2 October 2019

By email only: FoRConsultation@ag.gov.au

Dear Sir/Madam,

Inner City Legal Centre submission to the consultation on Religious Freedom reforms

We take pleasure in having the opportunity to contribute to this consultation.

The Inner City Legal Centre (ICLC) is a community legal centre in Kings Cross, NSW. We have been in operation since 1980, and have developed a statewide specialist service in LGBTIQ law. That service is in addition to our generalist practice in criminal law, employment law, family law, and civil law; and our statewide service for sex workers.

We frequently advise and represent clients in relation to discrimination law, particularly in the context of employment and the provision of goods and services.

Here at the ICLC we see clients from a variety of backgrounds, including LGBTIQ individuals, single parents, people with disabilities, sex workers, people from different racial and ethnic backgrounds, indigenous Australians; and we are greatly concerned that the bills, if passed, will have a disproportionate impact on those communities.

We have serious concerns about the impact of these bills if passed, and believe that the bills represent:

- The effective creation of a right to free speech for people of religious faith, where free speech has no protection in Commonwealth law other than the implied freedom of political communication under the Constitution;
- An astonishing and unprecedented extension of human rights protection to a body corporate or body politic; and
- An interference with state’s rights.

Discrimination law generally
The ICLC position is that the purpose of discrimination law is to allow equal participation in areas of public life, regardless of irrelevant personal characteristics.

Introduction of objects clauses generally
The ICLC supports the introduction, or amendment, of objects clauses in Commonwealth anti-discrimination legislation to make express reference to human rights.

The Religious Discrimination Bill 2019
The idea behind the bill is sound, i.e. adding the protected ground of “religious belief or activity” to existing federal discrimination protections for race, sex, disability and age.
But this bill goes much further than other discrimination laws and weakens existing protections for LGBTIQ people, women, people with disabilities, and those from diverse racial and cultural backgrounds.

We note that this Bill is framed as something that will bring "legislative protections for religious belief and activity to the same standards as those already afforded under federal anti-discrimination law". Our concern is that this package in fact gives greater protections to religious belief and activity than the other grounds that are already subject to protection at the Commonwealth level.

**Statements of belief – the proposed new provision**

Clause 41 of the Bill provides that a statement of belief will not constitute discrimination under Commonwealth, state or territory anti-discrimination law, unless it:

- Is malicious;
- Would, or is likely to, harass, vilify or incite hatred against another person or group of persons; or
- Is a statement which a reasonable person having regard to all the circumstances would conclude would counsel, promote or encourage conduct that would constitute a serious offence (defined as an offence involving harm or financial detriment that is punishable for two years or more under a law of the Commonwealth, a State or a Territory).

A statement of belief is relevantly defined to be a statement, of a religious belief held by a person, made "in good faith". The ICLC notes in the reported case of *Bropho v Human Rights and Equal Opportunity Commission and Another* (2004) 135 FCR 106 honesty was determined to be a fundamental element of "good faith". History has shown us that sincerity and harm are far from mutually exclusive.

There is a significant problem with the subjectivity of the exceptions. So many incredibly damaging statements of religious belief would presumably not fit the criteria of the exceptions, for example:

- Lesbian teachers are a danger to children;
- Telling the parents of a transgender child, "I am not comfortable with your child being in the same class as my son";
- A surf club coach telling a lesbian teenager that she can’t use the female change rooms while other heterosexual club members are using it;
- Football coach telling gay players they’re not welcome, as he has an "honest belief" that they might corrupt the other players;
- Pregnant unmarried women are sinners; or that
- Disabled people carry the sins of the parents

This will open a Pandora’s box – it won’t just be that certain type of speech is not allowed, supported by federal law, but it will have the result of putting people, particularly vulnerable, young Australians, back in the closet. They won’t come out, be who they are, for fear of being excluded/persecuted.

It is also going to have the effect of increasing incidences of bullying Australia-wide. If children see adults and authority figures making harmful comments towards particular groups of people, and that such comments are not only backed up by a particular interpretation of religion but by the national law of Australia, it will give generations to come the license to harm, ridicule, humiliate particular groups based on their sexuality, marital status, gender identity, race or ethnicity, or disability. This will have significant impact on the health and wellbeing of Australians across social and demographic groups, and increase

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1 See paragraph 8 of the Explanatory Notes.
suicide rates amongst some populations in particular. It will also have the effect of embedding protections for ignorance, hatred and prejudice.

**Limits on protection**
The ICLC submits that the limits on this sweeping defence are insufficient.

The ICLC proposes that the Bill should replicate Tasmanian discrimination law and section 18C of the Racial Discrimination Act. The exclusion provision in those pieces of legislation, stating that statements will not be exempt if they "offend, insult or humiliate," is a far more appropriate for federal discrimination law. The criteria in the current Bill, i.e. that statements have to be "malicious, harass, vilify or incite hatred or violence, or which advocate for the commission of a serious criminal offence" is a much higher bar to meet. As Arthur Moses, President of the Law Council recently stated, "The exclusion provision – in terms of being able to say what you want based on religious belief – is narrower in relation to what will fall foul of the legislation and not be protected by the provisions of the Act."²

**Procedural and constitutional difficulties**
The ICLC notes and agrees with the comments made by barrister Simeon Beckett³:

> The government is proposing that a federal defence be available against a claim which is most likely to be made in a state tribunal. The constitution says that a tribunal cannot determine a federal question of law and the government's proposed defence is a federal question of law. It will need to be decided by a court.

> A person who claims in a state tribunal they have been discriminated against may now be dragged by a person countering with a statement of religious belief defence into a federal court or a state supreme court. Both parties face the cost and delay of running two cases. No one wins from such a legal quagmire.

The ICLC submits that many of our clients – in part due to lack of funding in the legal assistance sector – attend conciliation processes at the Anti-Discrimination Board (NSW) or the Australian Human Rights Commission without the assistance of legal representation. The majority of disputes settle at conciliation. The ICLC submits that it is directly contrary to the objects of the proposed Act, namely having regard to the "principle that every person is free and equal in dignity and rights" to allow for a subjective defence to be raised in response to a complaint which may have the effect of exhausting the resources of a person in making a claim of discrimination. The discrimination jurisdiction is one where disparity of resources should not impede access to justice.

**Who may make a complaint of religious discrimination**
Subsection 5(1) provides that a ‘person’ for the purposes of the Act has a meaning affected by the Acts Interpretation Act, to the effect that a body corporate may make a complaint alleging discrimination on the basis of religious belief or activity. This new right is distinguishable from the existing right of advocacy organisations to bring representative or class actions on behalf of their members.

The ICLC has serious concerns about allowing bodies corporate to make a complaint of discrimination. If a body engaging in religious activity is allowed to file a complaint, the logical corollary of this is that – for

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instance – a body corporate whose objects include engaging in non-religious cultural activities should be able to make a complaint under the Racial Discrimination Act.

However, the ICLC does not propose that the bills be amended to include any extension of an ability for bodies corporate to make claims of discrimination on other grounds. Discrimination law is for the protection of individuals – not bodies corporate or politic.

Conditions that are not reasonable relating to statements of belief

We note that proposed section 8(3) provides that an employer conduct rule that restricts or prevents an employee from making statements of belief when not performing work for the employer is "not reasonable" unless "necessary to avoid unjustifiable financial hardship to the employer". The proposed restriction applies to large employers with annual revenue of at least $50m. We submit that the emphasis on financial matters here, in relation to both the employers subject to this rule, and the novel test of financial hardship, is beside the point. The main issue should be whether the statement/s have caused harm, humiliation or ridicule.

Regardless, under this criterion, the only way for an employer to escape this finding under the bill is if they can prove the rule was needed to avoid "unjustifiable financial hardship to the employer", or, if the statement the employee made was malicious or would harass, vilify or incite hatred towards a person or group. These are both hugely high standards to meet, and would in effect mean that an employer could sack an employee for expressing almost all views except those that are religious. The test of unjustifiable financial hardship in s 8(3) is novel and inconsistent with the tests of unjustifiable hardship contained in other state, territory and commonwealth discrimination law.

The ICLC has had the benefit of reading a draft submission from the Public Interest Advocacy Centre and agrees with and endorses the submissions of PIAC on this point. "Employers should not be limited in seeking to promote values of diversity and inclusion, especially where their workplace is itself diverse, or to protect their reputation in the community where damage is not easily quantifiable in financial terms."

The ICLC submits that no person should be required to make a statement which is contrary to their religious faith under an employer conduct rule, but that some limits may be necessary on the positive expression of religious faith in order to protect the legitimate business interests of an employer in promoting a diverse and inclusive workplace and to protect vulnerable people from harm.

ICLC supports the right of individuals to practice and to talk about their faith, provided it does not injure or harm individuals or groups of individuals in the process.

Healthcare

Subsection 8(5) preserves the primacy of state or territory laws that allow conscientious objection. Subsection 8(6) provides that an employer or professional health body will only be able to restrict or prevent conscientious objection by a health professional if the objection would cause an "unjustifiable adverse impact" on the service or on the health of the patient. The explanatory notes suggest that "death or serious injury" of the person seeking a health service would generally amount to an unjustifiable adverse impact.4

4 See paragraph 147 of the Explanatory Notes.
The ICLC suggests that it is entirely wrongly framed to consider that there could be *justifiable* adverse impact on the health of a patient. The ICLC agrees with the position suggested by Equality Australia that subsections 8(5) and 8(6) should be removed. If they are passed, the religious views of healthcare professionals will be given unprecedented primacy over the rights of patients. The careful, patient-centred, conscientious objection provisions in state legislation such as Victorian voluntary assisted dying laws provide sufficient protection and balance the rights of health professionals with the rights of patients.

The ICLC submits that the broad discretion that s 8(6) applies to a wide range of health practitioners — from surgeons to podiatrists — is likely to have a chilling effect on the ability of vulnerable people, especially LGBTIQ people, to access healthcare with confidence, particularly given the severe harm that needs to be demonstrated for a "health practitioner conduct rule" to be found not to be reasonable. We note that suicide is the leading cause of death across Australia for young people aged 15-24.\(^5\) 16% of LGBTI young people report that they have attempted suicide.\(^6\)

The proposed broad conscientious objection provisions in s 8(6) make no allowances for the age or vulnerability of a patient in determining ‘unjustifiable adverse impact’, and make no distinction between different forms of treatment. It is difficult to see the public interest in allowing, for example, a Catholic chiropractor to conscientiously object to providing a back adjustment to a gay teenager.

**Encroachment on states’ rights**

The ICLC has significant concerns about the fact that the federal bill would explicitly override state-based discrimination laws, upending the longstanding concurrent state and federal discrimination law system. All other federal discrimination laws contain a specific provision noting that they are not intended to exclude or limit the operation of state laws that can operate concurrently.

To privilege federal override of state-based laws for statements of religious belief only is a radical change to the way discrimination law operates in Australia, and blatantly ideological in protecting one group of people above all others.

It also has the effect of watering down discrimination protections for Australians based on their sexual orientation, marital status, ethnic or racial background, gender identity or disability.

For example, Tasmania already has laws prohibiting discrimination on the grounds of religious beliefs, affiliation or activity. Tasmanian law also prohibits statements that “offend, insult or humiliate” based on protected grounds including gender, race, age, sexual orientation, disability and relationship status. We have serious concerns that the current bills, if passed, would mean that a person in Tasmania could lawfully make a statement that humiliates, intimidates or ridicules people of a certain race, as long as they can prove there is some religious basis for that statement.

\(^5\) Data tables available from the Australian Institute of Health and Welfare at [https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/data](https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/data) show that 31.9% of reported deaths in the period 2015-2017 for this age group were due to suicide. This was more than the deaths recorded as due to land transport accidents, poisoning, assault, leukaemia, drowning, and diabetes combined.

Concerns about the meaning of religious "activity"
While the bill does not define protected religious "activity", the explanatory notes confirm it has a broad meaning including religious observance, dress and expression of religious belief, especially where "adherents of that religious group are required, or encouraged, to evangelise". We have significant concerns that evangelising will provide umbrella protection for all sorts of harmful behaviour and statements from religious groups and individuals.

We would be pleased to discuss our submission with you if required.

Yours sincerely,

INNER CITY LEGAL CENTRE

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