Executive Council of
Australian Jewry

Religious Discrimination Bill 2019: A Jewish community perspective

On 29 August 2019, the Federal government released an Exposure Draft of the *Religious Discrimination Bill 2019* (the Bill) and two further Bills making related and associated amendments. These are intended to give effect to Recommendations 3, 15 and 19 in the Report of the Expert Panel on Religious Freedom.

The Bill would make it unlawful to discriminate against others on the basis of their religious belief or activity. Nevertheless, it seeks to provide some general protection to individuals for "statements of belief" that might be attacked as discrimination, and to allow religious bodies to continue to operate in accordance with their beliefs. This attempts to plug a gap in the current law, and for this the government deserves credit. As stated in para 6 of the Explanatory Memorandum to the Bill, "*current protections in Commonwealth, state and territory laws for discrimination on the basis of a person's religious belief or activity are piecemeal, have limited application and are inconsistent across jurisdictions*".

In our view, certain critical aspects of the Bill require further thought. The following comments are a preliminary analysis only, and do not purport to cover everything that the three Bills address. A list of **Recommendations** appears in the final section of this document.

The Australian government has invited submissions on the draft legislation. **Submissions close on Wednesday, 2 October 2019**. The Submission Form can be accessed via https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx. Members of the Jewish community are also welcome to email their comments to the Executive Council of Australian Jewry at info@ecaj.org.au by 16 September 2019.

Part 1

Freedom of religion

The Bill does not create a positive right of freedom of religion in the sense of a Bill of Rights type of provision. But that is not what the ECAJ called for. The ECAJ called for freedom of religion to be affirmed as a positive right, rather than as a negative "exception to the rule" in the exemptions to various anti-discrimination laws of the States and Territories. The Bill in effect, if not in terms, achieves this in clauses 8(3), 10, 11 and 41(1).

As para 160 of the Explanatory Memorandum to the Bill notes, these provisions are "*not framed as an exception to the prohibition of discrimination under Part 3*". Rather, they are over-riding provisions affirming that persons of faith do not in general engage in discrimination simply by professing their faith, nor do religious bodies engage in discrimination simply by operating according to their ethos. It is the affirmation that these acts are not discrimination which is made the rule, and the limited circumstances where such acts might constitute discrimination which are made the exceptions. This is the reverse of the structure adopted in the current anti-discrimination laws of the States and Territories with regard to religion, as was discussed by many faith community leaders, including the ECAJ, in their consultation with the Prime Minister on 5 August 2019.

Although it may be less relevant to the Jewish community, the Bill will also need to be considered in light of the Report of the Australian Law Reform Commission (ALRC) when it completes its Review into the Framework of Religious Exemptions in Anti-discrimination Legislation. The terms of reference of that review have now been narrowed. Accordingly, the timing of the release of the ALRC Report should be brought forward to as early a date as possible, and no later than the date originally set, namely 10 April 2020. Alternatively:

- the government should announce that the Report will be released, and any consequent legislative reform will be enacted, during the life of the present parliament; and
- a provision should be added to the Bill to the effect that a review of its provisions will commence upon release of the Report and it will be completed, and any consequent legislative reform will be enacted, during the life of the present parliament.

Part 2

Religious bodies may act in accordance with their beliefs

No act of discrimination occurs under the Bill if "a religious body" engages "*in good faith*" in conduct "*that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted*" – clause 10(1). A "*religious body*" is defined in clause 10(2). It covers any educational institution, registered charity or other body "*that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion*", but does not include charities or other bodies that engage solely or primarily in "*commercial activities*". Clause 10(3) says that the protections given to religious bodies under clause 10 apply "*despite anything else in this Act*".

According to para 178 of the Explanatory Memorandum, religious bodies protected under clause 10 would generally include Jewish places of worship, bodies engaged in the ordination, appointment or training of Jewish clergy or in the selection or appointment of persons to perform duties or functions for, or to participate in, any Jewish religious observance or practice, Jewish schools and pre-schools, and charities and other communal bodies which operate according to a religious ethos and are not engaged solely or primarily in commercial activities. Under the Bill all of

these bodies would be free to continue operating in accordance with their religious beliefs in all their operations – including enrolment of students in the case of educational institutions, their employment practices, and the hiring out of their facilities - without this being considered discriminatory.

Under clause 29 of the Bill, a religious charity which has been set up to benefit persons of a specific religion may continue to do so.

Potential problem areas for religious bodies

(i) Under clause 10(1), the conduct of the religious body will only be protected if it "*may **reasonably** be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion*". What standard of reasonableness will apply? If it is to be the standard of the ordinary reasonable person, how would a reasonable member of the general Australian community have the knowledge and experience to assess whether a particular act is in accordance with Judaism? On what basis would a judge or jury in a civil court be able to determine what conclusion a reasonable member of the general Australian community would reach on such a question? Civil courts in English-speaking jurisdictions have long declined to rule on questions of religious doctrine. To do so would trespass across the well-recognised divide between religion and state. Yet this is precisely what Australia's civil courts will have to do if an issue arises as to whether or not certain conduct is in accordance with a particular religion, even if the word "reasonably" were to be deleted.

A solution might be to define the standard of reasonableness as that of a reasonable person who is observant in that religion or a denomination or stream of that religion. The question might then at least be determined on the basis of expert evidence from recognised faith leaders and teachers. Even this solution could present problems in the case of Judaism, with its well-established tradition of argument, dissent and, on occasions, conflicts of views between relevant religious authorities.

(ii) Religious bodies are defined in clause 10(2) as those which operate in accordance with the doctrines of a "religion". The definitions of several other key terms in clause 5 (such as "statement of belief") also refer to "religion". Yet the Bill contains no definition of "religion". There is important case law to suggest that a religion must be a system of belief and worship that is held in good faith and is "neither fictitious, nor capricious" and "not an artifice". The absence of a definition of religion in the Bill potentially raises questions as to whether a denomination or stream of a particular religion is itself a religion for the purposes of the Bill. In his speech when he released the Bill, the Attorney-General spoke of the desirability of the judiciary being "*guided and narrowed by a set of legislative guardrails*" in interpreting the Bill's provisions. For that reason it would be desirable for the Bill to include a definition of so fundamental a concept as religion. The definition would incorporate the case law, and make clear that a religion includes a denomination or stream of a religion. A definition of "religion' would also be desirable in order to give greater clarity to the meaning of "religious belief or activity" – see below.

(iii) Aged care facilities and hospitals which operate according to a religious ethos are excluded from the definition of religious bodies and therefore will not be protected under the Bill. This is because they engage in "commercial activities" – see clause 10(2)(b) and (c). "Commercial activities" is another crucial concept in the Bill which is not defined, but the Explanatory Memorandum provides some guidance.

> *"172. Commercial activities may include activities such as providing goods, services or facilities to the public, or sectors of the public, on a fee basis.*
>
> *173. However, it is not necessary that a body operate for-profit in order to fall within the commercial exception. For example, a registered charity which primarily sells goods to the general public on a commercial basis will not constitute a religious body for the purposes of this Act even if the profits are directed to other charitable purposes or activities so that it operates as a not-for-profit entity.*
>
> *174. Religious hospitals and aged care providers are not religious bodies for the purposes of this clause because they provide services to the public on a commercial basis and are not otherwise captured by the definition of 'religious body'. Accordingly, a religious hospital could not, for example, discriminate against a potential or existing patient on the basis of the patient's religious belief or activity.*
>
> *175. Although commercial religious entities are not entitled to rely upon this provision, such entities may rely upon other exceptions in this Act in order to maintain their religious ethos."*

This means that Jewish faith-based aged care facilities and hospitals cannot preference Jewish residents or patients.

Nor may they preference the employment of Jewish staff, except where there this is an inherent requirement of the position, such as a chaplain's role. According to para 347 of the Explanatory Memorandum:

> "*The High Court has held that whether certain requirements constitute inherent requirements of particular work depends on whether the requirements are 'something essential' to, or an 'essential element' of, the particular position. The High Court held that this question must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and by reference to the organisation*."

It is entirely possible that Jewish aged care facilities and hospitals do not exclude or seek to exclude non-Jewish residents or patients or employees, so these provisions would not matter to them. Nevertheless, even though such bodies operate commercially, they are designed to incorporate religious values and a religious ethos and culture into their care of the ill and vulnerable. This can be especially important for Jewish institutions in providing care that is culturally appropriate for Holocaust survivors.

A solution might be to remove the bracketed words in paragraphs (b) and (c) in clause 10(1) of the Bill, and add a new subsection to clause 10 to the effect that the protection extended to religious bodies does not extend to their commercial activities except to the extent necessary to prevent their facilities from being used in a manner that detracts from their giving effect to, or is inconsistent with, their religious ethos.

Part 3

Protection of persons from religious discrimination

The Bill will protect against discrimination on the grounds of religious belief or activity. The term 'religious belief or activity' is defined broadly in clause 5 as holding or not holding a religious belief, or engaging, not engaging or refusing to engage in lawful religious activity. Neither the concept of "religious belief" nor the concept of "religious activity" is defined in the Bill. The Attorney-General's overview says that "religious belief" is intended to cover the Abrahamic religions, Buddhism, Hinduism as well as smaller and emerging faith traditions.

Potential problem areas for persons facing religious discrimination

Religious activity is expressly limited to "***lawful*** religious activity".

This means that a person is not protected from being discriminated against on the basis of that person's religious activity if the activity is not "lawful". On the surface, this seems to be a reasonable requirement. As the Explanatory Memorandum notes, the Bill does not seek to protect people from being discriminated against for engaging in child marriage, to pick one example.

However, it seems that the lawfulness or otherwise of the religious activity will be gauged at the time that the person was allegedly discriminated against. If that is so, then if at some future time *shechita* (kosher slaughter of animals for consumption) and *brit milah* (infant male circumcision) were to become unlawful, it would then be permissible to discriminate against Jews on the basis that they had previously eaten kosher meat, or participated in a *brit milah* ceremony, even if at the time they had done so such activities were lawful. This would be a harsh and unfair, and probably unintended, consequence of the Bill as presently worded. Religious activity that was lawful ***at the time it occurred*** should expressly be deemed to be included in the meaning of "religious belief or activity".

More broadly, the limitation of protection against discrimination to "lawful" religious activities does open up the potential for abuse. The protection would cease if, for example, a State or Territory government, or a local Council, were to come under the control or influence of an extremist group with an anti-religious agenda and which passed laws banning certain activities which might be regarded as core religious behaviour of a particular faith community. .

A possible solution would be to add a provision to clause 5 that for the purposes of the Bill a religious activity is lawful unless it involves the commission of a serious offence within the meaning of clause 27(2) ie "*an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years*".

It should also be made clear that the preservation of State and Territory legislation in clause 29(3) of the Bill does not extend to local Council by-laws.

Part 4

Persons may state their religious beliefs

Clause 41(1) of the Bill provides that a statement of religious belief does not constitute discrimination under Commonwealth, state or territory anti-discrimination laws and does not contravene subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998*.

This provision will mean that persons cannot be found to have discriminated against others under any anti-discrimination law for merely expressing their genuinely held religious beliefs in good faith. This could include, for example, merely stating a biblical view of marriage or an atheist view on prayer.

The provision is intended to address the kind of problem created when Tasmania's Catholic Archbishop Julian Porteous was accused of behaving unlawfully by circulating Catholic schools with material spelling out the Catholic view on marriage in a manner which LGBTIQ people said disparaged them in a manner that contravened subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998*.

Clause 41(1) of the Bill seems to rule out similar material being challenged in the future under subsection 17(1) of the Tasmanian legislation. However, Clause 41(1) of the Bill does not protect statements that are malicious, would harass, vilify or incite hatred or violence against a person or group or which advocate for the commission of a serious criminal offence. (See clause 41(2)).

Potential problem areas regarding statements of religious belief

LGBTIQ people argue that these provisions in the Bill would make it easier for others to publicly disparage them in the name, or under the guise, of religious belief.

Clause 41(1) does clearly over-ride the specific terms of subsection 17(1) of the Tasmanian Anti-Discrimination Act 1998. That subsection was originally enacted to prohibit "*conduct which offends, humiliates, intimidates, insults or ridicules another person*" on the basis of **gender** "*in circumstances in which a reasonable person…would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed*". The subsection was later amended to prohibit such conduct on the basis of 12 other attributes, including race, sexual orientation, religious belief or affiliation and religious activity. By over-riding the subsection, the level of legal protection it provides to various groups is reduced.

On the other hand, no provision that is comparable to subsection 17(1) of the Tasmanian Anti-Discrimination Act 1998 is found in any other State or Territory legislation. All other State and Territory Anti-Discrimination Acts prohibit incitement of hatred, serious contempt and severe ridicule on the basis of race and other attributes, as does section 19 of the Anti-Discrimination Act in Tasmania. Section 17 is therefore very much an outlier provision. The only other provision which prohibits conduct in similar terms to subsection 17(1) is section 18C of the Racial Discrimination Act which is limited in its application to the attribute of race and which has been interpreted by the courts as being limited to situations where the offence, insult, humiliation or intimidation is found by a court to have "*profound and serious effects, not to be likened to mere slights*". No such limitation applies with regard to subsection 17(1) of the Tasmanian Anti-Discrimination Act 1998.

One little-noticed potential benefit in the Bill for LGBTIQ and other vulnerable groups arises from the use of the word "vilify" in clause 41(2), and also in clause 8(4)(b), which is discussed below.

The word "vilify" has not been defined in the Bill, which means that a court would likely interpret it in accordance with its ordinary, dictionary meaning. Most dictionaries seem to define "vilify" as involving the subjection of a person or group to severe disparagement that is not fair and that damages their reputation. This would appear to be easier to prove than incitement of hatred, serious contempt and severe ridicule, as is currently required by all other State and territory laws.

On balance, therefore, the Bill appears to marginally lower the level of legal protection in Tasmania for vulnerable groups against public disparagement, but to increase it qualitatively in the other States and in the Territories.

Part 5

Protection of persons of faith in their employment

Clause 8 of the Bill defines and prohibits indirect discrimination on the ground of religious belief or activity, that is, "*where an apparently neutral condition, requirement or practice has the effect of disadvantaging people who have or engage in a particular religious belief or activity*" (Explanatory Memorandum, para 106)

The example given in the Explanatory Memorandum (para 109) is "*a condition of employment that all employees are to attend meetings every Friday afternoon. This would disadvantage Jewish employees who leave early on Fridays to observe the Sabbath*".

Clause 8 also deals with rules imposed by employers, via company policy or contractual terms, on the conduct of employees as part of the employees' conditions of employment, such as dress codes and codes of conduct ("employer conduct rules"). To be lawful, these rules must be "reasonable" in all the circumstances and after weighing up various considerations set out in clause 8(2). If any of these rules are not reasonable in all the circumstances, and would operate so as to limit

disproportionately the ability of the employee to have or engage in their religious belief or activity, then the rules would to that extent be unlawful.

For example, a dress code which prohibits employees from wearing any form of religious dress, when such a prohibition is not related to the requirements of their job, or which prohibits them from wearing religious dress at all times while in the workplace, could disproportionately limit the ability of employees to engage in their religious activity, and therefore could be held to be unreasonable – (Explanatory Memorandum, para 119). That dress code would be unlawfully discriminatory and therefore invalid.

An important qualification appears in clause 31(2) of the Bill. It would not be unlawful for a person to discriminate against another person on the ground of religious belief or activity in employment if the other person is unable to carry out the "inherent requirements" of the employment because of their religious belief or activity. (See Part 2 section (iii) above).

Clause 8(3) of the Bill would prevent large employers (with revenue exceeding $50 million) from imposing "*standards of dress, appearance or behaviour which would have the effect of restricting or preventing employees from making statements of religious belief outside of work. If compliance with such standards is not necessary to avoid unjustifiable financial hardship, these standards will not be reasonable and therefore will constitute unlawful discrimination*" - (Explanatory Memorandum, para 28).

This provision is intended to prevent a large employer from taking action against an employee similar to the sacking of Rugby player Israel Folau by the Australian Rugby Union when, outside of work, he sent out an Instagram post proclaiming that hell awaits "drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters", thereby allegedly breaching the Professional Players' Code of Conduct.

Clause 8(3) of the Bill may deem an employer conduct rule of the kind that was used against Israel Folau in response to his statement of belief to be unreasonable and therefore unlawful for a large employer, "*unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer*".

Further, clause 8(4) says that clause 8(3) will not apply to assist an employee if the statement of belief in question is "*malicious, or likely to, harass, vilify or incite hatred or violence against another person or group of persons*" or would reasonably be seen to be "*counselling, promoting, encouraging or urging conduct that would constitute a serious offence"*.

Potential problem areas regarding employment protections

The expression "*unjustifiable financial hardship*" is not defined in the Bill. Presumably it would include demonstrable damage of a substantial kind to the employer's brand or the likelihood of significant financial loss.

Permitting people to suffer religious discrimination in their employment simply because their opinions about religion, expressed out of hours, would cause a large

employer unjustifiable financial hardship, seems alien to Australia's tradition of a 'fair go'.

There is also a larger question of principle as to whether the personal freedom of employees to express their religious beliefs outside the work environment, without facing potential retaliatory action by their employer, should depend on the financial size of the employer, or the potential financial consequences for the employer.

Both the "*unjustifiable financial hardship*" exception for large employers and the limitation of the provisions of clause 8(3) to large employers should therefore be reconsidered.

Part 6

Protections for health practitioners

There are specific protections for health practitioners clauses 8(5) and (6) which seek to prevent those who govern the activities of such practitioners from imposing a "conduct rule" preventing them from conscientiously objecting to providing certain health services.

Potential problem areas regarding protections for health practitioners

Clause 8(5) provides that if there is a State or Territory law which allows conscientious objection, then that law will apply, not the provisions of the Bill. It seems that the Bill will only assist a health practitioner operating in a State or Territory that has no law on the topic. Thus, religious medical practitioners who object, for example, to the Victorian law on abortion (which seems to require a formal "referral" of a patient seeking an abortion to someone who will carry it out), will not be able to rely on the protections in clauses 8(5) and 8(6) of the Bill.

Recommendations

1. **The timing of the release of the ALRC Report should be brought forward to as early a date as possible, and no later than the date originally set, namely 10 April 2020. Alternatively:**

   - **the government should announce that the Report will be released, and any consequent legislative reform will be enacted, during the life of the present parliament; and**
   - **a provision should be added to the Bill to the effect that a review of its provisions will commence upon release of the Report and it will be completed, and any consequent legislative reform will be enacted, during the life of the present parliament.**

2. **Add a provision to clause 10(1) of the Bill which states that the standard of reasonableness for determining whether conduct may "reasonably" be regarded as being in accordance with the doctrines,**

tenets, beliefs or teachings of a religion, will be that of a reasonable person who is observant in that religion or a denomination or stream of that religion.

3. **In clause 5, add a definition of "religion" which incorporates the case law on the meaning of that expression, and which specifies that a religion includes a denomination or stream of a religion.**

4. **In clause 5, add a definition of "commercial activities" which refers to the provision of goods or services, or the making available of facilities, in return for a commercial payment.**

5. **Remove the bracketed words in paragraphs (b) and (c) in clause 10(1) of the Bill, and add a new subsection to clause 10 to the effect that the protection extended to religious bodies does not extend to their commercial activities except to the extent necessary to prevent their facilities from being used in a manner that detracts from their giving effect to, or is inconsistent with, their religious ethos.**

6. **Add a provision to the definition of "*religious belief or activity*" in clause 5 to specify that the time for gauging whether a religious activity is "lawful" is the time when the activity occurred.**

7. **Add a provision to the definition of "*religious belief or activity*" in clause 5 to the effect that for the purposes of the Bill a religious activity is lawful unless it involves the commission of a serious offence within the meaning of clause 27(2) ie "*an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years*".**

8. **Add a provision to Clause 29(3) to the effect that the preservation of State and Territory legislation does not extend to local Council by-laws.**

9. **In clause 5, add a definition of "vilify" for the purposes of clauses 8(4)(b) and 41(2).**

10. **Both the "unjustifiable financial hardship" exception for large employers and the limitation of the provisions of clause 8(3) to large employers should be reconsidered.**

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