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Of shields and swords – let the jousting begin!

The Hon Justice S C Derrington
President – Australian Law Reform Commission

On Thursday of last week, the Attorney-General released an exposure draft of religious freedoms reforms, which he intends to present to Parliament in final form in October. The exposure draft traverses many of the issues that were within the ALRC's original terms of reference for our Religious Freedoms Inquiry. Consequently, the Attorney has issued the ALRC Amended Terms of Reference.

The Amended Terms of Reference narrow the scope of the ALRC's Inquiry significantly. We are required to confine ourselves to issues not already covered by the Religious Discrimination Bill and are not to make any recommendations that relate to the Religious Discrimination Bill itself. Further, we are required to delay releasing any consultation documents until after the public consultation process in relation to the Religious Discrimination Bill is completed and take into account any amendments to the Bill resulting from that consultation process. In effect, and as stated by the Attorney in his speech last week, all the ALRC is engaged in is a drafting exercise to amend (if practicable) the *Sex Discrimination Act*, the *Age Discrimination Act*, the *Fair Work Act* and the *Australian Human Rights Commission Act*. Our reporting date has been extended until 12 December 2020.

It is important to emphasize at the outset that neither the original Terms of Reference, nor the Amended Terms, direct the ALRC to inquire into the desirability or necessity for reform of the existing legal framework that governs the interaction between anti-discrimination law and religious freedom. That task was undertaken by the *Expert Panel on Religious Freedom (Religious Freedom Review)*, which concluded that 'by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law'.[1] The ALRC's Inquiry, by contrast, has a narrow and technical focus. Consequently, the ALRC cannot and does not take a position on whether or not it is desirable to remove the exemptions; it will, however, attempt to identify consequences that will flow therefrom, be they intended or not.

What all this means is that I am not in a position today to release, as advertised, the ALRC's Discussion Paper, which would have introduced our preliminary views on whether, and if so how, it might be practicable to remove the exemptions in anti-discrimination law that apply to religious institutions whilst 'guaranteeing' the rights of religious institutions to conduct their affairs in a way consistent with their religious ethos.

[1] Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018) [1.419].

I might also say at the outset that despite our best endeavours, the ALRC will be unable to propose any legislative solution that 'guarantees' the rights of religious institutions to conduct their affairs in a way consistent with their religious ethos. Within the complex framework of international human rights law and its intersection with domestic anti-discrimination law, there is no justification in law, nor practical means, of 'guaranteeing' that one right, let alone an institutional right rather than an individual right, will trump any other rights. A similar observation was made by Professors Enid Campbell and Harry Whitmore in their 1966 work *Freedom in Australia*, where they said:

> As a practical matter, it is impossible for the legal order to guarantee religious liberty absolutely and without qualification … Governments have a perfectly legitimate claim to restrict the exercise of religion, both to ensure that the exercise of one religion will not interfere unduly with the exercise of other religions, and to ensure that practice of religion does not inhibit unduly the exercise of other civil liberties.[2]

In its consideration of the issues thus far, I can say that the ALRC has identified and been guided by the following principles:

1. Australian law should properly reflect the content of the international covenants and conventions to which Australia has agreed to be bound;
2. All Australians are entitled to the protection of their fundamental human rights and no one right is subordinate to another right — rights that are invisible may lead to a diminution of the equal and inalienable rights of all people;
3. The inherent dignity of all people is fundamental to a pluralistic democratic society — transparency and integrity in the way competing rights are balanced is essential to protecting that inherent dignity;
4. The exercise of any right must not cause injury or harm to another, and the existence of any one right does not entitle anyone to engage in any activity aimed at the destruction or limitation of another right to a greater extent than is provided for at law.

A 'Freedom of Religion Act', or equivalent, is of course one way that a more positive statement of religious rights could be enshrined. However, and without venturing into the debate about bills of rights, there is much force in the view that one right should not be seen to be privileged over any other right. Indeed, this very issue arose in 1994 in the Law Reform Commission's Report into *Equality before the Law*.[3] The Commission recommended an Equality Act but noted that the Act would provide a remedy only for inequality on the ground of gender. It observed that the right to equality in international human rights law is not so restricted. Whilst observing that a general guarantee to implement Australia's international human rights

[2] Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204.
[3] The ALRC had originally been styled 'The Law Reform Commission'.

obligations more fully would be outside its terms of reference, the Commission acknowledged the strength of the arguments for a general equality guarantee.[4]

It must also be acknowledged that perceptions as to how and which rights are privileged by different legislative mechanisms will be very much in the eye of the beholder. Whilst the Religious Discrimination Bill has been described by many as a 'shield' for religious institutions, the very same language within the context of anti-discrimination legislation is seen as a sword by others. It is unsurprising that the issues raised in this Bill have invited renewed discussions about Australia's approach to human rights and fundamental freedoms – including today by the President of the Law Council of Australia in relation to freedom of speech and freedom of the press.[5] Only last month, the President of the Human Rights Commission, Emeritus Professor Rosalind Croucher AM, also called for a renewed conversation about an Australian Human Rights Act that would positively frame freedoms and rights.[6]

As was observed by the ALRC in its Report on *Traditional Rights and Freedoms*, freedom of religion is infringed in two ways: first, when a law prevents individuals from exercising their religion or requires them to engage in conduct which is prohibited by their religion; secondly, when a law mandates a particular religious practice.[7] As the Report notes, there are few, if any Commonwealth laws that can be said to interfere with freedom of religion in these ways – although, for example, State and Territory laws requiring Roman Catholic clergy to breach the seal of the confessional could be considered to amount to infringement of the first kind.

The more usual challenges to freedom of religion in this country fall outside liturgical and worship settings and involve 'questions of freedom of conscience in a commercial or service provision setting, the integrity of religious education, and the manifestation of belief in other ways'.[8] These areas are, of course, where the anti-discrimination laws may be seen to limit freedom of religion.

The history of the anti-discrimination legislation in Australia is instructive when considering the intersection between freedom of religion and freedom of equality. That history reveals attempts by the legislature to keep pace with changes in standards of public morality and changing social mores and the consequent difficult issues for social policy. It tends to reveal a reactive approach to social issues that are emerging and evolving, almost in real time, and which cannot be reconciled immediately with the generally more static questions of religious doctrines and practices which may take centuries to evolve, if at all.

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[4] The Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 (Part II) (1994) [4.24].
[5] 'Lawyers unite to stop erosion of freedoms', *The Australian*, 4 September 2019, 6.
[6] Rosalind Croucher AM, *Freedom of religion and freedom of speech: it's time for change*, Law Society Journal, 1 August 2019.
[7] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) [5.66].
[8] Submission of Australian Christian Lobby to the Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) [5.67].

But we know that religious doctrines and practices do evolve. Overt racial discrimination has not been tenable under cover of religious freedom since the success of the civil rights movement in the United States and, in this country, the *Racial Discrimination Act 1975* has never afforded an exemption to religious institutions on the basis of race.

When the *Sex Discrimination Act 1984* was first promulgated in 1984, the only protected attributes were sex, marital status and pregnancy. In his Second Reading Speech, Special Minister of State, Mr Young, said;[9]

> I should make clear that the aim of the Bill is to ensure equality of opportunity for men and women through the elimination of unjust discrimination. The Bill does not interfere with religious or family values and will not force women or men into roles they may not wish to undertake.

Within only 10 years of the promulgation of that Act, the Law Reform Commission had been asked to consider whether any changes should be made to that law and, in the course of its Inquiry, considered whether or not the exemption for religious schools should be maintained or removed.[10] The Commission recommended that the exemption contained in section 38 of the *Sex Discrimination Act 1984* for educational institutions established for religious purposes should be removed. At the very least, it recommended, the exemption should be removed in relation to discrimination on the ground of sex and pregnancy.[11] The Commission said there could be 'no religious basis for discrimination on the grounds of sex or pregnancy',[12] although it said it had received no submissions on the issue from religious organisations or schools.[13] If the exemption for discrimination on the ground of marital status was to remain, the Commission recommended it be amended to require a test of reasonableness.[14] The Commission's theological advice was, evidently, not acted upon – there was no change to section 38.

'Family responsibilities' was added as a protected attribute to the *Sex Discrimination Act 1984* in 1992 by the *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992*. This was to give effect to the International Labour Organisation Convention 156 (1981) — *A Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*.[15]

Two further protected attributes were added to the *Sex Discrimination Act 1984*: 'potential pregnancy' by the *Sex Discrimination Amendment Act 1995*, and 'breastfeeding' by the *Sex and Age Discrimination Legislation Amendment Act 2011*. No change was made by any of

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[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 February 1984, 67 (Young).
[10] Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (Part 1) (1995) [3.68]ff.
[11] Ibid rec 3.11.
[12] Ibid [3.81].
[13] Ibid [3.78].
[14] Ibid rec 3.11.
[15] Explanatory Memorandum, Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992 (Cth) [6].

these amending acts to the exemptions that applied to religious institutions and none of the explanatory memoranda make any reference to whether there could be a religious basis for discrimination on the grounds of family responsibilities, potential pregnancy, or breastfeeding such that an exemption might be necessary.

In 2013, the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* added as protected attributes sexual orientation (s 5A), gender identity (s 5B), and intersex status (s 5C). It also substituted the attribute of 'marital status' with that of 'marital or relationship status' in section 6. Further, it amended the exemptions for educational institutions established for religious purposes provided in section 38(1)–(3) to add to the pre-existing exemptions in relation to sex, marital status and pregnancy, further exemptions in relation to sexual orientation, gender identity, and relationship status.

The then Attorney-General, the Hon Mark Dreyfuss QC, said in the Explanatory Memorandum to the amending Bill:[16]

> The importance of the right to freedom of religion is recognised in sections 37 and 38 of the SDA. These sections provide exemptions for religious bodies and education institutions from the operation of the prohibition of discrimination provisions of the SDA in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
> …
> The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the right to freedom of thought, conscience, and religion or belief in respect of the new grounds of sexual orientation and gender identity.
>
> The Bill will not extend the exemption to cover the new ground of intersex status…religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents.

The then Shadow Attorney-General, the Hon Senator George Brandis QC, said in the course of the Second Reading Speech, in which he expressed bi-partisan support for the Bill (except in relation to the late amendment in relation to aged-care facilities that subsequently became section 37(2)):[17]

> The right of people to fair treatment, a precious value, must take its place alongside other precious values, and one of those precious values is freedom of religion…in balancing those competing and sometimes inconsistent values…the right of freedom of religious practice and the right of freedom of religious worship must always be respected. And if we are to respect the right of religions which conduct social institutions, whether they be schools or churches or

[16] Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).
[17] Commonwealth, *Parliamentary Debates*, Senate, 18 June 2013, 3272 (Brandis QC).

> aged-care facilities or hospitals, to conduct those institutions in accordance with the tenets of their faith should always be respected. That is a very fundamental value.
>
> You cannot have freedom of religion if you also have legislation which requires, which imposes by statutory obligation, an obligation upon a church or religious institution to conduct its affairs at variance with the tenets of its teachings.

It seems, therefore, that both sides of Government accept that religious institutions should be able to conduct those institutions in accordance with the doctrines and tenets of their faith. If that is so, *a priori* determinations about what is and is not a legitimate expression of a particular doctrine or tenet of a particular faith might be considered courageous – in the Sir Humphrey Appleby sense.

In the *Religious Freedom Review*, the Panel recommended that the *Sex Discrimination Act 1984* should be amended to provide that the religious schools can discriminate in relation to employment matters, and in relation to students, on the basis of sexual orientation, gender identity or relationship status (with certain provisos) but not on the basis of any other protected attribute.[18] It also recommended that jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination with respect to employees or students on the basis of race, disability, pregnancy, or intersex status, or on the basis that an existing employee has entered into a marriage.[19]

Just as religious doctrines and practices have evolved in relation to matters of race, so too do we see changing attitudes within a variety of faiths in relation to other protected attributes. Different religious organisations have very different things to say about whether, and if so on what basis, they wish to discriminate within the context of their religious institutions. Although the Law Reform Commission, almost 30 years ago now, asserted that there could be no religious basis for discrimination on the basis of pregnancy, the ALRC's preliminary consultations in this present Inquiry have, to the contrary, encountered several faith-based organisations who hold to a religious basis for discriminating in relation to women who become pregnant out of wedlock.

Assuming it is accepted, as it appears to be on both sides of government, that there is a legitimate balancing exercise to be undertaken between the right to equality and the right to freedom of religion, it seems fraught for secular law to provide in legislation, from time to time, which doctrines, tenets and beliefs or teachings of a particular creed are deemed an acceptable basis on which to discriminate and which are not – subject always to the overriding limitations on the right to freedom of religion that are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

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[18] Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018), recs 5 and 7.
[19] Ibid, recs 6 and 8.

The remainder of what I have to say I do so in a personal capacity. Given the amendment to our Terms of Reference only last week, neither the ALRC nor the Advisory Committee to this Inquiry has yet had an opportunity to reframe the scope of the Inquiry.

Against the background that I have just outlined, one approach might be to repeal sections 37 and 38 of the *Sex Discrimination Act 1984*, such that there is no *a priori* determination of which attributes should be included in an exemption for religious bodies, and to insert a new section 7E, which I have entitled for present purposes,

7E – Justification consistent with religious beliefs and practices.

Such a section could cover:

1. *Non-secular institutions and religious ceremony*

This section could provide that a person does not discriminate against another person by conduct within the meaning of the Act when acting on behalf of a religious institution in relation to those matters most intimately connected with the religion; the training of people for ministry of any kind within a religion and the selection of who may participate, and how, in religious observance or practice. It could also permit a religious institution to refuse to make available its places of worship (churches, mosques, temples, synagogues, etc.) as provided for in the section but would not otherwise prevent the operation of discrimination law. The use of facilities that are not places of worship, observance or devotion are treated differently.

The section would exclude the operation of section 18 of the Act (insofar as it would operate in relation to religious institutions) which deals with bodies empowered to confer, renew, extend, revoke or withdraw an authorization or qualification that facilitates the carrying on of a profession or engaging in an occupation.

It would operate in lieu of the existing section 37(1), which could be repealed.

2. *Educational institutions*

This section could apply to educational institutions which are also religious institutions. Similarly, it could provide that a person does not discriminate against another person by conduct within the meaning of the Act when acting on behalf of an educational institution in relation to the admission (or non-admission) of a student to an educational institution if:

- the conduct is consistent with religious beliefs and practices of the institution;
- the conduct has the effect of preferring (or refusing to admit) a student on the grounds that the student (or his or her parents) are adherents of the religious beliefs and practices of the institution, and where necessary, the student is recognised by the institution as having the relevant religious status; or conducts themselves in accordance with the religious beliefs and practices or religious purposes of the institution; and

- the institution has a publicly available written policy, to which it adheres, that sets out its position in relation to its religious beliefs and practices or religious purposes in the context of the environment of the educational institution.

Such a section would respond to (and largely adopt) Recommendation 7 of the *Religious Freedom Review*. Its intended effect would be that no student could be discriminated against at the time of admission to an institution on the basis of any protected attribute alone. Rather, the onus would be on the institution to establish that any decision to prefer or refuse a student is consistent with its religious beliefs and practices or its religious purpose as set out in a policy to which the institution adheres (it cannot selectively enforce the policy). It would also be consistent with the principle of integrity and transparency to protect the inherent dignity of those who might otherwise be surprised or confronted by a religious institution's adherence to particular religious beliefs and practices.

Such a section would have the effect that the existing provisions of the Act (s 21) would continue to operate so as to make it unlawful for a person to discriminate in relation to a student on any ground during the student's term of enrolment or in relation to exclusion or expulsion from the institution. This is consistent with the findings of the *Religious Freedom Review.*[20]

3. Other religious institutions

This section could provide, similarly, that a person does not discriminate against another person by conduct within the meaning of the Act when acting on behalf of a religious institution in relation to the employment (or refusal to employ) a person, including conduct relating to the allocation of particular duties or responsibilities. Religious institutions would have the freedom to prefer to hire (or not) if:

- the conduct is consistent (or not) with the religious beliefs and practices of the institution;
- the conduct has the effect of preferring (or refusing to employ) a candidate for employment on the grounds that the candidate adheres (or does not) to the religious beliefs and practices of the institution, or conducts himself or herself in accordance with the religious beliefs and practices or religious purposes of the institution; and
- the institution has a publicly available written policy, to which it adheres, that sets out its position in relation to the manner in which persons employed or engaged by the institution are expected to conduct themselves consistently with the religious beliefs and practices or religious purposes in the context of the course of their employment.

Such a section would respond to (and adopt) Recommendations 5 of the *Religious Freedom Review*. Its intent would be to have the effect that no person can be discriminated against in relation to their employment on the basis of any protected attribute alone. Rather, the onus would be on the institution to establish that any decision to prefer a candidate for employment,

[20] Ibid [4.121].

or to refuse employment, is consistent its religious beliefs and practices or its religious purpose as set out in a policy to which the institution adheres (it cannot selectively enforce the policy).

Such a section would have the effect that the existing provisions of the Act (Part II, Div 1) would continue to operate so as to make it unlawful for a person to discriminate in relation to a person's employment during the period of the person's employment (s 14(2)). There would be no ability to terminate a contract of employment purely on the basis that an employee subsequently exhibits an attribute that is said not to accord with the religious beliefs or practices of the institution. Rather, there would be an ability to terminate a person's employment only where the employee has breached a written agreement to conduct him or herself in accordance with the particular ethos of the institution.

Such a section would be intended to replace section 38, which could be repealed. Appropriate drafting should also then enable the religious exemptions within the *Fair Work Act 2009*[21] to be repealed.

4. Facilities, goods and services

The section could also deal with the issue of discrimination in relation to the provision of facilities, goods and services by religious institutions within a similar framework. It could have the effect that it will not be discriminatory for a religious institution to refuse to provide its facilities, goods and services <u>if</u> that institution has a public policy describing the circumstances in which it will offer its facilities or goods and services <u>only</u> consistently with its religious beliefs and practices or its religious purpose.

In the absence of such a policy, it would remain unlawful to discriminate in relation to the provision of goods, services and facilities (s 22)).

These preliminary thoughts on amendments to the *Sex Discrimination Act* must now await the consultation process for the Religious Discrimination Bill and any amendments to that Bill. The ALRC will not resume work on its Inquiry until then. In the meantime, it is perhaps worth reflecting on some observations made by Justice McHugh two decades ago in *Malika Holdings v Stretton.*[22]

> But times change. What is fundamental in one age or place may not be regarded as fundamental in another age or place. When community values are undergoing radical change and few principles or rights are immune from legislative amendment or abolition, as is the case in Australia today, few principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them.

So perhaps it is time to consider a different way of protecting those principles or rights that Australians do consider fundamental — but that is not the task that falls to the ALRC in this

[21] Ss 351(2)(c), 772(2)(b).
[22] (2001) 204 CLR 290 [29].

Inquiry. Whether one considers that the existing legislation (and the proposed new legislation) equips religious institutions on the one hand, and those who would see religious protections greatly reduced on the other, with a shield or a sword – the jousting has begun.

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