



A FREEDOM FROM DISCRIMINATION, NOT A LICENCE TO DISCRIMINATE:



EQUALITY AUSTRALIA'S SUBMISSION TO THE CONSULTATION ON
THE EXPOSURE DRAFTS OF THE RELIGIOUS FREEDOM BILLS

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EXECUTIVE SUMMARY

Equality Australia is a national LGBTIQ+ legal advocacy and campaigning organisation dedicated to achieving equality for LGBTIQ+ people. We work with LGBTIQ+ people to amplify the voices of our communities and achieve positive legal, policy and social change for LGBTIQ+ people and their families in Australia. Equality Australia has been built from the Equality Campaign, which ran the successful campaign for marriage equality, and was established with support from the Human Rights Law Centre.

Equality Australia welcomes the opportunity to make a submission to the Attorney-General Department's consultation on the exposure drafts of the Religious Freedom Bills, namely the Religious Discrimination Bill 2019 (**Religious Discrimination Bill**), the Religious Discrimination (Consequential Amendments) Bill 2019 (**Consequential Amendments Bill**) and Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (**HR Amendments Bill**).

EQUAL PROTECTIONS FOR ALL

Everyone should be able to feel safe and free from discrimination at work, school and when accessing goods or services – whether they are part of the LGBTIQ+ community, a person of faith or both. While this process considers further protections for people of faith (including LGBTIQ+ people of faith), it is important to remember that existing laws already allow religious bodies to lawfully discriminate against LGBTIQ+ people. These laws out-of-step with community standards and international human rights principles.

The religious exemptions in the *Sex Discrimination Act 1984* (Cth) must be removed to ensure that LGBTIQ+ people and others are free from discrimination in the workplace, at school, on the sporting field and when accessing goods and services, particularly in government-funded social services such as housing, welfare, disability and health.

There is an urgent need to reform these exemptions and end their harmful effects on LGBTIQ+ people.

OUR POSITION AND RECOMMENDATIONS ON THE RELIGIOUS FREEDOM BILLS

Equality Australia supports fair, balanced protections against discrimination on the grounds of religious belief and activity, but not laws granting some a licence to discriminate against others. Unfortunately, the Religious Freedom Bills go too far in privileging the religious views of some over the fundamental rights of others, including LGBTIQ+ people, people with disabilities, women, unmarried and divorced people, and people of minority faiths or with no religious belief.

The centrepiece of these reforms, the Religious Discrimination Bill, is in many respects consistent with existing Australian laws that prohibit discrimination on grounds such as sex, age and disability. The Religious Discriminations Bill would prohibit direct and indirect discrimination on the ground of religious belief or activity (including having no religious belief and refusing to engage in religious activity) in certain areas of public life in a similar manner to other discrimination laws. However, in certain respects, the Religious Discrimination Bill introduces unprecedented and unbalanced provisions which protect the religious beliefs of some, while silencing those of different or no faith, and licencing discrimination against people (including LGBTIQ+ people) in their workplace, in the schoolyard, and in hospitals and healthcare settings across Australia.

Equality Australia supports the introduction of conventional anti-discrimination protections on the basis of religious belief and activity, including for those who do profess a religion or who refuse to engage in religious activity. However, we do not support granting some a licence to discriminate. A survey responded to by over 2,800 of our supporters has also confirmed their support for this position.

To this end, Equality Australia recommends:

1. **Delete subsections 8(5), 8(6) and 31(7) from the Religious Discrimination Bill.** These subsections would reduce access to healthcare for all Australians by conferring upon health practitioners a national, broad and unprecedented freedom to refuse treatment to patients on religious grounds.
2. **Delete subsections 8(2)(d), 8(3), 8(4) and 31(6) from the Religious Discrimination Bill.** These subsections hinder large private employers from ensuring their workplaces are inclusive and safe places to work for all employees, and a good place to do business or access services for their clients and customers. At the same time, these subsections discriminate against employees in small organisations or the public sector, or who are not religious.
3. **Delete section 41 from the Religious Discrimination Bill.** Section 41 would allow people who wish to express prejudiced, harmful or dangerous views about women, people with disabilities, LGBTIQ+ people and others to hide

behind a cloak of religious belief, free from any consequences for their conduct under federal, state and territory anti-discrimination laws.

4. **Amend section 10 of the Religious Discrimination Bill.** Section 10 would allow religious organisations to discriminate against people of different faiths or of no faith, and use religious beliefs to cloak discrimination against people on the basis of sex, marital status, pregnancy, sexual orientation or gender identity. Section 10 must be amended to:
 - a. require all religious bodies to *actually* conform with the doctrines, tenets, beliefs or teachings of their religion, and make those doctrines, tenets, beliefs or teachings transparent, if they wish to take advantage of the exemption;
 - b. narrow the exemption only to bodies established for religious purposes;
 - c. clarify that commercial entities and activities which are commercial in nature are not exempted; and
 - d. include a balancing mechanism to accommodate the rights of individuals of different and no faith who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by these organisations.
5. **Delete the definition of ‘person’ in the Religious Discrimination Bill and clarify that complaints under the Religious Discrimination Bill can only be brought on behalf of a natural person.** Contrary to the approach under other federal anti-discrimination laws, the definition of ‘person’ in the Religious Discrimination Bill would grant religious and non-religious corporations a right to bring discrimination complaints directly and on their own behalf, handing them a powerful weapon to deploy their resources to silence individuals with different (or no) religious beliefs.
6. **Clarify that the Religious Discrimination Bill does not extend protections against discrimination on the basis of religious belief if the complainant is engaged in conduct which is otherwise unlawful.** It appears that the Religious Discrimination Bill may leave loopholes allowing people to counsel, promote, encourage or urge conduct which breaches laws, or to express beliefs in a manner which breaches laws.
7. **Delete proposed section 11(2) of the Charities Act 2013 (Cth) from the HR Amendments Bill.** This clause, which privileges views regarding marriage between a man and a woman, is unnecessary, offensive and may lead to unintended consequences for all charities engaged in advocacy.
8. **Delete proposed section 47C of the Marriage Act 1961 (Cth) from the HR Amendments Bill and ensure exemptions for religious educational institutions (including to protect LGBTQI+ teachers and students from discrimination) are considered together.** Further exemptions allowing religious schools to discriminate are not necessary, especially while exemptions currently exist for religious schools to expel students or teachers who are LGBTQI+.
9. **If a Freedom of Religion Commission is to be established, establish a LGBTQI+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.** Otherwise, enlarge the existing Human Rights Commissioner or Race Discrimination Commissioner roles to include responsibility for religious discrimination.

FURTHER INFORMATION ABOUT OUR SUBMISSION

Equality Australia has no objection to its submission being made public.

Further questions regarding our submissions can be addressed to:

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

INTRODUCTION

Equality Australia’s position on the exposure drafts of the Religious Freedom Bills is informed by our commitment to protecting and promoting human rights, and listening to the voice of our community. The Religious Freedom Bills must be amended to ensure they provide fair, balanced protection against discrimination to everyone without granting some a licence to discriminate. To this end, it is important to understand what protecting the freedom of religion requires, including for LGBTIQ+ people of faith, and ensuring that any new protections do not impact adversely on the rights of any Australian.

UNDERSTANDING FREEDOM OF RELIGION

It is essential when talking of freedom of religion that we are clear about what it is and what is not. It is not, and has never been, a licence to discriminate against others.

The freedom of religion is a fundamental human right.¹ It includes the right to hold a religious view, as well as the right *not* to profess any religion or belief.² It includes protections against being compelled to reveal your thoughts or adherence to a religion or belief.³

The freedom of religion includes the right to manifest religion or belief individually or in community with others and in public or private.⁴ However, the right to manifest a religion or belief may be limited if prescribed by law and if those limitations are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁵ Limitations must be applied only for those purposes and must be directly related and proportionate to the specific need on which they are predicated.⁶

Specifically, in respect of objections based on religious grounds, the International Covenant on Civil and Political Rights (ICCPR) does not explicitly refer to a right to ‘conscientious objection’. The UN Human Rights Committee says such a right can be derived from article 18 of the ICCPR in respect of military service (conscription), inasmuch as ‘the obligation to use lethal force’ may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief. However, the Committee notes that, when this right is recognised by law or practice, there must not be any differentiation among conscientious objectors based on the nature of their particular beliefs.⁷ The Committee has not expressed a view regarding conscientious objection in other areas.

However, in considering similar human rights protections, the European Court of Human Rights has affirmed that conscientious objection does not allow interfering with the rights of others, particularly in healthcare settings. In *Eweida and Ors v United Kingdom*,⁸ the European Court of Human Rights ruled against Mr McFarlane, an orthodox Christian counsellor, who refused to comply with his employer’s equal opportunities policy requiring him to provide sex therapy and relationship counselling services equally to all couples, including same-sex couples. The Court was strongly persuaded by the reason for the employer’s actions in dismissing him; namely to secure the implementation of its policy of providing a service without discrimination.⁹ Protecting the rights of people to access services without discrimination was therefore a legitimate reason for restricting Mr McFarlane’s freedom of religion. The European Court of Human Rights thereby refused to overrule previous determinations of United Kingdom courts to that effect.¹⁰

¹ *Universal Declaration of Human Rights (UDHR)*, art 18; *International Covenant on Civil and Political Rights (ICCPR)*, art 18.

² UN Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (article 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993 (**General Comment No 22**), [2].

³ General Comment No 22, [3].

⁴ General Comment No 22, [4].

⁵ ICCPR, art 18(3); see also UDHR, art 29(2).

⁶ General Comment No 22, [8].

⁷ General Comment No 22, [11].

⁸ *Case of Eweida and Ors v The United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) European Court of Human Rights, 27 May 2013 (**Eweida v UK**).

⁹ *Eweida v UK*, [109].

¹⁰ *Eweida v UK*, [38]-[40], [110]; *McFarlane v Relate Avon Ltd* [2008] UKEAT 0453 – 08 – 1912; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

SUPPORT AND RELIGIOUSITY WITHIN THE LGBTIQ+ COMMUNITY

When speaking of the freedom of religion, it is also essential that we do not introduce divisions where there are none. Many people of faith support and affirm LGBTIQ+ people and many LGBTIQ+ people are themselves people of faith. Freedom of religion means protection for all persons, whether of or no faith.

In preparing our submission, we conducted a survey of our supporters and received responses from over 2,800 people, including 646 people who identified as religious and 369 people who identified as spiritual or agnostic.¹¹ Moreover, of the 1,728 LGBTIQ+ respondents to our community survey, 367 (21%) specified having a religion, with a further 233 (13.5%) identifying themselves as either agnostic or spiritual. What was clear is that our supporters – whether religious or not – support the need to protect everyone from discrimination, but without giving some a licence to discriminate.

The degree of religious affiliation within the LGBTIQ+ community is also noted in other research. Of the 3,828 LGBTIQ+ respondents in the *Private Lives 2* national survey who identified a religious affiliation, around 60% identified themselves as having no religion or belief, with 32% identifying a specific religious affiliation (such as Catholic, Anglican, Buddhist, Uniting Church, Wicca, Presbyterian, Jewish and Baptist) and the remaining 8% identifying themselves as ‘other’.¹²

It is true, however, that LGBTIQ+ people and people who support them are particularly vulnerable to discrimination from religious institutions. LGBTIQ+ lives and relationships have been attacked, demeaned, degraded and abused in the name of religion. Some have attempted to ‘convert’ us,¹³ contrary to all credible health guidance.¹⁴

A 45-54 YEAR OLD TRANS WOMAN TOLD US:

“It sucks that I have to deal with the fallout from conversion therapy & abuse as a child-teenager (PTSD, Depression etc) as well as daily acts ranging from looks to dog s...t in my mailbox to being physically assaulted (4 times in 16 months... no arrests in any case). Yet if this gets up any legal recourse that may be open to me will be shut down by saying those magical words ‘Religious Freedom’. What about me? What about my rights to live and exist in peace without being verbally abused while shopping, being told ‘move on or die’, or worse – how is that fair?”

A 35-44 YEAR OLD WOMAN TOLD US:

“I am a practicing Catholic, a single mother with a gender diverse child that attends a Catholic school. I am scared about the implications of the Religious Discrimination Bill and do not believe it is necessary...”

¹¹ The survey was advertised via email to subscribers and promoted on the Equality Australia social media channels. The survey was first advertised on 16 September 2019 and was closed on 24 September 2019. Only responses from those who indicated an Australian postcode were included.

¹² W Leonard, M Pitts, A Mitchell, A Lyons, A Smith, S Patel, M Couch and A Barrett (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Melbourne: The Australian Research Centre in Sex, Health & Society, La Trobe University, available at arrow.latrobe.edu.au:8080/vital/access/services/Download/latrobe:35653/SOURCE01 (accessed 1 October 2019) (**Private Lives 2 Report**), p.16.

¹³ T Jones, A Brown, L Carnie, G Fletcher and W Leonard (2018) *Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia*, Melbourne: GLHV@ARCSHS and the Human Rights Law Centre, available at <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5bd78764eef1a1ba57990efe/1540851637658/LGBT+conversion+therapy+in+Australia+v2.pdf> (accessed 1 October 2019).

¹⁴ Australian Psychological Society (2015) *APS Position Statement on Psychological Practices that attempt to change Sexual Orientation*, available at www.psychology.org.au/getmedia/ebd486a2-761c-403c-bdef-406fda87dc4b/Position-Statement-Sexual-Orientation.pdf (accessed 1 October 2019); Psychotherapy and Counselling Federation of Australia (2014) *Position Statement on Therapeutic Support for Lesbian, Gay, Bisexual, Transsexual, Transgender and Intersex Individuals and their Families*, available at www.pacfa.org.au/wp-content/uploads/2019/03/Position-Statement-on-therapeutic-support-for-LGBTIQ-people.pdf (accessed 1 October 2019); Australian Medical Association (2002) *AMA Position Statement: Sexual Diversity and Gender Identity*; Royal Australian & New Zealand College of Psychiatrists (2015) *Sexual Orientation Change efforts*, available at www.ranzcp.org/news-policy/policy-and-advocacy/position-statements/sexual-orientation-change-efforts (accessed 1 October 2019); see also World Health Organisation, UNHCR, UNICEF and others (2015) ‘United Nations Entities Call on States to Act Urgently to End Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Adults, Adolescents and Children’, available at www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF (accessed 1 October 2019).

A 55-64 YEAR OLD STRAIGHT WOMAN TOLD US:

“As a teacher in a Christian school and mother to a gay school student, I consider myself an LGBTQI+ ally. I don’t think religious schools should be allowed to expel, refuse enrolment to or discriminate against LGBTQI students. Neither should they be allowed to fire, refuse to hire, refuse to promote or be allowed discriminate against LGBTQI staff who practise the same religion... Likewise LGBTQI staff/student allies of the same religion (e.g. those who support SSM) should be protected...”

RELIGIOUS DISCRIMINATION BILL

The Religious Discrimination Bill proposes to put in place federal anti-discrimination protections on the grounds of religious belief or activity in certain areas of public life. However, in its attempts to do so, the Religious Discrimination Bill goes too far in privileging the views of some people and institutions over the rights of others to live free from discrimination and, even, enjoy the freedom of religion equally.

If passed in its current form, the Religious Discrimination Bill would:

- reduce access to healthcare for all Australians by conferring upon health practitioners a national, broad and unprecedented freedom to refuse treatment to patients on religious grounds (see **Conscientious objection in healthcare**);
- hinder large private employers from ensuring their workplaces are inclusive and safe places to work for all employees, and a good place to do business or access services for their clients and customers (see **The ‘No Consequences for Conduct’ clause**);
- allow people who wish to express prejudiced, harmful or dangerous views about women, people with disabilities, LGBTQI+ people and others to hide behind a cloak of religious belief, free from any consequences for their conduct under federal, state and territory anti-discrimination laws (see **Overriding anti-discrimination protections**);
- allow religious organisations to discriminate against people of different faiths or of no faith, and use religious beliefs to cloak discrimination against people on the basis of sex, marital status, pregnancy, sexual orientation or gender identity (see **Exemptions for religious organisations**); and
- grant religious and non-religious corporations an unprecedented right to bring discrimination complaints directly and on their own behalf, handing them a powerful weapon to deploy their resources to silence individuals with different (or no) religious beliefs (see **Definition of a ‘person’ includes corporations**).

CONSCIENTIOUS OBJECTION IN HEALTHCARE (S 8(5) AND 8(6))

Subsections 8(5) and (6) of the Religious Discrimination Bill provide that:

- where state and territory laws allow conscientious objection in healthcare, employers of health practitioners and professional health bodies must not make rules inconsistent with those laws; and
- where state and territory laws are *silent* on conscientious objection, employers and professional bodies must not restrict or prevent a health practitioner from objecting to the provision of a health service on religious grounds, except where necessary to avoid an ‘unjustified adverse impact’ to the service or the patient’s health.¹⁵

The effect of subsections 8(5) and (6) is that, where state and territory laws are silent on conscientious objection in healthcare, employers and professional health bodies will find it much harder to impose policies or standards that require health practitioners to provide health services to everyone, regardless of the health practitioner’s personal religious views.

¹⁵ Religious Discrimination Bill, ss 8(5) and 8(6).

They will also make it harder for employers and professional bodies to impose conditions on how conscientious objections should be handled, such as requirements to refer patients or provide advance notice of an objection. Subsections 8(5) and (6) are reinforced by subsection 31(7) that could prevent compliance with such policies and standards as comprising an inherent requirement of a job.

Given state and territory laws are silent on conscientious objection in most cases, these new laws will affect almost *all* health services for almost *everyone*. Yet state and territory laws are silent on conscientious objection in the majority of cases for a very good reason. It is an anathema to public health if your doctor, nurse, pharmacist or other health professional could simply refuse to treat you because they disagreed with who you were or the kind of treatment you needed. Patient care must never be compromised to prioritise the personal religious beliefs of health professionals. Yet subsections 8(5) and (6) of the Religious Discrimination Bill do just that. They introduce unprecedented and unbalanced laws which will allow health professionals to refuse or delay on religious grounds a wide range of health services to people who need them. Subsections 8(5), 8(6) and 31(7) must be removed.

(a) Reintroducing discrimination in healthcare by the backdoor

Subsections 8(5) and (6) of the Religious Discrimination Bill will reintroduce discrimination by the backdoor against patients who are susceptible to unfavourable religious views, especially LGBTIQ+ people, women, unmarried people, and anyone seeking access to reproductive or sexual health services or other services which do not conform with religious views.

Subsections 8(5) and (6) apply to *any* health service provided by a doctor, dentist, midwife, nurse, occupational therapist, optometrist, pharmacist, physiotherapist, podiatrist, psychologist or Aboriginal and Torres Strait Islander health practitioner.¹⁶ They allow health practitioners to refuse to provide services not only because they object to the kind of treatment being requested by the patient (such as an abortion, euthanasia, blood transfusion, contraception etc.), but because they object to *whom* the treatment will be given (such as a single mother, LGBTIQ+ person or the children of a same-sex couple). In effect, these laws condemn *both* the sin and the sinner to substandard treatment in healthcare.

There is nothing in the Religious Discrimination Bill which would prevent, for example, a health practitioner refusing to provide health services to:

- an unmarried mother because her nurse believes sex before marriage is sinful;
- a divorced person, or person having an extra-marital affair, because his psychologist believes marriage must be a life-long, monogamous union;
- the child of a lesbian couple, or a single woman or lesbian seeking access to fertility services, because their doctor believes children should only be born and raised in a married family comprising of a mother and a father;
- a trans woman seeking hormones because her pharmacist believes the biological sex of a person defines their God-given gender;
- a gay man seeking access to pre-exposure prophylaxis (**PrEP**) or post-exposure prophylaxis (**PEP**) because his doctor believes sex outside marriage is a sin;
- a woman because her male Muslim physiotherapist, or a man because his female Muslim physiotherapist, is prohibited from touching unrelated persons of the opposite sex; and
- anyone who requests access to contraception, such as a woman or girl seeking the morning after pill, because a doctor or nurse believes contraception is religiously forbidden.

Employers and professional bodies that mandate health practitioners treat all patients without their personal views clouding professional obligations will be required to navigate a range of potential objections from health practitioners on religious grounds. All the while, these employers (comprising of public and private hospitals, clinics and health practices) will remain liable under other discrimination laws for refusing services to patients on the grounds of their sex, sexual orientation, gender identity, intersex status, marital status, or disability.¹⁷ These employers will have to navigate a workforce of health professionals refusing to treat patients on religious grounds and a group of patients who, rightly, will complain about health

¹⁶ Religious Discrimination Bill, s 5(1) (definition of *health service*).

¹⁷ *Sex Discrimination Act 1984* (Cth), s 22; *Disability Discrimination Act 1992* (Cth), s 24.

services being denied or delayed to them by religious health employees. This clause is simply unworkable and risks creating chaos and confusion in our health system.

Subsections 8(5) and (6) also send a terrible message to groups who have historically avoided accessing health services precisely because they fear rejection and condemnation by health professionals. In particular, these laws will set back decades of progress in ensuring mainstream health services are accessible to LGBTIQ+ people. The social science research on this issue is telling:

- Young people who are sexuality and/or gender diverse are significantly more likely to experience more barriers in their access to healthcare than other young people (including but not exclusively due to cost, having to ask their parents, embarrassment, difficulty getting to health professionals and feeling judged).¹⁸ In a 2018 study conducted by the University of Sydney and University of Technology Sydney, many of the 426 young people who were sexuality and/or gender diverse described experiences of stigma and discrimination. This group (and especially young transgender people) reported feeling misunderstood by health professionals who lacked understanding about their experiences and needs.¹⁹ In another 2014 study of transgender and gender diverse young people, 188 respondents were asked to provide reasons for not seeing a healthcare professional. Among the reasons, 33% reported a fear they would not be understood, 30% reported past negative experiences and 23% reported that the language used by health professionals made them feel uncomfortable or angry.²⁰ This mirrors international research which shows that transgender people delay their access to medical care due to discrimination, and are often involved in educating their own health professionals about transgender care.²¹
- Higher rates of suicide, depression or anxiety among LGBT populations are compounded by interpersonal and institutional experiences of discrimination. In a 2015 national consultation conducted by the Australian Human Rights Commission, nearly 25% of the 1,518 survey respondents reported being refused a service (of some kind) on the basis of their sexual orientation, gender identity and/or intersex status. The Australian Human Rights Commission noted that experiences of interpersonal and institutional discrimination in settings such as schools, healthcare facilities, and structural barriers to informed and appropriate healthcare were among the key factors that contributed to the higher risk of poor mental health outcomes for LGBT people.²²
- Not all LGBTI people feel safe disclosing their sexuality, even to their regular GP. In the 2015 consultation conducted by the Australian Human Rights Commission, 55% of the 1,390 respondents reporting having felt uncomfortable disclosing their sexual orientation in a clinical healthcare setting (e.g. to a doctor), and nearly 50% of trans and gender diverse participants also reported having felt uncomfortable disclosing their gender identity.²³ Of the 3,835 participants in the *Private Lives 2* national survey on LGBT health and wellbeing, almost 75% reported having a regular GP. However, 18.5% of those respondents also reported that their GP did not know about their sexuality, and a further 12.8% did not know if their regular GP knew about their sexuality.²⁴ Conversely, in a University of Sydney

¹⁸ M Kang, F Robards, L Sancic, K Steinbeck, S Jan, C Hawke, G Luscombe, M Kong and T Usherwood (2018) *Access 3: Young people and the health system in the digital age – final research report*, Department of General Practice Westmead, The University of Sydney and the Australian Centre for Public and Population Health Research, The University of Technology Sydney, Australia, available at https://www.uts.edu.au/sites/default/files/2019-04/Access%203_young%20people%20and%20the%20health%20system%20in%20the%20digital%20age.pdf (accessed 1 October 2019) (**Access 3 Report**) p.54.

¹⁹ Access 3 Report, p.64.

²⁰ E Smith, T Jones, R Ward, J Dixon, A Mitchell and L Hillier (2014) *From Blues to Rainbows: Mental health and wellbeing of gender diverse and transgender young people in Australia*, Melbourne: The Australian Research Centre in Sex, Health and Society, La Trobe University, available at <http://arrow.latrobe.edu.au:8080/vital/access/services/Download/latrobe:42299/SOURCE01> (accessed 1 October 2019), p.73.

²¹ For example, one US study of 6,450 transgender people found that 28% had postponed necessary medical care when sick or injured due to discrimination by healthcare providers and 50% reported having to teach their doctors about transgender care: J Grant, LA Mottet and J Tanis, et al (2011) *Injustice at Every Turn: A report of the national transgender discrimination survey*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, available at www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (accessed 1 October 2019), p.72.

²² Australian Human Rights Commission (2015) *Resilient Individuals: Sexual orientation, gender identity & intersex rights – national consultation report*, Sydney: Australian Human Rights Commission, available at www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf (accessed 1 October 2019) (**Resilient Individuals Report**), p.18.

²³ Resilient Individuals Report, p.33.

²⁴ Private Lives 2 Report, p.41.

study of 1,272 lesbian, bisexual and queer women, those respondents who were out to their regular GP were more likely to be very satisfied (49%) than those who were not out (30%).²⁵ Accordingly, there is an association between women who feel comfortable disclosing their sexuality and those who report a more positive relationship with their regular GP.

Any laws which drive people back into the closet when accessing health services will adversely affect the delivery of effective healthcare. However, it is not only LGBTQ+ people who will fear the religious condemnation of their health professional. Anyone who fears their doctor, nurse, midwife, occupational therapist, optometrist, pharmacist, physiotherapist, podiatrist, psychologist or Aboriginal and Torres Strait Islander health practitioner will judge them may hold back disclosing critical information about their lifestyle which is relevant to their healthcare. A 16-year-old girl may not disclose that she has had sex outside of marriage, losing an opportunity to obtain information about contraception. A 50-year-old married man may not disclose information about his extramarital sexual activities when presenting to a clinic with flu-like systems, which could be a sign of HIV seroconversion, putting himself and his wife at risk. The fear that a health practitioner may judge you is not helped by a law which literally grants health practitioners the right to do so.

A 35-44 YEAR OLD GAY MAN TOLD US:

“As a nurse myself my sexuality or religious beliefs should never come in the way of me doing my job. And I expect the same from others with other beliefs or preferences. Health care is an industry where your personal beliefs and preferences should never come into play. It’s peoples lives and that’s what needs to be the most important part.”

A 35-44 YEAR OLD QUEER WOMAN TOLD US:

“I support people’s right to religious freedom so long as it doesn’t harm anyone else. Wearing a sign of your religion - fine. Health workers treating patients differently because of the patient’s sexual orientation/gender identity/etc - not okay. Also, if someone has religious views against contraception or giving hormones to trans people they should not become a pharmacist. They should get a job that their religious views don’t conflict with instead.”

A 55-64 YEAR OLD TRANS WOMAN TOLD US:

“I am a Trans person. I am a woman dependent, for medical reasons, on the administration of hormones for the rest of my life. Indeed, to withdraw them would lead to forced premature aging and a severe and rapid reduction in my quality of life and my ability to work and care for my family. I do not need to live in fear that a change of my circumstances should lead me to be dependent on a medical practitioner who religiously objects to providing me with a prescription for those necessary hormones. Such treatment I would regard as a violent attack on my body and human rights.”

(b) Throwing out the balance achieved in state and territory law

Subsections 8(5) and 8(6) also throw out the careful balance that has been achieved in state and territory laws which allow conscientious objection in very limited circumstances. Subsections 8(5) and (6) start from the premise that the absence of a right to conscientiously object in state and territory laws is a ‘silence’ which must be filled by Commonwealth law. It is not. The ‘silence’ is deliberate and effects a prohibition on the personal views of health practitioners (whether religious or not) interfering in the services they deliver to patients. Moreover, even where conscientious objections are permitted under state and territory laws, these laws generally craft a clear and consistent set of requirements if a conscientious objection is to be raised, which ensures patient needs are not compromised. Subsections 8(5) and (6) do not achieve this careful balance.

²⁵ J Mooney-Somers, RM Deacon, P Scott, K Price and N Parkhill (2018) *Women in Contact with the Sydney LGBTQ Communities: Report of the SWASH lesbian, bisexual and queer women’s health survey 2014, 2016, 2018*, Sydney: Sydney Health Ethics, University of Sydney, available at www.acon.org.au/wp-content/uploads/2019/03/Sydney-SWASH-Report-2014-16-18_FA.pdf (accessed 1 October 2019), p.31.

Annexure A to this submission sets out examples of state and territory laws which allow conscientious objection in healthcare. They are very few in number and are almost exclusively concerned with life-and-death procedures such as abortion and euthanasia. By contrast, subsections 8(5) and (6) introduce an unbridled right to refuse treatment across a wide range of health services well beyond life-and-death procedures.

Subsection 8(6) also introduces an unsatisfactory test on when a refusal to provide health services is permitted. This test relies on an employer or professional body proving that a restriction on refusing treatment is ‘necessary to avoid unjustifiable adverse impacts’ on the service or patient’s health. The words ‘necessary’ and ‘unjustifiable’ themselves place an extremely high burden of proof on the employer or professional body, which is pitched in favour of the health professional and against the patient. This law expressly assumes that some impact on patient health may be justified. But how can *any* impact to patient health, on account of an individual health practitioner’s personal religious views, ever be justified?

By contrast, state and territory laws place the burden of ensuring patient needs are not compromised at the foot of the conscientious objector. They generally require conditions to be met before a health professional can refuse to assist in the provision of certain treatments, such as a duty to refer the patient to another practitioner or at least notify the patient of their objection.²⁶ They also generally place an absolute and overriding obligation on health professionals to render assistance or provide treatment – even if contrary to their religious beliefs – when necessary to preserve life or avoid serious injury.²⁷ These conditions are clear and ensure continuity of care for patients.

Subsection 8(6) contains none of that certainty, shifts the onus on employers and professional bodies to advocate for their patients, and will allow services to be denied or delayed while employers, professional bodies and health practitioners debate whether a requirement is ‘necessary to avoid an unjustifiable adverse impact’. This is not a satisfactory, patient-informed approach, especially for time-critical health services (such as contraception, PEP or in emergencies). It also ignores that a patient may be unable to access healthcare from another practitioner owing to cost, disability or distance.

Worse still, patients will be entirely excluded from any debate on whether the employer or professional body has struck the right balance. Any religious discrimination complaint brought by a health practitioner, which challenges their employer or professional body’s rules, will only involve that employer or professional body and the health practitioner. The patient who has been denied or delayed a health service will have no say or standing in that complaint. Therefore, the patient will never have the opportunity to argue that their right to healthcare should have been prioritised over the personal religious views of the health professional.

A 25-34 YEAR OLD GAY MAN TOLD US:

“Personally, I’d like to see these things spelt out a little clearer. I believe that doctors and nurses are there to look after the sick not to moralise over their patients. However, I do recognise that some doctors or nurses may not want to participate in non-essential or non-emergency abortions or the facilitation of someone’s end of life rights. I think it is possible to achieve this balance without negatively impacting the community.”

²⁶ For example, *Abortion Law Reform Act 2008* (Vic), s 8; *Health Act 1993* (ACT), s 84A and *Termination of Pregnancy Act 2018* (Qld), s 8. See also Annexure A.

²⁷ For example, *Criminal Law Consolidation Act 1935* (SA), s 82 and *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 6. See Annexure A.

A 45-54 YEAR OLD QUEER MAN TOLD US:

“If a health professional chooses not to administer contraceptive services/advice, they MUST provide a referral to a REPUTABLE alternative that will provide the service the client wants, and at the equivalent or lower cost to the client.”

(c) Inconsistent with Australia’s international obligations and interfering with state/territory responsibility

Subsections 8(5) and (6) are not supported by any international human rights obligation owed by Australia on religious freedom, which begs the question as to what basis the federal government should interfere in an area largely regulated by the states and territories.

International human rights law does not recognise a general right to conscientious objection on religious grounds. It accepts a right of conscientious objection to military service, derived from article 18 of the ICCPR, only inasmuch as the ‘use of lethal force’ may conflict with the freedom of conscience and religious belief.²⁸ This is not surprising given an objection to participating in activities which involve the taking of life is *in conformity* with other internationally-recognised human rights, such as the right to life.²⁹

As stated above, subsections 8(5) and (6) do not limit themselves to health services concerned with the taking of life, or even health services such as abortion or euthanasia over which there are debates regarding when life begins and should be allowed to end. These provisions apply to the provision of *any* service performed by a wide variety of health professionals.³⁰

Rather than working in *conformity* with fundamental human rights such as the right to non-discrimination³¹ and the right to health,³² these provisions depart from Australia’s fundamental obligation that health services which are made available, must be made available to all without discrimination.³³ They also depart from the requirement that, even where conscientious objection to military service is to be allowed, it must not differentiate among conscientious objectors on the basis of the nature of their particular beliefs.³⁴ As these provisions only substantively protect conscientious objection on religious grounds,³⁵ it differentiates among conscientious objectors and privileges only those with objections based on *religious* doctrines, tenets, beliefs, or teachings. These provisions do not faithfully implement any of Australia’s international human rights obligations, but in fact depart from them.

Although subsections 8(6) and (5) seek to apply to health practitioners registered or licensed state or territory laws,³⁶ the Commonwealth has no general power to make laws with respect to health under section 51 of the Australian Constitution.³⁷ To the extent the Commonwealth is relying on its external affairs power,³⁸ it finds no support for these provisions from international human rights instruments, which are silent on a general right to conscientious objection in healthcare and

²⁸ General Comment No 22, [11].

²⁹ UDHR, art 3; ICCPR, art 6(1).

³⁰ Religious Discrimination Bill, s 5(1) (definition of *health service*).

³¹ ICCPR, art 2(1) and (3); *International Convent on Economic, Social and Cultural Rights (ICESCR)*, arts 2(2).

³² ICESCR, art 12.

³³ ICESCR, art 2(2); see also UN Committee on Economic, Cultural and Social Rights, *General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, [5]-[6], [32].

³⁴ General Comment No 22, [11].

³⁵ Religious Discrimination Bill, s 5(1) (definition of *health practitioner conduct rule*). The only conditions, requirements or practices which are dealt with by the proposed conscientious objection provisions concerns those that would have an effect of restricting or preventing conscientious objections that “*may reasonably be regard as being in accordance with the doctrines, tenants, beliefs or teachings of the health practitioner’s religion.*”

³⁶ Religious Discrimination Bill, s 5(1) (definition of *health practitioner*).

³⁷ See, for example, the Health Practitioner Regulation National Law which necessitated legislation passed by each of the states and territories: *Health Practitioner Regulation National Law Act 2009 (QLD)*; *Health Practitioner Regulation National Law (NSW)*; *Health Practitioner Regulation National Law (Victoria) Act 2009 (VIC)*; *Health Practitioner Regulation National Law (ACT) Act 2010 (ACT)*; *Health Practitioner Regulation (National Uniform Legislation) Act 2010 (NT)*; *Health Practitioner Regulation National Law (Tasmania) Act 2010 (Tas)*; *Health Practitioner Regulation National Law (South Australia) Act 2010 (SA)* and *Health Practitioner Regulation National Law (WA) Act 2010 (WA)*.

³⁸ Australian Constitution, s 51(xxix).

which prohibit discrimination between those with religious convictions and those without. The human right which is protected is the right to hold a belief or religion and to manifest that religion, subject to limitations that prevent the manifestation of religion in a manner limiting the fundamental rights and freedoms of others. The rights of others to healthcare (including non-discriminatory healthcare) is such a right. These provisions therefore interfere with the legislative competence of states and territories to regulate health professional conduct, contrary to Australia's international human rights obligations. This leaves open the question of their constitutionality, given substantial inconsistency with an international obligation deprives a law from being capable of characterisation as a law which implements Australia's international obligations under the external affairs power.³⁹

(d) Contrary to professional guidance

Subsections 8(5) and (6) would leave doubtful the lawfulness of professional guidance issued by health professional bodies, such as the Australian Medical Association (**AMA**) and the Australian Nursing and Midwifery Federation (**ANMF**).

The AMA's policy position on conscientious objection emphasises a doctor's 'ethical obligation to minimise disruption to patient care and never use a conscientious objection to intentionally impede patients' access to care'.⁴⁰ Doctors must provide 'medically appropriate treatment in an emergency situation, even if that treatment conflicts with their personal beliefs and values'.⁴¹ Doctors who invoke conscientious objections must 'make every effort in a timely manner to minimise the disruption in the delivery of health care and ensuing burden on colleagues and other health care professionals'.⁴² A doctor with a conscientious objection is instructed to comply with the following requirements:

- inform the patient of their objection, preferably in advance or as soon as practicable;
- inform the patient that they have the right to see another doctor and ensure the patient has sufficient information to enable them to exercise that right;
- take whatever steps are necessary to ensure the patient's access to care is not impeded;
- continue to treat the patient with dignity and respect, even if the doctor objects to the treatment or procedure the patient is seeking;
- continue to provide other care to the patient, if they wish;
- refrain from expressing their own personal beliefs to the patient in a way that may cause them distress; and
- inform their employer, or prospective employer, of their conscientious objection and discuss with their employer how they can practice in accordance with their beliefs without compromising patient care or placing a burden on their colleagues.⁴³

The ANMF policy position on conscientious objection provides that, in exercising their conscientious objection, 'nurses, midwives and assistants in nursing must take all reasonable steps to ensure that the persons preference, quality of care, safety, and advance care directives are not compromised'⁴⁴ and 'should express a desire not to participate in [a] ... procedure, in advance if possible'.⁴⁵ Nurses and midwives 'must not refuse to carry out urgent life-saving measures or procedures' and 'should give serious consideration to avoiding employment positions where they can foresee that a situation of conscientious objection may arise with relative frequency'.⁴⁶ Nurses and midwives accepting employment

³⁹ *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at [38] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

⁴⁰ Australian Medical Association (2019) *Position Statement – Conscientious Objection*, available at <https://ama.com.au/position-statement/conscientious-objection-2019> (accessed 1 October 2019) (**AMA Conscientious Objection Position Statement**), [1.5].

⁴¹ AMA Conscientious Objection Position Statement, [2.1].

⁴² AMA Conscientious Objection Position Statement, [2.2].

⁴³ AMA Conscientious Objection Position Statement, [2.3].

⁴⁴ Australian Nursing and Midwifery Federation (2017) *Conscientious Objection*, available at www.anf.org.au/documents/policies/P_Conscientious_Objection.pdf (accessed 1 October 2019) (**ANMF Conscientious Objection Position Statement**), [2].

⁴⁵ ANMF Conscientious Objection Position Statement, [4].

⁴⁶ ANMF Conscientious Objection Position Statement, [5].

positions ‘where they know they may be called on to be involved in situations at variance with their beliefs, have a responsibility to inform their employer’.⁴⁷

In terms of the conduct of medical professionals generally, the Medical Board of Australia’s (MBA) Code of Conduct stipulates a number of restrictions against doctors allowing their moral or religious views to interfere in the care they provide to patients. These include not prejudicing patient care because they believe that a patient’s behaviour has contributed to their condition; upholding their duty to a patient and not discriminating on medically irrelevant grounds (such as race, religion, sex or other grounds); giving priority to investigating and treating patients on the basis of clinical need and the effectiveness of proposed investigations or treatment; and informing patients and, if relevant, colleagues of any conscientious objection and not impeding access to treatments that are legal.⁴⁸

In respect of abortion specifically, the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG) says that while no member of a health team should be expected to perform abortion against his or her personal convictions ‘all have a professional responsibility to inform patients where and how such services can be obtained and to be respectful of the women’s decision.’⁴⁹

If subsections 8(5) and(6) of the Religious Discrimination Bill are passed in their current form, the requirements placed on health practitioners by professional bodies and employers could now be subject to challenge. Subsection 31(7) could also prevent requirements to comply with professional guidance from comprising an inherent requirement of the job.

For example:

- Victorian abortion legislation requires conscientious objectors to inform and refer a patient wishing to access an abortion.⁵⁰ The AMA guidelines also require a doctor to ‘take whatever steps are necessary to ensure the patient’s access to care is not impeded’ and ‘refrain from expressing their own personal beliefs to the patient in a way that may cause them distress’.⁵¹ The ANWF guidelines also require a nurse to ‘inform their employer’ if they know they may be involved in situations at variance with their beliefs.⁵² Under subsection 8(5), these additional requirements imposed by the AMA and ANWF are arguably inconsistent with Victorian laws, and therefore could constitute unlawful religious discrimination if enforced by the AMA/ANWF or an employer.
- South Australian laws allow a health practitioner to refuse to comply with an advanced care directive on conscientious grounds.⁵³ The AMA guidelines would also require a doctor to ‘inform the patient of their objection, preferably in advance or as soon as practicable’, ‘inform ... and discuss with their employer how they can practice in accordance with their beliefs without compromising patient care or placing a burden on their colleagues’, and render ‘medically appropriate treatment in an emergency situation’.⁵⁴ Meanwhile, the ANWF guidelines would also require a nurse to ‘take all reasonable steps to ensure that the persons preference, quality of care, safety, and advance care directives are not compromised’.⁵⁵ Under subsection 8(5), these additional requirements imposed by the AMA and ANWF are arguably inconsistent with South Australian laws, and therefore could constitute unlawful religious discrimination if enforced by the AMA/ANWF or an employer.

⁴⁷ ANMF Conscientious Objection Position Statement, [6].

⁴⁸ Medical Board of Australia (2014) *Good Medical Practice: A code of conduct for doctors in Australia*, available at www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx (accessed 1 October 2019) (**MBA Code of Conduct**), s 2.4.

⁴⁹ Royal Australian and New Zealand College of Obstetricians and Gynaecologists (2005) *Abortion*, available at [https://ranzocg.edu.au/RANZCOG_SITE/media/RANZCOG-MEDIA/Women%27s%20Health/Statement%20and%20guidelines/Clinical%20-%20Gynaecology/Abortion-\(C-Gyn-17\)Review-March-2019.pdf?ext=.pdf](https://ranzocg.edu.au/RANZCOG_SITE/media/RANZCOG-MEDIA/Women%27s%20Health/Statement%20and%20guidelines/Clinical%20-%20Gynaecology/Abortion-(C-Gyn-17)Review-March-2019.pdf?ext=.pdf) (accessed 1 October 2019) (**RANZCOG Abortion Policy**), p.4.

⁵⁰ *Abortion Law Reform Act 2008* (Vic), s 8.

⁵¹ AMA Conscientious Objection Position Statement, [2.3].

⁵² ANMF Conscientious Objection Position Statement, [4].

⁵³ *Advance Care Directive Act 2013* (SA), s 37.

⁵⁴ AMA Conscientious Objection Position Statement, [2.1], [2.3].

⁵⁵ ANMF Conscientious Objection Position Statement, [2].

- Tasmanian laws allow doctors and nurses to conscientiously object to participating in abortions except in emergency situations.⁵⁶ The AMA guidelines would also require the doctor to, among other things, ‘inform the patient that they have the right to see another doctor and ensure the patient has sufficient information to enable them to exercise that right’.⁵⁷ The RANZCOG would require its members to ‘inform patients where and how such services can be obtained’.⁵⁸ The MBA Code of Conduct would at least require the doctor to inform the patient of their objection and not impede their access to treatment.⁵⁹ The ANWF guidelines would also require a nurse to ‘express a desire not to participate in that procedure, in advance if possible.’⁶⁰ Under subsection 8(5), these additional requirements imposed by the AMA, ANWF, MBA and RANZCOG are arguably inconsistent with Tasmanian laws, and therefore could constitute unlawful religious discrimination if enforced by a professional body or an employer.
- Western Australia allows health practitioners to conscientiously object to participating in abortions without prescribing any conditions.⁶¹ Under subsection 8(5), all the additional requirements imposed by the AMA, ANWF, MBA and RANZCOG are arguably inconsistent with Western Australian laws, and therefore could constitute unlawful religious discrimination if enforced by a professional body or an employer.

Crucially, the vast majority of state and territory laws are silent on the refusal of health services on religious or conscientious grounds outside of start and end of life scenarios. Therefore, the lawfulness of any professional guidance which restricts or prevents the ability of health professionals to conscientiously object will depend on whether those rules are necessary to avoid an unjustifiable adverse impact to the service or the patient’s health. Restrictions on conscientious objection, such as those which impose requirements to inform patients and employers in advance or refer patients to others who will treat them, may therefore be subject to challenge on a hospital-by-hospital, clinic-by-clinic or practice-by-practice basis.

A 35-44 YEAR OLD BISEXUAL TOLD US:

“The argument that faith should allow discrimination for a part of humanness is not only against contemporary best practice in healthcare for example, but I am sure falls outside the code of ethics of many disciplines. It certainly does for me in a counselling / psychotherapy based discipline. My own values, biases, prejudices etc need to be constantly reflected on and must never influence my care for clients. The same should go for any others in the medical, education, mental health, community health and services etc.”

A 55-64 YEAR OLD HETEROSEXUAL WOMAN TOLD US:

“While I do not object to people holding personal religious views, I believe that professionals and organisations - health workers, teachers, charities, schools, for example, should uphold professional standards which have obligations to respond to the people they care for - not influenced by private views.”

(e) Conventional discrimination protections are enough

Subsections 8(5) and (6) are unnecessary and unworkable, given the ordinary ‘reasonableness’ indirect discrimination test in subsections 8(1) is sufficient to protect the religious beliefs of health professionals.

⁵⁶ *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 6.

⁵⁷ AMA Conscientious Objection Position Statement, [2.3].

⁵⁸ RANZCOG Abortion Policy, p.4.

⁵⁹ MBA Code of Conduct, s 2.4.

⁶⁰ ANMF Conscientious Objection Position Statement, [4].

⁶¹ *Health (Miscellaneous Provisions) Act 1911* (WA), s 334(2).

The reasonableness test in subsection 8(1)(c) has the benefit of allowing all the relevant circumstances of the case to be taken into account, which means not only the impact on the health practitioner's religious beliefs, the service and the patient, but broader considerations such as:

- the availability and cost of alternative health services in the neighbouring vicinity;
- the type of treatment which is objected to by the health practitioner, and whether the health practitioner is willing to provide it in some cases but not others; and
- the burden on the hospital, clinic or practice, and other colleagues, of honouring the conscientious objection.

It also creates a level playing field where the health practitioner's religious beliefs are not prioritised over and above the patient's rights to access healthcare. The 'unjustifiable adverse impacts' test prioritises the rights of the religious objector over a patient's right to health, contravening the very objects of the Act which are directed to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.⁶²

RECOMMENDATION

Delete subsections 8(5), 8(6) and 31(7) from the Religious Discrimination Bill.

THE 'NO CONSEQUENCES FOR CONDUCT' CLAUSE (S 8(3) AND 8(4))

Subsections 8(3) and (4) of the Religious Discrimination Bill prevent large private employers with revenues of \$50 million or more from restricting or preventing their employees from making certain religious statements outside of work hours, unless the employer can show its employee conduct rules are necessary for avoiding 'unjustifiable financial hardship' to the employer. These provisions are legally unorthodox, unnecessary, undermining of workplace inclusion and carry reputational and other risks for large employers.

Subsections 8(3) and (4) will allow people who wish to express prejudiced, harmful or dangerous views to hide behind a cloak of religious belief without facing consequences for their conduct. They will undercut the ability of employers to promote inclusive and respectful workplaces and avoid harmful conduct affecting their employees, clients or customers.

Subsections 8(3) and (4) will also lead to several bizarre outcomes. First, they protect a broader range of statements which could be made by employees based on their religious views, thus discriminating against employees who have no religion. Second, they only protect statements made by employees in large private organisations which means that employees in small organisations or the public sector – even those with religious beliefs – have less protection than other employees.

Subsections 8(3) and (4) also displace the standard 'reasonableness' requirement found in indirect discrimination protections, thus removing a key mechanism which allows for the balancing of rights and responsibilities. They protect statements which may be seriously prejudicial to an employer's staff, clients, customers or mission, without allowing that prejudice to be taken into account in determining whether the employer's rules were justified.

Subsections 8(3) and (4) are reinforced by subsections 8(2)(d) and 31(6). Subsections 31(6) prevents a requirement to comply with an employer conduct rule that otherwise offend subsections 8(3) and (4) from being an inherent requirement of the job. All these subsections must be removed.

(a) No consequences for prejudiced, harmful or dangerous comments

Subsections 8(3) and (4) will make it harder for employers to ensure their employees do not express prejudiced, harmful or dangerous views outside of work which interfere with the rights or dignity of other employees, clients or customers, or the employer's mission. It will be harder for employers to promote inclusive workplace cultures that affirm the dignity of all in the workplace.

Subsections 8(3) and (4) will protect statements of belief informed by religion or about religion no matter how outlandish or dangerous, provided they are made in good faith, are not malicious, and are not likely to harass, vilify, incite hatred or

⁶² Religious Discrimination Bill, s 3(2).

violence a person or group of persons, or counsel, promote, encourage or urge serious offences.⁶³ Religious statements of belief do not have to *actually* accord with any doctrines, tenets, beliefs or teachings of a religion, provided they ‘may reasonably be regarded’ as doing so.⁶⁴ The types of religious beliefs a person may claim to hold are limitless, given the absence of any definition of a religious belief.⁶⁵ These provisions give people who want to express prejudiced, harmful or dangerous views the licence to do so by hiding behind a cloak of religious belief, and without having to face any consequences for doing so.

For example:

- A large health promotion agency may not be able to prevent a Christian Scientist from encouraging ‘prayer-based healing’ over the immunising of children,⁶⁶
- A large health organisation may not be able to prevent an executive from tweeting ‘homosexuality is an abomination in the eyes of God’ or ‘AIDS is a punishment from God’, despite LGBTIQ+ people being a key demographic for the organisation;
- A media organisation may not be able to discipline a high-profile radio presenter who is a non-believer from expressing the view off-air that the Virgin Mary is a liar who fell pregnant ‘behind a camel shed’;⁶⁷
- A corporation may not be able to prevent its employees from sharing religiously-inspired statements, such as:
 - *in response to a sexual assault*: ‘The uncovered meat is the problem. If she was in her room, in her home, in her hijab, no problem would have occurred’;⁶⁸ or
 - *regarding the Black Saturday bushfires*: ‘God’s conditional protection has been removed from the nation of Australia, in particular Victoria, for approving the slaughter of innocent children in the womb’.⁶⁹

Being free to express your views does not mean that there should be no consequences to you if those views could cause serious harm to others or the organisation they work for. Importantly, as submitted below, harm cannot only be measured in financial terms to the employer.

A 35-44 YEAR OLD QUEER WOMAN TOLD US:

*“I believe an employer should be able to prohibit *as a condition of employment* the expression of homophobic views in public, which includes public social media posts, outside of work hours. A workplace has a duty of care to current or future ‘customers’ and employees, in accordance with workplace legislation and codes of conduct, and an employee demonstrating this behaviour poses a potential risk. Additionally public acts of homophobia out of hours can negatively impact an employer’s reputation, work place culture, and recruitment of staff... It is possible to follow a religion without breaking discrimination law or workplace agreements. People do it already every day. If an employee chooses not to they are responsible for the consequences.”*

⁶³ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*) and 8(4).

⁶⁴ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*).

⁶⁵ Religious Discrimination Bill, s 5(1) (definition of *religious belief or activity*).

⁶⁶ See, for example, Christian Science Committee on Publication, Submission to the Australian Human Rights Commission’s *Freedom of Religion and Belief in the 21st Century* project, Submission no. 1815, available at https://www.humanrights.gov.au/sites/default/files/content/frb/submissions/Sub1815.Christian_Science_Committee_on_Publication.doc (accessed 1 October 2019), pp.6-7.

⁶⁷ ‘Christian and Muslim protesters gather outside KIIS FM studios demanding Kyle Sandilands be fired over his offensive comments about the Virgin Mary’, *Daily Mail*, 23 September 2019, available at www.msn.com/en-au/news/australia/christian-and-muslim-protesters-gather-outside-kis-fm-studios-demanding-kyle-sandilands-be-fired-over-his-offensive-comments-about-the-virgin-mary/ar-AAHG1mM (accessed 1 October 2019).

⁶⁸ ‘Ethnic leader condemn Muslim cleric’, *The Age*, 26 October 2006, available at www.theage.com.au/national/ethnic-leaders-condemn-muslim-cleric-20061026-ge3fal.html (accessed 1 October 2019).

⁶⁹ S Nicholls and E Dunn, ‘Others didn’t have a prayer’, *Sydney Morning Herald*, 2 October 2009, available at www.smh.com.au/national/others-didnt-have-a-prayer-20091001-ger9.html (accessed 1 October 2019).

ANOTHER 35-44 YEAR OLD QUEER WOMAN TOLD US:

"I don't think an employer should be able to prohibit expressing views on social media, however, the company should be allowed to outline consequences of doing so – eg setting a code of conduct, making it clear that doing so would reflect poorly on the company, that discriminatory views may result in termination of employment etc."

(b) The 'No Consequences' clause is only concerned with financial harm to the employer

Employers will have to prove that they are likely to suffer 'unjustifiable financial hardship' if they wish to prevent employees expressing religious views outside of work hours which adversely impact their organisations or other employees, clients or customers. But harm cannot only be measured by the employer's bottom line.

The 'unjustifiable financial hardship' test fails to take account all relevant considerations in determining whether the employer was justified to enforce their rules. The test of 'unjustifiable financial hardship' ignores any non-financial impacts which are experienced or likely to be experienced by the employer, such as damage to reputation and brand, damage to staff morale or to the mission of the organisation. As the test is only directed to hardship experienced by an *employer*, it also ignores any financial and non-financial impacts which are experienced or likely to be experienced by other employees, clients or customers. For example, it would ignore the impact on colleagues of their boss expressing views such as 'AIDS is a punishment from God', 'homosexuality is a sin' and 'disability is a sign of being possessed by the devil'⁷⁰.

The test also ignores a range of other relevant considerations which may determine whether the employer's rules are justified, for example:

- the seniority of the employee making the statement – it treats statements made by senior executive or by a graduate employee in the same way;
- whether the views expressed are contradictory to the employer's mission or commercial interests, or the missions or commercial interests of key stakeholders, clients or customers; and
- whether the views are being expressed in public or largely private forums.

Many of the people who responded to our survey highlighted the importance of flexibility and taking into account all relevant circumstances. While a majority (both of all and religious respondents) 'strongly agreed' or 'agreed' that an employer should be allowed to prohibit its employees from expressing anti-LGBTIQ religious views on social media outside of workhours, many provided comments saying that it really depends on the circumstances, including the public profile of the person making the comments.

A 35-44 YEAR OLD AGNOSTIC LESBIAN TOLD US:

"People should be allowed to express their own views on social media if they include a disclaimer (opinions are my own and not the views of my employer.) Except where they have signed a contract explicitly agreeing not to bring their employer, profession etc into disrepute... if you agree to a contract stick to it."

A 45-54 YEAR OLD STRAIGHT WOMAN TOLD US:

"If a person has a platform / profile as a direct result of their employment, they should respect their employer's position on social media use."

⁷⁰ Annie Guest, 'Disabled Australians subjected to hate crimes', *ABC News*, 7 August 2010, available at www.abc.net.au/news/2010-08-07/disabled-australians-subjected-to-hate-crimes/935662 (accessed 1 October 2019).

A 55-64 YEAR OLD GAY MAN TOLD US:

"I don't agree with an employer being able to limit what employees say on social media, unless that person is a public representative of the company, or the person has identified themselves as an employee of the company on their social media page. Such as a high profile employee who represents their employer at all times, and they have signed a contract with a code of conduct, that specifically outlines what they can and cannot say publicly as a representative of that company."

A 55-64 YEAR OLD CHRISTIAN LESBIAN TOLD US:

"On the issue of employees freedom to voice religious views on social media that contradict their employers' public stance, I think this depends on the role and the public profile of the employee. CEOs, senior management, board members, high profile employees who are expected to be ambassadors for the company etc have a responsibility to represent the company 24/7 that other employees do not."

(c) The 'No Consequences' clause discriminates among employees

Subsections 8(3) and (4) discriminate among employees based on their religion and where they work. They afford religious employees in large private organisations a greater level of protection than non-religious employees, or any employee working in smaller organisations or the public sector.

Subsections 8(3) and (4) defines 'statements of belief' effectively as any statements made by religious people generally conforming with their faith, or statements made by non-religious people *about* religion.⁷¹ That is, while religious people are protected when speaking *on any topic* informed by their faith, non-religious people are only protected when expressing views *about* religion. These subsections entrench, rather than remove, discrimination on the basis of religious belief.

Subsections 8(3) and (4) apply only to employees employed by private sector employers with revenue of \$50 million or more.⁷² An employee in a company with revenues of \$49.9 million would have less protection than an employee in company with revenue of \$50 million. This distinction is entirely arbitrary.

A 35-44 YEAR OLD STRAIGHT WOMAN TOLD US:

"Public servants are bound by the APS code of conduct, meaning they cannot really publicly comment about policy in the space they work, regardless of their opinions on the matter, as they are meant to be neutral... So if the Government can gag the opinion of public servants, they cannot implement legislation that potentially allows hate speech..."

(d) Conventional discrimination protections are enough

Subsections 8(3) and (4) are entirely unorthodox and unnecessary. Conventional discrimination protections would provide adequate protection for employees who wish to express religious views (whether at or outside of work), while ensuring the rights of others are not unreasonably affected.

The standard indirect discrimination test in subsection 8(1) would already make unlawful any unreasonable employer rules which had the effect of limiting the expression of religious beliefs or activities. Conventional discrimination provisions would avoid the issues addressed above by protecting all employees regardless of their religious beliefs or where they work. Importantly, the in-built 'reasonableness' test would allow for the balancing of all relevant considerations, including any harm to an employee's freedom of religion from an employer imposing rules limiting its expression.

⁷¹ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*).

⁷² Religious Discrimination Bill, s 5(1) (definition of *relevant employer*).

RECOMMENDATION

Delete subsections 8(2)(d), 8(3), 8(4) and 31(6) from the Religious Discrimination Bill.

OVERRIDING ANTI-DISCRIMINATION PROTECTIONS (S 41)

Section 41 of the Religious Discrimination Bill will override anti-discrimination protections in federal, state and territory laws for everyone to privilege certain ‘statements of belief’ made by religious people or about religion. Section 41 will introduce enormous complexity in discrimination complaints, increasing the cost and effort for all involved.

(a) No protection from religious discrimination

Section 41 will protect statements informed by religious views which would otherwise constitute discrimination on grounds such as race, sex, disability, sexual orientation, gender identity, intersex status and marital status, provided they are made in good faith, are not malicious, and are not likely to harass, vilify, incite hatred or violence a person or group of persons, or counsel, promote, encourage or urge serious offences.⁷³ Like above, religious statements of belief do not have to *actually* accord with any doctrines, tenets, beliefs or teachings of a religion, provided they ‘may reasonably be regarded’ as doing so,⁷⁴ and the types of religious beliefs a person may claim to hold are limitless.⁷⁵ While religious people will be afforded protection under section 41 for making statements *on any topic* informed by their beliefs, non-religious people will only be afforded the protection of section 41 when making statements about religion. These provisions give people who want to express prejudiced, harmful or dangerous views the licence to do so without any consequence. For race- and disability-based discrimination, section 41 will introduce religious exemptions in federal anti-discrimination laws for the very first time.

The sort of statements which may be protected under section 41 include:

- a boss saying to their employee ‘I don’t agree with your lifestyle because the Bible says homosexuality is a sin’;
- a teacher saying to a child with same-sex parents ‘I believe God intended children to have a mother and a father’;
- a disability support worker saying to the parent of a child with autism ‘I believe prayer can cure your child’s disability’;
- a doctor saying to a trans patient ‘I believe God made men and women and assisting you to transition is wrong’;
- a social worker or counsellor saying encouraging a client to pray for healing for their ‘sexual brokenness’.

There is also nothing in section 41 which defines what conduct or otherwise constitutes a ‘statement’ and whether it is exclusively limited to verbal or written communications, not accompanied by other acts or omissions (such as refusals of service). Section 41 also does not clarify whether a statement of belief can be used as evidence in support of a discrimination claim, even if it cannot be the sole basis for one.

The Queensland Human Rights Commission provides a useful example to illustrate this point. In one conciliated case, a woman made a complaint about being fired by her employer for being a lesbian. The employer stated that he found it offensive that the applicant and her partner had once held hands when they left his premises, and he had also written religious quotes condemning homosexuality in a book she was reading. The employer agreed that he did not like the fact that she was a lesbian but maintained that it was not the reason she was sacked. The matter ultimately settled with compensation of \$1000 being paid to the woman.⁷⁶ If section 41 existed in law at the time of her complaint, it is not clear whether the comments made by the employer (such as his view that he found her relationship ‘offensive’ and his writing of

⁷³ Religious Discrimination Bill, ss 5(1) (definition of *statement of belief*) and 41(2).

⁷⁴ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*).

⁷⁵ Religious Discrimination Bill, s 5(1) (definition of *religious belief or activity*).

⁷⁶ Queensland Human Rights Commission, *Sexuality case studies*, available at www.qhrc.qld.gov.au/resources/case-studies/sexuality (accessed 1 October 2019).

religious quotes) could have been considered as evidence in support of the woman's discrimination complaint, or whether section 41 would have otherwise defeated this woman's discrimination complaint.

A MESSAGE SENT TO EQUALITY AUSTRALIA ON 13 SEPTEMBER 2019:

"I look forward to religious protection then I can say what I want to your kind legally. These are the consequences of your Ssm so get use to it..."

A 55-64 YEAR OLD HETEROSEXUAL CHRISTIAN WOMAN TOLD US:

"I am a retired public servant. I worked for decades with youth at risk and the unemployed. I have sadly seen the horrible damage caused by bigotry discrimination and bullying of people who are different usually by family and people close to them. I am also a grandmother and optimist and my message to all young LGBTQI people there is nothing wrong with you and there is a place for you in this world. We need to set important standards around homophobia, racism and domestic violence not remove them."

A 55-64 YEAR OLD MOTHER OF A GAY SON TOLD US:

"I am a Social Worker and see first hand the adverse effects on mental health this constant questioning and debating is having on LGBTQIA+ people."

(b) Introducing complexity and cost into discrimination complaints

By introducing a federal defence to discrimination complaints involving statements of belief, section 41 will undermine the accessibility of state and territory-based anti-discrimination mechanisms.

States and territories generally provide low cost, low risk forums for people bringing discrimination complaints. These are characterised by a system of tribunals where costs orders cannot be made – except in exceptional circumstances – for or against any party.⁷⁷ Save for matters that are appealed on narrow questions of law, discrimination matters can largely be heard and resolved without ever going to court.

The High Court of Australia has confirmed that state tribunals cannot hear disputes about federal matters,⁷⁸ which is what section 41 would introduce. A dispute about whether section 41 applies to oust an anti-discrimination complaint founded in state law will therefore require a court ordered resolution. That will introduce, by necessity, additional costs and effort, and the unattractive possibility of costs orders being made against a losing party. This will only serve to discourage complaints from being brought by people who are genuinely aggrieved and increase the costs for all parties in complaints which are brought.

Given the drafting of section 41, there is a very high likelihood of matters being brought to court. For example, section 41 allows protection for certain statements of belief, but not those which are malicious, harassing, vilifying or inciting of hatred or violence against a person or group of persons. None of those terms are defined by the legislation, and where the line might be drawn between a statement a belief which is permitted and one which is not, will require testing in a court. Rather than providing a defence to discrimination complaints, section 41 just introduces complexity and costs for all concerned.

(c) Section 41 is not necessary

Section 41 is not necessary given it duplicates the work of other provisions in state and territory laws which protect freedom of expression, including for people of faith.

⁷⁷ See, for example, *Civil and Administrative Tribunal Act 2013* (NSW), s 60.

⁷⁸ *Burns v Corbett* [2018] HCA 15 at [49]-[50] per Kiefel CJ, Bell and Keane JJ; [76]-[79] per Gageler J.

For example:

- Section 55 of the Tasmanian *Anti-Discrimination Act 1997* excludes public acts, done in good faith for any purpose in the public interest from constituting a contravention of section 17(1), being conduct which offends, humiliates, intimidates, insults or ridicules another person based on a protected attribute.
- Section 49ZT(2)(c) of the NSW *Anti-Discrimination Act 1977* excludes any public act, done reasonably and in good faith, for any purpose in the public interest (including discussion or debate about and expositions of any act or matter) from constituting homosexual vilification.

Sections 55 and 49ZT provide examples of much wider and non-discriminatory defences already allowing the public expression of religious, political and other views, and the benefit of raising those defences in the context of a relatively informal, inexpensive and no-costs jurisdiction.⁷⁹ Section 41 would only serve to muddy the waters, by disturbing the balance between free speech and hate speech which states and territories have already resolved.

Notably, the two examples cited by the Government in support of this clause were discrimination complaints that were ultimately withdrawn or discontinued.⁸⁰ There is no evidence to support the unprecedented and radical step of introducing a new federal law to override federal, state and territory anti-discrimination laws, with confusing and complicated provisions that have uncertain legal effect, and which have negative consequences for vulnerable communities. Nor does it achieve the intention that the Attorney-General has given to it, namely avoiding a situation where the process becomes a punishment.⁸¹

RECOMMENDATION

Delete section 41 of the Religious Discrimination Bill.

EXEMPTIONS FOR RELIGIOUS ORGANISATIONS

The Religious Discrimination Bill is replete with exemptions for religious schools, charities and other organisations allowing them to discriminate on the basis of religious belief or activity while non-religious organisations cannot. These include sections 10, 28, 34 and 35. While appropriate allowance must be given to religious bodies which facilitate the communal expression of individual religious beliefs, religious bodies should not be allowed to discriminate against others of different faiths or of no faith where their activities are commercially driven and/or government funded.

(a) A licence to discriminate for religious bodies

Section 10 of the Religious Discrimination Bill allows religious bodies to discriminate against people on the basis of their religious belief or activity, if that conduct is done in 'good faith' and 'may reasonably be regarded' as being in accordance with the doctrines, tenets, beliefs or teachings of the religion relating to which the religious body is conducted. Religious educational institutions, and religious bodies (such as registered charities) not engaged solely or primarily in commercial activities, will be covered by this section, in addition to other potential exemptions (such as section 28 relating to registered charities).

In effect, section 10 places a gigantic hole in the legislation, allowing religious bodies to discriminate within their organisations against people who hold different religious beliefs (including those who are not religious). For legislation aimed at protecting the fundamental *human* right to religious freedom, section 10 prioritises institutional views over the individual beliefs of the people who work, study or interact with these organisations. This is not freedom of religion, but a licence, granted to some institutions, to discriminate against individuals on religious grounds.

⁷⁹ See *Civil and Administrative Tribunal Act 2013* (NSW), s 60; *Anti-Discrimination Act 1998* (Tas), s 95.

⁸⁰ Attorney-General for Australia, The Hon Christian Porter MP, Speech on the Religious Discrimination Bill 2019, 29 August 2019, available at www.attorneygeneral.gov.au/Media/Pages/religious-discrimination-bill-speech-29-aug-2019.aspx (accessed 2 October 2019).

⁸¹ *Ibid*: 'These complaints were ultimately withdrawn or discontinued. But the process here was the punishment – the message sent is that before you say something on a public issue from a traditional religious underpinning be warned that you can face a long costly action designed to achieve a state sanctioned punitive response for expressing your religious view.'

Section 10 allows religious schools and bodies to disguise the real reasons for their discrimination against employees, students and customers based on race, sex, marital status, pregnancy, sexual orientation, gender identity or intersex status. Already, religious bodies enjoy unjustified exemptions from other anti-discrimination laws that laws them to hire, fire, expel or refuse to serve people because they are divorced, unmarried and pregnant, gay, bisexual or trans. The Religious Discrimination Bill will allow more avenues for discrimination against vulnerable communities by religious bodies on a broader basis. These bodies will simply be able to discriminate against these same groups of people by saying, 'sorry, your religious views do not accord with ours'.

In using untested and novel language, section 10 adds uncertainty and expands protection to a class of potentially dubious claims regarding religious beliefs. Coupled with exemptions for registered charities under section 28, religious clubs under section 34, voluntary bodies under section 35, and the ability to seek temporary exemptions under section 36, the Religious Discrimination Bill establishes a double standard whereby religious organisations may freely discriminate but non-religious organisations may not. At the very least, section 10 must be amended to accommodate the communal manifestation of religion by individuals (which is a protected *human* right), without granting large, powerful religious organisations a licence to discriminate against others based on their religious beliefs or lack of belief.

i) Section 10 does not protect the freedom of religion for everyone

In prioritising the right of religious schools and bodies to discriminate based on their institutional beliefs, section 10 fails to protect everyone's freedom to believe or not believe, and practice religion or not practice religion, as they wish.

As stated above, the freedom of religion is a fundamental *human* right. It includes the right to manifest a religion individually or in community with others and encompasses acts of worship, observance, practice and teaching.⁸² Worshipping extends to ritual and ceremonial acts giving direct expression to beliefs, as well as various practices integral to such acts, such as building places of worship. Observance and practice includes things such as following dietary regulations, wearing distinctive clothing or head coverings and participating in rites and rituals. Teaching includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.⁸³ All of these are, of course, limited by such proportionate legal proscriptions as are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁸⁴

Section 10 seeks to exclude religious organisations (other than religious schools) which conduct primarily or solely commercial activities from being able to rely on the exemption. In so doing, section 10 recognises that the further away from religious worship, observance, practice or teaching that a body goes, the less it should be permitted to encroach on the fundamental rights of individuals to practice their own religion (or no religion). Unfortunately, section 10 does not import the same balancing approach for religious educational institutions such as schools and universities, and those religious bodies which have commercial or government-funded activities as part of their overall mission.

So, for example, section 10 appears to allow:

- a Christian school to refuse to hire a science teacher of the Jewish, Muslim or no faith, or fire a staff member who converted from Christianity;
- an Islamic school to refuse to employ a female Muslim teacher who refuses to wear the hijab;
- a Jewish school to refuse to enrol students of Jewish converts.

The case of Mrs Rachel Colvin, which is currently before the Victorian Civil and Administrative Appeals Tribunal, demonstrates the very issue of institutions imposing religious beliefs on individuals employed by them.⁸⁵ Mrs Colvin, a committed Christian with religious beliefs in favour of same sex marriage, alleges she was forced to resign after the non-denominational Christian school at which she was employed required her to agree to and abide by an amended statement of faith stating that marriage must be between 'a man and a woman'. The statement of faith was amended and imposed on Mrs Colvin following the national marriage postal survey, some 10 years after she was first employed by the school, and does

⁸² General Comment No 22, [4].

⁸³ General Comment No 22, [4].

⁸⁴ ICCPR, art 18(2).

⁸⁵ For a summary of the case, see equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/.

not conform with her own religious beliefs.⁸⁶ Regardless of the outcome in Mrs Colvin's case, it highlights the risks to freedom of thought, conscience and religion when religious schools are granted a broad licence to discriminate against employees. This concerning prioritisation of the organisation over the individual's right to freedom of thought, conscience and religion is reflected in the drafting of section 10.

The delicate balance with which the law must approach these issues is evident from Equality Australia's own survey responses. Our supporters were strongly opposed to the idea of firing someone already working at a religious school who converted to a different faith. Similarly, the notion that a religious charity might be allowed to hire only workers of a particular faith, or serve only clients of a particular faith when delivering government-funding services, was strongly rejected. Section 10 does not presently achieve a balance which adequately protects the religious freedom of individuals over the views of religious institutions.

ii) Disguising other types of discrimination

The biggest risk inherent in section 10 is the licence it gives to religious schools and bodies to discriminate lawfully against persons who should otherwise be protected from such discrimination. We are concerned that religious schools and bodies will be able to discriminate lawfully in hiring, firing, refusing or expelling workers, students and clients by simply imposing requirements that these people accept and abide by the religion of the institution. A personal characteristic or 'protected attribute' (such as being gay, trans or unmarried and pregnant) may also be taken by a religious body to impute a certain religious belief. This is concerning given the test for section 10 sets a lower threshold than the current exemption in the *Sex Discrimination Act 1984* (Cth).

Discrimination is notoriously difficult to prove. Rarely will an organisation reveal the real reasons for its adverse treatment. Individuals will be rejected from positions because they are not the 'right fit'. Individuals will be excluded in their workplace or denied promotions because they are not a 'team player'. Now, religious schools and bodies will be able to lawfully add 'they don't share our beliefs' to their list of reasons, and the required basis for such discrimination is (as set out further below) set at a lower threshold than other exemptions available for religious bodies in anti-discrimination laws.

Sadly, the purge of those who do not share institutional religious views is commonplace and has been exacerbated by the marriage postal survey. Following the marriage postal survey, religious institutions have taken to amending their policies to reinforce discriminatory views towards LGBTIQ+ people and others. For example, the Sydney Anglican Church passed a policy prohibiting the use of its hundreds of properties for same-sex wedding receptions, yoga derived from Hindu practices or by Christian groups 'whose basis of faith' differed from the four principles constituting the Church's Doctrine of Salvation.⁸⁷ It stopped short of banning Indigenous smoking ceremonies.⁸⁸ The rationale for the policy was squarely explained by Bishop Stead as an attempt by the Church to 'rely on existing anti-discrimination exemptions'.⁸⁹ In Mrs Colvin's case, the non-denominational school at which she worked amended its statement of faith and imposed it on staff who were already employed at the school as a condition of their ongoing employment.⁹⁰ Exemptions for religious bodies do not promote religious freedom; they stifle it by granting religious institutions a legal way to exclude anyone who does not share their views.

⁸⁶ Ibid.

⁸⁷ Synod of the Anglican Diocese of Sydney (2018) *Property Use Policy: A Policy of the Synod of the Diocese of Sydney*, 23 October, available at www.sds.asn.au/sites/default/files/Property%20Use%20Policy_1.pdf?doc_id=NTczOTc= (accessed 2 October 2019), cls 14(c) and 20(c).

⁸⁸ J Baird and S Boltje (2018) 'Sydney Anglicans to ban SSM, yoga and Indigenous smoking ceremonies on all church property', *ABC News*, 19 October, available at <https://www.abc.net.au/news/2018-10-19/sydney-anglicans-banning-ssm-yoga-on-all-church-property/10397748> (accessed 2 October 2019); J Baird and S Boltje (2018) 'Sydney Anglicans ban same-sex marriage on hundreds of church properties', *ABC News*, 23 October, available at www.abc.net.au/news/2018-10-23/sydney-anglicans-banning-ssm-on-thousands-properties/10418108 (accessed 2 October 2019).

⁸⁹ J Baird and S Boltje (2018) 'Sydney Anglicans ban same-sex marriage on hundreds of church properties', *ABC News*, 23 October, available at www.abc.net.au/news/2018-10-23/sydney-anglicans-banning-ssm-on-thousands-properties/10418108 (accessed 2 October 2019).

⁹⁰ See <https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/>.

A FORMER TEACHER AT A CATHOLIC SCHOOL WROTE TO US ABOUT HER STORY:

"I'm a Catholic lesbian and my LGBTIQ+ advocacy work is underpinned by tenets of the faith I grew up with such as "love thy neighbour" and "do not judge others." ... [A] heavily pregnant colleague [of mine at a Catholic school in Melbourne] was told to hide her pregnancy because, although living with her male partner for many years, wasn't married. She wore a heavy woollen jumper over summer to hide her growing bump. Unfathomable."

A 17 YEAR OLD CHRISTIAN LESBIAN TOLD US:

"I'm seventeen, and as far as finding work goes in my future, this bill has me genuinely scared if I'm totally honest. I want to become a high school teacher, and if schools are given the power to be able to refuse to hire me based on my (visibly butch) lesbian identity, I know that my chances of being hired will massively decrease as I will be judged on my looks and who I love INSTEAD of my ability to help students learn. I'm also incredibly worried for my transgender & gender-diverse friends who will have an even harder time accessing the healthcare they need, not to mention how much more difficult it will make my home life (dealing with family members who will feel vindicated to discriminate and be considerably homophobic/transphobic in the name of faith) as well as the home life and relationships of thousands of LGBTI Australians."

A 55-64 YEAR OLD HETEROSEXUAL CHRISTIAN WOMAN TOLD US:

"As a teacher in a Christian school and mother to a gay school student, I consider myself an LGBTIQ+ ally. I don't think religious schools should be allowed to expel, refuse enrolment to or discriminate against LGBTIQ students. Neither should they be allowed to fire, refuse to hire, refuse to promote or be allowed discriminate against LGBTIQ staff who practise the same religion - whatever that means! Sadly, some Christian denominations/churches, eg. Sydney Anglicans, believe other Christian denominations/churches, eg. Uniting Church Christians, are 'going to hell!' Aaaggghhh! Likewise LGBTIQ staff/student allies of the same religion (eg. those who support SSM) should be protected. Unfortunately, these things will continue - subtly - even if it were possible to legislate against them."

iii) Section 10 is broad, legally uncertain and untested

Section 10 differs from comparable religious body exemptions currently existing in other discrimination laws, leaving its scope broader in some respects and largely untested and uncertain in other respects. It needs more clarity in its drafting to more closely connect the need for the discrimination to religious doctrine and exclude commercial entities and government-funded services from being able to discriminate against others on the basis of their religious beliefs (or lack thereof).

First, section 10 merely requires the religious body to show that its conduct 'may reasonably be regarded as being in accordance...' with its doctrines, tenets, beliefs or teachings. By contrast, under the *Sex Discrimination Act 1984* (Cth) and *Aged Discrimination Act 2004* (Cth), a religious body must show that its conduct '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'.⁹¹ That is, the threshold for meeting the exemption under the Religious Discrimination Bill is much more relaxed.

Secondly, this Bill seeks to differentiate between religious bodies (other than religious educational institutions) whose activities are primarily or solely commercial, and those which are not. While we welcome the intention behind this drafting, its application needs more clarity. The Explanatory Note suggests goods, services or facilities made available to the public on a fee basis, such as those provided by a 'halal butcher' or 'Christian-run bakery', would not be allowed to discriminate.⁹² Religious hospitals and aged care providers are also apparently excluded.⁹³ However, all of these examples rely on an

⁹¹ *Sex Discrimination Act 1984* (Cth), s 37; *Age Discrimination Act 2004* (Cth), s 35.

⁹² Explanatory Notes to the Exposure Draft of the Religious Discrimination Bill 2019 (**Religious Discrimination Bill EN**), [172].

⁹³ Religious Discrimination Bill EN, [174].

interpretation of section 10 which first recognises commercial bodies, such as shops, hospitals and aged care providers, as potential 'religious bodies' eligible for an exemption under section 10. Here the Religious Discrimination Bill departs from the drafting in the *Sex Discrimination Act* limiting religious exemptions to only those bodies 'established for religious purposes'.⁹⁴

The drafting of section 10 also does not remove exemptions from religious bodies in receipt of government funding, as the *Sex Discrimination Act* does in respect of Commonwealth-funded aged care services,⁹⁵ or for students already enrolled at a religious school, as Queensland,⁹⁶ Tasmania,⁹⁷ the ACT⁹⁸ and Northern Territory⁹⁹ anti-discrimination laws currently do.

The problems with section 10 arise because it is trying to do too many things, for too many bodies, which are otherwise very different in size, type and purpose. This clause appears to be covering everything from actual religious orders, churches and places of worship¹⁰⁰ (where there exist sound policy reasons for a strong protection of religious freedom in community with others) to schools,¹⁰¹ charities,¹⁰² shops,¹⁰³ and 'religiously-affiliated businesses'¹⁰⁴ (where the protection of religious freedom is more likely to butt up against the rights of others and must necessarily be limited).¹⁰⁵

Section 10 is a clause which first needs to be narrowed to organisations established properly for religious purposes and which actually conform with their religious doctrines, and which then needs to accommodate the rights of individuals of different and no faith who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by these organisations.

(b) Other exemptions

Section 10 stands alongside a number of other exemptions, which together, have the effect of establishing a double standard between the treatment of religious and non-religious organisations. These exemptions provide a wide basis for registered charities,¹⁰⁶ religious clubs¹⁰⁷ and voluntary bodies¹⁰⁸ to discriminate on the basis of religious belief, and to seek further temporary exemptions to do so.¹⁰⁹ These exemptions, on their own, do not necessarily raise issues, although they do reinforce the importance of ensuring exemptions, such as those in section 10, protect the rights of individuals of different and no faith who are already employed, enrolled or interact with such organisations or rely on government-funded services delivered by these organisations.

Section 39(1) of the Religious Discrimination Bill is also novel in that it allows the Attorney-General to vary or revoke a temporary exemption. This is an unprecedented power, not existing in any other federal anti-discrimination law which allows temporary exemptions.¹¹⁰ It could politicise the granting of exemptions to religious institutions and threatens the

⁹⁴ *Sex Discrimination Act 1984* (Cth), s 37(1)(d).

⁹⁵ *Sex Discrimination Act 1984* (Cth), s 37(2).

⁹⁶ *Anti-Discrimination Act 1991* (Qld), s 41.

⁹⁷ *Anti-Discrimination Act 1998* (Tas), s 51A.

⁹⁸ *Discrimination Act 1991* (ACT), s 46(1).

⁹⁹ *Anti-Discrimination Act 1992* (NT), s 30(2).

¹⁰⁰ Religious Discrimination Bill EN, [178], [179].

¹⁰¹ Religious Discrimination Bill, s 10(2)(a).

¹⁰² Religious Discrimination Bill, s 10(2)(b).

¹⁰³ Religious Discrimination Bill EN, [172].

¹⁰⁴ Religious Discrimination Bill EN, [175].

¹⁰⁵ Religious Discrimination Bill EN, [173], [181].

¹⁰⁶ Religious Discrimination Bill, s 28.

¹⁰⁷ Religious Discrimination Bill, s 34.

¹⁰⁸ Religious Discrimination Bill, s 35.

¹⁰⁹ Religious Discrimination Bill, s 36.

¹¹⁰ *Sex Discrimination Act 1984* (Cth), s 44; *Disability Discrimination Act 1992* (Cth), s 55; *Age Discrimination Act 2004* (Cth), s 44.

statutory independence of the Australian Human Rights Commission. It is unnecessary given that decisions of the Commission are reviewable by the Administrative Appeals Tribunal,¹¹¹ and also subject to judicial review by the courts.

(c) A better way forward

The latitude given to religious bodies to discriminate against others of different faiths or no faith are currently framed too broadly.

Firstly, section 10 should be amended to:

- require all religious bodies to *actually* conform with the doctrines, tenets, beliefs or teachings of their religion, and make those doctrines, tenets, beliefs or teachings transparent, if they wish to take advantage of the exemption;
- narrow the exemption only to bodies established for religious purposes; and
- clarify that commercial entities and activities which are commercial in nature are not exempted.

Secondly, section 10 must be amended to include a better balancing mechanism to accommodate the rights of individuals of different and no faith who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by these organisations.

RECOMMENDATION

Section 10 should be amended to:

- **require all religious bodies to *actually* conform with the doctrines, tenets, beliefs or teachings of their religion, and make those doctrines, tenets, beliefs or teachings transparent, if they wish to take advantage of the exemption;**
- **narrow the exemption only to bodies established for religious purposes;**
- **clarify that commercial entities and activities which are commercial in nature are not exempted; and**
- **include a balancing mechanism to accommodate the rights of individuals of different and no faith who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by these organisations.**

DEFINITION OF A 'PERSON' INCLUDES CORPORATIONS

The Religious Discrimination Bill defines a 'person' with reference to the *Acts Interpretation Act 1901* (Cth), such that a body politic or body corporate, as well as individuals, can bring complaints of unlawful religious discrimination directly and on their own behalf.¹¹²

No other federal anti-discrimination law explicitly defines a 'person' as including an incorporated body, or grants a direct right to corporations to bring anti-discrimination actions on their own behalf. The effect doing so in the context of religious discrimination would be to introduce the possibility for a multitude of unintended consequences, handing new rights to large institutions in a manner not intended by the legislation and unjustified by international human rights law. Religious organisations (and organisations with *no* religious belief, which are also protected)¹¹³ come in various shapes and sizes, with many holding a privileged position in society. It is not appropriate to provide a blanket right to bring a discrimination complaint to all corporations based on religious belief.

Leaving aside the uncertainty of how an incorporated body (such as a company) can be said to have a religion, such bodies could ostensibly bring discrimination complaints on the basis that they have or do not have a religious belief across a wide

¹¹¹ Religious Discrimination Bill, s 40.

¹¹² Religious Discrimination Bill, s 5(1) (definition of *person*); *Acts Interpretation Act 1901* (Cth), s 2C.

¹¹³ Religious Discrimination Bill, s 5(1) (definition of *person* and *religious belief or activity*) and use of the word 'person' in ss 13-26.

range of areas, including in goods and services, accommodation and in government programs (including funding grants and policies). For example:

- a multimillion-dollar Christian charity could seek to challenge to a government program which made its funding contractually conditional on performing services to a standard which conflicted with its ostensible religious beliefs (such as a requirement that aged care service providers deliver culturally safe services to their residents cognisant of their religious background);
- an institution with no religious belief could seek to challenge a benefit offered by the Commonwealth Government, such as a funding grant for chaplains in schools.

Religious belief and expression are personal attributes: companies do not have religions. While the right to manifest a religion includes the right to do so *communally* with others, it is nonetheless an individual human right exercisable together with other humans. It is not a right granted to corporations under any international *human* rights obligation.¹¹⁴ Human rights attach to the individual rather than corporations or other legal entities.

The aim of protecting members of an organisation who are refused services on religious grounds would already be protected by existing mechanisms under the *Australian Human Rights Commission Act 1986* (Cth) for bringing representative complaints.¹¹⁵ If an association comprising members who were, for example, Muslim or Christian, were refused access to a facility for the purposes of communal prayer, a member of the association could challenge that refusal on behalf of the class of members. Accordingly, it is not necessary to extend the definition of a 'person' to include the association itself, given each of its members have themselves been refused access to the facility for the purposes of a lawful religious activity (prayer).

Further, if people of a particular faith characteristically practice their religion communally in association with others, discrimination based on these characteristics is also protected under s 6 of the Religious Discrimination Bill. So, for example, discrimination against a characteristic of the religion (such as forming associations, or membership to a youth or prayer group) could also be protected.

RECOMMENDATION

Delete the definition of 'person' in the Religious Discrimination Bill.

Clarify that complaints under the Religious Discrimination Bill can only be brought on behalf of a natural person.

CLARIFYING THE EFFECT OF THE BILL ON OTHER LAWS

There is a need to clarify the effect of the Religious Discrimination Bill on other federal, state and territory laws given limitations in the scope of section 27 and the potential for section 109 of the Australian Constitution to render state or territory laws inoperative to the extent of any inconsistency with federal law.

The Religious Discrimination Bill principally protects against discrimination based on *lawful* religious activity.¹¹⁶ But it also protects against discrimination on the basis of characteristics associated with a religious belief,¹¹⁷ and there is no express requirement that those characteristics (if they involve particular types of conduct) be lawful in order to obtain protection. Whether that means that the Religious Discrimination Bill could protect some forms of unlawful conduct characteristically associated with a particular religious belief is therefore not clear.

Section 27 of the Religious Discrimination Bill also exempts from religious discrimination protection expressions of religious beliefs which counsel, promote, encourage or urge conduct that would constitute a 'serious offence'. However, a serious

¹¹⁴ See, for example, the Preamble to the ICCPR provides: "Recognizing that these rights derive from the inherent dignity of the *human person*, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free *human beings* enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, ... Agree upon the following articles...".

¹¹⁵ *Australian Human Rights Commission Act 1986* (Cth), s 46P(2).

¹¹⁶ Religious Discrimination Bill, s 5(1) (definition of *religious belief or activity*).

¹¹⁷ Religious Discrimination Bill, s 6.

offence is defined to exclude any offences with less than 2 years' imprisonment.¹¹⁸ Accordingly, it appears that the Religious Discrimination Bill might provide discrimination protection to those would counsel, promote, encourage or urge conduct that would breach:

- safe access zone laws, given the penalties for these offences in states such as NSW and Victoria are less than two years;¹¹⁹ and
- professional obligations, such as obligations of confidence or duties of care to patients, given these are generally not offences at all.

Therefore, it is not hard to imagine that a person with a particular religious view, who is disciplined at work for making certain statements, could nonetheless bring a claim for religious discrimination. For example, a social worker or counsellor who is disciplined by their employer for saying to a client that homosexuality is a sin and can be 'corrected' through prayer; or a bank employee who is disciplined by their employer for urging staff to publicly disclose details of a loan made to an abortion clinic which would otherwise be confidential.

RECOMMENDATION

Clarify that the Religious Discrimination Bill does not extend protections against discrimination on the basis of religious belief where the complainant is engaged in conduct which is otherwise unlawful.

CONSEQUENTIAL AMENDMENTS BILL AND HR AMENDMENTS BILL

AMENDMENTS TO THE CHARITIES ACT

The Government has proposed amendments to the *Charities Act 2013* (Cth) to "clarify" that the definition of a charity does not necessarily disqualify bodies which have a purpose of engaging in, or promoting, activities that support a 'traditional' view of marriage.¹²⁰ This stems from a purported concern that bodies which have a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy are disqualified from the definition of a charity.¹²¹

Such an amendment is entirely unnecessary, undermines the position of LGBTIQ+ people in society and carries the legal risk of unintended consequences. Despite years of marriage being defined as a union between a man and a woman, no charity was disqualified for advocating in *favour* of marriage equality and against that government policy. Section 11 of the *Charities Act* already provides clarity, by way of an explanatory note, that activities are not contrary to public policy merely because they are contrary to government policy. Accordingly, there is no risk of a charity being disqualified merely because it advocates for marriage being between a man and a woman.

This view was also shared by the Australian Charities and Not-for-profits Commissioner when the Senate considered and rejected proposed amendments to the same effect when debating the Marriage Amendment (Definition and Religious Freedoms) Bill 2017.¹²² The Ruddock Religious Freedom Review also came to the same conclusion, suggesting clarifying amendments only because it did not see any 'particular harm' from them.¹²³

The insertion of this amendment sends a harmful and false message that marriage equality for LGBTIQ+ people poses a threat to religious freedom and the ability of charities to express these views. The exclusion of same-sex couples from the

¹¹⁸ Religious Discrimination Bill, s 27(2).

¹¹⁹ See, for example, *Public Health Act 2010* (NSW), ss 98C-E; *Public Health and Wellbeing Act 2008* (Vic), s 185D-185E.

¹²⁰ Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, Sch 1, cl 4 (proposed s 11(2) of the *Charities Act 2013*).

¹²¹ *Charities Act 2013* (Cth), s 11.

¹²² See amendments moved by Senators Fawcett and Paterson (item (4) on sheet 8329); *Senate Hansard*, 28 November 2017, p.9082.

¹²³ Expert Panel chaired by The Hon Philip Ruddock (2018) *Religious Freedom Review: Report of the expert panel*, available at www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf (accessed 2 October 2019) (**Ruddock Religious Freedom Review**), [1.200].

institution of civil marriage, along with the requirement for a statement to be made at every wedding that ‘Marriage according to Australian law is between a man and a woman’, reflected discriminatory and hurtful attitudes which excluded LGBTIQ+ people from full and equal citizenship. This clause calls out and gives legitimacy to this particular view of marriage, over and above any other social or religious view, in the face of the overwhelming number of Australians that voted to change Australian marriage laws to be fairer and more equal. The rarefication and privileging of this belief in Australian law is entirely inappropriate and ignores the overwhelming vote of the Australian people. There is no need for this amendment, which only serves to remind LGBTIQ+ people that their place and acceptance within Australian society remains conditional on the views of others.

Finally, as further elaborated in the Justice Connect Not-for-Profit Law service submission,¹²⁴ there is a real risk of unintended consequences from calling out advocacy on marriage as being between a man and a woman for special protection. Among those risks is the potential creation of a new charitable purpose, the exclusion of other prohibitions from that purpose, and the possibility that other forms of advocacy, which are not specifically called out in the *Charities Act*, might therefore constitute a ‘disqualifying purpose’. Introducing protections for some cases of advocacy, but not others, does not clarify but instead confuses the matter. The effect may be to cast doubt on the ability of charities to advocate on issues more generally.

RECOMMENDATION

Delete proposed section 11(2) of the *Charities Act 2013* (Cth) from the HR Amendments Bill.

EXEMPTIONS FOR RELIGIOUS SCHOOLS IN THE MARRIAGE ACT

The Government has proposed amendments to the *Marriage Act 1961* (Cth) to allow religious educational institutions to refuse to make facilities available, or provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of the marriage, provided the refusal conforms with their religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.¹²⁵

There is already a wide and unnecessary exemption for religious bodies under the *Marriage Act 1961* (Cth),¹²⁶ given the already wide exemptions given to religious bodies (including religious education institutions) under the *Sex Discrimination Act 1984* (Cth).¹²⁷ There is nothing on the face of the *Sex Discrimination Act 1984* (Cth) which would prevent a religious school providing services and facilities, other than education and training, to rely on the broader religious body exemption. There is also no evidence of any issues of this nature arising in religious schools since the achievement of marriage equality in 2017.

These broad exemptions in the *Sex Discrimination Act 1984* (Cth) continue to licence unacceptable levels of discrimination against LGBTIQ+ people, including students. In the lead up to the Wentworth byelection, the Government made a commitment to repeal exemptions for religious schools allowing them to expel students based on their sexual orientation.¹²⁸ That promise remains unfulfilled. Moves to entrench exemptions for religious schools in connection with marriage, while the broader issue of religious school exemptions remain, highlights a lack of balance in the approach to exemptions generally and a prioritisation of religious privilege over and above the interests of LGBTIQ+ people.

Given our previous submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, and the submissions above on the need to achieve a better balance in religious exemptions generally, Equality Australia considers that the issue of exemptions for religious

¹²⁴ Justice Connect (2019) *Submission on Religious Freedom Bills*, 2 October 2019.

¹²⁵ Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, Sch 1, cl 7 (proposed s 47C of the *Marriage Act 1961*).

¹²⁶ *Marriage Act 1961* (Cth), s 47B.

¹²⁷ *Sex Discrimination Act 1984* (Cth), ss 37, 38.

¹²⁸ Prime Minister Scott Morrison (2018) *Media Release*, 13 October, available at www.pm.gov.au/media/media-statement (accessed 2 October 2019): “To address this issue I will be taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality. I believe this view is shared across the Parliament and we should use the next fortnight to ensure this matter is addressed.”

schools more broadly should be considered together to ensure that an appropriate balance is achieved in federal anti-discrimination law.

RECOMMENDATION

Exemptions for religious educational institutions, including to protect LGBTQI+ teachers and students from discrimination, should be considered together.

Delete proposed section 47C of the *Marriage Act 1961* (Cth) from the HR Amendments Bill.

FREEDOM OF RELIGION COMMISSIONER

The Government has proposed the creation of a new Freedom of Religion Commissioner to exercise functions under the proposed *Religious Discrimination Act* and under the existing *Australian Human Rights Commission Act 1986* (Cth).¹²⁹ Equality Australia considers such functions would be better placed within the existing role of either the Human Rights Commissioner, to enable a proportionate balancing of human rights, or the Race Discrimination Commissioner, given overlapping cultural and religious identities in many Australian communities.

The Ruddock Religious Freedom Review expressly considered the proposal for a specific Religious Freedom Commissioner and rejected it on the basis that it was not necessary.¹³⁰ The review stated that the existing Human Rights Commissioner already had the capacity to perform many of the functions proposed for a Freedom of Religion Commissioner.¹³¹ Instead, the Ruddock Review suggested that the remit of the existing Human Rights Commissioner could be extended to include responsibility for issues relating to religious freedom.¹³²

If a Freedom of Religion Commissioner is to be introduced, LGBTQI+ people will become the only protected group under federal anti-discrimination legislation without their own Commissioner, given the existing Age, Sex, Race, Disability, Children's and Aboriginal and Torres Strait Social Justice Commissioner roles. This is despite the Ruddock Religious Freedom Review finding that Australians already enjoy a high degree of religious freedom.¹³³ Conversely, as the Australian Human Rights Commission has found, LGBTQI+ people continue to experience extremely high levels of marginalisation, bullying, harassment and violence.¹³⁴

As former Human Rights Commissioner Tim Wilson noted in 2011:¹³⁵

"There is no dedicated commissioner for sexual orientation, gender identity and intersex (SOGII) issues in the Commission's legislation, nor Commonwealth Ministers or government agencies that take primary responsibility for advancing issues that arise for lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians.

As a consequence, SOGII issues too often fall through the cracks of policy. This is particularly concerning because of the level and type of State-sanctioned discrimination experienced by LGBTI Australians. To address this, I have also taken on the role as the de facto SOGII Commissioner at the Commission to ensure that LGBTI people have a voice."

Given the balancing nature of the freedom of the religion vis-à-vis the fundamental rights and freedoms of others,¹³⁶ responsibility for religious discrimination within the Human Rights Commissioner role seems a better fit if LGBTQI+ people are going to continue without a dedicated Commissioner. The would help frame the Human Rights Commissioner's functions to consider human rights issues together, rather than in isolation. Conversely, given the relationship between

¹²⁹ Religious Discrimination Bill, ss 45-53; Consequential Amendments Bill, Schedule 1, cls 1-13 affecting amendments to the *Australian Human Rights Commission Act 1986* (Cth). See, in particular, s 10A of the *Australian Human Rights Commission Act 1986* (Cth).

¹³⁰ Ruddock Religious Freedom Review, [1.415].

¹³¹ Ruddock Religious Freedom Review, [1.415].

¹³² Ruddock Religious Freedom Review, [1.416].

¹³³ Ruddock Religious Freedom Review, [1.419].

¹³⁴ Resilient Individuals Report, pp.2, 15-20.

¹³⁵ Resilient Individuals Report, p.1.

¹³⁶ ICCPR, art 18(2).

racial and religious discrimination experienced by people of minority faiths in Australia, such as Muslims and Jews,¹³⁷ it would make more sense to enlarge the Race Discrimination Commissioner's role to include functions related to religious discrimination.

If a Freedom of Religion Commissioner is to be introduced, it is essential that such a Commissioner is given responsibility for protecting the human right of freedom of thought, conscience and religion for all Australians. This requires the Commissioner's mandate to extend to the protection of non-religious beliefs as well as religious beliefs, and ensure that Australians of atheist and agnostic belief are protected in the work of the Commission on an equal footing to people of faith.

RECOMMENDATION

If a Freedom of Religion Commissioner is to be established, establish also an LGBTIQ+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.

Otherwise, enlarge the existing Human Rights Commissioner or Race Discrimination Commissioner roles to include responsibility for religious discrimination.

¹³⁷ Australian Human Rights Commission (2018) *Religious Freedom Review – Submission to the Expert Panel*, available at www.humanrights.gov.au/sites/default/files/ahrc_20180214_religious_freedom_review_submission_0.pdf (accessed 1 October 2019), [64]-[76]; Human Rights and Equal Opportunity Commission (2003) Ismağ – *Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*, pp.43-69.

ANNEXURE A: EXAMPLES OF CONSCIENTIOUS OBJECTION IN STATE AND TERRITORY HEALTH LAWS

STATE / TERRITORY	TYPE OF HEALTH SERVICE	CONDITIONS
Abortion-related services		
Victoria	Performing, directing, authorising or supervising abortions	<p>Must inform of conscientious objection.</p> <p>Must refer to another health practitioner who does not have a conscientious objection.</p> <p>Doctors and nurses are under an overriding duty to perform, or assist in performing, abortions in an emergency where the abortion is necessary to preserve the life of the pregnant woman.</p> <p><i>(Abortion Law Reform Act 2008 (Vic), s 8).</i></p>
New South Wales	Perform, assist, make a decision or advise on abortions	<p>Must inform of conscientious objection as soon as possible.</p> <p>Must give information about, or transfer the patient's care to, a health practitioner or service provider who does not have a conscientious objection.</p> <p>Does not limit any duty owed by a health practitioner to provide a service in an emergency.</p> <p><i>(Abortion Law Reform Act 2019 (NSW), s 9 – awaiting assent)</i></p>
Queensland	Perform, assist, make a decision or advise on abortions	<p>Must inform of conscientious objection.</p> <p>Must refer and transfer the patient's care to a health practitioner or service provider who does not have a conscientious objection.</p> <p>Does not limit any duty owed by a health practitioner to provide a service in an emergency.</p> <p><i>(Termination of Pregnancy Act 2018 (Qld), s 8)</i></p>
South Australia	Participation in abortions	<p>Overriding duty to participate in treatment which is necessary to save the life, or to prevent grave injury to the physical or mental health, of a pregnant woman.</p> <p>In legal proceedings, burden of proof of conscientious objection rests on objector.</p> <p><i>(Criminal Law Consolidation Act 1935 (SA), s 82)</i></p>
Australian Capital Territory	Prescribe, supply or administer abortifacient Carry out or assist in surgical abortions	<p>Must inform of conscientious objection.</p> <p>Overriding duty to carry out, or assist in carrying out, surgical abortions in an emergency where necessary to preserve the life of the pregnant person.</p> <p>Must not refuse to provide medical assistance or treatment to a person requirement medical treatment because of an abortion.</p> <p><i>(Health Act 1993 (ACT), s 84A)</i></p>
Tasmania	Participate in, or provide advice on, abortions	<p>Counsellors must provide a list of prescribed health services from which the woman may seek advice, information or counselling on the full range of pregnancy options.</p> <p>Doctors and nurses are under an overriding duty to perform, or assist in performing, abortions if necessary to preserve the life of the pregnant woman or to prevent her serious physical injury.</p> <p><i>(Reproductive Health (Access to Terminations) Act 2013 (Tas), ss 6-7)</i></p>
Northern Territory	Advise on, or perform, abortion	<p>Must inform of conscientious objection.</p> <p>Doctor must, within clinically relevant time, refer to another doctor who does not have a conscientious objection.</p> <p>Overriding duty to perform, or assist in performing, abortions if necessary to preserve the life of the pregnant woman.</p> <p><i>(Termination of Pregnancy Law Reform Act 2017 (NT), ss 11-13)</i></p>
Western Australia	Participation in abortions	<p>None prescribed.</p> <p><i>(Health (Miscellaneous Provisions) Act 1911 (WA), s 334(2))</i></p>
Fertility related services		
Western Australia	Use of, or assisting in use of, excess embryos resulting from assisted reproductive technology procedures	<p>None prescribed.</p> <p><i>(Human Reproductive Technology Act 1991 (WA), s 53ZVA)</i></p>

End-of-life health services		
Victoria	Participating in voluntary assisted dying (euthanasia)	Must within 7 days of receiving certain requests or referrals inform the person of their objection/refuse the referral. <i>(Voluntary Assisted Dying Act 2017 (Vic), ss 7, 13(1)(a)(i) and 23(1)(b)(i))</i>
South Australia	Complying with an advance care directive provision	None prescribed. <i>(Advance Care Directives Act 2013 (SA), s 37)</i>
Other health services		
South Australia	An examination or treatment ordered by the Chief Public Health Officer relating to certain notifiable conditions	Conscientious objection may be raised by the person ordered to undergo the treatment or examination (i.e. not the health practitioner). Chief Public Officer must be satisfied the conscientious objection is due to a religious, cultural or other similar ground. In the case of a child, an objection raised by a parent or guardian can be overridden if the Chief Public Health Officer considers the examination or treatment is in the best interests of the child and reasonably necessary in the interests of public health. <i>(South Australian Public Health Act 2011 (SA), ss 75(5)-(6))</i>