Submission: Religious Discrimination Bill – Exposure Draft

1. The principle

Until recently Australians could afford to have an undefined framework of protections addressing freedom of religion. Until recently pluralism was a value that allowed and assumed diversity of views, as long as no one religious or non-religious view dominated. That was a secular Australia and pluralism in action.

Secularism, a perspective gaining momentum, is a very different approach to public discourse. Secularists strongly believe that religion has no place in the public square or influence in the shape of culture. Now is the time to create a robust instrument that provides a genuinely workable negotiation between a genuine freedom to manifest a faith-based identity and real disadvantage and exclusion.

People of faith in most religions are members of some form of organisation. Every religion should be given the greatest possible freedom in the management of its religious affairs.

Religion should be understood as a belief akin to political beliefs, but also as a personal identity, as immutable as race, gender and sexuality. Freedom of religion is more than merely freedom to worship; it extends to freedom to manifest one’s religion in observance, practice and teaching, both in private and in public.

Faith-based organisations and education institutions have until now assumed the legitimate principle that to maintain a meaningful community ethos necessarily involved preferring or exclusively selecting members of that community for membership, leadership and employment. Faith-based communities are akin to all other common interest associations such as political parties, lobby groups, trade unions and clubs made up of enthusiasts of cultural, sporting and artistic groups. The people of a particular ethnicity, sex, sexuality, religion or political opinion often exercise their rights to freedom of association by forming organisations to pursue their particular interests. It is not necessarily a breach of non-discrimination principles for these organisations to apply conditions of membership which differentiate on these grounds. Unless this differentiation is respected it is difficult to see how distinct identities can remain meaningful. Freedom of thought, conscience, religion, opinion, expression, assembly and association are essential to the maintenance of a diverse, multicultural society. The exercise of religious expression and association is a public good,
that has been assumed in the past but now must be asserted and confirmed in law from now on.

(I note that in Section 34 of the Bill there is reference to the necessary relationship between membership and member identity and religious affiliation. This principle should be consistently reinforced throughout.)

2. International codes

In Section 57 the bill makes it clear its constitutional basis is international obligations such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination. However, contrary to Recommendation 2 of the Religious Freedom Review Report of the Expert Panel there is no application of the Siracusa Principles for setting the limitations of religious freedom.

Although reference to these international obligations is not controversial, this Bill still falls short of those standards. These international instruments could easily be reflected in the Bill to establish that religious freedom must only be limited where necessary and limitations to that freedom is to be no more restrictive than necessary to respond to a pressing public or social need or pursue a legitimate aim. In theory, all stakeholders respect the ICCPR.

3. Objectivity

The wording found in Section 8 subsection 3(b) and Section 41 Subsection 2(b) is

… is likely to, harass, vilify or incite hatred or violence against another person or group of persons.

It is unclear what ‘vilify’ means here. Vilification in NSW anti-discrimination is defined as ‘a public act that could incite or encourage hatred, serious contempt or severe ridicule towards people’. Since ‘incite hatred’ is included in this subsection along with ‘vilify’ it could potentially refer to an act that is open to interpretation. If ‘vilify’ is a substitute for ‘offend’, the Bill is setting a low bar on religious speech which opens the door to a growing cultural predisposition to make complaints. A Religious Discrimination Act should aim for the most objective standard possible in regard to limiting speech. ‘Hate speech’ is often used in a way that means ‘speech that offends’. Again, a more objective standard is required. Hate speech, if this law encapsulates such a concept should refer to speech that attacks, demeans and brutalises another person. The NSW Crimes Amendment (Publicly Threatening and Inciting
Violence) Act 2018 No 32 is helpful in defining illegal speech as that kind of speech that ‘intentionally or recklessly threatens or incites violence’.

4. Victimisation

Until recently individuals who expressed religious views did not have reason to consider the possibility that they may - simply for holding and expressing a view integral to their religious identity – be punished by employers, commercial entities, social media and qualifying bodies for expressing that view.

There is a growing pressure to privatise religious views; that a secular society means that religious views are inappropriate in public, media and in the workplace. Increasingly there are reports of individuals and faith-based organisations who find themselves threatened or excluded for speech that has up until the recent past been acceptable and normal.

- A Perth wedding photographer who did not refuse service to a gay couple was taken to the Equal Opportunity Commission purely for saying he had a conflict of belief

- An Australian university student was suspended for making a classmate feel “unsafe” because he said he would show love to a gay friend but not agree with their lifestyle.

- A manager was sacked for expressing the view that the Safe Schools program conflicted with his personal views on sexuality.

- Public reports of campaigns to have employees sacked or to force them to resign from private directorships because of perceived association with support for man-woman marriage.

- A campaign to have a professional deregistered for her views on same sex marriage

- A federal public servant disciplined for expressing concern about pressure to march in gay pride parade.

- Commercial boycotts and refusals to supply businesses because they expressed or supported the expression of a belief in traditional marriage. Over 1700 advertising professionals have committed to refusing service to potential clients that support a particular religious and political position.
• University of Sydney Union threatened to deregister the Evangelical Union if it did not remove a declaration of faith as part of membership application.

• A GP investigated by the medical board after an anonymous complaint was made by someone who was not a patient after posting scientific facts and sexuality and gender issues.

• Christian parents who made an application to foster children between the ages of 0-5 with a fostering agency. They were rejected as “unsafe” as foster parents because of their orthodox Christian views on sexuality and gender.

• A teacher who posted links to articles about homosexual marriage leading up to the marriage postal vote was reported to the Department of Education who subjected him to a long investigation which was only terminated when he obtained legal help.

In every case listed above these individuals faced exclusion, discipline and loss of livelihood simply for expressing a view. They experienced the same kinds of investigation and penalty that would normally be reserved for illegal activity, professional negligence or misconduct.

The Exposure Draft of the Religious Discrimination Act goes some way to addressing these issues.

5. Comments on the Exposure Draft

Consider amendments

I outline below some issues with the draft Bill which I hope will be considered for inclusion in the bill that enters Parliament. In summary, the Bill should aim to close the gap between current protections and international conventions.

Section 5

In the definitions there is reference to ‘lawful religious activity’. This leaves open the possibility of certain activities being made unlawful by state and local jurisdictions. It would be better to find an alternative wording to deal with practices that are in view, such as child marriage.

Section 8 Subsection 4 (b)
As indicated above, ‘vilify’ is unclear and should be defined.

Section 8 Subsection 6

Reference to ‘unjustifiable financial impact’. This may leave open and invite actions of third parties such as sponsors, suppliers, customers or landlords who threaten to impose hardship unless the employee is disciplined or sacked. Instead, the Bill should make clear that an employer cannot restrict an employee’s ability to state their genuine religious beliefs in their own time unless their speech incite hatred or ridicule against the employer, product, co-workers or customers.

Section 10 subsection 1

Reference to ‘statement of belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion’. This appears to put a judge or tribunal member in a position to make a ruling based on their assessment of a religious doctrine and a person’s interpretation of that interpretation. The court should test for the genuineness of the belief, not alignment with a doctrine.

Section 10 subsection 2(c)

Refers to charities that engage in commercial activities. Many charities engage in commercial activity as part of funding their charitable work. Commercial activity and religious activity are not mutually exclusive. Further clarity is required here to enable charities to charge for services while maintaining a faith identity.

Section 43

Referred to above – there is a need to define ‘vilify’ according to objective terms and in alignment with existing legal terminology.

Section 57

Reference to international obligations. Ruddock recommended, and the government also committed to reference the Siracusa Principles - that religious freedom could only be limited where necessary and limitations were to be no more restrictive than is required.
Include additional components

Case law exists to state that a corporation cannot hold a religious belief. A Religious Discrimination Act needs to expressly provide that corporations can hold a religious view and how that is evidenced.

It is not clear that corporations such as the Baptist Union, charity, counselling centre, religious bakery or Christian publishing company will be protected from religious discrimination.

There is nothing in the bill at this stage to prevent a person from being coerced to speak or act against one’s conscience or religious conviction. This is relevant in ‘expressive’ services such as decorating, photography and publishing. In addition, professionals such as lawyers should be protected from complaints about refusal of service. For example, a lawyer may not be able to reconcile their conscience with a brief to advocate for a brothel application.

Clarification, not privilege

It is often claimed that a Religious Discrimination Bill or similar enshrines religious privilege over other rights, and that it ‘winds back’ recent civil rights gains. This is not the case. Religious organisations and individuals simply ask for clarification in law that they may continue without interference as they have until now. There is no attempt or intent to impose on the rights of others. Individuals and organisations with a faith outlook are in favour of a genuinely plural and secular culture, where no religion or ideology dominates and all individuals and groups are free to participate and advocate for their interests.

While the Exposure Draft is a good first step, there is opportunity and need to improve it.

Please take on board the comments made above and similar submissions. They are made in good faith and do not seek to disadvantage anyone with an alternative outlook.