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SUBMISSION ON THE SECOND EXPOSURE DRAFT OF THE RELIGIOUS DISCRIMINATION BILL 2019

The ACT Human Rights Commission is pleased to provide a submission on the second exposure draft of the Religious Discrimination Bill 2019. We suggest that it should be read together with the submission that we provided in October 2019 on the first exposure draft of the bill.¹

In this submission, the Commission seeks to highlight the following concerns with the bill as currently drafted:

- Right of corporations to make complaints of religious discrimination as 'associates';
- Statements of beliefs and the overriding of State and Territory discrimination laws; and
- Deeming provisions that prejudge the assessment of reasonableness of employee codes of conduct of large private sector employers, and rules dealing with conscientious objections by health practitioners.

The ACT legal framework

The ACT has a comprehensive human rights framework in place to protect freedom of religion and to protect against discrimination and vilification on the basis of religious conviction:

- The ACT *Human Rights Act 2004* (HR Act) provides statutory protection to a broad range of fundamental human rights drawn from international human rights law (principally the International Covenant on Civil and Political Rights), including religious freedom. This includes the right to have or to adopt a religion or belief and demonstrate one's religion or belief in worship, observance, practice and teaching in public or in private, either individually or as part of a community. It also protects against coercion or restraints that limit freedom of religion.
- The ACT *Discrimination Act 1991* (Discrimination Act) protects an individual's right to hold a religious belief and practice that belief free from discrimination and vilification. Section 4AA of the Discrimination Act requires that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute to the extent possible while remaining consistent with

¹ The Commission's submission on the first exposure draft of the bill is available here: <https://hrc.act.gov.au/wp-content/uploads/2019/10/ACT-HRC-submission-Religious-Freedom-Bills.pdf>

the objects of the Act (which includes eliminating discrimination and promoting the right to equality under the HR Act) and human rights under the HR Act.

The main object of the ACT Human Rights Commission, which is established under the *Human Rights Commission Act 2005* (ACT), is to promote the human rights and welfare of people in the ACT. The Commission has distinct statutory functions that give effect to, support, or are otherwise relevant to fundamental human rights, including religious freedom. Among other things, the Commission can receive and conciliate complaints about religious discrimination or vilification that arise under the Discrimination Act.

As set out in our original submission, the Commission supports the extension of Commonwealth anti-discrimination laws to include express protection against discrimination on the basis of religious belief, provided that the reforms are consistent with Australia's international human rights obligations. These obligations are reflected in the human rights regime currently operating successfully in the ACT.

Key areas of concern

i) Complaints by corporations as 'associates'

The Commission welcomes that the second exposure draft has removed the definition of 'person' from the bill, which would have expressly enabled corporations to make complaints of religious discrimination in their own right, and clarified in the explanatory notes that it is not envisaged that non-natural persons, such as corporations, can hold or engage in religious beliefs or activities.

However, we have significant concerns that new cl 9, which will enable 'persons' who are associated with individuals who hold or engage in a religious belief or activity to make complaints of religious discrimination in their own right, will effectively reintroduce the ability of corporations to be direct beneficiaries as rights holders under the Act.

Clause 9 provides that:

This Act applies to a **person** who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.

In accordance with the meaning given to the term 'person' in s 2C of the *Acts Interpretation Act 1901* (Cth) – which provides that expressions used to denote persons generally, such as person, include a body politic or corporate as well as an individual – the Explanatory Notes make clear that cl 9 is intended to protect 'a person – including a natural person or body corporate – from discrimination on the basis of their association with a natural person who holds or engages in a religious belief or activity'.²

² Explanatory Notes, para 203.

As highlighted in the Commission's original submission, enabling corporations to make discrimination complaints in their own right is markedly at odds with established principles under international human rights law, whereby only natural persons qualify as beneficiaries of human rights. Under the International Covenant on Civil and Political Rights (ICCPR), legal persons are denied standing and direct protection as beneficiaries of the guaranteed rights, including the right to non-discrimination on the grounds of religion.³ This understanding is reflected in the ACT HR Act, which only allows a victim, that is, is a natural person who is directly affected or who is at risk of being directly affected by a human rights breach, the ability to enforce their rights under the Act.⁴

The Commission remains opposed to the extension of standing to legal persons. It is recommended that cl 9 be amended to make clear that only individuals can make complaints of religious discrimination in their own right as associates of a person with a religious belief.

ii) Statements of belief

The Commission notes that minimal changes have been made to the provisions dealing with 'statements of belief' in the bill, and some of the proposed amendments may further exacerbate concerns about their potential impact on social cohesion. In particular, the Commission is concerned that the range of statements of belief that would not constitute discrimination for the purposes of any anti-discrimination law would appear to be broader than that provided under the original bill.

While we welcome that the bill and explanatory notes seek to clarify that the protection from other discrimination laws only applies to the statement itself and does not extend to related conduct, we remain concerned that the complexity of pursuing these matters as a discrimination claim given the new defence provided for by cl 42 will create an additional barrier to people seeking redress for acts of discrimination that are currently unlawful in the ACT.

As noted in our original submission, any unfavourable treatment arising from a 'statement of belief' must meet the test for legitimate differential treatment to be consistent with the right to non-discrimination under international human rights law. The protection of religious freedom in article 18 of the ICCPR and the right to freedom of expression in article 19 of the ICCPR do not extend to an automatic entitlement for particular expressions to be quarantined from being assessed against reasonableness, in accordance with existing protections afforded under the right to non-discrimination.

The Commission remains strongly opposed to enabling State and Territory laws to be overridden in this way. We can see no cogent reason why these laws should stand apart from all other federal anti-discrimination laws, which explicitly do not exclude or limit the operation of State or Territory laws that are capable of operating concurrently. We reiterate our view that cl 42 should be removed from the bill.

³ Optional Protocol to the International Covenant on Civil and Political Rights, December 19, 1966, into force, March 23, 1976, 999 UNTS 302

⁴ *Human Rights Act 2004 (ACT)*, s 40C.

iii) Employer conduct rules

The Commission notes that cl 8(3) in the second exposure draft clarifies that the obligation not to restrict employees' religious expression in their own time does not extend to employee conduct that takes place 'in the course' of their employment. This is a welcome clarification, in so far as it enables the appropriate regulation of employee conduct in a marginally wider range of contexts, such as work social functions.

However, the Commission remains concerned by the overall approach of deeming certain conditions under which employer rules that restrict religious expression would not be considered reasonable for large employers. An employer conduct rule imposed by a relevant employer (defined as a non-government employer with a revenue of at least \$50 million in the previous financial year) that would have the effect of restricting or preventing an employee from making a statement of belief outside work duties is not reasonable unless compliance with the rule is necessary to avoid unjustifiable hardship.

As we have previously noted, it is well established under international human rights law that a difference in treatment on prohibited grounds, including religion, will be directly or indirectly discriminatory if it is not justifiable in the following terms: (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved. The deeming provisions remove any requirement to consider these criteria, which are standard to any assessment of indirect discrimination in existing State and Territory anti-discrimination laws.

We remain of the view that the provisions dealing with the separate treatment of employer conduct rules by private sector businesses with annual revenue of more than \$50 million should be removed.

iv) Conscientious objections by health practitioners

The Commission notes that the provisions dealing with conscientious objections by health practitioners have been subject to some changes:

- We welcome that the addition of notes to clarify that the provisions are not intended to permit a health practitioner to refuse to provide a particular kind of health service to particular people or group of people, and that any objection must be aimed at the procedure, not the person.
- While we welcome that dentists, radiologists, occupational therapists, optometrists, physiotherapists, podiatrists and Aboriginal and Torres Strait Islander health practices have been removed from the list of health professions that are entitled to make a conscientious objection, we, however, note that the list is still very broad as it retains medicine, midwifery, nursing, pharmacy and psychology.
- We are also concerned by the expansion of the definition of 'conscientiously object' in cl 5(1) to include health practitioners *participating* in the provision of a health service. This revised definition risks further reducing clarity regarding the scope of these provisions. Particularly in a small jurisdiction, where many services are provided by publicly funded faith based

organisations these provisions may have a chilling effect both on the services available and on the communities willingness to access those services in fear of statements of belief in the provision of those services or refusal of service on conscientious objection grounds.

We remain of the view that the operation of cl 8(7) – which provides that, in the absence of a state or territory law providing for conscientious objection by a health practitioner, a health practitioner conduct rule will not be reasonable unless compliance with the rule is necessary to avoid an unjustifiable impact on the ability to provide the health service, or on the health of a patient – continues to lack sufficient clarity. In particular, we are concerned that provision of health services that may be currently the subject of guidance in professional codes of conduct, but which are not dealt with in under state or territory law, would be at risk of being deemed to amount to religious discrimination. This issue remains unaddressed in the bill. We consider that consistency with human rights standards requires these matters to be assessed on a case-by-case basis for reasonableness, as is currently the case in the ACT.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely,



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