 Submission on draft Religious Discrimination Bill

Thank you for the opportunity to comment on the draft Religious Discrimination Bill. I make these comments in my capacity as a lecturer in constitutional and human rights law at the Faculty of Law of the University of Tasmania. The views expressed in this submission are my own and do not necessarily reflect those of the University of Tasmania.

Summary

It is my view that the Bill is not supported by the Constitution’s external affairs power for two main reasons. First, vaguely worded ‘op-out’ provisions for religious bodies and individuals, without any balancing against the rights of others, is not consistent with the ICCPR. Section 10 allows religious bodies to discriminate against an employee or client on the basis of their religious belief or activity (or the lack of these) and s 8(6) allows religious health practitioners, including dentists, optometrists and psychologists, to refuse to provide health services if they have a conscientious objection to doing so. There is no requirement in the Bill to weigh up the impact of such refusals on the rights of women and LGBT persons.

Secondly, the Bill does not meet the requirement that laws limiting human rights be clear and accessible. The complexity and uncertainty of the Bill's operation is particularly evident in section 29. This section provides that the Bill does not apply to conduct in ‘direct compliance’ with a provision in another Commonwealth, State or Territory law. However, regulations made under the Bill may override such laws.1 To rely for consistency with the ICCPR on a technical provision such as s 29 and for that provision to be able to be curtailed by delegated legislation is problematic. Delegated legislation is both poorly scrutinised by Parliament and difficult to discover by members of the public. Given the controversy around religious exemptions from the prohibitions in the Sex Discrimination Act, 1984 (Cth) (‘SDA’), the balancing of conflicting rights should be clear on the face of the statute. This is particularly so since exempting religious individuals from the Sex Discrimination Act (e.g. the health practitioner provisions) would constitute a major departure from existing law.

The Bill is unconstitutional because it fails to adequately balance rights

A law relying on the external affairs power for its constitutional validity 'must be capable of being reasonably considered to be appropriate and adapted to the object' of the treaty it is implementing.2 While partial implementation of a treaty is possible, a 'law will be invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention'.3 In my submission, the aspects of the Bill discussed below are substantially inconsistent with the ICCPR. As a result the Bill in its current form cannot be supported by the external affairs power and is thus likely to be held invalid.

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1 See s 29(1)(b) and s 29(3)(b) of the Bill.
3 Industrial Relations Act case, 488-48.
The ICCPR in providing a framework of human rights requires that the limitation of a human right (including when done to protect other rights) be subject to rigorous justification and careful balancing. The multiple steps involved in adhering to the careful balancing of limits on rights are reflected in the Attorney General’s Department’s Flowchart for Assessing the Human Rights Compatibility of Bills and Legislative Instruments. The chart requires that any limits on human rights be identified and demonstrated to be reasonable, necessary and proportionate. This is consistent with international human rights jurisprudence. The flowchart cautions that:

‘… even if the limitation is aimed at a legitimate objective and has been designed to limit the right as little as possible, it may still not be proportionate if its impact on particular individuals or groups is too severe, or if it destroys the very essence of the right concerned. Consider whether the Bill includes appropriate safeguards to provide effective guarantees of human rights in practice.’

While the objects clause of the Religious Discrimination Bill provides that regard must be had to the indivisibility and universality of human rights, the opt-out provisions in the Bill fail to protect people with religious and non-religious beliefs equally and fail to balance the right to religious freedom with other relevant human rights such as the rights to work, privacy, family life and equality. The Bill allows religious bodies and religious health practitioners to discriminate without having to weigh up the dignitary and material harm done to persons resulting from such discrimination. Such statutory rights are not an appropriate and adapted means to implement the holistic human rights framework of the ICCPR and cannot, therefore enliven the external affairs power.

The remainder of the submission demonstrates this in more detail.

Section 10 of the Bill exempts religious bodies (other than those engaged solely or primarily in commercial activities) from the entirety of the Religious Discrimination Bill if their conduct is undertaken in ‘good faith’ and ‘in accordance’ with their religious beliefs. This allows religious bodies to discriminate on the basis of another person’s lack of religious belief, or refusal to engage in lawful religious activities, without any balancing against other rights.

The words of the exemption in s 10 are potentially wide in meaning. They could be read to allow dismissal of an employee who refuses to sign a code of conduct that states that sexual relations outside a heterosexual marriage are sinful. It would also allow schools to refuse to admit LGBT students or the children of unmarried mothers and for religious charities to refuse to provide foster children to same sex couples. These things may be done without requiring any weighing up of the impact of such conduct on the rights to work, family life, privacy or sexual orientation of the employee, student or parents. Associate Professor Amy Maguire and I have shown elsewhere that a similar exemption for religious bodies in the Sex Discrimination Act is inconsistent with international human rights law.

Section 8(6) of the Bill permits religious health practitioners to refuse to provide a health service to which they conscientiously object. In doing so only the right to health needs to be taken into account and then only so as to avoid ‘unjustifiable adverse impacts’. The Explanatory Notes provide that ‘death or serious injury’ would meet this threshold. Impacts on physical or mental health that fall short of this are not protected nor are impacts on the rights to privacy, family life and equality. Furthermore, the Bill’s test of ‘justifiability’ is not consistent with the ‘necessity’ test in the ICCPR. As a result, established human rights jurisprudence for demonstrating that a limitation of a right is ‘necessary’ will not need to be applied.


\[^6\] Section 8(6) of the draft Bill.

\[^7\] At paragraph 147 of the Bill’s Explanatory Notes.
In fact, when international human rights courts have balanced the right to manifest religious belief against the rights to health, work, privacy, family life and equality, the latter tend to outweigh the former except in cases that go to the heart of religious manifestation such as the teaching of religious doctrine or publicly representing a church at the highest levels. For example, in cases concerning a pharmacist who refused to sell contraceptives, and a sex therapist who refused to provide therapy to same sex clients, rights to equality, family life, privacy and health were found to outweigh the right to the manifest religious belief. Courts applying a human rights framework have also decided that the right of a surgeon at a Catholic hospital to engage in extra marital relations outweighed the right to religious institutional autonomy, and the right of a woman to live in a de facto relationship outweighed the religious rights of a religious school. Additionally it has been held that the rights to equality and to work of a gay piano teacher at an adult education course outweighed those of the religious school who employed him.

Allowing religious bodies and individuals to engage in conduct that impacts on the rights of women and LGBT persons, without requiring that these limits be demonstrably ‘reasonable, necessary and proportionate’ and without safeguards to ensure that the essence of these rights is protected, is not consistent with the regime for the protection of rights established by the ICCPR. These provisions, therefore, cannot be supported by the external affairs power.

**Opt-out provisions discriminate against non-religious beliefs**

Provisions in the Bill enable religious individuals and organisations to depart from rules of general application (including the Bill itself) but do not provide similar exemptions for individuals or organisations with coherent and strongly held non-religious beliefs, such as humanists, pacifists or atheists. To discriminate against persons who hold protected non-religious beliefs is inconsistent with article 18 of the ICCPR because that article protects religious, conscientious and other coherent and sincerely held beliefs equally.

For example, section 10 of the Bill exempts a religious body from all of the requirements of the Religious Discrimination Bill if acting in ‘good faith’ in accordance with religious beliefs. Therefore, a religious school or charity may dismiss an employee who does believe that sexual relations must only take place in a heterosexual marriage or to refuse to provide services to someone who does not share that belief. Organisations established to further non-religious beliefs are not so protected. The Atheist Foundation or Humanists Australia, for example, would breach the Religious Discrimination Bill if they dismissed an employee because, contrary to the beliefs of those organisations, the employee had a religious belief.

Similarly, the Bill allows employees to opt-out of ‘employer conduct rules’ in relation to conduct or statements of religious belief or for statements about religion. However, an employee’s statement of a secularist, atheist or humanist belief that is not ‘about religion’ but that is contrary to the code of conduct of a religious organisation would not be protected by the Bill.

The privileging of religious over non-religious belief systems is also evident in the provisions of the Bill dealing with what is described as the ‘health practitioner rule’. The Bill provides that a health practitioner who, on the basis of their religious belief, conscientiously objects to providing a health service may refuse to do so unless this would cause death or serious injury. For example, a religious doctor may refuse to participate or

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8 Pichon and Sajous v France, ECtHR 2 October 2001(dec.), appl. no. 49853/99.
9 Eweida and Others v The United Kingdom, ECtHR 15 January 2013, Appl. Nos. 48420/10, 59842/10, 51671/10 and 36516/10.
10 IR v JQ, European Court of Justice, Grand Chamber, Case C-68/17, 11 September 2018.
11 Gan Menachem Hendon Ltd v Ms Zelda De Groot (UKEAT/0059/18/OO, 12 February 2019).
give advice on an abortion but a non-religious doctor who had a deeply held belief in the sanctity of human life would, under this Bill, not be permitted to do so.

**The scope of conscientious objection is far wider than permitted by article 18 of the ICCPR**

In relation to religious health practitioners the Bill expands the scope of the right to conscientious objection beyond that accepted in international human rights law. The Bill allows a wide range of health practitioners - including dentists, optometrists, occupational therapists, pharmacists, physiotherapist, podiatrists and psychologists - to refuse to provide any health service to which they conscientiously object on religious grounds.

Under international human rights law, accepted categories of conscientious objection are narrowly confined to conduct directly involving life and death (e.g. military service, participation in abortion and euthanasia). The right to conscientious objection does not extend to matters such as the sale of contraceptives.13 There are other features of accepted conscientious objection that differentiate it from the service refusal permitted under the Bill. Accepted categories of conscientious objection do not involve prohibited discrimination (and therefore harm) against another person. The work of Professors Nejaime (UCLA) and Siegel (Yale) demonstrates that accommodating such ‘complicity based conscientious objections’ has the capacity to inflict material and dignitary harm on women and members of the LGBT community.14 Furthermore, where permitted, conscientious objection only excuses an objector from directly engaging in the objectionable action (i.e. a pacifist may refuse to participate in active military service). The right to conscientious objection under international human rights law could never be relied on, for example, to refuse to provide general health services on the ground of a patient or patient’s parents’ sexual orientation.

The Ruddock Panel Report on Religious Freedom recognised that broad conscience-based refusals of service are inconsistent with international human rights law (see especially paragraphs 1.161 – 1.165 of that report). As referred to earlier, legislation relying on the external affairs power must be appropriate and adapted to the treaty obligation and, therefore, cannot stray outside the obligations in the treaty. Provisions that seek to protect rights that do not exist under article 18 of the ICCPR and cannot be said to be ancillary to ensuring compliance with that article are not supported by the external affairs power.

**The health practitioner provision is inconsistent with the Sex Discrimination Act**

Section 8(6) of the Bill allows health practitioners acting in accordance with their religious belief, to engage in conduct that would be prohibited under the *Sex Discrimination Act 1984* (Cth).

This provision is wide in scope. Religious health practitioners may opt out of any requirement imposed by any ‘person’ and the *Acts Interpretation Act 1901* (Cth) provides that ‘a person’ includes the ‘body politic’. The body politic includes the executive arms of government (e.g. statutory bodies such as human rights and anti discrimination tribunals) as well as parliaments.15 Therefore, the Bill could be read to permit a psychologist, on the basis of a religious belief, to refuse to provide therapy to same sex couples or a pharmacist to refuse to sell contraceptives to unmarried women despite the fact that such conduct might be prohibited by professional or legal bodies. Such refusals in the provision of services constitute prohibited discrimination under the *Sex Discrimination Act* and, as shown above, have been held to be impermissible by courts in other liberal democracies applying a human rights framework. The refusal of health services to unmarried women and LGBT persons on the basis of the religious belief of health practitioners is not a hypothetical concern. A Human Rights Watch report documents numerous cases in the United States of health practitioners who, on

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15 McHugh J in *Mann v Carnell* 201 CLR 1 at 80 and 93.
the basis of their religious beliefs, refuse to treat the children of same sex couples or to provide treatments to LGBT persons.16

If the Act were to operate as the above interpretation suggests, the rights of women and members of the LGBT community provided for in the Sex Discrimination Act would be severely diminished. As a result, Australian law would no longer conform to the equality obligations in s 26 of the ICCPR.

The Bill is too uncertain in its meaning and operation

To conform to the regime of human rights protections established by the ICCPR, laws must be sufficiently precise to avoid the risk of arbitrariness.17 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights emphasize this requirement. Article 16 provides that ‘laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable’ and Article 17 further requires that ‘legal rules limiting the exercise of human rights shall be clear and accessible to everyone’. The draft Bill is so complex that it falls well short of this requirement.

Section 29 is particularly confusing. It provides that nothing in the Bill prevents a person from ‘acting in direct compliance’ with other Commonwealth, State and Territory laws, other than those laws listed in regulations enacted under the Bill. This would mean that while section 8(6) of the Bill permits religious health practitioners, with a conscientious objection, to refuse to provide health services to LGBT persons, section 29 would prevent such discrimination through the application of the Sex Discrimination Act and similar provisions in State/Territory laws. This could mean, for example, that a medical clinic could require, in direct compliance with the Sex Discrimination Act that employees serve all clients regardless of their sexual orientation or gender identity. However, Commonwealth, State and Territory laws apply only in the absence of contrary regulations. In other words, at some future date (or even immediately on the entry into force of the Bill) regulations could be put in place to allow the health practitioner provision to operate to the full extent that the words of s 8(6) permit.

No existing Commonwealth discrimination laws allow for the removal of the operation of Commonwealth laws by the mere listing of such laws in a regulation. The Age Discrimination Act 2004 (Cth) (ADA) includes such a mechanism for State/Territory laws but Commonwealth laws overridden by the ADA are clearly listed in a schedule to that Act. At the heart of the debate driving the enactment of Religious Discrimination Bill are claims by people of religious faith to be permitted to discriminate contrary to prohibitions in the Sex Discrimination Act. Such complex and controversial public issues should not be resolved by delegated legislation, particularly given that the making of such legislation is notoriously lacking in transparency and parliamentary scrutiny.

A further problem is that the exemption for religious bodies in s. 10 of the Bill applies regardless of any other provision in the Bill. As noted above, s. 10 allows religious bodies to discriminate on the basis of ‘religious belief or activity’ (or lack thereof). The fact that s. 29 does not apply to s. 10 may lead to a number of complications. For example, under the Bill religious schools could dismiss a teacher who was in a same sex relationship because, in accordance with the school’s tenets of faith, the teacher was ‘not engaging in or refusing to engage in lawful religious activity’. Under the Sex Discrimination Act, the school would also be permitted to discriminate in these circumstances but only if doing so met a higher threshold, i.e. such discrimination would need to be shown to be ‘necessary’ to ‘avoid injury’ to ‘religious susceptibilities’(s 38). Therefore, as a result of the Bill, it would be easier for religious bodies to discriminate against employees,


students and clients on the basis of their sex, sexual orientation or gender identity than is currently permitted under the SDA.

A further complication arises from the fact that the Bill excludes religious bodies who ‘engage solely or primarily in commercial activities’ from the general exemption in s 10. The SDA imposes no such limit on religious bodies whose actions are exempt from the provisions of the SDA. Therefore, dismissal of an employee by a religious hospital on the basis that the employee does not adhere to a proscribed religious ‘activity’ may constitute prohibited religious discrimination under the Bill but could be lawful under s 37(1)(d) of the SDA. All these matters add layers of complexity and uncertainty to the operation of the Bill.

**Amending the Bill to ensure consistency with the ICCPR**

The following amendments should be made to ensure consistency with the ICCPR:

1. Section 10, if retained, should provide that religious bodies may discriminate in accordance with their religious beliefs only when this is ‘reasonable’ based on a careful balancing of all relevant rights including the rights to work, privacy, family life and equality.
2. Rights and exemptions provided to individuals and organizations that hold religious beliefs should be provided equally to individuals and organizations that hold protected non-religious beliefs (e.g. pacifists, humanists, atheists).
3. The provisions that deem employer conduct rules (s 8(3)) and health practitioner rules (s 8(6)) to be indirect discrimination should be removed from the Bill. These provisions permit conduct that unreasonably limits rights to family life, privacy and equality in breach of international human rights law.
4. Section 29 should be amended to make it clear on the face of the statute which Commonwealth laws (if any) override the Bill.

Yours sincerely

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18 See Explanatory Notes at paragraph 174.