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Submission to the Attorney-General’s Department Consultation on Legislative Reforms on Religious Freedom

To whom it may concern

I am an Associate Professor of Constitutional Law at Monash University and a leading expert on religious freedom and separation of religion and government under the Australian Constitution. I am the author of Religious Freedom and Australian Constitution: Origins and Future (Routledge, 2018) as well as numerous scholarly articles.

As a general proposition, I support making discrimination on the ground of religious belief or activity unlawful. However, I note that discrimination on the ground of religious belief or activity is already unlawful: (a) in respect of employment decisions under federal law, and (b) more generally in respect of various areas of activity under the law of Victoria, Queensland, Tasmania, Western Australia, the Australian Capital Territory and the Northern Territory. To the extent that religious discrimination is already prohibited by State and Territory laws, a federal law to the same effect is likely to have little practical impact. This would not be unusual: other federal anti-discrimination laws have significant overlap with State and Territory anti-discrimination laws.

However, the Religious Discrimination Bill is more than an ordinary anti-discrimination statute protecting people against religious discrimination (a ‘shield’). It includes additional and strange provisions granting what are in effect positive rights to individuals to inflict harms on other people (a ‘sword’).

It seems to me that a standard anti-discrimination statute was first drafted and then a series of additional provisions were thrown in to satisfy the demands of certain conservative advocates. Those additional provisions are poorly drafted, sometimes incoherent, afflicted with constitutional difficulties, have strange consequences and appear to be motivated by a desire to allow people to be nasty to others.

This submission deals with the problematic aspects of the draft package of legislation.

I trust this submission is of assistance.

Yours sincerely

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1. The definition of ‘statement of belief’

A number of provisions in the Bill give special protection to statements of belief. Section 5 defines that concept as follows:

**statement of belief**: a statement is a statement of belief if:

(a) the statement:
   (i) is of a religious belief held by a person; and
   (ii) is made by the person in good faith; and
   (iii) is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion; or

(b) the statement:
   (i) is made by a person who does not hold a religious belief; and
   (ii) is of a belief held by the person that arises directly from the fact that the person does not hold a religious belief; and
   (iii) is made in good faith; and
   (iv) is about religion.

There are two key special protections given to statements of belief. First, section 41 grants individuals, in effect, a positive right to ignore any other law that might prevent making a statement of belief. Secondly, section 8(3) renders unlawful any employee code of conduct prohibiting the making of statements of belief outside of work. These provisions are not ‘shields’. They are ‘swords’. These provisions are dealt with separately in this submission.

This part of the submission explains a number of serious problems that arise from the definition of ‘statement of belief’.

1.1 The definition of ‘statement of belief’ deliberately gives preferential treatment to religious people compared to non-religious people

Paragraph (a) of the definition deals with statements of belief made by religious people. Paragraph (b) of the definition deals with statements of belief made by non-religious people.

There are two ways in which the definition of ‘statement of belief’ deliberately gives preferential treatment to religious people compared to non-religious people.

The first concerns the subject-matters of protected statements of belief. Paragraph (a) covers statements of belief made on any topic whatsoever. Paragraph (b) covers statements of belief made only on the topic of religion: there is a sub-paragraph (iv) in paragraph (b) limiting the definition to statements made “about religion” that finds no counterpart in paragraph (a). Sub-paragraph (iv) does not serve a purpose of excluding statements that do not have anything to do with being non-religious: that is the function of sub-paragraph (ii).
The evident purpose of limiting the definition in paragraph (b) to statements on the topic of religion is to give religious people a much broader protection than is given to non-religious people. Sub-paragraph (iv) should be deleted.

The second way in which the definition of ‘statement of belief’ deliberately gives preferential treatment to religious people compared to non-religious people concerns the degree of the connection a statement must have with a person’s religious belief or lack of religious belief. For religious people under paragraph (a), the statement need only satisfy the low threshold of being of a belief that “may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”. For non-religious people under paragraph (b), the statement needs to satisfy the high threshold of being of a belief that “arises directly from the fact that the person does not hold a religious belief”.

The evident purpose of not requiring the same degree of connection with the person’s religious or non-religious belief is to give religious people a much broader protection than is given to non-religious people.

The definition of ‘statement of religious belief’ is drafted in a way that gives religious people a bigger ‘sword’ than is given to non-religious people.

I do not support ‘sword’ provisions. However, if there are to be ‘sword’ provisions they should be non-discriminatory. For this purpose, the definition should be amended by either (i) replacing “arises directly from” with “may reasonably be regarded as arising from”, or (ii) replacing “may reasonably be regarded as being in accordance with” with “arises directly from”, or (ii) adopting some other test that is used for both paragraphs.

1.2 The definition of ‘statement of belief’ appears to be inconsistent with international human rights law

It is not consistent with international human rights law to give greater protection to religious beliefs than to non-religious beliefs.

The UN Human Rights Committee states in General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion) at para[1]:

The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that countries must respect and ensure to all individuals the rights guaranteed by the ICCPR without discrimination. Article 26 provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

The UN Human Rights Committee states in General Comment 18: Articles 2.1 and 26 (Non Discrimination) at para [4] that while countries have discretion to “determine appropriate measures to implement” the ICCPR, those measures must be in “conformity with the principles of non-discrimination and equality before the law and equal protection of the law.”
As the Committee notes at para [8], the basic principle is about ensuring the “enjoyment of rights and freedoms on an equal footing” (emphasis added).

Because the definition of statement of belief (i) very clearly discriminates between religious and non-religious people and between religious and non-religious beliefs and (ii) does not ensure the enjoyment of rights freedoms on an equal footing, there is a sufficient basis for a conclusion that the provisions of the Bill dealing with statements of belief are inconsistent with international human rights law.

1.3 The definition of ‘statement of belief’ gives rise to constitutional difficulties

Section 57 of the Bill states that the “main constitutional basis” for the Bill is the external affairs power in section 51(xxiv) of the Constitution. This head of federal legislative power supports federal laws implementing Australia’s international legal obligations.

It is well-established that for a federal law to be valid under the external affairs power the law need not fully implement an international legal obligation. However, it is also well-established that for a federal law to be valid under the external affairs power the law must not be inconsistent with the international legal obligation: see Industrial Relations Act Case (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. Such a law cannot be said to be implementing the international legal obligation.

In contrast, it is well-established that under heads of power other than the external affairs power the Federal Parliament may enact laws that breach international law.

As noted at 1.2 above, it appears that key provisions in the Bill are inconsistent with international law.

Accordingly, to the extent that the statements of belief ‘sword’ provisions or particular applications of those provisions rely for their validity only on the external affairs power there must be significant constitutional doubt that those provisions or those applications are constitutionally valid.

One course of action is to amend the Bill to avoid this particular constitutional issue arising. This can be done by treating statements of belief by religious and non-religious people equally. However, I note there are other potential constitutional issues relating to the protections given by the Bill to statements of belief. These are discussed elsewhere in this submission. The safest course of action would be to delete the various ‘sword’ provisions from the Bill leaving in place a traditional anti-discrimination statute.
2. Section 41: the right to make statements of belief

Section 41 has the practical effect of granting people a general right to make statements of belief, even where doing so would otherwise be unlawful. This provision gives legal effect to what former Attorney-General George Brandis called the ‘right to be a bigot’.

2.1 Section 41 overrides every anti-discrimination law in the country

Section 41 expressly overrides every anti-discrimination statute in the country to authorise the making of ‘statements of belief’ that would otherwise amount to unlawful discrimination. The following federal statutes are overridden:


The following State and Territory statutes are overridden:

- Equal Opportunity Act 1984 of Western Australia.
- Equal Opportunity Act 1984 of South Australia.
- Anti-Discrimination Act of the Northern Territory.

This is an extraordinary and troubling departure from standard practice in federal anti-discrimination law. Standard practice is to ensure that State and Territory laws are not overridden.

Section 41 in its entirety should be deleted from the Bill.

2.2 Section 41(1) establishes a ‘right to be a bigot’

The practical effect of section 41(1) is to give people a positive to right to ignore other laws in order to make ‘statements of belief’ that insult, offend, ridicule or humiliate other people that would otherwise amount to unlawful discrimination. The operation of this provision establishes what the former Attorney-General, George Brandis, referred to as the right to be a bigot.

For example, in none of the following scenarios involving a ‘statement of belief’ would the person on the receiving end of the statement of belief be able to lodge a discrimination complaint:

- An employer tells a gay worker “being gay is a form of brokenness”.
• A school principal tells a school assembly “trans people choose to reject God’s nature”.
• A childcare provider tells a single mother “God will judge you harshly for taking away the child’s right to have a father”.
• An employer points a Catholic worker’s desk with a small picture of the Virgin Mary and says “look at that Catholic superstitious nonsense.”
• An employer refers to a male Sikh employee wearing a turban as “a towel head”.
• A doctor tells a gender-non conforming patient that “God condemns your sin”.
• An employer tells a female worker that “women should not be in positions of leadership over men”.
• A café owner tells a customer with a disability that “disabilities are God’s punishment for sin”.
• A pharmacist tells a Muslim customer “All Muslims will go to Hell”.

2.3 Section 41(2) provides inadequate and ineffective limits on the ‘right to be a bigot’

Section 41(2) is an inadequate attempt to set limits on the right to make ‘statements of belief’.

The paragraph (a) limitation likely has no operation

Paragraph (a) provides that section 41(1) does not apply to statements of belief that are ‘malicious’. This purported limit may be almost entirely useless.

A ‘statement of belief’ is by definition not malicious. The definition of ‘statement of belief’ (as set out in section 5 of the Bill) requires that the statement be made by the person in good faith. If a statement is malicious then it may be open to say that the statement (i) is not made in good faith, and therefore (ii) would not qualify as a ‘statement of belief’, and therefore (iii) would not be covered by section 41(1) in the first place.

If a statement is made in good faith, and therefore qualifies as a ‘statement of belief’, then that statement is not malicious and would not be captured by the section 41(2)(a) limitation. It is difficult to see many scenarios in which a statement could be made simultaneously in good faith and maliciously.

Malice is generally understood as referring to acting for an improper purpose: Roberts v Bass (2002) 212 CLR 1 at [76]. The High Court has observed that ‘Neither irrationality, nor prejudice, constitute or establish malice’ (Roberts v Bass (2002) 212 CLR 1 at [5]) and that:

merely proof of the defendant’s ill-will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice. The evidence or the publication must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion and actuated the publication (Roberts v Bass (2002) 212 CLR 1 at [76])

It may be that a purpose of expressing religious beliefs can never be an improper purpose in the context of this Bill, and therefore be malicious. One of the express purposes of the Bill is to ensure people can make statements of belief (see section 3(1)(c)).
The paragraph (b) limitation confirms that section 41 grants a right to insult, offend, ridicule or humiliate

Paragraph (b) provides that section 41(1) does not apply to statements of belief that would, or are likely to, harass, vilify or incite hatred or violence against another person or group of persons. This gives the game away, so to speak.

The concepts of harass, vilify and incite hatred are different concepts to, and involve higher thresholds of nastiness than, the concepts of insult, offend, ridicule or humiliate.

The limits set out in section 41(2) do not prohibit the scenarios outlined above because the nastiness involved in those scenarios does not rise to the level of harassment, vilification or incitement of hatred.

In other words, section 41 very clearly gives a right to ignore other laws in order to make ‘statements of belief’ that insult, offend, ridicule or humiliate other people.

2.4 Section 41(1)(c) gives the Government power to override other laws

Section 41(1)(c) gives the Government power to override other federal, State and Territory laws by regulation. It effect, this provision gives the Government power to make a long list of laws that people can ignore in order to make statements of belief that insult, offend, ridicule or humiliate other people.

This is an inappropriate delegation of legislative power. As the Australian Law Reform Commission concluded in its Traditional Rights and Freedoms Report (ALRC Report 129, 2016) at [17.54]: “Although delegating legislative power to the executive is necessary for an efficient and effective government, some laws are more properly made by Parliament—for example, laws that have a significant impact on individual rights.”

Section 41(1)(a) allows the Federal Government to override federal, State and Territory laws by regulation for the purpose of taking away protections currently enjoyed by vulnerable minorities. This should be done, if at all, by primary legislation enacted by Parliament not by Executive decision.

The purpose of section 41(1)(c) is to make sure that the Government can override any laws that are discovered that stand in the way of allowing people to make ‘statements of belief’ that insult, offend, ridicule or humiliate other people.

2.5 There appears to be a silent plan to override Work Health and Safety laws

There is at least one immediately apparent example of a law that stands in the way of allowing people to make ‘statements of belief’ that insult, offend, ridicule or humiliate other people in some circumstances. That is the Work Health and Safety Act 2011 (Cth).

The WHS Act imposes a duty on employers and others to ensure, so far as is reasonably practicable, the health and safety of workers. ‘Health’ is defined to include both physical and
psychological health. Workplace bullying is accepted to be a risk to a worker’s health and safety, and therefore is unlawful.

Safe Work Australia (a federal government agency) states the following on its website (https://www.safeworkaustralia.gov.au/bullying):

Some examples of workplace bullying include:

- abusive or offensive language or comments
- aggressive and intimidating behaviour
- belittling or humiliating comments
- practical jokes or initiation
- unjustified criticism or complaints.

In other words, it is unlawful under WHS law to engage in or permit insulting, offensive, ridiculing or humiliating comments in the workplace because these pose a risk to worker health and safety. However, the central purpose of section 41 is to give individuals a right to make such comments.

The only way for section 41 to operate as apparently intended is for WHS laws to be overridden. If WHS laws are not overridden, the workers in the examples given at 2.2 above would not be able to bring discrimination claims but they would still be able to bring WHS claims.

I assume the Federal Government knows this and intends to use the section 41(1)(c) mechanism to override WHS law if the Bill passes.

If WHS laws are not overridden, then the right to insult, offend, humiliate and ridicule exists only in situations outside of the workplace.

2.6 Inconsistency with international human rights law and potential constitutional problems

Because section 41 involves ‘statements of belief’, all of the analysis provided at 1.2 concerning inconsistency with international law and at 1.3 concerning constitutional validity applies to this provision.

2.7 The singling out of Tasmanian law by section 41(1)(b) gives rise to potential constitutional problems

Assuming section 41 as a whole is not constitutionally invalid for lacking a supporting head of federal legislative power, section 41(1)(b) gives rise to separate constitutional issues.

What section 41(1)(b) does

Section 41(1)(b) overrides section 17(1) of the Anti-Discrimination Act 1998 of Tasmania for the purpose of authorising people to make ‘statements of belief’ that insult, offend, ridicule or humiliate other people that would otherwise be unlawful by reason of that Tasmanian law.
That Tasmanian law provides:

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e) [gender], (a) [race], (b) [age], (c) [sexual orientation], (d) [lawful sexual activity], (ea) [gender identity], (eb) [intersex variations of sex characteristics] and (k) [disability], (f) [marital status], (fa) [relationship status], (g) [pregnancy], (h) [breastfeeding], (i) [parental status] or (j) [family responsibilities] in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

This Tasmanian law has some overlap with section 18C of the Racial Discrimination Act 1975 (Cth). Both the Tasmanian law and section 18C prohibit conduct that offends, insults, humiliates or intimidates a person on the ground of race.

**Section 117 of the Constitution**

Section 117 of the Constitution grants immunity against any law that discriminates between Australians based on State residency. Section 117 provides: “A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.”

While the point has never been authoritatively decided, the weight of High Court dicta supports the proposition that section 117 confers an immunity against offending federal laws as well as against offending State laws: *Street v Qld Bar Association* (1989) 168 CLR 461; *Leeth v Commonwealth* (1992) 174 CLR 455.

Section 41(1)(b) of the Bill has the potential to impose a disability on a Tasmanian citizen which would not be equally applicable to that person if they were resident in another State. Application of section 117 requires a comparison between a person’s actual situation in one State and the hypothetical situation of the same person being resident in another State: *Street v Qld Bar Association* (1989) 168 CLR 461.

Consider this hypothetical: Victoria enacts a law in equivalent terms to section 17(1) of the Anti-Discrimination Act 1998 of Tasmania. A person is subjected to humiliation and insults on the basis of a protected attribute by means of a series of posts made by another person on a Facebook page. If the person resides in Tasmania, the person cannot bring legal action seeking a remedy because section 41(1)(b) overrides the applicable Tasmanian law. However, if the person happened to live in Victoria, the person could bring legal action seeking a remedy because the Bill does not override the Victorian law applicable to the scenario. Section 41(1)(b) in practice treats people differently seemingly by reason of State residency and therefore section 117 of the Constitution may be engaged.

The mechanism in section 41(1)(c) for the Government to override the other State’s law does not change the analysis: that mechanism requires (i) the Government to create a legislative instrument, and (ii) neither House of Parliament to disallow that legislative instrument. Neither thing is certain to happen.
Accordingly, there is the potential for section 41(1)(b) to be the subject of complex constitutional litigation. This is avoidable: proper drafting is capable of avoiding the constitutional issue from arising in the first place.

**Tasmania could circumvent section 41(1)(b)**

Section 41(1)(b) is expressed to override only a single sub-section of a Tasmanian statute. In an attempt to avoid the operation of section 41(1)(b), the Tasmanian Parliament may simply re-enact the text of section 17(1) of the *Anti-Discrimination Act 1998* in another statute or, indeed, in a new section in the same statute.

The Federal Government might attempt to override the new Tasmanian law by legislative instrument. But there is no guarantee that will happen. And even if the Federal Government attempted to do so, the Senate might disallow the legislative instrument.

**To ensure effectiveness, section 41(1)(b) would need to be redrafted**

Rather than single out the Tasmanian provision by name, it would be more effective (in the sense of avoiding the constitutional issue and avoiding circumvention) for the provision to be drafted to expressly state its intended operation. In other words, section 41(1)(b) would need to read something like:

> A statement of belief does not ...
> (b) contravene any law (other than a criminal law) that prohibits conduct which only offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute protected by an anti-discrimination law applying in the jurisdiction in which the conduct occurs.

By way of comparison, the *Human Rights (Sexual Conduct) Act 1994* (Cth), which was enacted for the purpose of overriding Tasmania’s anti gay sex laws, was expressed in terms of its intended operation. That statute was expressed to apply generally throughout Australia, even though its principal operation was to override a Tasmanian law. It did not in terms single out the Tasmanian law.

I fully understand that the Government does not want to put in express words that its Bill is, in effect, giving people a right to offend, humiliate, intimidate, insult or ridicule others. It is very clear from the way section 41 as a whole is drafted that it wants that fact to fly under the radar. Nevertheless, it appears necessary for the Bill to be drafted in more explicit terms.

I reiterate my opening point in this part of the submission that the entirety of section 41 should be deleted.

**2.8 Section 41 causes constitutional difficulties for the operation of the State tribunal systems**

Assuming section 41 as a whole is not constitutionally invalid for lacking a supporting head of federal legislative power, by setting up "statements of belief" as a defence to State anti-discrimination laws section 41 the effect of depriving many discrimination victims of access to the State tribunal systems.
Discrimination cases involving breaches of State anti-discrimination laws are usually dealt with by the State tribunal systems. State tribunal systems are less formal than courts, often quicker than courts, and less expensive than courts. A particularly important feature of the State tribunal systems is that ordinarily a party who loses a case is not subject to an adverse costs order. This allows ordinary people who are victims of discrimination to seek justice without having to risk their homes or financial livelihood in the event they lose on a technicality. By contrast, the losing party in a court case is ordinarily ordered to pay the other side’s legal costs.

Section 41 significantly impedes access to the State tribunal systems. Because section 41 overrides State anti-discrimination laws, a case involving an allegation of a breach of a State anti-discrimination law may also involve an argument about section 41.

One effect of Chapter III of the Constitution is that "federal jurisdiction" can be exercised only by "courts". Most State tribunals are not ‘courts’ in the constitutional sense. "Federal jurisdiction" is exercised whenever a matter meets the description of any of the subject-matters listed in sections 75 and 76 of the Constitution. One of those subject-matters is matters “arising under any laws made by the Parliament”. Section 41 is such a law. The constitutional consequence of this is that the entire matter becomes a matter with federal jurisdiction even though it involves a State law. In other words, a case about a breach of a State anti-discrimination law that also involves an argument based on section 41 (even if the argument is unsuccessful) is therefore a case within federal jurisdiction and cannot be heard by a State tribunal (see Burns v Corbett [2018] HCA 15).

The effect is that the State tribunals will be deprived of the ability to determine many cases involving allegations of breaches of State anti-discrimination laws. Those cases will either have to be dealt with in the courts or not pursued at all.

The only way to avoid this problem is to not override the State anti-discrimination laws.
3. The ban on employer conduct rules regulating statements of belief outside of work

The practical effect of section 8(3) to is to make it unlawful for an employer with an annual revenue of more than $50 million to have a code of conduct that restricts or prevents an employee making a statement of a belief outside of work hours.

This provision is clearly intended to respond to the Israel Folau situation. This is odd given that there is already a federal law covering that situation, upon which Mr Folau is relying in his legal action against his former employers.

3.1 Inconsistency with international human rights law and potential constitutional problems

Because section 8(3) involves ‘statements of belief’, all of the analysis provided at 1.2 concerning inconsistency with international law and at 1.3 concerning constitutional validity applies to this provision.

3.2 This provision is drafted in an unclear manner

Section 8(3) applies to “restricting” or “preventing” the making of statements of belief outside of work. Neither concept is defined.

Section 8(3) would seem to make unlawful a code of conduct rule that required a worker when making a statement of belief on Twitter to ensure that the worker’s affiliation with the business was not apparent. This would not be preventing the making of the statement of belief but it would seem to be restricting the making of a statement of belief.

For the purpose of avoiding legal uncertainty, the concepts of “restricting” and “preventing” should be defined or examples given.

Section 8(3) is also subject to a limitation of ‘unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer’. The concept of unjustifiable is not defined, and its meaning and intended operation is uncertain.

For the purpose of avoiding legal uncertainty, the concept of “unjustifiable” should be defined, relevant factors listed or examples given.

3.3 If a version of this provision is to be retained it belongs in the Fair Work Act

The idea that an employer ought not regulate what a worker says or does outside of work may be defensible to some degree.

If that principle is considered to have merit, why should that principle apply only to ‘statements of belief’ as defined in this Bill? Why should that principle not also apply to statements of political belief or social belief? Why should that principle not apply generally?
This provision should be deleted from the Bill.

Instead, the Government should initiate a separate inquiry to consider whether a general rule prohibiting employers from regulating what a worker says or does outside of work should be included in the *Fair Work Act 2019* (Cth).
4. The right to refuse to provide healthcare

Section 8(6) has the practical effect of giving health practitioners a right to refuse to provide health services if the refusal is motivated by the practitioner’s religious beliefs.

The provision is in the following terms:

Section 8(6) For the purposes of paragraph (1)(c), if subsection (5) does not apply, a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on:

(a) the ability of the person imposing, or proposing to impose, the rule to provide the health service; or
(b) the health of any person who would otherwise be provided with the health service by the health practitioner.

Section 5 provides some relevant definitions:

**health practitioner conduct rule** means a condition, requirement or practice:

(a) that is imposed, or proposed to be imposed, by a person on a health practitioner; and
(b) that relates to the provision of a health service by the health practitioner; and
(c) that would have the effect of restricting or preventing the health practitioner from conscientiously objecting to providing the health service because of a religious belief or activity held or engaged in by the health practitioner, being a religious belief or activity that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the health practitioner’s religion.

**health service** means a service provided in the practice of any of the following health professions:

(a) Aboriginal and Torres Strait Islander health practice;
(b) dental (not including the professions of dental therapist, dental hygienist, dental prosthodontist or oral health therapist);
(c) medical;
(d) medical radiation practice;
(e) midwifery;
(f) nursing;
(g) occupational therapy;
(h) optometry;
(i) pharmacy;
(j) physiotherapy;
(k) podiatry;
(l) psychology.
4.1 The purpose of section 8(6) is to permit health practitioners to discriminate against patients and refuse to provide health care

Any person – whether that person is an employer or professional standards body – requiring all health practitioners to provide health care services to all people without discrimination or exception would be acting unlawfully contrary to section 8(6).

For example, this provision authorises the following conduct where there is a religious motivation for the conduct:

- A pharmacist refusing to fill a teenage girl’s prescription for the contraceptive pill.
- A midwife refusing to assist a single woman deliver a baby.
- A nurse refusing to dress the wounds of Muslim patient.
- A GP refusing to treat a trans person’s ear infection.
- A physiotherapist refusing to assist in the rehabilitation of a gay man’s injured knee.

4.2 Section 8(6) may be legally ineffective

There is a risk that section 8(6) is legally ineffective. That is, there is a risk that the provision does not do what it is intended to do.

For example, if a pharmacy owner attempts to require an employed pharmacist to dispense the contraceptive pill to unmarried women and that employed pharmacist has a religious objection to doing so the pharmacy owner has prima facie contravened the Religious Discrimination Bill.

However, the employed pharmacist appears to have acted unlawfully under section 22 of the Sex Discrimination Act 1984 (Cth) and the relevant State or Territory anti-discrimination law by refusing to provide goods or services to the unmarried women. This would be a case of discrimination on the ground of marital status. Under the vicarious liability provisions of the Sex Discrimination Act 1984 (Cth) (section 106) and of the relevant State or Territory anti-discrimination law the pharmacy owner is liable for the employed pharmacist’s conduct.

In other words, while it is apparently unlawful under the Bill for the pharmacy owner to compel the employed pharmacist to serve the unmarried woman, it is unlawful under another law for the pharmacy owner to fail to compel the employed pharmacist to serve the unmarried woman. The Bill makes clear in section 29 that the other law prevails because the pharmacy owner’s conduct in compelling the employed pharmacist to serve the unmarried woman is in direct compliance with another federal law (section 29(1)) and in compliance with a State or Territory law (section 29(3)).

However, section 29(3)(2) provides a mechanism for the Government to override any State or Territory law that prevents a health practitioner refusing to serve a patient. My comments at 2.4 about inappropriate delegations of legislative power also apply here.

It appears that for section 8(6) to actually work, the Government will need to override every other federal, State and Territory anti-discrimination law. The Bill includes only a mechanism to override State and Territory laws for this purpose.
4.3 Section 8(6) may be constitutionally invalid

To the extent that the constitutional validity of section 8(6) as a whole or particular applications of section 8(6) rests only on the external affairs power there must be significant doubt that the provision or those applications are constitutionally valid.

As explained at 1.3 above, a federal law that is inconsistent with international law is not supported by the external affairs power. Such a federal law cannot be said to be implementing an international legal obligation.

There is reason to believe that section 8(6) is inconsistent with international human rights law.

The Report of the Special Rapporteur on Freedom of Religion and Belief submitted to the UN Human Rights Council on 28 February 2018 (document A/HRC/37/49) states:

37. Religious discrimination does not only take place when an individual’s right to manifest their religion or belief freely is restricted or interfered with by the State or non State actors. It can also take place when an individual’s enjoyment of other fundamental rights — for example the right to health, education, expression — is restricted or interfered with by State or non-State actors in the name of religion, or on the basis of a person’s religion or belief.

39. The Special Rapporteur also notes with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public.

40. … It should be noted, however, that the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.

42. The Special Rapporteur would like to reiterate that freedom of religion or belief can never be used to justify violations of the rights of women and girls, and that it can no longer be taboo to demand that women’s rights take priority over intolerant beliefs used to justify gender discrimination. It would be contrary to both women’s human rights as well as freedom of religion or belief provisions to allow one set of rights (i.e. women’s rights) to be undermined on the basis of claims made in defence of the right to freedom of religion or belief.

The Special Rapporteur’s understanding of the international human rights jurisprudence therefore suggests that section 86(6) is “contrary to” international human rights law. This is
because section 8(6) subjects a person’s right to access healthcare to interference by reason of another person’s religious beliefs. According to the Special Rapporteur, this is

- a form of religious discrimination,
- a breach of the right to freedom of religion belief, and
- a breach of other rights protected by international law.

In these circumstances, there must be significant doubt that section 8(6) is supported by the external affairs power.

The safest course of action is to leave conscientious objection situations to be dealt with by the general provisions of section 8 and by specific laws enacted by the States and Territories.
5. The ‘may reasonably be regarded’ standard is not consistent with other federal laws

The Bill adopts a novel standard for determining whether a belief is a religious belief. In the definitions of health practitioner conduct rule and statement of belief, the Bill sets a standard of:

may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the [person]’s religion.

5.1 The ‘may reasonably be regarded’ standard is not consistent with other federal laws

The ‘may reasonably be regarded’ standard contrasts with the traditional standard used in federal legislation. Section 37(1)(d) of the Sex Discrimination Act 1984 uses the standard of:

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.

Section 35 of the Age Discrimination Act 2005 uses the standard of:

conforms to the doctrines, tenets or beliefs of that religion; or is necessary to avoid injury to the religious sensitivities of adherents of that religion.

The standard in the Bill sets a lower threshold than is the case in other federal anti-discrimination laws. The Explanatory Notes do not appear to offer any explanation as to why this unusual standard is adopted in the Bill or what it might actually mean.

However, the Explanatory Notes appear to celebrate the fact that the definition of ‘religion’ is “consistent with the approach taken in other Australian anti-discrimination laws” (at [72]). It is therefore rather curious that an inconsistent approach is taken in respect of the standard for determining whether a belief is a religious belief.

5.2 The ‘may reasonably be regarded’ standard will likely lead to expensive litigation because of the legal uncertainty it creates

The novelty of the ‘may reasonably be regarded’ standard gives rise to uncertainty about its precise legal meaning. Plainly, it is intended to mean something different to the existing standards and to set a lower threshold. But precisely how different and how much lower is not clear.

This will inevitably lead to complex and expensive litigation. Parties to an otherwise straightforward discrimination dispute are likely to find themselves in protracted litigation in the appellate courts arguing about legal technicalities. It is also possible that in order to avoid the enormous legal costs created by this uncertainty victims of discrimination will choose not pursue their claims at all. In other words, adopting a novel legal standard without any explanation whatsoever may have the perverse effect of impeding ordinary peoples’ access to justice.

The ‘may reasonably be regarded’ should be amended to reflect the existing standard in federal anti-discrimination laws.
6. The Freedom of Religion Commissioner

Part 6 of the Bill establishes a Freedom of Religion Commissioner.

I note that the Religious Freedom Review, chaired by the Hon Philip Ruddock, did not support establishing a Freedom of Religion Commissioner.

6.1 The title of the Commissioner is inappropriate

The title of the Commissioner is inappropriate because it is inconsistent with standard federal practice:

- The Sex Discrimination Act 1984 establishes a Sex Discrimination Commissioner.
- The Disability Discrimination Act 1992 establishes a Disability Discrimination Commissioner.
- The Age Discrimination Act 2004 establishes an Age Discrimination Commissioner.

Nothing in the Explanatory Notes explain why a non-standard name has been chosen.

The appropriate title for the Commissioner is therefore the Religious Discrimination Commissioner. This would be consistent with the existing titles of the other Commissioners established in connection with specific federal anti-discrimination statutes.

The title of the Commissioner is also inappropriate because it is inconsistent with the relevant right protected under international law. If there is a political imperative at play requiring the word ‘Freedom’ in the title, then the appropriate title is Freedom of Religion and Belief Commissioner. The terminology ‘freedom of religion and belief’ is the conventional shorthand way of referring to the right guaranteed by article 18 of the ICCPR.