

The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600
religiousfreedom@pmc.gov.au

This submission is presented on behalf of the AIDS Action Council of the ACT and A Gender Agenda Incorporated. We consent to this submission being published.

To the Expert Panel on Religious Freedom

The AIDS Action Council of the ACT (the Council) has a long history of advocating for, and protecting the rights of, people who have been stigmatised and discriminated against because of their actual or perceived HIV status or sexual orientation or gender identity.

A Gender Agenda is a unique Canberra-based community organisation actively engaged in promoting the health and well-being of the intersex, transgender and gender-diverse community. In addition to training and education, AGA provide advocacy and support services, information and resources and are actively engaged in human rights and law reform. AGA is a vibrant community of sex and gender diverse individuals, their families, friends and allies.

The AIDS Action Council and A Gender Agenda welcome the opportunity to make this submission to the Expert Panel on Religious Freedoms.

It is the position of the AIDS Action Council and A Gender Agenda that current anti-discrimination legislation, Commonwealth and State, aims to balance the intersections of the enjoyment of the freedom of religion and other human rights well. Existing laws recognise that freedom of religion is suitably constrained to ensure that an individual's right to housing, the provision of goods and services, healthcare, education and individual expression is not curtailed by the religious beliefs of others. Similarly, the existing legislative environment ensures an individual's right to freedom of belief, worship, religious practice and teaching and the rights of religious bodies to select and train clergy, and to carry out the tenets and practices of the religion are not curtailed by the beliefs of others. It is open, under the current law, for Christians to teach that Jesus is the only means of salvation while other religions teach that he is not, and for still others to hold that there is no god. What the current law does not permit is for a person with a religious belief to treat another less fairly or extend lesser rights to someone because their life or practice does not accord with the substance or practice of an individual's religious belief.

The current legal framework has been tested and refined over time and has demonstrated an ability to encompass new understandings of appropriate checks and balances in the expression of human rights in an Australian context.

Within the LGBTI community are people of all faiths and none, and within all faith communities are people who identify, even if not openly, as LGBTI. Our community has many decades of experience in balancing the enjoyment of freedom of religion with other human rights. The LGBTI community also has experience of times when those rights have been out of balance, and impinged on the rights of individuals to privacy, to housing, to security and to safety.

Freedom of religion is, in our view, the right to believe and practice matters of faith in accordance with the tenets of that faith; to worship and observe faith freely; to teach the tenets and practices of that faith to those who wish to learn them and to minor children of believers; and to engage in the democratic processes from a perspective of faith. In this regard all religious beliefs should be treated equally and no one religious perspective should be preferred in law over another. This right includes the right for those of a particular religion to change religions or abandon religion all together.

Freedom of religion is, however, appropriately constrained where the religious body (church, mosque etc.) engages in the provision of goods and services for those outside the faith, for profit or fundraising, accepts government funding (for example for the provision of aged care, emergency relief provision or family relationship services) and in advocacy for a particular faith to be preferred over another.

The most pertinent articles of the UN Declaration of Human Rights¹ in our view are:

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

¹ United Nations Declaration of Human Rights 1948 <http://www.un.org/en/universal-declaration-human-rights/index.html> extracted 9 February 2018.

Article 29.

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

We note the right to freedom of religion is not unfettered; it is not a public right able to be exercised without consideration of other rights. The right to freedom of religion is constrained by the right of others to freedom from arbitrary interference with privacy, free access to public services, and access to the provision of the necessities of life and freedom of thought and conscience.

Which rights are sought by those arguing for a different balance between freedom of religion and other human rights?

The public discourse, particularly during the period of the Marriage Survey has focussed on four areas:

- The right of religious bodies to refuse to conduct marriages of couples whose life or belief is inconsistent with their religious tenets.
- The right of people of faith to refuse to provide goods and services to those whose life or belief are inconsistent with their religious beliefs
- The right of religious bodies to not provide services funded by government to people whose life or belief are inconsistent with the tenets of that faith.
- The right of religious bodies and their followers to teach the tenets of their faith freely without restriction.

The right to refuse to conduct a marriage

Under the law prior to the recent amendment there was recognition that religious marriage celebrants were free to refuse to marry any couple. A reason was not required and conditions could be imposed on the couple which, if not complied with, would result in refusal of marriage solemnisation by the Minister of Religion.² This “right to refuse to solemnise” was extended to Religious Marriage celebrants under s47A of the amended Act.³ We see then, that provision exists under existing law for people of faith to register to solemnise marriages in a manner consistent with their beliefs.

² *Marriage Act 1961* s 47

³ *Marriage Act 1961* s 47A

The right to refuse goods and services

As a society we recognise that access to goods and services, including healthcare, disability support and education is vital to a productive and healthy life. An individual should be able to confidently approach a business, charity or other organisation providing goods and services knowing that they will be treated on an equal basis to all others seeking goods or services. This has been recognised by the Parliament as recently as 2013 when the *Sex Discrimination Act 1984* was amended to include sexual orientation, gender identity and inter-sex status as prohibited grounds for discrimination.⁴

Members of the LGBTI community have experienced hurt, embarrassment, shame and real harm from being refused goods and services on the basis of other's beliefs. Early in the history of the AIDS crisis, members of the LGBTI community were refused accommodation on the basis of their actual or perceived sexual orientation and/or AIDS status. Some lost employment. However, such attitudes are not confined to history.

Around 34% of LGBTI people report hiding their sexual orientation or gender identity when accessing goods or services.⁵ There have been recent examples of discrimination and threatened discrimination against members of the LGBTI community in Australia and overseas as follows:

- Threats to teachers in same-sex relationships who teach in religious schools of dismissal if they marry⁶
- Refusal of accommodation because of status as an LGBTI person⁷
- Lack of access to appropriate healthcare, including referral to "gay conversion" therapists⁸
- Lack of recognition of relationships, or stigmatisation of those relationships in institutional settings such as hospitals or aged care services^{9,10}
- Lack of access to holiday accommodation¹¹

⁴ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*

⁵ Australian Human Rights Commission (AHRC) 2015. Resilient individuals: sexual orientation, gender identity & intersex rights 2015. Sydney: AHRC.

⁶ <http://www.smh.com.au/federal-politics/political-news/married-sunday-fired-monday-churches-threaten-to-dismiss-staff-who-wed-samesex-partners-20170817-gxy4ds.html>

⁷ <http://www.starobserver.com.au/news/national-news/victoria-news/trans-people-denied-rentals-homelessness-crisis/163529>

⁸ <http://www.news.com.au/lifestyle/real-life/true-stories/survivors-tell-their-horror-stories-of-exgay-therapy-treatments-in-australia/news-story/443cd4ff7fd72cd58705ae34d8327d61>

⁹ <http://journalofdementiacare.com/we-are-still-gay-the-needs-of-lgbt-australians-with-dementia/>

¹⁰ <https://www.theguardian.com/australia-news/2016/jun/22/aged-care-surveillance-means-no-privacy-for-couples-to-enjoy-sex-study>

¹¹ <https://www.mirror.co.uk/news/uk-news/anti-gay-hotel-owners-refuse-host-5239495>

The actions that religious groups have asked to be protected- such as the ability to refuse the provision of goods or services in relation to a wedding of same-sex people, or the ability to refuse service to a transgender person have not been permitted under the law since 2013^{12 13}. Prior to the amendment of the Sex Discrimination Act in 2013 LGBTI people had no effective recourse when refused employment, the provision of goods and services, or accommodation on the basis of their gender identity or sexual orientation. It is our contention that this should not be reversed, but that instead there should be greater enforcement of the existing law.

The current legislative environment protects the right to freedom of religious belief and practice: the current act excludes the ordination and appointment of clergy, the training and education of clergy and the selection of persons for employment or carrying out of any activity in connection with religion. The exception to this is in the provision of Commonwealth funded aged care, where the Parliament has rightly seen the need for residents in an aged care setting where care is funded wholly or in part by taxpayers to be free from a religious test in determining admission or residential security.¹⁴ Similar exemptions exist for voluntary bodies.¹⁵

It is open to people of religious conviction who object on religious grounds to say, same-sex weddings, to decline to supply goods and/or services for any civil wedding and be within the existing law. What they cannot, and should not, be allowed to do is to exclude a particular class of persons (same- sex couples) while providing services to others.

The right to refuse services funded by government

The example of aged care has been mentioned above, and it is noted that religiously affiliated bodies are amongst the largest aged care providers in Australia. It is our contention that where services are funded in part or whole by government that carries an implicit acceptance of the policy parameters which government puts in place. For example, the trial of marriage counselling services extended to married and unmarried couples, same-sex and opposite sex couples. Family relationship services are equally available to heterosexual and non-heterosexual couples. Family support services should be provided regardless of the composition of the family. Health services should be provided regardless of whether an individual identifies as LGBTI or not. In addition, services funded by governments ought not to harm citizens, and for this reason harmful “gay conversion” therapies and the assumptions that LGBTI status is intrinsically is disordered which underlies this approach, ought not to be offered by funded organisations regardless of their religious tenets.¹⁶ Government funding is for the purpose of delivering the funded services, not for the purpose of proselytising service users to the provider’s world view.

¹² *Sex Discrimination Act 1984* ss 5, 5A, 5B, 5C

¹³ <https://www.business.gov.au/info/plan-and-start/start-your-business/what-is-customer-service/refusing-service>

¹⁴ *Sex Discrimination Act 1984* s 37

¹⁵ *Sex Discrimination Act 1984* s39

¹⁶ <https://www.psychotherapy.org.uk/wp-content/uploads/2017/10/UKCP-Memorandum-of-Understanding-on-Conversion-Therapy-in-the-UK.pdf>

The right of religious bodies and their followers to teach the tenets of their faith freely without restriction

As has been outlined above, the law currently protects the rights of religious bodies and their followers to teach their beliefs without restriction. However, that is not the same as being able to impose those beliefs on another. There is no suggestion that churches or other religious bodies are unable to put forward their views on, for example, the construct of a religious marriage. However, there are differences of opinion within religious traditions on how the tenets and scriptures of a faith should be interpreted. Similarly, there is a diversity of view on the nature of sexual orientation and gender identity. Our parliament has concluded that these views should be able to be held in tension and expressed while preserving the rights of LGBTI people to live lives free from discrimination, hatred and vilification.

Balancing human rights is not the same as enshrining privilege. It is understandable that the changing position of religious belief in Australia is of some concern to religious bodies. That concern however, should not lead to enhanced protections for some religious beliefs at the expense of the rights of others.



Philippa Moss
Executive Director



AIDS ACTION COUNCIL OF THE ACT
ABN 97 812 719 846
02 6257 2855
contact@aidsaction.org.au
Havelock House
85 Northbourne Avenue
(Gould Street entrance)
Turner ACT 2612
PO Box 5245 Braddon ACT 2612

aidsaction.org.au



Sel Cooper
Executive Director
A Gender Agenda



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