



**public interest**  
ADVOCACY CENTRE

**Submission to the Religious Freedom Review**

**14 February 2018**



# 1. Introduction

## 1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles difficult issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through legal assistance and litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

## 1.2 PIAC's work on freedom of religion and human rights

PIAC has engaged in key public policy debates about the issue of freedom of religion over many years. This includes submissions in response to:

- The Australian Human Rights Commission Religious Freedom Roundtables<sup>1</sup>
- Both the Issues Paper<sup>2</sup> and Interim Report<sup>3</sup> of the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms, and
- The Australian Human Rights Commission Inquiry into Freedom of Religion and Belief in the 21<sup>st</sup> Century (in conjunction with Kingsford Legal Centre and the Combined Community Legal Centres Group).<sup>4</sup>

However, as will be discussed in this submission, PIAC sees freedom of religion as only one part of a broader conversation about human rights, and has also contributed to a number of other

---

<sup>1</sup> PIAC, *Submission to the Australian Human Rights Commission Religious Freedom Roundtable*, 6 October 2015, available at: <https://www.piac.asn.au/2015/10/07/religious-freedom/> accessed on 9 February 2018.

<sup>2</sup> PIAC, *Submission to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms Issues Paper*, 12 March 2015, available at: <https://www.piac.asn.au/2015/03/12/submission-to-the-alrc-inquiry-traditional-rights-and-freedoms/> accessed on 9 February 2018.

<sup>3</sup> PIAC, *Submission to the Australian Law Reform Commission Traditional Rights and Freedoms Encroachment by Commonwealth Laws Interim Report*, 29 September 2015, available at: <https://www.piac.asn.au/2015/09/29/rights-and-freedoms/> accessed on 14 February 2018.

<sup>4</sup> Kingsford Legal Centre, PIAC et al, *Submission to the Australian Human Rights Commission Inquiry into the Freedom of Religion and Belief in the 21<sup>st</sup> Century*, 6 March 2009, available at: <https://www.piac.asn.au/2010/07/13/final-freedom-of-religion-submission/> accessed on 9 February 2018.

relevant public consultation processes including the Exposure Draft Human Rights and Anti-Discrimination Bill 2012,<sup>5</sup> and in response to the National Human Rights Consultation in 2009.<sup>6</sup>

## 2. Recommendations

### **Recommendation 1**

---

*The Review Panel should recommend the introduction of a Human Rights Act which protects fundamental human rights, including the right to religious belief.*

### **Recommendation 2**

---

*The Review Panel should recommend the introduction of religious belief as a protected attribute in Commonwealth anti-discrimination law.*

### **Recommendation 3**

---

*The Review Panel should recommend the introduction of provisions prohibiting vilification on the basis of religious belief.*

### **Recommendation 4**

---

*The Review Panel should recommend that s 37(1)(d) of the Sex Discrimination Act 1984 and s 35 of the Age Discrimination Act 2004 be repealed.*

### **Recommendation 5**

---

*The Review Panel should recommend that s 38 of the Sex Discrimination Act 1984 be repealed.*

### **Recommendation 6**

---

*The Review Panel should recommend that organisations provided with government funding to deliver public services such as health, aged care, community services and education are not exempt from anti-discrimination laws in connection with provision of those services.*

### **Recommendation 7**

---

*The Review Panel should recommend that s 39DD(2) of the Marriage Act, allowing existing civil celebrants to nominate as 'religious marriage celebrants' and refuse to perform marriage ceremonies, including discriminating against LGBTI couples, should be repealed.*

### **Recommendation 8**

---

*The Review Panel should reject proposals to provide civil celebrants with the ability to refuse to perform marriage ceremonies of couples on the basis of any protected attribute.*

### **Recommendation 9**

---

*The Review Panel should reject proposals to allow individuals and organisations to discriminate in the provision of wedding-related goods, services and facilities.*

---

<sup>5</sup> PIAC, *Aligning the pieces: consolidating a framework for equality and human rights*, 21 December 2012, available at: <https://www.piac.asn.au/2013/01/29/aligning-the-pieces/> accessed on 9 February 2018.

<sup>6</sup> PIAC, *Realising rights*, 15 June 2009, available at: <https://www.piac.asn.au/2010/07/13/09-06-15-piac-human-rights-sub/> accessed on 9 February 2018.

### 3. Religious freedom and the need for a Human Rights Act

PIAC welcomes the opportunity to contribute to a debate about the human right to freedom of religion.

There have been a number of public consultations in recent years that have examined the question of freedom of religion either independently, or as part of a wider discussion of human rights. This includes:

- The ongoing inquiry by the Commonwealth Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade,<sup>7</sup> which is considering ‘Australian efforts, including those of Federal, State and Territory governments and non-government organisations, to protect and promote the freedom of religion and belief’
- The Australian Human Rights Commission (AHRC) inquiry into Freedom of Religion and Belief in 21<sup>st</sup> Century Australia,<sup>8</sup> and
- The Australian Law Reform Commission (ALRC) inquiry into Traditional Rights and Freedoms.<sup>9</sup>

These processes have all examined how religious freedom is currently protected in Australian law, and whether there has been unjustifiable encroachment on this freedom.

The ALRC in particular found that ‘[g]enerally speaking, Australians are not constrained in the exercise of religious freedom.’<sup>10</sup> The Final Report concluded that

Australians enjoy the freedom to worship and observe religion, and the freedom not to be coerced into engaging in religious practices. There are very few, if any, provisions in Commonwealth laws that interfere with religious freedom in these ways.<sup>11</sup>

The ALRC further observed:

The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.<sup>12</sup>

---

<sup>7</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the state of the human right to freedom of religion or belief*, ongoing, details at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Freed\\_omofreligion](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freed_omofreligion) including interim report ‘Legal Foundations of Religious Freedom in Australia’, November 2017, available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Freed\\_omofreligion/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freed_omofreligion/Interim_Report) accessed on 9 February 2018.

<sup>8</sup> Professor Gary Bouma, Professor Desmond Cahill, Dr Hass Dellal and Athalia Zwartz, *Freedom of Religion and Belief in 21<sup>st</sup> Century Australia*, 2011, available at: <https://www.humanrights.gov.au/publications/2011-freedom-religion-and-belief-21st-century-australia> accessed on 9 February 2018.

<sup>9</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Report 129, 2 March 2016, available at: <https://www.alrc.gov.au/publications/freedoms-alrc129> accessed on 9 February 2018.

<sup>10</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Interim Report 127, July 2015, at [4.115].

<sup>11</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Report 129, 2 March 2016, p129.

<sup>12</sup> *Ibid.*

In their Interim Report, the ALRC specifically identified two Commonwealth laws that give rise to potential concerns:

There are only a few provisions in Commonwealth laws that interfere with religious freedom. A diverse range of stakeholders raised concerns about the scope and application of the religious organisation exemptions in ss 37 and 39 of the *Sex Discrimination Act 1984* (Cth)... The solemnisation provisions for wedding celebrants in the *Marriage Act 1961* (Cth) raise practical concerns about the authorisation of religious celebrants.<sup>13</sup>

We address these specific issues below. Both issues raise the intersection of fundamental human rights, most notably the right to non-discrimination and the right to freedom of religion.

### 3.1 The right to non-discrimination

Article 26 of the ICCPR provides for the right to non-discrimination as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

‘Other status’ is intended as a flexible term that ‘captures other forms of differential treatment that cannot be reasonably and objectively justified’ and will include attributes such as disability, age, marital status, sexual orientation and gender identity.<sup>14</sup>

This human right has been positively, and progressively, implemented in Australian legislation. At the Commonwealth level, this includes the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. These laws have been a central part of the way that Australia has sought to protect the enjoyment of human rights.

The grounds covered in these laws have also expanded over time, most recently through the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, which protected lesbians, gay men, bisexual, transgender and intersex individuals.

### 3.2 Freedom of religion

The human right to freedom of religion is set out in Article 18 of the International Covenant on Civil and Political Rights (‘ICCPR’). This provides for an unconditional right to freedom of thought, conscience and religion. The UN Human Rights Committee has confirmed that ‘Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.’<sup>15</sup>

---

<sup>13</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Interim Report 127, July 2015, at [4.115-117].

<sup>14</sup> See, for example, the discussion in United Nations Economic and Social Council, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights*, 10 June 2009, [27]-[35].

<sup>15</sup> UN Human Rights Committee, *General comment No. 22 (48) (art. 18)*, CCPR/C/21/Rev. 1/Add. 4, 27 September 1993.

However, Article 18 explicitly recognises that the ability to manifest one's religious beliefs can be subject to limitations, provided they are prescribed by law and necessary for the protection of specific objectives, including most relevantly the rights and freedoms of others.<sup>16</sup> The distinction between the right to hold a religious belief and the freedom to manifest religion or belief is a critical one. Importantly in the present context, the freedom to manifest religion may be limited as is necessary to protect the right to non-discrimination.

Religious freedom is also protected by the prohibition on discrimination on the ground of religion in Articles 2 and 26 of the ICCPR. Article 27 also protects the right of ethnic, religious and linguistic minorities to enjoy their own culture, profess and practise their own religion and use their own language. Article 20(2) of the ICCPR further provides that

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>17</sup>

At the Commonwealth level, limited protection from discrimination on the grounds of religion exists in the area of employment under the *Fair Work Act 2009* (Cth),<sup>18</sup> while the Australian Human Rights Commission has powers of investigation and reporting (but not with enforceable remedies) in the area of employment and occupation.<sup>19</sup>

However, there is currently no Commonwealth anti-discrimination legislation which prohibits discrimination on the basis of religious belief. Similarly in NSW, religious belief is not a protected attribute under the NSW *Anti-Discrimination Act 1977*.

There is also an absence of anti-vilification protections on the basis of religious belief at the Commonwealth level and in a number of States and Territories, including NSW.<sup>20</sup>

Under Commonwealth law, the only attributes that currently enjoy protection against vilification are 'race, colour or national or ethnic origin'.<sup>21</sup> The term 'ethnic origin' has been found to include Jewish<sup>22</sup> and Sikh<sup>23</sup> people, but does not cover religious groups generally and is, for example, very unlikely to apply to Muslims<sup>24</sup> and would not apply to Christians.

---

<sup>16</sup> Article 18(3).

<sup>17</sup> It should be noted that the Australian Government has a reservation against this article, albeit expressed in terms that leaves open the introduction of further legislation: Attorney-General's Department, *Australia's Sixth Report to the United Nations Human Rights Committee*, 2016, para 48, available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/Australias-Sixth-Report-under-the-ICCPR.pdf> accessed on 12 February 2018.

<sup>18</sup> *Fair Work Act 2009* (Cth), s153 (discriminatory terms in an award); s 195 (discriminatory terms in enterprise agreements); s 351 (adverse action where discrimination is also unlawful under the State or Territory law of the place where the action is taken); s 772 (termination).

<sup>19</sup> *Australian Human Rights Commission Act 1986* (Cth), Part II Division 4.

<sup>20</sup> Protections against religious vilification are found in the *Discrimination Act 1991* (ACT) s 67A; the *Anti-Discrimination Act 1991* (Qld) s 124A; the *Anti-Discrimination Act 1998* (Tas) ss 17, 19; and the *Racial and Religious Tolerance Act 2001* (Vic) s 8.

<sup>21</sup> Section 18C of the *Racial Discrimination Act 1975* (Cth).

<sup>22</sup> See, for example, *Jones v Toben* [2002] FCA 1150, [101].

<sup>23</sup> See in the UK context, *Mandla v Dowell Lee* [1983] 2 AC 548.

<sup>24</sup> See, for example, in the context of 'ethno-religious' discrimination under the *Anti-Discrimination Act 1977* (NSW), *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.

In NSW, vilification protections exist for homosexuality, HIV/AIDS status, transgender and race (with race defined in s 4 as including 'colour, nationality, descent and ethnic, ethno-religious or national origin'), but there is no stand-alone protection against religious vilification.

### **3.3 The role for a Human Rights Act**

Both the need to better protect human rights, as well as the challenge of balancing potentially competing rights, point to the need for a national Human Rights Act.

PIAC notes the existing Australian models adopted in Victoria,<sup>25</sup> and the Australian Capital Territory,<sup>26</sup> and the commitment by the Queensland Government to introduce a Human Rights Act this term.<sup>27</sup>

In PIAC's view, it is in this broader context that conflicts between competing human rights should be resolved, rather than in the context of an inquiry into one specific human right. A narrow approach risks prioritising concerns surrounding one particular human right (in this case, freedom of religion) above other rights.

Developing a Human Rights Act at Commonwealth level would not just better protect the human right to religious freedom, it would also ensure a much broader range of fundamental human rights and freedoms are protected in Australia.

#### ***Recommendation 1***

---

*The Review Panel should recommend the introduction of a Human Rights Act which protects fundamental human rights, including the right to religious belief.*

## **4. Protection from discrimination on the ground of religion**

While PIAC sees the introduction of a Human Rights Act as the primary vehicle to better protect the freedom of religious belief in Australia, we recognise the lack of comprehensive anti-discrimination and anti-vilification protections on the basis of religious belief as a deficiency in our law that could appropriately be addressed in the short-term.

### **4.1 Protection from discrimination**

PIAC believes that the inclusion of religion as a protected attribute in anti-discrimination laws is necessary to protect the right to non-discrimination outlined in article 26 of the ICCPR.

It would play an important role in supporting a tolerant, diverse and fair community and help prevent discrimination against religious minorities in Australia.

#### ***Recommendation 2***

---

*The Review Panel should recommend the introduction of religious belief as a protected attribute in Commonwealth anti-discrimination law.*

---

<sup>25</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic).

<sup>26</sup> Human Rights Act 2004 (ACT).

<sup>27</sup> Felicity Caldwell, 'Human rights set to be enshrined in a Queensland act', *Brisbane Times*, 6 February 2018, available at: <https://www.brisbanetimes.com.au/politics/queensland/human-rights-set-to-be-enshrined-in-a-queensland-act-20180205-p4vzgc.html> accessed on 12 February 2018.



## 4.2 Protection from vilification

The harms of hate-speech are well-recognised. This has been particularly well-documented in the context of racist speech.<sup>28</sup> People experiencing racism face poorer social and health outcomes, including higher suicide risk in young people.<sup>29</sup> Racist speech also silences its victims and impacts upon their ability to enjoy basic freedoms.<sup>30</sup>

PIAC therefore believes that vilification protections should be extended to cover a wider range of protected attributes under Commonwealth, state and territory law, including religious belief, as well as other attributes that have been the subject of historical persecution such as sexual orientation, gender identity and intersex status.

### ***Recommendation 3***

---

*The Review Panel should recommend the introduction of provisions prohibiting vilification on the basis of religious belief.*

## 5. Religious freedom and anti-discrimination laws

Commonwealth, State and Territory anti-discrimination regimes all contain provisions that permit religious organisations to discriminate in certain circumstances on prohibited grounds, generally including sex, marital or relationship status, sexual orientation, gender identity and intersex status.

While PIAC accepts that there is a role for exceptions to anti-discrimination regimes that accommodate the right to religious freedom, such exceptions must be carefully limited and defined to ensure that they do not undermine the right to non-discrimination.

In PIAC's view, current provisions providing for exemptions for religious bodies fail to achieve an appropriate balance.

---

<sup>28</sup> See, for example, Katharine Gelber and Luke McNamara, 'Evidencing the harms of hate speech', (2016) 22(3) *Social Identities*, 324-341.

<sup>29</sup> See Niyi Awefeso, 'Racism: A major impediment to optimal Indigenous health and health care in Australia', (2011) 11(3) *Australian Indigenous Health Bulletin*; Naomi C Priest, Yin C Paradies, Wendy Gunthorpe, Sheree J Cairney, Sue M Sayers, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth', (2011) 194(10) *Medical Journal of Australia* at 546, available at [https://www.mja.com.au/system/files/issues/194\\_10\\_160511/pri10947\\_fm.pdf](https://www.mja.com.au/system/files/issues/194_10_160511/pri10947_fm.pdf) (accessed 14 February 2018); Ann Larson, Marisa Gillies, Peter J. Howard, Juli Coffin, 'It's enough to make you sick: the impact of racism on the health of Aboriginal Australians', (2007) 31(4) *Australia and New Zealand Journal of Public Health* 322 – 329.

<sup>30</sup> See, for example, Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320 – 2381, 2337.

## 5.1 General exemption for religious bodies

Section 37 of the SDA provides:

### 37 Religious bodies

- (1) Nothing in Division 1 or 2 affects:
  - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
  - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
  - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
  - (d) any other act or practice of a body established for religious purposes, being an act or practice that 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.

PIAC accepts that the activities in subsections (1)(a)-(c) have a close connection with religious worship and ceremony such that an exemption from the operation of the prohibition against discrimination may be justified.

However, the breadth of the exemption contained in s 37(1)(d) is excessive and should be repealed.

Amongst other things, the provision fails to require consideration of proportionality. It would appear that any act of discrimination, regardless of its consequences, is permissible if it conforms with any of the doctrines, tenets or beliefs of a religion, regardless of their significance. Similarly, any injury to religious susceptibility of even some members of the religion is enough to invoke the exemption, regardless of how serious the injury may be to a person who is discriminated against.

The provision accordingly fails to strike an appropriate balance between the right to religious freedom and the right to non-discrimination and should be repealed.

PIAC notes further that s 35 of the *Age Discrimination Act 2004* (Cth) is in similar terms and should also be repealed for the same reasons.

### ***Recommendation 4***

*The Review Panel should recommend that s 37(1)(d) of the Sex Discrimination Act 1984 and s 35 of the Age Discrimination Act 2004 be repealed.*

## 5.2 Religious schools

Section 38 of the SDA provides:

### **Educational institutions established for religious purposes**

- (1) Nothing in paragraph 14(1)(a) of (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

PIAC acknowledges that the right to freedom of religion under Article 18 of the ICCPR requires State Parties to 'have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.

In PIAC's view, this may allow for a religious school to discriminate against potential teachers and employees on the grounds of religious belief, in relation to roles that are sufficiently connected with the 'religious and moral education' of children. It may also support discrimination on the basis of religious belief against prospective students to support the religious ethos of the institution.<sup>31</sup>

However, in PIAC's view, religious schools should not be able to discriminate on other grounds, including sex, marital or relationship status, pregnancy, sexual orientation, gender identity or intersex status. Discriminating in this way is not a necessary or proportionate measure for the protection of religious freedom and is accordingly an unjustifiable infringement on the right to non-discrimination.

---

<sup>31</sup> An example of such an approach can be found in s 51(2) (employment) and s 51A (admission of students) of the *Anti-Discrimination Act 1998* (Tas).

This is particularly the case in the context of young people who may be particularly vulnerable, including young LGBTI students.

PIAC notes that for the vast majority of students, it is the parents and not the children who determine the school of attendance, and those parents may be unaware – particularly at the time of enrolment – of their child’s sexual orientation or gender identity. Particularly in those circumstances, subjecting students to discrimination simply because of their sexual orientation or gender identity is not, in PIAC’s view, a measure that is reasonably necessary and proportionate for the enjoyment of the right to freedom of religion.

PIAC also notes that, in any event, the exemption granted by s 38 is excessively broad. As with s 37, it fails to require a consideration of proportionality, allowing discrimination regardless of its consequences to avoid any injury to ‘religious susceptibilities’.

Accordingly, 38 should be repealed.

#### ***Recommendation 5***

---

*The Review Panel should recommend that s 38 of the Sex Discrimination Act 1984 be repealed.*

### **5.3 Services funded by government**

In PIAC’s view, organisations that choose to receive government funding to deliver public services such as health care, aged care or other community services, or education, should not be entitled to discriminate.

It is not consistent with Australia’s commitment to the human right of non-discrimination that the government funds acts of discrimination.

This basic principle should apply to exclude any exceptions that may otherwise be available to permit discrimination.

#### ***Recommendation 6***

---

*The Review Panel should recommend that organisations provided with government funding to deliver public services such as health, aged care, community services and education are not exempt from anti-discrimination laws in connection with provision of those services.*

## **6. Marriage and religious freedom**

Concerns about the potential conflict between protection from non-discrimination and religious freedom were the subject of particular attention in 2017, during the same-sex marriage law postal survey and parliamentary debate of legislation to introduce marriage equality in Australia.

Indeed, the current review into religious freedom was established in the period between the announcement of the successful Yes result in the postal survey (November 15) and the final

sitting fortnight of Commonwealth Parliament which saw marriage equality debated,<sup>32</sup> and was seen by some as a process to allow consideration of competing issues of marriage and religious freedom in more detail.

The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) seeks to accommodate religious freedom in the following ways:

- By confirming the ability of ministers of religion to decline to perform the marriage ceremonies of any couple, for any reason<sup>33</sup>
- By clarifying that ministers of religion of non-recognised denominations should also be able to refuse to perform marriage ceremonies<sup>34</sup>
- By allowing existing civil celebrants to nominate to become 'religious marriage celebrants' and thereby refuse to perform marriage ceremonies,<sup>35</sup> and
- By ensuring that military chaplains will continue to be able to refuse to perform marriage ceremonies.<sup>36</sup>

In PIAC's view, the first two exceptions can be justified as reasonably necessary to protect religious freedom. They involve ministers of religion performing a ceremony that is essentially religious in nature.

PIAC also accepts that Military Chaplains, in exercising a part of their role that is to do with religious ministry, should not be required to perform a service that is inconsistent with their faith. Although government employees, PIAC recognises that they are engaged, at least in part, to support the right of ADF members to practice their religion.<sup>37</sup>

PIAC does not, however, accept the exception relating to civil celebrants is justifiable.

## 6.1 Civil celebrants

Civil celebrants perform marriage ceremonies that are secular in nature. Registration as a 'religious marriage celebrant' does not reflect any formal position within a religious organisation.

If individuals hold views, including religious beliefs, that are inconsistent with the right to non-discrimination such as would prevent them from officiating in particular marriage ceremonies, they are not in a position to undertake the duties that should be expected of a Commonwealth-registered celebrant. As the Attorney-General's website recognises: 'Being a marriage celebrant is a special and important role in the community. It also attracts legal responsibilities'.<sup>38</sup>

---

<sup>32</sup> Stephanie Borys, 'Philip Ruddock to review religious protections amid same-sex marriage debate', *ABC News*, 22 November 2017, available at: <http://www.abc.net.au/news/2017-11-22/same-sex-marriage-philip-ruddock-to-review-religious-protections/9178558> accessed on 12 February 2018.

<sup>33</sup> Amended section 47.

<sup>34</sup> New ss 39DD(1) and 47A.

<sup>35</sup> New ss 39DD(2) and 47A.

<sup>36</sup> Amended s 81.

<sup>37</sup> PIAC also notes the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) introduced an alternative process to allow ADF personnel to be married by 'marriage officers' appointed by the Chief of the Defence Force: s 71A.

<sup>38</sup> See <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Pages/Becomingamarriagecelebrant.aspx>, accessed 13 February 2018.

People choosing to become marriage celebrants should have the legal responsibility of not discriminating against those who seek to use their services.

It is relevant to note that existing civil celebrants have not previously been allowed to discriminate on the basis of marital or relationship status, as prohibited under the *Sex Discrimination Act 1984*,<sup>39</sup> despite the existence of strong religious beliefs against divorce and remarriage. It is unclear to PIAC why such a provision is now required if its purpose is genuinely to protect religious freedom, rather than merely allowing discrimination on the basis of sexual orientation, gender identity or intersex status.

PIAC therefore submits that the grandfathering provision in s 39DD(2) of the *Marriage Act* should be repealed. The Review Panel should also reject any proposals to provide civil celebrants with the ability to refuse to perform marriage ceremonies of couples on the basis of any protected attribute.

### ***Recommendation 7***

---

*The Review Panel should recommend that s 39DD(2) of the Marriage Act, allowing existing civil celebrants to nominate as 'religious marriage celebrants' and refuse to perform marriage ceremonies, including discriminating against LGBTI couples, should be repealed.*

### ***Recommendation 8***

---

*The Review Panel should reject proposals to provide civil celebrants with the ability to refuse to perform marriage ceremonies of couples on the basis of any protected attribute.*

## **6.2 Wedding-related services**

PIAC notes that additional amendments were proposed during the parliamentary debate on marriage equality seeking to expand the right to discriminate to individuals and organisations involved in the delivery of commercial services in the marketplace.

Any such exception to the human right to non-discrimination is, in PIAC's view, unacceptable.

It is well-established in Australian law that people offering goods, services and facilities must do so without discrimination on the grounds of protected attributes such as race, disability, sex and sexuality. This basic protection of the human right to non-discrimination in public life must not be wound back. Those who may find this incompatible with their conscience or religion are not – and clearly should not be – compelled to work in roles, or operate businesses, that may require them to act contrary to their beliefs.

---

<sup>39</sup> Defined in s 4 as:  
marital or relationship status means a person's status of being any of the following:  
(a) single;  
(b) married;  
(c) married, but living separately and apart from his or her spouse;  
(d) divorced;  
(e) the de facto partner of another person;  
(f) the de facto partner of another person, but living separately and apart from that other person  
(g) the former de facto partner of another person;  
(h) the surviving spouse or de facto partner of a person who has died.

***Recommendation 9***

---

*The Review Panel should reject proposals to allow individuals and organisations to discriminate in the provision of wedding-related goods, services and facilities.*