



## **Executive Summary**

### **Comments on the Exposure Draft of the *Religious Discrimination Bill 2019* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019***

25 September, 2019

ICS believes that the Religious Discrimination Bill (RD Bill) has much to commend it. However, there are a number of amendments and improvements that should be made in order to bolster the protection of freedom of religion and to meet Australia's obligations under Article 18 of the *International Covenant on Civil and Political Rights*.

Key issues addressed within our submission include the following 18 points:

**1. *The definition of 'statement of belief'***

Clause 41 of the Bill provides that a statement of belief does not constitute discrimination, if it is subject to certain conditions. The nebulous test of 'good faith' may be highly subjective, imposing inherently secular (and possibly inappropriate) considerations. Furthermore, having judges determine what is 'reasonably regarded' as being in accordance with the doctrines and tenets of a religion violates the separation of church and state, and puts power in the hands of those ill-equipped to make theological judgements. It is not necessary to require this exercise in order to provide appropriate limitations on unacceptable religious manifestation. Instead, adopting the approach in the United Kingdom and Canada, a court should look to the 'genuineness' of a belief.

**2. *Statements of belief do not constitute discrimination cl 41***

The protection to 'statements of belief' is commendable, however if an employer can still discipline or sack an employee for a statement of belief, the protection offered by

the RD Bill is weak. Additionally, the words ‘harass’ or ‘vilify’ should be omitted from the Bill or defined to ensure that they aren’t interpreted in a way that effectively undermines the protection.

**3. *A narrow interpretation of what constitutes a “religious activity”: cl 5***

The words ‘religious activity’ in clause 5, may be read too narrowly and be restricted to activities such as prayer and worship, but not to the manifestation of religious moral or ethical views. The definition of religious activity should be amended to cover any conduct to which the religious person has a genuine conviction (with appropriate limitations being dealt with through other means).

**4. *Application of the comparator test: cl 7***

Existing anti-discrimination law provides that if a person who acted in the same way without religious reasons would have been treated the same, an employer has not discriminated. In application, this will seriously undermine the protections provided. The Bill should avoid this outcome.

**5. *Defining “lawful religious activity”: cl 5***

This definition at clause 5 permits the Bill’s protections to be held hostage to the whims of States or council by-laws that render a religious activity unlawful, thereby removing federal discrimination protection for the activity. As a result the Act would not protect against a State Government that imposed limitations on a religious school in its funding contract; or a State Government ban on homosexual ‘conversion therapy’, even where that ban limits affirmation of traditional Biblical views by religious ministers to their congregations; or a State Government requiring that faith-based aged-care providers facilitate euthanasia on their premises.

**6. *The reasonableness requirement for indirect discrimination: cl 8***

The reasonableness criterion for indirect discrimination in cl 8(1)(c) is not consistent with the relevant international law. One way to do this may be to provide that a limitation on the expression of a religious belief or activity is not ‘reasonable’ if it fails to satisfy the test of being “necessary” to ensure public safety, order, health or morals, or the fundamental rights of others.

**7. *The employer conduct rule: cl 8(3)***

The provisions under clause 8(3) of the RDA introduce a presumption that regulation of the speech of employees by small employers and government is reasonable, whether within or outside their workplace. Similarly, the provisions introduce a presumption that regulation of the speech of employees of large employers within the workplace is reasonable. These presumptions should be expressly displaced. Furthermore, any assessment of the financial hardship on the employer must exclude the anticipated and actual responses of third parties who threaten to impose hardship. This makes the law victim to the whims of boycotts by sponsors, suppliers, customers etc in order to assure a particular legal outcome. There is reason, however, to provide specific direction in respect of the regulation of the speech of employees and this submission provides a detailed framework.

**8. *The exception for inherent requirements: cl 31***

Clause 31 of the RD Bill permits discrimination against a person in employment (cl 13) or partnerships (cl 14) or in relation to qualifying bodies (cl 15) or by employment agencies (cl 17) where, because of the person's religious belief or activity, the person is unable to carry out the "inherent requirements" of the employment, partnership, profession, trade or organisation. This exception could permit an employer, qualifying body etc to circumvent the RD Bill by simply making it an inherent requirement of a position that the person acts to affirm various matters that contradict his or her religious beliefs in circumstances where this has nothing to do with the core business of the employer. ICS recommends that the exceptions only apply to chaplaincy roles that are employed by non-religious employers (such as in hospitals, prisons or schools) or where being a religious adherent is an actual requirement of the role.

**9. *Application to corporations and other unincorporated bodies***

The Bill does not make sufficiently clear that the full range of corporate and unincorporated bodies may take the benefit of its protections. As the Bill protects against discrimination 'on the ground' of a religious belief, it must also displace existing case law which holds that such bodies cannot adopt a religious belief. It must also clarify that such a body can incur compensable damage as a result of religious discrimination.

***10. Unprecedented Exclusion of Religious Bodies that Undertake “Commercial Activities”: cl 10***

The Bill excludes from the exemption provided in clause 10 any body that engages solely or primarily in commercial activities. This exclusion has no precedent in any anti-discrimination law in any jurisdiction in Australia (or any Anglophone democracy). It will prevent a large swathe of the charitable religious sector from being able to ensure that its character remains identifiably religious. Drawing such a line in the RD Bill will also set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law. Drawing a distinction that provides an exemption for employment, but not for goods and service supply, is not an alternative.

***11. Freedom of Religion Commissioner: cl 45***

The RD Bill should include more detailed appointment criteria, in order to ensure that the appointee to this position is a person who understands religion and the importance of advocating for religious freedom. If this would violate s 116, the position should not be created.

***12. Federal RDA must be expressed to override State and Territory laws which are directly inconsistent***

It must be made clear that if a State or Territory Act does not protect religious freedom to the same extent as the Federal RDA, the Federal RDA must prevail to the extent of that inconsistency. The coverage of Section 60 of the RDA allows legislation to operate concurrently but does not provide a mechanism for explicit ‘overriding’.

***13. Compelling a person to act against their conscience is discrimination***

Religious persons or entities should not be required to engage in, or affirm, acts which are contrary to their genuine religious beliefs. In light of the watering-down of standard-form religious discrimination legislation by judicial interpretation overseas, to offer adequate protection, the Bill should clarify that such compulsion is religious discrimination.

#### **14. *Health Practitioner Conduct Rule***

The provisions regarding objections by health practitioners (subparagraph 8(5) and (6)) do not extend to religious hospitals. This does not provide sufficient protection to faith-based health institutions from religious discrimination claims. To the extent that the protections to health practitioners are also made subject to weak State laws, they are inadequate.

#### **15. *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019: cl 4***

Clause 4 of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* amends section 11 of the *Charities Act*, to provide that advocating for a traditional view of marriage will not lead to the loss of a charity's tax status. That Bill has not, however, amended section 6 of that Act, which requires that charities be for the 'public benefit'. Courts have removed the tax exemption of charities that have a traditional view of marriage or sexuality in other common law countries for not satisfying the 'public benefit' requirement. This is an area of the law where developments overseas are uniquely influential. Section 6 must also be amended.

#### **16. *The Equal Status of Religious Freedom with Other Human Rights***

The Expert Panel on Religious Freedom recommended that the Government amend the objects clauses in existing Commonwealth anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion. However, the current drafting of the proposed objects clauses only refers to the 'indivisibility' of human rights, rather than their 'equal status'. The two terms do not parallel each other in protection and thus, the legislation fails to give accurate effect to the Expert Panel's recommendation.

#### **17. *A Religious Freedom Act***

A Religious Freedom Act would be based on the external affairs power to meet Australia's international obligation to implement ICCPR Article 18. The history of weak purposive interpretation that the High Court has given to religious freedom under section 116 of the Constitution, demonstrates the need for such an Act. Under such an Act, any council or government agency would have to justify its administration of

policy. The Act would also act as a defensive shield against practices which unduly burden religious freedom, unless they are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

***18. Issues not addressed in the Religious Discrimination Bill***

The following issues are not addressed in the RD Bill. Some of them are currently with the Australian Law Reform Commission, which is now not due to report until late 2020. Others are not addressed at all under the government's agenda:

- parental rights in relation to schooling (in particular, the right of parents to remove their children from teaching that is not in conformity with the parents' beliefs and morals pursuant to Art 18(4)); and
- the rules for allowing schools and religious bodies to manage their affairs in accordance with their faith under the Sex Discrimination Act and other discrimination laws.

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