



Submission to the Religious Freedom Review

13 February 2018

The Victorian AIDS Council

The Victorian AIDS Council (VAC) is one of Australia's largest lesbian, gay, bisexual, transgender, and intersex (LGBTI) health services, serving the populations of Victoria and South Australia. In partnership with other organisations, VAC works to support all members of sexually and gender diverse communities, and is committed to improving the health and wellbeing of all LGBTI people.

www.vac.org.au

Contents

Introduction.....	3
Balancing Rights.....	3
Anti-Discrimination Laws.....	4
Religious protections	4
Religious exemptions.....	5
<i>Maintaining a shared ethos</i>	5
<i>Preserving religious identity</i>	5
Belief-based exemptions.....	6
<i>Belief-based exemptions violate secular principles</i>	6
<i>Belief-based exemptions harm LGBTI people</i>	7
Victims of religious discrimination are often also religious.....	7
Transparency and consistency	8
Voluntary public activities.....	8
Public funding	9
Free Speech.....	9
Conclusion.....	11
Recommendations	12

Introduction

The Victorian AIDS Council (VAC) welcomes the opportunity to contribute to the Expert Panel on Religious Freedom's Religious Freedom Review (the Review).

The Review's Terms of Reference includes consideration of the intersections between the enjoyment of the freedom of religion and other human rights. This submission will focus on the intersection between the enjoyment of religious freedom and the rights of sexually and gender diverse Australians in the context of anti-discrimination laws and free speech.

The Review's Terms of Reference also state that it will have regard to any previous or ongoing reviews or inquiries that are relevant. We note that the recent Inquiry into the Status of the Human Right to Freedom of Religion or Belief is one such relevant inquiry, and that parts of its Terms of Reference were not dissimilar to those of the current Review.

There are some who have framed marriage equality and other rights of LGBTI people being progressively realised as an assault on religious *freedom*. While some people hold that misconception, in reality what is being eroded is religious *privilege*, which is not a right at all.

Balancing Rights

As the 2016 Census showed, nearly a third of Australians have no religious affiliation or beliefs,¹ and with this growing non-religious population more and more Australians are questioning why religious organisations are so immensely privileged and in many respects 'above the law'. Even many religious people question religious privilege, because they understand that it undermines secular liberal democracies, and inevitably leads to the privileging of one religion over others, which is not conducive to religious freedom.

While some rights are absolute, like the right to freedom from slavery or from torture or ill treatment, most rights are not absolute and must be balanced against each other. Article 18 of the International Covenant on Civil and Political Rights codifies the right to freedom of thought, conscience and religion. Importantly, this right consists of two distinct freedoms: The absolute freedom of an individual to "have or to adopt a religion or belief of his choice", which guarantees the freedom to change one's religion or belief, including non-religious beliefs; and the limited "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." This latter freedom is limited to ensure adequate protection of the fundamental rights of others, such as the right to non-discrimination or to the highest attainable standard of health.

This need for balancing the right to religious freedom against other rights is exemplified by limitations already (and rightly) imposed on religious freedom in Australia, such as laws prohibiting female genital mutilation even when performed for religious reasons. However, in

¹ "Media Release: 2016 census data reveals "no religion" is rising fast", Australian Bureau of Statistics, 27 June 2017. <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85?OpenDocument>> (last accessed 06/02/18).

general the right to religious freedom has for a long time been given undue weight compared to other rights in Australia, and this imbalance has resulted in religious privilege, which curtails many rights of a great many Australians.

When priests are not obligated to report instances of child abuse and rape revealed to them during confession, and the sexual and physical abuse of children is allowed to continue unchecked, it is clear we have got the balance wrong; too many children have suffered, and continue to suffer, as a result. Unfortunately religious privilege in Australia doesn't end with the power to conceal child abuse; it also extends to the power to discriminate against some of our society's most vulnerable minorities.

Anti-Discrimination Laws

Religious protections

Australia's anti-discrimination laws protect religious freedom to different degrees. In Victoria, Queensland, Tasmania, Western Australia, the Northern Territory and Australian Capital Territory, anti-discrimination laws make it illegal in areas such as employment, education, and the provision of goods, services and facilities, to discriminate against others based on their religious or political beliefs.²

Notably, anti-discrimination laws are narrower in other states, covering only "religious appearance or dress" in South Australia (SA)³ and "ethno-religious or national origin" in New South Wales (NSW).⁴ Commonwealth religious anti-discrimination provisions are limited to the *Fair Work Act 2009*, which prohibits adverse action against employees on grounds including religious and political opinion.⁵

Recommendation 1.1: In the interests of consistency, NSW, SA and Commonwealth anti-discrimination laws should be amended to prohibit discrimination on the basis of religious and political belief.

Recommendation 1.2: If freedom of thought, conscience and religion is to be protected under federal law then it should be part of a comprehensive bill or charter of rights that protects and balances fundamental human rights.

Serious consideration of any proposals by religious lobbyists should begin and end here, with their enjoying *equal protection* under anti-discrimination laws. Any proposed expansion of religious exemptions to anti-discrimination laws should be rejected. Indeed, the scope of these exemptions should be narrowed, not broadened.

² *Discrimination Act 1991 (ACT)* ss 7(1)(o), (u); *Anti-Discrimination Act 1996 (NT)* ss 19(1)(m), (n); *Anti-Discrimination Act 1991 (Qld)* ss 7(i), (j); *Anti-Discrimination Act 1998 (Tas)* ss 16(m), (n), (o), (p); *Equal Opportunity Act 2010 (Vic)*, ss 6(k), (n); *Equal Opportunity Act 1984 (WA)* ss 54-65.

³ *Equal Opportunity Act 1984 (SA)* ss 85T(1)(f), 85T(7), 85U-85ZH.

⁴ *Anti-Discrimination Act 1977 (NSW)* s 4 (definition of "race"), ss 8-13.

⁵ *Fair Work Act 2009 (Cth)* s 351(1). Note: this is subject to any exemptions at State/Territory level: s 351(2)(a).

Religious exemptions

Currently, religious bodies have exemptions to federal⁶ and state and territory-based⁷ anti-discrimination laws that allow them to discriminate on grounds such as sex, sexual orientation, gender identity, or marital status. The result is that, for example, religious schools are able to expel students or terminate the employment of staff for being gay, transgender or pregnant while unmarried. For staff this is the case even when they teach subjects unrelated to religious *instruction*, such as general religious education, science or mathematics, or even if they're cleaners and gardeners. Religious charities can also discriminate in who they employ and provide their services to.

Some attempt to justify these broad exemptions by arguing that they help to uphold a shared ethos in line with a particular religious faith, or that they're needed to preserve religious identity. The first of these arguments only justifies narrower exemptions than the current broad exemptions, and the second should be rejected in its entirety.

Maintaining a shared ethos

It could be argued that just as political parties are not required to employ people from different political parties, religious bodies should be able to positively discriminate in the employment of people with shared religious beliefs and practices. Shared beliefs and practices do indeed constitute a genuine occupational requirement for people whose job it is to promote religious, political or social causes. However, this doesn't justify the current broad exemptions to anti-discrimination laws, which go beyond genuine occupational requirements. Rather, this argument succeeds only in justifying narrow exemptions in relation to the employment of people by bodies established specifically to propagate religious beliefs, to positions that substantially involve the practice of religion, such as religious observance, teaching, leadership, pastoral care or lobbying.

Preserving religious identity

Religious bodies often argue all their staff members are part of a community of believers bound by common beliefs and practices. They further argue that this gives them the right to positively discriminate and only employ people who share their religious beliefs and practices, regardless of whether or not those beliefs and practices are genuine occupational requirements essential to the role. They argue that this right to positive discrimination is necessary to preserve the religious identity of their organisation. However, religious bodies that demand the right to positive discrimination object to it being extended to non-religious organisations, despite the fact they also have values and identities they wish to preserve.

During the marriage equality debate, many were rightly outraged at calls for people opposing marriage equality to lose their corporate jobs. Yet many corporations see marriage equality

⁶ *Sex Discrimination Act 1984 (Cth)* s 37; *Age Discrimination Act 2004 (Cth)* s 35.

⁷ *Discrimination Act 1991 (ACT)* ss 32-33; *Anti-Discrimination Act 1996 (NT)* ss 37A and 51; *Anti-Discrimination Act 1991 (Qld)* ss 41, 109; *Anti-Discrimination Act 1998 (Tas)* s 52; *Equal Opportunity Act 2010 (Vic)*, ss 82-84; *Equal Opportunity Act 1984 (WA)* s 73; *Equal Opportunity Act 1984 (SA)* ss 50, 85ZM; *Anti-Discrimination Act 1977 (NSW)* s 56.

as a manifestation of their values of diversity and non-discrimination, which they also view as being essential to their businesses. The obvious question, then, is why religious bodies should be able to discriminate against people who don't share their beliefs and values, but corporations should not be able to do the same?

To be clear, we are not arguing that corporations should have the same belief-based exemptions to anti-discrimination laws as religious bodies. Rather, we are arguing that religious bodies should likewise not have such exemptions, except in cases the discrimination is based on beliefs and practices that are genuine occupational requirements.

The primary purpose of schools and hospitals is to educate and provide healthcare, not to propagate religious beliefs. Likewise for any service provider, their primary purpose is to provide a service, not to push their religious beliefs onto their clients. And it will always be a relevant job attribute to understand an organisation's history, traditions and culture. Preserving religious identity does not require a right to positive discrimination.

Belief-based exemptions

Belief-based exemptions violate secular principles

It is ironic, to say the least, that religious lobbyists argue that it should be illegal for people to discriminate against them on the basis of their religious beliefs, but legal for them to discriminate against others who have different beliefs. Such belief-based exemptions represent a double standard, and are corrosive to basic principles fundamental to secular liberal democracies:

- **The rule of law** – the law must be applied equally to everyone; nobody can be above the law, even if they disagree with the it;
- **The harm principle** – freedom does not convey a right to harm others, and;
- **The neutrality principle** – the law should not favour or privilege any one religion over others or over non-religious belief; freedom of conscience, religion and belief should apply equally to all citizens.

Belief-based exemptions violate all three of these fundamental principles: they privilege religious bodies, and in some cases religious individuals, exempting them from laws that apply to everyone else and in so doing place them 'above the law'; in allowing religious bodies to discriminate against vulnerable minorities, they allow them to harm people from those groups; and they clearly privilege religious belief over non-belief in public spheres where non-religious people have a right to freedom *from* religion.⁸

⁸ UN Human Rights Committee (HRC), *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 1993:(5).

Belief-based exemptions harm LGBTI people

Evidence clearly shows that members of LGBTI communities have significantly higher rates of depression, anxiety, self harm, suicidal ideation and suicide than the general population.⁹ LGBTI people have poorer health outcomes not because of their LGBTI status, but because of the prejudice and discrimination they endure as a result of it. As a 2017 joint statement signed by 37 leading Australian community health organisations stated, “Discriminatory legislation is an impediment to LGBTI people achieving the highest attainable standard of health.”¹⁰ Belief-based exemptions to anti-discrimination laws are harming LGBTI people.

Recommendation 2.1:

Anti-discrimination laws should be amended to remove belief-based exemptions in relation to employment, education, or the provision of goods, services or facilities.

Recommendation 2.2:

Accordingly, religious exemptions to anti-discrimination laws should be limited to:

- a. the ordination or appointment of priests, ministers or members of any religious order;
- b. the training or education of people seeking ordination or appointment as priests, ministers or members of a religious order;
- c. the employment of people to perform functions in relation to, or to participate in, any religious observance or practice; and
- d. the employment of people by a body specifically established to propagate religious beliefs or views, to positions that substantially involve the practice of religion, such as religious observance, teaching, leadership, pastoral care or lobbying.

Victims of religious discrimination are often also religious

We note there is division within every religion and between religious individuals as to the acceptability of people from sexually and gender diverse backgrounds;¹¹ and most religious people in Australia abide by a live and let live approach, which is consistent with the widely held Australian value of a fair go for everyone. Indeed, the majority of religious people who voted in the marriage equality postal survey voted in favour of marriage equality.

⁹ “Snapshot of mental health and suicide prevention statistics for LGBTI people”, National LGBTI Health Alliance, July 2016. <<https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>> (last accessed 07/02/18).

¹⁰ “Marriage discrimination is harmful to LGBTI Australian’s health”, The Equality Campaign, 4 August 2017. <<https://vac.org.au/site/assets/uploads/516e8fb1-healthstatement-2.pdf>> (last accessed 07/02/18).

¹¹ Peter Norden, “Not so straight: a national study examining how Catholic schools can best respond to the needs of same sex attracted students”, The Ignatius Centre for Social Policy and Research, Jesuit Social Services. <<http://jss.org.au/wp-content/uploads/2015/10/NSS.pdf>> (last accessed 07/02/18).

We also note that having a sexual orientation or gender identity that is not heteronormative, being pregnant while unmarried, or being married to someone of the same sex, are not mutually exclusive with holding religious beliefs. There are many sexually and gender diverse people who are also religious. Denying these people the ability to attend or teach at a religious school on the basis of their sexual orientation or gender identity doesn't just breach their right to equality and non-discrimination, it also breaches their right to freedom of religion.

Transparency and consistency

To imagine religious schools saying 'no gays allowed' in their promotional materials is to feel confronted, as such prejudice is an affront to decency itself; however, that is precisely the power given to religious schools under exemptions to anti-discrimination laws. While VAC does not support these exemptions, should they continue to exist, there must be transparency and consistency in the way they are applied so people can make informed choices about the services they use. Currently the way these exemptions are applied is neither transparent nor consistent. Indeed, it would appear most religious schools are more than happy to accept gay and lesbian students, and the huge sums of money their parents spend to send them there, based on the unspoken rule that they conceal their sexual orientation and not bring a same-sex partner to their school formal.

Parents could be forgiven for not assuming all religious schools are prejudiced against sexually and gender diverse students. It is not good enough for parents to only be made aware that the school they've chosen for their children will not accept them for being who they are when their children discover their sexuality or change their gender identity. It is also problematic that mostly it is parents who choose schools for their children, meaning LGBTI students are not able to boycott schools that discriminate.

This need for transparency and consistency applies not just to religious schools, but to all services provided by religious bodies with the power to discriminate.

Voluntary public activities

Christian schools have used their right to discriminate under current exemptions to anti-discrimination laws to refuse gay students and even students with same-sex parents,¹² and to sack teachers who are unmarried mothers¹³ or gay.¹⁴ However, it is not a *requirement* of Christianity that Christians run schools. Indeed, it is not a requirement of any religion that its adherents provide employment, education, goods, services or facilities. Religious bodies instead choose to enter these public spheres and engage with the general public, which for the most part do not share their beliefs.

¹² "Gay parents accuse school of enrolment snub", *ABC News*, 13 December 2011; "Gay dad not welcome at Mandurah Christian school", *Mandurah Mail*, 28 October 2015; "Schools defend right to expel gays", *Sydney Morning Herald*, 7 July 2013.

¹³ "Union in plea for sacked teacher", *Sunshine Coast Daily*, 2 May 2012.

¹⁴ Brian Greig, "You're gay? You're out! Gay teacher sacked due to WA law loophole", *WA Today*, 22 November 2017.

It is a reasonable expectation that religious bodies adhere to the same rules as the general public should they choose to enter the public sphere.¹⁵ The removal of religious exemptions that allow discrimination in the provision of education, goods, services, facilities, and employment (other than discrimination limited to the inherent requirements of a position) would therefore not violate religious freedom, because religious bodies choose to engage in such public activities in the first place.

Public funding

Many religious bodies benefit from public funding. This means that “LGBTI taxpayers are being asked to fund religious organisations that can discriminate against them as employers.”¹⁶ Government funded discrimination cannot be justified in the name of diversity, because not all views deserve public support, least of all discriminatory views based on prejudice. Governments would not, for example, fund anti-Semitic organisations to ensure a diversity of views about Jewish people in the public sphere is maintained. In any case, recipients of public funds should abide by the same rules as the general public.

Free Speech

During the marriage equality postal survey debate, many working for the ‘No’ campaign argued that marriage equality would limit freedom of speech.¹⁷ This argument has no basis in logic or reason, and certainly no basis in law. There is nothing about two people of the same sex having the equal right to marry that would limit the right of others to freely express their opinion about same sex marriage or anything else, and indeed now that we have marriage equality, people continue to freely speak their mind about it.

The right to freedom of opinion and expression is fundamental to open and democratic societies. However, like most other rights it is not absolute, and indeed Australia has federal and state laws that prohibit speech in cases such speech is likely to result in harm.¹⁸ While it is reasonable that any limits imposed on speech should be consistent,¹⁹ unfortunately these laws are inconsistent in terms of the attributes they protect, the extent to which certain speech is prohibited, and the penalties that apply.

¹⁵ Compare *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75 at [269] (Maxwell P; Neave JA agreeing): “[M]oving from the field of religious activity to the field of secular activity...has the consequence...that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.”

¹⁶ Elizabeth Sutherland, “Bigotry in the Name of God: the Case Against Religious Exemptions”, *New Matilda*, 3 June 2016.

¹⁷ Paul Karp, “Abbott insists marriage equality a threat to religious freedom after Brandis calls it ‘a trick’” *The Guardian*, 21 August 2017. <<https://www.theguardian.com/australia-news/2017/aug/21/abbott-insists-marriage-equality-threat-to-religious-freedom-after-brandis-calls-it-a-trick>> (last accessed 07/02/18).

¹⁸ *Racial Discrimination Act 1975 (Cth)* s 18C; *Anti-Discrimination Act 1998 (Tas)* ss 17 & 19; *Anti-Discrimination Act 1977 (NSW)* s 20c; *Anti-Discrimination Act 1991 (Qld)* s 131A; *Racial and Religious Tolerance Act 2001 (Vic)* ss 7-8, 24-25; *Racial Vilification Act 1996 (SA)* s 4; *Discrimination Act 1991 (ACT)* s 67A; *Criminal Code Amendment Racial Vilification Act (WA)* ss 77-78, 80A-80B.

¹⁹ Russell Blackford, “Freedom of Religion and the Secular State”, Wiley-Blackwell, John Wiley & Sons Inc., 2012, p.195.

There has been much debate about the wording of sections 18C and 18D of the *Racial Discrimination Act 1975 (Cth)*. Some argue the wording of 18C, with its inclusion of “offence and insult”, is too low a bar, and they fear people will be prosecuted for ‘mere slights’.²⁰ Others argue that they needn’t be so concerned, because the low bar set by 18C is balanced against broad exemptions contained in section 18D.²¹ Some have also noted that the legislation is ineffectual, and that the low bar set by 18C encourages spurious complaints, with only 3% of complaints ever making it to court.²²

We note that there are currently no federal anti-hate speech laws that protect people on the basis of their religious beliefs, sexual orientation, gender identity, or HIV or AIDS status. We also note that the replication of sections 18C and 18D of the *Racial Discrimination Act 1975 (Cth)* in any new federal legislation aimed at prohibiting hate speech against people on such grounds would simply replicate what many see as the problems with these clauses; and should such legislation be worded differently, it would create a disparity between laws prohibiting certain speech in relation to race compared to other characteristics. A better option would be to enact a single piece of federal anti-hate speech legislation that covers race, sexual orientation, gender identity, HIV or AIDS status, religious conviction, and disability, and which sets a high bar for limiting speech, given that “the purpose [of limits on speech] is to protect citizens from harm, not to protect them from offense caused by the speech itself.”²³

Recommendation 3.1: To ensure the right to freedom of speech is protected, but also limited appropriately to balance it against other rights, a federal anti-hate speech law should be enacted. This legislation should prohibit speech which degrades, intimidates, or incites hatred against or serious contempt for, people on the basis of their race, colour, national or ethnic origin, sexual orientation, gender identity, HIV or AIDS status, religious conviction, or disability, with suitable academic, scientific, artistic and public interest exemptions.

Recommendation 3.2: States should amend their anti-hate speech laws so they are consistent with such federal legislation.

²⁰ Editorial, “Free speech has to include freedom to offend: Tony Abbott is right: racial vilification laws are too broad.” *The Sydney Morning Herald*, 8 August 2012. <<http://www.smh.com.au/federal-politics/editorial/free-speech-has-to-include-freedom-to-offend-20120807-23s8j.html>> (last accessed 07/02/18).

²¹ Waleed Aly, “The real agenda behind amending 18C: sending a message to minorities”, *The Age*, 1 September 2016. <<http://www.smh.com.au/comment/the-real-agenda-behind-amending-18c-sending-a-message-to-minorities-20160901-gr62nl.html>> (last accessed 07/02/18).

²² Chris Fotinopoulos and Jonathan Meddings, “Why walking out on bigots is a bad idea”, *The Sydney Morning Herald*, 15 September 2016. <<http://www.smh.com.au/comment/why-walking-out-on-bigots-is-a-bad-idea-20160915-grqu5i.html>> (last accessed 07/02/18).

²³ Russell Blackford, “Freedom of Religion and the Secular State”, p.176.

Conclusion

There should be no belief-based exemptions to anti-discrimination laws in relation to the provision of employment, education, goods, services or facilities, because such exemptions are inconsistent with fundamental principles that underpin secular liberal democracies, and because these all represent voluntary public activities. The removal of these exemptions, which currently privilege religious bodies, will not limit religious freedom because there is nothing inherent in religion that obliges believers to do things like run schools, hospitals, or commercial enterprises. If religious adherents are unwilling to follow the same rules as everyone else, then they are at liberty to withdraw from public spheres and not provide services or operate businesses, and to continue their belief and worship in a way that does not infringe upon the fundamental principles of secular liberal democracies, and indeed upon the fundamental rights of others.

The progressive realisation of human rights for LGBTI people does not limit religious freedom or free speech. There is a need for federal anti-hate speech legislation that protects a range of attributes, including religious conviction, sexual orientation, gender identity and HIV or AIDS status. States should amend their anti-hate speech laws to ensure consistency with such federal legislation.

Recommendations

Recommendation 1.1: New South Wales, South Australia and the Commonwealth should amend their anti-discrimination laws to prohibit discrimination on the basis of religious and political belief.

Recommendation 1.2: If freedom of thought, conscience and religion is to be protected under federal law then it should be part of a comprehensive bill or charter of rights that protects and balances fundamental human rights.

Recommendation 2.1:

Anti-discrimination laws should be amended to remove belief-based exemptions in relation to employment, education, or the provision of goods, services or facilities.

Recommendation 2.2:

Accordingly, religious exemptions to anti-discrimination laws should be limited to:

- a. the ordination or appointment of priests, ministers or members of any religious order;
- b. the training or education of people seeking ordination or appointment as priests, ministers or members of a religious order;
- c. the selection or appointment of people to perform functions in relation to, or to participate in, any religious observance or practice; and
- d. the selection or appointment of people by a body specifically established to propagate religious beliefs or views, to positions that substantially involve the practice of religion, such as religious observance, teaching, leadership, pastoral care or lobbying.

Recommendation 3.1: To ensure the right to freedom of speech is protected, but also limited appropriately to balance it against other rights, a federal anti-hate speech law should be enacted. This legislation should prohibit speech which degrades, intimidates, or incites hatred against or serious contempt for, people on the basis of their race, colour, national or ethnic origin, sexual orientation, gender identity, HIV or AIDS status, religious conviction, or disability, with suitable academic, scientific, artistic and public interest exemptions.

Recommendation 3.2: States should amend their anti-hate speech laws so they are consistent with such federal legislation.