**Context**

“Waiting for Equality” is a multidisciplinary research project at the University of Newcastle. Our project involves the collation of stories and experiences to support the creation of an exhibition on marriage equality at the University of Newcastle Art Gallery. The project aims to create a new and permanent resource that tells a story about LGBT+ equality rights. As part of this process our we have sought to uncover stories about this significant social and policy issue in the Newcastle and Hunter region, including a detailed analysis of the postal survey vote; impacts on LGBT+ mental health; lobbying to bring about change, and the panoply of responses from both LGBT+ individuals and social groups.

In order to uncover these stories and to better understand the experiences of the LGBT+ community we sought interview participants who are over the age of 18, who identify as part of the LGBT+ community in Newcastle and the Hunter who wished to share their experiences around the marriage equality debate with a particular focus on the marriage equality postal survey. (This research was approved by the University of Newcastle Human Ethics Committee. The approval number is H-2019-0161).

Our research is supported by the Janet Copley Bequest. The University of Newcastle Project Research team members are: Dr James Bennett (History); Professor Marguerite Johnson (Classics); Dr Kcasey McLoughlin (Newcastle Law School); Dr David Betts (Social Work); Gillean Shaw (University Art Curator). We also acknowledge our research assistants, Mr Blake Pepper, Ms Umeya Chaudhuri, Ms Tanika Koosmen, and Ms Niamh Simpson. The views expressed here are of course, our own and not expressed on behalf of the University of Newcastle.

**Overview**


The tension or conflict between claims of religious freedoms, on one hand, and equality rights claims made by LGBTQ+ people, on the other is well documented. Although we note ‘the absence of unanimity’ as to whether discrimination on the grounds of religious belief should be unlawful or not we acknowledge that prohibiting discrimination of the grounds of religious belief is generally consistent with the rationale of human rights and anti-discrimination law. However, we emphasise the extent to which religion is already privileged in anti-discrimination

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1 See Margaret Thornton and Trish Luker,’ The Spectral Ground: Religious Belief Discrimination’ (2009) 9 Macquarie Law Journal 71, 71
law. \(^2\) We further note the extent to which the law has been complicit in the historic and ongoing marginalisation of LGBTQ+ people—from the criminalisation of homosexuality\(^3\) to the lack of recognition of same-sex relationships. This history of marginalisation, and the extent to which the law has denied the humanity of LGBTQ+ people animates our concerns about the proposed legislation.

The breadth of protection afforded by the draft bills privileges the rights of one group in a manner that subverts the very rationale and purpose of human rights protections. In particular, we are concerned about the manner in which religious discrimination is defined, the inclusion of ‘religious conscientious objection’ and finally, the limited extent to which LGBTQI+ person were engaged in this law reform process.

**The breadth of protection is so wide that it subverts the rationale of anti-discrimination laws**

It has been widely accepted that the policy bases for Anti-discrimination laws are often unclear and vague.\(^4\) Rees et al note that parliamentary debates reveal ‘rhetorical flourish in Australia, and very little by way of careful analysis of the aims of these laws’ largely because they were developed off a model that ‘effectively delegate[d] much responsibility for determining significant issues of social policy to the judiciary.’\(^5\) Their summary of second reading speeches in Australia illuminates a lack of ‘detailed statements about policy goals’ because ‘they were often enacted in the face of strong opposition from parts of the community.’\(^6\)

Legal academics have further recognised the sometimes changing (and unclear) aims of anti-discrimination laws; with Professor Beth Gaze commenting that when these laws were passed it ‘was in recognition of wide-spread discriminatory practices in society that should be prevented… But what is not clear is how far it was intended that these laws should actually bring about change in those social structures and practices.’\(^7\) Creighton inquires whether the aim is ‘thoroughgoing social change in order to reduce or eliminate unfair discrimination’ or more a tokenistic remedy for individuals who experience discrimination.\(^8\) Despite the general lack of clarity about the aims of specific anti-discrimination laws, our concern is the extent to which the proposed laws depart from the *rationale* of anti-discrimination law. That is, by explicitly privileging the rights and freedoms of one group over that of another, this legislative response subverts accepted understandings of the purpose and scope of anti-discrimination law, particularly regarding the universality and indivisibility of human rights.

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\(^2\) See Submission by the Discrimination Law Experts to the Expert Panel on Religious Freedoms Inquiry: Religious Freedoms Review, 14 February 2018. They observed (at 7) “The institution of religion, and its associated beliefs and practices, are uniquely privileged in Australian anti-discrimination law, and exempt in many respects from complying with our national commitment to equality.”

\(^3\) Noting that homosexuality was not decriminalised in Tasmania until 1997, the last Australian state to do so.


\(^6\) Ibid p8.


To give substance to this claim we note that the concept of religious discrimination in the Exposure Draft of a Religious Discrimination Bill 2019 is so broad that it is completely out of step with existing framework of anti-discrimination law. This breadth is manifest in a number of ways (many of which have been usefully and expansively canvassed by other submissions\(^9\)), but here we note three interconnected issues: how religious freedom is understood and defined, the extraordinarily wide exemptions afforded to religious bodies and the inclusion of conscientious objections by health practitioners clause.

The Bill provides (at clause 41) that “statements of belief do not constitute discrimination” and is so doing overrides other Australian anti-discrimination law (e.g. the *Fair Work Act 2009* (Cth) and the *Anti-Discrimination Act 1998* (Tas)). As the Australian Human Rights Commission Submission noted “this provision seeks to favour one right over all others” and as such, “sets a concerning precedent, and is inconsistent with the stated objects of the Bill, which recognises the indivisibility and universality of human rights.”\(^10\) Similarly the breadth of the protection afforded by clause 10 “religious bodies may act in accordance with their faith” acts as widespread exemption for religious bodies (granted, only if the conduct is done in good faith in “accordance with the doctrines, tenets, beliefs or teachings of a particular religion”), and as such privileges these bodies (and potentially dilutes the very protections the Act is trying to create). Finally, clause 8 “conditions that are not reasonable relating to conscientious objections by health practitioners” effectively acts as a prohibition on any rule imposed by an employer on a health practitioner requiring the employee to undertake or provide services to which they have a religious objection. This clause gives serious cause for concern—it would permit healthcare professionals to refuse treatment to LGBTIQ+ people.

**The LGBTQIA+ community were not sufficiently consulted as part of this process**

We are concerned about the limited extent to which members of the LGBTQIA+ community have been engaged as part of this process. We are a further concerned about the potential for this process to further stigmatise minority groups. We note that a Galaxy Poll commissioned by the Parents and Friends of Lesbians and Gays (PFLAG) revealed “that 63% of Australians do not believe religious organisations should have the right to discriminate against LGBTIQ people, unmarried mothers, divorcees and de facto partners”, while also finding that 62% of Australians “agree that religious organisations and individuals should be protected from being discriminated against because of their faith.”\(^11\) This same article noted that although religious and family groups were consulted as part of the law reform process, LGBTQIA+ groups were not. It also bears emphasising that a survey conducted by LGBTIQ+ Advocacy group

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\(^10\) Ibid.

‘just.equal’ (who polled over 4000 LGBTIQ+ Australians and allies) about the religious discrimination debate found that 80% reported feeling worse now than during the 2017 Australian Marriage Postal Survey and 70.9% agreed that “the aim of religious freedom advocates is to take away the rights of LGBTIQ+ people.”

Our own research (smaller scale but more in-depth interview process) further reinforces the findings of the abovementioned survey. Although we did not ask our participants directly about the Religious Freedom Bill as part of their interviews, the topic emerged as a response to other questions. When asked what they would like to see to build on the outcome of the marriage equality postal survey many participants expressed the need to stay vigilant and continue their activism in the face of this emerging bill. The need for this continued activism was due to the fear it would undermine the success of the marriage equality outcome and would expose members of the LGBTQIA+ community to more stigma and bigotry. This fear was also linked back to the Religious Freedom Bill when participants were asked if they were exposed to more stigma during the marriage equality debates, with many of the participants expecting this stigmatisation to be amplified with the debates regarding the Religious Freedom Bill. While the Religious Freedom Bill was not included as part of the interview guide, the fact that it was frequently raised in general discussions around equality in Australia/Newcastle indicates that it is a pressing concern for members of the LGBTQIA+ community. For example, one participant commented:

I just think that it's a massive step backwards because it's allowing people, in a sense, the right to discriminate using false grounds. There's all those examples of the bakeries going, "Well, I can't bake you a cake for your wedding because religion says no," which is absolute crap. There's nothing. The two don't marry up, but people will use it as an excuse to do so.

A key theme, and one that has been stressed repeatedly by many of the participants in our interviews is that marriage equality isn’t in fact about marriage. Rather, it is about human rights, civil rights, and equal participation. Which is why many participants noted that while they were not personally interested in marriage, or at least were not in the past, the fight for marriage equality was important because of what it represented for wider equality and acceptance in Australian society. This emphasis on the importance of civil and legal rights was equally matched by an acknowledgment that the process of a postal survey did not support the needs of the community. In fact, the process emphasised that the right to be recognised as equal was now up to the votes and opinions of strangers across the country, rather than a process of democratic debate within parliament. This outsourcing of democracy was criticised as a way for the government to distance itself from any outcome, and in the process resulted in increased exposure to bigotry, homophobia, and wider discrimination during the inflammatory debates that came alongside the postal survey.

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12 These survey results were reported at ‘Survey shows religious discrimination debate taking a toll on LBTIQ+ people’, Out in Perth, 25 September 2019. See: https://www.outinperth.com/survey-shows-religious-discrimination-debate-taking-a-toll-on-lgbtiq-people/
We note that larger-scale empirical research demonstrates the extent to which the postal survey legislative process stigmatised members of the LGBTQI+ community and had an adverse impact on their mental health.\textsuperscript{13} By extension, it is therefore noteworthy that some of our interview participants regarded the Religious Freedoms Bill (and associated law reform processes) as a ‘clawback’ or retribution following the “YES” vote. Given its proximity to the YES vote and subsequent amendments to the \textit{Marriage Act} 1961 (Cth), the timing of the appointment of an Expert Panel into Religious Freedom to examine whether Australian law adequately protects the human right to freedom of religion, certainly raised questions about the impetus for this reform agenda. Reflecting this concern one interview participant remarked:

\textit{It's not to say it's only a short amount of time. But I mean look, I'm feeling, I'm sure a lot of people are also feeling, that the government is trying to claw back some of that stuff with the whole religious freedom. So that sort of thing people are keeping an eye on, just because one thing has gone forward. It doesn't necessarily mean that things might not try and claim it back.}

And another participant further reflected on their feeling that there has been a backlash in the wake of marriage equality:

\textit{So, the conservatives feel they've lost ground. They did a bit. A smidgen. But you know, they're not going to put up with that, they'll be back. There was some talk after the law changed, after a few weeks and the dust settled, that that would happen. That the conservatives would just sit back and wait and do this thing, we knew this was going to happen, we knew there was going to be a backlash of some sort. There was a lot of happiness for a few months then there was a case where two lesbians wanted to get married and the local baker refused to do the cake, so stuff like that started to happen straight away. Immediately there was a reaction like, "Well, that's all right, they can do that, can't they?" You know, refuse services, so that was the beginning of it.}

Speaking at time when the draft bill had not yet been released, one respondent reflected on their concerns about the intersection of competing rights claims:

\textit{Now, we've not seen the detail of the government's bill on that yet. I spoke at the university about this this morning because I don't think there's ever a time where you just sit back and think you've achieved what you need to achieve and that there isn't some kind of need for some vigilance. Sometimes it's about protecting, but you also want to build on and progress the sort of agenda. So my concern on the religious freedom, of course people should have freedom to practice their religious faith in Australia. That's not the question. The question is how that intersects with other people's rights. If that is, as some people have suggested, if the debate around religious becomes about the implementation of further discriminatory laws in Australia, then that will be more than disappointing. It would be a profoundly disturbing sort of outcome of that debate if that's where we ended up landing.}

\textsuperscript{13} Stefano Verrelli, Fiona White, Lauren Harvey and Michael Pulciani, ‘Minority stress, social support, and the mental health of lesbian, gay, and bisexual Australians during the Australian Marriage Law Postal Survey’ (2019) 54 \textit{Australian Psychologist} 336.
Another responded reflected on the importance of recognising the harm engendered by certain kinds of discrimination:

*I do believe that each person is entitled to their beliefs and opinions and I suppose religious practices if they don't harm anybody else, I think it's when they harm others that the issues arise. Like maybe I'm a little bit Buddhist about my views of culture and belief but I just think like each to their own, what is most important to me is like acceptance. I don't think that religion should ever be an excuse for harming other people physically or with words and I think that in that situation it's bigotry and it's judgment and it is pushing your beliefs onto not only one person or one section of society but onto, because of his high profile, certain people's high profile's, it's unfair I feel like to present your views as the right views to a wide population through the media.*

**Conclusion:**

In the current format the Exposure Draft of a Religious Discrimination Bill 2019 (“RDB”) and associated bills (the Religious Discrimination (Consequential Amendments) Bill 2019, and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 privilege religious freedoms at the expense of the equality of members of the LGBTQ+ community. We implore the government to consult appropriately with the LBTQ+ community and to revise its legislative response so that the protections afforded to one group do not come at the expense of other marginalised minority groups.

We further note the relatively tight deadline for these submissions and the very real possibility that it might limit the depth and breadth of responses.

*“Waiting For Equality” Research Team,*  
*University of Newcastle*  
*Wednesday October 2, 2019.*