



In Good Faith

**Redfern Legal Centre Submission to the Attorney-General on the
Second Exposure Drafts of the Religious Discrimination Bill 2019, Religious
Discrimination (Consequential Amendments) Bill 2019 and Human Rights
Legislation Amendment (Freedom of Religion) Bill 2019 | 31 January 2020**
Prepared by Sharmilla Bargon, Employment Law Practice

Acknowledgements

We acknowledge the traditional owners of the land on which we work.

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Redfern Legal Centre

RLC is an independent, non-profit, community-based legal centre with a particular focus on human rights and social justice. Our specialist areas of legal practice include tenancy; credit, debt and consumer; employment and discrimination; and complaints about police and other government agencies. RLC runs the International Students Service NSW and is a part of the Migrant Employment Legal Service.

By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct casework, deliver community legal education, prepare publications and submissions and advocate for law reform. RLC works towards reforming our legal system for the benefit of the community.

Contact:

Sharmilla Bargon

Solicitor, Employment Law Practice, Redfern Legal Centre

Sharmilla@rlc.org.au

02 9698 7277

73 Pitt Street,

Redfern, 2016

We consent to this submission being published on the Attorney-General's Department webpage.

Endorsement

This report is endorsed by Community Legal Centres NSW, and to the extent it applies to employment law, is also endorsed by JobWatch Employment Rights Legal Centre and the Employment Law Centre of WA

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1 Introduction

Our submission dated 2 October 2019 (Annexure A to this submission) (**RLC's first submission**) details a number of concerns held by Redfern Legal Centre (**RLC**) in relation to the Religious Discrimination Bill 2019 (**the Bill**), Religious Discrimination (Consequential Amendments) Bill 2019 (**the Consequential Amendments Bill**) and Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (**the Human Rights Amendment Bill**) (together, **the Bills**).

While RLC supports the introduction of protections for individuals from religious discrimination and acknowledges improvements to the Bills in the second exposure drafts, it is RLC's view that, overall, the Bills remain deeply flawed.

The Bills continue to favour religious bodies, health practitioners and individuals who make offensive, insulting, humiliating or intimidating public statements in accordance with their religious views, at the expense of protections for individuals from all types of discrimination. Some of the protections given to religious bodies have been expanded at even further expense to individual protections, ignoring important community concerns raised in the submissions on the first exposure drafts.

This submission addresses the issues arising from the changes to the Bills as reflected in the second exposure drafts. We repeat and rely on RLC's first submission in all other respects.

2 Summary of recommendations

RLC makes the following recommendations:

1. The public consultation period on the second exposure drafts of the Bills should be extended.
2. The definition of religious body should be limited to bodies established for religious purposes that operate places of worship, conduct religious services and ceremonies and provide religious education and instruction. The definition should not include educational institutions more broadly.
3. The test in subsection 11(1) should be amended to require religious bodies to demonstrate that conduct 'is in accordance with' or 'conforms to' the doctrine, tenets, beliefs or teachings of a religion.
4. The ability of religious bodies other than places of religious worship to preference persons of the same religion should be removed.
5. The religious bodies exception should not apply to conduct connected with commercial activities.
6. Subsections 32(8) and 32(10) of the Bill should be removed.
7. The Bill should adopt the definition of associate in section 4 of the *Disability Discrimination Act 1992* (Cth).

8. Protections for ‘Statements of belief’ should be removed from the Bill.
9. The conscientious protections provisions in the Bill should be removed.
10. The creation of the office of the Freedom of Religion Commissioner should be removed.
11. The amendment to the *Charities Act 2013* (Cth) proposed by the Human Rights Legislation Amendment Bill 2019 should be removed.
12. The amendment to the *Marriage Act 1991* (Cth) proposed by the Human Rights Amendment Bill should be removed.
13. The Australian Government should enact a federal Human Rights Act.
14. The Australian Government should consolidate and modernise anti-discrimination legislation.

3 Public consultation

In RLC’s first submission, we recommended that the period of public consultation on the reforms be extended. The second exposure drafts were released on 10 December 2018 and submissions close on 31 January 2019.

Although the second exposure drafts provide a welcome further opportunity for comment on the Bills, the short time frame provided for public consultation over the end of year holiday period has again limited the opportunity for meaningful consultation to take place.

Given the significance of the Bills, further opportunity should be given for consultation in relation to the second exposure drafts and any further set of exposure drafts.

Recommendation

The public consultation period on the second exposure drafts of the Bills should be extended.

4 Religious bodies exception

In RLC’s first submission, we recommended that the scope of the religious bodies exception (now found in section 11 of the Bill) be significantly narrowed.

We welcome the exclusion of institutions that are a hospital or aged care facility or that solely or primarily provide accommodation from the definition of religious body in subsection 11(5) (however, see below our concerns regarding the provisions around employment in such institutions and facilities).

However, we remain concerned about the scope and operation of the religious bodies exception.

4.1 The test for the exception

Person of the same religion

RLC's first submission recommended that the religious bodies exception be amended to provide that a religious body does not discriminate where it is engaging, in good faith, in conduct that "is" in accordance with the doctrine, tenets, beliefs or teachings of a religion. This recommendation was made in a number of other submissions on the first exposure draft¹ and would bring the provision in line with discrimination law more broadly.²

The amendments to the test in the second exposure draft ignore this recommendation. Subsection 11(1) amends the test to state that a religious body does not discriminate where they are engaging, in good faith, in conduct that:

"...a person of the same religion as the religious body **could** reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion".
[emphasis added]

The explanatory notes state that the amendment avoids the need for the Court to make decisions around what the doctrine, tenets, beliefs or teachings of a religion are.

However, the amendment to the test creates further uncertainty and results in an even more remote connection between the conduct in question and religious doctrine, tenets, beliefs or teachings. The question becomes, not whether conduct is actually in accordance with religious doctrine, tenets, beliefs or teachings, but whether a person of the same religion could reasonably consider the conduct to be in accordance with their religion – whether or not they are correct in holding that view and whether or not other persons of the same religion hold that view.

The test should be amended to require religious bodies to demonstrate that conduct 'is in accordance with' or 'conforms to' the doctrine, tenets, beliefs of teachings of a religion. With the introduction of the religious susceptibilities test in subsection 11(3), this amendment will mean that the test is consistent with other federal legislation such as the religious bodies exception in section 37 of the *Sex Discrimination Act 1984* (Cth).

4.2 Definition of religious body

RLC welcomes the exclusion of hospitals, aged care facilities and institutions that solely or primarily provide accommodation from the definition of religious body in subsection 11(5) and the restriction from charity to public benevolent institution in subsection 11(b). We do not support the removal of the restriction on public benevolent institutions engaged in commercial activities as stated below.

¹ See for example, the submissions by the Australian Discrimination Law Experts Group dated 1 October 2019, Law Council of Australia dated 3 October 2019, Public Interest Advocacy Centre dated 30 September 2019 and Equality Australia dated 2 October 2019.

² See section 37 of the *Sex Discrimination Act 1984* (Cth) which states "...[an]...act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

However, for the reasons set out in RLC's first submission, we recommend that the definition of religious body be further narrowed.

Specifically, other bodies and religiously affiliated organisations and educational facilities should not fall within the definition of religious body, nor should any body (including a public benevolent institution) that is engaged solely or primarily in commercial activities.

The definition of religious body should be limited to public benevolent institutions that have the purpose of advancing religion as its core activity, such as bodies established for the purpose of religious worship.

4.3 Preferencing

The second exposure draft amends the religious bodies exception at subsections (2) and (4) to permit religious bodies to give preference to persons of the same religion.

We acknowledge that it might be desirable for places of religious worship like churches, mosques and temples to be able to preference persons of the same religion in certain circumstances such as employment and admission to the place of worship.

However, we otherwise strongly oppose the ability of organisations to preference persons of the same religion. There is no reason a charity should preference individuals seeking services on the basis of their faith nor any reason for a charity to preference employees of the same faith.

The ability of religious bodies to give preference to persons of the same religion also undermines the protections for individuals from discrimination on the basis of religious belief elsewhere in the Bill, for example, in relation to the provision of goods and services and the making available of facilities as found in section 21 of the Bill.

'Preferencing' by religious bodies would allow:

- a law firm such as Salvos Legal, with public benevolent institution status as part of the Salvation Army Group, which operates a commercial practice specialising in corporate and commercial, property and technology law to fund the provision of free legal services in areas such as family, migration, policing, human rights, credit and debt and social security law, to hire only Protestant Christian solicitors, legal secretaries, hospitality staff and mail room staff and to preference clients who are Protestant Christian clients.
- St Vincent de Paul shops across Australia (currently numbering 650), which have public benevolent institution status and sell donated goods to the community, to hire only Christian staff and preference Christian consumers.
- Mission Australia, a public benevolent institution which receives 74 per cent of its income from government grants (over \$167 million) to hire only Christian staff and preference Christians for services it provides including disability support, employment skills training, playgroups, youth and many others.

4.4 Other Commonwealth Laws

We welcome the note in section 11 that the religious bodies exception does not permit conduct that is otherwise unlawful under any other law of the Commonwealth, including the *Sex Discrimination Act 1984* (Cth). The Bill should not dilute any existing protections from discrimination that already exist in Commonwealth legislation.

However, we are concerned that in practice this will increase the complexity of disputes about the conduct of religious organisations pursuant to section 11 of the Bill.

The better approach is to ensure that that the definition of religious body and the circumstances in which the religious body exception in section 11 applies is sufficiently limited and consistent with existing protections against discrimination.

Recommendations

The definition of religious body should be limited to bodies established for religious purposes that operate places of worship, conduct religious services and ceremonies and provide religious education and instruction. The definition should not include educational institutions more broadly.

The test in subsection 11(1) should be amended to require religious bodies to demonstrate that conduct 'is in accordance with' or 'conforms to' the doctrine, tenets, beliefs or teachings of a religion.

The ability of religious bodies other than places of religious worship to preference persons of the same religion should be removed.

The religious bodies exception should not apply to conduct connected with commercial activities.

5 Religious hospitals, aged care facilities and accommodation providers

The changes in the second exposure draft permit religious hospitals, aged care facilities and accommodation providers to discriminate in employment (subsections 32(8) and 32(10)).

Many of these bodies receive public funding from the Government. Indeed, Government provides funding to some of these 'religious bodies' to provide services to people facing disadvantage and minority groups such as people who are homeless and people with disabilities. Such bodies, essentially outsourced by Government to provide crucial services, often with minimal or no financial funding from the religious institution itself, should not be permitted to discriminate and impose their religious views by making staffing decisions on the basis of faith.

We strongly oppose the ability of any religious hospital, aged care facility and accommodation provider that receives State, Territory or Commonwealth funding to make staffing decisions on the basis of faith.

Recommendation

Subsections 32(8) and 32(10) of the Bill should be removed.

6 Associates

We welcome the introduction of protections for associates in section 9 of the second exposure draft.

To avoid uncertainty about who might be an associate, we recommend that the term 'associate' is defined in the Bill.

For consistency, we recommend using the definition of associate in section 4 of the *Disability Discrimination Act 1992*:

"Associate", in relation to a person, includes:

- (a) a spouse of the person; and
- (b) another person who is living with the person on a genuine domestic basis; and
- (c) a relative of the person; and
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person."

Recommendation

The Bill should adopt the definition of associate in section 4 of the *Disability Discrimination Act 1992* (Cth).

7 Statements of belief

We raised significant concerns about the operation of statements of belief in RLC's first submission. These concerns have not been addressed in the second exposure drafts.

We repeat and rely on the detailed discussion in RLC's first submission.

We also note and endorse the relevant sections of the submissions made by the Australian Discrimination Law Experts Group and Law Council of Australia in their submissions on the first exposure draft regarding the procedural difficulties arising from the override of State and Territory laws.

Recommendation

Protections for 'Statements of belief' should be removed from the Bill.

8 Conscientious objection

8.1 Health practitioners

We welcome the narrowing of health services that a health practitioner may conscientiously object to providing to medical, midwifery, nursing, pharmacy and psychology.

The Explanatory Notes indicate that amendments to subsections 8(6) and (7) and the notes to these subsections³, and the introduction of a definition for the term ‘conscientiously object’ in section 5, reflect an intention to establish that a health practitioner’s conscientious objection must be to a particular kind of health service and not to the provision of that service to a particular person or persons based on them having a particular attribute, such as being a single woman, or an LGBTIQ+ person.

However, the amendments as currently drafted do not reflect this intention.

Health practitioners will still be able to conscientiously object to providing health services, depending on how the grounds of their religious beliefs or activities are understood. A health practitioner could:

- decline birth control treatments or measures, such as filling or issuing birth control prescriptions, vasectomy, or tubal ligation, because the health practitioner opposes contraception on the Catholic grounds that all sex must be unitive and procreative.
- decline birth control treatments or measures to non-married people or for those engaging in extra-marital affairs, because the health provider’s Methodist beliefs support married couples using contraception to regulate the size and spacing of their family, but upholds the teaching of chastity for all outside marriage and fidelity within it.
- decline to assist a LGBTIQ+ person seeking advice or testing in sexual health related matters because the health service provider’s Pentecostal Christian views are that sexual relationships should be between a man and woman only.
- refuse to provide sex reassignment therapy, such as transgender hormone therapy, to transgender people on the basis that God created people as “male and female” and any attempt to alter the way a person was made is an act of rebellion against God.
- decline to provide medication treating HIV/AIDS to anyone on the basis that HIV/AIDS is the consequence of sinful behaviour incompatible with Islam.

Health practitioners would also be able to decline to refer patients in the above circumstances to another health provider that is willing to provide the service.

³ Note 2 states: “...this provision does not have the effect of allowing a health practitioner to decline to provide a particular kind of health service or health services generally to particular people or groups of people. For example, refusal to prescribe contraception to single women may constitute discrimination under the *Sex Discrimination Act 1984*.”

In addition to creating barriers to accessing basic health care, the Bill's conscientious objection provisions risk serious trauma to patients who attend a health service only to learn that they are being declined treatment. Although it is RLC's firm view that the conscientious objection protection provisions in the Bill should be removed, if this does not occur, the Bill should be amended to require all health practitioners who conscientiously object to providing a health service to publish on a publicly available register the health services that the health practitioner objects to providing to inform consumers and reduce the risk of the serious trauma referred to above.

It is RLC's view that the Bill's conscientious objection provisions remain unnecessarily broad and are likely to significantly disadvantage RLC clients including women, people with disability, Aboriginal and Torres Strait Islander people, people living in rural, regional and remote areas and LGBTIQ+ people. The Bill risks creating classes of people in our society for whom access to health care services is no longer a basic human right. This will have a deep and direct impact on the physical and mental health of many people in our community.

8.2 Unjustifiable adverse impact

We refer to and rely on the concerns raised in RLC's first submission about the narrow circumstances in which a health practitioner can be required to provide treatment because of 'unjustifiable adverse impact'.

It remains our view that this will leave many people without essential health services and will be particularly problematic in rural, regional and remote areas where people may only have one health service they can go to.

The examples given in the Explanatory Notes only reinforce our concerns. The Notes state that 'unjustifiable adverse impact' might arise where there is a risk of death or serious injury of the person seeking the health service. The Explanatory Notes give an example of a woman living in a remote area who is declined a prescription for birth control medication in circumstances where that medication is needed for non-contraceptive use such as to treat endometriosis or polycystic ovary syndrome where other health care cannot be accessed without significant travel and cost.⁴ However, if that same woman living remotely seeks birth control for a contraceptive purpose, the Bill will operate to allow a health service to decline to provide that prescription.

RLC also shares the concern noted by the Anti-Discrimination Board of NSW in its submission on the first exposure draft about a health practitioner's discretion to make a judgment in emergency situations when judicial oversight is not readily available.

If a person wishes to challenge the decision of a health practitioner to decline to provide them with treatment, their only recourse is to make their own complaint under federal legislation. At a federal level, such complaints are only formally adjudicated in the Federal Circuit Court and Federal Court, both of which are cost jurisdictions. This is a significant barrier to individuals attempting to secure appropriate health care.

⁴ Explanatory Notes to Religious Discrimination Bill 2019, paragraph 148.

The circumstances in which a health practitioner may conscientiously object to provide treatment should be significantly narrowed. There should be stronger exceptions to ensure that groups including LGBTIQ+ people, women and people living in rural regional and remote areas (including Aboriginal and Torres Strait Islander peoples) are appropriately able to access health care.

Recommendation

The conscientious objection protections provisions in the Bill should be removed.

9 Amendments proposed by the Human Rights Legislation Amendment Bill

We refer to and rely on RLC's first submission in relation to the office of the Freedom of Religion Commissioner, the protection for charities in the Human Rights Legislation Amendment Bill and the amendment to the *Marriage Act 1991* (Cth) proposed by the Human Rights Amendment Bill.

We endorse the recommendation made by Equality Australia and the Public Interest Advocacy Centre in their submissions on the first exposure draft that in the event of the creation of the office of the Freedom of Religion Commissioner, the office of a LGBTIQ+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status should also be created.

Recommendations

The creation of the office of the Freedom of Religion Commissioner should be removed. The amendment to the *Charities Act 2013* (Cth) proposed by the Human Rights Legislation Amendment Bill 2019 should be removed.

The amendment to the *Marriage Act 1991* (Cth) proposed by the Human Rights Amendment Bill should be removed.

10 A Human Rights Act

We note and endorse the recommendations made by the Human Rights Law Centre, Law Council of Australia and others in their submissions on the first exposure draft that rights and freedoms should be protected in a coherent legal framework which can be achieved through the enactment of a federal Human Rights Act and consolidated and modernised anti-discrimination legislation.

Recommendations

The Australian Government should enact a federal Human Rights Act.

The Australian Government should consolidate and modernise anti-discrimination legislation.

11 Discrimination for unpaid workers

We note and endorse the recommendations made by the Australian Human Rights Commission in their submissions on the first exposure draft that the protection for volunteers and unpaid interns in the Bill should be extended to the other grounds of discrimination covered by Commonwealth discrimination laws.

Recommendation

The protection against discrimination for unpaid workers provided by the Bill also be included in the existing four Commonwealth Discrimination Acts, namely the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).