

Committee Secretary
Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill
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To the Committee Secretary

Response to questions taken on notice

The Human Rights Law Centre appeared before the Select Committee on Wednesday 25 January and provides the additional information below in response to the questions raised during our appearance.

How would you see the interplay with state laws so that we get that positive protection for some of the cases that have been mentioned of people being dismissed or hauled before equal opportunity tribunals?

Time has not permitted us to adequately consider whether the case of *Qantas Airways Limited v Lustig* [2015] FCA 253 provides authority for the proposition that a discrimination claim relating to an area regulated by Commonwealth law (e.g. marriage) could not be commenced under a state or territory anti-discrimination regime. We recommend that legal advice be sought on this question.

However, importantly, the examples of potential adverse action raised in evidence before the Select Committee fail to consider the protections available under existing law.

Unfair dismissal or adverse action on the basis of religious belief in the workplace

Evidence provided to the Select Committee raised a small number of anecdotal examples where an employee has been subject to adverse action or unfair dismissal because they expressed a traditional view of marriage as being between a man and a woman, based on a religious belief. The information provided is limited and it appears that these anecdotal examples have not been determined by a court.

The example of Lee Jones was raised in evidence before the Select Committee. Lee Jones is allegedly a managing director of a digital services agency who was dismissed because he either expressed an opinion against the LGBTI anti-bullying program he was hired by or because of his religious beliefs about homosexuality.¹

The *Fair Work Act 2009* (Cth) (**FWA**) already provides protections against discrimination on the basis of religion and political opinion. For example, the FWA provides that a modern award or enterprise agreement must not include terms that discriminate against an employee because of their religion or political opinion.² Similarly, s 351 of the FWA provides that an employer must not take adverse action against a person because of their religion or political opinion.

¹ We note that there are different versions of what occurred, which makes it difficult to ascertain the relevant facts at play.

² *Fair Work Act 2009* (Cth) ss 153, 195.

As with any other protected attribute, this protection does not apply to action that is taken because of the inherent requirements of the particular position concerned.³ There are broader exemptions made for conduct in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.⁴

If an employee is dismissed on the basis of their political opinion or religion – as has been suggested in the above examples – they are entitled to make a complaint.

Other anecdotal examples cited in evidence related to a school teacher in a government school who was allegedly notified by the Department of Education that he was under investigation for suspected breaches of discipline and a Commonwealth public servant who expressed opposition to participating in a Pride March and was allegedly told he was under investigation for breaches of discipline.

It is important to remember that workplaces are entitled to conduct investigations into whether an employee has behaved in accordance with relevant workplace policies and procedures to ascertain whether there has been a breach of these policies and/or conditions of employment. Investigating a complaint is the appropriate and necessary approach for a workplace to establish whether a complaint has merit or not. It is unclear whether either of the investigations referred to above resulted in termination or demotion by the employer. Importantly, these cases have obviously occurred regardless of whether the Marriage Act 1961 (Cth) allows marriage between same-sex couples.

Protection of free speech

Individuals can freely express their views in relation to marriage in Australia and changing the law to allow same-sex couples to marry will not impact on this freedom. The vast majority of Australians support marriage equality and obviously are currently free to express this view, despite the inconsistency with the *Marriage Act 1961* (Cth).

In terms of legal protection, freedom of speech is protected to a degree under the implied freedom of political communication in the Australian Constitution. Individuals are also protected from discrimination on the basis of political belief and religious belief in a number of state anti-discrimination laws.

In a free society, those with opposing views should be free to express their opinions and should be able to purchase consumer products from companies that espouse positions and values that align with their personal values. Criminal laws protect individuals from threats and violence that may result from the expression of a political opinion or associating with a particular religious or political organisation.

Complaints under anti-discrimination law

People who feel that they have been discriminated against have the right to make a complaint to state and territory equal opportunity tribunals or the AHRC.

Only a small number of people take complaints to state and territory based equal opportunity commissions or to the Australian Human Rights Commission (**AHRC**) given the emotional and financial resources and time commitment involved. The AHRC's 2015-2016 Annual Report confirms that 2,013 complaints about discrimination and breaches of human rights were received. The AHRC has the power to 'terminate complaints that are trivial, vexatious, misconceived or lacking in

³ *Fair Work Act 2009* (Cth) ss 153, 195, 351.

⁴ *Ibid.*

substance' in appropriate cases.⁵ Of the 1,308 conciliation processes conducted, 76% of these complaints were successfully resolved.⁶ The AHRC provides a low cost, informal dispute resolution mechanism to avoid the significant cost and delays of court action.

Strengthening legal protections for people of faith

A comprehensive review of anti-discrimination laws and extensive community feedback was provided in the Commonwealth Government's proposed *Human Rights and Anti-Discrimination Bill 2013* (Cth). The HRAD Bill would have consolidated and modernised the five separate Commonwealth anti-discrimination laws to ensure justice is not denied because of the complex technicalities of our current laws which represent a significant barrier for both victims of discrimination and innocent parties who are subject to a discrimination complaint.

Our position is that a Human Rights Act incorporating positive protections for all human rights under international human rights instruments should be introduced to ensure the human rights of all Australians are equally protected and balanced. However, we note that introducing a human rights act or consolidating federal -discrimination laws is outside the scope of the current inquiry.

As stated in evidence before the hearing, an appropriate pathway to protect against discrimination on the basis of religious belief would be to include religious belief (including not holding a religious belief) as a protected attribute in federal discrimination law, whether a stand-alone statute or addition to the *Racial Discrimination Act 1975* (Cth). Such legal protection would apply in various settings including education, goods and services, employment and clubs. The development of any such legislation would have to carefully consider any exemptions or exceptions that would be appropriate.

Using the Asher Bakery example, when discrimination on the basis of a protected attribute (e.g. sexual orientation) is in combination with another reason (e.g. the interpretation or understanding of an institution such as marriage being between a man and a woman), are there grounds to get the balance of harms right?

The Select Committee has asked us to consider whether discrimination which is not solely on the basis of a protected attribute should constitute unlawful discrimination in the delivery of marriage-related goods and services. All Commonwealth discrimination legislation contain provisions that make it clear that the prohibited ground (e.g. sexual orientation) need not be the sole reason for the unlawful conduct. Indeed, the prohibited ground need simply be a *reason* for the conduct.⁷

In principle, why should a minister of religion have an exemption from solemnising marriages but a civil celebrant who is religious should not?

Ministers of religion⁸ should not be compelled to solemnise marriages that do not accord with their religion's beliefs because there is generally a close and direct nexus between their religion and the religious ceremony they perform. A minister of religion performs a religious marriage ceremony which

⁵ Australian Human Rights Commission, *Inquiry into freedom of speech* (2016) http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/Freedoms_peechAustralia/Submissions 41.

⁶ Australian Human Rights Commission, *Annual Report 2015-2016* (2016) <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC%20Annual%20Report%202015-2016.pdf> 15.

⁷ RDA (Cth) s 18, ADA (Cth) s 16, SDA (Cth) s 8, DDA (Cth) s 10.

⁸ A 'minister of religion' includes a minister of religion under Part IV, Division 1, Subdivision A of the Marriage Act and a marriage celebrant from a non-recognised denomination who performs religious marriage ceremonies.

is legally recognised by the state, but the form of that ceremony is dictated by their particular religious denomination. They may be required to perform certain rituals and recite religious passages which are central to the denomination's beliefs. This authority to solemnise marriages derives from their denomination's doctrines, tenets and beliefs.

In contrast, civil celebrants perform a secular function on behalf of the state in solemnising civil marriages. Civil celebrants provide an important secular alternative to solemnisation by a minister of religion and perform approximately 75% of marriages in Australia. As civil celebrants are authorised to provide an important function on behalf of the state, they have a duty to uphold the law and perform civil marriages according to the civil law of Australia. This includes a duty not to engage in unlawful discrimination, whether in keeping with their private religious beliefs or not. The form of the ceremony they perform is prescribed by law and neither their authority to solemnise marriages nor the function they serve is drawn from religious belief. They are required to perform their duties in accordance with the law as are any other people performing a state function, regardless of their personal beliefs.

The Marriage Act recognises that religious bodies and organisations should be free to determine which suitably qualified and respected ministers of religion can perform these important religious functions and ceremonies related to marriage and free to determine the nature and form of religious marriage ceremonies.

Is religious freedom a collective right or is it an individual right?

Freedom of thought, conscience and religion is both an individual right and a collective right. Article 18(1) of the International Covenant on Civil and Political Rights (**ICCPR**) protects freedom to manifest a religion or belief 'either individually or in community with others'.⁹

Nowak explains that:

Because fundamental rights of communication protect not merely the individual's spiritual existence but moreover communication of spiritual subject matter to the world at large and defence of a conviction in public, they are also termed "community rights". This means that in order to exercise these rights effectively ... the individual requires a like-minded community. This collective character is particularly stressed in Art. 18(1) with the words "individually or in community with others". This means that religious societies as juridical persons are also entitled to a human right to the exercise of their belief, enabling them to submit an individual communication in the event this is violated.¹⁰

However, the freedom to manifest a religion or belief in public or private relates to an individual's 'worship, observance, practice and teaching'. Worship relates to freedom of ritual, such as a religious prayer or preaching. Observance includes processions, wearing of religious clothing, beards, circumcision, prayer and all other religious customs and rites. Teaching relates to imparting the substance of a religion or belief in schools, non-formal education and missionary work in conformity with the parental right in Art. 18(4).

Religious 'practice' is more difficult to define, as an overly broad interpretation of religious practice would 'most certainly open the floodgates to abuse of this right'.¹¹ For this reason, religious practice

⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171, art 18(1).

¹⁰ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel Press: 2nd revised edition) (2005) 411.

¹¹ *Ibid.*

only relates to conduct 'obviously related to a religious conviction'. This would include, for example, freedom to assemble in connection with a religion, training of religious leaders, celebrating religious holidays, making and using religious articles for important rites or customs and disseminating relevant publications with religious views.¹² However, a refusal to fulfil legal duties (such as payment of tax) under civil law is not a manifestation of a religious practice or belief.

As discussed in our submission, a religious body is justified in refusing to allow a couple who have been previously divorced to marry inside a place of worship – as freedom to manifest a religious belief would be affected if a church could be compelled to allow any couple to conduct a ceremony in their place of worship not in accordance with their religious doctrine. Similarly, a person would not be successful in a discrimination complaint if a religious body refused to provide a religious article for a marriage ceremony which is not in keeping with their religion (e.g. a refusal to provide a Buddhist couple with Catholic holy water). However, baking a cake (as in the *Ashers Bakery* case), allowing rental of a hall that is not used for religious gatherings, taking photographs or playing a musical instrument are commercial activities that are not connected to religious worship, practice observance or teaching and should not be improperly characterised as a manifestation of religious belief.

Please feel free to contact us if you have any queries or require further additional information.

Yours sincerely

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¹² Ibid.