Our reference: 19/6135

Hon. Christian Porter
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Australian Government
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Submission on the Religious Discrimination Bill – Exposure Draft

Thank you for the opportunity to make a submission providing feedback on the Religious Discrimination Bill – Exposure Draft. As Commissioner for Children and Young People in Western Australia, my role is to advocate for the best interests of all children and young people under the age of 18 in Western Australia, and to promote and monitor their wellbeing. In doing so, I must have regard for the United Nations Convention on the Rights of the Child, and give priority to Aboriginal children and young people, and children and young people who are vulnerable or disadvantaged for any reason.

The Universal Declaration on Human Rights, and the Convention on the Rights of the Child, both recognise and outline the right for people, including children and young people, to freedom of thought, conscience and religion.¹ It is important that people are free to practice their religion, and that there are protections in place to ensure that people are not discriminated against because of their religious beliefs or activities. However, whilst the International Covenant on Civil and Political Rights sets out the right to freedom of thought, conscience and religion, it additionally states that there may be necessary limitations on the manifestation or expression of religion and beliefs in order to “protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”²

I wrote to the Expert Panel on Religious Freedom last year, expressing my concerns that increased protections for religious freedom have the potential to diminish and undermine anti-discrimination protections provided for through other Australian legislation. I also expressed concerns about maintaining existing religious exemptions under the Sex Discrimination Act 1984, and recommended that these exemptions be removed to allow for children and young people, particularly lesbian, gay, bisexual, trans and intersex (LGBTI) children and young people, to enjoy full protection under anti-discrimination laws. A copy of this submission is attached to this correspondence for your reference.

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² Ibid.
**Protections afforded under the draft Bill**

The Universal Declaration on Human Rights, and the principles of equality and non-discrimination apply equally to all people. The International Covenant on Civil and Political Rights outlines, in Article 26, that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Explanatory Notes document states that this draft Bill aims to bring legislative protections for religious belief and activity to the same standard as other federal anti-discrimination law. However, the draft Bill provides unprecedented protection for discrimination against religious people and organisations, and in doing so, undermines the protections offered under anti-discrimination laws aimed at protecting other groups of people, at both state and national levels. For example, in Western Australia, the Equal Opportunity (LGBTIQ Anti-Discrimination) Amendment Bill 2018 is being considered to improve discrimination protections for LGBTI people, however this would be overruled by the proposed legislation. The result of this would be heightened protections for religious people and organisations, and unequal legal protections for other groups of people, in direct contrast to the International Covenant on Civil and Political Rights.

The draft Bill is the only example of a federal discrimination law that would explicitly take precedence or overrule over other discrimination laws. I am concerned that the draft Bill, as it stands, may in fact legitimise some forms of discrimination on the grounds of a religious belief, whereby in other circumstances this discrimination would be considered unlawful. The Bill has the potential to allow for religiously motivated discrimination against particular groups of people based on otherwise protected attributes such as sex, sexuality, race, marital status or disability.

I would be further concerned that the protections under the Bill may be used to legitimise harmful “conversion therapies” which attempt to change the gender identity and sexuality of LGBTI people. These kind of “therapies” have been denounced by leading Australian and international health and human rights bodies, with evidence indicating the negative impact that these have on an individual’s mental health and wellbeing, both in the short and long-term.

**Removing exemptions for government funded services**

The draft Bill, and some existing legislation, including the *Sex Discrimination Act 1984*, exempt religious organisations from adhering to certain aspects of discrimination law. These exemptions allow for these organisations to discriminate against, deny access or withhold a service from an individual if this is in line with the organisation’s religious beliefs, teachings and doctrines. This becomes problematic where these organisations

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are funded by the government to provide a service to the Australian public, as individual members of the public may be discriminated against or denied a service because of their identity or status. An example of this may be a religious organisation that is funded to provide a housing and accommodation service denying access to that service to a person who is transgender, or an unmarried couple, if this is against the beliefs, teachings and doctrines of the organisation.

All members of the public should be eligible to access and receive a service from government funded services, including religious organisations providing education, health, accommodation, and other community or social services. As a minimum, religious organisations that receive federal or state funding to provide a service for the community should not be exempt from discrimination legislation. There are already provisions in the Sex Discrimination Act 1984 which states that discrimination exemptions for religious organisations do not apply where the act of practice is connected to the provision of Commonwealth funded aged care, aged care accommodation or for the employment of a person to provide that aged care. This approach should be extended, to ensure that federally funded services are not exempt from discrimination legislation, ensuring that all Australians can access the services and supports that they require from the organisations funded to provide them.

Conscientious objection

The draft Bill outlines the right for a health service provider to conscientiously object to providing a medical treatment or health service where this is in contrast with their religious beliefs, teachings or doctrines. However, where the health practitioner has been employed to provide a health service to the public, there should be mechanisms in place to ensure that the individual’s health needs are met. The Australian Medical Association of Australia outline that a doctor’s refusal to provide or participate in a health treatment or procedure, based on a conscientious objection, has an impact on patients seeking care. This impact could be particularly compounded for young people, who already face a range of barriers in accessing health services, including a fear of being judged, concerns about confidentiality, and challenges in physically accessing services.5

Conscientious objection is currently allowed for under medical codes of conduct and ethics,6 however it should be made clear in any legislation that, in line with these codes, treatment cannot be refused in an emergency/life threatening situation on the basis of conscientious objection, and the health practitioner cannot impede the patient’s access to medical treatment, or by refusing to refer them to be treated by another practitioner.

Employer conduct rules

The inclusion of a clause around “employer conduct rules” is questionable, particularly given that no other discrimination legislation includes a clause such as this. The employer conduct rule outlines that it would be unreasonable to restrict or prevent an

5 Commissioner for Children and Young People 2014, Speaking out about youth health, Commissioner for Children and Young People WA, Perth.

employee of the employer from making a statement of belief at a time other than when the employee is performing work on behalf of the employer, unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer. However, it must be recognised that there are other hardships that may be faced by an employer or organisation as a result of statements of belief made outside of work time, including impacts on the credibility and reputation of an organisation, public faith in the organisation to be able to deliver or provide its services to a diverse range of stakeholders, as well as potentially impacting on the workplace safety of the organisation for other staff and/or clients where such conduct occurs in a public manner.

Additionally, the language in Section 8 of the Bill is quite ambiguous, and would require a subjective assessment as to whether imposition of a condition, requirement or practice on an employee is reasonable or not.

**Statements of belief**

Part 4 of the draft Bill outlines that a statement of religious belief does not constitute discrimination under any other anti-discrimination law. Anti-discrimination laws exist to ensure protections for groups of people who have, or are likely to, experience discrimination. They also exist in recognition of the specific groups of people likely to experience discrimination, and in recognition of the impact that such discrimination has on the wellbeing and safety of individuals, and the wider community. However, the exemptions afforded through this section of the draft Bill have the potential to prioritise the rights of religious people to make statements of belief over the rights of other people to feel safe, supported, and treated equally. It is important to recognise that the impact of a religious statement of belief on a person being discriminated against are equally as harmful than if those same statements were being made by a non-religious person, in which case they may be considered unlawful. Given the experiences of discrimination already faced by a range of people based on their identities, such as their sexuality, gender identity, race, or disability, I would be particularly concerned about the adverse impact that allowing such statements of belief may have on the wellbeing of these groups of people, particularly so for children and young people.

Subsection 4 further outlines that it is reasonable for employees to impose a condition to prevent statements of belief being made where those related to statements are malicious, or would, or are likely to, harass, vilify or incite hatred of violence against another person or group of persons or which counsel, promote, encourage or urge conduct that would constitute a serious offence. However, there are no further definitions or explanations around what would constitute a malicious statement, or a statement that would harass or vilify, and this would require a subjective interpretation. Additionally, the descriptions around a statement of belief should be expanded to also include that a statement is offensive if, in line with the Racial Discrimination Act 1975 Section 18C, "the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" and the act is done because of the identity or status of a person or group of people.7 Section 18D of the Racial to provide interpretive context for the legislation.

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Distinction between non-work time and private life

The explanatory notes of the Bill explain that the clauses of the Bill are supposed to reflect the distinction between public life and private life. For the purposes of the draft Bill, “private life” is assumed to be any time a person is not at work (as per the Section 8 (3) (b)). This differs from other legislation, such as the Racial Discrimination Act 1975, which, under Section 18C (2), states that an act is not considered as a private act if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.  

The Racial Discrimination Act 1984 goes on further to define a public place as being as “any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.”

This view and definition of public life should be similarly applied across any other anti-discrimination legislation, and reflected in the details of the draft Bill.

Summary

I appreciate the chance to provide feedback on the draft Bill, and acknowledge the importance and challenge of upholding the right to people’s religious beliefs and expressions, balanced alongside the rights and freedoms of others.

Yours sincerely,

Colin Pettit
Commissioner for Children and Young People WA
2 October 2019

Attachments: Submission to the Religious Freedom Review

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