

Australian Council of Human Rights Authorities

Submission to the Australian Government regarding the Religious Freedom Bills

Dear Attorney-General,

The Australian Council of Human Rights Authorities ("ACHRA") welcomes the opportunity to make a submission in response to the Australian Government's package of legislative reforms on religious freedom released on 29 August 2019, including the exposure drafts of the Religious Discrimination Bill 2019, Religious Discrimination (Consequential Amendments) Bill 2019, and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

ACHRA is comprised of the State, Territory and Federal Human Rights and Discrimination Authorities and this submission is made on behalf of the following ACHRA members;

- Anti-Discrimination Board of New South Wales
- Australian Capital Territory Human Rights Commission
- Equal Opportunity Tasmania
- Northern Territory Antidiscrimination Commission
- Queensland Human Rights Commission
- South Australian Equal Opportunity Commission
- Victorian Equal Opportunity and Human Rights Commission
- Western Australian Equal Opportunity Commission

Individual authorities will consider making their own submission. Where they do, this submission should be read in conjunction with those to ensure jurisdiction-specific issues are fully understood.

Each authority has an important role in administering anti-discrimination and human rights law. Additionally, authorities promote equal opportunity and human rights across all levels of government, including the Australian Government.

ACHRA exists to promote the work of each of the authorities, share resources and information, as well as formulate coordinated responses to issues that impact across respective jurisdictions.

In general, ACHRA's position on the reform measures can be characterised as follows;

- To the extent that the Draft Exposure Bills conform with orthodox and current anti-discrimination legislative frameworks, ACHRA is supportive of the introduction of religious belief as a protected ground in Commonwealth legislation
- To the extent that the Draft Exposure Bills depart from orthodox anti-discrimination legislation, and in particular where the Bills override existing state protections and law, ACHRA does not support these measures
- ACHRA supports the staged implementation plan inclusive of additional consultation via the Australian Law Reform Commission, as proposed by Dr Sarah Moulds from the University of South Australia, School of Law.

Further information on ACHRA's positions are provided, in brief, in the following pages and we look forward to seeing a revised Bill before Parliament over the coming months.



Dr Niki Vincent, Chair, Australian Council of Human Rights Authorities

30 September 2019

ACHRA SUBMISSION (Cont'd)

Introduction

ACHRA is a network of the authorities established in each State, Territory and Commonwealth jurisdiction to administer anti-discrimination and, where relevant, human rights legislation.

As a network of the authorities working at the coal face of human rights and anti-discrimination, the expertise and experience represented is significant.

Discrimination Law Principles

ACHRA welcomes the move by the Australian Government to introduce protections for all Australians on the basis of religious belief or the absence of religious belief.

Australia is a richly diverse society, including many faith traditions. To date, protections available for those who hold to a particular faith or spirituality tradition have been inconsistent, often depending on which jurisdiction the person lives, whether their faith was visible through religious dress or appearance, or whether they constituted a particular 'ethnic group'.

ACHRA supports the objects of the proposed Bill which recognises Australia's international human rights law obligations. The principle that all are free and equal in dignity necessarily gives rise to the need for religious freedom. However, the protected ground of religious belief is only one of many freedoms and rights available to all who are 'free and equal in dignity'.

ACHRA is of the view that Commonwealth law should represent the strongest standards in discrimination and human rights law. Commonwealth law should also be a safety net to ensure that all Australians enjoy a set of minimum protections, irrespective of jurisdiction.

In the formulation of our view on the Draft Exposure Bills, the following principles are paramount:

- the need for consistent Commonwealth legislated protections for all Australians, irrespective of their jurisdiction
- the need to respect state sovereignty through the provision of model Commonwealth legislation, enabling the States and Territories to apply and/or develop concurrent legislation, where desirable to do so
- that all people are treated equally before the law and have equal access to the law.

To the extent that these reforms create consistent protections for all Australians on the basis of religious belief, and remedies for where and when discrimination occurs, ACHRA welcomes them.

Protecting religious freedom is a matter of balance and proportionality. Religious freedom, and the protection of it, does not require that other rights be displaced. In fact, the very nature of much of the work of ACHRA members is to balance these rights and interests through education, conciliation and through tribunal and other court mechanisms.

It would be antithetical to the work of ACHRA members to have to insist that any one human right is protected above another. ACHRA is of the view that in its current form, the draft legislation which establishes religious belief as a protected attribute will displace other rights and/or well established policy positions.

In general, ACHRA members are concerned that:

- the introduction of the proposed reforms, in their current format, are inconsistent with other Commonwealth discrimination legislation, and further complicate the protections available, increasing the difficulty people will have in understanding which attribute is protected in which circumstances
- provisions which directly or indirectly seek to displace existing federal, State and Territory laws, after years of local education and guidance by ACHRA members, will mean significant disruption and unintended consequences for businesses and service users whom have sought to be compliant with local codes of practice and best practice models
- the proposed reforms privilege religious belief above other hard-won protections.

Health Practitioner Conduct Rule

The sections relating to health practitioner conduct are of significant concern for ACHRA members.

The current draft legislation makes an extraordinary incursion into the legislative and policy objectives of both the Commonwealth health department and the State/Territories. The draft legislation privileges the religious belief of a health practitioner above any other right or policy objective, such as equitable access to health care in regional areas.

Not only do the current Bills privilege a health practitioner's religious belief above patient rights, it provides no protections for those patients who can foreseeably be impacted by this Bill. Such protections should include a requirement for objecting practitioners to provide a respectful and timely notification to the patient of their conscientious objection, information on their options, an offer of a timely and effective referral to an appropriate alternative health practitioner, and notification of their conscientious objections to the health service provider.

ACHRA members are concerned that:

- there is no guidance in which services conscientious objection might be appropriate, therefore any health practitioners captured within the current definition, may conscientiously object to any service where they claim that objection is linked to a religious tenant
- the test of 'unjustifiable adverse impact' is too high a threshold to appropriately balance the rights of patients, particularly LGBTIQ+ patients and/or regional and remote patients
- the reforms undermine state policy objectives where many have established mechanisms for dealing with conscientious objection in policy health directives or in non-legislative instruments, which could be overridden by the Bill
- the reform potentially conflicts with health practitioner professional codes of conduct.

Section 41 and a Statement of belief

Section 41 of the Exposure Draft Bill provides that a 'statement of belief' (not being malicious etc.) that 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion' do not constitute discrimination.

What exactly a statement of belief is in this context is not clear, but may, for example, include a verbal comment from an employer to a prospective employee.

In addition to the lack of clarity on what a statement of belief is, the section explicitly rolls back protections afforded to Tasmanians. Not only is this another incursion into a state jurisdiction, it goes against the principles of best practice with regard to discrimination

legislation, in particular that Commonwealth law should be 'model' so as to allow concurrent protections in all jurisdictions.

Additionally, the wording 'may reasonably be regarded' is essentially a broader protection than available to religious bodies under other religious exemption legislation, such as s 37 of the *Sex Discrimination Act 1984* (Cth) or s 82 of the *Equal Opportunity Act 2010* (Vic). There is no rationale provided for this departure from standard religious exemption tests, the scope of which has been established through case law.

Section 41 also raises the real possibility that state tribunals will not have the jurisdiction to decide matters where section 41 is used as a defence as tribunals cannot decide a federal question of law.

ACHRA members are concerned that:

- section 41 privileges the freedom of religious expression over the right to be free from discrimination by allowing for potentially harmful speech towards vulnerable communities
- the test of vilification, harassment, maliciousness etc., is very high and unlikely to provide any practical protection for those that may be the subject matter of such statements
- the test of 'reasonably regarded' is a lower threshold than in other religious exemption tests, with no clear associated policy objective
- section 41 is at odds with the policy objective of access to justice by virtue that any matter which rests on section 41 as a defence gives rise to complex legal questions with regard to the involvement of State tribunals

Employer restrictions on statements of belief

Where an employer wishes to restrict an employee's statement of beliefs outside of work time, for example through a social media policy designed to conform employee behaviour with the values of the workplace, the proposed reforms will require a 'relevant employer', who earns over \$50 million per annum, to prove that without such a restriction, they would be subject to 'unjustifiable financial hardship'.

What is clear from the current version of the reforms is that unless discriminatory statements have an economic impact, the current government does not consider those statements discriminatory and/or does not consider that any member of the public ought to be afforded protection from discriminatory statements.

Additionally, it is not clear how a business would prove unjustifiable financial hardship in the abstract. It is quite likely that a business would only be able to prove realised instances of financial loss.

This is at odds with the stated objectives of the Bill in clause 3.

ACHRA members are concerned that:

- financial loss is not the only relevant circumstance that should be considered when deciding if statements are discriminatory
- proving unjustifiable financial loss is likely to be very hard prior to the financial loss being realised

Including religious bodies within the definition of a 'person'

The Bill takes the unprecedented step of including religious bodies within the definition of a 'person', meaning religious bodies enjoy human rights ordinarily provided only to natural

persons.¹ A consequence of this is that religious bodies can make claims that they have been discriminated against – as persons – by other individuals or organisations.² For example, a religious charity and advocacy organisation may make a claim against a young trans woman for starting a petition calling for the organisation to lose its charity status due to transphobic comments.

This can be addressed by amending clause 5 so that 'person' refers only to natural persons.

Further consultation on the unorthodox measures and tests

ACHRA members agree with the assessment of Dr Sarah Moulds that some of the novel features of the proposed Bills give rise to significant legal complexity.

Dr Moulds proposes a two-stage implementation and consultation process, where the more unconventional elements of the Bills are referred to the Australian Law Reform Commission ("ALRC") for further investigation and consultation.³

ACHRA supports this proposal for the following reasons (inter alia):

- to minimise the unintended consequences likely to arise through the hasty introduction of complex law reform measures
- to ensure the final legislation reflects the best policy outcomes for those most affected by the changes, including individuals, businesses, and ACHRA members
- to allow adequate consideration of these more complex elements of the proposed Bill given the very short public consultation period.

¹ In clause 5 the definition of a person is given the effect of section 2C of the *Acts Interpretation Act 1901* (Cth). A note in clause 5 confirms that this intends to include a religious body or religious institution. This interacts with, for example, clauses 7 and 8 of the Bill, which protect a 'person' from direct and indirect discrimination (respectively).

² This is unprecedented in Australian discrimination law: Section 5 of the *Equal Opportunity Act 2010* (Vic) defines a person as "an unincorporated association and, in relation to a natural person, means a person of any age", which is mirrored in section 3 of the *Racial and Religious Tolerance Act 2001* (Vic). A person means a "human being" under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The meaning of "person" is section 2C of the *Acts Interpretation Act 1901* (Cth) is not imported into *Age Discrimination Act 2004* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), and the *Racial Discrimination Act 1975*.

³ Dr Sarah Moulds, Lecturer, School of Law, University of South Australia, Submission to The Hon Christian Porter, 26 September 2019. For a full list of Dr Moulds' publications, see: <http://orcid.org/0000-0003-3246-0987>