ACON Submission on Legislative Reforms relating to the Religious Freedom Review

October 2019
Acknowledgment of Traditional Land Owners

ACON acknowledges the traditional owners of the lands on which we work. We pay respect to Aboriginal elders past, present and emerging.

About ACON

ACON is NSW’s leading health organisation specialising in community health, inclusion and HIV responses for people of diverse sexualities and genders. Established in 1985, ACON works to create opportunities for people in our communities to live their healthiest lives.

We are a fiercely proud community organisation, unique in our connection to our community and in our role as an authentic and respected voice.

Members of Australia’s sexuality and gender diverse communities experience health disparities when compared to health and wellbeing outcomes experienced by the total population. They may also face significant barriers to accessing traditional healthcare pathways. These issues can be compounded by other factors in a person’s life, such as living with a disability or being from a culturally diverse background.

We recognise that members of our communities share their sexual and gender identity with other identities and experiences and work to ensure that these are reflected in our work. These can include people who are:

- Aboriginal and Torres Strait Islander people
- people from culturally and linguistically diverse backgrounds
- people who use drugs
- mature aged people
- young adults
- people with disability

We know that how our communities define and describe themselves changes, and we strive to ensure that all people we work for feel welcomed by the services we offer and the language we use.
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Overview

Discrimination is fundamentally unacceptable. ACON supports measures which aim to eliminate discrimination against people of faith and those who are not religious. Currently, laws in some states and territories, including New South Wales do not adequately provide this protection.

All Australians should be free to practise religion if they choose to, and these choices should not impact their ability to engage in public life. Equally, people who choose not to engage in religion should not be excluded from public life, nor should they experience harms from others’ practice of faith. It is important to reflect on the fact that people can, and do, experience discrimination and exclusion on multiple grounds. Also, many of our communities face potential discrimination for their age, gender or other aspects that make up their person. Anti-discrimination legislation must recognise and be responsive to this.

In making this submission, ACON wishes to highlight the experience our communities have had with some faith based organisations and entities. The care given by St Vincent’s in Sydney to gay men and others who were impacted by HIV and AIDS related illnesses (many of whom died) in the 1980s and 1990s was then, a brave act of compassion. They gave care before others were prepared to. More recently, Uniting have worked very hard to attain a Rainbow Tick accreditation, to ensure the organisation and its services are inclusive of sexuality and gender diverse individuals.

Some members of Australia’s sexuality and gender diverse communities are also people of faith. These are people who everyday, both uphold their faith, while still being true to who they are. Legal protections need to uphold principles that align with the fair, egalitarian and mutually respectful communities we all want to live in.

We fear that the implementation of the Bill may conflict with the intended purpose outlined in the Objects of the Bill as noted in the Exposure Draft. The proposed legislation presents a clear potential to reduce the human rights of members of our communities, and establish a hierarchical attitude towards human rights, placing the rights of those with religious beliefs or convictions above the rights of others in the community, including those of diverse sexualities and genders.

Our submission highlights a number of concerns and issues with the Bill – including its impact on workplaces, health services, and the consultation process. The following recommendations are offered in conjunction with the detail of our submission.

Recommendations

1. That further consultation is undertaken in the development of the Bill, given its complex nature and how it differs from other pieces of federal anti-discrimination legislation.
2. That the Bill is revised to make explicit that its provisions, mechanisms and redress avenues are not elevated compared to those applicable to other areas of anti-discrimination.
3. That the Bill is amended to require that the legislation be the subject of a formal parliamentary review (including a call for submissions) within three years of its introduction to ascertain the impacts and effects of the legislation on the Australian community.
4. Amend the Bill to make clear that a complaint of religious discrimination can only be made by, or on behalf of, a natural person.
5. Remove Subsection 8(3) and (4).
6. Remove Subsection 8(5) and (6).
7. Amend Section 10 of the Bill to reflect that religious bodies are bodies established for religious purposes.
8. Remove Section 41 of the Bill.
Introduction

It is important to provide a historical context for the recommendations contained in this submission.

Over recent decades, people who are sexuality or gender diverse have been deemed mentally ill, been included in the criminal law of Australian jurisdictions, experienced extreme levels of abuse and violence (including murder)¹, denied access to care and services, and excluded from family, workplaces and religious congregations simply for being who they are². These are some of the reasons why people who are gay, lesbian, bisexual, transgender, non-binary and queer are deeply impacted by harmful public commentary, discriminatory practice and legislative reform efforts which weaken the safety and inclusion they feel in our communities all across Australia.

Given that discrimination is fundamentally unacceptable, we cautiously support the overall objectives of the Bill, which will make it unlawful to discriminate on the basis of religious belief or activity in specified areas of public life.

Similarly, we offer qualified support for the introduction of a formal mechanism of complaint through the Australian Human Rights Commission. It is important to maintain that beliefs defined by a lack of religious belief such as atheism and agnosticism are protected by the Bill.

Anti-discrimination legislation which aims to remove state and territory based inconsistencies which allow for direct discrimination may be useful, considering the broad range of faiths that Australian people hold, including those who are not of a specific faith.

There is concern regarding the lack of further definition of the concept of religious belief in the Bill. We find it potentially problematic for the Commissioner, or any other interpreter of legislation, to make a distinction on whether a belief is a genuinely held belief of a small or emerging faith tradition.

We also have concerns about the determination of whether or not an individual may have a genuine religious belief, or simply be stating they have a genuine religious belief in order to gain legal protection for expressing views or engaging in actions which would otherwise be deemed as unlawful. While established and more recognisable religions have doctrines and tenets of faith which outline expected religious activity, the Bill requires that a determination is made about the authenticity of a religion, and related religious activity. This requirement for interpretation by an arbiter, including the proposed Commissioner, provides for more concern from the communities ACON works with.

² https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5bd78764eef1a1ba57990efe/1540851637658/LGBT+conversion+therapy+in+Australia+v2.pdf
Workplaces

Our communities and workplaces
We understand that many people in our communities experience difficulty in being their authentic selves at work for fear of homophobia and exclusion\(^3\), \(^4\). For many of these individuals, work is not a safe space to express their sexuality. This fear extends also to public life in arenas such as sport, social lives and education.

Employment is of particular interest to ACON, as our Pride in Diversity programs support employers across Australia, and through them, support their employees. Working with over 300 employer organisations, representing nearly three million employees, professionals and contractors, we have tracked the state of workplace inclusion and health and well-being for the LGBTI community for nearly a decade.

According to a report commissioned by the SBS (Special Broadcasting Service), produced by Deloitte\(^5\), “diversity and inclusion policies have matured from adhering to laws and tolerating difference. Workplace inclusion is about deeply valuing people from different backgrounds, creating a strong sense of connectedness, and belonging as well as a recognition that diversity of experience and thought can bring benefits to business productivity and the ability to connect with customers”.

The report goes on to quote further research from Deloitte which identifies key dimensions through which social inclusion can yield economic benefit, which are: increased productivity in the workplace, improved employment outcomes, improvement in mental and physical health, reduced cost of social services and inclusive growth.

The Australian Workplace Equality Index (AWEI) survey is a national engagement survey focused on LGBTI workplace inclusion and in 2019, nearly 28,000 Australian employees participated. Although the AWEI does show significant progress in LGBTI workplace inclusion and well-being, it also highlighted significant areas of concern. For example, only 63% of LGBTI employees are completely out in the workplace, and this was primarily driven by a fear for being labelled.

Of those with diverse sexuality, 16% were the target of unwanted jokes and commentary over the past year. 4% had experienced sexual harassment and 3% had experienced serious bullying because of their diverse sexuality. For trans and gender diverse employees, the experience of serious bullying was 5%; sexual harassment was 7% and the degree of unwanted commentary and jokes was a disturbing 34%.

It is in this context that ACON is very concerned about the draft changes to the discrimination legislation concerning the need for employers to prove financial consequences so as to address inappropriate commentary and behaviours. We have found our employer organisations have spent significant thought and effort in developing appropriate codes of conduct and statements of values which should be central to employees’ expected behaviours in the workplace.

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\(^3\) https://www.aph.gov.au/DocumentStore.ashx?id=b0aa5f9e-bed2-4dcb-964e-96f76f0abde&subId=663081
Faith in the workplace

Many people of faith, hold the view/belief that their religion expressly forbids homosexuality or gender diversity. The expression of this view/belief varies between religions, and indeed individuals within those religions. Unlike other pieces of Anti-Discrimination legislation, this Bill allows people of faith to make genuine statements of belief about people of diverse sexualities and genders, and then spread these messages of prohibition in a way that is undoubtedly harmful to an already marginalised community. Within the workplace, this potentially creates a space which is unsafe for people of diverse sexualities and genders.

The Bill specifically mentions the protected act of evangelising, which could be seen to include acts related to proselytising. These broad terms could include disseminating interpretations of religious texts that demonise people based on their sexuality and gender identity.

Further, a legal protection for proselytising could create an environment in which other team members in the workplace, or members of management, engage in these activities in a work environment – a situation that would be uncomfortable for non-religious people, especially those who may have suffered for many years as a result of faith based systemic and institutional homophobia or transphobia.

Overall, our concern relates to the potential for people of faith to directly express to same sex attracted and gender diverse people in the workplace, views on their sexuality and gender that may cause offence, exclusion and harm, especially over a longer period of time. This concern extends not just to employees of an organisation, but also to clients and or customers.

Public statements

The importance of historical systemic and institutionalised homophobia in relation to this proposed legislation cannot be understated. Many members of our communities have had to overcome institutionalised and societal stigma in order to actively engage for more than half a century in the hard won advancements in their rights.

As our communities begin to enjoy longer life expectancies, we move into more areas of public life. For many people in our communities, friendship and social supports were decimated through the AIDS crisis, they fought violent and corrupt law enforcement officers who degraded and humiliated them, and were denied services because of who they loved. For many of these individuals, religion was inextricably linked to much of that discrimination. Even through the recent Marriage Equality Postal Survey, religious groups rallied together to use faith as a weapon against equality for our communities.

More recently, statements made by public figures that asserted homosexuals were destined for an afterlife in hell have promoted much community discussion. ACON is concerned that this would be an example of the kind of speech that would be protected under the proposed legislation. Leaving aside whether the statements constitute harassment or vilification, they create an environment in which people of diverse sexualities and genders feel excluded and unsafe, which can lead to negative social and health outcomes, for individuals and more broadly, for specific populations.

Sections 8(3) and (4) give cause to very serious concerns that such protections could impact on the provision of services for our communities, who already face significant challenges in terms of access to appropriate healthcare and human services. Already, people who are sexuality and gender diverse face difficulties finding appropriate services for issues such as homelessness, aged care and problematic drug
use in which untrained staff can engender unsafe and unsupportive services. Many providers of social, health and welfare services funded by government are faith based providers.

If, for example, support staff, or indeed leaders in these organisations were able to assert in public forums such as social media, harmful views based on an understanding of their religion in relation to sexuality and gender diversity, members of our community would have diminished confidence that they would be welcome in those services, let alone receiving an appropriate standard of care.

Many such large organisations, faith based or otherwise, who provide services for marginalised community members would be included in the scope of the legislation given their fiscal position. This Bill and its impacts need to be assessed against the prioritisation of LGBTQ communities in State and Federal Government strategies, including many that recognise the lack of culturally safe services. Reducing poor health, social and other outcomes requires increased access and safety. It is imperative that this legislation does not increase the sense of exclusion from services that already presents barriers to improving the health outcomes of our communities.

Inter-faith workplaces
This proposed legislation also presents issues in terms of the coming together of people of different faiths. A general person might expect that they would have the freedom to practise their religion without suffering personal attacks, however this Bill potentially allows that, for example only, a person of Muslim faith who genuinely believed that an individual who knew of and rejected Allah was an enemy of Islam, could make that point known publicly.

We note that under the proposed legislation, that individual could make that point known directly to a Christian who was engaging in their faith (through prayer or evangelising, or the wearing of a Christian symbol as a piece of jewellery), or an atheist who had expressed their choice to not engage in religious beliefs. The situation, equally can be reversed. In each case, a person making a statement would be protected by the proposed Bill, even as they were causing harm and distress for someone based on the person’s religious beliefs.

Mainstream Australia holds egalitarian values which include fair play, compassion, respect and a commitment to laws, and democratic principles. Indeed, the Department of Home Affairs explicitly outlines these as critical foundations of our country, as expressed in its “Australian Values Statement” (www.immi.homeaffairs.gov.au). Those drafting this Bill have a very significant duty to ensure that the proposed legislation does not put into conflict the wide variety of religious teachings and practices within our successful multicultural and pluralistic society, and those values that most Australians would uphold – including the principle of mutual respect.

While the Bill is clear that religious activity is limited to lawful activities, we believe the potential to cause harm or suffering through an unfettered expression of religion is potentially damaging to individuals, and creates an inconsistent and legislatively confusing environment. Just because there is not an explicit law against something, doesn’t automatically mean the behaviour is acceptable.

Sections of the Bill regarding employer conduct rules do not reflect modern attitudes towards employment and social media. In a time when an individual’s private social media is often identifiably linked to their place or places of employment, there is an expectation amongst many that where such a link exists, an individual must adhere to the values of the organisation publically.
Conscientious objections by health practitioners

ACON holds serious concerns about sections of the proposed legislation that deem conduct rules imposed on health practitioners unreasonable, if those rules restrict or prevent a health practitioner from conscientiously objecting to providing a service based on their religious belief or activity. These situations are covered in Section 8(5) and (6) of the Bill. We believe that nobody should be in a position where their healthcare is compromised in order to allow for the beliefs of a health practitioner.

These concerns are exacerbated for people in our communities in rural and regional areas where access to culturally safe and appropriate healthcare is often limited for people of diverse sexualities and genders.

Our communities face significant disparities in health. The Australian Institute of Health and Welfare notes that homosexual and bisexual people experience higher levels of psychological distress, increased use of alcohol and illicit drugs and are at higher risk of suicide. A report commissioned by the National LGBTI Health Alliance found high levels of discrimination reported by sexuality and gender diverse people and also higher rates of mental ill health and distress.

Access to care in our communities

The potential impact of this legislation on members of our communities, especially those individuals who have limited access to healthcare and prevention, is great. The Bill allows a practitioner to deny, for example, access to Pre Exposure Prophylaxis (PrEP) to prevent HIV, whether that practitioner be a doctor prescribing the medication or a pharmacist dispensing the medication. Not only does this objection mean a person at risk of HIV is denied medication that has been proven to reduce the risk of HIV, it also undermines current federal policies to decrease transmission rates through the subsidisation of PrEP medications through the Pharmaceutical Benefits Scheme.

Similar concerns exist for patients seeking gender affirming care. Members of these communities interface with several aspects of the health sector. Not only is this already cumbersome and costly (especially for those living in regional areas), but experiences of lack of understanding, judgemental attitudes and denial of service, or lesser service provision are unfortunately, common experiences when attempting to access care.

ACON understands the vital importance of gender affirming care. However, our current understanding of the Bill leads us to believe a practitioner may be able to refuse the provision of gender affirming care due to a religious belief as the refusal of provision of such care may not be seen as having an “unjustifiable adverse impact”.

The potential impact of this legislation on the provision of good healthcare to our communities and the broader community is incredibly broad. Access to a range of healthcare services such as vasectomies,

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tube ligation, contraception provision, treatment of hepatitis, drug and alcohol treatments, treatment for some sexually transmissible infections and provision of the ‘morning after pill’ could all be potentially refused on the grounds of religious beliefs.

ACON also is extremely concerned about the potential refusal of ongoing paediatric care for children of parents of diverse sexualities and genders. Similar legislative allowances in the United States have led to negative consequences for members of our communities. ⁸

ACON is also concerned that in any debate on the implementation of this section of the legislation will not hear the voice of the person seeking medical care. Religious discrimination complaints brought against a health practitioner will involve the practitioner and the professional body or employer. The ability for the individual to speak to their experience of losing the right to effective healthcare is lost.

Gay Conversion Therapy
Significant concerns also exist regarding the potential for this proposed legislation to open the door to a number of harmful and discriminatory practices commonly known as “gay conversion therapy”. It is important to understand that this nomenclature is misleading and often misunderstood; often these practices are also employed to encourage people to change their gender identity to one which aligns to the sex on an individual’s birth certificate as well as to change a person’s sexual identity or practices.

Much of this practice is founded in faith based beliefs which centre on the idea of people of diverse sexualities being ‘wrong’ or ‘broken’ and therefore being able to be rectified. These practices play out in a variety of ways including abstinence, denouncement of a person’s sexuality or gender identity, and forms of psychological influence and manipulation. Survivors experience (often) lifelong consequences and extreme mental and other health problems. It is imperative that this legislation not permit, or give protection to, health practitioners, people of faith or religious bodies to undertake these processes, regardless of a genuinely held belief.

Conduct by religious bodies

Section 10 of the Bill creates concern in relation to the allowance of religious bodies to discriminate against people on the basis of religious belief or activity, contrary to the nature of the legislation.

While it is important that religious bodies be able to live and act in accordance with their faith, any proposed legislation with this goal should be cautious in how it provides exemptions on the basis of such beliefs, especially considering wording in the Bill which requires a religious body only to show that conduct “may reasonably regarded as being in accordance” with tenets or beliefs.

While direct discrimination against individuals more broadly in relation to their sexuality or gender identity is unlawful under the Sex Discrimination Act, we note that significant reform to these laws is still called for by many people in our communities, especially in relation to the ability to remove students, faculty and staff from religious education institutions based on their sexuality, gender identity, or views on either.

We also have concerns that while the current exemptions under the Sex Discrimination Act allow exclusion from a religious school, for example, at enrolment, the Bill would allow for the removal of students who are currently enrolled in education. While it would be unlawful to remove the student on the grounds of their sexual orientation directly, a religious school could discontinue the education of the student for a failure to repent for their behaviours or feelings. Essentially, the discord between homosexuality and the views of the religious body provides a further avenue for a religious body to discriminate, rather than providing increased protections for individuals.

Faith based providers

We note also that there are often high levels of disadvantage faced by members of our community, including in relation to the problematic use of alcohol and other drugs, poorer mental health outcomes and increased rates of homelessness. This legislation proposes a definition of religious bodies that includes “a registered charity conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”.

Given the amount of services with a religious ethos responding to issues pertinent to our communities, we are concerned that proposed legislation, while not allowing direct discrimination, may create an environment in which these services are culturally insensitive and potentially unsafe, leading people of diverse sexualities and genders with fewer options to seek support from a service which they feel will help them without judgement, exclusion, or the need to ‘return to the closet’ in order to access the help they need.

These include aged care services that are often run by faith based organisations. Aged care providers are caring for vulnerable people, however those vulnerabilities are exacerbated manyfold for older LGBTQ people who have lived through decades of their lives where the worst of criminalisation, violence and exclusion characterised their lives. Now in their advanced years, the implications of this Bill for our older community members are deeply concerning.

It is vital, especially in relation to drug and alcohol, housing, aged care, disability and other welfare providers, that clients from our communities are able to participate in programs which are culturally safe, and allow them to engage authentically and honestly.

Statements of belief

Proposed legislation (Section 41) regarding genuine statements of belief has the potential to create an environment in which members of our community, and the broader community, are exposed to public messaging which is inherently harmful to their mental health. For example, several statements in both the Old and New Testaments in a number of translations, present messaging which may be read to condone sexual assault, the subservience of women in community and capital punishment.

Protection given to statements such as these, whether they are directly quoted from religious texts, or interpreted by those of faith who ascribe to these texts, allows these messages to be propagated in society.

An environment in which members of our communities are exposed to information in public places which condemns them for eternal punishment, or makes clear that people of faith hold a genuine belief
they should be excluded from society or public life is extremely damaging – to know that these views and their public proliferation are protected by law establishes a society in which our communities are likely to feel unsupported as citizens.

We are concerned there is a significant grey area between the protections sought to be afforded by this Bill and statements that are malicious, vilifying or inciting. The recent Marriage Equality Postal Survey demonstrated that public opinion on the lives of marginalised people can have devastating impacts on our mental health, for example, religious groups publically called the children of LGBTQ parents ‘the Stolen Generation’ among other harmful statements.

The National Mental Health Commission, during the survey noted “The Commission is concerned about the potential negative health impacts these debates about marriage equality will have on individuals, couples and families as they are exposed to continued scrutiny and judgement.”

Following the survey, a study conducted found “More frequent exposure to negative media messages about same-sex marriage was associated with greater psychological distress.” The potential introduction of this legislation calls many members of our communities back to a very recent time when religious opposition to same sex marriage and same sex individuals and couples becoming parents was widespread and hurtful.

Freedom of Religion Commissioner

We note in the Summary Document provided by the Australian Attorney-General’s Department that the intent of the amendments in the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, the document states “these amendments will also ensure that existing Commonwealth anti-discrimination legislation gives appropriate weight to all human rights, including the right to freedom of religion.” The proposed legislation should be clear that the rights of people to be religious and express their religion are equally – not more – important as other rights currently enshrined in federal laws.

It is in this light that we are concerned that the legislation enables the establishment of an office for a Religious Freedom Commissioner, a title which does not reflect the titles of other Commissioners, whose titles focus on discrimination (e.g. Disability Discrimination Commissioner Dr Ben Gauntlett and Race Discrimination Commissioner Mr Chin Tan). There has been some community concern regarding the nomenclature of religious discrimination as opposed to religious freedoms – both in this specific example, and more broadly.

We have no objection to the establishment of a Commissioner in the Australian Human Rights Commission. However, it is vital that that such a Commissioner responds to all cases fairly, ensuring that religions which are dominant in Australian culture are viewed equally as those religions which may not enjoy the same status. It is critical that such a Commissioner is not given ‘elevated’ status compared to other anti-discrimination Commissioners.

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Access to Legal Recourse

Given the unusual position of defining a person in the legislation as inclusive of organisations and bodies corporate (Section 5), we feel that the process of bringing a complaint under this law may become burdensome for individuals. Given complaints under this Bill would have to be addressed in a federal arena, many may consider the costs burdensome, especially when compared to resolving other anti-discrimination claims which can be addressed at a state level.

It is also uncommon for an organisation or body to be able to bring a complaint under anti-discrimination laws. No other anti-discrimination offers such protection to organisations. Corporations under law have neither soul nor body, and as such it is difficult for us to understand how an organisation may be able to bring a complaint of religious discrimination. It is our belief that a complaint such as this should only be made by, or on behalf of a natural person, and ideally that the Bill defines a person as a natural person.

Consultation Period

We are grateful for the opportunity to provide feedback on this important piece of proposed legislation. The law can be a blunt instrument, and the balance this Bill attempts to strike is very complex. It is because of this and the significance of this Bill, the time period available for consultation has been too limited. This is especially true considering the limited number of sitting days remaining in the calendar year in which the ramifications of this Bill can be explored.

The complex nature of the subject matter, compounded by the introduction of novel clauses into an Anti-Discrimination Bill call for greater consideration and community consultation. It would be preferable not to rush this Bill than to deal with multiple issues associated with it after it has received the Governor-General’s assent.