2 October 2019

RE: Public Consultation on the Religious Discrimination Bills 2019

Thank you for the opportunity to submit comments and requests for clarification on a number of issues relating to the proposed legislation. This issue is of great public interest and there are many elements which require careful consideration. Due to personal time constraints, this submission will focus on the exposure draft of the Religious Discrimination Bill 2019.

A. The Main Constitutional Basis for the Act & Stated Objects of the Act

The explanatory notes explain that the Act is supported by the external affairs power. To this end, section 57 outlines that the Act gives effects to Australia's obligations under:

- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- Convention on the Rights of the Child 1989
- International Convention on the Elimination of All Forms of Racial Discrimination 1965
- ILO Convention concerning Discrimination (Employment and Occupation) 1958
- ILO Convention concerning Termination of Employment 1982

Although it is not listed, in addition to the ICCPR the most important human rights instrument relevant to religious freedom is:

- The Universal Declaration of Human Rights 1948
The stated purpose of the Bill, according to the explanatory notes, is to eliminate discrimination on the grounds of religious belief in public life, and to further ensure equality before the law regardless of religious belief or activity. These objects are outlined in section 3 of the Act.

However, the stated purpose of the Bill as described in the explanatory notes and section 3 of the Act falls short of Australia’s international legal obligations. Several of the noted international instruments contain important entitlements to freedom of religion and related expression, however, they also contain equally important limits on those freedoms.

i. **International Covenant on Civil and Political Rights 1966**

Despite being ratified in 1980, Australia has yet to adopt the ICCPR into domestic law, making elements of the proposed legislation commendable. The relevant freedoms and limits in this instrument are described in Article 18:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹

Articles 18(1) and 18(2) specify the freedom for individuals to adopt, practice, adapt or abandon religious beliefs and convictions in public and in private, in worship, observance, practice and teaching, and free from any kind of coercion.

However, Article 18(3) stipulates that the manifestation of religious belief may reasonably subject to limitations, including those that are prescribed by law to protect public safety, order, health or the fundamental rights and freedoms of others.

In other words, Article 18(3) justifies domestic laws which conceivably limit some religious practices or expressions of belief to secure the fundamental rights and freedoms of others. This highlights the underlying point that religious freedoms are not intended to contradict the rights and freedoms of other persons or groups.

**ii. International Covenant on Economic, Social and Cultural Rights 1966**

Similar limitations are implied in Article 2(2) of the CESCR:

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The rights guaranteed under the Covenant must indeed be exercised without discrimination on the basis of religion, but also without discrimination on the basis of a series of other protected categories e.g. race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.

The reflects the human rights norms explicit in the ICCPR, namely, that religious freedoms are not intended to contradict other fundamental rights. To this extent, any codification of the rules and norms of CESCR into domestic law should include the caveat that religious freedoms do not contradict the fundamental rights and freedoms of persons or groups.

**iii. Convention on the Rights of the Child 1989**

Article 2(1) of the CRC implies a similar operation of religious freedoms not contradicting other rights and freedoms. Article 14, subsection 3 goes further by stating that:

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

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This clause replicates the wording and intent of 18(3) in the ICCPR. The norm which appears across these international legal instruments is that religious freedoms are not intended to contradict the fundamental rights and freedoms of other persons or groups.

iv. The Universal Declaration of Human Rights

The ‘Inquiry into the status of the human right to freedom of religion or belief’ identified that the two most significant instruments relating to religious freedom are the UDHR and the ICCPR. The Act under consideration identifies the ICCPR but not the UDHR, probably given that the latter is not a binding instrument.

However, the UDHR is a primary source of international legal norms which have force in international law. The relevant rights are described in Article 18 of the UDHR which reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

However, this is augmented by Article 30 which reads:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The UDHR enshrines a right to freedom of religion, which includes the right to change religion or belief, and to manifest these in teaching, practice, worship and observance. However, as per Article 30 none of these can be understood as a right to engage in activities that infringe on the other rights and freedoms contained in the UDHR.

In this sense, it is important to read the UDHR holistically and not merely a document which provides grounds for religious rights. The ICCPR is a more precise instrument in this respect in that it explicitly includes this understanding in Article 18(3).

v. Ensuring The Main Constitutional Basis for the Act & Stated Objects of the Act

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6 Ibid.
The recent ‘Second Interim Report: Freedom of religion and belief, the Australian experience’ recommended that the Australian Government develop legislation that gives ‘full effect’ to Australia’s obligations under Article 18 of the UDHR and Article 18 of the ICCPR. This is a reasonable and productive suggestion.

However, the religious freedoms outlined in Article 18 of the UDHR must be balanced with the other rights and freedoms contained in the instrument. Article 18 of the ICCPR makes it clear that entitlements to religious freedoms are not intended to contradict other rights and freedoms. The CESCR and CRC contain similar provisions and these should be explicitly included in the Act.

For the exercise of the external affairs power to be valid, the Government must ensure that the proposed Bill adheres to all of Australia’s international legal obligations, and not merely a narrow interpretation of these. This raises two important points:

- The Government should clarify on what grounds the Anti-Discrimination Act 1998 of Tasmania is contrary to Australia’s legal obligations as described in the above legal instruments. If it does not or cannot then the use of the external affairs power is open to contest.
- Assuming that the use of the external affairs power is well-grounded, it is valid only insofar as the Government is appropriately enacting Australia’s international legal obligations. In this context, this should include the qualifications and limitations to the relevant rights as outlined in the legal instruments the Act is designed to enshrine into domestic law.

vi. Recommendations

Based on the preceding discussion in Section A of this submission, I recommend that the Government:

- Ensure that it is adequately enacting all the relevant provisions of the international legal instruments listed in the Act, including the ICCPR, CESCR, and CRC, in addition to those in the UDHR.
- Clarify on what grounds the Anti-Discrimination Act 1998 of Tasmania is contrary to Australia’s legal obligations as described in the above legal instruments for the purpose of justifying the use of the external affairs power.
- Insert a general provision which applies to the whole of the Act to the effect of:

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B. Section 8: Discrimination on the ground of religious belief or activity—indirect discrimination

According to the explanatory notes, this section deals with indirect discrimination on the grounds of religious belief or activity. Indirect discrimination refers to apparently neutral conditions which unfairly disadvantage individuals of faith e.g. requiring employees to attend meetings on a Friday afternoon thereby disadvantaging Jewish people observing the Sabbath.

Subsection 8(3)-8(4) takes this a step further by prohibiting employers from enforcing codes of conduct which apply to statements of belief as defined in section 41 outside of work hours. Further, subsections 8(5)-8(6) relate to legal privileges granted to various health practitioners to ‘conscientiously object’ and refuse service and referral to patients.

These provisions are unusual and unnecessary and should be removed from the Bill entirely.


This section appears prompted by the decision of Rugby Australia to terminate the contract of Mr Israel Folau. Indeed, explanatory notes explain that ‘a statement made in good faith that unrepentant sinners will go to hell may constitute a statement of belief’ which is similar to the statement made by Mr Folau.

The Attorney-General's department has identified that an aversion to principles-based legislation leads to unnecessary complexity is legislation.8 Legislating for specific cases in this way is likely to produce arbitrary outcomes in the future and should be avoided.

According to 8(3)-8(4) the impact of religious expression or practice on the fundamental rights and freedoms of others cannot be taken into account unless ‘unjustifiable financial hardship’ can be demonstrated. The concept of ‘unjustifiable financial hardship’ is not

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grounded in the norms or principles of international law or the specific legal instruments
the Government seeks to enact, nor is such wording found in other jurisdictions.

It is unclear why the Bill seeks to exclude the factors outlined in Article 18(3) of the ICCPR
when determining whether codes of conduct are reasonable. That the crucial factor is
financial and not rights-based is seemingly arbitrary and not in line with Australia’s
international legal obligations.

The provisions in this section do not adequately reflect the relevant legal instruments i.e.
Article 18(3) of the ICCPR. Additionally, they do not communicate the stated intent in the
explanatory notes. Rather, the provisions in this section would grant new rights to religious
individuals and groups to engage in homophobic and transphobic political activity.

This might include but is not limited to engaging in prejudiced rhetoric which damages the
social standing and opportunities of lesbian, gay, bisexual, transgender and intersex
(LGBTI) people. Statements that LGBTI people are destined for hell, are sinful, morally
bankrupts etc are closely related to the idea that LGBTI people are morally inferior and
undeserving of rights.

Statements of this kind directed at the arbitrary characteristic of a minority or other group
contradict numerous human rights norms. Protecting such statements in law is a
repudiation of Australia’s international human rights obligations.

I recommend that section 8(3)-8(4) be removed from the proposed legislation entirely.

ii. Subsections 8(5)-8(6): Conscientious Objections

This section relates to the proposed right for healthcare providers to refuse service and
referral to patients on religious grounds. The underlying principle here does not conform
to the legal instruments the Government seeks to enact, especially Article 18(3) of the
ICCPR. Under this section, patients might lose the ability to obtain ‘information,
prescriptions, or referrals’ from medical professionals in a variety of contexts.

According to the Act, the definition of a ‘health service’ includes: ATSI health practices,
dental, medical, medical radiation practice, midwifery, nursing, occupational therapy,
optometry, pharmacy, physiotherapy, podiatry, and psychology. Doctors, nurses and other
health professionals would have the legal capacity to refuse service and referral.

However, these categories are extremely broad and several have no relevance to the stated
objects of these provisions. The Government has not explained e.g. in what circumstances
a medical professional could justifiably refuse a medical service in an Aboriginal health
practice, or refuse dental, optometry or pharmacy services to individuals.
Subsection 8(6) provides that there are some limits that must be taken into account when assessing the reasonableness of rules vis a vis the refusal of service and referral. However, the explanatory notes say that 'death or serious injury' would only 'generally amount to an unjustifiable adverse impact'.

The implication is that doctors, nurses and pharmacists could legally refuse service and referral to patients even in cases where such an action would result in serious harms including injury and death. In this way, this section grants broad prerogatives to health care providers of faith which privilege their perceived interests over the fundamental rights of others.

I would like to offer just a few hypothetical case studies concerning how the right of LGBTI patients to access the best possible healthcare would be infringed by these provisions:

- An LGBTI person approaches a dentist or optometrist for a regular check-up. On learning of the LGBTI status the healthcare professional refuses service citing a religious belief in the immorality or sinfulness of same-sex attraction or sex, gender diversity, trans or intersex status.

- An LGBTI person approaches a psychologist to seek therapy addressing experiences with sexual orientation change efforts (SOCE). The psychologist declines citing a religious belief in the immorality or sinfulness of same-sex attraction or sex, gender diversity, trans or intersex status.

- A trans person approaches a GP or psychologist to obtain advice on gender affirmative therapy including transitioning. The healthcare professional declines service and referral citing a religious belief in the immorality or sinfulness of gender diversity or trans status.

- A trans man approaches a GP to obtain advice on abortion services. The healthcare professional declines service and referral citing a religious belief in the immorality or sinfulness of gender diversity, trans status, or abortion.

- A lesbian couple approaches a GP to inquire about IVF services. The psychologist declines citing a religious belief in the immorality or sinfulness of same-sex attraction or sex leaving the patient(s) at a disadvantage.

- A gay man approaches his GP to obtain a prescription for pre-exposure prophylaxis (PrEP). The GP declines service and referral citing a religious belief in the immorality or sinfulness of gay sex leaving the patient at relatively higher risk of acquiring HIV.
A gay man approaches his GP to obtain treatment for HIV. The GP declines service and referral citing a religious belief in the immorality or sinfulness of gay sex leaving the patient high risk of developing serious health complications.

An LGBTI approaches a GP for a comprehensive sexual health check up. The GP declines service and referral citing a religious belief in the immorality or sinfulness of gay sex leaving the patient at risk of unknowingly having acquired an STI.

An LGBTI approaches a pharmacist to purchase anti-retroviral drugs, PrEP, or treatment for various sexually communicable conditions. The pharmacist declines service citing a religious belief in the immorality or sinfulness of gay sex infringing the fundamental rights of the patient.

The above cases would be legally protected even in cases where patients were likely to or did eventually experience severely harmful health outcomes, including injury and even death.

For example, a GP could refuse service and referral to a patient at risk of acquiring an STI and the psychologist could refuse service and referral to someone practising self-harm or at risk of suicide etc. This clearly contradicts Australia’s international legal obligations in a number of respects.

I recommend that section 8(5)-8(6) be removed from the proposed legislation entirely.

**iii. Recommendations**

Based on the preceding discussion in Section B of this submission, I recommend that the Government:

- Remove sections 8(3)-8(6) from the proposed Bill entirely

**C. Sections 13: Employment and 18: Education**

According to the explanatory notes, sections 13 and 18 are intended to prohibit employers and educational institutions from discriminating on the grounds of religion. This would prohibit employers from preventing a Jewish employee from wearing a kippah or schools from refusing to admit a student because they were Muslim.

These are legitimate examples of religious discrimination of the kind prohibited by the ICCPR and the UDHR. However, the provisions in these sections have broader implications in terms of the conduct and activity they protect.
For example, 13 states that it is ‘unlawful for an employer to discriminate against another person on the ground of the other person's religious belief or activity’ and 13(2)(d) specifies that employers may not subject employees to ‘to any other detriment’.

Religious activity in this context may refer to ‘statements of belief’ of the kind discussed above, which includes prejudiced rhetoric which damages the social standing and opportunities of LGBTI people. In this way, these provisions protect not only statements of belief but various kinds of political activity aimed at undermining the rights and freedoms of others.

For example, Section 13 may have the unintended effect that employers are forced to hire individuals with a history of aggressive but non-violent homophobia and transphobia. This might include public campaigning against LGBTI rights or such things as wearing a shirt which reads 'gays go to hell' to work, which would be covered by the provisions of section 41. This introduces legal complexities relating to an employers responsibility to ensure a safe working environment for other employees.

Further, in the absence of qualification or a reasonableness clause, it also may have the unintended effect that LGBTI owned or affiliated businesses would be similarly forced to hire individuals with a history of aggressive but non-violent homophobia and transphobia so long as the person of faith claimed a religious basis for such activity.

Further to that point, Section 13(2)(d) might be read as implying that employers are not permitted to reprimand employees for improper i.e. homophobic or transphobic conduct so long as there was a claim to religious grounds. A person of faith could conceivably argue that a letter of reprimand, compulsory sensitivity training or dismissal was discriminatory on the basis that they were subject to ‘other detriments’ on the basis of their ‘religious activity’.

A similar problem arises with section 18 which applies the same rules to educational institutions. A student engaging in homophobic or transphobic political activity aimed at undermining the rights and freedoms of others i.e. LGBTI people could argue that reprimand, censure, or sensitivity training represented suffering ‘other detriments’ on the basis of their ‘religious activity’.

While the overall intent is legitimate, elements of section 13 and 18 are contrary to the normative limited specified in Article 18(3) of the ICCPR and the rules of the UDHR. It is necessary to amend these sections with provisions which explicitly specify that e.g. nothing in these sections implies a right to infringe on the fundamental rights and freedoms of others.


i. **Recommendations**

Based on the preceding discussion in Section C of this submission, I recommend that the Government:

- Clarify section 13 of the Act so that it is clear that it does not imply a right to contravene the fundamental rights and freedoms of others.
- Clarify section 18 of the Act to make it explicit that they do not grant any right to infringe the fundamental rights and freedoms of others.

**D. Sections 19: Access to Premises**

This section, according to the explanatory notes, is intended to prevent discrimination on religious grounds in relation to the provision of access to public premises and facilities. This would include such things as prohibiting a public museum or pool from denying people wearing religious dress entry, or by forcing them to use a different entrance.

These are genuine examples of religious discrimination of the kind prohibited by the ICCPR and the UDHR. However, the particular form of this clause operates in such a way as to contradict the rules and norms of these international instruments.

The explanatory notes give the example that a cafe requiring a person to leave the premises on the basis that they said grace before eating would be unlawful. This is not insubstantially different, on the current wording, from asking an individual or group to leave a premises on the basis of making loud but non-violent ‘expressions of belief’.

Under section 19 LGBTI owned or affiliated businesses, such as cafes, bookshops, clubs, or venues for hire would arguably be obligated to host groups deliberately attempting to undermine their standing, rights and opportunities so long as those groups claimed a religious basis for that activity.

This could conceivably lead to gay bookstores being forced to host anti-LGBTI panels or talks, or gay venues being forced to host anti-LGBTI fundraisers for religious groups. If they were refused access, service, booking or asked to leave they could argue that that is discriminatory on the basis of religious activity under the Act.

In the extreme, religious groups who believe that they are required to proselytise could argue that they entitled to access to LGBTI spaces to do so. This might include such things as handing out Bibles in or around gender clinics or groups wearing ‘gays go to hell’ t-shirts entering gay clubs or sex-on-premises venues. If ejected, such groups could similarly argue they have been discriminated against on the basis of religious activity.
From the explanatory documents this is not the intended effect of these provisions, but their general and unqualified wording mean that they could be interpreted in such a way as to protect such obviously unreasonable conduct.

To this end, it is necessary to bring these provisions in line with Article 18(3) of the ICCPR and the broad entitlements of the UDHR. While religious freedoms do require protection in this context, it is similarly necessary to ensure that religious freedoms do not enshrine new or positive rights to discriminate against others.

Briefly, the Government should also clarify how this section interacts with clause 60 of the Act which reads:

This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act. [Emphasis added]

The intention that the Act does not override state or territory laws is modified by the phrase ‘to the extent that’ implying that the Act does exclude or limit the operation of such laws when they are not capable of operating concurrently.

This clause refers to Tasmania’s Anti-Discrimination Act 1998 which is superseded by the proposed Religious Discrimination Bill. However, section 60 is not limited in its scope to only the legislation specified in section 41 but, in its current wording, applies generally.

This implies that the Act would override any state or territory law in any case where there was an inconsistency. One obvious inconsistency is between state-based Safe Access Zones for abortion clinics and section 19 of the Act.

Some religious groups and individuals argue that it is their religious responsibility, in other words a part of their religious observances, to picket, protest or otherwise demonstrate against abortion generally and abortion clinics specifically.

Section 19 of the Act provides that it is unlawful to refuse a person or persons access to a premises which even a section of the public is entitled to access. This could be interpreted as permitting religiously motivated individuals from entering the grounds or even waiting rooms of abortion clinics to demonstrate or proselytise.

Such conduct is unlawful across most jurisdictions under various Safe Access Zone laws, however, this would seem to contradict the provisions of section 19 which, according to section 60 of the Act, takes precedence over state law. The Government must ensure that the Act better represents its intent and its international obligations in this context.
i. Recommendations

Based on the preceding discussion in Section D of this submission, I recommend that the Government:

- Clarify section 19 so that it is clear that it does not provide any right to contradict the fundamental rights and freedoms of others.
- Clarify its operation in the context of section 60 of the Act and further narrow the scope of section 60.

E. Sections 41: Statements of Belief

The explanatory notes suggest that this section of the Bill aims to protect ‘statements of belief’ that are made in good faith from ‘the operation of… anti-discrimination law’. This intent is, in itself, unusual and unnecessary given that the majority of such statements will not contravene anti-discrimination laws at any level of government.

In cases where ‘statements of belief’ may conceivably breach anti-discrimination law, the Government has not explained why these statements should trump anti-discrimination law. Indeed, there does not seem to be any clear rationale why they should.

Further, the authority of the Bill derives from the Commonwealth’s jurisdiction to enact, among much else, human rights treaties in domestic law under the external affairs power. This means that the Bill ought to be subject to all the provisions in the relevant human rights instruments, namely, the ICCPR and the UDHR.

These documents, and especially Article 18(3) of the ICCPR, make it abundantly clear that the legitimate entitlement to various religious freedoms including freedom from discrimination is not intended to infringe the rights and freedoms of others. In so many words, religious freedoms do not include a positive right to discriminate.

Section 41 of the Act has the effect of rendering discriminatory statements lawful. To this extent it is inconsistent with Australia’s international commitments as outlined in the above mentioned international instruments, especially the ICCPR and the UDHR. This section additionally undermines the constitutional basis of the Act.

This section does not obviously serve to benefit the overwhelming majority of people of faith or religious groups and is, instead, likely to be misused by bad faith actors engaging in harmful rhetoric or political activity which undermines the rights and standing of other people.
Indeed, such provisions are highly likely to legitimise and protect political activity, rhetoric and conduct which would otherwise be unlawful. This would be to the detriment of many groups, including not limited to LGBTI people, Aboriginal and Torres Strait Islander people and women.

i. Recommendations

Based on the preceding discussion in Section D of this submission, I recommend that the Government:

- Remove section 41 from the Bill entirely to maintain consistency with the ICCPR especially Article 18(3) and other human rights instruments.

**Recommendations**

Based on the above discussion I recommend that the Government:

- Remove section 8(5)-8(6) from the proposed legislation entirely.
- Clarify section 13 of the Act so that it is clear that it does not imply a right to contravene the fundamental rights and freedoms of others.
- Clarify section 18 of the Act to make it explicit that they do not grant any right to infringe the fundamental rights and freedoms of others.
- Clarify section 19 so that it is clear that it does not provide any right to contradict the fundamental rights and freedoms of others.
- Remove section 41 from the Bill entirely to maintain consistency with the ICCPR especially Article 18(3) and other human rights instruments.
- Appropriately narrow the scope of section 60 to limit inconsistencies with state legislation especially regarding Safe Access Zones.
- Ensure that it is adequately enacting all the relevant provisions of the international legal instruments e.g. the ICCPR, CESC, and CRC, in addition to those in the UDHR, in accordance with section 57 of the Act.
- Clarify on what grounds the *Anti-Discrimination Act 1998* of Tasmania and any other overridden state legislation is contrary to Australia’s legal obligations as described in the above legal instruments for the purpose of justifying the use of the external affairs power.
- Insert a general provision which applies to the whole of the Act to the effect of:
e.g. ‘Nothing in this Act may be interpreted as implying exception from limitations prescribed by law especially those necessary to protect public safety, order and health, or a right to infringe on the fundamental rights and freedoms of others’.

Additionally, insert specific subclauses to a similar effect to clarify particular sections of the Act e.g. sections 13, 18, and 19 and their various subsections.

No doubt individuals and groups experience religious discrimination in Australia, but any move to enact Australia’s international legal obligations must be holistic and sensitive to the needs of a wide array of stakeholders beyond only people of faith and atheists, including but not limited to Aboriginal and Torres Strait Islander people, LGBTI people, and women.

Article 18(3) of the ICCPR, along with similar clauses and norms in other international legal instruments, make it clear that legitimate entitlements to religious freedoms are not intended to contradict other rights and freedoms. The Government must make this legal norm explicit in the proposed Bill.

Regards,

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