2 October 2019
The Hon Christian Porter MP
Attorney General

Dear Attorney General,

I am making a submission on behalf of Women’s Electoral Lobby Australia (WELA) in relation to the consultations on the package of draft Bills described as the Religion Freedom Bills and specifically on the Exposure Draft to the Bill.

General concerns

WELA is very concerned about the potential impacts of a number of aspects of the Bill on Australia’s existing regime of complementary Commonwealth, State and Territory laws which allow for local variation to provide the highest level of rights protection. Since 1972 Women’s Electoral Lobby has contributed to the development of this legislative structure, specifically in relation to sex discrimination and discrimination against women in employment.

WELA does not necessarily oppose legislation to prevent religious discrimination. However we note that the Ruddock Inquiry into Religious Freedom declined to recommend such a course of action.

In the current circumstance WELA believes the most practical and immediate approach is for the Attorney General to ensure that the proposed Bill is revised to complement relevant Commonwealth and state legislation. This would also entail the Attorney General encouraging NSW and South Australia to include religious discrimination in their suites of anti-discrimination legislation.

In the longer term WELA strongly endorses the Law Council of Australia’s statement that ‘the best way to protect human rights in Australia is through a legislated, comprehensive Charter of Rights, which would allow competing interests to be balanced.’

Nevertheless we recognise that an Australian Charter of Human Rights is not on the current political agenda. It is therefore imperative to ensure the proposed Religious Discrimination Bill takes account of other important rights that also need protecting, such as the right to live without fear of discrimination on the basis of other attributes.
Anti-Discrimination Law sends a message and sets norms supporting the equal status and dignity of all people, including women.

As a national advocacy organisation dedicated to creating a society where women’s participation and their ability to fulfil their potential are supported and respected and which promotes equality between men and women, WELA notes that some (but not all) of the religious organisations - now proposed to have a special and unusual status as ‘persons’ in the Bill - have long established doctrines, beliefs and practices which openly advocate and result in a secondary and unequal role for women.

This reinforces our concerns regarding the ‘normative’ impacts of those sections of the Bill which privilege religious expression over other values, including freedom from discrimination; and by overriding State and Territory laws.

Anti-Discrimination Law in Australia has long set an ethical bench mark on the entitlement of every person to equal treatment, respect and dignity. The status of Australian women and their entitlement to equality in the private and public spheres have benefited immeasurably form the accumulated effects of these laws on public opinion. Legislation to prevent discrimination against women has set a benchmark for legislation preventing discrimination against other groups of people on the basis of characteristics such as race and disability as well as generic anti-discrimination law and workplace legislation.

Exemptions of Statements of Belief

We are particularly concerned by the unprecedented exemptions proposed in Clause 41 of the Bill, which would exempt certain ‘statements of belief’ from all Commonwealth, State and Territory anti-discrimination protections (including adverse action protections under the Fair Work Act), s17(1) of Tasmania’s Anti-Discrimination Act, and any other law prescribed by the regulations. We are troubled that such provisions could set back the positive tide for Australian women flowing from the pressure on institutions and civil society exerted by anti-discrimination legislation enacted over the past forty years.

We note that Clause 41(2) of the exposure draft does exclude conduct which is in bad faith, malicious, harassing, vilifying or incites hatred or violence.

However it potentially leaves women, without protection from a significant range of conduct that is demeaning, humiliating, intimidating, insulting, ridiculing or offensive and may otherwise constitute discrimination. This would be a setback for the Australian community as a whole.

WELA also notes the concerns of the Australian Human Rights Commission regarding the potential impact of exemptions for ‘statements of belief’ on establishing evidence for complaints made under the Sex Discrimination Act. These proposed exemptions could undermine the legal basis of many complaints and prevent their ‘just resolution. The AHRC submission outlines how this could work in practice. should the Bill be implemented with this clause intact:
Discriminatory statements potentially exempted as statements of belief under the Bill ‘may amount to ‘less favourable treatment’ in and of themselves. They may also provide evidence that other conduct, which is less favourable to a person, was undertaken for a prohibited reason. Often establishing the reason that unfavourable conduct was undertaken is one of the greatest obstacles to an individual, who has in fact been discriminated against, being able to prove it to the requisite legal standard.

For example, an employer may make a statement that ‘women should not be in leadership positions’. That is a statement that may reasonably be regarded as being in accordance with the doctrines of some religions. The employer may genuinely believe the statement and make it in good faith. However, it may have a significant adverse effect on women in that workplace. Further, if there was subsequent conduct by the employer of not promoting women, it may provide evidence that the conduct was engaged in for a prohibited reason.

Safe Access Zones Legislation
The majority of Australian states have recently enacted Safe Access Zones Legislation to prevent the harassment of women and health workers seeking access to Reproductive Health clinics. The High Court has confirmed that this state legislation conforms with provisions of the Australian Constitution providing for political communication and free speech.

WELA is concerned that the Bill’s proposed exemptions for statements of religious belief could provide the basis for a new challenge to these laws based on the constraints they potentially place on expressions of religious belief in the form of counselling. These clauses of the Bill therefore have the potential to set back women’s access to reproductive health care facilities and once again license the speech and behaviour that state laws are designed to eliminate.

Potential consequences for women’s employment and Australia’s international obligations

WELA believes that the Bill needs to take account of any impact it may have on constraining Australia’s fulfilment of its obligations under international treaties, in particular the Convention on the Elimination of All Forms of Discrimination Against Women, together with other covenants and treaties. We address this further in our comments on the Bill’s clauses constraining limitations on conscientious objection in the provision of health services.

Related to the Bill’s uneasy fit with existing legislation at the Commonwealth and State level, WELA is also struck by the sheer complexity and indeed ambiguities of the Bill, especially in relation to its deeming provisions, definitions of religious belief, exemptions and the uncertainties about the extent to which it will override state legislation and other rules and regulations. This will potentially make appeals and claims difficult and time consuming, especially for vulnerable and marginal individuals and poorly resourced organisations.

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WELA notes the specific concerns raised by the submission from the Australian Human Rights Commission in relation to the inclusion of corporations in the Bill’s definition of persons who could be subject to and victims of religious discrimination.

WELA is concerned that there are likely to be many unintended consequences of the Bill that will have an adverse effect on the status of women, including economic consequences.

It would seem that where a religious purpose can be argued, people of religion and religious organisations are given special status. This has the potential to impact Australia and our fundamental rule of law - the principle that every person and organisation, including government, is subject to the same law.

WELA notes that many sole parents, including divorced and never married parents, are employed in industries where the churches have a significant role; including schools, aged care and hospitals. The vast majority of these sole parents are women. We are concerned that this employment may be jeopardised if religious organisations are exempted from the anti-discrimination laws. Even unmarried women who become pregnant while employed by a religious organisation could be at risk.

In addition to workers employed by religious organisations, the clients of such organisations need to be considered. The freedom to express religious views should not override the rights of others to make decisions.

Some religious health service providers do not make certain reproductive health services – not only abortion - available to women. Provisions in the Bill could strengthen these constraints on women’s access and licensed in a most retrograde way.

Less visibly, older women are overrepresented in residential aged care, and there is the risk that they could be subjected to unwanted religious commentary and prohibitions.

**Conscientious objection**

We already have noted the specific concerns raised by the submission from the Australian Human Rights Commission in relation to the inclusion of corporations in the Bill’s definition of persons who could be subject to and victims of religious discrimination.

We are aware that the HRC and other submissions to this consultation will outline the difficulties presented by such an expanded definition of ‘person; one that we understand is completely inconsistent with International Human Rights Law definitions and conventions.

WELA is particularly concerned that by potentially enabling institutions such as hospitals to exercise conscientious objection, this provision could add to the constraints on women’s access to reproductive health services already established.
through the conscientious objection clauses in the various state based laws regulating abortion. At present Western Australia is the only state which permits hospitals to conscientiously object to undertaking terminations. Since most complex and difficult late term abortions take place in hospitals or in public health facilities, such an enlargement of the scope of conscientious objection has significant implications for women’s access to the full span of reproductive health care services, including contraception.

Sections 8.5 and 8.6 of the Bill relate to rules that restrict or prevent a health practitioner from conscientiously objecting to providing a health service on religious grounds. The provisions operate to deem such rules to be unreasonable in certain circumstances.

The definition of a ‘health service’ that a health practitioner may object to providing on religious grounds, is exceptionally broad and would cover all of the services accessed by women seeking reproductive health care, including contraception, transgender and binary women and people.

The Bill relies on State and Territory law to achieve the balance between conscientious objection and the necessity for treatment. The Explanatory Notes say that clause 8(5) of the Bill ‘recognises that statutory conscientious objection provisions are primarily a matter for the states and territories’.

Given the differing emphases and provisions of conscientious objection clauses in state legislation regulating abortion care, WELA is very concerned that clauses 8.5 and 8.6 of the Bill would prevail over state law providing for referrals to a non-objecting practitioner or service. This could entail a practitioner refusing any service including even the limited referral information required by the recently adopted NSW Abortion Law reform Act 2019.

We are alarmed by the implications of the AHRC observation in their submission that ‘the particular circumstances in which clause 8(6) operates are not clear’. Where state and territory law is silent about conscientious objection or where gaps occur in the wording of specific clauses relating to conscientious objection, the provisions outlined in in the Religious Discrimination Bill could prevail.

Moreover WELA shares the concerns of the AHRC regarding the adverse impacts that could limit the exercise of conscientious objection. State laws regulating abortion exempt emergency and refer to the life and health of the woman. However:  

*The Bill does not attempt to distinguish between which adverse impacts are justifiable and which are unjustifiable. The Explanatory Notes say that a result of death or serious injury ‘would generally amount to an unjustifiable adverse impact’ (emphasis added). The only conclusions that can be drawn from this are that not all adverse impacts on patients will justify rules that limit conscientious objections, and sometimes even the death of a patient may be insufficient.*

*The Commission is concerned that this appears to countenance a wide range of possible adverse health impacts in the name of protecting the freedom of religion of health practitioners.*
The risk involved in this approach is that patients may lose the ability to obtain ‘information, prescriptions, or referrals’ or to have procedures related to services such as abortion, euthanasia, contraception or sterilisation where, in all the circumstances, it would be reasonable to require health practitioners to provide those services or to make referrals to another health practitioner who is willing to do so. 

Conclusion

Women’s Electoral Lobby Australia appreciates the opportunity to contribute to the community consultations on the Religious Discrimination Bill. We believe that the Bill includes clauses which have the potential to impede Australian women’s attainment of equality, limit our status and impair our dignity. For that reasons we recommend against adoption of the Bill without radical revision in the light of existing anti-discrimination legislation at the state and Federal level and Australia’s international human rights agreements and obligations.

Yours sincerely

Emma Davidson

National Convenor, Women’s Electoral Lobby

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