Hello FoR person,

I have the following comments to make regarding the Religious Discrimination Bill.

The test of ‘good faith’ may impose inherently secular (and possibly inappropriate) considerations. Furthermore, having judges determine what is ‘reasonably regarded’ as being in accordance with the doctrines and tenets of a religion violates the separation of church and state, and puts power in the hands of those ill-equipped to make theological judgements.

It is not necessary to require this exercise in order to provide appropriate limitations on unacceptable religious manifestation. Instead, adopting the approach in the United Kingdom and Canada, a court should look to the ‘genuineness’ of a belief.

The ‘statements of belief’ is open to interpretation and the words ‘harass’ or ‘vilify’ should be omitted from the Bill or defined to ensure that they aren’t interpreted in a way that effectively undermines the protection.

In clause 5, the words ‘religious activity’ should be amended to cover any conduct to which the religious person has a genuine conviction with appropriate limitations.

This definition at clause 5 permits the Bill’s protections to be held hostage to the whims of States or council by-laws that render a religious activity unlawful, thereby removing federal discrimination protection for the activity. As a result the Act would not protect against a State Government that imposed limitations on a religious school in its funding contract; or a State Government ban on homosexual ‘conversion therapy’, even where that ban limits affirmation of traditional Biblical views by religious ministers to their congregations; or a State Government requiring that faith-based aged-care providers facilitate euthanasia on their premises.

Clause 8(1)(c) is not consistent with the relevant international law nor is it reasonable. One way to do this may be to provide that a limitation on the expression of a religious belief or activity is not ‘reasonable’ if it fails to satisfy the test of being “necessary” to ensure public safety, order, health or morals, or the fundamental rights of others.

Clause 8(3) of the RDA introduces a presumption that regulation of the speech of employees by small employers and government is reasonable, whether within or outside their workplace. Similarly, the provisions introduce a presumption that regulation of the speech of employees of large employers within the workplace is reasonable. These presumptions should be expressly displaced. Furthermore, any assessment of the financial hardship on the employer must exclude the anticipated and actual responses of third parties who threaten to impose hardship. This makes the law victim to the whims of boycotts by sponsors, suppliers, customers etc in order to assure a particular legal outcome.

Clause 31 of the RD Bill permits discrimination against a person in employment (cl 13) or partnerships (cl 14) or in relation to qualifying bodies (cl 15) or by employment agencies (cl 17) where, because of the person’s religious belief or activity, the person is unable to carry out the “inherent requirements” of the employment, partnership, profession, trade or organisation. This exception could permit an employer, qualifying
body etc to circumvent the RD Bill by simply making it an inherent requirement of a position that the person acts to affirm various matters that contradict his or her religious beliefs in circumstances where this has nothing to do with the core business of the employer. Exceptions should only apply to chaplaincy roles that are employed by non-religious employers (such as in hospitals, prisons or schools) or where being a religious adherent is an actual requirement of the role.

As the Bill protects against discrimination ‘on the ground’ of a religious belief, it must also displace existing case law which holds that such bodies cannot adopt a religious belief. It must also clarify that such a body can incur compensable damage as a result of religious discrimination.

Cl 10 The Bill excludes from the exemption provided in clause 10 any body that engages solely or primarily in commercial activities. It will prevent a large swathe of the charitable religious sector from being able to ensure that its character remains identifiably religious. Drawing such a line in the RD Bill will also set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law.

Cl 45 The RD Bill should include more detailed appointment criteria, in order to ensure that the appointee of Freedom of Religion Commissioner is a person who understands religion and the importance of advocating for religious freedom. If this would violate s 116, the position should not be created.

The Federal RDA must prevail if a State or Territory Act does not protect religious freedom against inconsistency. The coverage of Section 60 of the RDA allows legislation to operate concurrently but does not provide a mechanism for explicit ‘overriding’

Religious persons or entities should not be required to engage in, or affirm, acts which are contrary to their genuine religious beliefs. The Bill should clarify that such compulsion is religious discrimination.

The provisions regarding objections by health practitioners (subparagraph 8(5) and (6)) do not extend to religious hospitals. This does not provide sufficient protection to faith-based health institutions from religious discrimination claims. To the extent that the protections to health practitioners are also made subject to weak State laws, they are inadequate.

Clause 4 of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 amends section 11 of the Charities Act, to provide that advocating for a traditional view of marriage will not lead to the loss of a charity’s tax status. That Bill has not, however, amended section 6 of that Act, which requires that charities be for the ‘public benefit’. Courts have removed the tax exemption of charities that have a traditional view of marriage or sexuality in other common law countries for not satisfying the ‘public benefit’ requirement. This is an area of the law where developments overseas are uniquely influential. Section 6 must also be amended.

A Religious Freedom Act would be based on the external affairs power to meet Australia’s international obligation to implement ICCPR Article 18. The history of weak purposive interpretation that the High Court has given to religious freedom under section 116 of the Constitution, demonstrates the need for such an Act. Under such an Act, any council or government agency would have to justify its administration of policy. The Act would also act as a defensive shield against practices which unduly burden
religious freedom, unless they are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

The following issues are not addressed in the RD Bill. Some of them are currently with the Australian Law Reform Commission, which is now not due to report until late 2020. Others are not addressed at all under the government’s agenda:

I am concerned about parental rights in relation to schooling (in particular, the right of parents to remove their children from teaching that is not in conformity with the parents’ beliefs and morals pursuant to Art 18(4)); and the rules for allowing schools and religious bodies to manage their affairs in accordance with their faith under the Sex Discrimination Act and other discrimination laws.