensure that the right to freedom of religion is appropriately balanced with the right to be free from discrimination. Maintaining the status quo simply means that in many cases the rights of individuals are not properly considered vis-à-vis the right to freedom of religion.

As noted above, under international law, the proportionality test is unquestionably the principal means by which the lawfulness of impingements or encroachments on human rights are judged. Over the past two decades, the same has also become true in the domestic law of common law countries that have long provided jurisprudential inspiration to Australia, such as the United Kingdom, New Zealand and Canada. Indeed, in Australia itself, the proportionality principle is well established in constitutional law, as well as in consideration of the legality of delegated legislation. Most recently, again in Australia, proportionality has become the touchstone in the assessment made about the accommodation of human rights and other interests under the two ‘dialogue model’ human rights statutes: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Reforming the broad exemptions for religious organisations would provide much needed clarity and certainty to this frequently contentious area of law.

The provision of public services by religious organisations

The broad exemptions in anti-discrimination legislation are particularly problematic in relation to the provision of public services, government funded or partially government funded, by religious organisations. Religious organisations play a large and important role in public life in Australia; for example, in the provision of education, aged care and other services. The extent to which they are allowed to discriminate affects a significant number of people, including potential and existing employees and recipients of these services. Where an organisation is providing a service on behalf of government, PIAC believes it should not be permitted to discriminate in a way that would otherwise be unlawful.

The wide-ranging permanent exemptions for religious organisations allows for on-going discrimination in this context. PIAC believes there should be strict prohibition on discrimination in the provision of public services – especially those that receive some government funding. At a minimum, PIAC believes that if a religious body wishes to discriminate in the provision of a public service it should be required to justify why it should be able to do so. Only by imposing such a requirement will the right to freedom of religion be properly balanced against competing interests, with a decision carefully reached about how relevant conflicting rights should be accommodated in a particular situation.

Balancing religious freedom and equality before the law

There is vibrant debate in Australia on whether Commonwealth marriage legislation should be amended to allow couples of the same sex to be legally married. Following recent moves to legalise same-sex marriage in Ireland, New Zealand, the United Kingdom and a number of states in the United States of America, there has been renewed impetus for same-sex marriage to be adopted in Australia.

This is a move that PIAC supports; it is a necessary reform to protect the right of same-sex couples to live free from discrimination and to be treated equally before the law. Through many years of working with clients in this area, PIAC is aware of the stigma, vilification and unlawful discrimination that same-sex couples, and families led by same-sex couples, experience every day. This experience demonstrates that same-sex couples do not fully enjoy protection and fulfilment of their human rights to equality before the law.

PIAC recognises that certain religious groups strongly object to this marriage reform. It should be also acknowledged that just as there are religious groups who oppose same-sex marriage, there are others who support it. Quakers Australia, for example, have ordained same-sex commitment ceremonies within their Meetings for many years, and recently wrote to the Prime Minister in support of same-sex marriage and in order to point out that while certain denominations object to the reform 'these views are not representative of all Christians in Australia'.³

The debate in relation to this issue has been divisive, emotionally charged and subject to sweeping and unsubstantiated claims. PIAC recognises the concerns of certain religious and faith groups and supports their right not to have to perform same-sex marriage if they believe it conflicts with the tenets of their faith. In this respect, PIAC believes that amending legislation will be able to adequately protect faith groups that do not wish to perform same-sex marriage ceremonies. Legislation to allow for same-sex marriage in the UK, for example, has successfully carved out exceptions for religious groups who did not wish to perform same-sex marriage ceremonies. As marriage is a function of the state, PIAC believes an exceptionality approach should be adopted. Further, on this basis, PIAC does not believe that civil celebrants should be able to refuse to conduct a same-sex marriage ceremony on the basis of their religious faith.

In addition, PIAC does not support an exception in amending legislation that would allow businesses to discriminate when providing goods and services to same-sex couples seeking to celebrate their union. Anti-discrimination law has for many years applied in a number of areas to eliminate discrimination on the basis of one of the protected characteristics of race, gender, sexuality and so on. It is legally and socially unacceptable, for example, for a business to refuse to provide a good or service to an individual on the basis of their race. PIAC appreciates that concerns have been raised in relation to business owners who object to same-sex marriages due to their faith. PIAC does, however, draw a distinction between religious ministers and people with faith operating a commercial enterprise. A corollary of creating equality for same-sex couples in marriage must be to the elimination of discrimination in the context of its celebration.

³ See Letter from the Presiding Clerk, Quakers Australia, to the Prime Minister, 6 August 2015, available at http://c.ymcdn.com/sites/www.quakers.org.au/resource/resmgr/QPLC/Letter_PM_marriage-equality.pdf.

Greater protection for religious freedom

PIAC believes there are means by which religious freedom could be afforded greater protection in Australian domestic law. As outlined above, PIAC supports specific protection for religious groups in marriage reform.

PIAC also supports the inclusion in anti-discrimination legislation of a generally applicable positive duty imposed on public sector organisations, widely defined, to eliminate discrimination and harassment. Discrimination law is currently largely reactive and change relies on individual complaints. This characterises the discrimination as a personal dispute and does not encourage organisations to look at holistic change. Imposing a positive duty on public sector organisations would proactively promote substantive equality. A positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible was introduced in Victoria's *Equal Opportunity Act 2010* (s 15(6)).

In addition, another approach may be to formalise the common law doctrine of legality by requiring, in legislative form, the interpretation of legislation in line with Australia's human rights law obligations unless there is a clear legislative intent to the contrary. This could be pursued as an amendment to the *Acts Interpretation Act 1901* (Cth), which applies to the interpretation of all legislation and regulation unless there is expressed statutory intent to the contrary. For example, an interpretive provision could require other legislation to be interpreted in a non-discriminatory way unless the legislature states that it intends to be discriminatory.

Should PIAC be able to provide any further information or input to the AHRC Roundtables, relevant contact details are below.

Yours sincerely



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