Religious Freedom Draft Exposure Bills

1. I refer to your memorandum of 30 August 2019 in relation to the Religious Freedom Draft Exposure Bills.

2. The Law Council is seeking input into a submission to the Attorney-General’s Department regarding the exposure drafts of the following three Bills: Religious Discrimination Bill 2019; Religious Discrimination (Consequential Amendments) Bill 2019; and Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (“the draft Bills”).

3. The Society notes the draft Bills are intended to implement key recommendations of the Ruddock Review, conducted by the Hon Philip Ruddock in 2018. The Society understands that the Law Council will be drawing on its previous submissions, including its submission regarding the Ruddock Review to inform its response to the draft Bills.

4. The Society has considered the draft Bills and provides comment below with respect to the Religious Discrimination Bill 2019 (“the Bill”). These comments have been informed by the Society’s Human Rights Committee and Aboriginal Issues Committee.

Consistency with existing anti-discrimination laws

5. The Society notes the Religious Discrimination Bill seeks to introduce legislative protections for religious belief and activity that reflect those already afforded to other protected attributes under federal anti-discrimination law. For example, the areas of public life covered by the Bill, such as discrimination in work, education, access to premises, goods, services and facilities, accommodation, sport and Commonwealth laws and programs are consistent with the coverage that is provided by other components of the federal anti-discrimination law regime.

6. While a consistent approach with respect to protected attributes is supported, the Society notes the recommendation made by the Law Council in its submission regarding the Religious Freedom Review. The Law Council endorsed the recommendation of the United Nations Human Rights
Committee\(^1\) that existing federal anti-discrimination provisions should be consolidated into a single, comprehensive enactment, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion.

7. The Society considers that a more holistic approach to anti-discrimination laws, such as the approach recommended by the United Nations Human Rights Committee, should be pursued.

**Definition of religion or religious belief or activity**

8. Clause 5 of the Bill defines religious belief or activity as: holding a religious belief; or engaging in lawful religious activity; or not holding a religious belief; or not engaging in, or refusing to engage in, lawful religious activity.

9. The Society considers the definition aligns with Australia’s obligations under international human rights law, including Article 18 of the International Covenant on Civil and Political Rights. Furthermore, the Society’s Aboriginal Issues Committee considers traditional Aboriginal customs and beliefs are also captured by the definition, thereby providing the same protections to Aboriginal people as non-aboriginal people under the Bill.

**Objects of the Act**

10. Clause 3(2) of the Bill provides that in giving effect to the objects of the Act, regard is to be had to (a) the indivisibility and universality of human rights; and the principle that every person is free and equal in dignity and rights.

11. However, clause 3(2) may be at odds with other provisions in the Bill including the those relating to employee conduct rules, health practitioners conduct rules and statements of belief, which seek to elevate the status of freedom of religious belief or activity above the status of other important rights and freedoms, including those currently protected under federal, state and territory anti-discrimination laws.

**Counselling, promoting a serious offence**

12. Clause 27 of the Bill provides that it is not unlawful to discriminate against a person on the ground of a person’s religious belief or activity if a reasonable person, having regard to all the circumstances, would conclude that, in expressing the belief the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence.

13. The Society notes that serious offence is defined as an offence involving harm (within the meaning of the *Criminal Code*), or financial detriment, that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a State or a Territory.

14. The Society questions why the definition of serious offence has been limited to offences that are punishable by imprisonment of 2 years or more, given that there are a range of less serious offences under state and federal laws, such as offences relating to distributing offensive indecent material or public nuisance offences, that could be directly relevant to the policy objectives underpinning this exemption. The Society suggests that this provision could be extended to cover any offence giving rise to harm under the *Criminal Code*.

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\(^1\) Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102\(^{nd}\) session, UN Doc CCPR/C/AUS/CP
New provisions

15. The Bill proposes some new provisions around health practitioner conduct rules and employer conduct rules. The Society is concerned that these provisions may give rise to legal complexities, practical difficulties and may undermine other important rights and interests. The Society takes the view that further consideration and consultation is required with respect to these matters.

Health practitioner conduct rule

16. The Bill provides that the conditions, requirements or practices imposed on health practitioners which would have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing a health service on the basis of their religious belief or activity are not reasonable in certain circumstances for the purposes of the test of indirect discrimination, and therefore will constitute unlawful discrimination.

17. The Society considers the Bill could potentially operate to override state laws or policies designed to ensure patients health care needs are not compromised as a result of the religious views of health practitioners, particularly with respect to patients in rural and regional areas where access to health care services may be severely limited. For example, this is an issue currently being considered in South Australia as part of the South Australian Law Reform Institute Reference into abortion laws.

18. While it is important to protect health care practitioners from discrimination on the grounds of religious belief, the provisions in the Bill that set out the general test for indirect discrimination are considered to be sufficient to guard against most examples of policies or conduct rules that would otherwise force employees to provide services that are contrary to their religious belief.

19. If a different or more targeted approach to ‘reasonableness’ is required with respect to the provision of health care services, it is suggested that further consultation is undertaken.

Employer conduct rule

20. Subclause 8(3) provides that an employer conduct rule imposed, or proposed to be imposed, by a relevant employer which would have the effect of restricting or preventing an employee from making a statement of belief outside of work hours is not reasonable unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer. An employer is a ‘relevant employer’ at a particular time in a financial year if the employer has, or had in the previous financial year, revenue of at least $50 million.

21. The Society considers that the proposed provisions add significant legal complexity to the reasonableness test and give rise to practical challenges for employers that meet (or may potentially meet) this definition. The provisions may also create challenges for compliance and enforcement bodies including the Australian Human Rights Commission and the proposed new Religious Freedoms Commissioner.

22. The Society suggests the practical implications of the proposed provision require further consideration. Furthermore, the Society questions whether the provision, which places unjustifiable financial hardship at the centre of the legal test for reasonableness, is consistent with the stated objects of the Bill. If the key policy objectives are to protect against discrimination on the grounds of religious belief or activity, it makes sense to apply a reasonableness test that takes into account such matters, including the nature and extent of the disadvantage experienced by the person being discriminated against, and the feasibility of overcoming that disadvantage.
23. Furthermore, the Society considers there needs to be a more holistic consideration of the provisions, in particular, their broader impact on members of the Australian community. Under the Bill, a person may say something that constitutes unlawful discrimination (for example on the basis of a person’s sex, gender, marital status, disability or even race) and it will be lawful provided it was made in good faith and can be reasonably regarded as being in line with the teachings of a religion. While the provision states that malicious statements or those that harass, vilify or incite hatred or violence will not be exempt under this provision, this would appear to be a very high threshold to meet. This provision places those who may be subject to discriminatory statements based on religious beliefs (for example, members of the LGBTIQ+ community) in a position of further vulnerability.

24. This provision places those who may be vulnerable to the discriminatory statements based on religious beliefs (for example, members of the LGBTIQ+ community) in a position of further vulnerability.

25. In addition, further consultation and consideration should be undertaken with respect to the provisions contained in the Bill, which either directly or indirectly seek to override existing federal, state or territory laws. Given that such provisions have significant legal consequences, perhaps a more prudent approach would be to include such matters within the terms of reference of the Australian Law Reform Commission’s current Review into the Framework of Religious Exemptions in Anti-discrimination Legislation.

Yours sincerely

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