

Religious freedom reforms

Submission to Australian Government Attorney-
General's Department

27 September 2019

CONTENTS

Who we are	4
Introduction	5
Religious Discrimination Bill 2019.....	6
Clause 8 – Indirect discrimination – Conditions that are not reasonable relating to statements of belief	6
Clause 8 – Indirect discrimination – Health practitioner conduct rule	7
Clause 10 – Religious bodies may act in accordance with their faith	8
Clause 11 – Conduct that is not <i>discrimination</i> – Reasonable conduct intended to meet a need or reduce a disadvantage	8
Clause 41 – Statements of belief do not constitute discrimination	9
The Human Rights Legislation Amendment (Freedom of Religion) Bill.....	10
Conclusion.....	10

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the package of legislative reforms on religious freedom that have been publicly distributed for consultation by the Australian Government Attorney-General's Department.
2. The ALA supports providing additional protections against discrimination on the basis of religious belief or activity, but is concerned that the package of legislative reforms is flawed and cannot be supported in its current form. Moreover the ALA submits that the proposed legislative reforms are significantly different to the existing discrimination laws and will significantly weaken existing protections for people who rely on other discrimination laws to protect them from offensive, insulting, humiliating or intimidating conduct. If the legislative package becomes law, the effect will be to prioritise religious rights over all others, weakening existing protections for women, people with disabilities, people from culturally and linguistically diverse backgrounds, and Gay, Lesbian Bisexual, Transgender, Intersex and Queer (GLBTIQ+) people.
3. The ALA submits that the purpose of discrimination laws is to provide appropriate protection for people who may be disadvantaged by the fact that they may experience or possess a particular attribute. Legislative protection against discrimination on the basis of that particular attribute is based on a clear, well-established, evidenced-based rationale that people who possess that attribute would be otherwise disadvantaged and vulnerable to significant hardship without such protections. In other words, a major rationale for such discrimination laws is to 'level the playing field'.
4. The ALA is concerned that the Government has not presented a strong, evidence-based rationale for the need for such discrimination legislation in respect of religious belief or activity. The ALA submits that the package of legislative reforms on religious freedom that has been distributed is not premised on the basis of addressing an identified disadvantage that is faced by the possession of the relevant attribute in the same way that other discrimination laws are. The ALA is concerned that rather than seeking to 'level an otherwise unfair playing field' the package of reforms serves to privilege and prioritise religious belief and activity over other attributes that are in need of discrimination protection. This will have the inevitable effect of weakening existing discrimination protections in respect of these other attributes, namely gender, race, disability and age.

5. This submission will focus on the following:
 - a) Sections 8, 10 and 11 of the Religious Discrimination Bill 2019 ('the RD Bill');
 - b) The Human Rights Legislation Amendment (Freedom of Religion) Bill ('the HRLA (FoR) Bill').

Religious Discrimination Bill 2019

Clause 8 – Indirect discrimination – Conditions that are not reasonable relating to statements of belief

6. Clause 8 prohibits indirect discrimination on the basis of religious belief or activity. The prohibition of indirect discrimination is a common feature of discrimination law and deals with situations where the imposition of a condition or requirement disadvantages a certain group of people on the basis of the protected attribute. The ALA is concerned that clause 8 of the RD Bill goes much further than other federal discrimination laws, affording privilege to people of faith and religious belief over others.
7. In particular, the ALA notes the reference in clause 8(3) to *employer conduct rules*. Under clause 8(3) an employer conduct rule is not reasonable if it would restrict or prevent an employee from making a statement of belief at a time other than when the employee is performing work on behalf of the employer. Clause 8(4) states the exception to this, namely if the statement is malicious or would (or would be likely to) harass, vilify or incite hatred or violence against a person or group. These provisions only apply to employers with an annual revenue of at least \$50 million (clause 5(1), Definition of *relevant employer*).
8. This provision would cover the situation where an employer's code of conduct prohibits employees from making offensive comments on social media outside of work. Under the RD Bill, such a code of conduct would be considered as unlawful discrimination. This provision appears to be specifically designed to address Israel Folau-type situations.
9. The ALA is concerned that the provisions in relation to employer conduct rules do not appear in any other federal discrimination laws. This exemplifies how the RD Bill effectively privileges people of faith above people with other protected attributes under Federal discrimination laws.

10. The ALA is concerned that the standard of what is an unreasonable, unacceptable statement of belief in clause 8(4) (i.e. 'if the statement is malicious or would (or would likely to) harass, vilify or incite hatred or violence against a person or group') is excessive, as it is much higher than the standard set by existing Australian vilification laws. The ALA is concerned that the provision provides cover for the expression of highly offensive, bigoted and insulting comments on the basis that it is regarded as an expression of religious belief. Such comments are likely to cause significant harm and distress to people, particularly young GLBTIQ+ people.
11. The ALA also submits that the provisions in relation to employer conduct rules are incongruous in that they allow an employer to develop conduct rules that restrict or prevent an employee from making a non-religious statement of belief at a time other than when the employee is performing work on behalf of the employer. These statements may be similarly deeply held personal convictions relating to social issues, environmental issues, political beliefs or group affiliations. However, because they are not expressed as statements of religious belief they are not afforded the same protection.

Clause 8 – Indirect discrimination – Health practitioner conduct rule

12. Clauses 8(5) and (6) sets out the conditions that are not reasonable relating to conscientious objections by health practitioners. The effect of ss (5) and (6) is to prohibit any rule imposed by an employer on a health practitioner that would require them to perform services to which they have a religious objection.
13. The ALA is concerned that the wording of these sub-sections is extremely broad and will have far-reaching effects. Specifically, the ALA is concerned that this provision will allow doctors to refuse to perform abortions or other reproductive health treatments, or provide appropriate referrals for such treatments. In addition, the ALA is concerned that this provision would allow doctors to refuse to provide medical services for GLBTIQ+ people.
14. The ALA notes that this provision is not found in any other Australian discrimination law. In this regard these sub-sections appear to be examples of the ALA's concern that this Bill privileges the rights not to be discriminated against on the basis of religious belief or activity over the right not to be discriminated against on the basis of other protected attributes. In effect, a medical practitioner could refuse to provide services on the basis of religious grounds but not on the basis of any other protected attribute.

Clause 10 – Religious bodies may act in accordance with their faith

15. Clause 10 of the RD Bill states that a religious body does not discriminate against a person where it is engaging in good faith in conduct that may be reasonably regarded as acting in accordance with the doctrines, tenets, beliefs or teachings of the religion to which the religious body is conducted. A religious body includes religious schools, registered religious charities and any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.
16. The ALA is concerned that this section, as it is currently drafted, could potentially allow religious charities to refuse to assist people of a different faith. It could also allow religious charities to refuse to provide services to GLBTIQ+ people who do not accept the teachings in relation to gender and sexuality of the particular religion that operates the charity.
17. The ALA notes that this provision is also far broader than clauses found in other federal discrimination laws, and this again serves to privilege and prioritise religious belief and activity over other attributes that are in need of discrimination protection.
18. The ALA submits that clause 10 should be redrafted to ensure that the exemption granted to a religious body should not extend to the performance of functions, activities or the delivery of services which are not directly or immediately religious, but are essentially secular in nature.²

Clause 11 – Conduct that is not *discrimination* – Reasonable conduct intended to meet a need or reduce a disadvantage

19. Like other discrimination laws, clause 11 of the RD Bill allows for positive measures to be taken for further opportunities for people of religious belief, and particularly to reduce disadvantage based on religious belief. Clause 11 provides that any reasonable conduct that is intended to

² For example, see *Cobaw Community Health Services Limited v Christian Youth Camps Limited and Mark Rowe* [2010] VCAT 1613, per Justice Hampel, paragraphs 253, 288-307. Deputy President Justice Hampel considered the purposes of Christian Youth Camp ('CYC') to be essentially secular and related to the conduct of camping activities for both secular and religious groups that involved neither spiritual teaching, the maintenance of religious doctrines or the observances that promote or manifest the religion. This reasoning was subsequently confirmed by the Victorian Court of Appeal in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* (2014) 308 ALR 615 (per Maxwell P, paragraphs 157-158, 245, 290, 304).

meet a need arising out of a religious belief or reduce disadvantage based on religious belief will not be unlawful discrimination.

20. The ALA is concerned that the way in which clause 11 is drafted is far wider than similar clauses in other discrimination laws and thereby provides significant privileges to people of religious faith over those who do not share that religious faith.

Clause 41 – Statements of belief do not constitute discrimination

21. Australian discrimination law operates on the basis that there are concurrent federal and state discrimination laws. Up to this point this has operated effectively, as neither has sought to override the other. However, clause 41 of the RD Bill undermines this convention by determining that religious speech in good faith cannot amount to unlawful discrimination. It overrides all state laws to protect religious speech provided it is not malicious and does not 'harass, vilify or incite hatred', and expressly overrides s17(1) of the Tasmanian *Anti-Discrimination Act 1998*. If this section becomes law, this appears to be the first time that a federal discrimination law will override a state discrimination law.
22. Clause 41(1) states that a statement of belief will not breach s17(1) of the Tasmanian *Anti-Discrimination Act 1998*, which states that a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a protected attribute. The effect of clause 41(1) is that a person in Tasmania who makes a statement based on religious beliefs that offends, humiliates, insults, intimidates or ridicules another person on the basis of their gender, sexuality, disability, age, race, marital status, gender identity, parental status or other protected attribute would be undertaking a lawful activity. This fails to acknowledge the significant harm and damage that such statements can inflict, particularly for young people.
23. The ALA submits that this is unacceptable and means that the RD Bill is effectively legislating bigotry, by enabling religious belief to be used as a cloak for sexism, racism, homophobia and other prejudices.

The Human Rights Legislation Amendment (Freedom of Religion) Bill

24. The ALA is concerned that the HRLA (FoR) Bill amends all existing federal discrimination laws so that each contains a new 'objects' provision that requires judges, in assessing discrimination claims (whether for race, disability, gender or age), to take into account the importance of all human rights, not just non-discrimination rights. The explanatory memorandum states that this is intended to ensure that freedom of religion is taken into account when assessing any discrimination claims. In addition, other rights such as freedom of speech will also need to be taken into account.
25. The ALA is concerned that this means that ultimately religious freedom and the right to use offensive or insulting language (under freedom of expression) will play an increasingly important role in assessing claims of discrimination which are brought on the basis of race, sex, disability, age or GLBTIQ+ status.

Conclusion

26. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the package of legislative reforms on religious freedom that has been distributed for consultation by the Australian Government Attorney-General's Department.
27. The ALA is concerned about the provisions contained in the package of legislated reforms and recommends that they be substantially redrafted. The ALA looks forward to further reviewing the proposed legislation following consideration of the comments received as part of this consultation.

Andrew Christopoulos



President
Australian Lawyers Alliance