



South Australian Rainbow Advocacy Alliance

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Dear Attorney General,

This submission about the draft *Religious Discrimination Bill 2019* (the Bill) is being made on behalf of the South Australian Rainbow Advocacy Alliance (SARAA), a not-for-profit incorporated association that advocates for the rights and wellbeing of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) South Australians.

We support the objects of the Bill to eliminate discrimination and to ensure equality before the law. As members of the LGBTIQ community we know how important this equality is, and we applaud the goal of creating a fair and equitable Australia where everyone is equal regardless of who they are or what they believe. After reviewing the Bill and consulting with LGBTIQ South Australians, we have serious concerns and objections about the Bill in its current form and we do not believe that it appropriately achieves the stated objects.

Our primary concern is that the scope of the Bill is too broad. In an attempt to create protections from discrimination on the basis of religious belief, the Bill effectively provides a license for people of faith to discriminate against other Australians through statements of belief and by creating a “two-tiered” system of anti-discrimination legislation where the rights of religious Australians outweigh the rights of non-religious Australians. In doing so, it provides a “sword” with which people of faith can attack others. We instead believe that anti-discrimination legislation should be a “shield” that protects from discrimination, but does not harm others.

After consulting with LGBTIQ South Australians, SARAA recommends that one of the two following actions are taken:

1. The Bill is amended in the following ways:
 - a. In Clause 5, add definitions for “good faith”, “malicious”, “harass” and “vilify”, and specifically identify Aboriginal and Torres Strait Islander beliefs as a type of “religious belief or activity”;
 - b. Amend Clause 8 so it does not undermine the ability of employers to provide inclusive workplaces for employees and customers;

- c. Remove Subclauses 8(5) & 8(6) to ensure no one is disadvantaged or harmed through the introduction of conscientious objection provisions;
 - d. Add reasonableness tests, especially in relation to Subclause 10(1);
 - e. Exclude religious charities from Clause 10 if they provide government funded services to the community;
 - f. Remove Clause 41 in its entirety;
 - g. Remove the appointment of a Religious Freedoms Commissioner and continue to refer religious discrimination complaints to the Australian Human Rights Commission under the existing system.
2. The Bill is referred to the Australian Law Reform Commission for a more detailed review to ensure that no one is disadvantaged or harmed in the introduction of the Bill.

Please read on for a full analysis outlining our recommendations.

Positive aspects of the Bill

SARAA supports several aspects of the Bill, most notably the objects of the Bill as outlined in Clause 3. As far as practicable, we don't believe that any Australian should be discriminated against for who they are or what they believe, provided that they are not impeding the rights and wellbeing of other community members.

In particular, we acknowledge that the people most likely to experience religious discrimination in Australia (either directly or indirectly) are religious minorities, and we stand in solidarity with them in seeking protection under the law. We believe that, with appropriate amendments, this Bill can be beneficial to people of faith without causing harm to other groups such as the LGBTIQ community (remembering that many LGBTIQ people are also people of faith).

We generally support Part 3 of the Bill in its entirety. We consider this Part to largely mirror other anti-discrimination legislation, and we support the right for people of faith to be protected from discrimination in areas such as employment, education, access to good and services, and in acquiring and maintaining accommodation.

Concerns about the Bill

Despite our general support for the Bill, we believe that several amendments are required. These are outlined over the following pages.

Clause 41 provides a license to discriminate in the name of religious beliefs

Legislating that “statements of (religious) belief do not constitute discrimination” goes far beyond the scope of existing anti-discrimination legislation and creates an unreasonable and unnecessary double standard in Australian law.

Clause 41 explicitly provides that a statement of belief will not constitute discrimination under any law listed in the *Fair Work Act* as an anti-discrimination law. That list includes the *Equal Opportunity Act 1984 (SA)*. This means that Clause 41 effectively ‘strikes out’ the protections against discrimination on other grounds – including sexual orientation and gender identity – when a statement of belief is made. As a result, a LGBTIQ complainant in South Australia would no longer be able to bring a complaint to the Equal Opportunity Commission in South Australia if the discriminatory conduct was in the form of a “statement of belief”. The complainant is also likely to be excluded from protection at the federal level due to Clause 41 ‘striking out’ the protections offered in other federal discrimination laws such as the *Sex Discrimination Act 1984*.

Although Subclause 41(2) does outline exemptions to the breadth of Clause 41, the thresholds of “malicious”, “harass”, “vilify” or “inciting hatred or violence” are unreasonably high, especially when it is considered that this Bill directly undermines the thresholds of “offend, insult, humiliate or intimidate” as found in Section 18C of the *Racial Discrimination Act 1975* and Subsection 17(1) of the *Anti-Discrimination Act 1998* of Tasmania.

In effect, Clause 41 means that if two people – one religious and one an atheist – were to make identical remarks that are seen as discriminatory under other State, Territory or Federal legislation, the religious person would be permitted to make the statement but the atheist would be engaging in discrimination.

We therefore fully oppose Clause 41. We strongly believe it creates an unfair “two-tiered” anti-discrimination system that undermines all other anti-discrimination legislation and privileges religious beliefs over other beliefs. This goes far beyond protecting people of faith from discrimination, and instead provides people of faith with a license to discriminate provided they do so in the name of their religious beliefs.

Clause 8 undermines efforts to create inclusive workplaces

According to Paragraph 126 of the explanatory notes for the Bill, Subclause 8(3) “will assist in building a corporate culture that supports religious diversity across the Australian community at large.” We respect and encourage the goal of religiously diverse workplaces, however this should not come at the expense of other forms of diversity.

In order to comply with Clauses 8, 13 and 41, an employer cannot prevent an employee from making statements of belief that may be distressing, exclusionary, hurtful or derogatory towards colleagues. Such statements will not constitute discrimination unless they meet the threshold of being “malicious”, etc. as outlined in our assessment of Clause 41. What happens, though, if these statements of belief are derogatory towards colleagues, clients or customers but do not meet these high thresholds?

Subclause 8(2) implies that an employer would need to balance the rights of the employee to make statements of belief against the potential harm that those statements could cause and that they would need to act in a way that avoids discriminating against employees on the basis of their religious beliefs wherever possible. Furthermore, Clause 13 would potentially make it illegal to dismiss an employee for making derogatory comments if those comments were statements of religious belief.

This completely undermines the rights of other employees to be free from discrimination in the workplace, and once again provides leniency for religious employees to make discriminatory comments that would see other employees disciplined or dismissed. As with Clause 41, we strongly oppose this double standard.

Subclauses 8(5) & 8(6) jeopardise access to healthcare for LGBTIQ people and others

Subclauses 8(5) & 8(6) caused great concern for LGBTIQ people we consulted with.

We are extremely concerned that the right for health practitioners to conscientiously object to providing health services will make it harder for people to access healthcare. For LGBTIQ people this relates directly to sexual and reproductive health in areas such as contraception, testing and treatment for sexually transmitted infections, and access to assisted reproductive technology (ie IVF). It also relates to pharmacists refusing to provide a transgender or intersex person with prescribed hormones if doing so would be contrary to the pharmacist’s faith, or providing Pre Exposure Prophylaxis (PrEP) for HIV prevention.

Conscientious objection could also arguably apply to the provision of any health service to an LGBTIQ person or their children and would also apply for health practitioners caring for other Australians such as single mothers, divorcees, women seeking abortions or unmarried couples.

There are countless examples of conscientious objections being practised to the detriment of patients in the United States, such as situations where doctors have refused to assist women who have experienced complications from contraceptive implants, or where LGBTIQ people have been denied health services on the basis of their gender or sexuality. There is a

very real fear from LGBTIQ people that this Bill could create similar situations here in Australia.

Even when referrals elsewhere are provided, turning people away from healthcare in the initial instance still causes harm as indicated by a vast body of research (we would refer to the National LGBTI Health Alliance as the relevant peak body for further insight into this). Given that the Prime Minister has stated he wishes to eliminate the scourge of suicide from our country, we are highly concerned that Subclauses 8(5) & 8(6) will instead have the opposite effect.

Based on these concerns, we argue that Subclauses 8(5) & 8(6) must be removed completely with the control of health practitioner conduct rules instead remaining in the hands of relevant medical bodies who are better placed to make these decisions.

Government funded charities must not be allowed to discriminate

Clause 10 stipulates that if a religious body acts in accordance with its faith, their actions will not be considered discriminatory. Generally speaking, we respect this right. It makes sense that a church should be able to hire a priest who shares the same faith, for example. We are, however, concerned about how this Clause relates to religious charities, which are also defined as a religious body for the purpose of this Bill.

Throughout Australia, many (if not most) social services are provided by charities. The largest not-for-profit organisations in the country are generally church affiliated, and they often provide essential services to vulnerable members of our communities. This is certainly the case in South Australia where almost all homelessness services, for example, are provided by charities that are either directly or closely affiliated with a church.

Clause 10 would in theory allow these charities to discriminate in determining who they employ, who they assist, and how they provide this assistance. This could, for example, allow a religious domestic violence shelter to deny help to a divorced woman or allow a counselling service to practice unscientific and harmful “conversion therapy” with same-sex attracted clients. This is despite the fact that their funding is coming from State and Commonwealth governments.

We completely reject the right for government funded charities to discriminate in their provision of services and believe that the definition of “religious body” in Clause 10 must be narrowed to explicitly state that charities cannot discriminate if they are providing government funded services.

Additional definitions and clarity around reasonableness tests should be added

In addition to terms such as “malicious”, “harass” and “vilify” that were discussed previously, we believe there are other key terms that need to be defined within the context of this Bill.

Clause 10, for example, states that:

*“a religious body does not discriminate against a person under this Act by engaging, in **good faith**, in conduct that may **reasonably be regarded** as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.” (emphasis added)*

“Good faith” isn’t defined within the Bill, nor is the basis for reasonableness tests. For example, who determines whether a religious body is acting reasonably in accordance with the teachings of its corresponding religion? What one person considers to be acting “in good faith” may seem completely unreasonable to someone of a different (or no) faith. Given the subjective nature of religious belief, we suggest a specific reasonableness test is necessary.

We also pose that consideration should be given to specifically recognise Aboriginal and Torres Strait Islander beliefs under the definition of “religious belief or activity” to ensure that traditional beliefs are protected by this Bill.

A Religious Freedoms Commissioner is not required

We do not believe there is a need to appoint a Religious Freedoms Commissioner. We refer to Recommendation 19 of the *Religious Freedom Review*, in which the Panel noted that the Australian Human Rights Commission already has the capacity to address matters relating to religious discrimination.

Summary of Recommendations

The right to freedom from discrimination should exist for all Australians, regardless of who they are or what they believe. This has not been particularly controversial with existing anti-discrimination legislation, but in the current Bill it is important to ensure that the right to express one's religious beliefs does not come at the expense of the rights of other people in society, especially vulnerable communities.

After consulting with LGBTIQ South Australians, SARAA recommends that one of the two following actions are taken:

1. The Bill is amended in the following ways:
 - a. In Clause 5, add definitions for "good faith", "malicious", "harass" and "vilify", and specifically identify Aboriginal and Torres Strait Islander beliefs as a type of "religious belief or activity";
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 - e. Exclude religious charities from Clause 10 if they provide government funded services to the community;
 - f. Remove Clause 41 in its entirety;
 - g. Remove the appointment of a Religious Freedoms Commissioner and continue to refer religious discrimination complaints to the Australian Human Rights Commission under the existing system.

2. Refer the Bill to the Australian Law Reform Commission for a more detailed review to ensure that no one is disadvantaged or harmed in the introduction of this Bill.

On behalf of SARAA, thank you for the opportunity to provide this submission. We hope that the Government can find a solution that protects people of faith without harming other Australians.

We are willing to assist if further community consultation is undertaken.

Kind regards,

Matthew Morris
Chair, South Australian Rainbow Advocacy Alliance