Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Religious Discrimination Bill 2021 and related bills

Submission to the Parliamentary Joint Committee on Human Rights

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Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are 4

Introduction 5

Clause 9 - Areas of public life in which the conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is not discrimination 6

Clause 11 - Conduct in relation to employment by religious educational institutions - overriding certain State and Territory laws 7

Clause 12 – Statements of belief 8

Clause 15 – Discrimination on the ground of religious belief or activity – qualifying body conduct rules 10

Clauses 65 and 66 – Constitutional basis 11

Conclusion 12

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review of the Religious Discrimination Bill 2021 ('the RD Bill') and related bills being conducted by the Parliamentary Joint Committee on Human Rights ('the Joint Committee').

2. The ALA expresses its disappointment at the extremely short timeframe within which submissions will be accepted by the Joint Committee. The ALA considers that, given the importance of the RD Bill and the significant human rights implications for this proposed legislation, that such a short timeframe is inappropriate. In particular, the ALA notes that combined with the timing of this review, the short timeframe causes particular difficulties for those faith-based communities who are either in the middle of significant religious festivals or about to prepare for such festivals, to respond in a meaningful manner.

3. The ALA supports providing additional protections against discrimination on the basis of religious belief or activity but is concerned that the RD Bill is flawed and cannot be supported in its current form. The ALA submits that the RD Bill will weaken existing protections for people who rely on other discrimination laws to protect them from offensive, insulting, humiliating or intimidating conduct, including women, people with disabilities, people from culturally and linguistically diverse backgrounds, and Gay, Lesbian, Bisexual, Transgender, Intersex and Queer (GLBTIQ+) people.

4. The ALA submits that the purpose of discrimination laws is to provide appropriate protection for people who may be disadvantaged by the fact that they may experience or possess a particular attribute. Legislative protection against discrimination on the basis of that particular attribute is based on a clear, well-established and evidenced-based rationale that people who possess that attribute would be otherwise disadvantaged and vulnerable to significant hardship without such protections. In other words, a major rationale for such discrimination laws is to 'level the playing field'.

5. The ALA is concerned that the Government has not presented a strong, evidence-based rationale for the need for such discrimination legislation in respect of religious belief or activity. The ALA submits that the RD Bill is not premised on the basis of addressing an identified disadvantage that is faced by the possession of the relevant attribute in the same way that other discrimination laws are.

6. The ALA notes the advice from the Joint Committee that it has resolved that it will accept submissions strictly addressing its terms of reference: that is, relating to the religious discrimination legislative package. The ALA submits that this is an unduly narrow focus and may inappropriately limit the content or number of submissions that seek to address the relationship of the issues raised by the religious discrimination legislative package to the need for further legislative protections against discrimination for GLBTIQ+ students and teachers to ensure that they cannot be expelled, removed from school or discriminated against in other ways. Further to this, the ALA strongly submits that the RD Bill should not be enacted until such appropriate legislative protections are introduced.

7. This submission will focus on the following clauses in the RD Bill:

    - Clause 9 - Areas of public life in which the conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is not discrimination;
    - Clause 11 - Conduct in relation to employment by religious educational institutions - overriding certain State and Territory laws;
    - Clause 12 – Statements of belief;
    - Clause 15 – Discrimination on the ground of religious belief or activity – qualifying body conduct rules;
    - Clauses 65 and 66 – Constitutional basis.

Clause 9 - Areas of public life in which the conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is not discrimination

8. Clause 9 of the RD Bill outlines the areas of public life in which the conduct of religious hospitals, aged care facilities and accommodation and disability service providers does not constitute discrimination under the RD Bill. The clause provides an exception for a body that undertakes the provision of aged care, hospital accommodation and disability services.

9. Clause 9(3) provides that a religious hospital, religious aged care facility, religious accommodation provider or religious disability service provider does not discriminate under

this Bill by engaging in certain conduct. According to the Explanatory Notes, this clause enables these bodies to maintain their religious ethos through decisions about staff composition, and that this is fundamental to maintaining the religious nature of these bodies. The clause provides protection for these bodies to maintain their ethos in this manner by providing that it is not discrimination to make faith-based decisions in employment and partnerships. This provision solely applies to discrimination in employment and partnerships.

10. Clauses 9(3)(d) and 9(5)(d) provide that the conduct must be in accordance with a publicly available policy issued by the religious body.

11. The effect of clause 9 is to enable such bodies to have a hiring policy that states that only adherents of the religion for that religious hospital/aged care facility/accommodation provider/disability service provider will be employed. For example, a Catholic hospital would be able to have a Catholics-only hiring policy, as long as it had a publicly available policy indicating this.

12. The ALA does not support this clause as it effectively authorises discriminatory employment policies and practices

Clause 11 - Conduct in relation to employment by religious educational institutions - overriding certain State and Territory laws

13. Clause 11 of the RD Bill provides that educational institutions are able to preference people in employment who hold or engage in a particular religious belief or activity. The preference may be given to people of any, or no, religion, as long as the preference is given in good faith and in accordance with a publicly available policy, regardless of relevant State or Territory provisions.

14. The effect of the clause is to protect the right of religious schools to positively discriminate in their employment practices. Clause 11(1)(b) provides that a religious educational institution may only preference people in employment when such conduct is in accordance with a written policy that meets the following requirements:

    i) outlines the religious body's position in relation to particular religious beliefs or activities;

    ii) explains how the position in subparagraph i) is or will be enforced by the religious body; and

iii) is publicly available, including at the time employment opportunities with the religious body become available.

15. The ALA does not support this clause as it effectively authorises discriminatory employment policies and practices in educational institutions.

16. The ALA submits that it is not appropriate for the RD Bill to override state/territory anti-discrimination laws that prohibit religious schools from terminating the employment of, or refusing to employ, teachers because of their sexuality or gender identity. The ALA submits that the only circumstances in which a religious school should be able to discriminate in employment decisions is when a particular religious belief is an inherent requirement of the role (for example, as a chaplain).

17. As noted in the introduction, the ALA submits that the RD Bill should not be enacted until appropriate legislative protections against discrimination are introduced for GLBTIQ+ students and teachers to ensure that they cannot be expelled, removed from school or discriminated against in other ways.

18. While the ALA welcomes the decision to repeal section 38(3) of *Sex Discrimination Act 1984* (Cth) ('*SDA*'), the ALA is concerned that there are other provisions in the *SDA* that enable the discrimination against staff, particularly teachers, on the basis of religion or to avoid injury to the religious susceptibilities of adherents of that religion. This includes section 37(1)(d) and sections 38(1) and (2) of the *SDA*. The ALA is particularly concerned of the potential for a positive right for educational institutions to discriminate on the basis of religious ethos under clause 11, to exacerbate these existing exemptions in the *SDA* that allow educational institutions to discriminate against staff.

Clause 12 – Statements of belief

19. Australian discrimination law operates on the basis that there are concurrent federal and state discrimination laws. Up to this point this has operated effectively, as neither has sought to override the other. However, clause 12 of the RD Bill undermines this convention by determining that a statement of belief in and of itself does not constitute discrimination for the purposes of all Federal and State/Territory anti-discrimination and equal opportunity legislation. The clause overrides all federal, state and territory anti-discrimination law to make "statements of belief" immune from legal consequences under those laws.

20. In order to gain immunity, the statement has to be a religious belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion. For non-religious people, the statement has to be of a belief that the person genuinely considers to relate to the fact of not holding a religious belief.

21. Under clause 12 a statement of belief will not be protected if it is –

    - malicious,
    - if a reasonable person would consider the statement would threaten, intimidate, harass or vilify a person or group, or
    - if the statement would promote or encourage the commission of an offence punishable by at least two years' imprisonment.

22. The ALA submits that this is unacceptable and means that the RD Bill is effectively legislating bigotry, by enabling religious statements of belief to be used as a cloak for sexism, racism, homophobia and other prejudices.

23. If this section becomes law, this appears to be the first time that a federal discrimination law will override a state/territory discrimination law.

24. The ALA is concerned that some state/territory anti-discrimination complaints will not be able to be considered by state/territory tribunals, where the respondent claims a "statement of belief" exemption. As state/territory tribunals cannot consider federal laws, these matters will now have to be heard by a state/territory court or a federal court if this provision becomes law. This will significantly increase the cost for complainants in other discrimination matters, making the complaint process less accessible.

25. The effect of this clause will be that complaints under state/territory jurisdiction in respect of discrimination on the basis of sex, relationship status, pregnancy, parental status, breastfeeding, race, age, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, will not be able to be considered by state/territory tribunals if the respondent alleges that the alleged discriminatory conduct was a "statement of belief". Whether the conduct amounted to a statement of belief would need to be considered by the state/territory court or a federal court.

Clause 15 – Discrimination on the ground of religious belief or activity – qualifying body conduct rules

26. Clause 15 prohibits a qualifying body, such as those bodies which certify or register professionals such as lawyers, teachers, accountants or health practitioners, from setting professional conduct rules that limit the ability of professionals or members of a trade or occupation to make statements of belief in their personal capacity, unless compliance with such rules is an essential requirement of the profession/trade/occupation.

27. The effect of clause 15 is that a professional association cannot discipline a member of that association for making a statement of belief, while an employer can so discipline an employee. The ALA submits that a professional association should not be subject to such a prohibition, as this does not appear in any other federal discrimination laws. This exemplifies how the RD Bill effectively privileges people of faith above people with other protected attributes under Federal discrimination laws.

28. The ALA is concerned that the standard of what is an unreasonable, unacceptable statement of belief in clause 15(3) (i.e. 'if the statement is malicious or that a reasonable person would consider would threaten, intimidate, harass or vilify a person') is excessive. The ALA is concerned that the provision provides cover for the expression of highly offensive, bigoted and insulting comments on the basis that it is regarded as an expression of religious belief. Such comments are likely to cause significant harm and distress to people, particularly young GLBTIQ+ people.

29. The ALA is particularly concerned as to how this provision will interact with the regulation of the conduct of legal practitioners, with the potential for this to undermine the paramount duty of legal practitioners to the court and the administration of justice. Rule 3.1 of the Australian Solicitors Conduct Rules (ASCR) states:

    > A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

    Similarly, rule 4(a) of the Australian Barristers Conduct Rules (ABCR) state that barristers owe their paramount duty to the administration of justice.

30. The ALA submits that clause 15 has the potential to undermine the legal practitioner's paramount duty to the administration of justice under ASCR 3.1 and ABCR 4(a). This can be illustrated by the following hypothetical example:

> *A senior legal practitioner makes a comment on a social media platform highly critical of a judge's decision in a case and that he considers the decision to be immoral and contrary to Christian teaching. He then goes further suggesting that the judge's decision reflects a lack of morality and ethics in the legal system and the judge's own moral character, and that he will be subject to a 'higher judgment'.*

31. Such a comment on social media, even in a personal capacity, could be considered as undermining public confidence in the administration of justice and contrary to the solicitor's paramount duty under ASCR 3.1. However, any professional disciplinary sanction for such a breach of the ASCRs could not be pursued if clause 15 becomes law, as the comment on social media could be considered as a "statement of belief made in a personal capacity".

32. The ALA submits that it is not appropriate for legal practitioners to be able to make statements of belief in a personal capacity which have the effect of undermining public confidence in the administration of justice, which would be contrary to the paramount duty of legal practitioners under ASCR3.1 and ABCR 4(a). The ALA submits that such conduct should always be subject to investigation and appropriate disciplinary sanctions by the respective state/territory legal regulatory bodies.

Clauses 65 and 66 – Constitutional basis

33. The ALA is concerned that there is significant doubt as to the constitutional validity of key provisions in the RD Bill.

34. The ALA notes that under clause 65, heavy reliance is placed on the constitutional external affairs power (section 51(xxix)), stating that the purpose is to give effect to Australia's obligations under several international instruments, including the *International Covenant on Civil and Political Rights* (*ICCPR*), the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *International Convention on the Elimination of all Forms of Racial Discrimination* and *ILO Conventions Number 111 and Number 158*.

35. According to the United Nations Special Rapporteur on freedom of religion and belief, there is no hierarchy of human rights and where freedom of religion (as protected by article 18 of the *ICCPR*) clashes with the right to non-discrimination and equality, or laws of general effect, the focus should be on ensuring that all human rights are protected, including through reasonable accommodation.[2]

36. This suggests that under international human rights law religious freedom cannot be used to interfere with other rights. Key provisions of RD Bill have the effect of interfering with other rights protected by the *ICCPR*. These provisions may therefore not be valid under the constitutional external affairs power as they do not give effect to Australia's obligations under the *ICCPR*.

Conclusion

37. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the review of the Religious Discrimination Bill 2021 and related bills being conducted by the Parliamentary Joint Committee on Human Rights. The ALA submits that there is a need to provide additional protections against discrimination on the basis of religious belief or activity. However, the ALA submits that the RD Bill is significantly flawed and should not be enacted in in its current form. The ALA further submits that the RD Bill should not be enacted until there are further explicit legislated protections from discrimination for GLBTIQ+ students and teachers.

Graham Droppert SC

President

Australian Lawyers Alliance

[2] United Nations General Assembly Human Rights Council. 2018. *Report of the Special Rapporteur on freedom of religion and belief*. Human Rights Council Thirty-seventh session. 26 February – 23 March 2018. A/HRC/37/49. Paragraph 81.