Dear Attorney,

Re: Religious Freedom Reforms

Thank you for the opportunity to make a submission about the exposure drafts for the government’s religious freedom reforms. My submission focuses on the Religious Discrimination Bill and it draws on the empirical, doctrinal and comparative research I have conducted on Australia’s anti-discrimination laws over the past 14 years.

Protection from discrimination on the basis of religion (including having a religious belief and expressing that belief) is a fundamental human right. Religious discrimination is protected by Article 2 of the United Nations Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights, Article 9 of the European Convention on Human Rights and by domestic laws in Britain,1 Northern Ireland,2 Ireland,3 Canada,4 New Zealand5 and South Africa.6 It is therefore surprising that despite being early to enact laws prohibiting discrimination on the basis of other attributes, the Commonwealth has not prohibited religious discrimination. Instead, such protection has been left to the states and territories.

Though anti-discrimination laws in several states and territories explicitly prohibit religious discrimination, neither NSW nor South Australia provide such protections. Those two jurisdictions account for approximately 39% of Australia’s population.7 So many citizens are protected but not all. Israel Folau, for example, receives no state-based protections as NSW does not prohibit religious discrimination; instead, anti-discrimination laws in that state are limited to protecting ‘ethno-religious origin’ as a form of race discrimination.8 In South Australia, discrimination is only prohibited on the basis of ‘religious appearance or dress’.9 What Federal law there is offers limited protection. The Australian Human Rights Commission Act 1986 (Cth) offers protection to employees who are discriminated against on the basis of religion, but the scope of that protection is limited. The Australian Human Rights Commission can only conduct an inquiry and attempt to conciliate the matter; if that is not successful, a report can be prepared.10 No cause of action follows for the employee. The Fair Work Act 2009 (Cth) prohibits religious discrimination at work but not if the exception in s 351(2) applies, an exception that appears to apply to Israel Folau.

I raise the Folau case because to my mind it reveals how unwieldy the current framework is and how problematic it is that protection from religious discrimination varies according to one’s residence and/or one’s employment status. The Folau case also highlights the complexities in this area of law, a complexity that means that without legal advice a lay person will find it very difficult to determine if their religious practice is protected, and if it is, the extent of that protection. Most people

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1 Equality Act 2010 s 4.
2 The Fair Employment and Treatment (Northern Ireland) Order 1998.
3 Employment Equality Act 1998 s 6(2)(e); Equal Status Act 2000 s 3(2)(e)
4 Human Rights Act 1985 s 3). Freedom of religion is also protected in the Canadian Charter of Rights and Freedoms.
5 Human Rights Act 1993 s 21(1)(d).
6 Constitution of the Republic of South Africa 1996 s 9(3).
9 Equal Opportunity Act 1984 (SA), s 85T(7).
10 Sections 11(1)(f), 32A.
who experience discrimination, whether in the workplace or not, will not have access to legal representation; they will have to navigate the system on their own. I am concerned that this Bill compounds rather than reduces complexity, and I urge the government to devote more time to consider how this Bill interacts with existing federal, state and territory anti-discrimination laws so that it does not further complicate what is already a complex system.

Since the release of the exposure draft, there have been suggestions in the media that it is not necessary to prohibit discrimination on the basis of religion because people are not being subjected to discrimination on the basis of their religion. That suggestion is misleading and not supported by the evidence from our equality commissions. While there are very few cases about religious discrimination, particularly in employment, that is not unique to the attribute of religion – the courts hear very few discrimination cases each year, regardless of the ground. The High Court, for example, has never heard a case about age discrimination or one under the Sex Discrimination Act 1984 (Cth). Since the Equal Opportunity Act 2010 (Vic) came into force, the Victorian tribunal only heard 75 cases in the period between 2012 (when the first case was decided) and December 2018. This is because discrimination claims are overwhelmingly resolved privately, outside the formal legal system.

In each of the states and territories in which religion is a protected attribute, complaints have been lodged at equality commissions (which is a compulsory step before litigation in every jurisdiction except Victoria) alleging a breach of the right to non-discrimination. The Australian Human Rights Commission, too, receives complaints on the basis of religion, though it can only conduct an inquiry into the complaint as the right is not enforceable. Importantly, the number of complaints lodged on the basis of religion is comparable to several other attributes. For example, in the 2017-18 financial year, the Victorian Equal Opportunity and Human Rights Commission received 65 complaints on the basis of religious belief/activity, 65 on the basis of sexual orientation and 72 on the basis of parental status. The experience is similar in Queensland. In the same period, 7 complaints were accepted on the basis of religion, a similar figure to sexuality (13) and parental status (13).

My research has identified several reasons why people decide not to lodge a discrimination complaint (and why, when they do lodge complaints, they do not take them to court, particularly federally). These reasons include the difficulties of proving discrimination, the complex language of the statutes, the time delay in lodging a claim and reaching court, the need to have a lawyer and, most notably in the federal jurisdiction, the risk of losing and having to pay the other side's costs. With these considerations in mind, it is not surprising that people who have experienced discrimination either do not lodge a claim or prefer to use the state and territory systems which are tribunal based and a ‘no costs’ jurisdiction. A further factor which may explain why people do not lodge discrimination complaints is the fear that to do so will cause them to be labelled a ‘trouble maker’, a label that can adversely affect how they are treated at work.

I strongly support the government’s proposal to prohibit discrimination on the basis of religion in employment and non-employment. The current form of the Bill, however, is problematic. I do not propose to comment on the entirety of the Bill because my primary concern is with clause 8 – the indirect discrimination provision. While the clause contains some of the better features of a definition of indirect discrimination (no complex language about proportionality, a definition of reasonableness, and the burden of proof resting on the respondent to show reasonableness), it is the inclusion of the ‘employer conduct rule’ in sub-clause (2)(d) that I am most concerned with.

This clause provides that when an employer seeks to establish ‘reasonableness’, one of the factors that the court may take into account is whether an ‘employer conduct rule’ limits the ability of the employee ‘to have or engage in’ a religious belief.

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11 Clause 8, which I discuss below, is one such example.
13 The most common attributes were disability (663), sex (226), race (207) and sexual harassment (156), as is typically the case in other jurisdictions: Victorian Equal Opportunity and Human Rights Commission, Annual Report 2017-18, 11.
14 Similar to Victoria, the most common attributes were impairment (202), sex (83), race (51) and sexual harassment (78): Queensland Anti-Discrimination Commission, Annual Report 2017-18, 23.

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or activity. Permitting employers to limit the expression of religious freedom in the workplace through such conduct rules would undermine the goals of the Bill.

Sub-clause (3) then provides that an employer conduct rule which prevents a ‘relevant employer’ from making a statement of belief outside the workplace is reasonable if the employer can show that the employee has to comply with the employer conduct rule to avoid ‘unjustifiable financial hardship to the employer’. There are four problems with sub-clause (3).

- First, it says that it is not unreasonable for an employer to stop an employee from making a statement of belief while they are ‘performing work on behalf of the employer.’ For full-time employees, half of that person’s waking day is spent at work. This sub-clause may require that employee to hide or suppress their religious beliefs during those working hours. It is the only protected attribute in the suite of federal anti-discrimination laws that an employer is allowed to limit in this way.

- Second, sub-clause (3) only applies to employers with revenue of at least $50 million in the current or previous financial year, and it does not apply to government employers at any level of government (sub-clause (3)(a)). There is no reason for singling out certain types of employers and offering Australian employees varying levels of protection depending upon whom they work for.

- Third, sub-clauses (2)(d) and (3) have no equivalents in any other anti-discrimination law in the country. I am also not aware of equivalents in any comparable common law countries. Including these provisions not only undermines the protection of religious freedom that the Bill seeks to provide, they also add to the complexity of discrimination laws. They are difficult provisions to understand (and thus apply) and do not conform with the existing federal anti-discrimination laws, therefore complicating the system for employers and employees alike.

- Finally, clause 8(4) provides that a statement of belief falling within clause 8(3) is not protected if it is malicious or is likely to harass, vilify or incite hatred or violence. The Bill does not define ‘malicious’ or ‘vilify’; this will be left to the courts. In providing such a vast exception to practice of one’s religion, the Bill imposes a substantial limitation on the scope of the protections it seeks to grant. Given the importance of the right to religious freedom, it is regrettable that this protection is so limited in scope.

Prohibiting discrimination on the basis of religion would be a landmark in the development of Australia’s anti-discrimination law. As with other attributes, however, there are competing interests, rights and freedoms which must be considered. The Religious Freedom Review charted the first steps in navigating this terrain, and the Australian Law Reform Commission is continuing this process.

There is more to be done and more consultation is required. Indeed, this may present the ideal opportunity to review the federal anti-discrimination framework, a framework that I consider to be outdated and in need of an overhaul. Much of this work was done in 2010-12, culminating in the release of the exposure draft of the Human Rights and Anti-Discrimination Bill 2012, which prohibited religious discrimination. The government could use this opportunity and the community’s current interest in discrimination to look at these issues in more depth with the aims of strengthening the law and simplifying what has become a complex suite of human rights protections. It is uncontested that this is an area fraught with emotion, one that brings competing rights into conflict. However, the government must engage with the difficult questions that inevitably arise when religious freedom is balanced against other rights.

I am happy to provide the inquiry with additional information should you require it.

Yours sincerely,
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