Religious Discrimination Bill – Exposure Draft

Your Submission

Submission on Draft Religious Discrimination Bill
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2. I am a legal academic working in the Newcastle Law School, at the University of Newcastle. I teach, among other courses, an elective on Law and Religion to upper level law students, and comment online on related issues at "Law and Religion Australia" https://lawandreligionaustralia.blog. The views expressed there and here, of course, are my own and not expressed on behalf of my University.

3. I am also a Board member of Freedom for Faith, a not-for-profit organisation concerned with religious freedom in Australia. I support, and commend to the Government for their careful consideration, the submission on the Bill made by Freedom for Faith. My comments here, however, are offered as my own perspective and are not to be seen as an “official” view of that organisation.

The Religious Discrimination Bill

(a) Overview

4. I see the Bill as a good initiative. It will make it unlawful to discriminate against others on the basis of their religious belief or activity. It allows religious bodies, however, to continue to operate in accordance with their beliefs. It also tries to provide some general protection to “statements of belief” that might be attacked as discrimination.

5. This is in general a good step forward; it plugs a “gap” in the Commonwealth legislation dealing with discrimination, which until now has not covered this area. As well as a gap in the Commonwealth law on the area, currently NSW and SA residents also have had little recourse where they have been subjected to detrimental treatment on the basis of their religious beliefs.

6. This is generally a helpful development which will support and strengthen religious freedom in Australia, in accordance with Australia’s international obligations under provisions such as art 18 of the ICCPR.

7. However, there are some areas where in my view the Bill needs “fine-tuning” to more effectively deal with possible problems. Hence most of my submissions to follow are critical, but they should be seen against the background of my general support for the initiative, and appreciation of the work that has already been put into the draft.

(b) Definition of “religious activity”

8. The definition of “religious belief or activity” in cl 5(1) refers to “engaging in lawful religious activity”. While the concern not to allow seriously harmful practices to be protected is supported, use of the broad phrase “lawful” seems to
run the risk of negating much of the protection provided by the Bill.

9. On its face it would seem to mean that a State or Territory government, or even a local Council, could pass a law banning certain activities which might be regarded as core religious behaviour (preaching in a public park, for example, or hiring a hall to run church services). While of course some types of “religiously motivated” acts should not be protected (for example, under-age marriage), simply using the broad category of “unlawful” will potentially undermine the protection of religious freedom under Federal law. More attention needs to be paid to precisely what forms of “unlawful” activity should not be regarded as protected by the law. It may be more honest to remove the qualification “unlawful” altogether, but to openly acknowledge in a separate clause that some religiously inspired acts are not protected, and work on drawing up guidelines for these. To some extent this work has been done in relation to “religious speech” under cl 27(2) already, excluding from protection the advocacy of the commission of a “serious offence” under Federal law involving harm. A similar provision is needed restricting the sort of “unlawful” activity that would not be protected by the Bill.

(c) The “Israel Folau clause”

10. While this is not its official title, it is fairly clear that cl 8(3) is designed to respond to the issues raised by the recent events involving Israel Folau, who was sacked as a football player for comments he had made on the Bible’s view of homosexual activity (among other acts of “spiritual rebellion” or “sin”), on his personal social media pages.

11. Clause 8 deals with “indirect discrimination”. (Clause 7, forbidding “direct discrimination”, is more straightforward and seems to present no major problems). Clause 8 makes unlawful actions which may seem at first not to be based on religious belief or activity, but where the imposition of a “condition, requirement or practice” will have a “disadvantaging” effect on a believer over and above the effect it would have on others. One type of such condition would be, for example, a requirement that employees adhere to a “code of conduct” that prohibited comment, even outside the workplace, on Biblical sexual morality, which would offend others.

12. Such a condition may be imposed, however, if it is “reasonable”, under cl 8(1)(c). What cl 8(3) and (4) attempt to do is to specify certain conditions under which such a condition would not be reasonable. They operate where there is an “employer code of conduct” restricting employee comment on matters connected to faith outside working hours.

13. The other important background to this provision is that the phrase “relevant employer” is defined in cl 5 to be restricted to a private employer whose revenue for the current or previous financial year is at least $50 million.

14. The clauses will then apply only to the largest of employers. It seems likely that Rugby Australia (for example) would qualify, but also other employers who in the past have been accused of imposing speech restrictions on employees on controversial moral issues (such as Qantas or Telstra).

15. I commend the Government for making a good faith attempt to deal with a situation which has concerned many Australia employees. But the provisions of cl 8(3) and 8(4) at the moment are not satisfactory. In particular, it seems odd to effectively allow an employer’s “sponsor” to “buy” the right to control an employee’s speech by a threat to withdraw sponsorship (hence imposing “unjustifiable financial hardship”) if unpopular things are said. In addition, the other “exemption” under cl 8(4)(b) for speech that would “vilify” is decidedly unclear. The verb is not defined, and it really needs to be. I would support its presence if it means “incite hatred or violence”. But since both of those concepts are contained in other parts of the paragraph that is probably not what it currently means. The word “vilify” might be thought by some to include any speech which indicates that sexual activity contrary to the Biblical standard (in the context of a marriage between a man and a woman) is wrong. In that case it may nullify the practical impact of the provision as a whole. Clarification is needed. Given that some exemption to the protection of employee speech is needed, I recommend that a definition of such speech be provided consistent with arts 19 and 20.2 of the ICCPR, and the “Siracusa Principles” referred to in the Ruddock Report, requiring any limits on free religious speech to be carefully targeted.

16. There is also, I think, a more subtle problem. If the Parliament has made specific provision for this type of action for large (over $50 million turnover) companies, might a court then conclude that any similar case involving a smaller company had to be rejected out of hand? If cl 8(3) & (4) were not present, it would be possible for an employee of any company, penalised for breaching a “no comments on these issues outside work” policy, to argue that they were being indirectly discriminated against in a way which was not reasonable, considering the factors in s 8(2). But the danger is that a court may say that this argument is not available once specific provision has been made for the issue in a way which deals with large companies.

17. However, employees even of smaller companies should still be able to invoke the general prohibition on indirect discrimination under cl 8(1). Indeed, the government’s Explanatory Notes make this clear at para [130]:

130. If an employer conduct rule is not prima facie unreasonable by virtue of subclause 8(3), a court would still need to consider whether the rule was reasonable in accordance with subclause 8(2), including paragraph 8(2)(d).

18. The intention seems to be that cl 8(3) imposes a more demanding test to be met by large employers, but it does
prevent employees in other situations from seeking a remedy where an unreasonable condition has been imposed on them, which disadvantages them due to their religion.

19. In light of this, it would seem to be wise to make this very clear by noting this in the legislation itself—for example, by words at the beginning of cl 8(3) to the effect of “Without affecting the general provisions of clauses (1) and (2)...”

20. I think that the solution to the problems raised by the “financial hardship” defence, offered in the Freedom for Faith submission at p 9, should be adopted: dropping the “financial hardship” defence, “to say that a condition imposed by a relevant employer that inhibits the expression of an employee’s religious belief outside of working hours is presumed not to be reasonable within the meaning of s.8(1)(c). The onus then falls on the employer to justify it.” If this clause is still confined in operation to a “relevant employer” (large company), it will have the desired effect of ensuring that such employers (as part of their corporate social responsibility) are required to pay especially careful attention to the religious freedom rights of their workers outside hours, and to provide compelling reasons why they should be allowed to restrict speech on matters which are motivated by religious reasons. But it will also mean that smaller companies may also have their policies challenged as indirectly discriminatory under cl 8(2) and cannot ignore the religious freedom rights of their workers.

(d) Exclusion of protections under cl 10 from “commercial” activities

21. Protection for the religious freedom of religious bodies in cl 10 is a very good idea. The use of the phrase “does not discriminate” is a good choice. But more thought needs to be given to the exclusion of these protections in paragraphs 10(2)(b) and (c) from bodies that engage in “commercial activities”. Religious hospitals, for example, operate commercially but are designed to implement religious perspectives on the care of the ill and vulnerable. Why should they not also be able to operate in accordance with a religious ethos, and require that staff at least agree not to undermine that ethos in management or health-care decisions? The same applies to religious social services, such as aged care facilities.

22. None of these bodies would be seeking to discriminate against their clients or customers on a religious basis. But if they are not allowed to apply a preference for employment of those who share their religious commitments in staffing decisions, this will undermine their ability to operate in accordance with their very raison d’etre.

23. The High Court of Australia, in its decision in Commissioner of Taxation v Word Investments (2008) 236 CLR 204, held that a body can be involved in “commercial activities” and yet still be classified as a religious charity, so long as any profits it makes are directed to religious purposes. Gummow, Hayne, Heydon and Crennan JJ commented at para [24]:

Word endeavoured to make a profit, but only in aid of its charitable purposes. To point to the goal of profit and isolate it as the relevant purpose is to create a false dichotomy between characterization of an institution as commercial and characterization of it as charitable.

24. As currently framed, the exclusion of religious organisations engaged even partly in commercial activities, from protection under cl 10(2), seems to be contrary to the strong protections provided under art 18 of the ICCPR (one of the main constitutional grounds for the Bill, under cl 57(a)). Organisations are, under clear decisions at international law, entitled to the religious freedom protections under art 18. Under art 18(3) impairment of the right to manifest religion is only justified by “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”. The broad exclusion of religious groups with a commercial element from the protections of cl 10 is hard to justify as “necessary” for any of these reasons. It is rare that essential services in any part of Australia are only provided by religious organisations, and even where that might be so, such organisations never make a practice of excluding those from different religious traditions in the provision of essential services. The very slight theoretical possibility that such might happen in the future is not enough to justify this exclusion as “necessary”.

25. Even in relation to religious schools, which under cl 10(2)(a) are covered whether or not they charge fees (as of course all have to), there has been some doubt expressed as to whether this would support a Christian school adopting a policy that it would prefer to employ teachers who were in agreement with the doctrines under which the school was being run (or at least agree not to openly oppose such doctrines).

26. The doubt arises as to whether a school which was not completely consistent with such a policy could rely on the clause—a school, for example, which would like to “prefer” those who are whole-hearted supporters of their faith, but is willing to employ some, perhaps specialist, teachers to meet a need where none can be found who completely agree with the doctrines.

27. It would seem arguable that a “preference” policy would indeed still be justifiable as an expression of “doctrines, tenets or beliefs”, but it may be better to clarify this before the Bill becomes law.

(e) Inherent requirements under cl 31
28. There is an exemption to rules prohibiting religious discrimination in employment, where making decisions related to religion is an “inherent requirement”, in cl 31(2). It is unusual in discrimination law to see an exemption which assumes that a non-religious organisation may have an “inherent requirement” relating to religious belief or activity.

29. It will be important to define more closely what this means. One danger is that this becomes a back-door way of authorising religious discrimination, by a secular company specifying an “inherent requirement” that, for example, staff never talk about religious topics. The exemption could operate sensibly if restricted to requirements that relate to the “core business” of the enterprise, rather than being “tacked on” by means of a “code of conduct”. “Inherent requirements” could be defined more closely to reflect this requirement.

30. It would be consistent with religious freedom, however, to allow religious organisations to operate in accordance with their religious beliefs (which, assuming cl 10 is amended as noted above to include the whole range of organisations, will be covered adequately by that clause.)

(f) Clause 41 and religious statements

31. Clause 41 of the Bill seems designed in part to deal with problems created when Archbishop Porteous was accused of behaving unlawfully by circulating Roman Catholic schools with material spelling out the Roman Catholic view on marriage. Cl 41(1)(b) makes it clear that a “statement of belief” is not unlawful under the specific terms of s 17(1) of the Tasmanian Anti-Discrimination Act 1998, which penalises causing “offence” on various grounds. This is a welcome provision protecting freedom of religious speech.

32. Cl 41(1)(a) also prevents a “statement of belief” from amounting to “discrimination” for the purposes of all Commonwealth and State discrimination laws. However, there is a comment in the Explanatory Notes to the Bill, at para [418], which says that while a statement of belief cannot amount to “discrimination”, the clause “does not apply to harassment (including sexual harassment), vilification or incitement under an anti-discrimination law”. This means that it will still be possible for a statement of religious doctrine (on, say, homosexual behaviour being contrary to God’s will) to be the subject of a claim for “sexual orientation vilification” under State laws other than s 17 of the Tasmanian ADA. This is confirmed by the exemption of “vilification” from protection under cl 41(2)(b), along with statements that “harass” and “incite hatred or violence”.

33. While this is an improvement on the previous situation (as such vilification is at least defined to be worse than merely causing “offence”), it does leave open possible actions which could be regarded as chilling legitimate expression of religious views. In particular it should be noted that s 19 of the Tasmanian law is a “vilification” provision making it unlawful to “incite hatred towards, serious contempt for, or severe ridicule of” say, homosexual persons, and unlike most other Australian laws of this nature, the defence provision in s 55 of the Tasmanian Act does not contain a defence for “religious purposes”.

34. As noted, even the over-riding of the Tasmanian s 17 does not apply if the statement of belief, under cl 41(2), is “vilifying”. But again, the Bill does not state what this word means. It is in a list of verbs accompanied by “incite hatred or violence” and so cannot be restricted to those things (otherwise the word would be redundant). The Bill should define the word at an appropriately serious level (well above mere “offence”) or else just drop the word and use the other concepts (“incitement of hatred or violence”).

Related amending legislation

35. In the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, cl 4 amends the Charities Act 2013 (Cth) to make it clear that it is not a “disqualifying purpose” under charity law to support a traditional, Bible-based view of marriage. This is a helpful amendment and is supported, given that there have already been attempts to de-register a New Zealand charity on this ground.

36. This Bill also amends the Marriage Act 1961 to add a new s 47C, which will allow an “educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”, to decline to make its facilities available for same-sex weddings. This is an amendment which is in accord with the existing provision in the Marriage Act allowing a “body established for religious purposes” the same right. It is only necessary because there may be a class of educational institutions conducted on religious principles by bodies which themselves are not established for religious purposes (as recognised by the fact that these two different types of bodies are referred to to separately in ss 37 and 38 of the Sex Discrimination Act 1984). The new s 47C is a sensible incremental amendment which is supported.

37. Most of the RD Bill, when enacted, will be enforced through civil processes- a hearing before the AHRC followed, if appropriate, by a potential civil action before the Federal Court or the Federal Circuit Court. (This is achieved by the related Religious Discrimination (Consequential Amendments) Bill 2019, which adds a breach of Part 3 of the RDB to the definition of “unlawful discrimination” in s 3(1) of the Australian Human Rights Commission Act 1986 (Cth). Under that Act, s 49PO provides that a complaint of “unlawful discrimination” may be referred to these courts if it has not been successfully
mediated before the Commission.) This mechanism seems appropriate, as already being used for other discrimination complaints.

Conclusion
38. Other submissions have noted that the consultation period on this Bill has been fairly short. It may be that there are other ramifications which have not been identified. Nevertheless, the Bill in principle is a positive development towards improvement of religious freedom in Australia, and with some clarification and sharpening of some concepts, has the potential to be a very important legislative initiative.

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29 Sept 2019