Submission in Response to Proposed Legislative Reform on Religious Freedom

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Freedom of Religion Consultation Panel
Commonwealth Attorney General's Department
Email: FoRConsultation@ag.gov.au

Contact: Clara Mills
Managing Solicitor – Civil Section, North Australian Aboriginal Justice Agency
The North Australian Aboriginal Justice Agency (NAAJA) makes the following submission in response to the Commonwealth Government’s package of proposed legislative reforms on religious freedom and discrimination in Australia.

About NAAJA

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal aid services for Aboriginal people across the Northern Territory in the areas of criminal and civil law, prison support and through-care services. NAAJA is active in systemic advocacy and law reform in areas impacting on Aboriginal peoples’ legal rights and access to justice. NAAJA travels to remote communities across the entirety of the Northern Territory to provide legal advice and advocacy.

Throughout all of NAAJA’s sections and practice areas, we come into contact with clients who are some of the most socioeconomically disadvantaged people in Australia. By nature of systemic disadvantage and geographical remoteness, our clients are typically vulnerable to experiences of discrimination in public life and lack of access to basic services. Equally, NAAJA’s clients have some of the most diverse cultural backgrounds in Australia. Their complex understandings of Aboriginal spirituality form an essential part of Australia’s religious landscape.

Submission

The Commonwealth Government has released three draft religious freedom bills for public comment. Those are the:

1. Religious Discrimination Bill 2019;
2. Religious Discrimination (Consequential Amendments) Bill 2019; and

NAAJA welcomes the opportunity to comment on the package of proposed reforms.

This submission is of a focused nature due to the limited time period provided for public comment and the breadth and complexity of the issues raised by the reform package. NAAJA’s submission chiefly addresses key provisions within the Religious Discrimination Bill 2019 (“the Bill”), as the centrepiece of the reform package. NAAJA would be pleased to provide further comment in relation to the Bill and other aspects of the reform package at a later stage.

Summary of NAAJA’s position

NAAJA is concerned that the drafters of the Bill have not contemplated the extent to which the Bill’s provisions will impact Aboriginal communities in the Northern Territory who face the challenges of remoteness and basic service delivery. NAAJA is concerned that the exemptions in the Bill for health practitioners and religious organisations (including religious charities) will
enable a high level of discretion in decision-making by service providers on religious bases, and that this could further decrease access by individuals in remote Aboriginal communities to already limited services. NAAJA is particularly concerned that Aboriginal people in remote communities could face more limited access to some medical treatments (such as access to contraceptives and the administration of transgender hormones) and social services provided by religious bodies, on the basis of protected religious belief. NAAJA’s view is that this potential thinning of service availability would exacerbate Aboriginal communities’ existing experiences of systemic disadvantage and discrimination.

NAAJA is further concerned that the Bill may not sufficiently or specially protect Aboriginal communities’ belief and spirituality, particularly given the comments on Aboriginal spirituality made by the Religious Freedom Review Panel in its report dated May 2018. NAAJA notes the Panel’s comment that further and specific consultation on the special protection of Aboriginal spiritual beliefs is necessary but has not yet taken place.

**Potential impact of the Bill on the experience of remoteness**

The challenge of geographical remoteness is a fundamental aspect of life in the Northern Territory that is most keenly felt by the Northern Territory’s Aboriginal communities.

The total Northern Territory population makes up 1% of Australia’s total population,\(^1\) in what is a geographically dispersed and isolated population base.\(^2\) Of that proportion, 30% are Aboriginal communities,\(^3\) and 21%, or 51 000 people of the Northern Territory’s population, live in very remote Aboriginal communities or homelands.\(^4\)

Life for Aboriginal people in remote communities in the Northern Territory reflects the general challenges faced by people living in remote areas, but is further compounded by the experience of systemic disadvantage faced by Aboriginal communities in particular.

The factors that we know affect people living in remote areas of Australia include:\(^5\)

- higher burdens of disease (particularly for kidney and urinary diseases, which people living in highly remote areas experience at 6 times the rate of people living in major cities);
- higher mortality rates (almost 1.4 times as high as for people living in major cities);
- higher rates of potentially avoidable deaths (almost 2.5 times as high as for people living in major cities);
- low levels of supply of specialist health professionals;

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4. Ibid.
challenges in availability of general practitioners; and
high levels of potentially preventable hospitalisations.

In addition to this, people in the Northern Territory experience the lowest life expectancy in the country, the highest infant and child mortality rates, the lowest high school completion rates, the highest rate of homelessness, and one of the highest imprisonment rates in the country, with Aboriginal and Torres Strait Islander peoples making up at least 84% of the total full-time adult prisoner population in 2018 and 100% of youths held in detention.

These figures confirm that Aboriginal people living remotely in the Northern Territory are one of Australia’s most disadvantaged groups on a number of indicators. They also draw an alarming link between remoteness and disadvantage that is exacerbated when the particular histories of dispossession, trauma and cultural/linguistic differences faced by Aboriginal communities are taken into account.

The figures above also assist to contextualise NAAJA’s primary concerns in relation to the Bill’s provisions. Those concerns are briefly set out below.

1. **Exemptions in relation to health services provision**

NAAJA notes that the Bill proposes a number of specific provisions in relation to the health services. Those provisions aim to protect health practitioners from indirect religious discrimination that may arise from being required to provide a particular health service that is incompatible with their religious belief or activity.

The import of the proposed section 8(5) and (6) appears to be that health practitioners will be able to make conscientious objections to providing health services on religious grounds. The proposed exception is where there is a conduct rule preventing conscientious objection that is necessary to “avoid an unjustifiable adverse impact” on either the ability to provide a health service or the health of an individual who would otherwise receive that service. Paragraph 146 of the Explanatory Notes to the Exposure Draft of the Bill (Notes) provides, by way of example, of what might constitute an “unjustifiable adverse impact”, conduct that could result in “death or serious injury of the person seeking the health service”. This is an extremely high threshold. NAAJA notes the further example in paragraph 148 of the Notes of a circumstance that may create an unjustifiable adverse impact as being where a sole medical practitioner in a rural community refuses to supply contraception. However, NAAJA remains concerned that section 8(5) and (6) are not appropriately limited, particularly within the text of the statute, so as to protect the full scope of access of remote Aboriginal peoples to health services.

NAAJA considers the implications of the Bill’s proposal to be concerning in the context of remote health service provision.

As canvassed above, availability of health services to remote Aboriginal communities is already highly limited. The majority of remote communities that NAAJA provides casework assistance to are serviced by one small medical clinic that staffs one to two doctors, who are typically general practitioners. Large distances between remote communities mean that accessing “neighbouring” clinics is not feasible, and the possibility of remote patients receiving

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7 Ibid.
alternate or specialist medical advice typically requires a health and cost assessment by a remote clinic to determine whether the patient should be flown to Royal Darwin Hospital for treatment. Remote Aboriginal peoples’ experiences of health services are therefore already characterised by extremely limited availability of practitioners and the resourcing issues caused by the high costs of health care provision in those areas.

The Bill’s provisions in relation to health services have the potential to adversely affect individuals in those circumstances. If the Bill were to be introduced in its current form, a number of areas of health service provision would become open to the possibility of health practitioners making protected conscientious objections.

It is noted that in the Northern Territory, abortions are governed by specific conscientious objection laws, which require that individuals be referred on to another practitioner if a conscientious objection is made by a practitioner to providing a service.\(^8\)

This is not the case for the prescription of contraceptives and the administration of transgender hormones. These are two examples of areas that would ostensibly become open to conscientious objections.

In practice, without appropriate limitation in the text of the proposed Bill, health practitioners in remote communities could be able to deny some health services and treatments on the basis of protected religious belief. Where many remote Aboriginal communities have 1-2 general practitioners at most, the ability to turn elsewhere for the same health service or treatment is extremely limited. A foreseeable possibility is that some remote Aboriginal communities could be denied some health services in full due to a lack of alternative service provision. In addition, there is no provision in the Bill for health practitioners who refuse health services on religious grounds to refer patients to other services, were those services to exist.

One pertinent example of individuals who may be significantly affected by the Bill’s proposal is transgender women, or “sistergirls”, living on the Tiwi Islands, one of NAAJA’s areas of service. NAAJA has not had the opportunity to consult with Tiwi’s sistergirls in relation to this submission, given the limited timeframe. However, NAAJA encourages the drafters of the Bill to consult with this group in considering the potential impact of the Bill, as the group’s views on the current state of health service provision for remote transgender Aboriginal people, and the potential impacts of this Bill on their circumstances, are likely to be highly informative. NAAJA notes that Tiwi’s sistergirls currently face limited medical resourcing (and therefore limited access to transgender hormones as it is), as well as the general social challenges experienced by Aboriginal transgender people in Australia, such as social exclusion, economic instability, mental illness and abuse.\(^9\) In light of these existing factors, the possibility of any thinning of health service provision to Tiwi’s sistergirls, and similarly remote (and non-remote) transgender Aboriginal groups in the Northern Territory, is concerning.

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\(^8\) Termination of Pregnancy Law Reform Act 2017 (NT), ss 11-12.

2. Exemptions in relation to religious bodies

NAAJA further notes that the Bill proposes conduct by religious bodies (including religious schools and charities) that would not constitute religious discrimination. In particular, proposed section 10 protects the ability of religious bodies to act in accordance with their faith.

NAAJA considers that the Bill provides a high level of discretion to religious bodies to engage in conduct that can be linked to religious belief or activity and, by extension, to justify possibly exclusionary policies on the basis of religious belief or activity. This is again concerning in the context of remote Aboriginal communities in the Northern Territory.

Echoing the concerns set out above, it is noted that many of the areas that NAAJA works in are serviced exclusively, or almost exclusively, by religious charities and social service organisations. In the Top End of the Northern Territory, for example, Anglicare and Catholic Care provide the overwhelming majority of social assistance for Aboriginal communities. Alternative service providers are sparse where they do exist. For example, communities such as Borroloola substantially rely on service provision by religious charities based in Katherine, due to remoteness and the lack of permanent alternatives.

NAAJA is concerned that the provisions in relation to religious bodies could allow for protected exclusionary policies in remote Aboriginal communities that do not have viable alternatives for service provision. The possibility that religious bodies may be able to justify who they provide services to on religious grounds creates the potential for individuals within remote Aboriginal communities who do not identify with the same religion to be excluded from receiving a service. This could foreseeably extend to services such as social work, and housing, which religious bodies frequently provide in the communities known to NAAJA.

NAAJA notes that many remote Aboriginal communities are the sites of former Christian missions, and therefore have longstanding links to religious groups. The history of missions means that some communities have been and continue to be sites of trauma and disempowerment for some community members. Enabling religious bodies to limit the provision of services on the basis of religion may further entrench those circumstances of trauma and disempowerment.

Finally, Aboriginal people living in remote communities already contend with the difficulty of navigating complex service systems with cultural and linguistic barriers in place. Given these factors, the thinning of service availability as a result of the Bill’s provisions in relation to religious bodies could compound existing disadvantage in practice.

In sum, NAAJA is concerned about the practical impact of the above provisions of the Bill in the context of Aboriginal communities dealing with remoteness and disadvantage.

Lack of consideration of special protections for Aboriginal belief and spirituality

Beyond the above, NAAJA raises a concern that the Bill may not provide sufficient protection, or any special protection, of Aboriginal belief and spirituality. The Bill appears to be the product of the Religious Freedom Review Panel’s 2018 Report, which briefly touched upon the issue.
of Aboriginal belief and spirituality.\textsuperscript{10} In doing so, the Panel noted the importance of Aboriginal belief and spirituality as an aspect of religious practice in Australia. The Panel stated that limited submissions had been received on Aboriginal spirituality, but that it had heard that special protections were needed for Aboriginal belief and spirituality, that the law needs to accommodate the fundamental differences between Aboriginal religion and other religions in Australia, and that Aboriginal communities have complex understandings of Aboriginal religion that intersect with adherence to other faiths, such as Christianity. The Panel stated that it had been unable to conduct suitable consultation on Aboriginal belief and spirituality on the basis that it had neither the appropriate membership/expertise, nor time to give the issue due consideration. However, it expressed that there would be “considerable value” in properly exploring the issue, so as to inform a consideration of whether Aboriginal communities require greater protection for their religious freedoms.

Despite the above, the Bill does not indicate any consideration or special protection for Aboriginal belief and spirituality. The Bill’s explanatory documents do not suggest that this issue has been contemplated in the formulation of the Bill.

In light of the Panel’s comments, and the important place of Aboriginal belief and spirituality in Australia’s religious landscape, NAAJA is concerned by this lacuna. NAAJA considers that proper consultation regarding Aboriginal belief and spirituality and its need for special protection is required where religious freedoms in Australia are now being subject to major law reform.

\textbf{Conclusion}

NAAJA has significant concerns with the Bill being passed in its current form without further consultation. We would welcome the opportunity to provide further examples of the potential adverse impacts on remote Aboriginal communities.