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Introduction:

What follows are some comments on the Exposure Draft and the Explanatory Notes. First it should be stated that from the perspective of one who has spent most of his life and professional career as a Barrister & Solicitor outside of Australia, the creation of a Commonwealth Bill to protect the Freedom of Religion in line with Australia’s obligations in relation to, inter alia, the ICCPR Article, is a welcome and long overdue development.

What needs to be done to the Draft to make it workable is to make the intention of the Explanatory Notes clearer in the actual language of the Draft Bill and to frame both with a greater sense of the challenges to religions and religious believers being experienced in other countries where similar social movements are putting pressures on religious organizations and religious believers. It is that experience that frames the comments that follow. I have not burdened these comments with case citations. These may be provided if requested.

Concerns with the Draft Bill:

1) Conscience is not mentioned in this Bill. The Canadian Charter of Rights and Freedoms, 1982 at Section 2(a) mentions “conscience and religion” and there is a good reason for this. Similarly, in the Constitution of South Africa (Bill of Rights), conscience and belief are mentioned alongside religion.

While all citizens are believers and necessarily have faith, not all belief and faith are religious. All citizens also have consciences while not all are religious or have their consciences religiously formed.

The approach to the Draft Bill, while in the right direction, does not go far enough and should expressly protect conscience as well as religion. Such an approach, including express recognition of conscience, would fit symmetrically with the Bill and the Explanatory Notes since the latter claims to endorse “the indivisibility and universality of human rights”. While conscience and religion are linked they have different but related functions within an open society and both should be mentioned. This Draft Bill is the logical place to keep them together as they are in
International Documents as well as the human rights frameworks in other jurisdictions.

2) **Definitions: The Associational and Communal Dimension of Religion Needs Clearer Articulation:** the definition of “club” does not include “religion” and should do so. As a general point of concern, the Bill insufficiently specifies what is clearly laid out in Article 18 of the ICCPR namely that the right to the freedom of religion is not simply for individuals but is something held in common that involves community. Religion is also public as well as private. Both the public dimension of religious activities and the communal or associational dimension of religious manifestation are puzzlingly missing as clear provisions in the Bill or statements in the Explanatory Notes. The Preamble Statement should state this personal and communal, public and private aspect of religious beliefs. There is also no mention of the family which should be mentioned as the ICCPR makes this an important aspect of religious liberty.

3) **Health Practitioner Conduct Rules Definition and “Statement of Belief” Definition:** hinging religious belief or activity protections on the individual level only to those beliefs that “...may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the health practitioner’s religion” may well have the unintended effect of requiring evaluation of the doctrine of a particular religion by a court or tribunal and this breaches the well established understanding that it is not such a bodies role to delve into doctrinal matters. The standard test for religious belief concerns is a simple sincerity test based on the person’s belief not that of any particular group. This is heightened with respect to health care workers as their own ethical beliefs may well be based upon their religious beliefs but not doctrinally related to them. To give one example, a particular religion may not have a doctrinal position on a particular ethical practice (say, in relation to withdrawing health care at the end of life though many examples could readily be imagined) or may have an “official” position at variance with that of the practitioner him or herself. It would be subordination and subsumption of the beliefs of the person to make respect for those beliefs hinge on them being shared or “doctrinal.” Thus, in a non-denominational setting, a particular doctor may wish or not wish to perform or be involved in a practice while their religion may have no position on the matter or one at variance with that of the practitioner. The way the Bill is currently drafted this would mean that no religious (or conscience based on religion) respect would be shown. To say the least, this is not an appropriate level of respect and runs completely counter the claims of the Explanatory Notes.

In a denominational setting different concerns would obtain as the ethos of such a setting is set generally - - as they are not in a public hospital structured on a “secular” set of understandings. The public setting has a different standard of accommodation and tolerance than that which necessarily obtains in a denominational setting. The “statement of belief” definition in Section 5
paradoxically does not hinge the “personal unbeliever” to the same institutional tenet requirement thereby raising the spectre of the tail wagging the dog in relation to the individual non-believer in a belief specific ethos setting. The Explanatory Notes suggest this is not the goal of the legislation - - that being the case this area needs new articulations.

4) **The Relevant Employer Definition:** The financial size of an organization should not be the basis for allowing or excluding religious protections. While this may have been used in the Bill as a means of dealing with a certain kind of dispute, it is not a sound philosophical basis for deciding where fundamental rights should be allowed to exist. That recognition turns not on the size of an organization financially but, rather, on whether or not it has a religious ethos; subsuming fundamental rights to financial concerns is not a good precedent.

5) **Definition of Religious Belief Including Not Holding a Belief:** This definition while seeming to give symmetry, also raises a particular concern about religious ethos specific settings (education, work, medical etc.). *In order to ensure that the non-religious employee not dissolve the ethos of a religious setting the Bill needs to pay greater attention to the Explanatory Note assurance at para’s 30 and 31 that religious associations are not going to be deprived of the capacity to make ethos-related hiring or retention decisions.* This is a fundamental weakness in the Bill as drafted and needs urgent attention. Paragraph #68 of the Explanatory Notes, for example, could readily lead to the conclusion that “non-religious-believing” employees in a religious organization could use their non-acceptance of the religious ethos of their employer as a basis to challenge a religious ethos employer - - in direct conflict with what the Notes say elsewhere. This ambiguity is both dangerous and untenable. The Bill as drafted pays insufficient attention to the clarity of the statement made in the Explanatory Note. What is needed is a clear provision setting out that:

“nothing in the Act deprives a religious association from making employment related decisions in accordance with its religious beliefs and practices for greater clarity this applies to hiring, discipline and retention of employees.”

6) **Section 8(4) (b), Statements of Belief that “would or is likely to, harass, vilify or incite hatred or violence against another person or group of persons”** combine matters that should not be accorded religious belief protections (incitement to violence) with those that are now being routinely raised when matters of mere disagreement occur in relation to public debates. Reflection, say on issues such as current disagreements about the nature of marriage, or the legitimacy of sexual conduct or gender-reassignment surgery are all likely to be raised precisely in relation to the traditions of religions. Placing matters that ought to be restricted (incitement to violence) alongside matters that ought to be open to public disagreement but are met frequently with claims of “safety”, “harassment” or
“vilification” in a loose manner such as in the current Bill, should not be facilitated by too broad legislative provisions. This section should be limited to incitement to violence not the broader language restrictions.

7) Section 8 (7): The Burden of Proof should be Necessity not mere “reasonability”:
This is important since the restriction on the conscience of health care workers ought to require a serious onus not merely a review based on what a third party deems “reasonable.” The claim to restrict conscience protections (with corresponding threat to livelihood entailed) should require the restrictor to show the “necessity” of the restriction.

8) Explanatory Note #78 shows the problem with the lack of protection for use of facilities by religious bodies or groups basing their activities on religion: The kinds of matters that lead to denial of bookings, withdrawal of rental space etc. are not, as mentioned “communal prayer” (who has ever denied that in any case?!) but, rather, what has been seen, namely the removal of permission to rent space due to the politically charged dimension of the religious group activity. The Bill does not protect such activities and should do so. For example, during the same-sex marriage debate, a group was denied rental of a hotel ballroom in order to have a book launch; such activities, controversial in nature, are often religiously based even if not religiously purposed and the Bill needs to cover these.

As drafted the religious beliefs animating the debate could all too readily be framed as “political” and both the religious manifestation and communal witness aspect of religion (as set out in Article 18 of the ICCPR) would be subsumed by the test employed. The Bill needs to provide that: “facilities and services are not to be denied for religious purposes or where the activity is reasonably understood to be based on the religious mission and viewpoint of the group or members themselves.” It would be naïve in Section 8(4) (b) not to view the provision of goods and services alongside the heated debates on matters ethical and sexual that now make up much of the public disputes pitting traditional religious bodies and their believing members against emerging alternative dogmatic beliefs in relation to education, health care and other issues of the day.

9) Throughout Consider Using the Concept of “Unjust Discrimination”: In an open society many discriminations are not only valid but essential – we allow age restrictions to deny infants the right to drive cars or consume alcohol for example. The Bill should use the formulation employed in the South African Constitution – namely that of “unjust discrimination” thereby signalling what is an important fact, that not all discrimination is unhealthy in society.
Conclusion:

It is hoped that the foregoing suggestions, based in part on the litigation experience in Canada, South Africa and the United Kingdom, will be of assistance in the re-Drafting of this important piece of legislation for Australia.

Respectfully,

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