



August 2019

Religious Discrimination Bill – Exposure Draft

Submission Form

Date of Submission: 2 October 2019

Your details

Organisation Name: Human Rights Law Alliance Limited

Organisation Type: not for profit law firm

i.e. not-for-profit, religious institution, educational facility, etc.

If you are providing a submission on behalf of an organisation, please provide the name of a contact person

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Our ref: 19-0059



SUBMISSION TO THE ATTORNEY GENERAL'S DEPARTMENT

DATE: 2 November 2019

TO: Australian Government – Attorney-General's Department

FROM: Human Rights Law Alliance Limited

RE: **RELIGIOUS DISCRIMINATION BILL 2019 – EXPOSURE DRAFT**

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1. Human Rights Law Alliance (**HRLA**) is a not-for-profit law firm based in Canberra, ACT that represents individuals and organisations in matters involving freedom of religion and the fundamental freedoms of expression, thought, conscience and association.
 2. HRLA was originally established in 2016 within the Australian Christian Lobby to connect Australian Christians to allied lawyers in religious freedom matters.

3. In February 2019, HRLA was established as an independent law firm which takes on religious freedom matters and cases in its own right. Since establishment, HRLA has assisted in over fifty religious freedom matters.
4. In this context, HRLA provides the following submission on the exposure draft of the *Religious Discrimination Bill (2019) (Bill)*. We have included relevant case study examples which are based on actual religious freedom cases.

SUBMISSIONS

5. The core anti-discrimination provisions of the Bill follow the same structure as other Commonwealth and State discrimination legislation. The Bill seeks to prohibit both direct Discrimination (cl 7) and indirect discrimination (cl 8). As set out below, using a generic anti-discrimination regime fails to recognise the fundamental nature and unique attributes of religious freedom. As a result, the core anti-discrimination clauses of the Bill (as currently drafted) will provide limited protection for religious freedom.

Clause 7 - The Direct Discrimination Test - Comparator

6. Clause 7 of the Bill prohibits direct discrimination on the basis of religious beliefs or activities. To prove discrimination, a religious adherent must establish the following elements:
 - 6.1 that they hold a religious belief or engaged in a religious activity;
 - 6.2 who an appropriate comparison person is who is “*another person who does not have or engage in the religious belief or activity*” (**comparator**);
 - 6.3 what are the circumstances that are “not materially different”;
 - 6.4 that they have been treated ‘less favourably’ than the comparator; and
 - 6.5 that the less favourable treatment is ‘on the ground’ of the Applicants’ religious conviction.
7. Using a comparator formulation for direct discrimination is a poor method of protecting intangible rights like religious freedom.
8. The very attributes that form part of the religious conviction are likely to be included as part of the circumstances that are “not materially different” which effectively hollows out the protection supposed to be afforded by this clause of the Bill.
9. Case law for other protected attributes has established the difficulty of constructing appropriate comparators and the difficulty of determining what attributes are to be included as “not materially different”.¹

¹ *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62

CASE STUDY 1**CHRIS & MARY**

Chris and Mary* are a WA couple who applied to become respite foster carers for children between the age of 0-5 and were promptly rejected and labelled as “unsafe” by the agency due to their traditional Christian beliefs about gender and sexuality. Chris and Mary said they would love any foster child who was placed with them, but that they couldn’t affirm or promote a sexual identity that conflicts with their Christian convictions. Chris and Mary have been traumatised by the way the foster care agency has treated them and are taking legal action.

PROBLEM: Using the direct discrimination regime in clause 7, Chris and Mary would be unsuccessful with a direct discrimination claim, despite being able to clearly show that the agency rejected their application because of their Christian beliefs on gender and sexuality. Under clause 7 of the Bill, Chris and Mary would have to first construct a hypothetical comparator (say an atheist applicant who does not hold Christian beliefs on sexuality and Gender) and then determine whether they would be treated differently. A Court is likely to determine that the “not materially different” circumstances would include Chris and Mary’s views that they could not affirm or promote an LGBT identity. This would include the very content of their Christian conviction in the comparison. A Court would determine that the agency would not treat a Christian who cannot affirm LGBT identities differently than an atheist who cannot affirm LGBT identities, so direct discrimination is not established. Chris and Mary, and any other parents with traditional Christian beliefs about sexuality and gender would be excluded from the foster care system and there would be no protection against direct discrimination using a direct discrimination regime.

SOLUTION: There is no solution unless a radically different regime of protection of religious freedom rights is adopted more suited to their protection. Using a comparator regime has inherent flaws that will make it ineffective. To try and lever religious freedom rights into a discrimination framework just doesn’t work.

Clause 8 - The Indirect Discrimination Test - Reasonableness

10. Clause 8 of the Bill purports to protect against indirect discrimination on the basis of religious belief or activity. However, discrimination on the basis of religion is permissible if it is “reasonable” under clause 8(1)(c). Reasonableness is far too low a bar for allowing discrimination and inconsistent with the clearly articulated principles of Article 18 of the *International Covenant on Civil and Political Rights*.
11. Clause 8(2) sets out four generic and broad criteria for Courts to determine whether indirect discrimination is reasonable. These criteria for “reasonableness” are inconsistent with, and fall far

short of, the balancing clauses in Article 18(3) of the IPCC and the Siracusa Principles² that set out the principles for balancing religious freedom rights. This would set a far lower bar to excuse discrimination than is acceptable in international law. It will not effectively protect religious adherents from indirect discrimination.

12. The four criteria specified in clause 8(2) to test whether discrimination is “reasonable” are so broad, vague and generic that Courts will be given a wide latitude to water down the protections given to religious freedom as they have regularly done in other jurisdictions.

CASE STUDY 2



Felix Ngole (UK)

Felix Ngole was a social work student at the University of Sheffield and a devout Christian. In 2014, he posted Bible verses about homosexuality on a public Facebook page of a US news agency as part of a political debate. Sheffield University accused Ngole of breaching its student code of conduct and expelled him from the university. He appealed through a University hearing and two committee appeals and then to the High Court. The High Court used balancing criteria similar to those specified in clause 8(2) of the Bill to determine that the University’s suppression of Felix Ngole’s rights was reasonable. Ngole was subsequently successful in the UK Court of Appeal in 2019, four years after the event.

PROBLEM: A university student should never be kicked out and deprived of an education and a career just for posting bible verses on the internet. Yet, the UK High Court used a similar set of principles as proposed in clause 8(2) to do just that to Felix Ngole. Fundamental rights of freedom of expression and religion need a higher level of protection and a test for acceptable infringement must be set at a higher bar than “reasonable”. Courts have shown a ready willingness to trample fundamental religious freedoms where the balancing test is set at a low standard.

SOLUTION: Clause 8(2) of the Bill needs to be amended to define “reasonable” in accordance with Article 18(3) of the IPCC and the Siracusa Principles as was a recommendation of the Ruddock Review into Religious Freedom.

Clause 5 - Definition of “Religious Belief or Activity”

13. The definition of “religious belief or activity” in clause 5 of the Bill is largely undefined.
14. Religious activity, absent definition, is likely to be defined narrowly by Courts to be restricted to private personal observances of religious worship.

² *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, United Nations Economic and Social Council, 28 September 1984

15. **Solution.** The definition of “religious activity” should be defined to ensure it covers both worship, practice and teaching of religion in public and private, individually and communally as prescribed by Article 18 of the ICCPR.
16. Religious activity only attracts protection if it is “lawful”. “Lawful” is undefined. This term requires definition, as it would allow Courts to determine that State and Territory laws and regulations, local government by laws and even policies and codes of conduct promulgated under statute and regulation, will be able to make an otherwise lawful religious activity unlawful.
17. **Solution.** “Lawful” should be defined as being that which does not constitute a criminal offense punishable by a prison sentence.
18. Any other religious activity that is not criminal but which is contrary to public safety, order, health, morals or the fundamental rights and freedoms of others will be excluded by balancing provisions in clause 8(2) if it is properly constructed to include Article 18 of the IPCCR and the Siracusa Principles.

Clause 5 - Definition of “Statement of Belief”

19. Clause 5 defines a statement of belief to include that a statement of a belief must “*reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion*”. This formulation of wording needs to be amended to reflect Australian case law (both in this definition and other places that it appears in the Bill), as it invites the Court to assume theological authority over what constitutes a religion and what is a belief that accords with that religion.
20. Linking the definition of a “statement of belief” to a “religion” is immediately problematic. The Christian “religion” as an example consists of many denominations and divisions, Catholic, Orthodox and Protestant, traditional and progressive, etc. Each of these divisions in turn have various denominations such as Baptist, Pentecostal, Anglican, Presbyterian, Evangelical, Reformed, etc. There are very few statements of belief which will be universally held by all adherents to the Christian religion. The same will be true for Muslims and other faiths.
21. Secondly, it invites the Court to decide the validity of the belief within a particular religion. This is inappropriate for Courts to do.
22. Lord Nichols at para 22 of the UK Case *Williamson v. Secretary of State for Education*³ has set out what the principle should be for determining what constitutes a statement of belief:

“When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: ‘neither fictitious, nor capricious, and that it is not an artifice’, to adopt the felicitous phrase of the Jacobucci J in the decision of the Supreme Court of Canada in Syndicat Northcrest v Anselem (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief on the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion

³ [2005] UKHL 15, [22]

protects the subjective belief of an individual. As Jacobucci J also noted, at p.28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.”

23. In *The Scientology* case in Australia’s High Court, Mason A.C.J. and Brennan J state clearly the difficulty that courts face in intruding upon ‘sacred’ ground. Courts are not equipped to make theological determinations and if they are to determine the content or tenet of a religion, they should be guided by those who adhere to the religion in question. Murphy J in the same judgment states that, “The truth or falsity of religions is not the business of officials or the courts.”, and that, “...it is not within the judicial sphere to determine matters of religious doctrine and practice.”⁴
24. In *The Scientology Case* Mason ACJ and Brennan J further state that,
*“What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for his freedom to believe would be impaired by restriction upon conduct in which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.”*⁵
25. **Solution.** The definition of “statement of belief” subparagraph (iii) should be deleted and replaced with “*the belief is not fictitious, capricious or an artifice and the person genuinely holds the belief.*”

CASE STUDY 4 - COBAW



CHRISTIAN YOUTH CAMPS LIMITED

The Supreme Court of Victoria found that a Christian Youth Camp provider in Victoria had discriminated against a LGBT+ youth organisation because they refused an application to use the site on the grounds of their religious convictions. It was held, despite the choice coming from their religious beliefs, that they could not claim the religious exemptions under the Equal Opportunity Act.

PROBLEM: In the Cobaw case, the Court was required to determine whether CYC’s religious convictions on LGBT+ issues conformed to the doctrines, tenets, beliefs and teachings of the religion. The Court was required to determine the theological content of the beliefs of CYC which Courts have said is outside of the expertise of Courts.

⁴ *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, [6]-[7].

⁵ *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, [14].

SOLUTION: Adopt an amended “statement of belief” definition consistent with the Scientology Case as above.

Clause 41 – Statements of Belief do not constitute Discrimination

26. Clause 41 of the Bill purports to protect statements of belief from allegations of discrimination. If this clause is amended appropriately, it could provide some adequate protection.
27. This clause is limited in scope and only protects against cases where activists pursue discrimination claims against Christians who express their beliefs publicly.
28. However, statements that might “harass” or “vilify” are not protected by clause 41. The intent of this clause is understood and is intended to prevent a religious adherent from using religious beliefs as a cover for abuse and defamation.
29. However, the use of nebulous terms like “harass” or “vilify” is problematic and will remove the protection for any genuinely held belief that is out of step with the fashionable ideology in Australian society. Only benign statements of belief will attract any certain protection by clause 41.
30. Any statement of orthodox Christian beliefs on questions of life (abortion and euthanasia) and, even more so, identity (sexuality and gender) is immediately decried as misogynist and/or phobic and/or hateful and offensive.
31. Any time religious freedom issues are discussed or debated in the media, brand-new research appears like clockwork asserting that the mere discussion of these issues is causing harm to various interest groups and making them feel unsafe.
32. A statement of belief cannot lose protection because it hurts someone’s feelings. Thus, the terms “harass” and “vilify” need to be removed or given robust definitions that impose an objective test and require persistent conduct of a serious nature, not just mere offense.

CASE STUDY 5



ARCHBISHOP JULIAN PORTEOUS

Archbishop Julian Porteous became the focus of prominent media controversy after a discrimination complaint was filed against him because he expressed the traditional Catholic doctrines of marriage. A Tasmanian transgender person filed the complaint of discrimination over a pamphlet containing the traditional Catholic view on marriage after it was circulated by the Archbishop to Tasmanian Catholic Schools. The complainant eventually dropped the claim.

PROBLEM: While clause 41 overrides State anti-discrimination law, it would be arguable that the statements of the Archbishop constitute “harassment” or “vilification” and thus avoid protection because they offend LGBT activists.

SOLUTION: “harassment” and “vilification” should be removed or be given specific definitions which impose an objective test and which set a high bar for what constitutes conduct that disentitles protection. Article 19 of the ICCPR sets out an appropriate balancing test for necessary restrictions on freedom of speech.

33. Clause 41 does not protect many of the Australian Christians whose religious freedom is under attack just because of genuine statements of belief in regulated professions or by their employers. These Christians would need to proceed under the general anti-discrimination provisions of clause 7 and 8, both of which are problematic as set out above.
34. Conceptually, the freedom to express personal religious beliefs free from penalty should be provided with a high level of protection. Religious people should be free to speak about deeply held convictions and opinions without fear of threat to their jobs and this freedom is fundamental to a free society. Speech should be met with speech, not with legal action or threats to career. Where an expression of religious belief is deemed offensive or outmoded or hurts a person’s feelings, then offended persons can oppose those ideas where they are expressed.
35. Accordingly, clause 41 should be extended to protect groups like regulated employees (doctors, dentists, lawyers, academics, teachers, students) who express statements of belief in their personal time from adverse action by qualifying bodies and regulatory authorities.

CASE STUDY 6



PETER

Peter* was a doctor in QLD who had complaints made about him to the Medical Board over personal posts on a social media platform about traditional Christian beliefs on sexuality and gender. Without notification to Peter of any problematic posts, the Medical Board started an investigation into Peter’s social media use. The investigation questioned whether Peter’s personal posts promoted the health of the community and wellbeing of individual patients. Peter rejects the (anonymous and unclear) accusations of breaching any policy. The proceedings were discontinued after legal assistance was provided.

PROBLEM: Peter’s job was threatened by the Medical Board for expressing unpopular statements of religious belief. Religious adherents should be protected from regulators except for when they engage in actual conduct that is discriminatory, not merely statements of belief. Peter is one of many health practitioners who have spotless professional records and yet are subjected to investigation, censure and sometimes deregistration for expressing statements of belief. This shouldn’t happen.

SOLUTION: clause 41 should be extended to provide that statements of belief do not constitute any breach of regulatory statutes and regulations (such as the Health Practitioner Regulation National Law).

Clause 8(3) – Unreasonable Conditions for Statements of Belief

36. Clause 8(3) protects statements of belief by employees in their own personal time from action by large private employers (with revenue of \$50m plus).
37. Clause 8(3) provides that discrimination is reasonable if a large private employer can show that the rule is needed to avoid “unjustifiable financial hardship”. This proviso should be deleted. This would weaponise the clause for activists to pressure sponsors and commercial partners of employers (who are already motivated to engage in virtue signalling) to remove offensive employees at threat of withdrawing funding. This has happened in Australia in many cases.

CASE STUDIES 7 & 8**STEPHEN**

Stephen Chavura was an academic at Macquarie University who had never been accused of discrimination, abuse or inflammatory speech on LGBT+ issues. In 2017, activists publicly pressured Macquarie University to fire Dr. Chavura because he was a director of the Lachlan Macquarie Institute, a Christian political training organisation. Activists claimed that Dr. Chavura’s position at LMI conflicted with the University’s support of LGBT+ issues. Dr. Chavura received no support from university governance or management.

**WHITE MAGAZINE**

White Magazine is a company that was forced to shut-down due to the omission of same-sex content, and the company’s refusal to take a public political stance on the issue. LGBT+ activists pressured advertisers to boycott White Magazine, and as a result of the campaign White Magazine was forced to cease publication.

PROBLEM: If Macquarie University was a private entity, activists would have been able to pressure commercial partners of the University to threaten commercial sanctions if Stephen wasn’t fired. Macquarie’s discrimination would be protected by clause 8(3). The White Magazine case shows that activists will target sponsors if given the chance. Clause 8(3) will be an invitation for them to do so where they object to the religious convictions of an employee of that company.

SOLUTION: clause 8.3 should be amended to remove the words “*unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer*”.

38. The freedom to personally communicate religious beliefs is a fundamental right, so statements of belief should attract the broadest protection possible and all balancing provisions should only

restrict it as far as necessary. There is no reason why an employer should be able to impose draconian rules on employees and how they manifest their religion in their own time unless absolutely necessary.

39. There is no reason why clause 8(3) should only protect employees of large private employers and not regular employees who express their views in their own personal time. It should also extend to employees of government bodies.

CASE STUDY 9



IAN

Ian Shepherd is a teacher in the NT who was subjected to a formal investigation by the Department of Education for his private social media posts about his religious beliefs after complaints by activists. The investigation was long and stressful for Ian, with the overarching threat of possible termination for his personal posts that linked to Christian news articles about same-sex marriage, sexuality, and gender issues. Ian has never been accused of discrimination or mistreatment of students. After legal assistance was provided, the Department of Education dropped its investigation.

PROBLEM: Ian is a public sector employee and would not be covered by clause 8(3) of the Act and cannot use the shield that it affords to employees of large private employers. Ian's employers at the Department of Education are unable to defuse pressure from activists by referring to a clear protection of Ian's right to personal statements of belief in the Bill and could easily impose an employer conduct rule prohibiting Ian from expressing personal beliefs.

SOLUTION: clause 8(3) should be extended to all employers, not just large private employers.

40. Further, clause 8(3) as currently drafted may lead to unintended restrictions on other employees' expressions of their faith. It would be open to a Court to infer that because clause 8(3) only extends to rules made by large employers about private statements of belief that all rules made by other employers about making statements of belief in any other context are reasonable discrimination. That would be bad.
41. This interpretation could actually restrict employee rights to expression of religious beliefs more than currently and would be a real step backwards. Many Christians face a hostile workplace where even banal expressions of Christian belief in watercooler conversations result in complaints and discipline.
42. There are many circumstances in the workplace where an employee is not performing work for the employer and where casual conversations and interactions occur. While employees are free to talk about and express opinions about sports, politics, current affairs and personal lives in this

context of the workplace, many employees come under attack if they express religious beliefs especially if they do not accord with the fashionable ideology prevalent in Australian society.

43. Ideally, the rights of employees to express religious beliefs should not be unnecessarily suppressed or limited even within the workplace and clause 8(3) should clarify that employer conduct rules can only apply to the time when employees are undertaking work duties, regardless of whether the employee is in the workplace or out of the workplace.

CASE STUDY 10 & 11



JANE

Jane* is a senior executive in the public service. She has voiced her support for traditional marriage and the positions taken by Margaret Court and Israel Folau in casual workplace conversations but has not expressly shared her Christian faith. Other employees mock Jane's position and have complained that her statements make them feel 'unsafe'. In her workplace, Jane faces growing ostracism and has been subject to performance management in her role. She is finding the work environment increasingly hostile and will probably quit her job or take redundancy.



SAMANTHA

Samantha* is a tertiary lecturer in WA who was ordered to never talk about her religion at work. In her workplace Samantha engaged in informal conversations about Christianity with staff and students. She addressed students using the name of God and Jesus as a curse word by saying "Do you know him? Because I know him." Her employer issued Samantha with a formal written warning and threatened her with discipline and even a psychiatric assessment for discussing her religious beliefs with students and staff members in workplace conversations.

PROBLEM: Samantha and Jane are public sector employees, so clause 8(3) of the Bill does not protect them. Employees and employers have reacted in a hostile manner to reasonable workplace interactions. They would need to bring an indirect discrimination claim which is subject to a low bar "reasonableness" test. These employees should be protected by clause 8(3).

SOLUTION: an additional subclause should be added to clause 8(3)(b) by adding the words in **bold**:

- (b) would have the effect of restricting or preventing an employee from making a statement of belief **inside or outside the workplace** at a time when the employee is performing work on behalf of the employer;

Clause 10 – Religious Bodies may act in accordance with their faith

44. Clause 10 of the Bill attempts to protect religious bodies who operate in accordance with their religious beliefs but only from religious discrimination claims under the Bill by a person who considers that they have experienced religious discrimination.
45. Clause 10 will not protect religious bodies from allegations of discrimination under other anti-discrimination Acts or under State anti-discrimination legislation which is currently under consideration by the Australian Law Reform Commission at the request of the Attorney-General and will report back next year. Care needs to be taken that the rights of religious organisations to operate in accordance with religious convictions including in relation to selecting appropriate staff is protected.
46. Additionally, under clause 10, Christian Schools can only engage in conduct that “may reasonably be regarded” as being in accordance with their doctrines, tenets, beliefs and teachings. The Court is given power to determine whether beliefs are “reasonably” part of doctrines and tenets. As set out above in this submission, this formulation of wording needs to be amended as it invites the Court to assume theological authority over what constitutes a religion and what is a conduct that accords with that religion. This is problematic for reasons already set out.
47. Clause 10 does not apply to religious bodies that engage solely or primarily in commercial activities. This proviso should be removed. Provided that a body is conducted in accordance with religious convictions and is a charitable body, there is no reason to include or exclude it depending on whether it is engaged in commercial activities.
48. Clause 10 of the Bill will not protect religious bodies who are pursued under State anti-discrimination legislation and should be amended to provide that protection extends to discrimination claims under State and Territory anti-discrimination laws.

CASE STUDY 12



BALLARAT CHRISTIAN SCHOOL

Ballarat Christian School is being sued by Rachel Colvin, a former teacher, for discrimination because the School required her to teach orthodox Christian sexuality and gender convictions despite the fact that Ms Colvin held different personal beliefs on these issues. The School advised Ms Colvin that she was free to hold her own personal beliefs but that she would be required to support and teach in accordance with the beliefs of the school. The matter is currently in the Victoria Civil and Administrative Tribunal.

PROBLEM: Ms Colvin is suing Ballarat Christian School for religious discrimination under the Victorian Equal Opportunity Act (**Vic EOA**) which has no equivalent section to clause 10 of the Bill. Ballarat is conducting its school in accordance with its religious tenets and beliefs and so if Ms Colvin was taking action under the Bill, Ballarat could rely on clause 10. However, clause 10 doesn't apply to the Vic EOA. If Ballarat had no defence under the Vic EOA, Ballarat could argue (under the constitutional doctrine of “covering the field” via section 109 of the Constitution), that clause 10 extends to the Vic EOA and its

conduct would be lawful under clause 10 of the Bill, so the Bill should prevail. However, it is a complex argument to make, and would need to be made in a Federal Court. Ultimately, it is unlikely that Ballarat could rely on clause 10 to defend a Vic EOA claim.

SOLUTION: clause 10 should be amended to expressly apply to State and Territory anti-discrimination Acts.