DATE: 19 September 2019  
SUBJECT: Submission Re Religious Discrimination Bill, 2019 (Cth) (the Bill)

1. We are grateful for the opportunity to provide this submission in relation to the Bill. We are three Professors of Law working at The University of Notre Dame Australia (Notre Dame) in the School of Law, Sydney (the School). This submission is made in our personal capacities rather than on behalf of the University or the School. This submission sets some background and identifies some areas of the Bill which we argue require review and modification for the reasons set out below.

Background

2. Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments in which it was undertaken to protect religious freedom among other rights. Article 18 of the ICCPR provides that:

   1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
   2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
   3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
   4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

3. While the Commonwealth has introduced general anti-discrimination laws proscribing discrimination on the grounds of age, race, disability, sex and sexual orientation it has not introduced similar laws to protect against discrimination on the basis of religion. All States and Territories other than NSW and South Australia have legislatively proscribed discrimination on the grounds of religion. This is an important background to the Bill because the Commonwealth has made promises in the ICCPR, (including promises about the protection of religious freedom in Australia) to the international community which it has failed to comply with to date. It is regrettable that the Commonwealth has not yet protected this internationally recognised human right and the Morrison government is to be commended for this initiative.

Substance of the Bill

Avoidance of ‘exemption language’ but only protecting lawful religious activity

4. Notre Dame Adjunct Associate Professor Mark Fowler has observed that the Bill has opted against using the exemption language which is used in other Australian anti-
discrimination law when protecting religious belief and practice. That means religious believers will be able to do anything they want in the name or practice of religion but only if to do so would be “lawful.” This wording is problematic as anything that is unlawful under Commonwealth, State or local government law now or in the future will not be protected. As subject to the limitations created by s116 of the Constitution the Federal Government and (without even that limited restriction) State and local governments can legally proscribe religious practices and activities, that is not anything new but the Bill adds another level of complexity to an already complex patchwork of laws.

An improvement to the Bill would make it override Federal, State and local government laws which proscribe any religious belief or activity that do not offend generally applicable serious offences as defined in s27(2) of the Bill.

Maintaining State and Territory provisions which override conscience

5. In keeping with its deference to State and territory laws the Bill specifically preserves those State and Territory laws which override the conscience of health professionals requiring them to refer patients seeking a termination of pregnancy to health professionals who they know do not have a conscientious objection to that procedure. The law should protect conscientious objectors with the possible exception of an emergency where actions need to be taken to prevent a person from dying. Some examples of such provisions written in the context of the termination of pregnancy are:

(1) No-one is under a duty (by contract or by statutory or other legal requirement) to carry out or assist in carrying out an abortion. (2) A person is entitled to refuse to assist in carrying out an abortion.

(5) Subject to subsection (6), no person is under a duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this section to which he has a conscientious objection, but in any legal proceedings the burden of proof of conscientious objection rests on the person claiming to rely on it.

(6) Nothing in subsection (5) affects any duty to participate in treatment which is necessary to save the life, or to prevent grave injury to the physical or mental health, of a pregnant woman.

No person, hospital, health institution, other institution or service is under a duty, whether by contract or

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1 Weekend Australian Inquirer (31 August 2019)
2 See definition of “religious belief or activity” in s5 of the Bill
3 There is a limit on the Commonwealth’s ability to pass laws specifically intended to interfere with religion in s116 of the Australian Constitution but this protection has not been successfully invoked by any religious believer to date.
4 subject to the limited restrictions on the Commonwealth under s116
5 Examples of such laws are the Abortion Law Reform Act 2008 (Vic) s 8 Termination of Pregnancy Law Reform Act 2017 (NT) and the Termination of Pregnancy Act 2018 (Qld), NSW is currently debating a similar law. At the time of writing the NSW Ministry of Health, Policy Directive: NSW Health Policy Directives And Other Policy Documents, (May 17, 2016), http://www0.health.nsw.gov.au/policies/pd/2016/pdf/PD2016_014.pdf (the NSW Policy). The NSW Policy does not apply to all medical practitioners in NSW. Compliance with the NSW Policy is mandatory for Area Health Services/Chief Executive Governed Statutory Health Corporations, Board Governed Statutory Health Corporations, Affiliated Health Organizations—Non-Declared, Affiliated Health Organizations—Declared, and Divisions of General Practice and Public Hospitals NSW Department of Health
6 Health Act 1993 (ACT) s 84:
7 Criminal Law Consolidation Act 1935 (SA) s 82A(5)–(6)
by statutory or other legal requirement, to participate in the performance of any abortion.\(^8\)

(1) Subject to subsection (2), no individual has a duty, whether by contract or by any statutory or other legal requirement, to participate in treatment authorized by section 4 or 5 of this Act if the individual has a conscientious objection to terminations.

(2) Subsection (1) does not apply to an individual who has a duty set out in subsection (3) or (4).

(3) A medical practitioner has a duty to perform a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.

(4) A nurse or midwife has a duty to assist a medical practitioner in performing a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury.\(^9\).

The South Australia legislation is a little less clear than it might be as what constitutes “grave injury to the physical or mental health” is open to debate and there is no immediacy or emergency identified.

**Archbishop Porteous clause**

6. One positive exception to the Bill’s general deference to State law is its clear intention in s41 to override s17 of the Tasmanian Anti-Discrimination Act. That section required that State’s Anti-Discrimination Commissioner to consider Martine Delaney’s complaint that Archbishop Porteous’ *Don’t Mess with Marriage* brochure for Hobart parishioners and parents was offensive. As drafted this provision protects only a “statement of belief.” As within the Catholic tradition faith and reason are not believed to be in conflict many Church documents such as *Don’t Mess with Marriage* combine statements of belief with statistical, empirical and factual material. It is not clear that as drafted the whole of such a religious publication would attract the relevant protection. It would be preferable if the protection extended to statements of “doctrines, tenets, beliefs or teachings of the religion” to use the formation adopted in s10 of the Bill.

**Section 10: Use It Or Lose It protections**

7. Section 10 has been drafted to enable religious bodies generally to preserve their religious identity by only hiring staff that uphold that ethos. It provides that such a body does not engage in discrimination under the Act “by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.”\(^10\) A religious body includes “an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.”\(^11\) As currently drafted, the Bill does not allow religious or educational institutions to certify their own doctrines and ethos through the publication of a policy for example. The consequence is that the adjudication of matters of theology and religious practice, will fall to secular courts that are not qualified to decide them. In practice working out whether an expression or belief accords with a particular church’s doctrine and whether a particular

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\(^8\) *Health Act 1911 (WA) s 334(2)*

\(^9\) *The Reproductive Health (Access to Terminations) Act 2013 (Tas) s 6(1)–(4)*

\(^10\) s10(1)

\(^11\) s10(2)
religious body is acting “in accordance with” those doctrines etc will require a secular
court to call expert evidence and adjudicate on this fact. It would be preferable for the
provision to require instead the publication of policies, and for the test to be whether or
not the relevant action complied with that policy. This would remove the Courts from
the uncomfortable position of arbitrating what was or was not a doctrine, tenet, belief
or teaching of a particular religion.

Hiring a majority of staff from a religious tradition

8. Unlike some religious bodies Catholic religious bodies usually do not only hire staff from
that religious tradition. However, they do seek to maintain a catholic ethos by hiring a
proportion of staff from the tradition. Catholic universities, for example, are not required
to only hire Catholic staff. However, Pope John Paul II’s 1991 mission statement for
Catholic universities (Ex Corde Ecclesiae) does require a majority of teachers to be
Catholic. As currently drafted, it appears that the Bill does not protect ethos
preservation within such institutions. The EN provides only examples of the operation of
s10 where all employees of a religious body are required to be from a particular religious
tradition. We recommend that s10 be amended to confirm that ethos preservation measures by
any institution transparently conducted in accordance with an ethos should be legal
unless those measures involve the commission of serious offences.

Commercial operations

9. Three other issues that arise from the language currently used in the Bill are of concern:

1. governments are defined out of the definition of “relevant employer”

2. religious faith-based charities and other religious bodies cannot insist on the observance
of their ethos in commercial activity space; and

3. large employers (more than $50m annual turnover) can insist on observance of an anti-
religious employer ethos in public and private.

As religious freedom is an internationally recognised human right to which the
Commonwealth has committed itself, there seems no rational reason for governments being
exempt from any of its provisions. It is also unclear why employees of businesses with a
turnover of less than $50million should enjoy less religious freedom than employees of
larger businesses. Sections 8, 31 and 32 allow ‘relevant employers’ who have annual
revenue of at least $50m to impose their ethos on their employees if non-compliance by
employees would cause “unjustifiable financial hardship to the employer”. It is not clear
why this protection should only be available to organisations undertaking commercial
activities with annual revenue over $50m.

12 Ex Corde Ecclesiae General Norms 4.4
13 EN [180]-[181]