2 October 2019

Hon. Christian Porter, MP
Attorney General
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Email: attorney@ag.gov.au & FoRConsultation@ag.gov.au

Dear Minister,

Re: Submission on the Religious Freedom Reforms


The submission is not confidential and may be published, including on the Attorney-General’s Department website.

Background

The Northern Territory Anti-Discrimination Commission (NT ADC) administers the NT Anti-Discrimination Act 1992 (the Act). We are a very small office charged with promoting the recognition of equality of opportunity in the Northern Territory (NT).
NT ADC has always supported the right of individuals to be free from discrimination on basis of their religious belief and activity. The NT Anti-Discrimination Act 1992 has strong proactive protections for religious belief and activity, including Aboriginal spirituality and specific protections in the workplace (s 31(3)) covering religious activity. There are also currently five exemptions for religious organisations from the provisions of the Act.

Recommendations:

1. Extend the consultation period; the 34-day period has not been enough time to draw the proposed changes to the attention of the community as stated in my letter dated 18 September 2019.

2. Consult with Aboriginal and Torres Strait Islander communities on whether Aboriginal spirituality and activity should specifically be included as it is in the NT Anti-Discrimination Act 1992.

3. Remove the definitions which enable religious institutions/bodies etc. to make a religious discrimination complaint.

4. Remove conscientious objection provisions for Health Practitioners from the indirect discrimination and inherent requirement provisions [clauses 8(5) & (6) and 31(7)].

5. Remove the concept and various implications of ‘statement of belief’ in particular from the object clause 3(1)(c) and from clause 8(3).

6. Remove clause 41, the provision for Federal law to override other Commonwealth and State/Territory Anti-Discrimination laws.

7. Remove clause 10.

Issues

1. Further consultation:

In the 34 days allocated, with the limited resources provided to explain the proposed reforms, the lack of easy read material, the lack of material in local Indigenous languages etc. it was not possible to provide information to or seek feedback from all
peak organisations in the Northern Territory, let alone people on the ground across the broad expanse of the NT in regard to the proposed reform.

The Religious Freedom Reforms package is a major reform which warrants a far longer consultation period to ensure that diverse views from across Australia can be heard on reforms that impact on service provision, workplace harmony and ultimately social cohesion.

The consultation period needs to be extended until the end of 2019, to enable information to be disseminated widely and for broad community views to be heard.

2. NT particular vulnerabilities & specific issues

All areas of concern raised in submissions I have endorsed as part of the Australian Council of Human Rights Authorities and had the opportunity to read from the Australian Human Rights Commission are amplified in the NT with our small population dispersed across a huge geographic area. In particular there are implications for equitable service provision. Territorians in remote or rural locations do not have services to pick and choose from. Numerous areas in the NT are only serviced by religious organisations.

The proposed framework would enable the conscientious objection of a health practitioner, based on their religious belief, or a decision by a religious organisation to provide services only to people of their religion to be put ahead of services to the most vulnerable Territorians, including single women, single parents (of any gender), de facto couples (of any gender), pregnant women, people of colour, race, disability etc. Not just the LGBTIQ + community will be impacted.

3. The Bill explicitly provides that religious organisations will be able to make a discrimination complaint.

This is the effect of the Clause 5 definition of person (and explanatory note). If it remains it would provide a broader protection than that which is provided in International Covenant on Civil and Political Rights (ICCPR), where human rights protections are limited to human – or natural people.
Human rights are not afforded to a corporate, organisation or body in any other Federal, State or Territory anti-discrimination legislation. This would be an extraordinary consequence of the Bill and an expansion of the rights of religious organisations far beyond rights of other organisations and corporations. A preferred position is religious organisations being able to make representative complaints on behalf of their members.

An example of the impact from the stories we hear may be that a religious organisation brings a discrimination complaint against one of its employees for making comments about the organisation’s position on same sex relationships. The employee is an administrative staff member on a low wage, unable to get legal representation; the organisation has a solicitor and barrister and they are a national organisation. This has very little to do with equality of opportunity, people being free and equal in dignity and rights or giving effect to the indivisibility and universality of human rights.

4. Unorthodox indirect discrimination & inherent requirements of the job provision, re health practitioners & discriminatory ‘statement of belief’.

(a) Health care codes of conduct as indirect discrimination, and not inherent requirements of a position - clauses 8(5) & (6) and clause 31(7).

The Religious Discrimination Bill (the Bill) includes a carve out for health practitioners who conscientiously object to providing health care on the basis of religious belief from the application of workplace codes of conduct. Specifically the Bill (clause 8(5) & (6)) provides that health care rules imposed on a health practitioner are not reasonable if the rule would have the effect of restricting or preventing the health practitioner conscientiously objecting to providing the health service on the basis of their religious belief or activity.

Further clause 31(7) also provides that the code of conduct provisions cannot be considered an inherent requirement of the job.

The implications for the NT need to be considered in light of the limited options in health care provision in the NT both in major centres, and rural and remote locations. If someone is denied service in the NT, they do not generally have easy access to a second provider.
For example a locum doctor or pharmacist at a service with inclusion policies, including service to all, may decide on the basis of their religious beliefs not to provide hormones to Trans youth or sistergirls on a remote island. The health practitioner under the proposed Bill could state the policy was indirect discrimination on the basis of their religious belief. This would leave the patient without access to health care, potentially embarrassed and humiliated, and with a right to make a complaint under the NT Anti-Discrimination law. The health service would be failing to provide a health service and at the same time would be exposed to potential discrimination complaints from both the patient and the health practitioner. The patient would need to incur significant cost and time to travel to an alternative provider.

A second example, a teenage female living in rural NT, 800km from a local town, visits only every 6-8 weeks. She makes an appointment with the only GP in town seeking medical assistance for a suspected STI and also wanting prescription for a form of contraceptive. The GP’s religious beliefs do not agree with sex outside of a marriage and he counsels the teenager on abstinence from sex. Angry at being lectured by the GP, the teenager leaves the medical appointment before receiving treatment for an STI. She has increased health risks and potential irreparable damage to her health, 

The NT impact would be exacerbated by our reliance on locum or fly in fly out staff to fill positions.

The current Bill includes a wide list of health services provided by an extensive range of health practitioners that are provided outside of legislative provisions, usually by territory-wide practices and guidelines etc. The clause would not just cover ‘controversial’ procedures but potentially all health care.

The scope of the clause would require an extra layer of scrutiny, not just ensuring evidence-based best practice in existing and new policies and standards, but for the impact of the personal religious views of a health professional. This is a major impost on time poor, cash strapped health services.

The clauses would also have a potential impact on a very wide cross section of the community including single women, single parents (of any gender), de facto couples (of any gender), pregnant women, people of colour, race, disability etc. There are
potential impacts on reproductive health, treatment of STI's, mental health and a range of other health conditions.

Whilst the Bill provides exclusions if there is “unjustifiable adverse impact”. A rule that restricts or prevents conscientious objection will be deemed to be unreasonable, unless the rule is necessary to avoid an ‘unjustifiable adverse impact’ on:

- The provision of the relevant health service or
- The health of a person who is seeking that health service.

The scope of this rider is very unclear. The explanatory memorandum mentions that a result of death or serious injury ‘would generally amount to an unjustifiable adverse impact’. However it is less clear on every-day care. It mentions, “…a sole medical practitioner declining contraceptive, resulting in medical service not being provided to a community and a community unable to access alternative healthcare promptly without significant travel and cost”.

However the scope of the phrase invites litigation and will not solve the immediate issue of access to ongoing hormone treatment, contraception etc. that may all be time sensitive in a remote community and may limit the access to health care for most vulnerable Australians because of a health care practitioner’s conscientious objection on the basis of their of religion.

The overwhelming concern is that Australians do not find it harder to access health care from health professionals and that this is not further compromised because of where they live. The current proposal will result in this being the case and would also make it harder for employers and professional bodies to continue to provide a service for every-one, if they are unable to require health professionals to treat all patients, regardless of the health professional’s religious views.

Finally, these clauses cover a wide range of medical procedures and services, by a very wide range of health practitioners and are not restricted to just ‘controversial’ medical procedures. It is not just aimed at particular procedures but could be used to target certain groups of people, people covered by Anti-Discrimination legislations who are vulnerable to discrimination.
(b) The use of the discriminatory ‘statement of belief’ deemed to be reasonable and not able to be covered by codes of conduct (clause 8(2) & (3) and 31(6)).

These provisions appear to be drafted to deal with the circumstances of the Folau incident. The “Folau protection” clauses restrict employers from imposing conduct rules that apply outside the workplace in relation to religious activity.

I will not comment on the difficulties for big business in negotiating the proposed “unjustifiable financial hardship test”. However I note the efforts and leadership of Australian corporations in the diversity and inclusion space greatly assist the advocacy of small Commissions to strive for equality of opportunity for all Australians and anything that impacts on the capacity to do this work or that looks to unravel it will be detrimental for cohesive Australia.

The impact in the NT is on the framework and norms in the workplace and the wider message that provisions such as this send to the broader community of the position of religious rights over other rights in Australia and the impact on diversity and inclusion in workplaces and safety in the community generally.

I will comment on two issues; firstly the different test for those with religious belief and those without, and secondly the broad and expansive nature of the test to link the ‘statement of belief’ (or in other parts of the Bill, conduct) to religious belief and activity.

(i) The test is very different in regard to religious statements of belief by those linked to a religion and those not.

This again does not promote equality of rights and does not cover all of Australia’s international obligations in regard to beliefs.

A statement of belief is;

For some-one who is religious it must be

- of a religious belief held by the person

- made in good faith, and
that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.

An example given by the Explanatory Memorandum is ‘a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell’.

In the case of someone who is not religious, the statement must be:

- a statement about religion,
- a statement of a belief held by the person that ‘arises directly from the fact that the person does not hold a religious belief’ themselves
- made in good faith.

Whilst the Bill will cover any statement made by religious people which generally conforms to their faith, it will only cover limited statements made about religion by non-religious people. So religious people would be free to express their religious views on any topic, potentially offensive derogatory comments about race, disability or sex, whereas non-religious people will only be protected when expressing views about religion itself.

(iii) The link required to one’s religion when making a “discriminatory” ‘statement of belief’ to attract the protection of the Bill.

The test used is much broader and less precise (objective) than that used in current exemptions under Commonwealth and also the NT Anti-Discrimination Act 1992.

The phrase or test in Clause 5 definition of “statement of belief” and in the Bill generally (clause 10 in particular) is:

“is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.”

It is much broader than other discrimination laws that provide that some religious acts are not discrimination – such as s 37 Sex Discrimination Act 1984 (Cth) which provides that for an exemption the test is “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" - a narrower provision and a higher standard to meet than Clause 10 – which only provides that conduct “may be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”.

The test in the NT Act for exemptions specifies a direct link to the doctrine of a religion in s 30, s 37A and s 40 etc. For example:

30 Exemptions

(1) An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex may exclude applicants who are not of that sex.

(2) An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion.

(3) An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students who have a general or specific impairment may exclude applicants who do not have that impairment.

A much lower test is included in the Bill. A much more tenuous connection to religion could satisfy this lower test.

Considering the scope of the rights that the Bill provides, the link to the person or body using the clause needs to be clearly defined and use existing phrases such as those in the Sex Discrimination Act 1984 (Cth). This provides for greater certainty of scope of the right being provided particularly in the clauses referring to “statement of belief”, clause 10, etc.

5. Religious bodies exempt from religious discrimination (clause 10)

The Bill provides that for religious bodies or organisations (clause 10) engaging in good faith in conduct that may reasonably be regarded as being in accordance with their religious beliefs, these acts cannot be unlawful discrimination. There is also a very
broad definition of religious bodies that includes religious educational institutions, religious charities etc.

The combination of these two features of the Bill would impact on a broad array of service providers in the NT, where many services are provided, including many government services by faith organisations that would fit under the broad definition of religious bodies and who would not be subject to the requirement not to discriminate.

For example this may include a particular religious body being able to require all employees, including volunteers to be of that denomination, to refuse services to other people of different faiths e.g. participants could be denied access to homelessness services or drug and alcohol services provided by religious organisations.

This is an area where the NT and in particular rural and remote locations are very vulnerable as there may only be one service provider. A number of Territory-wide service contracts for counselling, debt management, homelessness services and out of home care are provided by organisations which would fit the wide definition of religious bodies.

This clause would enable religious bodies under the Bill to potentially act in discriminatory ways that far exceed the currently available religious exemptions in the NT and impinge on the rights of other groups vulnerable to discrimination covered by the NT Anti-Discrimination legislation.

For example, a student attends the same religious school (in some NT communities the only option) all the way from pre-school through to grade 10 and in their teenage years, they, like many adolescents start to question the world around them, including their faith.

In a religious studies class, in the middle of grade 10 a teacher asks the student whether they believe in the school’s religion. The student answers honestly that they don't. Under the proposed section 10 of the Bill, that student can now be expelled as section 10 gives extremely broad powers to religious organisations, including schools, to discriminate against others on the basis of religious belief, or lack of belief. So unlike the current NT Anti-Discrimination Act 1992 (and the equivalent legislation in Queensland, Tasmania and, the ACT), the ability of schools to
discriminate is not limited to the point of admission or enrolment, but applies throughout the student’s entire education.

Also note that the manner in which the Bill is drafted means that it overrides clause 18 in regard to educational institutions not discriminating on the basis of religious belief and activity, so religious schools can discriminate but all other schools cannot. The Explanatory Memorandum says "....certain conduct engaged in by religious bodies, which includes religious educational institutions, does not constitute discrimination". Further as stated above this does not just apply to admission as the NT Anti-Discrimination Act 1992 section 30 does, but to expelling students, denying them benefits etc.

A further example that could occur in regional towns such Katherine, Tennant Creek or Nhulunbuy.

A homelessness charity operating in the regional town of Katherine is run by a not-for-profit religious organisation. The majority of its funding comes from Territory and local Government grants, and donations from members of the general public.

A new operating director decides to make the organisation more 'evangelical' in its approach. Access to its shelter is restricted to people from that faith, or people willing to attend and participate in its church services.

Because of the wide religious exception in section 10, this would not be considered discrimination under the Bill. It does not matter for this legislation that it is publicly-funded, nor that there are no other options in town.

A further NT example is of a member of a remote community having completed their teaching qualifications and then being refused a placement at the community school because they are:

- not of the same religion and that is the only school in that remote location, where the person is a traditional owner and all their family reside.
- Identify as same sex attracted or trans.

As stated above the link to a person’s religion is very broad and subjective.
Further clause 10 will ultimately make it easier for religious bodies to discriminate against each other, a feature of Australia’s history that we have moved beyond.


Clause 41 specifically provides that a statement of belief made in good faith will not constitute discrimination under Commonwealth, State or Territory discrimination law and specifically does not contravene section 17(1) of the Tasmanian Anti-Discrimination Act 1998.

The statement of belief provisions are extremely concerning as they are outside usual anti-discrimination provisions and do not balance other competing human rights.

Clause 41 proposes a fundamental change in the way anti-discrimination law works in Australia. It is a shift in discrimination law framework in Australia, in that it overrules the concurrent Commonwealth, and State/Territory jurisdiction. The exposure Bill if it becomes law would be the first and only time a federal discrimination law explicitly overrides other discrimination laws.

A key concept of the current framework is the concurrent operation. The Tasmanian provisions are specifically named as they are a very effective form of protection against every day conduct that we see that does very real damage in our community. The current proposals will make it easier to make comments that ‘offend, humiliate, intimidate, insult or ridicule’ groups vulnerable to discrimination who are covered by the NT Anti-Discrimination Act 1992.

In the Bill, pre-eminence is given to the right to make statements of religious belief over the known, evidence-based harm done to the other groups covered by Anti-discrimination legislation, e.g. race, disability, women etc.

The specific overriding of the Tasmanian provision which is similar to race vilification under section 18C of Racial Discrimination Act 1975 (Cth) (which is also overridden) would remove the protection of the most effective and comprehensive vilification provisions in the country. These provisions deal with the reality of harmful comments
made in the public domain, that reflect the way harm is caused via social media, in public places and against all groups vulnerable to discrimination. This would be replaced by a very high threshold before a discriminatory religious ‘statement of belief’ loses this protection. The discriminatory statement of belief would need to be malicious, likely to harass, vilify or incite hatred or violence or a serious offence to be considered under Anti-Discrimination law. This test is not aimed at balancing competing human rights or the harm that such statements may do to an individual or to a cohesive and harmonious community.

The 18C and Tasmanian provisions are the workable approach and direction to protect people most vulnerable to harmful speech, including young people and people living with disability. It is a balanced approach that is the envy of all other jurisdictions because it works. Peers in other states refer to vilification provisions they have, that cannot be used to ensure every-day harmony, as the threshold for use is too high and the test for application is impractical. They represent a false promise of protection.

Workable vilification provisions that enable education around bullying, eSafety, and respectful relationships that includes the harm caused by words, in all settings, including schools, employment, sports clubs etc. and that ultimately provide recourse to various Commissions conciliation processes need to be preserved.

The Tasmanian and 18C provisions move away from the historical incitement model aimed at addressing public demonstrations of hate. The incitement model does not address pervasive and insidious conduct and does not remedy the harm caused, it poses the difficult question of proving causation between the conduct and the effect on a third party.

The cause offence model is preferable, to address what we see every day and as a policy measure against vilification. It directly addresses the harm that is done by vilifying conduct, while at the same time putting people who engaged in such conduct on notice that it is unacceptable.

Unlike other State and Territory vilification provisions the Tasmanian provisions are actually used. They prohibit offensive language and protect those who are disadvantaged, stigmatised, marginalised and vulnerable from those who are powerful and in positions of authority. The Tasmanian protections are used primarily by people
with a disability. An analysis of the use of provisions discloses that people with a disability make up a third of the complaints that have been received. A further third of complaints are on the grounds of race, gender and age. The remaining third are spread across the other 10 grounds with around 5 to 10% of complaints being on the grounds of sexual orientation and gender identity.

All of these groups vulnerable to discrimination and offensive language potentially lose protection when the rights of people to make discriminatory ‘statements of belief’ override their current protection.

It has been a great source of frustration and disappointment that NT ADC has not been able to assist people with a disability when they convey to us stories of the offensive and humiliating things said to them in public places, such as on buses, at bus terminals and as they go about their life. To have a proposed law which would make this even harder to combat both at societal level and within the framework of the complaint process because the statement is linked to someone else’s religious belief is devastating.

There are other areas where the Bill and in particular clause 41 will mean people lose rights/ protections they currently have.

The Bill fundamentally undermines one of the best protections in the Sex Discrimination Act 1984 (Cth), a section with particular relevance to the NT as when it was enacted all aged care providers in the NT were faith based organisations.

Section 37(2) of the Sex Discrimination Act 1984 (Cth) means that government-funded aged care services, operated by religious organisations, cannot discriminate against the people accessing their services, on the basis of sex, sexual orientation, gender identity, intersex status or relationship status.

However under clause 41 a ‘statement of belief’ will be exempt from section 37(2).

So an older LGBT person spending their last days of their life in a place that is supposed to care and support them being looked after by someone who can ‘lawfully’ without consequences tell them ‘you’re going to hell’.
In practice, this means an aged care worker in these facilities will be able to say things that humiliate, insult or ridicule residents on the basis of who they are and as long as it reflects that person's faith, it will not be considered discrimination.

A further example of just how broad the impact will be is the case of a single mother who drops her child off to a privately-run child care centre, conveniently located close to her work.

The staff member who greets the mother holds religious beliefs against children born outside (cisgender-heterosexual) marriage. They tell the mother, in front of her child, that they pray for the child and fear they will be harmed by being raised in a 'fatherless' household.

The mother makes a complaint to the centre operator, but they refuse to take any internal action against the employee because of fears (justified or otherwise) the employee will claim it is indirect discrimination on the basis of religious belief.

Under section 41 of the Bill, the single mother would have no rights to make a discrimination complaint under the Sex Discrimination Act 1984 (Cth), or any equivalent State or Territory anti-discrimination law.

Finally, if passed in its current form the Bill will make it easier to make comments that 'offend, humiliate, intimidate, insult or ridicule' groups covered by current anti-discrimination laws. In the NT the most common areas of complaint are race based discrimination and discrimination against people with a disability.

7. Human Rights Concerns and balance

Protecting religious freedom is a matter of balance and proportionality, not displacing other rights. A Human Rights Charter that sets out a framework that balances all competing human rights, not the adhoc approach currently taken could achieve this for Australia. The proposed unorthodox provisions under the Religious Freedom Bill are not supported by the Government’s own Ruddock review.

A further issue of concern is that the Human Rights Legislation Amendment (Freedom of Religion) Bill adds an objective to each of the other four Commonwealth
discrimination Acts to increase the role of religious freedom, as well as freedom of speech when discrimination claims are brought in areas such as sex, race, LGBTIQ.

This appears reasonable however when read with the Explanatory Notes for the Bill the only other human right that is specifically mentioned by name is ‘the right to freedom of religion’. The consequence will be that in any judicial interpretation of the other four Commonwealth Acts the amended objects clauses potentially giving more weight to so-called religious freedom at the expense of other rights and will affect the interpretation of the RDA, SDA, DDA and ADA.

Conclusion

The reform package in its current form should not proceed, only the Human rights based religious belief and activity protections should be enacted. The numerous unorthodox provisions, commented on above looking to solve particular perceived issues will have many consequences and erode the rights of many Australians particularly Territorians who are vulnerable to discrimination.

Yours sincerely,

Sally Sievers

Anti-Discrimination Commissioner