

Our ref: RH:EH

4 January 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

By Email: religionbills@aph.gov.au ; human.rights@aph.gov.au

Dear Secretary

Re: Inquiry into the Religious Discrimination Legislative Package.

The LGBTI Legal Service Inc. ('the Service') thanks the Committee Members for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Religious Discrimination Legislative Package [Provisions].

The Service is a non-for-profit community legal centre that began operation on 7 July 2010 and officially launched on 1 December 2010 by former Justice of the High Court of Australia, the Hon Michael Kirby AC CMG.

The Service recognises the difficulties faced by the LGBTQIA+ community and seeks to assist the Queensland and wider Australian community in their access to justice. The Service provides legal assistance across a broad range of legal areas such as criminal law, family law, domestic violence, employment and discrimination law. The Service also has an active law reform division that seeks to advocate for LGBTQIA+ inclusion and the protection of human rights in Australia.

This submission was compiled on the homelands of the Turrbal and Yuggera People. The Service accordingly acknowledges the Turrbal and Yuggera people as the Traditional Custodians of this land and recognises their ongoing connection to land, waters and community. This submission was prepared collaboratively by the Service's staff and volunteers all with diverse backgrounds.

The Inquiry

In response to the inquiry on the Religious Discrimination Package [Provisions] announced on 2 December 2021 the Service has identified several relevant considerations given our knowledge of the unique experiences of the LGBTQIA+ community.

The Service holds the position that discrimination legislation should protect all members of the community equally and should be accurately balanced against human right considerations. The recently introduced Religious Discrimination Legislative Package is a step backwards in equality and severely harms the current protections for LGBTQIA+ community and sets back the strides in inclusivity that have been hard fought for over many years.

The Service accepts and acknowledges that those that hold religious beliefs should not be exposed to discrimination in practice of their beliefs. The practice of one's belief however should not take precedence over the rights of another to live without discrimination, vilification or vitriolic commentary.

Members of LGBTQIA+ community are presently at risk of facing discrimination in workplaces, schools, while accessing health care and goods and services. The Religious Discrimination Package if enacted will further impact the ability of our community to access those essential facilities and services and right to feel safe in wider areas of life.

As a Queensland based organisation, we are opposed to the Bill's effect in overriding any of the currently held rights of Queenslanders through our own human rights legislation (those being the *Human Rights Act 2019* and the *Anti-Discrimination Act 1991*). Queenslanders are in the midst of reform in improving their human rights legislation such as updating the vilification and broader anti-discrimination laws, the Religious Discrimination Package would unfairly damage the goals of promoting equality in these new reforms.

We also wish to express disappointment in the intention of the government to implement a Religious Discrimination Commissioner without acknowledgment of the lack of a representative commissioner for the LGBTQIA+ community.

The Service makes this submission in solidarity with many other organisations and stakeholders who are committed to the pursuit of equal treatment and recognition of intersectionality of the LGBTQIA+ community. In particular, we offer our support and full endorsement of the submission made by Equality Australia.

The Service also wishes to highlight the necessity for the committee to consider the intersectionality of the LGBTQIA+ community with communities from culturally and linguistically diverse backgrounds, Indigenous and First Nation peoples as well as those with disabilities and impairments to recognise that they as a unified group are more likely to be subjected to acts of discrimination.

Discussion

1. Religious Discrimination Bill 2021

1.1. Imbalance of Rights: Statement of Belief

The Service's main concern with the Religious Discrimination Bill is that it incorrectly weighs the rights of those with a religious belief over other protected attributes in the relevant areas of public life. Clause 12 of the Bill grants a protected status over what is considered a 'statement of belief'. This is defined as being a: "religious belief held by a person, made in good faith, by written or spoken words or other communication (other than physical contact) by the person and; is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion".¹

It is the view of the Service that this wording creates an imbalance of rights in comparison to other protected attributes such as age, disability, race, sex and other more specific attributes featured in state discrimination laws such as gender expression or marital status. It is an established principle that human rights are indivisible and interdependent of any other right and that freedom of a religion as a right must co-exist with other freedoms including the right

¹ Religious Discrimination Bill 2021 (Cth) s 5(1) (definition of 'Statement of belief').

to non-discrimination and equality.² The right to equal protection from discrimination is also a legislated right for Queenslanders.³ Clause 12 does not bring religious belief to equal footing with other attributes as was the stated intention of the Bill⁴, it does however elevate religion's status above all others.

It is our view that this clause clearly permits those with religious beliefs to make discriminatory statements against others as long as the commentary is founded in a reasonably held religious belief. It is recognised that the Bill attempts to restrict statements that would be considered malicious or to threaten, intimidate, harass or vilify a person.⁵ What is and is not considered a genuine statement of belief is unclear thereby creating a very broad test of what conduct comes under the protection of the wording.

During the Postal Marriage Survey in 2017 the Service commenced a State Government funded project to collect evidence of hate speech. We collected over 220 examples of hate speech that had been published online or sent to the Service directly, for which a large portion had religious overtones. Some examples collected on social media stated:

"There is nothing to be proud about! Turn to Christ today and repent from sexual sin"

and

"The world would end without traditional marriage".

In the context of the Bill, hurtful and discriminatory statements like this made in workplaces, schools or while accessing health care and other goods and services could potentially fall under the protection of clause 12.

The Australian Human Rights Commission (AHRC) in their reform agenda position paper noted that legislating rights to freedom of thought, conscience and religion should be carefully framed and reinforced by principles of non-discrimination and equality. They noted additionally that the draft exposure Bill on religious freedom in 2019 did not get this balance right.⁶ While the most recent rendition of the Bill is an improvement on the 2019 draft, the wording remains flawed and has not achieved an appropriate balance. Furthermore, there is a case to be made that the preferential treatment that this Bill contains may breach international human rights law.⁷

Considering the broad nature and imbalance of rights caused by the wording it is the Service's recommendation that clause 12 be deleted.

² Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112, 115.

³ *Human Rights Act 2019* (Qld) s 15.

⁴ Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 2 [9].

⁵ Religious Discrimination Bill 2021 (Cth) s 12(2).

⁶ Australian Human Rights Commission, 'Free and equal: An Australian conversation on human rights Issues Paper' (December, 2021) 262 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>

⁷ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) art 18.

1.2. Addressing Professional Misconduct

In professional industries, maintaining the confidence of the profession in the eyes of the public is a core obligation.⁸ Doctors in their code of ethics have a specific requirement to provide care without discrimination on the basis of a particular status and may be reprimanded for actions outside of their work if they damage public confidence in the profession.⁹ Clause 15 of the Bill deems it discrimination if a qualifying body attempts to limit statements of belief made outside of work contexts through any imposition of professional conduct rules.

This creates a two pronged effect, it creates a permissive culture where doctors, lawyers and other professionals can make discriminatory statements in public spaces as long as it is founded in a religious belief and it severely limits and hinders professional bodies from upholding confidence of the professions in the public eye due to the limitations set by the clause.

It is commonplace for the personal conduct of a professional to be in question by a qualifying body as this goes into consideration of the person's character, suitability and fitness to act in the professional role.

Healthcare encompasses a large variety of professional roles, the effect of this bill on the healthcare industry cannot be understated. It is considerably important to foster a culture of equality and safety in essential services like healthcare. A national survey into the health and wellbeing of LGBTQIA+ people in Australia conducted by La Trobe University found that only 43.4% of participants indicated that they felt accepted while accessing healthcare and support services.¹⁰ The Service recognises the difficulty of our community in finding LGBTQIA+ friendly professionals and services and in our view clause 15 would only negatively impact LGBTQIA+ people's desire to feel safe and accepted in accessing an essential service like healthcare.

It is therefore recommended that clause 15 be deleted.

1.3. Widening the Faith-based Exemptions

This Bill further extends existing exemptions for faith-based discrimination. The introduction of clauses 7-9 and 40(2)-(7) go further than previous legislation by implementing exemptions that allow faith based organisations such as schools, hospitals, care facilities and disability providers to actively discriminate against those with differing beliefs including giving preference to those within the same religion.

Such discrimination must be on the basis of good faith, as long as the conduct is the '*same conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*'¹¹ or '*the conduct is to avoid injury to the religious susceptibilities of adherents of the same religion as*

⁸ Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 5.1, Queensland College of Teachers, *Code of Ethics for Teachers in Queensland* (at December 2021) see acting with education colleagues and the wider community in ways which enhance the profession, The Royal Australian and New Zealand College of Psychiatrists, *Code of Ethics* (at 2018) Principle 10.

⁹ Australian Medical Council, *Code of Ethics* (at 17 March 2007) r 4.6.2, *Health Practitioner Regulation National Law Act 2009* (QLD) s156(1)(e).

¹⁰ Hill, A. O., Bourne, A., McNair, R., Carman, M. & Lyons, A., 'Private Lives 3: The health and wellbeing of LGBTIQ people in Australia' (ARCSHS Monograph Series No. 122, Australian Research Centre in Sex, Health and Society, La Trobe University 2020) 37.

¹¹ Religious Discrimination Bill 2021 (Cth) cls 7(2)-(4)

*the religious body*¹². Educational institutions have an added requirement that any religious specific discrimination be evidenced in a written policy.¹³

In the case of *Walsh v St Vincent de Paul Society Queensland (No 2)*¹⁴ Linda Walsh, a Christian woman was asked to leave her position as president of a local conference or convert to Catholicism. It was the respondent's submission that they could impose a requirement that she practice Catholicism as a genuine occupational requirement of her role. It was held that this was discrimination on the basis of religious belief or activity. The court added that it was not essential or indispensable to the role to practice the faith.¹⁵ Via the new exemptions, A Catholic organisation would be well within their rights to enforce a requirement of religion even against others of a different sect or different religion.

There is acknowledgment in the explanatory memorandum of the Bill that this could limit an individual's rights to equality and non-discrimination.¹⁶ This has been clarified as being carefully balanced and any exemption provided for must be engaged in good faith.¹⁷

This is an incredibly broad exemption that introduces an unmeasured double standard. Religious based services and institutions including those with government funding may refuse to offer services on the requirement of a belief regardless of how the belief is relevant to accessing services or acting in an employed position. What may be considered good faith and not good faith is also open to a wide degree of interpretation. The AHRC in their submission to the Religious Freedom Review panel in 2018 highlighted that the current system of religious exemptions to anti-discrimination law should be reviewed recommending the inclusion of a limitation clause noting that any changes should adhere to Australia's obligations under international law.¹⁸

The Services considers these new exemptions as being so broad and untested that they do not provide an accurate commitment to acknowledging equal human rights. It is also alarming considering the substantial influence faith-based organisations and providers have throughout the community. With these new exemptions, people who identify as LGBTQIA+ are likely to face additional barriers in accessing education, healthcare and other essential services. For example, a school could enforce a policy on students that they acknowledge that homosexuality is a sin or that young girls should submit to their future husbands, such policies are both discriminatory and demeaning in their effect.

The Service's view is that these exemptions are not improvements but digressions in establishing good anti-discrimination law and we recommend that clauses 7-9 and 40(2)-(7) be deleted or at least amended with the addition of appropriate limitations and consideration of already existing state based exemptions.

1.4. Protecting Corporate Entities with Human Rights

There are several state based laws that confer standing to a person with a personal association of a protected attribute to sue if they themselves have been the target of discrimination.¹⁹ This Bill goes further in granting specific protection to corporate entities to

¹² Ibid cl 7(4)

¹³ Ibid cl 7(6)

¹⁴ [2008] QADT 32

¹⁵ Ibid [123].

¹⁶ Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 10 [21].

¹⁷ Ibid 10 [22].

¹⁸ Australia Human Rights Commission, Submission No 14927 to the Expert Panel, Religious Freedom Review (14 February 2018) see recommendation 6.

¹⁹ *Equal Opportunity Act 2010* (Vic) s 6(q); *Anti-Discrimination Act 1998* (TAS) s16(s); *Discrimination Act 1991* (ACT) s7(c).

sue if they have suffered damage as a result of an association with someone with a religious belief.²⁰

It is the Service's position that this clause implements an unnecessary litigious element into a Bill that its focus should be on protecting the right to practice one's faith with regard to being equal and balanced with other federal discrimination laws. It additionally contributes to the wider contention of this submission that this Bill unfairly places religion as a superior class by the inclusion of such a clause. Human rights legislation inclusive of anti-discrimination laws should in their operation exist to protect natural persons and not corporate entities.

It is recommended that clause 16(3) be deleted.

2. Human rights legislation amendment Bill 2021

2.1. Further Exemptions for Charities and Educational Institutions

The Human Rights Legislation Amendment Bill (Cth) makes two questionable amendments to both the *Charities Act 2013* (Cth) and the *Marriages Act 1961* (Cth). The proposed amendment to the *Charities Act* states that professing a traditional view of marriage is for a public benefit and not against public policy.²¹ The logic behind this clause was to ensure that charities that espouse a traditional view of marriage do not lose their charitable status as a result.²² This amendment is considerably unnecessary and creates an exemption based on a particular Abrahamic religious view of marriage. There is acknowledgement that marriage between a man and a woman is a professed religious belief by those of several faiths, however we disagree with enshrining any description of a traditional view of marriage as a public benefit.

Since the Postal Marriage Survey, there have been several strides in the effort towards acceptance and equality with the recognition of same-sex marriage and social normalisation of same-sex relationships. The Service is opposed to any legislation that promotes a step back in the efforts made towards equality.

The amendment to the *Marriages Act* in a similar way allows educational institutions to refuse the use of their facilities or goods or services for the purposes of the solemnisation of marriages or purposes incidental to the solemnisation of marriage as long as the refusal conforms with a religion or is necessary to avoid injury to religious susceptibilities of adherents to that religion.²³

Despite there already being an exemption this was included as an amendment for the stated purpose of removing ambiguity.²⁴ Similar to the above, the Service submits that additional exemptions for religious education facilities to discriminate are unnecessary and only contribute to the divisive treatment of LGBTQIA+ students and teachers.

The Service does not support needless amendments and recommends the deletion of both Section 19 of the *Charities Act 2013* (Cth) and Section 47C of the *Marriage Act 1961* (Cth) from the Human Rights Legislation Amendment Bill.

²⁰ Religious Discrimination Bill 2021 (Cth) cl 16(3)

²¹ Human Rights Legislation Amendment Bill (Cth) Sch 1 cl 3.

²² Explanatory Memorandum, Human Rights Legislation Amendment Bill (Cth) 15 [42].

²³ Human Rights Legislation Amendment Bill (Cth) Sch 1 cl 6.

²⁴ Explanatory Memorandum, Human Rights Legislation Amendment Bill (Cth) 17 [56].

3. Recommendations

The following is a summary of the Service's recommendations for the committee's consideration:

<ul style="list-style-type: none">• Delete Clause 12 of the Religious Discrimination Bill (Cth)
<ul style="list-style-type: none">• Delete Clause 15 of the Religious Discrimination Bill (Cth)
<ul style="list-style-type: none">• Delete Clauses 7-9 and 40(2)-(7) of the Religious Discrimination Bill (Cth)
<ul style="list-style-type: none">• Delete Clause 16(3) of the Religious Discrimination Bill (Cth)
<ul style="list-style-type: none">• Delete Section 19 of the <i>Charities Act 2013</i> (Cth) and Section 47C of the <i>Marriage Act 1961</i>(Cth) from the Human Rights Legislation Amendment Bill (Cth).

Our Clients

The Service continues to assist clients who have been the target of discrimination founded in a guise of religious belief. The Service will continue to advocate for legislative change to ensure that the current protections and equality that our community has strived to achieve remain protected and not overwritten with consideration to the diversity and legal barriers that our clients face.

This submission was prepared by Ellie Hansson with assistance of volunteers and staff within the Service.

We consent to this submissions being made available to the public.

Please, if you have any queries regarding the submissions outlined in this correspondence we encourage you to contact our office.

Yours faithfully

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