29 January 2020

Joint Rainbow Families Submission to the Religious Freedom Reform Bills – 2nd Exposure Drafts

This joint statement has been prepared by Rainbow Families NSW, Rainbow Families Victoria and Rainbow Families Queensland in response to the following package of legislative reforms on religious freedom:

- Religious Discrimination Bill 2019
- Religious Discrimination (Consequential Amendments) Bill 2019
- Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

We will refer to the above as 'the Bills'.

We do not support the Bills in their current form as presented in the 2nd Exposure Drafts.

Our general concerns with the 2nd Exposure Drafts are detailed below. In crafting our response, we have considered the Bills through the lens of ensuring our children's rights and best interests. Our primary concern remains that our children are not discriminated against, treated unfairly, subjected to offensive or hurtful remarks or refused access to education, employment or health care because of who is in their family or how their family was formed. Given these considerations, we are unable to support the Bills as they stand.

At a minimum we recommend the following changes to the Religious Discrimination Bill 2019 ('the RD Bill'):

- Clause 8(3)-(9) are removed entirely.
- In Clause 11 the term "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" be changed to "conduct that conforms with" or "is in regard to the doctrines, tenets, beliefs or teachings of that religion."
- Clause 33(2)-(5) are removed entirely.
- Clause 42 is removed entirely.

Further we recommend that the federal government consider:

1. Creating a Gender Identity, Sexuality and Intersex Status Commissioner or an LGBTIQ+ equivalent as part of the Australian Human Rights Commission.
2. Removing of the existing exemptions in the Commonwealth Sex Discrimination Act that allow students and staff to be discriminated against in faith-based schools because of their sexual orientation, gender identify or relationship status.

We do support providing protection from discrimination for people of faith, as well as people of no faith, in the form of an orthodox Religious Discrimination Bill. We acknowledge that many minority faith communities are often faced with discrimination and vilification and their rights to be free from unfair treatment should be protected. We would welcome a bill that offers protection to those who need it but not one that allows individuals or organisations the ability to discriminate against people, including our children and our rainbow families.

However, because the proposed RD Bill still contains many unorthodox and deeply troubling elements, we are unable to support its passage through parliament.

In a previous submission on 2 October 2019 we expressed our serious concerns about the proposed legislation. A copy of these submissions is provided as Annexure A to this submission.

The 2nd exposure draft has not only failed to adequately address the many community concerns raised about the first exposure draft but now contains even more troubling elements that will encourage and licence others to discriminate against our families.

INTRODUCING OUR RAINBOW FAMILIES

Rainbow families are families where one or more parent or carers are lesbian, gay, bisexual, trans, gender diverse, non-binary, intersex or queer (LGBTIQ+) – and our children and families.

Our rainbow families live, work and play in every area of public life. We are parents and carers. Some of us are legally married, many of us live in de-facto or domestic partnerships. We are multi-cultural, of diverse races and multi-faith. We live in rural and regional communities and in metro areas. We work in schools, some of us are foster carers, or sole parents or living in blended families. Some of us have disabilities, some of us are neuro-diverse and many of us have children who live with disabilities. Importantly, we want our children to grow up in communities that love and cherish them and some of these communities are also our faith and religious communities. We are as diverse as every other Australian family.

Because of our diversity there are endless possibilities of where discriminatory comments could impact our access to health care, education, good or services in our day to day lives.

We respectfully remind you that:

1. Our children who should not, and should never be, discriminated against because of who they are, how they were created or what kind of family they come from, a family with sole parents, divorced parents and from a rainbow family where one or more parents or carers is LGBTIQ+.

2. Any health service of any description receiving government funding should not be allowed to discriminate based on a person's sexuality, gender diversity, family structure or relationship status.

3. Any educational institution of any description receiving government funding should not be allowed to discriminate based on a person's sexuality, gender diversity, family structure or relationship status.

4. As lesbian, gay, bisexual, pansexual, queer, transgender or gender diverse, non-binary community members and/or as intersex people, we should not be discriminated against based on our sex, gender identity, sexuality, relationship status including polyamorous relationships, or marital status.

COMMUNITY SURVEY RESPONSES

In September 2019, Rainbow Families NSW, Queensland and Victoria conducted an online survey of community members over a one-week period in late September. We collected 53 unique responses to a range of questions assessing our community concerns. The full survey responses are listed in Annexure A to this submission.

We do not intend to repeat the results of the survey again in these submissions. In summary the survey found that:

- Our families are diverse, many of no religion but some of Catholic, Eastern Orthodox Christian, Buddhist and Hindu faith, with some parents working as teachers in faith-based schools, and some children attending those schools.
- Our families are already subjected to discriminatory, inappropriate, offensive or hurtful comments, in general, in receiving goods and services, in workplaces and in health care settings.
- Many respondents feared an *increase* in discriminatory behaviour and attitudes from service providers, including health providers, if the Bills are passed.

Our primary concerns with the first exposure draft were that:

- Making it easier for health practitioners to conscientiously object to providing treatment under the health practitioner conduct rules will increase the discrimination that is experienced by rainbow families, including our children, when accessing health services and overall prevent equitable access to vital health care, particularly for regional and remote families.
- The exemptions for religious bodies are expressed in excessively broad terms.
- The statements of belief provision will erode erodes existing federal, state and territory protections against discrimination. Religious freedom should not be achieved at the cost of harming the rights of others.

FURTHER CONCERNS – CONSCIENTIOUS OBJECTION

Enabling health practitioners to conscientiously object to providing treatment under the cover of religious belief will serve to legitimise discrimination against our families and entrench inequitable access to vital health services.

Clauses 8(6) and (7) relate to the imposition of health practitioner conduct rules. The effect of these clauses is that conduct rules are not reasonable if they restrict or prevent the ability of a health practitioner to conscientiously object.

The definition of 'conscientiously object' for the purposes of the RD Bill is that the person refuses to provide or participate in a kind of health service on the ground of their religious belief or activity.

To establish that the objection is on the basis of religion, it is now only required that “a person of the same religion as the health practitioner could reasonably consider the refusal as being in accordance with the doctrines, tenets, belief or teachings of that religion”. This is a troubling departure from the ordinary objective third person test widely accepted in the law. It allows for a major departure from identifying what are the doctrines, tenets and beliefs of a

religion with reference to the religious texts on which the religion in based. We argue that this would result an overly broad protection for conscientious objections on the part of health practitioners.

A 'health practitioner' is defined as an individual registered or licenced to provide a health service, and the relevant health services are now confined to:

- medical
- midwifery
- nursing
- pharmacy
- psychology

Although on the face of it seems to be an improvement on the first draft to limit the scope of the health services to which the section applies, the adverse impact our community will be fairly unchanged. The included list of health services reflect the most crucial health services accessed by the general population, including our families. Based on our community survey, it is also in these key health areas that our families face the most discriminatory attitudes and practices – for example when seeing a general practitioner, obtaining mental health services, going to hospital, giving birth or having a prescription filled in a pharmacy.

A further concern is the broadening of the ability to conscientiously object beyond the person providing the care to include those merely "participating in a health service". This only increases the chance that our families will experience discrimination when accessing health services.

The newly inserted notes in clause 8(6) and clause 8(7) indicate that a health practitioner conduct rule that prevents a health practitioner from conscientiously objecting to providing or participating in a health service (for example assisted dying) may be discriminatory. However, it further states that this provision does not allow a service to be denied to a particular person or group of persons. In other words, the practitioner must refuse the type of treatment entirely, rather than refuse to give it to a particular person or group of persons. While appearing to somewhat limit the scope of conscientious objections by health services, in practice it would still entrench discrimination against particular groups. For example, certain groups may disproportionately (or even exclusively) access particular treatments or services. Men will not be directly disadvantaged by a refusal of to provide the contraceptive pill, only women. Similarly, refusal to provide HRT for gender transitioning will only adversely affect trans and gender diverse people.

We previously raised a concern that "unjustifiable adverse impact" was too high a bar as an exception to the ability to conscientiously object. We note that the test has remained unchanged but now includes unjustifiable adverse impact on both employers and patients. In the 2nd exposure draft the explanatory notes indicate that "death or serious injury" would "clearly" meet this bar. The notes also indicate that significant travel and cost to a person being refused the pill for non-contraceptive use in a regional area may amount to an unjustifiable impact. These examples do not provide us with much certainty that our health services will not be adversely impacted if this provision is passed.

While there have been minor "improvements" to this provision, the overall impact is that health bodies will find it difficult to impose rules with the goal of protecting the health and wellbeing of vulnerable population groups including the LGBTIQ+ community including our children. We argue that the conscientious objections clauses should be removed from the RD Bill entirely.

FURTHER CONCERNS – RELIGIOUS BODIES – CONDUCT NOT DISCRIMINATORY

In relation to the first exposure draft, we noted our concerns that exemptions for religious bodies (previously in clause 10) were too broad. The 2nd exposure draft creates much broader exemptions set out in clause 11.

The broader exemption allows 'religious bodies' to engage in conduct to avoid injury to the religious susceptibilities of adherents of their faith. Even bodies that are engaging in commercial activities, such as an “op shop”, are now covered. We are particularly concerned that this will extend to government-funded services that rainbow families may interact with.

As described above, the test for whether a body was engaging in conduct of a service is religious is a subjective test about whether “a person of the same religion as the religious body could reasonably consider to be accordance with the teachings of the religion”. The test moves away from objectively considering the established doctrines, tenets and beliefs of a particular religion towards a consideration of whether there is a mere possibility of one of its followers interpreting doctrine in a particular way. Even for faiths that are affirming of LGBTIQ+ people, there will always be the one or two people within a faith group who feel otherwise. It has not been justified as to why this should be the legal test.

We are also concerned that religious camps and conference sites are now permitted in the 2nd draft to discriminate in the provision of accommodation, along with the extension of the ability to discriminate in relation to the hiring of staff in religious hospitals, aged care facilities and accommodation. No satisfactory justification has been provided to indicate why these exemptions are necessary and in the public interest. Religious bodies are some of the largest service providers and employers in Australia and so the impact of these exemptions is significant. Allowing these exemptions is not consistent with inclusive practice in employment and goods and services.

Further, religious camps and conference sites will now be able to decide to take into account their faith when deciding whether to provide accommodation, so long it is stated in a publicly available policy. We are concerned in particular that religious camps and conferences are being encouraged to make public statements that they do not include minority groups, including LGBTIQ+ people. For example, if we wanted to hold a camping event for one of our Rainbow Families social groups, we might face discrimination because a faith group running the camp believes that children ‘should have a mother and a father’. We are also concerned that encouraging camps and conference sites to publish discriminatory policies will entrench discriminatory beliefs and conduct.

FURTHER CONCERNS – STATEMENTS OF BELIEF

Like many other LGBTIQ+ advocacy groups, we have previously expressed our grave concerns with Clause 41 of the first exposure draft of the RD Bill (now Clause 42 of the second exposure draft).

We remain deeply concerned about the impact of this clause on our workplaces being able to provide safe and inclusive workplaces for us as workers, for other staff from rainbow families or with family members from the LGBTIQ+ communities. Likewise, it may make it difficult for our children’s schools to ensure the conduct of their teachers in promoting diversity and including our families.

We are worried that this clause will, in practice, prioritise people with religious views over others and could allow for an increase in the discrimination already faced by many LGBTIQ+ community members as well as women, minority faith communities and people with disabilities.

We welcome a clarification in the explanatory notes that only statements are protected from being considered discriminatory conduct, but not the conduct that follows a statement. Nonetheless, this approach fails to recognise the harm that can be caused by experiencing discriminatory comments, particularly from those who are in positions of power such as teachers, doctors and employers. People from minority groups including LGBTIQ+ people may experience persistent discriminatory attitudes towards them throughout their lives, but it might be one particular comment directed towards them that is the "straw that breaks the camel's back". Even where further discriminatory actions do not follow discriminatory comments, being exposed to hurtful, discriminatory and intimidating comments can lead to quantifiable adverse impacts on mental health. If an affected employee, for example, has to go on sick leave and loses wages because of the impact of discriminatory comments in the workplace why should the person not be compensated under anti-discrimination legislation as they currently may be? To provide an analogy, sexual harassment is often established on the basis of comments alone. Both comments of a sexual nature and discriminatory comments can lead to similar adverse impacts on mental health, self-esteem and self-worth.

In addition, this fine distinction between what is acceptable to say, and what is acceptable to do, is likely to be a complex and elusive concept for many people in the community. We believe that the impact of the bill will be to encourage and increase the incidence of both hate speech and discriminatory practices.

One of the most troubling changes in the 2nd exposure draft is that it appears to now sanction even more serious and insidious statements. By defining the words "vilify", rather than allowing courts to apply a dictionary meaning has narrowed the scope of this to mean comments that would "incite hatred or violence". This definition of "vilify" reflects even more extreme conduct than the fairly high bar expressed in most state vilification laws, for example Queensland and NSW vilification laws define it to be "hatred towards, serious contempt for, or severe ridicule". In addition, the Victorian vilification definition also includes the word "revulsion". The words "ridicule" or "revulsion" that appear in state jurisdictions are notably absent. This sets the bar higher than any jurisdiction in Australia in establishing "vilification". In the 2nd exposure draft, the words "seriously intimidate" have also been added. This appears to indicate that a certain level of intimidation in statements of belief is actually acceptable. Ironically, the bills at the same time also fail to protect people from religious minorities who do actually experience vilification.

Further to this are the serious practical implications for people making complaints about situations in the workplace, in accommodation, in receiving education or goods or services. As we have also noted in our previous submissions, we are very concerned about the ability of a person to retrospectively defend their discriminatory words on the basis of faith. For example, a person has made a complaint against their co-worker for making a homophobic comment at work. The respondent could then later claim during conciliation, or in a court or tribunal, that their faith compelled them to make the statement. This could then even raise questions of jurisdiction or the power of a state tribunal to hear the matter if the complainant is at a state discrimination venue, because of a possible federal law issue. The complainant could not have foreseen necessarily that this defence could have been used. By that time, the costs and time of pursuing litigation will be oppressive to all parties. In many cases, the complainant will be left with no legal redress but to withdraw their complaint.

As we have previously expressed, the inclusion of this clause will be highly detrimental to our families for two reasons:

1. It will actively encourage people with extreme views to speak out against our families; and
2. It will prevent or deter our communities from making discrimination complaints about directly or indirectly discriminatory comments.

SUPPORTING TASMANIAN RAINBOW FAMILIES

While not officially representing Tasmanian rainbow families, we acknowledge that many LGBTIQ+ community members who live in Tasmania are very concerned about impact of the Bills.

According to Equality Tasmania, the Religious Discrimination Bill undermine the legal rights of LGBTIQ Tasmanians in three ways:

a) *Weakening section 17(1) of the Tasmanian Anti-Discrimination Act allowing LGBTIQ Tasmanians and others to be humiliated, intimidated, insulted or ridiculed in the name of religion*
b) *Making it harder for big companies to promote inclusive workplaces by allowing employees to make demeaning statements against other employees in the name of religion*
c) *Making it harder for LGBTIQ Tasmanians to seek safely seek health care by allowing health care professionals to refuse us service in the name of religion.*

(https://www.equal.org.au/equality_tasmania_religious_discrimination_fact_sheets)

SUPPORTING OUR INTERSEX PARENTS AND CHILDREN

We acknowledge we are not best placed to comment on the specific impacts on intersex people and strongly endorse the submissions on these matters from Intersex Human Rights Australia (IHRA).

PUBLICATION

We respectfully request that you publish this submission on the Attorney-General's Department website. We were deeply disappointed that only select submissions on the first exposure draft, not including ours, were included for publication. We represent the views and unique interests of hundreds of families and children across Australia. We consider the community survey results to be compelling and important evidence in the public interest. While we appreciate that a large volume of submissions were received in general, including from LGBTIQ+ groups, no other submission can adequately address the specific interests of our families and children.

We thank you for the opportunity to be consulted on the 2nd Exposure Drafts and for the opportunity to provide you with our submission. We also acknowledge the work of other LGBTIQ+ advocacy groups who have submitted to this consultation, including Intersex Human Rights Australia, Equality Australia, ACON, Equality Tasmania and others, and ask that you also consider their submissions in complement to ours.

Representatives from all three organisations are available to respond to any further queries or questions you may have, either online or in person:

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Thank you for considering our submissions.