



14 February 2018

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

Dear Expert Panel,

The Victorian Gay & Lesbian Rights Lobby (**VGLRL**), the New South Wales Gay & Lesbian Rights Lobby (**NSWGLRL**) and the Australian GLBTIQ Multicultural Council (AGMC) provide the following submission in response to the Religious Freedom Review.

The VGLRL is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. The NSWGLRL is the peak organisation for lesbian and gay rights in New South Wales. We work constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our organisation's respective mission and vision. The AGMC aims to represent the interests of Australian GLBTIQ individual/groups from a multicultural background. It does this primarily by recognising the interests of GLBTIQ multicultural individuals/groups and raising their profile within the wider GLBTIQ and multicultural communities.

This submission focuses on issues raised in the terms of reference on the intersections between the enjoyment of the freedom of religion and other human rights, particularly how anti-discrimination exemptions in the *Fair Work Act*, *Sex Discrimination Act* and *Marriage Act* effect lesbian, gay, bisexual transgender and intersex (**LGBTI**) Australians. In addition, we have provided a provided some case studies compiled by the VGLRL on LGBTI people who have experienced discrimination to highlight the real impacts of religious exceptions, and a report compiled by the NSWGLRL on LGBTI people's experiences of discrimination.

This submission can be made public and we would be pleased to make ourselves available to you at any stage to discuss the matters therein. Such a discussion and dialogue is, in our view, critical.

We thank you and your team for taking the time to review this submission.

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Religious Freedom Review

1. Human rights and interests protected

Equality and freedom from discrimination

- 1.1 Both the *Sex Discrimination Act* and *Fair Work Act* prohibit discrimination based on sexual orientation, amongst other attributes.¹ Prohibition from discrimination based on one's sexual orientation is a human right protected under international law.² Furthermore, "equality before the law is a fundamental principle of human rights."³
- 1.2 The underlying interest underpinning the human rights to equality and freedom from discrimination is to protect people's personal dignity,⁴ sexual orientation – like other attributes – being an innate part of a person's identity.⁵

Freedom of religion

- 1.3 The right to freedom of religion is protected under international law and, to a limited extent, under of Constitution,⁶ but there is some doubt as to whether it is protected under common law.⁷
- 1.4 Like freedom from discrimination, freedom of religion is an important part of personal identity.⁸
- 1.5 Freedom of religion is accepted as embracing two distinct aspects:
 - freedom of thought, conscience and religion, which includes the freedom to choose a religion and adopt a belief; and
 - freedom to manifest religion or belief in practice.

¹ *Sex Discrimination Act 1984* ss 5-7A; *Fair Work Act 2009* s 351(1).

² *Toonen v Australia*, CCPR/C/50/D/488/1992, United Nations Human Rights Committee, 4 April 1994.

³ Australian Human Rights Commission, *Rights and Responsibilities*, Consultation Report (2014) 26.

⁴ *Lifestyle Communities (No 3) (Anti-discrimination)* [2009] VCAT 1869 [108] per Bell J: "That bedrock value is that everybody without exception has a unique human dignity which is their birthright."

⁵ *Cobaw Community Health Services v Christian Youth Camps* [2010] VCAT 1613 [193] per Hampel J: "Sexual orientation, like gender, race and ethnicity, are part of a person's being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who or what they are. That carries with it the enjoyment of the right to equal treatment, or freedom from discrimination, as people with a different sexual orientation, gender, race or ethnicity have."

⁶ Australian Human Rights Commission, *Rights and Responsibilities*, Consultation Report (2014) 22.

⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.1]-[4.19].

⁸ Mark Durie, 'Religious liberties under threat in Victoria' (2009) 4 *Life News*.

Limitations of freedom of religion

- 1.6 A distinction can be made between the freedom to choose and hold a religious belief (the internal private dimension), which is regarded as absolute and thus not capable of any limitation, and the freedom to manifest one's belief (the external public dimension), which may be legitimately subject to reasonable limitation.⁹
- 1.7 Limitation is permissible where the manifestation of belief has the capacity to impact upon the rights and freedoms of others,¹⁰ and the state has a role in resolving this conflict of rights. As such, both the *Sex Discrimination Act* and the *Fair Work Act* seek to give effect to the conflicting human rights, namely the right to equality and freedom from discrimination and the right to manifest religious beliefs. In our view, the religious exemptions contained in both Acts do not appropriately balance these conflict rights.

2. Legislative objects

- 2.1 The legislative object of the *Sex Discrimination Act* is “to eliminate, so far as is possible, discrimination against persons on the ground of... sexual orientation, gender identity, intersex status.”¹¹ Similarly, the legislative object of the *Fair Work Act* is “enabling fairness... at work and the prevention of discrimination by... protecting against unfair treatment and discrimination.”¹²
- 2.2 At the same time, both the *Sex Discrimination Act* and *Fair Work Act* provide specific exemptions to the general prohibition on discrimination ostensibly to accommodate the freedom of religion.¹³
- 2.3 The statutory formulation of the exemptions protecting religious freedom include:
- an exemption in connection with the ordination, appointment, training or education of members of a religious order;¹⁴
 - an exemption in connection with the selection or appointment of persons to perform functions or participate in religious observance or practice;¹⁵
 - for educational institutions established for religious purposes, an exemption in connection with employment of staff, appointment of contractors or provision of education where the action is taken “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion”;¹⁶

⁹ Australian Human Rights Commission, *Rights and Responsibilities*, Consultation Report (2014) 20.

¹⁰ Australian Human Rights Commission, *Rights and Responsibilities*, Consultation Report (2014) 20.

¹¹ *Sex Discrimination Act 1984* s 3(b).

¹² *Fair Work Act 2009* s 3(e).

¹³ *Sex Discrimination Act 1984* ss 37(1), 37(2)(b), 38; *Fair Work Act* s 351(2)(c).

¹⁴ *Sex Discrimination Act 1984* ss 37(1)(a), 37(1)(b).

¹⁵ *Sex Discrimination Act 1984* s 37(1)(c).

¹⁶ *Sex Discrimination Act 1984* s 38.

- for religious bodies, an exemption in regard to conduct that either “conforms to the doctrines, tenets or beliefs of that religion” or “is necessary to avoid injury to the religious susceptibilities of adherents of that religion”;¹⁷
- an exemption in regard to action that “is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion” where the action is “taken in good faith and to avoid injury to the religious susceptibilities of adherents of that religion”.¹⁸

2.4 On the basis of these exemptions:

- religious schools are permitted to discriminate against LGBT¹⁹ students, including not accepting expelling those students on the basis of their sexual orientation or gender identity;
- religious schools are permitted to discriminate against LGBT staff members by refusing to hire or terminating their employment, including in circumstances where sexual orientation and gender identity is completely irrelevant to the ability of that person to perform the duties of the role;
- religious health and community services are permitted to discriminate against LGBTI employees and potential employees as well as LGBTI individuals who seek to access the subject services; and
- religious aged care services are permitted to discriminate against LGBTI employees or potential employees.

3. Issues for consideration

Negative effects of religious exemptions on LGBTI people generally

3.1 Despite significant positive changes and shifts in societal attitudes over the past few decades, LGBTI people continue to experience disadvantage in the form of harassment and violence, as well as structural and institutional discrimination in areas such as employment, housing, education, access to human and social services; adoption and foster care services; placement and residential services for children in state care; services for vulnerable children turning 18 and leaving state care; disability services; aged care; and health services, including crisis prevention.²⁰ Laws that either actively discriminate against LGBTI people or fail to protect their basic human rights are one of the key mechanisms for enforcing this oppression.²¹ Further, religious exemptions within such laws are one specific element of these mechanisms. They are of particular concern for the psychological, emotional and physical wellbeing of LGBTI people.

¹⁷ *Sex Discrimination Act 1984* s 37(1)(d).

¹⁸ *Fair Work Act 2009* s 351(2)(c).

¹⁹ The exemptions in relation to educational institutions do not extend to people with an intersex variation.

²⁰ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 14; Lyn Irwin, ‘Homophobia and Heterosexism: Implications for Nursing and Nursing Practice’ (2007) 25(1) *Australian Journal of Advanced Nursing* 70, 71.

²¹ Gary Harper and Margaret Schneider, ‘Oppression and Discrimination among Lesbian, Gay, Bisexual, and Transgendered People and Communities: A Challenge for Community Psychology’ (2003) 31(3-4) *American Journal of Community Psychology* 243, 246.

- 3.2 It is evident from a vast number of studies that religious exemptions have a profound impact, including immediate and negative effects, on LGBTI people:
*Direct and unjustified discrimination has both a legal and social impact on LGBTI people. When law is used to sanction discrimination it legitimises institutional and interpersonal discrimination. State-sanctioned discrimination can facilitate an environment in which discrimination towards LGBTI people is normalised. This has adverse consequences for the health and wellbeing of LGBTI people. [In addition, state-] sanctioned discrimination can also confuse social norms.*²²
- 3.3 Such discrimination has significant human consequences, including both personal harm and societal cost: specifically lower enjoyment of health and wellbeing for LGBTI people (from acute pathologies such as clinical depression, self-harm and general anxiety disorder, to experiences of episodic low self-esteem and self-worth, and high rates of suicide), as well as significantly limiting an individual’s sense of security to publicly participate in activities such as employment and sports.²³
- 3.4 Further, the psychological and social impact of externalised homophobia, biphobia, transphobia and prejudice against intersex people through oppression, rejection, discrimination, harassment and violence on LGBTI youth and adults can (re)inforce internalised homophobia, biphobia, transphobia and prejudice against intersex people, keep people ‘in the closet’ and can influence how well individuals adjust to their LGBTI identity;²⁴ such impact can be grouped under the term “minority stress.” Indeed, the Australian Human Rights Commission has found that, as a result of such stress, LGBTI people also experience a higher prevalence of other risk factors associated with mental ill-health and suicidality than the rest of the population, such as more harmful and frequent levels of alcohol and other drug misuse; homelessness and poverty; disengagement from schooling; and chronic health conditions.²⁵

²² Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 14.

²³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 17-8; Brian Feinstein et al, ‘The relationship between experiences of discrimination and mental health among lesbians and gay men: An examination of internalized homonegativity and rejection sensitivity as potential mechanisms’ (2012) 80(5) *Journal of Consulting and Clinical Psychology* 917.

²⁴ Lorene Gottschalk, ‘Coping with stigma: Coming out and living as lesbians and gay men in regional and rural areas in the context of problems of rural confidentiality and social exclusion’ (2007) 12(2) *Rural Social Work and Community Practice* 31; Gary Harper and Margaret Schneider, ‘Oppression and Discrimination among Lesbian, Gay, Bisexual, and Transgendered People and Communities: A Challenge for Community Psychology’ (2003) 31(3-4) *American Journal of Community Psychology* 243.

²⁵ Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011) 5.

Negative effects of religious exemptions in educational institutions

- 3.5 Religious exemptions within the education system, in particular in the treatment of LGBTI students, have clear and far-reaching consequences. Indeed, the Australian Human Rights Commission’s findings are conclusive:

*Many submissions outlined fear for the safety of young LGBTI people in schools exempt from unlawful discrimination towards students on the basis of SOGII status. While it was acknowledged that freedom of religion requires a level of protection, it was strongly emphasised that in resolving a conflict of rights it is imperative to prioritise the physical safety and emotional wellbeing of young people.*²⁶

- 3.6 At this crucial time of development, LGBTI children and young people are at heightened risk of suicidal ideation, self-harm, depressive symptomatology and emotional distress.²⁷ However, it is also important to note that religious exemptions in the education system can have ongoing negative effects for society as a whole, through developing and encouraging intolerance and a lack of respect for human rights and fundamental freedoms, which can thereby contribute to discrimination and harassment in adult settings later on in life.

Negative effects of religious exemptions at work

- 3.7 Employees also fall foul of religious exemptions in the *Sex Discrimination Act* and *Fair Work Act*. We estimate that there are over 28,000 jobs in the Victorian school and healthcare sectors alone that a worker can be fired from if they come out as LGBT.²⁸

- 3.8 The inconsistent implementation and arbitrary application of religious exemptions – as a result of a lack of certainty regarding what constitutes “the doctrines, tenets, beliefs or teachings of a particular religion”, as well as varying interpretations of religious doctrine across religious denominations – is a particular cause of stress and anxiety for LGBTI employees in any workplaces with a religious affiliation.²⁹ Indeed, “something as arbitrary as a change of superior, or a casual remark by a colleague or student can result in loss of livelihood for these individuals, simply on the grounds of their sexuality.”³⁰

²⁶ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 41.

²⁷ Joanna Almeida, ‘Emotional distress among LGBT youth: The influence of perceived discrimination based on sexual orientation’ (2009) 38(7) *Journal of Youth and Adolescence* 1001.

²⁸ Based on information gained from the MySchool website and annual reports of the Catholic Education Commission Victoria, Mecu Health, Southern Cross Care and Voncent Care.

²⁹ LGBTI people in many professions are impacted by religious exemptions, with unjust discrimination being raised by the Commission as a significant factor affecting employment and a barrier to equal participation in the workplace: Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 19. Recent studies have found that 10-7% of LGBTI people have been refused employment or denied a promotion based on their sexuality, and that 52% of gay and lesbian employees have experienced discrimination in their current employment because of their sexual orientation: Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011) 9. See also Carolyn Evans and Leilani Ujvari, ‘Non-discrimination Laws and Religious Schools in Australia’ (2009) 30(1) *Adelaide Law Review* 31, 52; Tania Ferfoljaa, ‘Institutional Silence: Experiences of Australian Lesbian Teachers Working in Catholic High Schools’ (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 51, 53.

³⁰ Jim Woulfe, ‘An end to the right to discriminate’ *ON LINE opinion*, 16 March 2009.

- 3.9 The uncertainty with which LGBTI individuals in these settings must live, the trauma of having to live a closeted lifestyle (and, in many cases, having to at least be seen to uphold religious doctrine), the fear of being uncovered and the potentially devastating consequences of being uncovered (including, but not limited to, forced resignation, personal and professional humiliation, relationship breakdown, financial loss, and the experience of discrimination, rejection and exclusion) and the negative impact of cognitive dissonance in trying to reconcile two core aspects of identity, all have clear and demonstrable negative effects on physical, emotional and mental health, as well as undermining LGBTI employees' capabilities and diminishing their potential.³¹
- 3.10 Consequentially, LGBTI employees often have to contend with the constant threat and fear of discrimination, abuse, harassment, rejection and ridicule from their colleagues, as well as the potential negative impact on their career and job prospects, resulting in many LGBTI people feeling unsafe and undervalued in the workplace.³² Various unions, including the National Tertiary Education Union,³³ the Queensland Independent Education Union,³⁴ the Victorian Independent Education Union,³⁵ the Independent Education Union of Australia³⁶ and the Australia Education Union,³⁷ have argued that religious exemptions should be removed or limited to ensure protection of LGBTI workers' job security and rights at work.
- 3.11 Furthermore, there is no evidence to justify religious exemptions that operate with respect of people's intersex status.³⁸ Religious organisations have never sought religious exemptions to permit discrimination against people with an intersex variation, as there is no doctrinal basis in any religion for such discrimination. It is extraordinary and unjust that religious exemptions have been applied when including intersex people in legislation in recent years, and such exemptions should be removed.

³¹ Carolyn Evans and Leilani Ujvari, 'Non-discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31, 42; Tania Ferfoljaa, 'Institutional Silence: Experiences of Australian Lesbian Teachers Working in Catholic High Schools' (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 51, 52-3, 60-3.

³² Lyn Irwin, 'Homophobia and Heterosexism: Implications for Nursing and Nursing Practice' (2007) 25(1) *Australian Journal of Advanced Nursing* 70, 74.

³³ National Tertiary Education Union, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (2012) 9.

³⁴ Queensland Independent Education Union, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (2012) 3.

³⁵ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, 'Final Report on Exceptions and Exemptions to the Equal Opportunity Act 1995' (2009) 65

³⁶ Independent Education Union of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (2012).

³⁷ Australian Education Union, Submission to the Attorney-General's Department Consolidation of Anti-Discrimination Legislation Discussion Paper (2012) 7.

³⁸ Australian Council of Trade Unions, Submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (2013) 3.

Choice is not always an option

- 3.12 One policy justification for the religious exemptions advanced by some is the ability of individuals to choose from available services, including both religious and non-religious providers.³⁹ However, the luxury of choice is simply not available in many areas and in many settings. LGBTI people living in regional, remote or rural areas, in particular, may have access to limited service delivery options.⁴⁰
- 3.13 Young people may not be able to choose the school they go to. Vulnerable people accessing crisis, emergency or other vital social services do not often find themselves with a field of potential providers to choose from. Often the market for these services is extremely scarce and those individuals accessing services are extremely vulnerable. It is grossly inappropriate for individuals experiencing mental illness or those with an intellectual or other disability to be subjected to the prospect of discrimination on the basis of their sexual orientation, gender identity or intersex status.
- 3.14 To the extent that there is choice, LGBTI people of faith accessing employment, goods or services are forced to choose between their faith or their sexual orientation, gender identity or intersex status.

Faith-based service providers do not necessarily want to discriminate

- 3.15 Many religious organisations do not discriminate in practice and a number have publicly stated their intention not to take advantage of the broad exceptions available anti-discrimination laws.⁴¹ Indeed, some religious organisations resent the existence of exemptions, seeing the exclusion of one particular group as inconsistent with their faith.⁴²
- 3.16 Jewish Care, Wesley Care Mission, BaptCare and UnitingCare all have explicit policies of non-discrimination on the grounds of sexual orientation or gender identity. A number of Jewish and Christian schools are members of Safe Schools Coalition and thus support same-sex attracted, gender diverse and intersex students, staff and families.
- 3.17 Unfortunately, the fear and apprehension of discrimination due to historical experiences is very real in the minds of LGBTI people, regardless of whether the provider in question intends to discriminate or not.

³⁹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 42.

⁴⁰ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.55].

⁴¹ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.25].

⁴² Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.23].

4. Alternative options

Remove religious exemptions and replace with a general limitations clause

- 4.1 We acknowledge the importance of the rights, freedoms and privileges that are recognised by the common law and the need to uphold those “traditional” rights where possible. However, our strong view is that blanket exemptions for religious exemptions fail to balance the human right of freedom of religion with freedom from discrimination. Indeed, such wide-ranging exemptions give priority to religious freedom at the expense of the freedoms of LGBTI Australians and allow LGBTI people to be discriminated against as they seek to obtain an education and access healthcare, themselves fundamental human rights.
- 4.2 This position does not reflect the current practices of religious organisations or the views of the vast majority of Australians. We are also concerned about the impact of the exemptions on LGBTI Australians. The protection of LGBTI rights is essential and, in that respect, a reasonable justification for encroaching upon freedom of religion where those rights are seen to be competing.
- 4.3 We believe that broad permanent exemptions for educational institutions and religious bodies should be removed and replaced with a general justification defence or general limitations clause.⁴³ Such a clause should set out criteria for evaluating circumstances in which religious rights and interests should take precedence over the right to freedom from discrimination, and how these competing rights should be balanced.
- 4.4 The model proposed ascribes value to all human rights, including the right to freedom of religion and the right to equality. Neither of these rights is absolute in law or in practice and, in cases of conflict, neither should automatically prevail. Instead, competing interests should be considered and balanced. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination would be allowed. Such an approach would, for example, most likely permit discrimination in circumstances such as the ordination of priests.
- 4.5 The Attorney-General’s Department Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Law identified three key benefits in favour of adopting a general limitations or exemptions clause. These included:⁴⁴
1. a ‘case-specific approach’ to resolving anti-discrimination claims, and an increased scope for judicial consideration;
 2. a reduction in the number of inconsistent protections under Commonwealth anti-discrimination legislation; and
 3. the flexibility of an exemptions regime to be able to adapt to changing standards and community expectations.

⁴³ This position would appear to be supported by the Australian Christian Lobby: Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Interim Report 127 (2015) [4.60].

⁴⁴ Attorney-General’s Department, ‘Consolidation of Commonwealth Anti-Discrimination Laws’, Discussion Paper (2011) 37 [147].

- 4.6 Furthermore, the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Effectiveness of the *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting Gender Equality made reference to a number of submissions on the benefits of a move towards a general exemption provision, including:⁴⁵
1. a more ‘detailed and considered approach to balancing human rights’;
 2. working examples in other international jurisdictions such as Canada, New Zealand and South Africa;
 3. a widened scope for ‘duty holders’; and
 4. a flexibility to adapt to ‘ever-changing conditions’.
- 4.7 Further, we wish to draw the Panel’s attention to the strong recommendations of the Senate Standing Committee on Legal and Constitutional Affairs following its inquiry into the draft Human Rights & Anti-Discrimination Bill 2012. In their recommendations the Committee suggested removing blanket religious exemptions.⁴⁶ Further, the Committee suggested that where organisations retain the legal right to discriminate, they must proactively publish their intention to rely upon the exemption up front.

Transparency and accountability through ‘right to know’ provisions

- 4.8 If the religious exemptions in the *Sex Discrimination Act* and *Fair Work Act* are to remain, we support the Senate Standing Committee on Legal and Constitutional Affairs’ view that, in the interests of transparency, religious organisations intending to discriminate by reliance on available exemptions should be required to notify prospective employees or users of their service.
- 4.9 If religious organisations are to be granted permanent exceptions from discrimination laws, members of the community are entitled to be informed of risk of discrimination before they make a decision to purchase goods and services or apply for a job. People have a right to know if they are going to be discriminated against. Imposing such a notice requirement would also enable those organisations that do not discriminate to be free from any suspicion of discriminatory conduct or intent.
- 4.10 The *Sex Discrimination Act* and *Fair Work Act* should include a requirement that religious organisations publish statements on their websites, position descriptions for job advertisements and brochures or other promotional or informational material relating to the provision of goods or services, education or accommodation.⁴⁷

⁴⁵ Senate Standing Committee on Legal and Constitutional Affairs, ‘Report on the Effectiveness of the *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting General Equality’ (2008) [7.10]- [7.16].

⁴⁶ Senate Standing Committee on Legal and Constitutional Affairs, ‘Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012’ (2013).

⁴⁷ See, e.g. *Equal Opportunity Act 1984* (SA) s 34(3).

- 4.11 Religious organisations should also be required to register a notice of their intention to discriminate with the Australian Human Rights Commission or Fair Work Commission and a searchable public record should be maintained of these notices.⁴⁸
- 4.12 This would serve to forewarn potential victims of discrimination.⁴⁹ Whereas:
*Without a notice provision, individuals may choose an employer or school with no knowledge or warning that they are thereby sacrificing their right to protection from discrimination. This can be a serious matter for a teacher choosing in which educational system to pursue their career, or a student making a choice of school.*⁵⁰
- 4.13 We encourage the Panel to support requiring educational institutions, religious bodies and employers to publicly document and advertise when and why they intend to rely on these exemptions.

Extending limitations to all publicly funded service delivery

- 4.14 As part of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act*, amendments were introduced to restrict religious exemptions in the delivery of aged care services.⁵¹ In the absence of the removal of permanent exemptions for religious organisations, this change represented a sensible compromise for a number of reasons. Firstly, there was clear support for the change by a number of service providers who took the view they wanted their service to be known as not discriminating. In many cases these providers may have had differing views to the Church hierarchy. Secondly, providers could remove themselves from being effected by the changes by ceasing to receive Commonwealth funds for their services. Finally, the change only affected vulnerable people in the delivery of their service. It did not affect an organisation's choice of who could be employed to deliver those services, which is an acknowledged concern of some religious organisations.⁵²
- 4.15 These existing protections to the area of aged care should be extended to prevent any organisations in receipt of government funding from relying on the exemptions.⁵³ This would ensure that public funding is not utilised to perpetuate discrimination and disadvantage. It is particularly offensive for LGBTI taxpayers to find themselves faced with public service delivery options that they may be unable to access or that may be delivered in a manner inappropriate for their needs. With the increasing outsourcing of government services, this is becoming a steady reality.

⁴⁸ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.60].

⁴⁹ Greg Walsh, 'An opt-in approach to regulating the employment decisions of religious schools' (2014) 14 *Macquarie Law Journal* 163.

⁵⁰ Senate Standing Committee on Legal and Constitutional Affairs, 'Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (2013) [5.58].

⁵¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 39.

⁵² Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 12.

⁵³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 12-3.

4.16 We strongly support a limitation on discrimination in publicly funded services including:

- mental health services;
- homelessness and housing services;
- disability services;
- health services;
- youth services;
- schools; and/or
- social, community and welfare services.

4.17 These settings deal with minors and potentially other people lacking legal capacity due to mental illness or intellectual disability, further evidencing their vulnerability. Considering the adverse mental and physical health impact of discrimination, the Government has a duty to ensure the delivery of these services is regulated so as to prevent or limit discrimination. As the Australian Human Rights Commission acknowledges, “prioritising the physical and mental health, safety and welfare of all people (especially school-aged children and vulnerable people) is paramount in any discussion about balancing rights.”⁵⁴

4.18 We also believe that these limitations should be extended to employment. It is contradictory to have non-discrimination for clients if there is discrimination in employment and creates an unsafe working environment that may impact on client care.

5. Religious exemptions and marriage equality

5.1 The preceding discussion has focused on the existing religious exemptions within the *Sex Discrimination Act* and *Fair Work Act*. The recent legalisation of marriage equality in Australia has, however, introduced new religious exemptions to accompany existing exemptions the *Marriage Act*. These exemptions address two key issues:

- the capacity of ministers of religion and religious celebrants to refuse to marry same-sex couples; and
- the capacity of providers of marriage-related facilities, goods or services to refuse to provide services to same-sex couples.⁵⁵

⁵⁴ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 13.

⁵⁵ See, for example, Tim Wilson, ‘Religious Freedom and Same-Sex Marriage need not be Incompatible’, *The Australian*, 6 July 2015 <<http://www.theaustralian.com.au/opinion/religious-freedom-and-same-sex-marriage-need-not-be-incompatible/story-e6frg6zo-1227429558684>>. Commissioner Wilson proposed a model in which providers of marriage-related services could, on the basis of their religious beliefs, advertise what types of marriages they provide services to and then only provide services to those types of marriages, without breaching anti-discrimination laws.

Exemptions for marriage celebrants

- 5.2 Under the *Marriage Act*, there are three main classes of authorised celebrants: ministers of religion, religious celebrants and civil celebrants.⁵⁶
- 5.3 Section 47 of the *Marriage Act* makes it clear that ministers of religion who are authorised celebrants are not bound to solemnise any marriage and may impose additional conditions or requirements to those required by the Act. Furthermore, section 47A makes it clear that religious celebrants are bound to solemnise a marriage if it goes against their religious beliefs.
- 5.4 In our view, these provisions that make it clear that ministers of religion and religious celebrants cannot be compelled to marry same-sex couples strike an appropriate balance between religious freedom and equality before the law and freedom from discrimination.⁵⁷
- 5.5 In our view, permitting civil celebrants, as distinct from ministers of religion and religious celebrants, to discriminate against same-sex couples would constitute an unjustifiable encroachment on the right to freedom from discrimination and undermine the principles upon which the Australian anti-discrimination law regime is based.

Exemptions for providers of marriage-related services

- 5.6 Section 47B of the *Marriage Act* states that bodies established for religious purposes may refuse to make facilities available or provide goods and services if the refusal conforms to the doctrines, tenets or beliefs of the religion of the body or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. This exemption reflects the existing exemptions in anti-discrimination law. The discrimination is limited to instances “for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage.”
- 5.7 The current exemption is quite limited. As discussed above, we strongly oppose broad exemptions that permit service providers acting in the commercial sphere to rely on freedom of religion to discriminate against same-sex couples in the provision of facilities, goods and services. We provide options to address this discrimination above, including a general limitations clause that would allow for case-by-case analysis of whether the discrimination should be lawful.

⁵⁶ *Marriage Act 1961* (Cth) Pt IV.

⁵⁷ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, Consultation Report (2015) 13.