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Freedom of Religion Consultations
Attorney-General's Department
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Dear Freedom of Religion Consultation

Thank you for the opportunity to provide submissions to the Australian Government on the proposed 'Religious Freedom Bills' (second exposure drafts).

Civil Liberties Australia (CLA) cannot support the proposed Bills in their current form.

We reach this view with considerable regret. CLA stands for people's rights. We advocate for the fundamental freedoms of all Australians in the face of increasing encroachment on those rights – in the name, for example, of 'tough on crime' policies, national security, or government secrecy. We have long advocated for better and more comprehensive protection of fundamental rights in Australian law. For this reason, we have strongly supported initiatives for a Bill of Rights, human rights charters, and other similar instruments at both the federal and state levels.

Religious liberty – as defined in international law – is one of those fundamental rights. No one should face discrimination in Australia because of their religious beliefs, or absence of religious beliefs. As such, we would have liked to be in a position to support legislation that purports to safeguard religious freedom. Indeed, we do support those elements of the Bills that protect people from discrimination. However, on careful analysis of the current exposure draft, we find that it distorts the meaning of religious freedom. It creates and legitimises new forms of discrimination, and turns a blind eye towards existing forms of religious discrimination.

In short, in the name of protecting religious freedom – an area in which neither we, nor our members, nor the Australian Law Reform Commission in its *Tradional Rights and Freedoms* report have detected any significant encroachments – the proposed law sets out limitations on the rights of Australians in relation to non-discrimination, employment, and access to health care – areas in which there are indeed serious areas of concern. This is a perverse outcome that, in our view, reflects the undue influence of a noisy and privileged minority.

We note that if these Bills are introduced into Parliament, they will likely be the subject of inquiry there, including the opportunity for public submissions. We therefore do not provide a line-by-line analysis of these draft Bills here. Instead, we summarise our key objections to the Bills.

Legitimising discrimination in the name of religion

Section 42 of the draft Religious Discrimination Bill 2019 says that a statement of belief does not constitute discrimination for the purposes of any anti-discrimination law. Australia's anti-discrimination laws have been hard won. They emerged out of a long and dark history of oppression and ill-treatment in this country of Indigenous people, LGBTI people, people with a disability, women, immigrants and others. In our view, anti-discrimination laws have achieved a balance of providing some measure of protection of the rights of these groups while, at the same time, ensuring minimal restrictions on the freedom of speech of all Australians. They set up processes of dialogue and conciliation which have promoted calm and reasonable debate.

Australia should be proud of these laws, but the current draft Bills undermine them. By allowing written or spoken statements that infringe upon the rights of marginalised groups, these draft Bills constitute a regrettable step back. CLA has seen little evidence – including in the report of the recent *Religious Freedom Review* – that any such winding back of anti-discrimination laws is necessary to safeguard religious freedom in this country.

Undermining states' rights

We note section 42(1)(b) which says statements of religious belief specifically do not contravene subsection 17(1) of the *Anti-Discrimination Act 1998 (Tas)*. In addition to the concerns above, we particularly object to this provision. Tasmanian laws were passed and given Royal Assent in accordance with parliamentary democracy in that state and proper procedures. Furthermore, the Tasmanian Supreme Court has rejected – in the case of Durston v Anti-Discrimination Tribunal (No 2) – the assertion that Tasmania's Anti-Discrimination Act infringes the right to freedom of religion under the Australian Constitution. And the Religious Freedom Review did not criticise the Tasmanian law or recommend that it be overridden in this way.

It should be up to the people of Tasmania to amend those laws as they see fit. When the Tasmanian Government itself proposed to amend the Tasmanian Act to provide a similar carve-out for religiously inspired statements, the proposal was rejected by the Tasmanian Parliament, not least because of the wide community opposition to the proposed amendment, including from religious organisations. Figures released by the Tasmanian Government – in response to a Right to Information request by CLA – showed that of the 80 submissions the Tasmanian Government received, only one supported the proposed amendments. Sixty-five submissions opposed the proposals and the remainder partially opposed them or were undecided.

If the federal government finds the Tasmanian laws to be so objectionable, it should – at least in the first instance – seek to resolve the issue through dialogue and negotiation with the state. We can find no evidence that it has sought to do so, either in direct discussion or through the Council of Australian Governments (COAG) or through the Council of Attorney-Generals (CAG).

We can only imagine that this provision has been inserted at the instigation of a very small and embittered minority who, having failed in their bid to amend the Tasmanian law, is now seeking to have the federal government override it despite the overwhelming will of

the Tasmanian people and their elected representatives. All states and territories should be very concerned about this federal intervention in their law-making powers.

Discriminating against people who do not have religious beliefs

As per section 5 of the draft Bill, a statement of belief must be a statement of religious belief. This means that two people saying or writing exactly the same words would be treated differently under the proposed law if one person's statement was inspired by religion while the other had arrived at their views independently. For example, if both made statements reasonably likely to offend, insult or humiliate women, LGBTI people, people with a disability, Indigenous people, people of a particular race, or others, the first person could get off scot-free while the other might not.

We believe this outcome is unfair and unworkable. No one should be treated more harshly because they do not adhere to any particular religion. A former Australian Attorney-General defended the right of all Australians to be bigots. At least his view was non-discriminatory; this draft Bill says only people of religious faith can be bigots.

Employer conduct rules

Section 8(3) of the draft Religious Discrimination Bill 2019 says that any conduct rule imposed by an employer on its employees is not reasonable if it restricts or prevents an employee from making a statement of belief in their own time, unless the rule is necessary to avoid unjustifiable financial hardship to the employer. The second draft of the Bill now extends this provision to the conduct rules of qualifying bodies.

CLA generally agrees that employers have gone too far in policing the words and deeds of their employees outside their work duties and in their own time. We believe this is an unjustifiable and increasingly draconian intrusion into people's privacy and freedom of speech. It is having a profound impact on the ability of working people to participate in public debate and engage in political communication. Millions of Australians are too afraid to speak up about issues that concern them; they do not participate in public meetings; they do not write to their local MPs or write submissions to parliamentary inquiries; they do not write letters to their local newspapers; they do not sign petitions. This has a negative impact on Australian democracy. This issue needs to be addressed comprehensively so as to minimise these infringements on freedom of speech.

However, section 8(3) does none of this.

- It applies only to private sector employers. If the government believes people should have more freedom to make religiously inspired statements, then why shouldn't they give this freedom to their own employees too? We can see no reason why section 8(3) discriminates against public sector employees.
- It entrenches discrimination against people who do not hold religious beliefs. Under section 8(3) an employee with religious beliefs and one without could make exactly the same statement but only the latter will run afoul of the employer conduct rules. As a result, the person without religious beliefs could be punished by their employer and could, potentially, lose their job. We can see no justification for this discrimination.

- It only applies to statements of religious belief. It gives no freedom to people to make other statements based on their personal views or political convictions.
- Section 8(3) gives freedom to employees to make statements of belief only where such statements don't cause 'unjustifiable financial hardship' to the employer. This term is unclear – what might constitute a justifiable financial hardship in such situations? But, more than this, it sets corporate profit over freedom of speech. In our view, it therefore represents an empty promise.

Employment in the hospital, aged care and accommodation sectors

Section 14 of the draft Bill makes it unlawful for an employer to discriminate against another person (including against an employee or prospective employee) on the ground of the other person's religious belief or activity. So far so good. But the draft Bill sets out a number of exceptions to this rule. Section 32(8)–(12) of the second draft of the Bill now allows hospitals, aged care facilities and accommodation providers to discriminate against employees (including prospective employees) on the basis of their religious faith if the facilities are established, directed, controlled or administered (a very wide exception) in accordance with religious doctrine.

Thus, qualified people may find themselves locked out of significant areas of employment on the basis of their belief or non-belief or other factors, even when religious belief or practice has nothing to do with the roles of the job. CLA cannot support such an exception. We can see no reason why businesses that provide services cannot meet the values and standards expected of all Australians – including by complying with anti-discrimination laws – just as we expect them to comply with tax or workplace safety laws.

(And, quietly, we wonder what is the rationale behind allowing discrimination only in these specific service areas. For example, why not allow it in a bookshop or a café established by a religious institution? Neither the overview of the draft Bills nor the report of the Religious Freedom Review gives any explanation for this. We suspect it simply reflects the lobbying of a few very powerful institutions.)

Employment in the education sector

Meanwhile, the draft Bills do nothing to address employment discrimination practised by educational facilities operated by religious institutions. Qualified teachers and other professionals whose role has nothing to do with religious instruction or the practise of religious rituals may continue to be excluded from a significant part of the educational sector. This is the case even when those institutions are receiving government support and other benefits paid for with taxation collected from all Australians.

We believe this is an area of religious freedom that the government should be giving attention to. The law in Tasmania provides a good model for what could be adopted nationally. The law there permits religious educational institutions to discriminate on the grounds of religious belief, affiliation or activity in employment, but only if religious observance or practice is a genuine occupational requirement of the position. The Tasmanian law does not permit religious educational institutions to discriminate on any other ground, including sex or sexuality.

Similarly, discrimination against students in religious educational institutions is another area where reform is necessary but, again, this is not touched on in these draft Bills. The federal Sex Discrimination Act allows religious educational institutions to discriminate against students on the basis of a range of attributes including sexual orientation, gender identity, intersex status, marital or relationship status, and pregnancy. The laws of the Northern Territory, Queensland and Victoria could provide a model for reform. They each permit discrimination on the basis of religious conviction in the provision of education. But they do not have exceptions for discrimination against students on the basis of sexual orientation or gender identity.

The school chaplaincy program

Similarly, we are also concerned that the draft Bills appear to do nothing about the religious discrimination intrinsic to the School Chaplaincy Program. In 2014, it became a requirement that funding could only be used to engage chaplains affiliated with a religious organisation. Secular counsellors who had previously been engaged under the program, including in public schools, could no longer be employed.

CLA believes it is completely inappropriate for governments to impose religious requirements on taxpayer-funded positions – particularly when there is no evidence to suggest that secular counsellors could not do the job just as well. Indeed, many school officials were quoted in the media at the time as saying secular counsellors had been performing their duties exceptionally well but could not be retained under the changed requirements. We can only imagine that these requirements were changed at the instigation of religious institutions so that funds of this lucrative program went exclusively into their coffers.

CLA considers it appalling that Australian taxpayers fund positions in state schools but may themselves be barred from filling those positions – despite being eminently qualified – simply because they are atheists or are not affiliated with a religious organisation. This is exactly the kind of unjustified intrusion into religious belief that these Bills should be doing something about.

Dangerous provisions affecting the health sector

In the name of conscientious objections, the draft Bills create dangerous new provisions that affect the standard of health care in Australia, particularly as experienced by marginalised or otherwise vulnerable people. These concerns were described in the submissions by the Australian Medical Association (AMA) and others in the consultations on the first exposure draft. We can see no evidence that these concerns have been listened to in this second exposure draft.

We support the AMA's submission that religious discrimination legislation should complement, and not undermine or override, existing anti-discrimination legislation. We are particularly concerned with provisions in the draft Bills that conflict with the medical profession's ethical and professional standards as they relate to conscientious objection. As the AMA pointed out in its submission, ethical and professional standards recognise that the conscientious objections of doctors directly affect patients, and that doctors have an obligation to minimise disruption to patient care.

Charitable benefits

Section 29 says nothing in the draft Bill would affect charitable benefits conferred on persons engaging in religious activity. Under Australian tax law, religious institutions are entitled to concessions or exemptions in relation to a range of taxes. These privileges are available to "institutions that advance or promote religious purposes" (in the words of the ATO's website) regardless of whether they carry out any charitable or welfare activities, and it is clear that many of them do not. The vast majority of activities of most religious organisations are spiritual, rather than charitable or welfare-directed.

No public purpose is served by the promotion of religious belief in a secular country like Australia – or at least none has ever been articulated. Therefore, there is no justification for this special treatment of religious institutions. Australia should hold firm to the policy that religiosity alone does not confer any special rights or privileges under Australian law. As with secular organisations, religious institutions should only be eligible for this kind of support under tax law insofar as their activities serve a defined public policy objective.

Yours sincerely

Dr Kris Klugman OAM
President

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