Rainbow Territory

Submission to the Religious Freedoms Bill exposure draft bills

Rainbow Territory aims to create a safer, fairer, and more inclusive Northern Territory

2 October 2019

www.outnt.info/rainbowterritory
1. **Summary of recommendations**

   (i) Delete subsections 8(5) and 8(6) (Conscientious objection in Health Care) from the Religious Discrimination Bill.

   (ii) Delete 10 (Religious Bodies exempt from religious discrimination) from the Religious Discrimination Bill.

   (iii) Delete clause 41 (Statement of Belief) from the Religious Discrimination Bill.


   (v) Extend the time frame for consultation and allow further submissions from organisations in a reasonable time-period after the Australian Law Reform Committee report is released which is due in April 2020.

2. **About Rainbow Territory**

   Formed in September 2014, Rainbow Territory is an unfunded community group that advocates for the human rights of people living in the Northern Territory ('NT') who identify as Lesbian, Gay, Bisexual, Transgender, Queer and Intersex ('LGBTQI'). We aim to develop a safer, fairer, and more inclusive NT by contributing to law and policy reform and increasing community visibility and connectedness.

   We welcome the opportunity to make a submission to the Religious Freedoms Bill - exposure draft bills released by the Commonwealth Government ('the Government'). Rainbow Territory does not speak on behalf of the entire LGBTQI NT community, only on behalf of our members and supporters.

3. **Timeframe for consultation**

   Rainbow Territory is of the view that thirty four (34) days is insufficient to prepare a submission
to the following exposure draft bills that the Australian Government is committed to implementing from the Report of the Religious Freedom Review's recommendations.

The exposure draft bills are outlined on the Attorney General's webpage as being:

- The Religious Discrimination Bill ("RDB") will provide comprehensive protection against discrimination on the basis of religious belief or activity in specified areas of public life.
- The Religious Discrimination (Consequential Amendments) Bill 2019 will make consequential amendments necessary to implement the Religious Discrimination Bill.
- The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 will amend existing Commonwealth legislation.

The package of the exposure draft bills are extensive and novel in their approach to traditional human rights protections of non-discrimination and the limited time frame for consultation and analysis is insufficient and unfair to those organisations and individuals who wish to critique it and propose amendments or alternatives legislation.

Rainbow Territory supports the postponement of this legislative package being introduced into Parliament in October 2019 by the Commonwealth Government.

Rainbow Territory supports extending the time period for consultation and allow further submissions after the Report by the Australian Law Reform Committee (ALRC) is released which is due in April 2020 given that it was the Commonwealth Government that referred a number of recommendations to the ALRC following the Federal report into religious freedoms.

4. **Health care provision - Conscientious Objection Subsections 8 (5) and (6) of the RDB**

The Religious Discrimination 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)) provide that health care practitioner 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 37(1) also provides that the code of conduct provisions cannot be considered inherent requirement of the job.

The implications of this in the NT needs to be considered in light of the limited options in health care provision in NT major centres, and in rural, remote and very remote locations. If someone is denied service in the NT, they do not generally have easy access to a second provider.

This section and submission focuses on the impact on LGBTQI+ people that will be affected by the proposed conscientious objections by health services. However, we are also very concerned about health practitioners being able to refuse services and its impact on decisions for single women, single parents (of any gender), de-facto couples (of any gender), pregnant women, and people who experience discrimination including but not limited to their race, disability, use of illicit drugs, employment including sex work, HIV and Hepatitis status. Rainbow Territory supports these people to have access to health services without being refused service because of health practitioner’s religious beliefs.

The type of health services included in the Religious Freedom Bill is extensive under the definition of ‘health service’ in clause 5 and encompasses:

(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.

Case study: pharmacy access in the NT
A search of the [www.healthdirect.gov.au](http://www.healthdirect.gov.au) website (accessed 1 October 2019) shows the lack of choice for services in the Northern Territory. Rainbow Territory is concerned this choice could be further narrowed by this proposed legislation.

Access to pharmacies free from discrimination is essential. Territorians needs to be able to access (without risk of discrimination by the service provider or individual):

- contraceptives, including the pill
- RU486
- HIV and Hepatitis C prevention and treatment medication
- hormone therapies.

Table: Pharmacy services in the NT by region based on health.gov.au

<table>
<thead>
<tr>
<th>Area</th>
<th>Pharmacy facilities in area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Darwin</td>
<td>Less than 30</td>
</tr>
<tr>
<td>Katherine</td>
<td>2</td>
</tr>
<tr>
<td>Alice Springs</td>
<td>4</td>
</tr>
<tr>
<td>Nhulunbuy</td>
<td>1</td>
</tr>
<tr>
<td>Yirrkala</td>
<td>1</td>
</tr>
<tr>
<td>Jabiru</td>
<td>1</td>
</tr>
<tr>
<td>Timber Creek</td>
<td>1</td>
</tr>
<tr>
<td>Tennant Creek</td>
<td>1</td>
</tr>
</tbody>
</table>

Scenario 1: access to hormones for trans and gender diverse people and Sistergirls in the NT
For example, a medical practice or pharmacy may decide to have policies based on their
religious beliefs not to provide hormones to trans and gender diverse young people and adults, Brotherboys or Sistergirls in the NT. The health service would argue that an inclusive policy making them do so under the proposed Bill was indirect discrimination on the basis of their religious belief.

**Scenario 2: impact on existing health services that are inclusive**

For example, an owner of a large pharmacy that has a strong diversity and inclusion policy, where all staff are expected to treat colleagues and customers with respect, irrespective of sexual orientation and gender identity. If a junior pharmacist working there holds religious beliefs that gender is binary and solely determined at birth and on that basis, they refuse to provide hormones to trans and gender diverse customers despite providing hormone treatment to cisgender women and men.

The pharmacy may be subject to a complaint by the trans or gender diverse customer for discrimination on basis of gender identity under the Sex Discrimination Act or State and Territory Anti-Discrimination legislation.

The owner attempts to discipline the junior pharmacist for breaching their workplace policy. The employee claims this policy is an unreasonable condition, and makes a complaint of indirect discrimination on the basis of religious belief to the Australian Human Rights Commission.

The onus is then on the owner to demonstrate the policy is ‘necessary to avoid an ‘unjustifiable adverse impact’ on their ability ... to provide the health service, or the health of any person.’ [section 8(6) of the Religious Discrimination Bill].

The owner, who has done everything possible to provide an inclusive health service, is now subject to two different discrimination complaints, with associated costs and stress. This could be a reality under the Religious Discrimination Bill.

The further effect of allowing both health service organisations and their individual employees
to conscientiously object to providing health services to LGBTI+ people in the NT will further restrict LGBTI+ people’s access to health services in already a limited market place because of the small population size in the NT and add to their stress financially if they need to leave the NT to access health services.

Whilst LGBTI+ people can already face discrimination, they currently have the protection of the NT Anti-Discrimination Act. This protection should not be reduced.

**Case study: psychology access in the NT**

We are concerned the proposed laws could further reduce access to psychological services for LGBTI+ people in the NT.

**Table: psychologist services in the NT by region based on health.gov.au**

<table>
<thead>
<tr>
<th>Area</th>
<th>Psychologist services in area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Darwin</td>
<td>30+</td>
</tr>
<tr>
<td>Katherine</td>
<td>1</td>
</tr>
<tr>
<td>Alice Springs</td>
<td>5 (including Catholic Care NT)</td>
</tr>
<tr>
<td>Nhulunbuy</td>
<td>Nil</td>
</tr>
<tr>
<td>Yirrkala</td>
<td>Nil</td>
</tr>
<tr>
<td>Jabiru</td>
<td>Nil</td>
</tr>
<tr>
<td>Timber Creek</td>
<td>Nil</td>
</tr>
<tr>
<td>Tennant Creek</td>
<td>Nil</td>
</tr>
</tbody>
</table>

**Scenario: access to counseling/psychology services**

A client attends counselling session/s due to hardships, lack of coping skills and low self-worth. The person after 3-4 counselling sessions decides that they can trust the counsellor and divulge that they identify as LGBTQ+ and have been on the verge of self-harm / suicide.

Could this counsellor use the Religious Discrimination Bill - Conscientious Objection Subsection 8 (5) and (6) and decide that they will no longer support or continue supporting their client?
Case study: Youth services in the NT

We are concerned the proposed laws could further reduce access to services for LGBTI+ young people in the NT. There is already limited supply of services for young people, and many are delivered by religious organisations.

Table: Youth services in the NT by region based on health.gov.au

<table>
<thead>
<tr>
<th>Area</th>
<th>Youth services in area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Darwin</td>
<td>1 (Headspace - operated by Anglicare)</td>
</tr>
<tr>
<td>Katherine</td>
<td>1 (Catholic Care)</td>
</tr>
<tr>
<td>Alice Springs</td>
<td>2</td>
</tr>
<tr>
<td>Nhulunbuy</td>
<td>1 (Anglicare)</td>
</tr>
<tr>
<td>Yirrkala</td>
<td>Nil</td>
</tr>
<tr>
<td>Jabiru</td>
<td>Nil</td>
</tr>
<tr>
<td>Timber Creek</td>
<td>Nil</td>
</tr>
<tr>
<td>Tennant Creek</td>
<td>Nil</td>
</tr>
</tbody>
</table>

Recommendation: delete subsections 8(5) and 8(6) (Conscientious objection in Health Care) from the Religious Discrimination Bill.

5. Religious bodies exempt from religious discrimination (Clause 10 of the RFB)

Rainbow Territory is concerned that clause 10 of the RFB may have a wider scope than originally intended and the limited timeframe given for submissions does not allow sufficient analysis of these clauses but rather raises more questions and issues.

The NT is a small jurisdiction compared to its southern counterparts and does not have a large range of service provider options should service providers refuse to provide services to individuals. This includes religious education institutions.

In particular we are concerned section 10 gives a licence to religious schools and bodies in the
NT to discriminate lawfully against persons who may otherwise be protected under other anti-discrimination laws such as s 38 of the SDA or s 37A of the NT ADA. We are concerned this could include lawful discrimination against LGBTQI+ staff members and students.

Rainbow Territory is currently advocating for further changes to NT law to remove an exemption which permits discrimination by religious educational institutions based on a staff member's sexuality. We are concerned this federal law will override any progress made to change the NT ADA to reduce discrimination. We include a number of case studies below to show the impact of the law in the NT (which we are campaigning to change) that allows discrimination based on sexuality. We do not want to see more laws that permit more discrimination against LGBTI+ people.

Clause 10 of the RFB states:

**Religious bodies may act in accordance with their faith**

1. A religious body does not **discriminate** against a person under this 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.

2. *Religious body* means:
   a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
   b) a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); or
   c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities).

3. This section applies despite anything else in this Act.
How does clause 10 of the FRB interact (if at all) with section 38 of the Sex Discrimination Act ("SDA") and 37A of the Anti-Discrimination Act 1992 ("NT ADA")?

Section 38 of the Federal SDA and section 37A of the ADA have conditional exemptions for religious educational institutions rather than blanket exemptions. The onus is on the religious education institutions to prove that they discriminated in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed in s38 of SDA whereas s 37A of the ADA states the discrimination must be in good faith to avoid offending the religious sensitivities of people of the particular religion.

The question arises if a religious education institutions discriminates on the basis of sexuality, sexual orientation or gender identity because they form the view that the LGBTQI+ person does not accept and/or comply with the particular religious beliefs of the school, does clause 10 override the NT ADA or SDA?

(i) Ground: Sexuality - Will the scope of Section 37A of the NT ADA be limited by way of section 109 of the Constitution when there is an inconsistency between State and Federal Law.

(ii) Grounds: Sexual orientation and gender identity - Will or how will the scope of the conditional exemption in section 38 of the SDA be affected by clause 10 of the FRB when two federal laws may not be consistent with each other?

Section 38 of the Federal SDA Act

In summary, the SDA Act states that it is not unlawful for educational institutions established for religious purposes to discriminate against employees and contract workers on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy, where:

- the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
- the person who discriminates does so in good to faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.
Section 37A of the NT ADA

An educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination:

(a) is on the grounds of:
   (i) religious belief or activity; or
   (ii) sexuality; and

(b) is in good faith to avoid offending the religious sensitivities of people of the particular religion.

Extract: Rainbow Territory’s submission re Section 37A of the NT ADA

Rainbow Territory made a submission into the Modernisation of the Anti-Discrimination Act 1992 (NT) Discussion Paper on 23 January 2019 and our position regarding exemptions for religious schools and religious bodies at the State level is clear when we answered question 14 posed at pages 17-21 as follows:

Should any exemptions for religious or cultural bodies be removed?

Rainbow Territory strongly supports the removal of religious exemptions on the basis of sexuality, specifically s37A(ii) which allows religious educational institutions to discriminate on the basis of sexuality in the area of employment. Tasmanian antidiscrimination legislation does not contain exemptions for religious schools on the basis of sexual orientation, gender identity or intersex status. Ireland has also removed an equivalent exemption; 84% of people in Ireland identify as Catholic.

In recent months, Rainbow Territory has collected case studies of LGBTQI Territorians who are, and could be, impacted by the current law regarding religious exemptions. We present their anonymised stories below.

Case study: Michelle

Michelle* is a teacher at a religious secondary school located in the top end region. She is largely closeted at work, stating "I am not in a relationship which makes it easier, there are less
questions, and I consciously don’t talk about past relationships or my sexuality with particular members of staff". She said since starting I have felt nervous and just really cautious. I have a gay colleague who has been in the job for 4 or 5 years, it is pretty scary to me to see them be closeted for so long”.

When asked by Rainbow Territory whether her sexuality is relevant to her work as a teacher, she said "In terms of my capacity to teach it is not relevant. In some ways lean better support the queer kids in the classroom. I think about the mental health of all my kids, but I particularly keep an eye out for kids who are gay or trans". Regarding the current law, Michelle said "I don't think religious schools should have special rules, people should be able to expect equal access to work there, and to be hired and not fired, and equal access to professional development."

Case study: Kim

Kim*, an employee working in a Catholic High School in the Top End, said "when I applied for a job I disclosed my sexuality and was told not to mention it again and that the interviewer would forget I had even disclosed it. In my first year at the school I was very conscious of what I said. I would refer to my partner as my housemate, not my partner of 6 years. This was difficult.

Engagements and pregnancy are openly celebrated in my workplace. However, I know if someone LGBTQI has become engaged they have not been able to share or celebrate their good news. I also definitely wouldn't be able to stay in that workplace if I had children. I feel that I would definitely lose my job".

Kim spoke about being discriminated against in relation to her workplace agreement: "Our current Enterprise Bargaining Agreement states that people are entitled to carers leave for partners and former partners only where the relationship is heterosexual. Bereavement leave is for 'immediate family members or a household member'. It was hard when I wanted to attend my partner's grandmother's funeral to support her and grieve myself. She wasn't recognised as my immediate family, so neither was her late grandmother." Kim also said "being closeted again has had a huge impact on me and I do know there are other people here that have been impacted. It makes me feel invisible. I strongly value community and relationships. I try to be
involved as much as possible in the school community. However my relationship or family are not welcomed."

**Case study: Lisa**

As a young queer woman educated in Darwin and now working as a teacher interstate, Lisa* recalled only one experience of overt homophobia at her school as a student but mainly recalls the invisibility of diversity in sexuality and gender and said "being an adolescent is already hard enough". Now teaching interstate, she said she "cannot imagine what it would be like to live with the fear of losing your job because of your sexuality" and believes that there must be a separation between religion and sexuality as they don't directly relate to each other; "school is about educating all learners who have a right to learn and be safe in school."

**Case study: Peter**

Peter* spoke about working in a supportive public school in Darwin where his sexual orientation was not seen by staff or students as a negative, but rather a positive. He said "There is normally two or three students who have come out at the end of the year in classes that I have been 'out' in. It's a really powerful thing for kids to trust you and feel safe enough as there was no support when I was in school".

The current Act provides comprehensive protection to people on the basis of marital status, pregnancy, and parental status. While being divorced, living in a defacto relationship, or being a single parent may go against the teachings and beliefs of some faiths, the Territory has long considered employment to be an area where people deserve protection from discrimination, including in religious educational institutions.

In addition, we believe that taxpayer funds should not be used to exclude people from employment based on LGBTQI+ status and instead only be expended where appointments are merit-based. Continuing to provide exemptions fails to create accountability and means that public funding is being expended on schools that do not actively uphold public values that all schools are expected to espouse: the values of respect, equality, and non-discrimination.
All of the religious institutions that are eligible for the exemption also receive significant
government funding. Some of the institutions receive 56-98% of their funding from the NT and
Federal governments (see Appendix 1). For example, in the calendar year 2016, the Catholic
Education Office received over $37 million from the NT government and $69 million from the
Commonwealth government for disbursement to Catholic schools in the NT, including capital
grants. NT Christian Schools did not publish its full financial income and expenditure so we
cannot include these figures.

Independent schools, a significant number of which are religious educational institutions,
receive substantial funding from government. The NT Department of Education Annual Report
2016-2017 showed that:

"In 2016-17, the department provided total direct funding support to nongovernment
schools of $229.3 million. This included $165.9 million in Commonwealth Government
funding, mainly untied Students First funding, and $61.8 million in Northern Territory
Government funding".

**Recommendation:** Delete 10 (Religious Bodies exempt from religious discrimination) from the
Religious Discrimination Bill.

### 6. Statements of belief (Clause 41)

The statement of belief provisions are extremely concerning as they are outside usual Anti-
Discrimination provisions and do not balance other competing human rights such as the
grounds of sexuality, sexual orientation and gender identity which are relevant to the
community that Rainbow Territory advocates for.

The concern is that the Religious Discrimination Bill explicitly overrides existing discrimination
protections for other groups. 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 subsection 17(1) of the Tasmanian Anti-
This has the impact of making s 37A of the NT ADA in some scenarios redundant. The religious
school will no longer need to show ‘offence’ to ‘religious sensitivities’ if a complaint is made
against them for discriminating against a gay or lesbian student or teacher by making a
statement of belief directed at that person if that the person interprets the Statement of Belief
as discriminating against them.

Whilst there are some restraints on the statements of belief, they operate only if the statement
is malicious, or a serious criminal offence. However, this is a very high threshold.

The provision will enable statements of religious belief made in good faith that offend,
humiliate or intimidate women, or people with a disability, or LGBTQI+ community members to
be lawful, no matter what the state or territory legislation provides. The pre-eminence is given
to the right to make statement religious belief over the known, evidence-based harm done to
the other groups covered by anti--discrimination legislation.

The statement by Israel Folau which has had extensive media attention where he stated in part
on his Facebook post:

WARNING Drunks Homosexuals Adulterers Liars Fornicators Thieves Atheists Idolaters,
HELL AWAITS YOU. REPENT! ONLY JESUS SAVES

could be treated as a ‘Statement of Belief’ under the proposed FRB and these types of
comments contribute to creating an environment that is hostile and at times unsafe for
LGBTIQ+ people causing harm both physically and psychologically.

This evidence-based harm to LGBTQI+ people is well documented with Australia having high
levels of suicides, suicidal ideation, self-harm and higher risk of poor mental health amongst
LGBTQI+ young people in particular. The limited time period given for submissions makes it very
difficult for an unfunded community group such as Rainbow Territory to properly address this
issue and provide the research that is needed to support such statements using evidence from
the Northern Territory.

As a snapshot, Equality Australia Submission to the Royal Commission into Victoria’s Mental Health System dated 5 June 2019 provided some examples of research as follows:

- 1 in 2 trans young people had attempted suicide and 4 out of 5 trans young people had engaged in self-harm (Telethon Kids Institute – *Trans Pathways* (2017)),
- 3 in 5 intersex people had experienced suicidal ideation, and 1 in 5 intersex people had attempted suicide (Intersex Human Rights Australia – *Intersex: Stories and Statistics from Australia* (2016)),
- LGBTI young people aged 16 to 27 are 5 times more likely to attempt suicide, with LGBT young people who had experienced abuse and harassment even more likely to attempt suicide (National LGBTI Health Alliance – *The Statistics at a Glance: The Mental Health of LGBTI people in Australia*),
- 7 out of 10 trans women, 6 out of 10 trans men, and 1 in 2 bisexual women, use mental health services (La Trobe University – *A Closer Look at Private Lives 2* (2015)); and
- The most common health conditions for LGBT people were depression and anxiety (La Trobe University – *Private Lives 2* (2012)).

**Recommendation:** Delete clause 41 (Statement of Belief) from the Religious Discrimination Bill.