Senate Legal and Constitutional Affairs Legislation Committee

Religious Discrimination Bill 2021 [Provisions]

Attorney-General's Department

Hearing date: 21 January 2022

Question date: 25 January 2022

Deborah O'Neill asked the following question:

Noting that the two exposure drafts of the Religious Discrimination Bill contained no equivalent to clause 11:

1. Who did the Attorney-General and the Attorney-General's Department consult on the drafting of that clause? Please provide names and dates of relevant consultations.
2. On what date were drafting instructions in relation to clause 11 first provided to the Attorney-General's Department?
3. On what date was the first draft of clause 11 completed?
4. If a state parliament enacted a standalone law that prevented religious schools from giving preference to persons who hold or engage in a particular religious belief or activity in an employment context but which did not prohibit discrimination on the ground of religious belief or activity, could the Attorney-General prescribe that standalone law under clause 11? If so, explain why, including how the Attorney-General could be satisfied of the matters in clause 11(3) in those circumstances. If not, what is to prevent a state parliament in effect circumventing the potential operation of clause 12 in this way?

The response to the question is as follows:

1. The Attorney-General conducted targeted consultation with key stakeholders before introduction of the Bills. These consultations were undertaken by the Attorney-General on a confidential basis.

2. The development of the Bill is a matter for Cabinet. The disclosure of such information would encroach upon the principle of Cabinet confidentiality and involve the disclosure of options, conversations, and other materials expressed or undertaken in the expectation of their continuing confidentiality.

3. As above, the development of the Bill is a matter for Cabinet. The disclosure of such information would encroach upon the principle of Cabinet confidentiality and involve the disclosure of options, conversations, and other materials expressed or undertaken in the expectation of their continuing confidentiality.

4. In the time available, the Attorney-General's Department is unable to provide technical legal advice on hypothetical examples.

Senate Legal and Constitutional Affairs Legislation Committee

Religious Discrimination Bill 2021 [Provisions]

Attorney-General's Department

Hearing date: 21 January 2022

Question date: 25 January 2022

Deborah O'Neill asked the following question:

In its formal response to the Religious Freedom Review, the Morrison Government promised that "the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to consider recommendations 1 and 5 to 8 of the Review with a view to settling upon a legislative mechanism that would, on a nationally consistent basis, achieve the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to prohibitions on discrimination based on a person's identity, while also protecting the right of religious institutions to reasonably conduct themselves in a way consistent with their religious ethos.". Did this ever happen? If so, provide details of all relevant consultations (including dates) and evidence that those consultations took place. If no such consultations have occurred, why not?

The response to the question is as follows:

On 22 February 2019, the former Attorney-General, the Hon Christian Porter MP, wrote to the Attorneys-General and Justice Ministers of each state and territory seeking their agreement to the draft terms of reference for an Australian Law Reform Commission inquiry into religious exemptions in anti-discrimination law. A sample of these letters is included at **Attachment A**. Further, on 12 March 2019, the former Attorney-General wrote to the President of the ALRC, the Hon Justice Sarah Derrington, seeking views on the inquiry's terms of reference. This letter is included at **Attachment B**.

In both of these letters, the former Attorney-General specifically asked for views on the consideration of reforms in order to:

- limit or remove religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and

- remove legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2019* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

The Government considered all responses received.

On 9 April 2019, the former Attorney-General wrote to his state and territory counterparts enclosing the final terms of reference. A sample of this letter is included at **Attachment C**.

ATTACHMENT A

The Hon Christian Porter MP
Attorney-General

The Hon Mark Speakman SC MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

22 FEB 2019

Dear Attorney General

I am writing to seek your agreement to the draft terms of reference for an Australian Law Reform Commission (ALRC) inquiry into religious exemptions in anti-discrimination law.

On 11 December 2018, I wrote to you advising of the Australian Government's response to the Report of the Expert Panel into Religious Freedom (Religious Freedom Review). In that response, the Australian Government committed to consult with states and territories on the terms and parameters of a potential reference to the ALRC on the framework of religious exemptions in anti-discrimination law.

As noted in the Religious Freedom Review, religious exemptions from discrimination laws vary widely between jurisdictions. The Government agrees with the Panel's assessment that reforms in this area should be undertaken with a view to greater harmonisation. The ALRC inquiry will consider potential reforms to limit or remove altogether (if practicable) religious exemptions to discrimination, while also protecting the ability of religious institutions to reasonably conduct their affairs in a way that is consistent with their religious ethos.

It will also consider reforms to remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

I have enclosed draft terms of reference for the proposed ALRC referral for your consideration.

The terms of reference require that, in undertaking this reference, the ALRC should have regard to the interaction between Commonwealth, state and territory anti-discrimination laws, and the desirability of national consistency in religious exemptions in those laws, and should consult widely, including with state and territory governments.

Since the reference will consider the anti-discrimination framework of New South Wales, I am seeking your agreement to the draft terms of reference. In order to issue the referral to the ALRC in a timely manner for inquiry and report by December 2019, I would be grateful for your response by 28 February 2019.

I look forward to continuing to work with you on this important reference.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Draft Terms of Reference – Australian Law Reform Commission Review of religious exemptions in anti-discrimination law

Terms of Reference

Review of religious exemptions in anti-discrimination law

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the rights and freedoms recognised in the international agreements to which Australia is a party, in particular:
  - the right to freedom of thought, conscience and religion, including the right to manifest one's religion or belief in worship, observance, practice and teaching and the liberty of parents and guardians (where applicable) to ensure the religious and moral education of their children in conformity with their own convictions; and
  - the rights of equality and non-discrimination
- the importance of protecting the rights of children to be free from discrimination in education
- the importance of allowing religious institutions to conduct themselves in a manner consistent with their religious ethos
- the interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth, State and Territory anti-discrimination laws and the Fair Work Act. To avoid doubt, religious institutions for the purposes of this reference includes bodies established for religious purposes as well as educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

The ALRC should identify and have regard to existing reports and inquiries including:

- the Report of the Expert Panel on Religious Freedom (Religious Freedom Review), particularly recommendations 1, 5, 6, 7 and 8;
- Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129); and
- any other inquiries or reviews, including state and territory inquiries or reviews, that it considers relevant.

Consultation

The ALRC should consult widely with State and Territory governments, religious institutions, the education sector, and other civil society representatives.

The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 20 December 2019.

ATTACHMENT B

The Hon Christian Porter MP
Attorney-General

The Hon Justice Sarah Derrington
President
Australian Law Reform Commission
PO Box 12953
BRISBANE QLD 4003

12 MAR 2019

Dear ~~Justice Derrington~~ Sarah

I am writing to seek your views on the draft terms of reference for an Australian Law Reform Commission (ALRC) inquiry into religious exemptions in anti-discrimination law.

On 13 December 2018, the Prime Minister, the Hon Scott Morrison MP, and I released the Expert Panel's Report into the Religious Freedom Review and the Government's comprehensive response to the Report. In that response, the Australian Government committed to consulting with the states and territories on the terms and parameters of a potential reference to the ALRC on the framework of religious exemptions in anti-discrimination law and the *Fair Work Act 2009* (Cth).

As noted in the Religious Freedom Review, religious exemptions from discrimination laws vary widely between jurisdictions. The Government agrees with the Panel's assessment that reforms in this area should be undertaken with a view to greater harmonisation. The ALRC inquiry will consider potential reforms to limit or remove altogether (if practicable) religious exemptions to discrimination, while also protecting the ability of religious institutions to reasonably conduct their affairs in a way that is consistent with their religious ethos.

It will also consider reforms to remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

The terms of reference require that, in undertaking this reference, the ALRC should have regard to the interaction between Commonwealth, state and territory anti-discrimination laws, and the desirability of national consistency in religious exemptions in those laws, and should consult widely, including with state and territory governments.

I have enclosed draft terms of reference for the proposed ALRC referral for your consideration. In order to issue the referral to the ALRC in a timely manner for inquiry and report by December 2019, I would be grateful for your response by 13 March 2019.

I have written to my counterparts in the states and territories separately, attaching the draft terms of reference for their consideration.

I look forward to continuing to work with you on this important reference.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Draft Terms of Reference – Australian Law Reform Commission Review of religious exemptions in anti-discrimination law

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Terms of Reference

Review of religious exemptions in anti-discrimination law

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the rights and freedoms recognised in the international agreements to which Australia is a party, in particular:
    - the right to freedom of thought, conscience and religion, including the right to manifest one's religion or belief in worship, observance, practice and teaching and the liberty of parents and guardians (where applicable) to ensure the religious and moral education of their children in conformity with their own convictions; and
    - the rights of equality and non-discrimination
- the importance of protecting the rights of children to be free from discrimination in education
- the importance of allowing religious institutions to conduct themselves in a manner consistent with their religious ethos
- the interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth, State and Territory anti-discrimination laws and the Fair Work Act. To avoid doubt, religious institutions for the purposes of this reference includes bodies established for religious purposes as well as educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

The ALRC should identify and have regard to existing reports and inquiries including:

- the Report of the Expert Panel on Religious Freedom (Religious Freedom Review), particularly recommendations 1, 5, 6, 7 and 8;
- Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129); and
- any other inquiries or reviews, including state and territory inquiries or reviews, that it considers relevant.

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Consultation

The ALRC should consult widely with State and Territory governments, religious institutions, the education sector, and other civil society representatives.

The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 20 December 2019.

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ATTACHMENT C

The Hon Christian Porter MP
Attorney-General

MS19-000388

Mr Gordon Ramsay MLA
Attorney-General
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

09 APR 2019

Dear Attorney-General

Following my correspondence of 22 February 2019, I am pleased to advise you that on 8 April 2019, I referred to the Australian Law Reform Commission (ALRC) an inquiry into the framework of religious exemptions in anti-discrimination law.

The final terms of reference for this inquiry are attached. The terms of reference require the ALRC to consider what reforms to Commonwealth, state and territory anti-discrimination laws, the *Fair Work Act 2009* and any other Australian laws should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

The terms of reference require the ALRC to consult widely, including with State and Territory Governments, and ask the ALRC to provide its final report by 10 April 2020.

Thank you for your engagement so far on this important reference, and I look forward to working with you in considering the recommendations of this inquiry.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Final terms of reference

Parliament House, Canberra ACT 2600 • Telephone (02) 6277 7300 Fax (02) 6273 4102

Terms of Reference

Review of religious exemptions in anti-discrimination law

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the rights and freedoms recognised in the international agreements to which Australia is a party, in particular:
  - the rights to freedom of speech, association and thought, conscience and religion, including the right to manifest one's religion or belief in worship, observance, practice and teaching (including in community with others) and the liberty of parents and guardians (where applicable) to ensure the religious and moral education of their children in conformity with their own convictions; and
  - the rights of equality and non-discrimination
- the importance of protecting the rights of all people, and children in particular, to be free from discrimination in education
- the importance of allowing religious institutions both to teach and otherwise conduct themselves in a manner consistent with their religious ethos
- the interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth, State and Territory anti-discrimination and vilification laws and the *Fair Work Act*.

To avoid doubt, religious institutions for the purposes of this reference includes bodies established for religious purposes (including faith-based institutions) and educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

The ALRC should identify and have regard to existing reports and inquiries including:

- the Report of the Expert Panel on Religious Freedom (Religious Freedom Review), particularly recommendations 1, 5, 6, 7 and 8;
- Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129); and
- any other inquiries or reviews, including state and territory inquiries or reviews, that it considers relevant.

The ALRC should also have regard to religious exemptions in anti-discrimination laws and their interaction with 'religious belief or activity', including the expression of religious and moral views, insofar as they are a ground of discrimination (as proposed by the Religious Freedom Review, particularly in recommendations 15 and 16, and in accordance with Recommendation 2).

Consultation

The ALRC should consult widely with State and Territory governments, religious institutions, the education sector, and other civil society representatives.

The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 10 April 2020.