OUR LAWS SHOULD PROTECT ALL OF US, EQUALLY:

SUBMISSION ON THE SECOND EXPOSURE DRAFT OF THE RELIGIOUS DISCRIMINATION BILL 2019

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EXECUTIVE SUMMARY

The second exposure draft of the Religious Discrimination Bill remains deeply flawed and we strongly urge the Government not to proceed with the Bill in its current form. Our concerns regarding the two other bills remain unaddressed, and we do not propose to repeat them in this submission.

The revised Religious Discrimination Bill contains a small number of marginal improvements, however the problems highlighted in our first submission mostly remain. A number of changes have worsened the negative aspects of the first draft Bill and new problems have emerged. The Bill continues to privilege the interests of some people and institutions over the rights of others. Australians who hold different religious beliefs or no beliefs at all will have less protections under the law. But, as we set out in this submission, this Bill has adverse impacts for both people of faith and of no faith. In fact, all Australians are potentially adversely affected by provisions of this Bill.

Our main concerns are:

- Comprising access to healthcare. Despite marginal improvements, access to non-judgemental healthcare remains under threat, as the Religious Discrimination Bill makes it harder for health sector employers and professional bodies to ensure doctors, nurses, midwives, pharmacists, and psychologists do not unreasonably refuse treatment to people on religious grounds.
- Enabling discrimination. LGBTIQ+ people, women, people with disabilities, people of faith and others will lose existing discrimination protections when people make certain statements based in or about religion. Large private sector employers and professional bodies will find it harder to enforce universal standards of appropriate conduct across their workplaces and professions.
- Entrenching double standards in the law. The Religious Discrimination Bill is replete with double standards: laws that apply to some but not others. Faith-based organisations will maintain an ability to discriminate against others with different beliefs or no beliefs, while enjoying public funding and broad exemptions under other anti-discrimination laws. Corporations associated with religious individuals will be given discrimination protections, while people related to other people are not protected in other discrimination laws. Protections will be extended, and exemptions will be given, in accordance with largely self-defined doctrines, tenets, beliefs and teachings, including where local by-laws are not followed.

The Religious Discrimination Bill is a complex, uncertain, and flawed piece of legislation. The first exposure draft of the Religious Discrimination Bill failed to achieve community consensus. It was criticised by business, employee, faith-based, human rights, legal experts, medical professionals, and other groups.[1] Despite an opportunity to improve this legislation following the first round of consultation, the proposed legislation fails to make changes needed to achieve community consensus and ensure equality for all.

Australians reject provisions that threaten our access to appropriate and non-judgemental healthcare, no matter where we live. Australians do not want our workplaces, schools and services diminished by people who wish to take

[1] For example, see submissions of the Australian Industry Group, Australian Chamber of Commerce, Australian Council of Trade Unions, Australian Discrimination Law Experts Group, Australian Federation of AIDS Organisations (AFAO), Australian Human Rights Commission, Australian Medical Association, Australian Nursing and Midwifery Federation, Equal Voices, Intersex Human Rights Australia, Law Council of Australia, National Secular Lobby, Mental Health Australia, Public Interest Advocacy Centre, Rainbow Families, Royal Australian and New Zealand College of Psychiatrists and Uniting Church via the Attorney-General's consultation website: www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx.

advantage of special protections in order to demean our lives or beliefs (whether religious or not). Australians want our laws to protect all of us, equally. Because the Religious Discrimination Bill fails to do this, we oppose it.

While we have recommended several particular changes to the Religious Discrimination Bill, given the extent of the adverse changes which have been tangled into the second exposure draft, the legislation now requires wholesale review and redrafting if it is to proceed at all.

Accordingly, we do not recommend proceeding with this Religious Discrimination Bill.

A list of our specific recommendations follows.

LIST OF SPECIFIC RECOMMENDATIONS

We do not recommend proceeding with this Religious Discrimination Bill or its associated bills.

Further, we recommend:

1. Delete subsections 8(6)-(7) and 32(7) of the Religious Discrimination Bill.
2. Delete section 42 of the Religious Discrimination Bill.
3. Delete subsections 8(2)(d)-(e), 8(3)-(5) and 32(6) of the Religious Discrimination Bill.
4. Review and narrow all exemptions for faith-based organisations under the Religious Discrimination Bill to:
    a. allow religious discrimination in activities which directly relate to religious worship, observance, practice and teaching, consistent with international human rights law;
    b. prohibit religious discrimination for those who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by faith-based organisations, unless that discrimination is:
        i. necessary to meet a religious need or redress historical disadvantage, or
        ii. sufficiently proximate to religious worship, observance, practice or teaching to necessitate that the individual personally holds the same religious belief, or engages in the same religious activity, as the faith-based organisation.
    c. include explanatory notes that make clear these exemptions only extend to discrimination based on religious belief or activity, not on other grounds of discrimination (such as sexual orientation and gender identity) protected in other legislation.
5. Redraft all provisions in the Religious Discrimination Bill which contain the 'It just takes two' test. Ensure no discrimination protections or exemptions are provided to conduct which is contrary to public safety, order, health, or morals or the fundamental rights and freedoms of others.
6. Only humans should be afforded *human* rights, and all humans should be afforded equal rights.
7. Delete '*a person who has an association (whether as a near relative or otherwise)…*' from section 9 of the Religious Discrimination Bill. Replace it with '*an individual who is the associate…*'. Define 'associate' as meaning, in respect of an individual:
    a. a spouse or de facto partner of the individual;
    b. a near relative of the individual;
    c. a carer of the individual;
    d. another individual who is in a business, sporting or recreational relationship with the individual.

These amendments will ensure that only humans can be recognised as associates under the Religious Discrimination Bill, similar to protections provided under the *Disability Discrimination Act 1992* (Cth).

8. Amend the *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) to include protections against discrimination for associates.
9. Delete subsection 5(2) from the Religious Discrimination Bill.
10. Implement a comprehensive mechanism for the review of laws which infringe on any human right.
11. Delete proposed section 11(2) of the *Charities Act 2013* (Cth) from the HR Amendments Bill.
12. Exemptions for religious educational institutions, including to protect LGBTQI+ teachers and students from discrimination, should be considered together.
13. Delete proposed section 47C of the *Marriage Act 1961* (Cth) from the HR Amendments Bill.
14. 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.

ABOUT EQUALITY AUSTRALIA

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.

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.

POLICY CHALLENGES IN PROHIBITING RELIGIOUS DISCRIMINATION

Before we address the issues in the second exposure draft of the Religious Discrimination Bill, it is necessary to set out the policy challenges which must be addressed to prohibit religious discrimination effectively.

Regulation relating to 'religious belief and activity' is a complex area for public policy, and our laws must recognise and address these complexities, if we are to provide effective protection against discrimination on this protected attribute, without diminishing the rights of others.

While 'religious belief or activity' shares some similarities with other protected attributes such as race, sex, disability or age, it also differs from other protected attributes. Legislation prohibiting discrimination on the grounds of 'religious belief or activity' needs to contend with these key policy considerations.

The key policy considerations are:

1. **Everyone has the 'religious belief or activity' attribute under** the Religious Discrimination Bill, either because they have particular religious beliefs or engage in particular religious activities, or they do not.[2] These laws are attempting to extend protections to everyone, which ultimately means actions protecting a religious belief held by one person, may conflict with a different belief or the absence of a belief in a different person. Take for example, the story of the couple carrying the Christmas ham who were allegedly refused a ride by their Muslim Uber driver.[3] Under the proposed Religious Discrimination Bill, the couple refused service would be protected because they do *not* engage in the religious activity of observing halal dietary requirements.[4] Meanwhile, the Muslim driver would be protected if Uber required him, as a condition of using its platform, to carry the couple's ham contrary to his religious observance of halal dietary requirements.[5] Protecting people against discrimination on the grounds of race, sex, or age rarely collides with the races, sexes or ages of others in this way. The Religious Discrimination Bill does not adequately address what happens when beliefs collide in areas of public life.

2. Religious belief is often expressed, and religious activities are often engaged, in community with others. To enable that communal expression, people of faith form congregations, communities and organisations dedicated to providing for and nurturing the needs of their adherents and demonstrating the tenets of their faith through service to others. These communal aspects of religiosity present the need for balancing protections as between groups and individuals with different or no beliefs. For example, faith-based organisations, including large, well-established and sophisticated organisations, employ, educate and provide goods and services to millions of Australians,[6] including those of different and no religious belief. Many of these organisations and services are publicly funded or provide services in areas which the public sector has vacated.[7] The Religious Discrimination Bill contains broad

[2] Religious Discrimination Bill 2019 (Cth), s 5(1) (definition of *religious belief or activity*).

[3] 'We were furious': Uber driver rejects couple because of their Christmas Ham', *3AW 693 News Talk*, 19 December 2019.

[4] Religious Discrimination Bill, ss 5(1) (definition of *religious belief or activity*) and 21.

[5] Religious Discrimination Bill, ss 5(1) (definition of *religious belief or activity*) and either 14 or 21.

[6] Penny Knight and David Gilchrist (2015) *Faith-Based Charities in Australia*, March 2015, Australian Charities and Not-for-profits Commission, at 7, 12 and 17.

[7] Ibid, at 17.

exemptions for faith-based organisations[8] which fails to grapple with the diversity of this sector and the responsibility it has, and will have for the foreseeable future, in employing, educating and delivering essential services to millions of Australians of differing or no religious belief. The balance between communal faith-based undertakings versus the rights of individuals with different or no beliefs must be carefully struck if this Bill is to protect people against discrimination based on religious belief or activity.

3. Religious beliefs can be invisible. As is conventional in anti-discrimination legislation, the Religious Discrimination Bill also includes provisions which make it unlawful to request or require information from others regarding their religious beliefs.[9] Yet, this Bill imposes obligations on employers, schools, service providers and others to factor in religious beliefs into their requirements, conditions and practices so as to ensure that they do not unreasonably disadvantage particular people of faith.[10] In some cases, it also imposes obligations on employers and professional bodies regulating how they must respond to people who make 'statements of belief',[11] in circumstances where an employer will not necessarily know whether a statement is based in any religious belief, or is merely the expression of a political or personal view (which is not otherwise protected). Moreover, employers may not be able to ask in order to find out.[12] The chilling effect of this will be workplaces, schools and services where views are not challenged, or called out as inappropriate or harmful, for fear of falling foul of the legislation. The Religious Discrimination Bill imposes obligations in circumstances where the duty holder will not be able to access the information necessary in time to comply (for example, before disciplinary processes are engaged). This Bill also imposes rights on an invisible class of people – namely, certain essential health professionals who may object to providing or participating in particular types of treatment on religious grounds.[13] These rights are imposed under a wall of silence, without any legislative safeguards to ensure those objections, if they should be allowed at all, are raised transparently and well before a patient has their treatment delayed or denied. Again, health professionals do not have to disclose their religious objections, and employers and health professional bodies cannot impose requirements that they do, lest it offend certain provisions of the Bill or amount to a 'conduct rule' which unjustifiably restricts or prevents a doctor, nurse, pharmacist, or psychologist refusing treatment to someone.[14]

4. Religious belief, and its expression, is limitless and diverse. The Religious Discrimination Bill recognises the rich diversity of religious belief in Australia, protecting beliefs and activities which form part of both dominant and very marginal faith traditions.[15] While that aim may be commendable, it means that the Bill provides obligations in respect of a very large, disparate and heterogenous group. The differences within this group are often larger than their similarities. For example, some feel compelled to cover their heads, while others are compelled to remove head coverings in sacred places. Some are required to refrain from pork, while others are forbidden from eating beef. Some believe polygamy is permitted, while others believe polygamy is forbidden. Some believe women have an equal place in society, while others believe

[8] In particular, see Religious Discrimination Bill, ss 11, 32(8)-(11) and 33(2)-(5).

[9] Religious Discrimination Bill, s 26.

[10] Religious Discrimination Bill, ss 8, 14, 19 and 21.

[11] Religious Discrimination Bill, ss 5(1) (definition of *statement of belief*) and 8(3)-(5).

[12] Religious Discrimination Bill, s 26.

[13] Religious Discrimination Bill, ss 8(6)-(7).

[14] Religious Discrimination Bill, s 5(1) (definitions of *health practitioner, health practitioner conduct rule* and *health service*) and 8(6)-(7).

[15] Explanatory notes to the second exposure draft of the Religious Discrimination Bill 2019, [70]-[74].

that place is equal but separate. Some believe laws of the land must be followed, while others are called to break laws they consider unjust. Not all believe that violence is never justified, nor do they all agree on what constitutes violence. Yet, employers and qualifying bodies are called to respond to statements expressing these limitless and diverse beliefs by reference to legal straightjackets, such as tests requiring proof of 'unjustified financial hardship' and 'essential requirements'.[16] Employers, educators, service providers and others are called to make requirements, conditions and practices which reasonably accommodate religious beliefs in all its forms so as not to indirectly discriminate.[17] Exemptions exist for unlawful conduct (but not all unlawful conduct),[18] the inherent requirements of a job (but not always for large private sector employers or health professionals),[19] and expressions urging serious offences (but not all crimes or breaches of legal obligations).[20] The Bill is a complex web of exceptions, and exceptions to those exceptions, in an undefined world of religious belief which requires little more than two people to agree on what constitutes a religious doctrine, tenet, belief or teaching.[21]

5. Some religions are dominant while others are not. There are different challenges for different faith groups in Australia, based on their collective size and the degree of historical and current discrimination they face. For example, Muslim Australians have experienced markedly high levels of harassment and abuse, particularly since September 11.[22] Many Jewish Australians live with the continued impacts of anti-Semitism in their lives.[23] While some faiths in Australia command a large following and can assert a degree of social, financial and political dominance and/or acceptance, others do not. The purpose of anti-discrimination laws has always been about the alleviation of barriers to participation in areas of public life, such as employment and education. But when those areas of public life also happen to be delivered by dominant faiths, there can be few barriers to the participation of those faiths. Instead there is a risk that their dominance overbears the wills of those who are less dominant, such as people from minority faiths who work or interact with these organisations. Considering those differences in power and resources, there is a materially different impact in giving all faith-based organisations exemptions under discrimination laws, when it also includes dominant faith-based organisations.

6. Religious beliefs, doctrines, tenets and teachings evolve. Religions have changed their views as their holy texts are revaluated and reinterpreted. Accordingly, doctrines, tenets, beliefs and teachings change. So, when drafting a law that will protect against religious discrimination in the enduring way that anti-discrimination statutes come to be held, it is important to get the settings right from the start. On the one hand, if the outer limits of acceptable behaviour are not drawn now, then the obligations under the Bill will continue to expand and evolve unpredictably, as religious beliefs themselves evolve. This is all the more important where there is no definition of a religious belief or activity underpinning the protections, and where there is already – and will likely be in future – a wide diversity of protected beliefs. On the other

[16] Religious Discrimination Bill, ss 8(3)-(4) and 8(8).

[17] Religious Discrimination Bill, ss 8, 14, 19 and 21.

[18] Religious Discrimination Bill, ss 5(1) (definition of *religious belief or activity)* and 5(2).

[19] Religious Discrimination Bill, ss 32(2)-(7).

[20] Religious Discrimination Bill, s 28.

[21] See further at section 7 below.

[22] Human Rights and Equality Opportunity Commission (HREOC) (2004) *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*, Sydney: HREOC; Derya Iner (2019) *Islamophobia in Australia Report II (2017-2018)*, Sydney: Charles Sturt University and ISRA.

[23] Julie Nathan (2019) *Report on Antisemitism in Australia 2019*, Sydney: Executive Council of Australian Jewry.

hand, within that clear outer boundary, flexibility in the language provides an internal buffer, allowing the statute to keep up with contemporary attitudes. The test of 'reasonableness' in anti-discrimination laws, as do other balancing provisions, work to keep the statute contemporary. What is reasonable today, may well be unreasonable tomorrow. In the era of turbulent technological change, it is an error to define for all time and all contexts the circumstances in which something will or will not be reasonable. Medical treatments will evolve, along with religious beliefs. Do we really want to rigidly codify existing standards regarding conscientious objection to a potential future world where stem cell research could dramatically change treatment in future? Do we really want to set rules on what can and can't be said by reference only to financial harm today, when we remember that social media, which has amplified the voices of so many, barely existed 10 years ago? Discrimination laws need to set minimum standards which are nonetheless flexible enough to adapt and adjust with time. One of the greatest issues with the Religious Discrimination Bill is the exceptional nature it has isolated cases today and converted them into inflexible principles, which will apply to everyone, tomorrow.

These are among the policy considerations which inform our submission on the second exposure draft of the Religious Discrimination Bill. Overall, our view is that any Religious Discrimination Bill must carefully take into account these considerations if it is to ensure that our laws protect all Australians, equally. We are deeply concerned that the Religious Discrimination Bill fails to do that in each of the following ways.

COMPROMISING ACCESS TO HEALTHCARE

The Religious Discrimination Bill makes it harder for health sector employers and professional bodies to ensure doctors, nurses, midwives, pharmacists, and psychologists do not unreasonably refuse treatment to people on religious grounds. Australians will find it harder to access non-judgemental healthcare, such as sexual health, family planning, fertility, mental health and gender affirming health services, wherever they live. Professional standards, such as those that require objective health professionals to refer patients to alternative health professionals who will treat them, may come under challenge.

1. PRIVILEGING RELIGIOUS VIEWS OVER PATIENT NEEDS

Subsections 8(6)-(7)[24] and 32(7)[25] of the Religious Discrimination Bill continue to prioritise the personal religious views of doctors, nurses, midwives, pharmacists and psychologists over the health of their patients. They make it harder for employers and health professional bodies to impose policies and standards which ensure patients are provided with the health services they need, wherever they live, and without judgement. These provisions compromise access to healthcare in essential health services and do not adequately safeguard patient health.

In our first submission, we recommended the equivalents of subsections 8(6)-(7) and 32(7) be removed from the Religious Discrimination Bill.[26] While there have been some improvements to these provisions, the original provisions remain largely intact. The amendments fail to address our chief concerns,[27] and in some cases, our concerns have been exacerbated by amendments which are unclear in law and application, and which extend the coverage of these provisions even further.

Our laws should draw a clear line in the sand at patient health. A law which allows adverse impacts on patient health in order to prioritise the personal religious views of health professionals cannot be supported.[28] The need for these provisions has never been explained, given existing laws in all states and territories preserve conscientious objection in abortion and euthanasia,[29] and existing professional codes of conduct carefully protect the rights of patients while allowing conscientious objections by health professionals.[30] Simply put, a patient's health must never be compromised by their doctor, nurse or others, and these provisions do not guarantee that minimum requirement. Subsections 8(6)-(7) and 32(7) must therefore be removed.

2. LITTLE CHANGES, MORE PROBLEMS

Subsections 8(6)-(7) of the Religious Discrimination Bill have been marginally improved in two ways in the second exposure draft. Yet, despite these improvements, old problems remain, and new problems emerge from the amendments.

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[24] Formerly, s 8(5)-(6).

[25] Formerly, s 31(7).

[26] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 15.

[27] These were that these provisions (a) reintroduced discrimination into healthcare, (b) threw out the balance achieved in state and territory laws, (c) were inconsistent with Australia's international obligations and interfered with state/territory responsibilities, and (d) were contrary to professional guidance. See Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 7-14.

[28] Religious Discrimination Bill, s 8(7)(a).

[29] See Annexure A in Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October.

[30] Ibid, at 12-14.

Definition of 'health service': While we welcome that these provisions no longer apply to allied health professionals (such as podiatrists and occupational therapists), they still apply to all health professionals providing essential health services.[31] Doctors, nurses, midwives, pharmacists and psychologists are at the frontline of healthcare, and where impacts on patient health from the refusal of healthcare are mostly readily felt. Accordingly, these changes are modest and do not ameliorate the adverse impact of these provisions.

Discrimination against particular kinds of people: We also welcome legislative notes that suggest these provisions are not intended to override existing anti-discrimination obligations, such as those contained in the *Sex Discrimination Act 1984* (Cth).[32] These changes are an acceptance by the Government of our submission that the first draft Bill reintroduced discrimination in healthcare by the backdoor, enabling the discriminatory refusal of healthcare to particular types of people who are seeking treatment.[33] However, as we detail below, the attempt to reduce the discriminatory impact of these provisions by stipulating that objections must be in respect of a '*particular kind of* health service' ultimately does not work. These provisions are still inconsistent with existing anti-discrimination obligations and are impossible for health professionals and the organisation which employ them to simultaneously comply with. It leads us to the conclusion that these provisions are either ineffective, because health professionals and their employers must still comply with the standards placed under other anti-discrimination laws, or worse, that the Religious Discrimination Bill impliedly repeals or overrides Commonwealth, state and territory anti-discrimination laws which guarantee equal access to health services.

Providing *or participating* in healthcare: Significantly, the improvements which have been made to these provisions are overshadowed by the extension of these provisions to any doctor, nurse, midwife, pharmacist or psychologist who *participates* in the provision of a health service – not only those who provide it.[34] This means that these health professionals can object to being required by an employer policy or professional standard to provide referrals to others, or even provide information about the existence of a treatment option, when it offends their personal religious beliefs.

Examples of this could include:

- a doctor or psychologist who refuses to provide a referral to an IVF specialist for a woman with difficulty conceiving;
- a doctor who refuses to provide a cancer patient with information on emerging treatment options because they object to human embryonic stem cell research underpinning that treatment;
- a pharmacist who refuses to dispense hormones to anyone, or refer those patients to another pharmacist, because of objections to hormone therapy for trans patients;
- a nurse who refuses to care for a woman in hospital after a late term abortion;
- a nurse who refuses to comply with an aged care provider's policy that free contraception is offered to any resident who requests it.

Key problems remain. Our submissions on the impacts of these provisions have otherwise been left unaddressed. Our first submission contains a detailed discussion of these issues, which include the following concerns:

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[31] Religious Discrimination Bill, s 5(1) (definition of *health service*).

[32] Religious Discrimination Bill, ss 8(6)-(7), Note 2.

[33] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 7-9.

[34] Religious Discrimination Bill, ss 8(6)-(7).

- Unlike state and territory laws governing conscientious objection, these provisions contain none of the patient-centred safeguards which exist in those laws.[35] For example, there is no requirement to notify patients of an objection. There is no unequivocal requirement to provide or participate in treatment in emergency or life-threatening situations. There are no requirements to refer patients to other practitioners who will treat them. There is not even an obligation to disclose the availability of all treatment options or provide information about them. So, a patient may not even know of the existence of an available option, such as IVF or a stem cell-based treatment, if their health professional objects to '*participating*' in the provision of that health service by merely providing information about it.
- These provisions undermine, and potentially render unlawful, professional standards which currently fill the gap where health professionals exercise conscientious objections.[36] These provisions cut across, and may override, safeguards in professional standards which stipulate, for example, that a doctor must not impede access to treatments that are legal.[37] Whether those professional standards will be lawful will depend on whether the professional body can prove an '*unjustifiable adverse impact*' to patient health or the service would necessarily follow if those standards were not imposed or enforced.
- These provisions, along with restrictions on asking questions regarding a person's religious beliefs,[38] prevent reasonable policies and standards from forming an 'inherent requirement of the job'.[39] This may mean, for example, that a hospital employing a triage nurse or emergency doctor cannot ask whether those people are prepared to *participate* in triaging a patient for, or performing, a blood transfusion.

3. REPEALING AND OVERRIDING ANTI-DISCRIMINATION PROTECTIONS IN HEALTHCARE?

In response to our criticisms on the first draft Bill,[40] subsections 8(6)-(7) now attempt to clarify that a health professional and their employer must still meet their anti-discrimination obligations if they are to object to providing or participating in '*particular kinds of health services*'. For example, a legislative note suggests that a health professional cannot solely refuse to prescribe contraception to *single* women, namely because that would constitute marital status discrimination prohibited by the *Sex Discrimination 1984* (Cth).

The legislative note exposes a very simplistic understanding of existing anti-discrimination law. Consistent treatment is only one of the obligations under existing anti-discrimination law. As detailed in our analysis below, we consider that there is a very real risk that the Religious Discrimination Bill impliedly repeals or overrides all Commonwealth, state and territory anti-discrimination laws which guarantee equal access to health services.

[35] See Annexure A in Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October.

[36] Ibid, at 12-14.

[37] Medical Board of Australia (2014) *Good Medical Practice: A code of conduct for doctors in Australia*, s 2.4.

[38] Religious Discrimination Bill, s 26.

[39] Religious Discrimination Bill, s 32(7).

[40] See Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 7-9.

(a) Understanding existing anti-discrimination obligations

To start our analysis, it is necessary to understand existing anti-discrimination obligations and how they may interact with the new obligations proposed by the Religious Discrimination Bill.

All health professionals who provide a health service, as well as their employers, have obligations under existing anti-discrimination laws. These obligations are placed directly on 'persons' who provide services (including health services),[41] as well as those who are vicariously responsible for the conduct of their directors, employees and agents,[42] and those who are relevantly involved in a breach of anti-discrimination laws (such as those who cause, aid or permit the breach).[43] This means that obligations not to discriminate exist on employers of health professionals as well as health professionals directly.

These laws prohibit both direct and indirect discrimination on the grounds of sex, pregnancy or potential pregnancy, disability, age, sexual orientation and gender identity, among others. So, refusing a health service to someone simply because they are, or are assumed to hold, one of these protected statuses would likely constitute *direct* discrimination by the health professional and, vicariously, by their employer, if any. Additionally, imposing an *unreasonable* requirement, condition or practice (such as the practice of refusing a particular kind of health service) can constitute *indirect* discrimination where it disproportionately affects a protected group.[44]

So, for example, a doctor who refuses to provide a consultation to those seeking contraception would be denying the service of a medical consultation to that group of people. If that refusal disadvantages a protected group of people (such as women, people of a particular age group,[45] heterosexuals,[46] people who are capable of falling pregnant,[47] people experiencing particular disabilities that require contraception medication,[48] and so on), the doctor and, vicariously, their employer must show that the practice of refusing service to people seeking contraception is reasonable. Given a requirement to provide contraception may collide with a doctor's religious belief, harm caused to the doctor's religious conviction would likely be one consideration which must be taken into account in determining whether the practice of refusing services to people requiring contraception is reasonable. But, importantly, under current discrimination laws, it would only be *one* of the factors to be taken into account, and not a factor which is placed in a position of privilege against the health of the patient.

Meanwhile, the Religious Discrimination Bill inserts a new provision which provides certain health professionals with the ability to challenge any requirement, condition or practice imposed on them by their employer or a professional body which requires them to provide particular types of health services contrary to their religious objections. It also prohibits such as requirements, conditions or practices forming an inherent requirement of the role.[49] While existing discrimination laws tests those requirements, conditions or practices against an ordinary reasonableness standard (as described above), the Religious Discrimination Bill looks at whether these same

[41] See, for example: *Sex Discrimination Act 1984* (Cth) (SDA), ss 4(1) (definition of *service*, para (d)) and 22; *Disability Discrimination Act 1992* (Cth) (DDA), ss 4(1) (definition of *service*, para (e)) and 24; *Age Discrimination Act 2004* (Cth) (ADA), ss 5 (definition of *service*, para (e)) and 28).

[42] See, for example: SDA, ss 106-7; DDA, s 123 and ADA, s 57.

[43] See, for example: SDA, s 105; DDA, s 122 and ADA, s 56.

[44] See, for example: SDA, ss 5(2), 5A(2), 5B(2), 5C(2), 6(2) and 7(2); DDA, s 6 and ADA s 15.

[45] ADA, s 5 (definition of *age*).

[46] SDA, s 5(1) (definition of *sexual orientation*).

[47] SDA, s 4B(a) and (c).

[48] DDA, ss 4(1) (definition of *disability*, para (e)).

[49] Religious Discrimination Bill, s 32(7).

conditions, requirements or practice meet the stricter standard of an '*unjustified adverse impact*' to patient health or the service.

(b) Repealing or overriding existing anti-discrimination laws?

The problem with the inconsistency between the Religious Discrimination Bill and other anti-discrimination laws is that one of the two following legal conclusions are possible.

The first alternative is that both the health professional who refuses the service, and their employer, remain obligated under existing anti-discrimination laws according to a conventional standard. This means that, if they are to refuse a particular kind of health service, they must do so consistently in order to avoid *directly* discriminating. But also, if that refusal of treatment would disadvantage protected classes of people, they must still consider, in an open-ended way, whether the discriminatory impact of the practice of refusing a particular kind of health service is reasonable, taking into account the needs of the patient and any injury to the religious convictions of the health professional. If this is the result of the Religious Discrimination Bill, then its provisions are largely ineffective in any case where the refusal of a treatment would amount to direct or indirect discrimination on the grounds of sex, age, disability, pregnancy or potential pregnancy, sexual orientation or gender identity. It is hard to imagine *any* refusal of treatment which would not collide with these grounds, as most treatments could be described as connected to some kind of 'disability' (given the broad definition of 'disability' in the *Disability Discrimination Act*) or another ground (given many types of treatment are intended for particular groups such as women, people of certain ages, etc).

The second alternative is the Religious Discrimination Bill affects an *implied repeal* of those obligations already existing in Commonwealth anti-discrimination laws,[50] and potentially overrides state and territory anti-discrimination laws which impose more stringent standards before services can be refused on a discriminatory basis.[51] This means that it will be lawful for patients to be discriminated against in healthcare service provision in order to accommodate a health professional's religious objection unless an adverse impact to patient health or the service cannot be justified. But the test of an 'unjustified adverse impact' is much stricter than the test of reasonableness, and privileges the religious views of the health professional over the health of the patient and the ability of the clinic or hospital to provide the service at all.

Unless this uncertainty is resolved by removing subsections 8(5)-(6) and 32(7) from the Religious Discrimination Bill, it is impossible to see how employers and professional bodies will be able to proceed with responding to health professionals who refuse treatment to patients on religious grounds.

So let's take an example.

If that doctor were to refuse hormone treatment only to trans patients, that would under existing laws likely amount to *direct* discrimination on the basis of gender identity.

If the doctor refused to provide hormone treatment to everyone, that could still amount to *indirect* discrimination because it disproportionately impacts on:

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[50] See *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 per Fullagar J.

[51] Constitution, s 109. For example, there may be a direct inconsistency where a Commonwealth law provides a broader right, privilege or entitlement to a doctor than a state law allows: see e.g. *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151. In this case, the Commonwealth provides a right to a religious doctor to challenge policies and standards which restricts their ability to refuse treatments on religious grounds except when the policy or standard is necessary to avoid an unjustified adverse impact on patient health or the services. This test is stricter, and favours the doctor's religious objection, than state laws which prohibit unreasonable policies and standards which result in discriminatory impacts. See also *McBain v State of Victoria* [2000] FCA 1009 at [19]-[20].

- post-menopausal women who require hormone treatment (i.e. potentially sex and age-based discrimination);
- trans people who require hormone treatment (i.e. potentially gender identity discrimination);
- people with hormone deficiencies who require hormone treatment (i.e. potentially disability-based discrimination).

If any one of the above patients challenged the doctor's refusal of prescribe hormones to them under the existing *Sex Discrimination Act, Age Discrimination* or *Disability Discrimination Act,* the doctor (and their employer, if any) would have to show that their refusal of service was reasonable. That would require looking, in an open-ended way, at all the circumstances of the case, including the impact to the patient, the impact on the doctor and any alternatives available.

If, however, the doctor was required by their employer or a professional standard to prescribe hormone treatment to all patients with a need for that treatment, how would the employer or professional body know whether their policy or standard complies with anti-discrimination laws when those laws impose two different and inconsistent standards? The Religious Discrimination Bill provides no answer.

(c) Laws that are impossible to understand and apply

Given the potential affect of the Religious Discrimination Bill on existing anti-discrimination obligations, there is an additional issue arising from the lack of clarity over what '*a particular type of health service*' actually means, and how a health service is to be characterised. This is important because, if you are effectively affording health professionals dispensation from their existing anti-discrimination obligations by allowing them to challenge policies and standards which restrict or prevent their ability to refuse health services, it is necessary to know what services you are allowing them to refuse and in what circumstances.

The concept of '*a particular kind of health service*' is very difficult to apply in practice. For example:

- in respect of pharmacists, is the dispensation of *any* medication '*a particular type of health service*', or is the dispensation of only a *particular* type of medication a '*particular type of health service*'?
- in respect of nurses, what '*particular type of health service*' does a nurse provide apart from the nursing? Or is the nursing service to be broken down into activities which comprise the nursing service, such as feeding, washing, administering medication, and/or providing information? Or, are those activities to be further broken down, such as by breaking down the service of providing information into the types of issues which may be addressed by the information provided?
- in respect of doctors, is diagnosing an illness and prescribing medication two particular types of health services provided by a doctor, or one 'particular type of service' provided by doctor that specialises in general practice? Or, are each of the tests conducted by a doctor, such as checking blood pressure, taking blood samples, etc., each '*a particular type of health service*' comprised in the service of diagnosing an illness?
- in respect of psychologists, can you (and how do you) distinguish the service of listening and providing advice to a patient into '*particular types*'?

How you characterise the service has implications for the policies and standards that employers and professional bodies that impose. For example:

- Similar to the scenario above, how does an employer policy or professional standard respond to a pharmacist who refuses to dispense a prescription for hormones to a trans patient? Can the

employer or professional body impose a requirement that the pharmacist also refrain from dispensing a prescription for hormones to everyone (for example, women who are post-menopausal), or is the provision of hormones to trans patients a different *'kind'* of health service to the provision of hormones to women post menopause?

- How does a professional standard apply when a doctor objects to providing sexual health services because of religious objections to sex before marriage? If a doctor is presented with a patient experiencing flu-like symptoms, can they be required by a professional standard to explore with their patient HIV transmission as a potential cause of the flu-like symptoms, or can they refuse to participate in providing that *'particular kind'* of service?
- How does an employer policy or professional standard apply when a psychologist objects to providing an affirming environment to a gay, lesbian, bisexual or trans person? If a client raises their sexuality or gender identity during a general consultation regarding their experiences with depression, can the psychologist refuse to continue with the consultation or leave to one side certain issues which they do not want to discuss?

The task of a health professional is to respond to the needs of their patient in all its complexity. The notion of a health professional 'opting out' of providing or participating in '*a particular kind of health service*' can clearly be at odds with the provision of appropriate healthcare. While there are some types of treatments that can be segregated into particular kinds (such as abortion and euthanasia), most cannot. Those that can have already been regulated by state and territory laws.[52] But many '*particular kinds*' of health services simply form part of the general provision of competent healthcare.

(d) Conventional protections are enough

The Government has not explained the need for subsections 8(6)-(7) and 32(7), which are impossible to understand and apply, and worse, potentially repeal or override existing anti-discrimination protections ensuring equal access to health services. Until a compelling case can be made for why these unprecedented provisions are necessary and how patient health will not be compromised, they cannot be supported and must be removed.

RECOMMENDATION

Delete subsections 8(6)-(7) and 32(7) of the Religious Discrimination Bill.

[52] See Annexure A in Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October.

ENABLING DISCRIMINATION

The Religious Discrimination Bill removes existing discrimination protections for LGBTIQ+ people, women, people with disabilities, and others when people make certain statements which are discriminatory based in religion or about religion. Large private sector employers and professional bodies will find it harder to enforce universal standards of appropriate conduct across their workplaces and professions.

4. REMOVING EXISTING DISCRIMINATION PROTECTIONS

Section 42[53] of the Religious Discrimination Bill continues to override anti-discrimination protections in federal, state and territory laws in order to privilege certain statements based in or about religion that may be expressed in workplaces, schools and service settings across Australia. While these provisions have been slightly amended in the second exposure draft, these amendments have not addressed our concerns that these provisions provide some people a licence to discriminate against others.

These provisions will remove discrimination protections when people say offensive, derogatory or harmful things in workplaces, schools and service settings, including about women, LGBTIQ+ people, people with disabilities or with lived experiences of mental health issues, people of faith, divorced people, de factos and single parents, among others. They will also introduce complexity and cost into discrimination complaints for applicants and defendants alike.[54]

(a) Licensing discrimination

While we welcome the clarification that only written and spoken statements (and not refusals of service) are captured by these provisions, section 42 means that many Australians will be without protection as their workplaces, schools and services are peppered with polite bigotry based in or about religion. In fact, a broader range of 'statements of belief' are now protected because the test for what constitutes a religious doctrine, tenet, belief or teaching has been relaxed (see the 'It just takes two' test at section 7 below).

Examples of statements which may be protected include:

- a colleague telling another colleague that women must learn to stay silent;[55]
- a boss writing in an employee's book that her lesbianism is sinful;[56]
- a teacher telling a student that children born out of wedlock are the product of sin;[57]
- a dentist telling his patient that her schizophrenia is caused by evil spirits and that spiritual healing can cure her;[58]

[53] Formerly, section 41.

[54] See Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 20.

[55] Ephesians 5: 22-23; 1 Timothy 2: 11-12.

[56] Queensland Human Rights Commission, *Sexuality case studies*. See discussion of the case in Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 19.

[57] A similar case occurred in the US to a child with two dads: Gwen Aviles (2019) 'Substitute teacher fired after telling boy with two dads 'homosexuality is wrong'', *NBC News*, 3 December.

[58] *Dr Paul Gardner* [2007] DPBV 1.

- a taxi driver telling a person with a guide or assistance dog that their dog is unclean;[59]
- a bus driver telling a passenger that she is oppressed by her faith;[60]
- a shop assistant telling a customer that his prophets are not to be revered;[61]
- a psychologist telling her client that gay people are broken;[62]
- a psychiatrist telling his patient diagnosed with depression that '*she should be looking forward to the Kingdom of heaven*';[63]
- a doctor telling a trans patient that God made men and women and attempts to affirm their gender are wrong.[64]

Statements of this kind, expressed in the workplace by colleagues, in schools by teachers, or in the course of providing goods and services, undermine the dignity of everyday Australians going about their lives. They make workplaces, schools and places where services are provided less welcoming and more hostile places for Australians, increasing barriers to their equal participation in society.

(b) Licensing intimidation?

Of concern to us are amendments to section 42(2)(b) in the second exposure draft which broaden the statements of belief deemed acceptable, and thereby protected by these provisions. The formulation for excluded statements now includes '*a statement of belief… that would, or is likely to harass, threaten, seriously intimidate or vilify another person or group of persons*'. The words 'threaten' and 'seriously intimidate' have been inserted. The word 'vilify' has been defined as 'incite hatred or violence'; words which previously sat in the main body of the phrase.

In contrast to the phrase 'offend, insult, humiliate or intimidate' contained in section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA), the words 'offend', 'insult' and 'humiliate' are not included in section 42(2)(b), and the word 'intimidate' has been narrowed in scope with the adjective 'seriously'.

There is a general principle of statutory construction that words take meaning from their context and different words are used when parliament intends them to mean different things.[65] Accordingly, in *Eatock v Bolt* [2011] FCA 1103, when considering the phrase 'offend, insult, humiliate or intimidate' in section 18C of the RDA, Justice Bromberg made the observation:[66]

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[59] Author unnamed (2006) 'Unclean' guide dog banned by Muslim cab driver, *Daily Mail*, 6 October. A refusal of service, however, would not be protected.

[60] Stereotypes that Muslim women are oppressed were noted as issue in the Australian Human Rights Commission consultation with Muslim women: see Human Rights and Equality Opportunity Commission (HREOC) (2004) *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*, section 2.3.6.

[61] A similar scenario was considered in the *Case of E.S. v Austria* (2019) ECoHR, Application No 38450/12.

[62] See, for example, Josh Butler (2019) 'Conversion 'therapy' survivors speak of cruel tactics used against them', *10 Daily,* 24 October; Timothy Jones et al (2018) *Prevent Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia*, Melbourne: Human Rights Law Centre and GLHV@ARCSHS, at 31-33.

[63] *Health Care Complaints Commission v Sharah* [2015] NSWCATOD 99.

[64] *Gender Identity Initial Principles of Engagement (as adopted by the Anglican Synod on 20 October 2018, Resolution No 49/18),* at [9.1.1(d)] and [9.1.5(d)].

[65] See, for example, *Certain Lloyd's Underwriters* v Cross [2012] HCA 56 at [35] per French CJ and Hayne J; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at [4] per Gibbs CJ and at [11] per Mason J; Pearce and Geddes (2014) *Statutory Interpretation in Australia,* 8th edition, Lexis Nexis at 153.

[66] *Eatock v Bolt* [2011] FCA 1103 at [265].

> *The definitions of "insult" and "humiliate" are closely connected to a loss of or lowering of dignity. The word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence.* ***The word "offend"*** *is potentially wider, but given the context,* ***"offend" should be interpreted conformably with the words chosen as its partners.***

In partnering the word 'harass' with 'threaten', 'seriously intimidate' and 'vilify' in section 42(2)(b), and omitting words such as 'offend', 'insult' and 'humiliate', it now becomes relatively clear that a great degree of latitude is being given to statements which could offend, insult, humiliate and even intimidate others – provided they do not *seriously* intimidate. Moreover, although the word 'harass' could have had a broader meaning on its own, given its context, it is likely to be interpreted much more narrowly to conform with the words chosen as its partners, namely, 'threaten', 'seriously intimidate' and 'vilify'.

The result of this is that section 42 now protects a wide range of prejudiced, harmful or derogatory statements that could be made by bosses, colleagues, teachers, support workers and service providers towards their fellow Australians, and which could constitute discrimination today but not tomorrow if the Religious Discrimination Bill is passed.

(c) Section 42 must be removed

Section 42 is a provision which is beyond repair and must be removed. It is not necessary to licence discrimination against some people in order to protect others from discrimination. As we previously submitted, conventional discrimination protections would protect the ability for people to express their faith by requiring any restrictions on religious expression at work, school and in the provision of goods and services to be consistently and reasonably applied.

RECOMMENDATION

Delete section 42 of the Religious Discrimination Bill.

5. 'NO CONSEQUENCES FOR CONDUCT' CLAUSES

The Religious Discrimination Bill persists with imposing unorthodox, unworkable and unnecessary rules on large private employers with annual revenues of at least $50 million when employees make certain statements based in or about religion outside the course of their employment. Rather than address concerns about these provisions, the second exposure draft inserts yet another unorthodox, unworkable and unnecessary variation of these provisions on all professional, occupational and trade qualifying bodies, such as those that provide licences or qualifications for practice to doctors, lawyers and accountants.

The effect of these provisions is to make it harder for large private sector employers, and bodies conferring professional, trade or occupational qualifications and licences, to enforce rules regarding appropriate standards of behaviour when certain statements are made by their employees or members outside professional contexts.

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

Subsections 8(3)-(5) of the Religious Discrimination Bill will allow people who wish to express prejudiced, harmful or dangerous views based in or about religion to do so without facing consequences for their conduct even when it impacts on other employees, clients or customers or diminishes public trust in a profession. These provisions, along with subsection 32(6), undercut the ability of employers and professional bodies to promote inclusive and respectful workplace cultures by putting them in complex legal straightjackets with multiple tests that are one-sided, and almost impossible to apply or understand, let alone meet.

The range of statements which are protected have now also been expanded. Not only are protections potentially afforded to statements based in or about religion which offend, humiliate, insult and intimidate others (see section 4(b) above), but statements about any topic based on an indefinite range of religious doctrines, tenets, beliefs or teachings are protected (see the 'It just takes two' test at section 7 below).

(b) Complex laws with bad outcomes

Subsections 8(3)-(5) continue to have bizarre outcomes for people of faith and no faith alike. The degree of protection afforded to workers, professionals and others depends on a range of largely arbitrarily chosen factors, such as where they work,[67] whether they are religious or not,[68] the nature of their profession, trade or occupation,[69] when and where the harmful conduct affecting other employees, clients or customers occurred,[70] whether their conduct causes 'unjustified financial hardship' to a business,[71] and/or whether their conduct offends an 'essential requirement' of the profession, trade or occupation[72] (a phrase which is unknown to anti-discrimination law, legally uncertain and must mean something other than an 'inherent requirement', which is another phrase used in the Bill[73] and in anti-discrimination law more broadly).

Meanwhile, highly relevant factors such as financial and non-financial harm caused to other employees, clients or customers,[74] impacts on the public reputation or mission of the organisation,[75] and impacts on public trust and confidence in the profession cannot inform the response taken by employers and professional bodies.

Further, employers and professional bodies will not necessarily know, and cannot ask, whether statements which have been made are based in religious beliefs or not.[76] That means, when considering whether and how to respond to complaints about such statements, employers and professional bodies may unknowingly offend these provisions.

There are a number of potential scenarios that demonstrate the complexity of these provisions. For example:

- A senior manager at a large mental health organisation tweets on the weekend that suicide is a sin, contravening the organisation's policies on communications which stigmatise depression and irresponsibly discusses suicide. A colleague of the manager sees the tweet and complains to Human Resources. Without the statement causing an 'unjustified financial hardship' to the organisation (which is unlikely), Human Resources could breach the Religious Discrimination Bill by initiating a disciplinary investigation into the employee's conduct or asking the employee to

[67] Public sector workers and employees in smaller private sector organisations have less protection: see definition of *relevant employer* in s 5(1) of the Religious Discrimination Bill.

[68] People of faith are able to express views on a wide range of topics based in their religious beliefs, while people of no faith are only protected if they express views about religion: see definition of *statement of belief* in s 5(1) of the Religious Discrimination Bill.

[69] The provisions apply only to certain professions, trades or occupations that have qualifying bodies that impose authorisations or qualifications: see definition of *qualifying body* in s 5(1) of the Religious Discrimination Bill.

[70] The provisions apply when statements are made 'other than in the course' of the person's employment or practice, notwithstanding that the impacts of those statements may be felt by other employees, clients or customers who hear these comments: Religious Discrimination Bill, ss 8(3)-(4).

[71] Religious Discrimination Bill, s 8(3).

[72] Religious Discrimination Bill, s 8(4).

[73] Religious Discrimination Bill, s 32(4).

[74] See Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 17.

[75] Ibid.

[76] Religious Discrimination Bill, s 26.

refrain from comments that contravene the organisation's mission of destigmatising discussions about mental health.

- An employee of a major bushfire relief charity announces at a community gathering that 'they've seen first-hand the results of turning our backs on traditional marriage'. The comments are heard by others in the community who write to the charity to express outrage at the insensitivity of their employee's comments. Short of donors pulling their financial support and causing 'unjustified financial hardship' to the charity, the charity could breach the Religious Discrimination Bill by simply asking its employee to refrain from such comments if those comments are based on the employee's religious beliefs. However, the charity will not be able to ask the employee what their religious beliefs are, when deciding how to respond.[77]
- A doctor writes a letter to a newspaper in which he expresses the view that 'it is child abuse to deprive a child of a mother and a father'. Patients of the doctor who are single parents make a complaint to the health regulator, citing concerns that the doctor is incapable of treating them without bias because of his personal views. In dealing with the complaint, the health regulator must determine what the 'essential' requirements of being a doctor are, and whether the doctor's statements are incompatible those requirements. It decides that it would be prudent to impose a condition on the doctor to attend some training on maintaining impartiality in professional practice. The doctor challenges the condition as religious discrimination.
- A bank employee volunteers outside her work at an activist organisation which works to prevent climate change. Her employer has previously had no issues with the employee doing this in her spare time, but the organisation has recently publicly criticised a loan made by the bank to a coal mine operator. The bank is unsure how the activist organisation has found out about the loan but suspects the employee may have breached the confidential information of their customer. When the bank questions the employee about her involvement, the employee responds that she didn't disclose any confidential information but that speaking out on environmental issues is an expression of her strong religious beliefs that Christians are called to protect God's precious natural creations. The employer cannot prove the source of the leak. It also considers itself hamstrung to enforce rules that prevent employees expressing views outside work which are likely to bring the bank into disrepute, given the size of the loan is not significant enough to amount to 'unjustified financial hardship' on the bank even if the customer took its business elsewhere. However, the position could be markedly different if the employee was not religious, as any statements made by the employee about the environment could not be protected statements of belief.

(c) Conventional discrimination protections are enough

In our submission on the first exposure draft of the Religious Discrimination Bill, we articulated the reasons for why 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.[78]

Rather than introducing conventional anti-discrimination standards, the Religious Discrimination Bill imposes different standards depending on the type of employee, employer, and profession, occupation or trade. Different employees will have different rights in different contexts. Sometimes their protections will be judged by what is

[77] Religious Discrimination Bill, s 26.

[78] See Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 18.

reasonable, sometimes by whether their employer will experience 'unjustified financial hardship', sometimes by whether a requirement of their profession, trade or occupation is 'essential', and sometimes by whether a requirement is 'inherent' to their employment. All these competing legal standards add unnecessary complexity on Australian workplaces while delivering workers haphazard, discriminatory and unsatisfactory protections. If there is a concern about protecting expression outside of work contexts, the Religious Discrimination Bill is not the vehicle to address this concern.

RECOMMENDATION

Delete subsections 8(2)(d)-(e), 8(3)-(5) and 32(6) of the Religious Discrimination Bill.

ENTRENCHING DOUBLE STANDARDS IN LAW

The Religious Discrimination Bill is replete with double standards: laws that apply to some but not others. Faith-based organisations will maintain an ability to discriminate against others with different beliefs or no beliefs, even when providing publicly funded services (as well as enjoying broad exemptions under other anti-discrimination laws). Corporations associated with religious individuals will be given discrimination protections, while people related to other people are not protected in other discrimination laws. Protections will be extended, and exemptions will be given, in accordance with largely self-defined doctrines, tenets, beliefs and teachings, including where local by-laws not followed.

6. DOUBLE STANDARDS IN EDUCATION, ACCOMODATION AND SERVICE DELIVERY

In our submission to the first exposure draft of the Religious Discrimination Bill, we identified the stark double standard underlying the Religious Discrimination Bill. While it purports to provide people of faith and no faith with protections against discrimination, it stops short of doing so in many cases when people with different or no religious beliefs are employed, enrolled or interact with faith-based organisations or rely on government-funded services delivered by these organisations.

(a) Broader exemptions for faith-based organisations

In the second exposure draft, exemptions for faith-based organisations have been:

- extended into the areas of employment in hospitals and aged care facilities;[79]
- broadened into service delivery by registered public benevolent institutions (such as charities) and other primarily non-commercial bodies;[80]
- reinforced and relaxed across all areas for schools, universities and colleagues;[81] and
- afforded in the area of accommodation to providers of camps or conference sites.[82]

The legal exemptions for faith-based organisations have been loosened to such a degree that people with different or no beliefs who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by these organisations are really offered very little protection under the Religious Discrimination Bill. This is the impact of several drafting decisions in the second exposure draft which are unprecedented, unorthodox and unbalanced. They include:

- confirming that all exemptions allow conduct which gives preference to persons of a particular religion;[83]
- the absence of any need to show any conformity with any religious doctrines, tenets, beliefs or teachings other than what the organisation (and one other person who shares its religious

[79] Religious Discrimination Bill, ss 32(8)-(11).

[80] Religious Discrimination Bill, s 11.

[81] Religious Discrimination Bill, s 11.

[82] Religious Discrimination Bill, s 33(2)-(5).

[83] Religious Discrimination Bill, ss 11(2), 11(4), 32(9), 32(11), 33(3) and 33(5).

belief) says are its religious doctrines, tenets, beliefs or teachings (see the 'It just takes two' test at section 7 below);

- the availability of an exemption allowing discrimination against others with different or no religious beliefs simply to avoid 'injury to the religious susceptibilities' of adherents of the organisation's religion (which, as set out in section 7, it largely defines for itself).[84]

The exemptions for faith-based organisations are really so broad that the various tests for meeting them become meaningless. Faith-based organisations can determine their own beliefs, change them at will, and not even have to rely on them, in order to discriminate against others with different or no beliefs.

People from minority faiths, and who have no faith, are those who are most vulnerable under these exemptions, especially given the size and significance of the faith-based sector. That is not to say that faith-based organisations want to, or do, discriminate – only that they can, and people will have no recourse if they do. It is not surprising then that several faith-based organisations have come out against these exemptions, arguing that they do not wish to discriminate against others of different or no faith.[85] In fact, these exemptions impact on the reputations of such faith-based organisations as inclusive employers, educators and service providers, depriving them of talented workers who assume they are not welcome and donors who direct their donations to other organisations they assume will not discriminate.

(b) Exemptions must recognise the significance of the faith-based sector

As submitted in our first submission, the problem with these exemptions is that they are trying to do too many things, for too many bodies, which are otherwise very different in size, type and purpose.[86] This becomes apparent when you consider the diversity of the faith-based sector. In 2015, the Australian Charities and Not-for-profits Commission identified that faith-based charities employed more than 428,000 full time and 490,000 part time staff, only about 3% of which were employed in faith-based charities where religious activities were the main activity.[87] Faith-based charities which identified their main activity as higher education, primary/secondary education, hospital and rehab, employment and training, aged care, and social services sectors have significantly larger headcounts on average, and employ a significantly larger number of people, than many other faith-based charities. Many of the services in this sector, such as education, health and aged care, are significantly publicly-funded.

Yet the drafting of these exemptions fails to respond to the diversity of the faith-based sector. For example, among the technical issues with these exemptions include:

- subsection 11(5) only refers to 'aged care facilities', not all providers of 'Commonwealth-funded aged care' (as defined in the *Sex Discrimination Act 1984* (Cth)). This means that faith-based providers of Commonwealth-funded *home* care may be able to discriminate against people with different or no beliefs in receipt of that care;
- providers of Government funded services, such as those providing accommodation for the homeless, domestic violence services and services for people with disabilities, may be permitted to discriminate against individuals with different or no beliefs in receipt of those services.

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[84] Religious Discrimination Bill, s 11(3).

[85] Media release, 'Prominent faith-based services providers are concerned the Religious Discrimination Bill overreach its initial intention', 29 November 2019.

[86] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 25.

[87] Penny Knight and David Gilchrist (2015) *Faith-Based Charities in Australia*, March 2015, Australian Charities and Not-for-profits Commission, at 12

(c) Broad exemptions are unnecessary

The effect of these broad exemptions for faith-based organisations is to leave a huge hole in the protections afforded by the Religious Discrimination Bill, particularly for people of minority faiths or no faith. It is incompatible with the approach taken in comparable cases overseas. For example, the European Court of Human Rights considers the proximity between the nature of a position and the mission of the religious organisation when determining the extent to which the organisation can impose its particular religious views on its employees.[88]

It has never been explained why the further exemption in section 12, which allows reasonable conduct that is consistent with purposes of the Religious Discrimination Bill, and which is intended to meet a religious need or reduce disadvantage experienced by people of particular faith, would not capture the vast majority of instances where religious discrimination would be justified. We can see no reason, why, for example, a faith-based organisation, particularly a minority faith-based organisation, could not rely on this provision to appoint religious leaders or school pastoral workers, organise religious spaces and observances for their adherents, and otherwise meet the needs of their adherents, without additional and untargeted blanket exemptions for faith-based organisations as a whole. Considering the diversity of faith-based organisations, there are few roles or services where the individual beliefs of a person prevents them from performing a role or alleviates their need for a service which they might otherwise be eligible to receive. And again, when that is be the case, conventional anti-discrimination exemptions fill that gap, for example, by providing an exception when religious beliefs are an inherent requirement of a role, or allow a service to express preferences when it is reasonable to impose a condition, requirement or practice notwithstanding the effect it has of disadvantaging persons of particular beliefs.

(d) A better way forward

As we submitted in our first submission, the latitude given to faith-based bodies to discriminate against others of different faiths or no faith were already framed too broadly in the first exposure draft. They have now been made even worse.

If the Religious Discrimination Bill is really about protecting people of faith or not faith, the any exemptions must include better balancing mechanisms to protect the rights of individuals who are employed, enrolled or interact with faith-based organisations or who rely on government-funded services delivered by these organisations. This is now all the more important because the test for what constitutes a religious doctrine, tenet, belief or teaching has been relaxed (see the 'It just takes two' test at section 7 below). At a minimum, these exemptions must be narrowed to address obvious gaps.

[88] *Fernandez v Spain* (2014) ECoHR, Application No 56030/07, 12 June, at [130]; *Schüth v Germany* (2010) ECoHR, Application No 1620/03, 23 September, at [69]. See Anja Hilkemeijer and Amy Maguire (2019) 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', 93 *Alternative Law Journal* 752.

RECOMMENDATION

Review and narrow all exemptions for faith-based organisations under the Religious Discrimination Bill to:

- allow religious discrimination in activities which directly relate to religious worship, observance, practice and teaching, consistent with international human rights law;
- prohibit religious discrimination for those who are employed, enrolled or interact with such organisations or who rely on government-funded services delivered by faith-based organisations, unless that discrimination is:
  - necessary to meet a religious need or redress historical disadvantage, or
  - sufficiently proximate to religious worship, observance, practice or teaching to necessitate that the individual personally holds the same religious belief, or engages in the same religious activity, as the faith-based organisation.
- include explanatory notes that make clear these exemptions only extend to discrimination based on religious belief or activity, not on other grounds of discrimination (such as sexual orientation and gender identity) protected in other legislation.

7. 'IT JUST TAKES TWO' TEST

The first exposure draft of the Religious Discrimination Bill was criticised by some groups for the difficulty inherent in giving protections based on the indefinite and undefined ground of 'religious belief'. In the absence of any definition of 'religious belief', and the extension of protections on characteristics associated with those undefined and indefinite religious beliefs,[89] we were concerned that expressions of religious belief which urged unlawful acts, falling short of serious offences,[90] could find protection against discrimination.[91] Examples may be, someone claiming religious discrimination protections when their employment is terminated, even though they have urged breaches of confidentiality owed to a client out of an overwhelming religious commitment to disclosing moral injustice.

When suggesting the extension of discrimination protections to the ground of religious belief, the NSW Young Lawyers' Human Rights and Public Law and Government Committees recommended that 'belief' be defined consistently with international human rights law and comparable jurisprudence, as one which:

- is genuinely held;
- is a belief and not an opinion or viewpoint based on the present state of information available;
- is a belief as to a weighty and substantial aspect of human life and behaviour;
- attains a certain level of cogency, seriousness, cohesion and importance; and

[89] Religious Discrimination Bill, s 6.

[90] Religious Discrimination Bill, s 28.

[91] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 27.

- is worthy of respect in a democratic society, not incompatible with human dignity and not conflict with fundamental rights of others.[92]

The Religious Discrimination Bill does not adopt this definition, nor many of these limitations on what beliefs will be protected by the Bill.

Instead, the second exposure draft goes even further in recognising a wide range of religious doctrines, tenets, beliefs or teachings without any effective minimum requirements or definitions. The Religious Discrimination Bill does this by extending protections, and providing exemptions, based on a new and unprecedented legal test. The test merely requires demonstrating that a statement, or conduct which discriminates against others of different or no belief, is based on doctrines, tenets, beliefs or teachings that *'a person of the same religion … could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'.*[93]

This means that the protections provided by this Bill, and the exemptions provided for faith-based organisations, will extend to extreme and unorthodox beliefs. Schools, charities and other faith-based organisations who wish to discriminate against others with different or no beliefs,[94] or people who wish to obtain immunity under anti-discrimination laws by making statements based on their beliefs, will be able to do so by pointing to doctrines, tenets, beliefs or teachings which only one other person reasonably considers to be part of their particular brand of faith.[95]

Or in other words, it will just take two people to establish a religious requirement exists and deserves protection.

The explanatory notes explain that the intention of this test is to protect the religious beliefs or activities of different denominations or sects within a particular religion.[96] But with the absence of any definition of a 'religion', and with the intention to include emerging and new faith traditions, what might qualify as a religious belief or activity is extremely broad, uncertain and highly subjective. Furthermore, the person who shares your faith does not actually have to be a *reasonable* person, they only have to reasonably consider that the doctrines, tenets, beliefs or teachings form part of your particular shared faith. That is, a person who believes what you believe is the arbiter of whether you are correct in what you say your particular beliefs entail.

The 'it just takes two' test will mean people and faith-based organisations will not need to show conformity with any established doctrines, tenets, beliefs or teachings of any established faith tradition in order to justify discrimination against others with different or no beliefs, or to make discriminatory 'statements of belief'.

If people are to be afforded protection for whatever religious doctrines, tenets, beliefs or teachings they believe in, the Bill must ensure that, consistent with article 18(3) of the International Covenant on Civil and Political Rights, no conduct is protected, authorised or permitted where it is contrary to *'public safety, order, health, or morals or the fundamental rights and freedoms of others'.*

[92] *R v AM* [2010] 5 ACTLR 170; Law Society of New South Wales Young Lawyers (2018) *Submission to the Religious Freedom Review*, 14 February, at 5.

[93] See, for example, Religious Discrimination Bill, ss 5(1) (definition of *statement of belief*) and 11.

[94] Religious Discrimination Bill, s 11.

[95] Religious Discrimination Bill, s 42.

[96] Explanatory notes to the second exposure draft of the Religious Discrimination Bill 2019, [71]-[73].

RECOMMENDATION

Redraft all provisions in the Religious Discrimination Bill which contain the 'It Just Takes Two' test.

Ensure no discrimination protections or exemptions are provided to conduct which is contrary to public safety, order, health, or morals or the fundamental rights and freedoms of others.

8. PROTECTING CORPORATIONS AGAINST DISCRIMINATION

The second exposure draft of the Religious Discrimination Bill now contains a provision extending all anti-discrimination protections found in the Bill to 'persons' who are associated with an individual of faith or no faith. While some other anti-discrimination laws give protection to 'associates' (such as the spouse, partner or relative of a person with a protected attribute),[97] section 9 of the Religious Discrimination Bill proposes to give these protections also to legal entities (e.g. companies) associated with such individuals. This is despite the Government seemingly accepting our recommendation, in part, that the Religious Discrimination Bill should only allow complaints to be brought on behalf of a natural person.[98]

This new provision will open an unprecedented opportunity for business-on-business disputes. It will also silence the ability of ordinary Australians to boycott companies as a way of showing their disagreement with individuals associated with these companies who have expressed discriminatory, outdated, dangerous or offensive views either based in or about religion.

So, for example:

- a sporting code could sue a sponsor who refused to supply it goods and services while it continued to employ a sports star expressing discriminatory views based on their religious beliefs;
- a radio network could sue a food business which refused to supply catering to an event while it remained associated with a radio star who had expressed offensive views about the Virgin Mary while on-air;
- a conference provider could sue a hotel if it refused accommodation to a prominent individual speaking at the conference with religious views in favour of racial segregation;
- a company could sue a printer who refused to print pamphlets authorised by its managing director that 'abortion is murder';
- a charity could sue the Commonwealth for cancelling a funding contract because its CEO made public comments that women are commanded to cover themselves in order to avoid unwanted sexual advances.

The problem with section 9 comes from the failure to define an 'associate', and limit that definition, either expressly or by necessary implication, to natural persons (as is done in other anti-discrimination laws).[99] Rather, it is the

[97] See, for example, RDA and DDA.

[98] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 26-7.

[99] See, for example, DDA, s 4(1) (definition of *associate*); *Anti-Discrimination Act 1977* (NSW), s 4(1) (definition of *associate*); *Equal Opportunity Act 2010* (Vic), s 6(q) ('personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes').

intention of the Religious Discrimination Bill to extend this protection to *legal* persons who have personal, business, employment and other forms of relationship with an individual of faith or no faith.[100]

This approach demonstrates the stark exceptionalism of the Religious Discrimination Bill. Neither the *Sex Discrimination Act* nor the *Age Discrimination Act* include any protections for associates, while the Religious Discrimination Bill seeks to extend these protections even to legal entities. Accordingly, while a child in a divorced, unmarried or same-sex family has no protection under the *Sex Discrimination Act* if they are discriminated against because of the marital status or sexual orientation of their parents, companies will be able to sue other companies under the Religious Discrimination Bill if they are refused goods, services, facilities, accommodation or access to premises because of their business or employment associations with individuals of faith or no faith. Not only is this a double standard, but it fails to grapple with the policy propositions relating to religious belief or activity (discussed at the opening of our submission) which require laws in this space to carefully balance competing beliefs and power relations.

RECOMMENDATION

Only humans should be afforded *human* rights, and all humans should be afforded equal rights.

RECOMMENDATION

Delete 'a person who has an association (whether as a near relative or otherwise)…' from section 9 of the Religious Discrimination Bill. Replace it with 'an individual who is the associate…'.

Define 'associate' as meaning, in respect of an individual:

- a spouse or de facto partner of the individual;
- a near relative of the individual;
- a carer of the individual;
- another individual who is in a business, sporting or recreational relationship with the individual.

These amendments will ensure that only humans can be recognised as associates under the Religious Discrimination Bill, similar to protections provided under the *Disability Discrimination Act 1992* (Cth).

[100] Explanatory notes to the second exposure draft of the Religious Discrimination Bill 2019, [201]-[204].

RECOMMENDATION

Amend the *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) to include protections against discrimination for associates.

9. OVERRIDING LAWS PROTECTING PUBLIC ORDER AND SAFETY

The second exposure draft of the Religious Discrimination Bill now contains a provision extending all anti-discrimination protections found in the Bill to people of faith or no faith, even if they are engaged in activities which breach local by-laws. Subsection 5(2) means that local by-laws which prevent or restrict religious activities, such as local government rules requiring a permit to hand out proselytising material in public malls,[101] or which impose noise restrictions, are susceptible to challenge.

In principle, Equality Australia has no objection to overriding council by-laws which impermissibly limit any human right but does object to the exceptionalism by which the Religious Discrimination Bill does so. In our view, all by-laws that impermissibly limit human rights (such as the right to peaceful political assembly) should be amended or overridden, and the mechanism for doing so should be available equally to all – not only to those whose religious beliefs or activities are intruded upon.

Equality Australia considers it is time for a broader review of laws which discriminate on all prohibited grounds, and greater statutory protection for all human rights, such as equality before the law. That review should be done through a comprehensive framework which incorporates the balancing approach necessary when considering whether laws impermissibly infringe human rights.

RECOMMENDATION

Delete subsection 5(2) from the Religious Discrimination Bill.

Implement a comprehensive mechanism for the review of laws which infringe on any human right.

[101] *Attorney-General for South Australia v Corporation of the City of Adelaide and Ors* [2013] HCA 3.

OTHER ISSUES

The following issues identified in our submission to the first exposure draft of the Religious Discrimination Bill remain in issue:

- A Freedom of Religion Commissioner has been retained but there is still no LGBTI Commissioner. LGBTI Australians will be the only group protected under federal anti-discrimination legislation without a dedicated Commissioner at the Australian Human Rights Commission.[102]
- Unnecessary amendments to the *Charities Act 2013* (Cth) purporting to 'clarify' that charities with so-called 'traditional views of marriage' are not disqualified from being charities, have not been removed.[103] This is despite strong submissions by the Australian Charities and Not-for-profits Commissioner and Justice Connect's Not-for-profit law service regarding the lack of a need for these changes negative unintended consequences from these changes.[104]
- Unnecessary amendments to provide further exemptions for religious schools in the *Marriage Act 1961* (Cth) have not been removed.[105]

Accordingly, Equality Australia reiterates its previous submissions and recommendations in this regard.

RECOMMENDATION

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

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.

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.

[102] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 30-31.

[103] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 28-29.

[104] Australian Charities and Not-for profits Commission (2019) *ACNC Submission – Religious Freedom Bills*, 25 September at [13], [18]-[19]; Justice Connect (2019) *Submission Religious Freedom Bills*, 2 October.

[105] Equality Australia (2019) *A Freedom From Discrimination, Not a Licence to Discriminate*, 2 October, at 29-30.