



LASA
LEADING AGE SERVICES
AUSTRALIA
The voice of aged care

LASA RESPONSE TO THE RELIGIOUS DISCRIMINATION BILL 2019 EXPOSURE DRAFT

2 October 2019

*A strong voice and a helping hand
for all providers of age services*

Leading Age Services Australia

Leading Age Services Australia (LASA) is a national association for all providers of age services across residential care, home care and retirement living/seniors housing. Our purpose is to enable high performing, respected and sustainable age services that support older Australians to age well by providing care, support and accommodation with quality, safety and compassion – always.

LASA's membership base is made up of organisations providing care, support and services to older Australians. Our Members include private, not-for-profit, faith-based and government operated organisations providing age services across residential aged care, home care and retirement living. 55% of our Members are not-for-profit, 37% are for-profit providers and 8% of our Members are government providers. Our diverse membership base provides LASA with the ability to speak with credibility and authority on issues of importance to older Australians and the age services industry.

LASA believes the proposed religious discrimination legislation (if passed) may have a significant impact upon aged care providers in terms of employment and the provision of services and accommodation, including:

- a. when forming partnerships;
- b. when employing people, managing people and/or terminating the employment of people;
- c. communications made by the organisation and/or staff within and outside their terms of employment;
- d. enabling healthcare practitioners and personal care workers to conscientiously object to engaging certain activities; and
- e. providing accommodation and services to people.

As an organisation with a diverse membership base (where different providers may have different views on some issues), the intention of this submission is not to set out an industry position in response to the draft *Religious Discrimination Bill 2019 Exposure Draft*. To respect the different viewpoints, LASA consulted with its members and affiliates to identify issues and their key concerns with regard to the proposed Bill, which are summarised below. The purpose of LASA making this submission is to ensure that Government is fully informed regarding any areas of confusion or contention.

Purpose of the Bill

LASA Members were generally supportive of the intent of the Bill which is to prohibit direct and indirect discrimination on the basis of religious belief or activity in the following areas of public (as compared to private) life: employment; partnerships; education; access to premises; goods, services and facilities; accommodation (in premises for more than three persons); land; and sport and clubs.

However, questions have been asked regarding what impact the proposed Bill will have on existing faith-based providers practicing “positive discrimination” such as in favouring the admission of elders of the same religion/cultural background first or choosing to hire a person from the same religion/cultural background because they believe the person to have a “lived experience” that is beneficial for them in undertaking their role at the premises. Providers may have an organisational constitution that stipulates that to become a paid member of an incorporated association, the person must be of the same religion/culture background.

Additionally, it was noted that a religious culturally and linguistically diverse (CALD) service provider has a number of challenges which include:

- a. provide care in a culturally appropriate environment;
- b. meet the linguistic needs of residents who do not speak fluent English or have reverted back to their mother tongue; and
- c. The Charter of Aged Care Rights includes under No 3 “have my identity, culture and diversity valued and supported” and also under No 7 “have control over and make choices about my care, and personal and social life...”

Consequently, the religious aged care provider has to merge religious and commercial objectives and cannot separate one from the other as the Bill would like to achieve. The merging is required to offer a sustainable aged care service as it provides for the needs of the ageing person whilst ensuring that the obligations under The Charter of Aged Care Rights and The Aged Care Act are met.

Religious belief or activity

Whilst laws protecting against discrimination are prima facie beneficial to a harmonious Australian community, one of the main issues with the draft legislation is the uncertainty over what constitutes a “religious belief” and how radical (and therefore disruptive) that belief could be.

“Religious belief or activity” is defined as holding a religious belief or engaging in lawful religious activity, not holding a religious belief or not engaging in, or refusing to engage in, lawful religious activity.

The explanatory memorandum to the bill states that the concept of religious belief is not defined for the purposes of this Act.

Religious belief is intended to include beliefs associated with major faith traditions (such as Buddhism, Christianity, Hinduism, Islam, Judaism, or Indigenous spirituality) in addition to the beliefs of smaller and emerging faith traditions. The term religious belief is intended to capture genuine religious beliefs. It is not intended to capture, for the purposes of the Bill, beliefs caused by mental illness or which are motivated by criminal intent.

While some Members have indicated support for consumer choice to choose how care is provided and by whom based on religious belief (noting peoples’ ability to express their thoughts and feelings without the need to self-censor when expressing oneself, would manifest in a better quality of care), others have raised concern that, considering a significant amount of aged care provision is undertaken by faith-based providers, these faith-based aged providers might use the legislation to limit their own employment practice (including ability to dismiss staff who practice their faith at work), and/or refuse service to the LGBTIQ elders.

For example, many faith groups have refused to acknowledge same-sex marriage within their religious institutions despite these marriages being legal. Therefore a situation could arise where same-sex married elderly couples are excluded from their facility when they would accept heterosexual couples. This could have even more severe consequences for people seeking care in more rural and remote areas where the only provider in the community might be a faith-based organisation.

Prohibition of discrimination

LASA notes that the bill prohibits discrimination largely on the same terms as existing discrimination laws, but adds the “religious belief or activity” ground, making it unlawful not to provide accommodation or services or terminate a person’s employment on the basis of them being Catholic or Muslim or Jewish.

The proposed Bill says that, a person discriminates against another person on the ground of the other person’s religious belief or activity if a person:

- a. directly discriminates (by way of how they treat that person) on the basis of their religious belief (section 7); or
- b. indirectly imposes, or proposes to impose, a condition or requirement of practice and that condition or requirement of practice has the effect of disadvantaging the person on the basis of their religious belief and that condition is not reasonable.

However, whether or not something is reasonable depends upon the nature and extent of the disadvantage, the feasibility of overcoming or mitigating the disadvantage, whether the disadvantage is proportionate to the result and if the condition, requirement or practice is an employer conduct rule.

Some Members have raised concern that the explanatory statement to the Bill states that an example of such a condition, requirement or practice could be a condition of employment that all employees are to attend meetings every Friday afternoon. This would disadvantage Jewish employees who leave early on Fridays to observe the Sabbath or Muslim employees who attend Friday prayer.

For example, a requirement that all employees involved in food preparation wear certain clothing for food safety purposes may disadvantage persons who wear religious dress.

This is likely to be reasonable if it is necessary to satisfy food safety requirements. However, if the dress code prohibited employees from wearing any form of religious dress that was not related to food safety requirements, or prohibited them from wearing religious dress at all times while in the workplace, this could disproportionately limit the ability of employees to engage in their religious activity, and therefore could be unreasonable.

Another concern is that if you have two or more reasons, one being on the basis of a person's religious belief or activity (whether or not it is the dominant or substantial reason), the conduct is taken to be engaged for the religious belief or activity.

Making statements of belief

Perhaps the most controversial element of the Bill is that the legislation protects people "from making a statement of belief" (section 41).

This provision only applies, though, to employers with annual revenue of at least \$50 million, which would be many health and aged care providers - refer to section 8(3) and the definition of 'relevant employer' in section 5(1).

Section 17(1) of the Tasmanian Anti-Discrimination Act prohibits people from offending, humiliating, intimidating, insulting or ridiculing others on the basis of attributes such as disability, sex, sexual orientation and gender identity.

Section 41 of the Religious Discrimination Bill states that "a statement of belief does not contravene section 17(1)" of the Tasmanian Act unless it is malicious or is likely to harass, vilify or incite hatred or violence against a person or group of persons.

It also provides that a statement of belief does not constitute discrimination for the purposes of any discrimination law in Australia – whether at federal, state or territory level.

Some Members were concerned that this would mean statements based on religious belief that offend, humiliate, insult or intimidate women, LGBTIQ+ people or persons with disabilities would be lawful, regardless of what state laws provide unless they meet the high threshold of harassment, vilification or incitement of hatred.

Additionally, under the provisions outlined in the Bill, large scale organisations would have to prove "unjustifiable financial hardship" to put in place a restriction on someone that curbed their freedom

of religious expression. Questions have been asked regarding how this is going to work and what the process to prove economic loss is.

Conscientious objections

Section 8(5) allows conscientious objections by health practitioners.

This means that where a health practitioner is required by their employer to provide a service to which they object on religious grounds, this requirement will likely be unreasonable – and therefore discriminatory. Areas where services may conflict with religious beliefs include assisting with the termination of pregnancies and voluntary assisted dying.

While these issues may pose problems to some providers, LASA notes, in practice, the right to conscientiously object has been observed by many faith based health and aged care providers for many years without an issue.

However, a question has been asked that if a staff member, such as a personal care worker, rejects delivery of meals based on meal preparation issues does this become a conscientious objection and how does this fit with the resident's right of choice and the obligation under The Aged Care Act to provide meals?

Short consultation limits capacity to scrutinize

LASA considers four weeks of community consultation to be inadequate to fully scrutinize the proposed Bill. Considering the unique aspects of the proposed Bill, we believe a longer consultation period should be provided to ensure appropriate evaluation (The Australian Law Reform Commission, for example, has been given 12 months to consider the question of religious organisations' exemptions from discrimination law, and it won't report until April 2020¹).

LASA would like to thank Hall&Wilcox, especially Ms Alison Choy Flannigan, for their analysis on what impact the proposed religious discrimination legislation will have on health and aged care providers, which has informed this submission.

¹ Elphick et al (2019) The Government has released its draft religious discrimination bill. How will it work? The Conversation August 29 2019. <https://theconversation.com/the-government-has-released-its-draft-religious-discrimination-bill-how-will-it-work-122618>