



31 January 2020

Kingsford Legal Centre

Submission to the Religious Freedom Bills – Second Exposure Drafts

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission to the Australian Government's second exposure drafts of a package of legislation on religious freedom. This submission refers to KLC's submission to the first exposure drafts (**enclosed**).

Summary of Recommendations

This submission makes the following recommendations:

1. Remove clause 11 from the *Religious Discrimination Bill* (**the Bill**)
2. Alternatively, if clause 11 is to remain in the Bill, narrow clause 11 to align with section 37 of the *Sex Discrimination Act 1984* (Cth) (**the SDA**)
3. Remove clauses 32(8)–(11) of the Bill
4. Remove clauses 33(2)–(5) of the Bill
5. Convert the notes on clauses 8(6)–(7) of the Bill into substantive provisions
6. If the Bill is to include provisions for conscientious objection, the Bill must also require health practitioners to disclose to patients when they are making a conscientious objection and give patients appropriate referrals
7. Adopt an Equality Act to provide a consistent national framework for discrimination protection
8. Adopt a Charter of Human Rights that comprehensively enshrines human rights protections
9. Increase funding for the Australian Human Rights Commission (**AHRC**)

About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Bayside Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2019 KLC provided 248 advices in the area of discrimination, which was over 14% of all advice provided. We have extensive experience in providing legal help to people who have experienced religious discrimination and for whom there is presently no effective remedy in NSW.¹

General comments on the Bill

It is disappointing that the Australian Government has not taken the opportunity to improve the Bill, but has instead released a second exposure draft that is even worse than the first.

The second exposure draft largely fails to address the concerns raised by KLC in response to the first exposure draft. The Bill maintains a piecemeal approach that increases the complexity of discrimination law, fails to appropriately respond to the problem of religious discrimination and weakens the overall level of discrimination protection in Australia. The second exposure draft has moved even further away from Australia's existing framework for discrimination protection than the first exposure draft, broadening already overbroad exceptions from discrimination law.

We reiterate our concerns in response to the first exposure draft. This submission addresses key changes in the second exposure draft.

¹ The protections for "ethno-religious" groups in the *Anti-Discrimination Act 1977* (NSW) are limited in scope and do not provide effective protection against religious discrimination.

Religious bodies

KLC maintains that the government should make laws to protect people from religious discrimination without weakening existing discrimination protections for marginalised people. As clause 11 creates a right for religious bodies to discriminate against others, it should be removed. Alternatively, if clause 11 is to remain in the Bill, it should be narrowed to align with the more limited exceptions in section 37 of the SDA.

The definition of a “religious body” should not be expanded to specifically include registered public benevolent institutions in clause 11(5)(b). Public benevolent institutions that do not engage solely or primarily in commercial activities are already included in the definition of a religious body in clause 11(5)(c). Clause 11(5)(b) therefore creates a right to discriminate for public benevolent institutions that engage solely or primarily in commercial activities. This is distant from the Bill’s purported object of eliminating religious discrimination and would significantly weaken the discrimination protection available to marginalised people. It would set up an arbitrary regulatory framework in a commercial setting by applying different regulations to religious and non-religious bodies, without clear justification.

Recommendations:

1. **Remove clause 11 of the Bill**
2. **Alternatively, if clause 11 is to remain in the Bill, narrow clause 11 to align with section 37 of the SDA**

Conduct to avoid injury to religious susceptibilities

The reference to “conduct to avoid injury to the religious susceptibilities of adherents” in clause 11(3) of the Bill is broader than the equivalent reference in section 37 of the SDA. Clause 11(3) of the Bill requires that the conduct must be “in good faith”. This is much broader than the requirement in section 37(1)(d) of the SDA that an act or practice must be “necessary” to avoid injury to the religious susceptibilities of adherents. Section 37(2) of the SDA further provides that the exception from sex discrimination law does not apply to certain acts or practices connected with Commonwealth-funded aged care.

Clause 11(3) is one of many ways in which the Bill increases the complexity of discrimination law by introducing different legal tests to those in existing discrimination law. If clause 11(3) is to remain in the Bill, it would be simpler and would achieve a better

balancing of rights if clause 11(3) were narrowed to align with the more limited exception in section 37 of the SDA. It would also better reflect human rights principles if exceptions from discrimination protection required consideration of reasonableness, necessity, proportionality and legitimacy of aims.

Religious hospitals, aged care and accommodation providers

It is unwelcome that clauses 32(8)–(11) of the Bill create broad work-related exceptions for religious hospitals, aged care facilities and accommodation providers. Unlike the inherent requirements exception in clause 32(2) of the Bill, the exceptions for religious hospitals, aged care facilities and accommodation providers permit discrimination against an employee or prospective employee who is able to carry out the inherent requirements of the job.

This will permit religious hospitals, aged care facilities and accommodation providers to hire a person because they have a particular religion, rather than because they are the best person for the job. It is likely to reduce employment opportunities for qualified people, who will be denied protection from discrimination on the basis of their religion. The Royal Commission into Aged Care Quality and Safety noted the need for qualified aged care workers.² It is contrary to this finding to deny protections to qualified people who seek to work in areas of great importance to the community. It is likely to negatively impact the quality and accessibility of services for vulnerable people if broad exceptions are maintained for religious hospitals, aged care facilities and accommodation providers.

The exceptions in clauses 32(8)–(11) of the Bill are especially concerning, as many religious hospitals, aged care facilities and accommodation providers receive public funding to provide social services in areas of governmental responsibility. Community members have an interest in ensuring that such services are provided by the most qualified people and that public money is not spent in a discriminatory manner.

Recommendation:

- 3. Remove clauses 32(8)–(11) of the Bill**

² *Royal Commission into Aged Care Quality and Safety* (Interim Report: Neglect, 31 October 2019) vol 1, 222.

Religious camps and conference sites

KLC can identify no rational justification for the exceptions for religious camps and conference sites in clauses 33(2)–(5) of the Bill. These unique exceptions add unnecessarily to the complexity of discrimination law.

Hiring out religious camps and conference sites is often a commercial activity. It should be regulated accordingly. We are concerned that exceptions for religious camps and conference sites would impact disproportionately on marginalised people, particularly in regional, rural and remote Australia, where alternative venues may be limited.

Recommendation:

- 4. Remove clauses 33(2)–(5) of the Bill**

Health practitioner conduct rules

The key changes regarding health practitioner conduct rules are a step in the right direction. It is positive that clauses 8(6)–(7) of the Bill now include notes that the provisions do “not have the effect of allowing a health practitioner to decline to provide a particular kind of health service, or health services generally, to particular groups of people”. Given the importance of this principle for access to health services, KLC considers that it would be more appropriately stated as a substantive provision of the Bill, rather than as a note.

Despite some improvements, the Bill’s provisions for conscientious objection remain excessively broad. The provisions continue to create avenues for discrimination and remain likely to restrict access to health services. They go much further than the provisions in existing federal discrimination law and are unwelcome in a Bill with the stated goal of increasing discrimination protection. We maintain that, if the Bill is to include provisions for conscientious objection, the Bill must also require health practitioners to disclose to patients when they are making a conscientious objection and give patients appropriate referrals.

Recommendations:

- 5. Convert the notes on clauses 8(6)–(7) of the Bill into substantive provisions**
- 6. If the Bill is to include provisions for conscientious objection, the Bill must also require health practitioners to disclose to patients when they**

are making a conscientious objection and give patients appropriate referrals

Definition of “vilify”

By defining “vilify” as meaning “incite hatred or violence towards the person or group”, the Bill has introduced another new legal test, further fragmenting and complicating discrimination law. Rather than creating new legal tests for religious discrimination, it would be desirable to move towards a consistent national framework for discrimination protection. Accordingly, we repeat our recommendation that Australia adopt an Equality Act to harmonise discrimination protection.

Recommendation:

- 7. Adopt an Equality Act to provide a consistent national framework for discrimination protection**

Objects clause

KLC supports the express statement in clause 3(2)(a) of the Bill that human rights have equal status in international law. It is disappointing that several substantive provisions of the Bill fail to implement this principle.

It remains the case that the objects of clause 3 would be better met by the adoption of a Charter of Human Rights that comprehensively enshrines human rights protections, including freedom from discrimination on the basis of religion.

Recommendation:

- 8. Adopt a Charter of Human Rights that comprehensively enshrines human rights protections**

Courts’ role in matters of faith

KLC submitted to the first exposure draft that what “may reasonably be regarded” as being in accordance with a religion was too broad for the purpose of establishing exceptions to discrimination law. The second exposure draft adopts the even broader test of “what a

person of the same religion ... could reasonably consider" to be in accordance with the religion.

This broader test worsens the problems that were present in the first exposure draft. It takes the test in the Bill further away from the test in section 37 of the Bill and further away from a requirement that conduct actually be in accordance with a given religion. The test is of an uncertain scope, creating difficulties for community members in knowing their rights and responsibilities. It is unclear how a person could get appropriate evidence of "what a person of the same religion ... could reasonably consider" to be in accordance with the religion. Such a broad and uncertain test has the potential to generate substantial litigation, increasing the workload of under resourced courts and adding to delays in the federal court system.

Other matters: The Australian Human Rights Commission

KLC reiterates that the AHRC is critical to promoting human rights, including freedom from discrimination on the basis of religion. The Bill will significantly increase the workload of the AHRC, despite the fact that the AHRC has faced numerous budget cuts. The government has not made clear how it will adequately resource the AHRC to perform additional functions in this context and must increase funding to the AHRC.

Recommendation:

9. Increase funding for the AHRC

Conclusion

KLC continues to support laws to protect people from religious discrimination, without weakening existing discrimination protections for marginalised people. The Bill fails to achieve this objective. We urge the government to continue consultation with a view to integrating protection against religious discrimination within a consistent national system for discrimination protection. Religious discrimination, and discrimination generally, are too important not to get right.

Yours sincerely,

KINGSFORD LEGAL CENTRE



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