



public interest
ADVOCACY CENTRE

‘Religious Freedom’ Bills Submissions on Exposure Drafts

30 September 2019

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a community legal centre that specialises in test cases and systemic policy advocacy on social justice issues.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Discrimination, human rights and government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Recommendation 1: the Bill should protect only natural persons

The definition of 'person' should be removed from the Bill. A complaint of discrimination on the ground of religious belief or activity should only be able to be made by natural persons.

Recommendation 2: apply a standard test for 'reasonableness'

The Bill should apply a standard test for reasonableness. Clauses 8(2)(d), (3), (4), (5) and (6) should be removed.

Recommendation 3: apply a standard test for 'inherent requirements'

The Bill should apply a standard test for inherent requirements. Clauses 31(6) and (7) should be removed.

Recommendation 4: require conduct to 'conform to' religious doctrine

Clause 10 of the Bill should apply only where a person engages, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of a religion.

Recommendation 5: limit to bodies 'established for religious purposes'

Clause 10(2)(c) of the Bill should apply only to 'other bodies' that are established for religious purposes.

Recommendation 6: protect students from disadvantage or expulsion

Clause 10 should apply only to discrimination by educational institutions against students at the point of admission. It should not allow schools to deny or limit students' access to benefits, expel students or subject them to detriment.

Recommendation 7: existing discrimination protections should be preserved

Clause 41 should be removed from the Bill.

Recommendation 8: further consideration of Commissioners within the AHRC

Based on Recommendation 19 of the Religious Freedom Review, the Government should reconsider the necessity of a Religious Freedom Commissioner. If this position is created, the Government should also create a Sexual Orientation, Gender identity and Expression and Sex Characteristics (SOGIESC) Commissioner.

Recommendation 9: remove amendment to the Charities Act

Clause 4 of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, which would amend the disqualifying purpose provisions of the Charities Act 2013, should be removed.

Recommendation 10: extension of time to allow fair participation

Further time should be allowed for consultation on the Bill to allow fair participation for people with disability.

1. Introduction

The Public Interest Advocacy Centre supports providing protection from discrimination for people of faith, including people of no faith, in the form of a Religious Discrimination Bill. However, we are unable to support the Religious Discrimination Bill 2019 in its present form.

The Bill contains a number of features that undermine existing anti-discrimination protections and, more generally, the integrity of Australia's anti-discrimination law regime. Our concerns include:

- the Bill's approach to the test for reasonableness, which seeks to interfere with the ordinary balancing of rights and interests in individual cases, as used in existing Commonwealth anti-discrimination legislation;
- the specific impact of the 'conscientious objection' provisions on access to health services – including reproductive services, contraception and abortion – for women generally as well as for specific groups (single women, lesbian couples, transgender people);
- the breadth of exclusions provided to religious bodies in proposed cl 10 and their application to school students to permit expulsion;
- the winding back of existing protection from discrimination in relation to 'statements of belief';
- the complexity of the Bill, and uncertainty in how parts of the Bill will operate in practice, which seem likely to make it harder for people to enforce their rights and harder for people (including small business) to ensure compliance with the law;
- the legal and practical effect the Bill may have on the ability of employers to provide for a safe and healthy work environment;
- the normative impact of these changes, which privilege religious expression over other values, including freedom from discrimination; and
- by overriding State and Territory laws, the departure from the decades-long, bi-partisan commitment to maintaining complementary Commonwealth and State/Territory laws that allow for local variation to provide the highest level of rights protection.

These issues could be resolved with changes to align the Bill with the standard structure and content of existing anti-discrimination laws and remove provisions that are unnecessary and likely to create uncertainty. Such changes would result in a Bill that would deliver on the promise of protection from discrimination for people of faith, without undermining the rights of others.

PIAC also has concerns about other aspects of the proposed legislative package, including in relation to the creation of the position of 'Religious Freedom Commissioner' and amendments to the *Charities Act* concerning the expression of views regarding marriage.

2. Actions by corporations

PIAC notes that the Religious Discrimination Bill takes the unusual step of seeking to include bodies corporate within the scope of 'persons' protected from discrimination. Such an approach is at odds with fundamental principles of human rights (being such rights as inhere to human beings) as well as Australia's existing framework of discrimination law.

We note the detailed analysis in the submission of the Australian Human Rights Commission on this point and agree with the Commission's recommendation. While it is appropriate that bodies corporate be able to bring representative complaints (as has been done under existing anti-discrimination laws), corporations should not be able to bring complaints in their own right.

Recommendation 1: the Bill should protect only natural persons

The definition of 'person' should be removed from the Bill. A complaint of discrimination on the ground of religious belief or activity should only be able to be made by natural persons.

3. 'Reasonableness'

Clause 8, defining indirect discrimination, should be amended to remove clauses 8(2)(d), (3), (4), (5) and (6). These provisions are unnecessary, and both complicate and potentially distort the approach to 'reasonableness' used in existing Commonwealth anti-discrimination legislation.

3.1 Unnecessary provisions

In determining 'reasonableness' for the purposes of indirect discrimination, it is well-established that all of the circumstances of a case are taken into account.¹

The *Age Discrimination Act 2004* (Cth) (**AgeDA**), *Disability Discrimination Act 1992* (Cth) (**DDA**), or *Racial Discrimination Act 1975* (Cth) (**RDA**) do not define 'reasonableness' or provide direction as to what matters should be taken into account in determining what is reasonable. PIAC is unaware of any problems that have arisen in the application of the indirect discrimination provisions in those Acts.

On the other hand, s 7B of the *Sex Discrimination Act 1984* (Cth) (**SDA**), provides:

- (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
 - (b) the feasibility of overcoming or mitigating the disadvantage; and
 - (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

Clause 8(2) of the Bill takes a similar approach to the SDA, but seeks to add

- (d) if the condition, requirement or practice is an employer conduct rule – the extent to which the rule would limit the ability of the employer to have or engage in the employee's religious belief or activity.

This additional paragraph is superfluous and should be removed. It specifically overlaps with cl 8(2)(a). No reason is provided in the Explanatory Notes for extracting this specific factor for consideration.

For the same reason, cls 8(3)-(6) – considered further below – are unnecessary.

3.2 Complication and distortion

The Bill also seeks to limit the circumstances in which it will be reasonable for large employers to impose standards of dress, appearance or behaviour.

¹ *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251.

It will be necessary for large employers to demonstrate that compliance with ‘employer conduct rules’ which restrict the ability of employees to make ‘statements of belief’ outside work hours is ‘necessary to avoid unjustifiable financial hardship to the employer’: cl 8(3).

In PIAC’s view, financial hardship should not be the determining factor for large employers seeking to promote values of diversity and inclusion, especially where their workplace is itself diverse, or to protect their reputation in the community where damage is not easily quantifiable in financial terms. Legitimate considerations of corporate social responsibility go well beyond financial matters and should be relevant to questions of reasonableness.

Indeed, the Explanatory Notes to the Bill recognise that ‘businesses play a significant role in setting standards of workplace culture across the country’. The Explanatory Notes suggest these provisions ‘will assist in building a corporate culture that supports religious diversity across the Australian community at large’. There is no suggestion that religious diversity is only relevant to the extent that it is reflected in financial terms. Nor is there any justification offered for why religious diversity is to be privileged over other forms of diversity.

In addition, the test of ‘necessity’ is a very high one that may impose an impossible burden on employers wishing to set standards that support values like diversity. Before introducing an ‘employer conduct rule’ that applies outside of work, employers will need to undertake complicated and potentially costly attempts to quantify a range of hypothetical circumstances that could have a financial impact on the business. It is difficult, if not impossible, to see how this could be done.

We understand the concept of ‘unjustifiable hardship’ is derived from the DDA. However, in that context, not only are all the circumstances of the case to be taken into account in determining unjustifiable hardship (not just financial matters: see s 11 DDA), but the defence is not couched in terms of necessity (see s 21B of the DDA).

A comparable test in the context of this Bill would be to provide that an employer conduct rule is not reasonable unless ‘non-compliance with the rule by employees would impose an unjustifiable hardship on the employer’. Even then, however, it is not clear why the ordinary test of reasonableness – which requires an assessment of the proportionality of the condition or requirement imposed – is inadequate or inappropriate to allow all relevant factors to be balanced.

3.3 Conscientious objection

Clauses 8(5) and (6) of the Bill seek to limit the imposition of ‘health practitioner conduct rules’: namely, rules applying to health practitioners relating to the provision of services that would restrict conscientious objection on religious grounds.

‘Health service’ has a very broad definition. It is not limited to services that are inherently likely to raise ethical issues – for example, relating to abortion. Rather, the provisions apply to services of any kind provided in the practice of a long list of health professions, including occupational therapy, optometry, pharmacy and podiatry.

For the Bill to foresee a role for conscientious objection in the provision of services by an optometrist or podiatrist, for example, suggests that these clauses seek to protect the outright refusal of services to people from certain groups. It is not limited to apparently controversial medical issues such as abortion or euthanasia. This is inconsistent with a commitment to non-discrimination in public life – including in the provision of health services.

There is no evidence that a standard test of reasonableness is unable to resolve potential conflicts between the religious beliefs of health practitioners and rules that may be imposed relating to the provision of health services.

Recommendation 2: apply a standard test for ‘reasonableness’

The Bill should apply a standard test for reasonableness. Clauses 8(2)(d), (3), (4), (5) and (6) should be removed.

3.4 Corresponding amendments to ‘inherent requirements’

The ‘employer conduct’ and ‘conscientious objection’ provisions in cl 8 are also reflected in the ‘inherent requirements’ provisions in cl 31 relating to employment. Consistent with our recommendations in relation to cl 8, we recommend the removal of cls 31(6) and (7).

Recommendation 3: apply a standard test for ‘inherent requirements’

The Bill should apply a standard test for inherent requirements. Clauses 31(6) and (7) should be removed.

4. Exclusion for religious bodies

4.1 ‘Reasonably regarded’

Clause 10 provides that a religious body does not discriminate under the Act if they engage ‘in good faith, in conduct that may reasonably² be regarded as being in accordance with’ religious doctrine, tenets, beliefs or teachings.

By requiring only that conduct ‘*may reasonably be regarded* as being in accordance with’ religious doctrine etc, cl 10 requires only a relatively loose connection with religious belief.

This can be compared to equivalent exceptions in the *Sex Discrimination Act* (s 37) and *Age Discrimination Act* (s 35), which require that conduct ‘conforms to’ religious doctrine or ‘is necessary to avoid injury to... religious susceptibilities’.

While an exclusion clause in some form is necessary to ensure that religious institutions are able to operate in certain circumstances to the exclusion of people who are not of the same religion, it is important that such an exclusion is carefully and narrowly defined to avoid unintended consequences and a negative impact on the rights of others.

We are therefore concerned that cl 10 gives an excessively wide discretion to large religious organisations, including charities that have welfare-related purposes and are large employers and service providers, to discriminate – for example in relation to those to whom they provide services.

In PIAC’s view, the exemption should only apply where a person engages, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of a religion.

² It is worth noting that the Bill, in this context, does not attempt to limit or direct how an assessment of ‘reasonableness’ is to be made. This is in contrast to the position taken in relation to cl 8 – set out above - and highlights the unnecessary nature of cls 8(2)(d), (3), (4), (5) and (6).

Recommendation 4: require conduct to ‘conform to’ religious doctrine

Clause 10 of the Bill should apply only where a person engages, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of a religion.

4.2 ‘Religious Bodies’

The Bill again departs from the form used by the SDA to provide for exemptions for ‘religious bodies’. Section 37(1)(d) of the SDA provides for the exemption to apply - beyond those involved in activities connected to religious observance as set out in ss 37(1)(a)-(c) - to religious bodies ‘established for religious purposes’.

Clause 10(2) of the Bill, however, is not limited to bodies that are established for a religious purpose. It will apply to any educational institution, registered charity or ‘other body’ (other than a body that engages solely or primarily in commercial activities) that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

In PIAC’s view, the inclusion of ‘other bodies’ in the clause gives it an excessively broad scope. Consistent with the SDA, cl 10(2)(c) should apply only to ‘other bodies’ that are established for religious purposes to ensure that this broad exemption is limited in its application.

Recommendation 5: limit to bodies ‘established for religious purposes’

Clause 10(2)(c) of the Bill should apply only to ‘other bodies’ that are established for religious purposes.

4.3 Expulsion of students

We are particularly concerned that cl 10 applies to religious schools so as to permit them to disadvantage or expel students – for example if a student decides in the course of their schooling that they no longer share the faith of the religious body, but nevertheless wish to complete their education in the school.

This is contrary to the approach taken in Queensland, Tasmania, the ACT and the Northern Territory, under which schools can discriminate at the time of enrolment, but not once a student is enrolled. The approach in these jurisdictions strikes an appropriate balance between the needs of schools and students and recognises the special vulnerability of children.

Clause 10 should therefore be amended to exclude cl 18(2) (prohibiting discrimination against students of an educational institution) from its operation. This could be done, for example, by amending cl 10(3) to read: ‘This section does not apply to section 18(2), relating to discrimination in education. It otherwise applies despite anything else in this Act’.

Recommendation 6: protect students from disadvantage or expulsion

Clause 10 should apply only to discrimination by educational institutions against students at the point of admission. It should not allow schools to deny or limit students’ access to benefits, expel students or subject them to detriment.

5. 'Statements of belief'

PIAC opposes clause 41 of the Bill in its entirety. The proposed section is unprecedented, not required to protect people of faith from discrimination and undermines the protection of others from discrimination.

Clause 41 exempts certain 'statements of belief' from all Commonwealth, State and Territory anti-discrimination protections (including adverse action protections under the *Fair Work Act*), s17(1) of Tasmania's *Anti-Discrimination Act*, and any other law prescribed by the regulations.

While clause 41(2) excludes conduct which is in bad faith, malicious, harassing, vilifying or incites hatred or violence, it will leave people without protection from a significant range of conduct that is demeaning, humiliating, intimidating, insulting, ridiculing or offensive and may otherwise constitute discrimination.

For example, cl 41 as currently drafted would operate to bar claims by:

- a single mother who, when dropping their child off at day-care, is told by a worker that they are sinful for denying the child a father;
- a transgender person who is told by a person providing goods or services, that their gender identity is not real, or 'against the laws of God';
- a woman who is told by a manager that women should submit to their husbands; or
- a student with a disability being told by a teacher that their disability is a trial imposed by God.

Whether such conduct or statements would give rise to a complaint of discrimination will depend upon a range of factors, including the particular context in which the conduct occurs. Some of the views suggested above may be rare and we might hope their expression would be unlikely. We do not accept, however, that all claims relating to such statements should be barred.

Our law currently recognises that people should be entitled to undertake their employment, access goods and services, and engage in other designated aspects of public life, without unfavourable treatment because of protected characteristics. The Bill, however, seeks to take the extraordinary step of overriding these protections in Commonwealth, State and Territory laws.

This is particularly significant in the context of our national anti-discrimination law regime, which is based on coexisting laws at the Commonwealth and State/Territory level. This is a regime that has enjoyed support from successive governments over decades and has allowed improvement over time in the protection of rights by respecting local variations. The Bill would fracture this system and constitute a radical and unwarranted step.

It appears that this change is proposed on the basis of two cases (one against the Catholic Archbishop of Hobart in 2015, one against the Baptist Union of Queensland in 2018) in which statements relating to same-sex marriage were the subject of complaints. It is very difficult to see how either case could have succeeded given the exceptions in both jurisdictions to protect free speech. It seems that the parties in both cases came to the same view, as neither claim proceeded to court.

PIAC does not accept that two discontinued claims in well over two decades justifies the Commonwealth's intervention in this exceptional way.

5.1 Practical consequences for complaints

The Bill's attempt to override State and Territory laws also raises the practical problem identified by barrister Simeon Beckett: namely that in creating a federal defence to a claim of discrimination, cases that could otherwise be determined in a State/Territory tribunal will need to be decided by a court.³ This will include a determination of whether a statement falls within the definition of a 'statement of belief', as well as whether such statement is malicious, likely to harass, vilify etc.

This removes one of the primary advantages of determination by state or territory tribunal – that it is a no-cost/low-cost arena – and thereby increases the financial impact of this legislation on complainants and respondents, including small business. Parties will also be unable to have their matters resolved in the less formal and more timely setting of a tribunal.

This consequence highlights the damage that this Bill would do to the established framework of protection from discrimination that exists in Australia.

Recommendation 7: existing discrimination protections should be preserved

Clause 41 should be removed from the Bill.

6. Complexity, uncertainty and normativity

PIAC is very concerned that the Bill's novel provisions and complicated drafting introduce unnecessary complexity which will make it harder for people to enforce their rights and harder for people (including small businesses) to ensure compliance with the law. This would undermine the potential benefits of a *Religious Discrimination Act* and weaken our existing discrimination laws.

PIAC is also concerned about the legal and practical effect the Bill may have on the ability of employers to provide for a safe and healthy work environment. As explained above, this results in part from the complexity and uncertainty created by the novel (and unnecessary) provisions of the Bill, as well as the specific impact of provisions that will apply to employers.

PIAC also emphasises the negative normative impact of these changes. The Bill in its current form would send a message that statements of religious views are 'exempt' from anti-discrimination laws (even if the legal effect of cl 41 is ultimately more qualified) and more generally that religious expression is to be privileged over freedom from discrimination.

For most people, justice is best found a long way from courts, tribunals and lawyers. Clear and principled statements of the law are the best way to ensure that justice is served. This Bill fails to achieve that.

7. Other issues

PIAC also has concerns with two of the provisions contained in the other two Bills released by the Attorney-General for public consultation.

³ Simeon Beckett, 'Key protection in religious discrimination bill is fatally flawed', *Sydney Morning Herald*, 18 September 2019.

7.1 Creation of a Religious Freedom Commissioner

The Religious Discrimination (Consequential Amendments) Bill 2019 creates the position of Religious Freedom Commissioner within the Australian Human Rights Commission. We note that the issue of creating a new Commissioner was explicitly considered by the Government's Religious Freedom Review, which stated:⁴

While the AHRC should play a greater role in bringing together people of diverse faiths and educating and engaging with the public about issues related to religious freedom, the Panel is of the view that the appointment of an additional commissioner is not necessary. The Panel noted that the Human Rights Commissioner already has the capacity to perform many of the functions suggested for a Religious Freedom Commissioner.

The Religious Freedom Review then recommended that:⁵

Recommendation 19. The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

PIAC believes there is merit in this recommendation, and does not believe the case has been made for a new stand-alone Commissioner.

At the same time, we note that, despite the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, there remains no equivalent Commissioner for Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) issues.

Based on ongoing legal, social and other forms of discrimination against lesbian, gay, bisexual, transgender and intersex Australians (including the homophobia and transphobia that arose because of the same-sex marriage postal survey), PIAC believes there is a more compelling case for creation of a SOGIESC Commissioner.

Recommendation 8: further consideration of Commissioners within the AHRC

Based on Recommendation 19 of the Religious Freedom Review, the Government should reconsider the necessity of a Religious Freedom Commissioner. If this position is created, the Government should also create a Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) Commissioner.

7.2 Amendments to the Charities Act

The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 would amend section 11 of the *Charities Act 2013* (Cth) to include the following:

(2) To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a ***disqualifying purpose***. [emphasis in original]

⁴ *Religious Freedom Review Final Report*, May 2018, pp 102-103.

⁵ *Ibid.*

PIAC believes this amendment is unnecessary. It has now been almost two years since the amendment to the definition of marriage, and there is no evidence of any charity being de-registered or otherwise sanctioned by the Australian Charities and Not-for-profits Commission in relation to this issue. Even if there were fears among some religious organisations at the time of the *Marriage Act* reforms, these fears have proven to be unfounded.

PIAC does not support singling out views about one particular social issue for protection in this way – and it is inappropriate to single out one particular view (*anti*-marriage equality) about one particular social issue (especially as there was no equivalent protection of *pro*-marriage equality charities before 2017). All charities should be subject to the same test for disqualifying purpose in section 11, noting that it already includes the following note:

The purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose.

Recommendation 9: remove amendment to the Charities Act

Clause 4 of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, which would amend the disqualifying purpose provisions of the Charities Act 2013, should be removed.

8. Accessibility of consultation

PIAC is aware of a number of concerns that have been raised concerning the accessibility of the consultation process to people with disability. The concerns include the lack of accessible format materials for people with cognitive impairment and the lack of audio format for consultation materials. These issues may have excluded people with disability from the consultation process and warrant an extension of the time taken for consultation to ensure fair participation on these important issues.

Recommendation 10: extension of time to allow fair participation

Further time should be allowed for consultation on the Bill to allow fair participation for people with disability.

9. Conclusion

PIAC is grateful for the opportunity to provide this submission and would welcome the chance to provide further information or clarification on the issues we have raised.