



New South Wales  
Council for Civil Liberties

**NSWCCL SUBMISSION**  
**ON**  
**SECOND EXPOSURE DRAFT**  
**RELIGIOUS DISCRIMINATION BILL**  
**2019**

**ATTORNEY GENERALS**  
**DEPARTMENT**

**31<sup>ST</sup> January 2020**

### **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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# NSWCCL SUBMISSION ON THE SECOND EXPOSURE DRAFT RELIGIOUS DISCRIMINATION BILL 2019

## INTRODUCTION

1. The NSW Council for Civil Liberties [NSWCCL] welcomes this opportunity to make a further submission<sup>1</sup> on the second exposure drafts of the Religious Discrimination Bill 2019, the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 and the Religious Discrimination (Consequential Amendments) Bill 2019.
2. That said, we must record our frustration that the consultation period has coincided with the Christmas and NY holidays which has significantly constrained our capacity to provide as thorough and detailed an analysis of the implications of this complex Bill as it requires.
3. Time for thorough and detailed analysis of this Bill is essential, not only because the central and up-front objective of providing protection against religious discrimination is important and complex, but also because the Bill incorporates numbers of interlocking provisions which have discriminatory and harmful implications for the rights and well-being of many Australians which are not easily discernible.

### **Recommendation 1**

4. **If the Government does present this draft Bill to Parliament it should then be referred to an appropriate Parliamentary Committee for review. There should be a more reasonable consultation period to allow members of the public to fully consider the final Bill and its implications for all community groups.**
5. In this submission we have focussed our comments on the second exposure draft Religious Discrimination Bill 2019 [The Bill]. We have incorporated our comments on key aspects of the changes from the first exposure draft into an updated version of our submission on the first exposure draft.

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<sup>1</sup> NSWCCL made a [submission](#) on the first exposure draft of this Bill in 2019. Much of that submission remains relevant and is incorporated into this submission.

## SUMMARY OF NSWCCCL's POSITION

6. NSWCCCL supports the right to freedom of religion and the need for a federal Religious Discrimination law consistent with the current federal Anti-Discrimination Act framework and our international human rights obligations. The need for such legislation stems from the long history of discrimination against minority religions in Australia – most notably Judaism and, more recently, Islam.
7. However, we maintain our opposition to the hasty development of this Bill as a stand-alone exercise – particularly when the Government had already initiated an expert and independent inquiry by the Australian Law Reform Commission [ALRC] to examine *The Framework of Religious Exemptions in Anti-Discrimination Legislation*. At the very least the Government should have awaited the finding and recommendation of the ALRC. Instead it has delayed the ALRC's report until the end of 2020 and effectively undermined its credibility and effectiveness by proceeding with this draft legislation.
8. Notwithstanding our unease about the process, we were hopeful that a Religious Discrimination Bill consistent with current federal and state anti-discrimination laws could be extracted from the first exposure draft with appropriate deletions and amendments.
9. However, this very disappointing second exposure draft not only fails to deliver this, but instead exacerbates the harmful, discriminatory impact of the proposed legislation on many groups in the Australian community, dangerously expands the over-privileging of religious rights in relation to other rights and weakens existing protections available under current state and federal anti-discrimination laws.
10. Some of the provisions in this Bill are surprising in their departure from existing discrimination laws and are, to our knowledge, unprecedented.
11. It is our view that this second exposure draft Bill has been distorted by the insertion of numerous provisions for the sole reason of conceding to the demands of major religious groups both for exceptionally broad rights and protections from discrimination on the basis of their religious beliefs or practices and an extraordinary range of exemptions and exceptions amounting to an extensive right to discriminate against others with legal impunity.
12. The problem with developing religious discrimination laws in isolation is that the implications of provisions for the exercise of other co-equal rights are obscured and remain untested. Even

without any deliberate bias, this uncontested approach to human rights legislation would be likely to generate unintentional and/or unidentified harmful discriminatory outcomes.

13. We should not lose sight of existing gaps in protection for Australians from religious discrimination. The reform process should be approached holistically to ensure comprehensiveness, jurisdictional consistency and the effective promotion of human rights and civil liberties in Australia. Most importantly the process must ensure that the legitimate rights of others, especially our society's most vulnerable, are not indefensibly undermined by harmful discrimination licensed by the State.
14. **Consequently, while we support the right to religious freedom and the need for statutory protection against religious discrimination – and therefore could support some of the more reasonable parts of this Bill - NSWCCCL cannot support this second exposure draft of the Bill and is firmly of the view that it must be withdrawn.**
15. NSWCCCL accepts that the Government appears to have acquiesced to the demands of churches/religious groups in relation to this Bill. It also appears to have determined to concede little to remedy the many problems identified in the Bill by civil society, legal and other professional groups.
16. We accept that it is likely the Government will push ahead with this Bill and attempt to have it passed in the coming Parliamentary term. Our submission again includes proposed amendments to alleviate the serious problems in the Bill.
17. But if the Bill presented to Parliament retains provisions which will undermine other rights and cause discriminatory harm to others, we will call on MPs and Senators to oppose or amend it. If it is passed without the removal of these provisions, we will campaign for its repeal or amendment.
18. NSWCCCL urges the Government to choose a more constructive way forward which can provide robust and appropriately balanced protections against religious discrimination, without provoking the community disharmony that is likely to be engendered if this unbalanced Bill becomes law.

## DETAILED COMMENTS

### OBJECTS OF THE BILL

19. The NSWCCCL supports the objects of the Bill as specified in clause 3:

3(1)

- (a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life;*
- (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and*
- (c) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.*

3(2) *In giving effect to the objects of this Act, regard is to be had to:*

- (a) the indivisibility and universality of human rights, and their equal status in international law; and*
- (b) the principle that every person is free and equal in dignity and rights.*

20. These provisions have been strengthened in this version of the Bill by the welcome addition of the explicit statement that human rights have “.. *equal status in international law*” in 2(a).

21. Read alone these objects are appropriate and consistent with the existing framework of anti-discrimination law in Australia.

22. However, as the Explanatory Notes state, while these objects apparently reflect the objects in existing federal anti-discrimination laws, sub-clause 3(1)(c) signals that the underpinning principles set out in Clause 42 are not entirely consistent with existing anti-discrimination law at state/territory or federal level.

*“In addition, paragraph 3(1)(c) reflects the principles underpinning Part 4, which protects the expression of statements of belief in good faith from the operation of certain provisions of Commonwealth, state and territory anti-discrimination law. The meaning of statements of belief is discussed at clause 42.”<sup>2</sup>*

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<sup>2</sup>Explanatory Notes Second Exposure Draft of The Religious Discrimination Bill 2019 [ EN RDB 2019 v2] p8

23. As will be detailed later in the submission, this comment hints at the major problems which flow from the intersection of clause 42 with other provisions in the Bill -including these Objects - and which undermine key protections in existing anti-discrimination legislation.
24. The effect of the Part 4 principles is to place great weight on the protection of ‘expression of [religious] statements in good faith’ but with insufficient weight on the critical ‘subject to specified limits’ provision. **The effect of clause 42 intertwined with other provisions, subverts the stated Objects of the Bill.**
25. The “indivisibility and universality of human rights” is a central concept in the approach to human rights frameworks and legislation including discrimination legislation. In so far as this reference appeared in the first exposure draft, we had hoped that this might open the way for a more cohesive approach to human rights legislation in Australia than the way this draft Bill was developed.
26. It is clearly important for Australia’s discrimination laws to work cohesively and for no one right to be privileged over another/others. The protection and balancing of human rights would be greatly assisted by the adoption of an Australian Charter of Human Rights and by a review of Australia’s state and federal human rights laws to ensure the appropriate coherence and consistency. The current Review by the ALRC into The Framework of Religious Exemptions in Anti-Discrimination Legislation will contribute to latter from the perspective of religious rights- but the broader exercise is necessary.
27. The NSWCCL considers this version of the Bill privileges religious rights to the detriment of other rights and existing anti-discrimination laws much more seriously than did the first exposure draft.
28. The problems with this Bill heighten the need for Australia to catch up with other liberal democracies and enact a strong and broad human rights charter.

**Recommendation 2:**

29. **This Bill be independently and expertly reviewed to identify and remove all provisions which are in contradiction to the stated Objects of the Bill and/or are not consistent with existing anti-discrimination laws in Australia and/or privilege one human right over other rights.**

### **Recommendation 3**

**30. The Australian Government should move quickly to the development of an Australian Charter of Human Rights to provide a strong and effective framework for the protection of the rights of Australians.**

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### **INCLUSION OF NON-BELIEVERS**

31. Religious belief or activity is defined in 5(1) as:

- (a) holding a religious belief; or*
- (b) engaging in lawful religious activity; or*
- (c) not holding a religious belief; or*
- (d) not engaging in, or refusing to engage in, lawful religious activity.*

32. The NSWCCCL has always argued for the fundamental right to freedom of ‘thought, conscience and religion’ for all persons- including for atheists and agnostics as well as religious believers. We are therefore fully supportive of the inclusion of both religious belief and activity, and the absence of same, as protected attributes in this Bill

33. This is the correct approach on principle, is consistent with our international human rights obligations and is clearly very appropriate given the substantial proportion of Australian who do not adhere to any religion or religious belief.

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### **DISCRIMINATION ON THE GROUND OF RELIGIOUS BELIEF OR ACTIVITY**

34. The Bill defines both direct and indirect discrimination on the grounds of religious belief or activity in standard terms in Clauses 7 and 8 (1). It is appropriate that the Bill encompasses both direct and indirect discrimination which is consistent with existing anti-discrimination law and the actual experience of discrimination.

35. Subclause 8(2) provides a list of non-inclusive considerations to determine if an imposed condition, requirement or practice relating to indirect discrimination is reasonable or discriminatory. These include ‘all the relevant circumstances of the case’ and a list of 5 general considerations as to ‘reasonableness’.



36. These provisions are straightforward and standard and provide a reasonably clear framework for establishing direct and indirect discriminatory conduct. However, additional provisions which qualify and limit these core provisions, complicate the definitions and generate unnecessary problems.

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#### **CONDITIONS THAT ARE NOT REASONABLE RELATING TO STATEMENTS OF BELIEF**

37. Clauses 8(3) and 8(4) overlay the general framework covering indirect discrimination on the grounds of religious belief with specified conditions that are deemed 'not reasonable' as part of an employer conduct rule or a qualifying body conduct rule. Such provisions do not exist in discrimination law in other jurisdictions.

38. This provision appears likely to have been generated by the Israel Folau dispute with Rugby Australia in relation to his controversial public statements of belief.

39. Clause 8(3) specifies for the purpose of determining the condition of 'reasonableness' of an employer conduct rule that:

*(a) is imposed, or proposed to be imposed, by a relevant employer; and  
(b) would have the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee's employment; and is not reasonable unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer.*

40. The definition of a 'statement of belief' requires it to be 'a religious belief' held by a person, made in good faith and '*is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*'<sup>3</sup>. This definition and the 'validating' role of a 'person of the same religion' has the potential to encompass a very wide range of 'religious beliefs.'

41. If so 'validated' the employer conduct rule can only restrict or prevent "*an employee of the employer from making a statement of belief - other than in the course of the employee's employment if it "is necessary to avoid unjustifiable financial hardship to the employer"*."

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<sup>3</sup> Definitions Clause 5(1). The requirement that the person be of the same religion was an amendment from the provision in the first draft of the average reasonable person.

- 42. Unjustified financial hardship to the employer is not the most appropriate condition to have as the only one which would make it reasonable for an employer to restrict or prevent an employee making a statement of belief.
- 43. The provision only applies to ‘relevant employers’ with an arbitrary revenue threshold of over \$50 million over the past two years. No similar provisions apply to employers with a lesser revenue.
- 44. Clause 8(4) specifies for the purpose of determining the condition of ‘reasonableness’ for a qualifying body conduct rule is not reasonable unless *‘compliance with the rule... is an essential requirement of the profession, trade or occupation.’*
- 45. These criteria are much narrower than the more usual reasonable tests that are set out in 8(2) and which are far more appropriate and balanced and includes consideration of ‘all the relevant circumstances.’
- 46. These clauses are not necessary or appropriate. They privilege religious beliefs and rights. Both clauses should be deleted from the Bill.

**Recommendation 4**

- 47. **It is recommended that Clauses 8(3) and 8(4) specifying conditions that are ‘not reasonable’ relating to statements of belief be removed from the Second Exposure Draft Religious Discrimination Bill 2019.**

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**CONSCIENTIOUS OBJECTION BY HEALTH PROVIDERS**

- 48. This is a particularly important and sensitive part of the draft Bill as conscientious objection provisions for health providers have the potential to cause great harm to many people if they are not carefully drafted with balanced consideration for both the rights of the health practitioner and the rights of persons seeking lawful health services.
- 49. The current Bill includes several positive changes from the first exposure draft Bill on this issue.
- 50. The Bill now specifies that conscientious objection must relate to a procedure not a person or a particular group of persons. This is a welcome, positive change which will prevent medical practitioners refusing services on the basis of a religious belief as to the appropriateness of the

individual seeking the procedure<sup>4</sup> - eg an unmarried woman seeking contraception. (Note 2 subclause 8(6))

51. We note, however, that such a distinction may not always be clear to the person being denied a procedure. The humiliation or offence and possible resulting harms experienced by the person denied the medical procedure are not likely to be ameliorated by this distinction.
52. The current Bill reduces the number of health professions to which the conscientious objection provisions apply to: medicine, midwifery, nursing, pharmacy and psychology. This is a sensible change as the previous much longer list drawn from the Therapeutic Goods Act 1989 was clearly inappropriate.
53. However, this change is of little significance. It will make little practical difference to the impact of the Bill, as it was difficult to identify what, if any, services would have been subject to conscientious objections on religious grounds within the professions deleted.
54. NSWCCCL supports the right of health practitioners to conscientiously object to providing a health service on religious grounds within reasonable parameters. It is however, vitally important to ensure this legitimate right of health practitioners is appropriately balanced against the rights of individuals to access health services and to be protected against discrimination.
55. This balancing of rights is especially significant if the service is being sought in regional and remote contexts where alternative practitioners are often difficult or impossible to access and the resulting harm (physical, mental and financial) to persons denied a procedure can be serious. This is further exacerbated if the service/procedure sought but denied is time sensitive.
56. It is also clearly the case that refusal to provide health services on the grounds of religious conscientious objection will most seriously discriminate against and cause harm to the poor, women, GLBTQI persons and indigenous Australians.
57. NSWCCCL considers that the provisions set out in this Bill do not achieve this necessary balancing of rights. Whether or not it is the Government's intention, these provisions will, if implemented, open the door to a significantly higher incidence of denial of health services to many more

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<sup>4</sup> . (Note 2 subclause 8(6))

people on the grounds of religious belief which will be most harmful to minority and underprivileged groups.

58. NSWCCCL maintains its previously expressed concerns about the overall effect of these provisions and their harmful and discriminatory implications for many persons seeking a wide range of needed health services and procedures.

#### **SPECIFIC PROVISIONS-CONDITIONS THAT ARE NOT REASONABLE**

59. The Bill defines conscientiously object in clause 5(1):

*'a health practitioner conscientiously objects to providing or participating in a particular kind of health service if:*

*(a) the health practitioner refuses to provide, or participate in, that kind of health service on the ground of his or her religious belief or activity; and*

*(b) a person of the same religion as the health practitioner could reasonably consider the refusal to provide, or participate in, that kind of health service as being in accordance with the doctrines, tenets, beliefs or teachings of that religion'.*

60. Section 8 of the Bill sets out specific provisions relating to *'conditions that are not reasonable relating to conscientious objections by health practitioners'* in clauses 8(6) and (7).

61. Clause 8(6) provides that if a state or territory law allows conscientious objection:

*'a health practitioner conduct rule that is not consistent with that law is not reasonable and would therefore constitute unlawful indirect discrimination'.*

62. This could allow state or territory laws to impose a more restrictive definition of what is a 'reasonable' condition in a health practitioner conduct rule<sup>5</sup> than is set out in the general provisions specifying *'Considerations relating to reasonableness'* in clause 8(2).

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<sup>5</sup> 5(1) A health practitioner conduct rule is defined as **health practitioner conduct rule** means a condition, requirement or practice:

- (a) that is imposed, or proposed to be imposed, by a person on a health practitioner; and
- (b) that relates to the provision of or participation in a particular kind of health service by the health practitioner; and
- (c) that would have the effect of restricting or preventing the health practitioner from conscientiously objecting to providing or participating in that kind of health service.

63. It is difficult to unravel the precise implications of this clause without a detailed analysis of all the relevant state and territory provisions.

64. If clause 8(6) does not apply, clause 8(7) specifies that a health practitioner conduct rule is not reasonable unless it is necessary to avoid an ‘unjustifiable adverse impact’ on:

*(a) the ability of the person imposing, or proposing to impose, the rule to provide the health service; or*

*(b) the health of any person who would otherwise be provided with the health service by the health practitioner.*

65. This clause imposes different and more limited considerations as to what may be taken into account in determining ‘reasonableness’ than are provided in clause 8(2) – which specifies “all the relevant circumstances of the case’ as well as a non-inclusive list of considerations.

66. The critical determinant in the clause 8(7) provision is the meaning of ‘unjustifiable adverse impact’ which is not defined or otherwise clarified in the Bill. The Explanatory Notes do offer guidance:

*(c) By way of illustrative example, if non-compliance with a health practitioner conduct rule could result in the death or serious injury of the person seeking the health service, this would generally amount to an unjustifiable adverse impact.*

*(d) By way of further example, non-compliance with a policy that required the sole medical practitioner in a small rural community to prescribe contraception in appropriate cases may amount to an unjustifiable adverse impact on the ability of that practice to provide medical services to that community, and may also have an unjustifiable adverse impact on the health of women seeking contraception (such as women seeking the Pill for non-contraceptive use, such as in order to treat endometriosis or polycystic ovary syndrome), as they may be unable to access alternative healthcare promptly without significant travel and cost<sup>6</sup>.*

67. Paragraph 186 provides a reasonable example of unjustifiable impact of non-compliance with a policy requiring a sole practitioner to prescribe contraception for a number of purposes in a

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<sup>6</sup> {EN 2019 v2] p24, paras 185,186

small rural community. But it would have been more helpful if this example had referenced some of the more controversial services that might be sought from this sole practitioner such as prescriptions for drugs to protect against HIV or progress gender transition.

68. Paragraph 185 on the other hand offers an example involving the most extreme of possible 'adverse impacts' - 'death or serious injury' to the person seeking the service. This is an unacceptably high threshold for calibrating an appropriate balance between the right to conscientious objection and the right of a patient to access a needed health service.
69. Apart from the lack of clarity, the stronger objection to this clause is its redundancy. The general considerations relating to 'reasonableness' of conditions imposed by employers or others at 8(2) provide appropriate guidance as to 'reasonable' conditions relating to conscientious objection by health practitioners.
70. Clause 8(7) should definitely be removed from the Bill as it reduces the range of matters that can be considered in determining the reasonableness of a health practitioner conduct rule - and therefore is likely to expose more persons to harm and discrimination because they cannot access a needed medical service.
71. Clause 8(6) should not proceed until a detailed analysis of existing state/territory relevant provisions in legislation and health practitioner conduct rules provides clarity as to its implications if enacted. This analysis should be part of the current review by the ALRC on The Framework of Religious Exemptions in Anti-Discrimination Legislation

#### **Recommendation 5**

72. **Clause 8(6) which sets out the *conditions that are not reasonable relating to conscientious objections by health practitioners* should not be proceeded with pending a detailed analysis of existing state/territory relevant provisions in legislation and health practitioner conduct rules to provides clarity as to its implications. This analysis should be included in the current ALRC Review of The Framework of Religious Exemptions in Anti-Discrimination Legislation**

#### **Recommendation 6**

73. **Clause 8(7) which sets out the *conditions that are not reasonable relating to conscientious objections by health practitioners* should be deleted from the Religious Discrimination Bill 2019.**

74. Where conscientious objection by health providers is deemed reasonable and lawful, NSWCCCL considers it imperative that an obligation to refer patients to a practitioner who does not have a conscientious objection should be mandatory. This will assist in ensuring that patients seeking health services are able to access them without discrimination.

75. It will not of course always provide a satisfactory outcome in regional and remote areas - particularly if the procedure sought is time sensitive. In these contexts, it should be lawful for a health practitioner conduct rule to require the delivery of the otherwise inaccessible medical service to the person seeking it.

#### **Recommendation 7**

**76. The Religious Discrimination Bill 2019 be amended to specify that an obligation to refer a patient to a different practitioner who does not conscientiously object to provide a health service by the medical practitioner who does conscientiously object, is reasonable.**

#### **Recommendation 8**

**77. In the context where alternative referrals are not practical such as remote and regional locations the Bill should make it explicit that medical conduct rules may, consistent with consideration of 8(2), override a conscientious objection on religious grounds and require a health practitioner to deliver a health service sought and needed by a patient/person.**

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#### **RESTRICTION OF SCOPE OF PROTECTION AGAINST DISCRIMINATION TO NATURAL PERSONS**

78. The first exposure draft of the Bill included a 'definition' of the word 'person' linking it with Section 2C of the Acts Interpretation Act which incorporates bodies corporate and bodies politic. The Explanatory Notes were explicit that:

*'it is open for a body corporate to make a complaint under this Act alleging that it has been discriminated against on the basis of its religious belief or activity'.<sup>7</sup>*

79. This interpretation was strongly opposed by the NSWCCCL – and others - as inappropriate and inconsistent with existing human rights law in Australia and internationally. In the second

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<sup>7</sup> [EN 2019 V1] p10, par 77

exposure draft the reference has been removed from the Definitions and paragraph 77 from the Explanatory Notes.

80. The Explanatory Notes still affirm that consistent with Section 2C of the Acts Interpretation Act:  
*... a person for the purposes of this Act includes natural persons, bodies corporate and bodies politic. This will ensure that the Act prohibits all discriminatory conduct, regardless of whether that conduct was engaged in by a natural person, body corporate or body politic.*<sup>8</sup>

Significantly the Notes now also state that:

81. *The Act is intended primarily to protect individuals from discrimination and does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities. However, the Act does not preclude bodies corporate or other non-natural persons from being 'persons aggrieved' for the purposes of the AHRC Act in appropriate cases*<sup>9</sup>. P10

82. The second sentence above does, however, leave open the possibility of non-natural persons being 'persons aggrieved' in appropriate cases.

83. This is signaled more strongly in an explanatory note relating to a new Clause 9 which extends the Bill's coverage to apply *'to a person who has an association with an individual who holds or engages in a religious belief in the same way as it applies to a person who holds or engages in a religious belief or activity.'*

84. The Explanatory Notes states that Clause 9:

*... protects 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.*

*... For example, a corporation would be protected against discrimination in relation to their association with a natural person, such as their CEO.*<sup>10</sup>

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<sup>8</sup> Ibid p10, para 65

<sup>9</sup> Ibid p10 ,para 66

<sup>10</sup> Ibid p26, par 203, 204.



85. These Explanatory Notes are somewhat confusing – but it seems clear that, as it stands, the Bill does extend protections against discrimination to corporations and other non-natural persons in ‘appropriate cases’.

86. NSWCCCL remains opposed to the coverage of non-natural persons as ‘aggrieved persons’. It seems perverse and bizarre to provide a corporation with the right to take legal action against natural persons on the basis of alleged religious discrimination against the corporation.

87. We do note however that case law is not totally consistent with this view.<sup>11</sup> The Law Council of Australia suggests on the basis of its analysis of a number of cases that:

*...it is clearly possible, but not automatic, for a body corporate to be considered to be a person aggrieved for the purposes of making a complaint of unlawful discrimination. However, this does not extend to affording a body corporate the full protections of non-discrimination law in its own right.<sup>12</sup>*

88. While noting this legal possibility, NSWCCCL remains strongly of the view that this would be a very damaging direction for the Religious Discrimination Bill to pursue.

#### **Recommendation 9**

**89. NSWCCCL strongly recommends that the second exposure draft Religious Discrimination Bill 2019 and the Explanatory Notes be amended to make clear that a complaint of discrimination on the ground of religious belief or activity can only be made on behalf of a natural person.**

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#### **STATEMENTS OF BELIEF DO NOT CONSTITUTE DISCRIMINATION**

90. One of the more unusual provisions in the Bill is clause 42 which explicitly protects statements of belief from being discriminatory for the purpose of all existing federal anti-discrimination laws, a

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<sup>11</sup> The LCA submission to the first exposure draft Religious Discrimination Bill has documented a number of cases with diverging findings. pp17-18. Paras 63-67  
<https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Law%20Council%20of%20Australia.pdf>

<sup>12</sup> Ibid para 67.

specific subsection of a state anti-discrimination law and possible future laws prescribed by regulation. If this draft Bill becomes law, this provision will apply to it also.

91. Clause 42:

(1) *A statement of belief, in and of itself, does not:*

*(a) constitute discrimination for the purposes of any anti-discrimination law within the meaning of the Fair Work Act 2009); or (*

*(b) contravene subsection 17(1) of the Anti-Discrimination Act 1998 (Tas.); or*

*(c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.*

(2) *Subsection (1) does not apply to a statement of belief:*

*(a) that is malicious; or*

*(b) that would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons; or*

*(c) that is covered by paragraph 28(1)(b).*

92. The Explanatory Memorandum provides a clear explanation as to the intention and effect of this provision:

*'This provision is intended to protect the rights to freedom of expression and freedom of religion by ensuring that a person may express their religious belief in good faith regardless of Commonwealth, state or territory anti-discrimination laws that might have otherwise made that statement unlawful'.<sup>13</sup> P64*

93. This is an extraordinary provision.

94. In its response to the first exposure draft of the Bill, NSWCCCL expressed its grave concern as to the implications of this clause. In this second exposure draft, our concern is heightened by the looser definition of 'statement of belief,' which now only requires validation by 'a person of the same religion' rather than by a Court.

95. This unusual, loose definitional requirement opens the possibility of an unprecedented range of religious beliefs which, if they are not captured under subclause 42 (2), can be expressed

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<sup>13</sup> . [EMem2019 v2] p64, par 533.

regardless of anti-discrimination laws that would otherwise have made such statements unlawful.

96. There are limitations to this protection. The provision does not apply if a 'statement of belief' is malicious, or would or is likely to *harass, vilify<sup>14</sup> or incite hatred or violence against another person or group of persons.*

97. These provisions set a high threshold for unlawful discrimination when the discriminatory statements are religious beliefs and leave a great deal of room for harmful discriminatory statements to be made with impunity.

98. As well as overriding all federal anti-discrimination laws Clause 42 also specifically overrides the key provision 17 (1) of the Tasmanian Anti-Discrimination Act 1998:

*A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in [section 16\(e\)](#) ..... in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*

99. No doubt this is because the Tasmanian Act has the broadest range of attributes which are grounds for anti-discrimination protection in state/territory legislation.

100. Section 16(e) specifies the attributes covered:

*A person must not discriminate against another person on the ground of any of the following attributes:*

*(a) race; (b) age; (c) sexual orientation; (d) lawful sexual activity; (e) gender; (ea) gender identity; (eb) intersex variations of sex characteristics; (f) marital status; (fa) relationship status; (g) pregnancy; (h) breastfeeding; (i) parental status; (j) family responsibilities; (k) disability; (l) industrial activity; (m) political belief or affiliation; (n) political activity; (o) religious belief or affiliation; (p) religious activity; (q) irrelevant criminal record; (r) irrelevant medical record; (s) association with a person who has, or is believed to have, any of these attributes.*

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<sup>14</sup> Vilify is defined as 'incite hatred or violence towards the person or group. Clause 5(1)

101. This is an unjustified and deliberate attempt to undermine the Tasmanian legislation's protection against harmful statements of religious belief which would otherwise be unlawful.
102. Clause 42 clearly privileges religious rights of speech over other rights and protections against discriminations. Clause 42 if enacted would be a major and dangerous divergence from existing anti-discrimination law in Australia. It should be removed from the Bill.

#### **Recommendation 10**

103. **Clause 42 which specifies that statements of belief do not constitute discrimination for the purposes of existing federal anti-discrimination laws, or contravene subsection 17(1) of the Tasmanian Anti-Discrimination Act 1998 or a future provision of a law prescribed by regulation, should be deleted from the second exposure draft Religious Discrimination Bill 2019.**

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#### **LACK OF PROTECTION AGAINST DISCRIMINATION OF LGBTQI+ STUDENTS**

104. The widespread concern about Clause 42 is linked to one the major disappointments with both exposure drafts of the Bill – that is the Government's failure to include urgently needed, widely supported and explicitly promised protections for LGBTQI+ students in religious and private schools.
105. Both the Government and the Opposition promised to address this issue as a matter of urgency when the lack of protection from discrimination became a public issue last year. The Prime Minister's commitment appeared to be clear<sup>15</sup>:

*"Contrary to what has been reported, the Ruddock Review proposes to strengthen the protections for students from discrimination. ....*

*This misreporting has created unnecessary confusion and anxiety for parents and students alike....*

*To address this issue, I will be taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the*

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<sup>15</sup> PM media release 13 Oct 2018 <https://www.pm.gov.au/media/media-statement>

*basis of their sexuality. I believe this view is shared across the Parliament and we should use the next fortnight to ensure this matter is addressed.*

*Our Government does not support expulsion of students from religious non-state schools on the basis of their sexuality. I also know that this view is widely shared by religious schools and communities across the country.*

*Amending the legislation will give all students and parents the certainty they require."*

106. Sadly the Labor party and the Government did not agree on a legislative approach and the promised urgent amendment to prohibit, at a minimum, the expulsion of students on the basis of their sexuality did not eventuate.
107. Obviously the logical and caring response by the Government should then have been the inclusion of provisions in this Bill to provide the urgently needed protection for LGBTQI+ students and provide them and their parents 'with the certainty they require'. The Government instead referred the issue to the ALRC Review and simultaneously pushed back the reporting date of that Review to the end of 2020.
108. This decision to avoid addressing the issue in the current Bill is disturbing but not surprising. It is a very controversial issue for some religious groups and educational institutions. It would appear likely that this was another decision the Government made in response to pressure from key church /religious bodies.
109. However, discrimination against LGBTQI+ school students is serious and extremely harmful to these young people and must be addressed urgently. The solution must put the interest of the child first.
110. NSWCCCL agrees with the PM's stated view that no student should be expelled from a school on the basis of their sexuality. We also consider all students should be protected from any discrimination on the basis of their sexuality in all schools.
111. This appears to be a clear-cut case of the privileging religious rights, including the right to discriminate, over the rights of students to be protected against discrimination on the basis of their sexuality. Not only did the Government decide not to include this urgent protection against expulsion from school on the basis of sexuality but it did include Clause 42 which would undermine existing protections for LGBTQI+ students in anti-discrimination legislation.

112. The ability of the ALRC to make appropriate findings in relation to Clause 42 and other provisions in this Bill is significantly constrained by the altered terms of reference which firmly exclude them making any recommendations to amend any aspect of the current Bills that become law:

*The ALRC should confine its inquiry to issues not resolved by that Bill, and should confine any amendment recommendations to legislation other than the Religious Discrimination Bill.....*

*but should confine its recommendations to amendments to laws existing prior to enactment of the Religious Discrimination Bill 2019.<sup>16</sup>*

113. The current Bill contains provisions which, if legislated, would make it difficult, if not impossible, for the ALRC to recommend necessary protections for LGQBTI+ students from 'lawful' discrimination protected by religious belief grounds and religious schools' exemptions.
114. These prohibitions will likely block the ALRC from properly addressing this issue in its review. The issue of protections from discrimination of GLBTQI+ students must therefore be addressed in this Bill.

#### **Recommendation 11**

115. **The draft exposure Religious Discrimination Bill 2019 be amended to include provisions which will prohibit the expulsion of LGBTI+ students in all Australian schools. These provisions should include the necessary limitation of exemptions on religious or other grounds to ensure this protection of children from discrimination is legally enforceable.**

#### **Recommendation 12**

116. **The Government amends the terms of reference to the ALRC to ensure they do not constrain it from being able to fully and professionally address all the issues relevant to its core reference including any provisions of this Bill if it is enacted.**

#### **Recommendation 13**

117. **In the context of the current ALRC Review of Framework of Religious Exemptions in Anti-Discrimination Legislation, the Australian Government should initiate a review of existing**

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<sup>16</sup> <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>

**federal human rights and discrimination laws to ensure comprehensiveness and appropriate consistency - including with the international human rights framework.**

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#### **RELIGIOUS BODIES MAY ACT IN ACCORDANCE WITH THEIR FAITH**

118. The NSWCCCL has always opposed the broad exemption of religious bodies – and especially religious schools – from discrimination laws. This concern is exacerbated when it extends to charities and other bodies which provide public services which are often funded wholly or significantly by government.

119. The second exposure draft Bill both significantly extends the range of bodies that are defined as ‘religious bodies’ and expands the kinds of conduct such ‘religious bodies’ can engage in and that are defined as ‘not discriminatory’. This is the opposite of the recommendations we made in relation to religious bodies and their exempt conduct in our response to the first exposure draft.

120. Clause 11(5) defines a religious body as:

(a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or

(b) a registered public benevolent institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or

(c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities);

but does not include an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation.

121. Clause 11(1) allows these religious bodies to act in accordance with their faith without fear of discriminating:

- *A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that a person of the same religion as the religious body*

*could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.*

- *A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body<sup>17</sup>. 11(3)*
- Conduct mentioned in subsections (1) and (3) includes giving preference to persons of the same religion as the religious body

122. Cumulatively these provisions are disturbing. A large number of religious bodies across the included categories are able to engage in a wide range of conduct that would otherwise be discriminatory - as long as it is in accordance with their religious beliefs as attested to by a person of the same religion.

123. The explicit permission to giving of preference to persons who share their religious belief will have major implications for Australian society. It constitutes large scale legal discrimination and is not a positive for the future diversity of the workforce in these organisations.

124. NSWCCCL cannot support these discriminatory provisions.

#### **Recommendation 14**

125. **The definition of 'religious body at 11(5) be amended to include only bodies established for religious purposes.**

#### **Recommendation 15**

126. **Bodies that are significantly engaged in commercial activity should not be defined as a religious body .**

127. At a broader level NSWCCCL remains opposed to the broad exemption of religious bodies from discrimination laws.

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<sup>17</sup> Note: This subsection does not permit conduct that is otherwise unlawful under any other law of the Commonwealth, including the Sex Discrimination Act 1984.



### **Recommendation 16**

128. **Clause 11 should be deleted and replaced with specific context exemptions based on a genuine need for the discriminatory conduct**
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### **APPOINTMENT OF A FREEDOM OF RELIGION COMMISSIONER**

129. The NSWCCCL is not convinced that there is need for a specific Freedom of Religion Commissioner. We note that the Ruddick Report did not recommend such a position. Rather it recommended that the Commissions should take a leading role in the protection of freedom of religion but not necessarily through the creation of a new position. There has been no substantive public justification by the Government for the creation of this position.
130. We note the AHRC comments in its submission of the budgetary implications of such an appointment and we support their reasonable argument for an appropriate increase in budget to cover the Commissioner position and support staff.

### **Recommendation 17**

131. **If a new Freedom of Religion Commissioner is appointed to the AHRC, it should have its budget increased appropriately to cover the costs associated with that position and support staff.**
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### **CONCLUSION**

132. NSWCCCL cannot support the second exposure draft Religious Discrimination Bill. It has too many disturbing and harmful aspects which will undermine current anti-discrimination protections. It does have numbers of positive aspects but these are tainted by the pervasive provisions over-privileging religious rights at the expense of other rights.

### **Recommendation 18**

**The NSW Council for Civil Liberties recommends the second exposure draft Religious Discrimination Bill 2019 be withdrawn by the Government and the issue of Religious Discrimination be referred to the Australian Law reform Commission for consideration in a wider human rights context.**

133. NSWCCCL hopes this submission is of assistance to the Attorney-Generals Department in assessing the package of Religious Freedoms Bills - and particularly the Religious Discrimination Bill 2019.

This submission was written by Dr Lesley Lynch and Jared Wilk, Co-Convenors of the Civil Liberties and Human Rights Action Group, on behalf of the NSW Council for Civil Liberties.

Michelle Falstein

**Secretary**

**NSW Council for Civil Liberties**

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