



**17 December 2021**

Committee Secretary

- Parliamentary Joint Committee on Human Rights
- Senate Legal and Constitutional Affairs Committee

Department of the Senate  
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Dear Committee Secretary,

### **Response to the Religious Discrimination Bill 2021 and related bills — Pride in Law**

We write to express serious concerns surrounding the Religious Discrimination Bill 2021 and related bills (the Bill). Pride in Law is concerned that aspects of this Bill would permit and prioritise faith-based discrimination over the rights and interests of others.

Pride in Law is a national non-political LGBTIQ+ Law Association, aimed at connecting lesbian, gay, bisexual, transgender, intersex, queer, and questioning (LGBTIQ+) members of the legal community and their allies. Pride in Law is Australia's first and only National LGBTIQ+ Law Association, which is '*Law Focused, Pride Inspired*'.

Since July 2017, Pride in Law has worked to provide visibility, education, and advocacy around LGBTIQ+ issues in the legal profession. We represent and promote legal professionals, increase community understanding of the law, particularly as it affects LGBTIQ+ individuals, help protect the rights of individuals and advise the community about the benefits legal professionals can provide. Pride in Law also assists the public by advocating for improvements to laws affecting Australians.

At its recent meetings, Pride in Law members discussed ongoing concerns regarding the Religious Discrimination Bill 2021 and related bills. We do not support the Bill and call for it to be withdrawn. In the alternative, we recommend that at the very least the Bill be significantly amended as proposed below.

On 26 November 2021, pursuant to clause 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred to the Parliamentary Joint Committee on Human Rights the following matters for inquiry and report by 4 February 2022:

- The Religious Discrimination Bill 2021;
- The Religious Discrimination (Consequential Amendments) Bill 2021;
- The Human Rights Legislation Amendment Bill 2021.

### **Privileging religious expression over discrimination protections**

Pride in Law's main concern, which precedes other issues in this space, is that the Bill will permit freedom of religious expression at the expense of the enjoyment of other human rights.

If enacted, the Bill will erode fundamental rights that have been hard fought for by minority groups, and will cause direct harm to women, the LGBTIQ+ community, people with a disability and people from minority faith groups.

The Bill, including clauses 7 to 9, will override existing State and Territory protections for these groups Australia-wide, allowing discrimination laws to effectively be used as a sword by people of faith against others. Further, clause 11 of the Bill, will permit the Commonwealth Attorney-General to make unchecked changes by using regulatory powers. We made additional comments in relation to the feasibility of clause 15 below.

All members of the community should all have the right, whether at work, school, and in healthcare and other essential service settings, to feel safe and respected.

Our Association is extremely concerned that certain religious statements will be allowed despite other legal discrimination protections in federal, state and territory laws, leaving many Australians vulnerable in public life.

The Bill will allow people to discriminate against and vilify LGBTIQ+ people on 'grounds of religious belief' so long as it is not 'violent'. It will affect people in workplaces, hospitals and medical services, schools and public life. The potential harms LGBTIQ+ people will be exposed to as a direct result of this legislation are significant and may have catastrophic consequences.

Further, in our view, this Bill does not protect all people of faith, and so does not represent true religious freedom.

In our view, clause 41 of the Bill overrides federal, state and territory discrimination protections, and Tasmanian offensive conduct provisions. Laws should not favour the rights of one group over another.

### **Impact on the Legal Profession**

The Bill places employers in precarious positions, where they must navigate on the one hand, a duty of care under workplace health and safety legislation to provide a safe and inclusive workplace for all employees, and on the other hand, the rights of employees to make "statements of belief" that will offend, insult or humiliate others.

Pride in Law considers that clause 15 is unworkable and should be omitted, as it will make it difficult for professional regulatory bodies, such as law societies and medical boards, to respond to or discipline members who make offensive, humiliating, derogatory or insulting "statements of belief" outside work contexts. Legal practitioners are subject to stringent professional and ethical guidelines under the Australian Solicitors Conduct Rules, which require practitioners to refrain from engaging in any conduct that could bring the profession into disrepute.

Where a legal practitioner, in a personal capacity, expresses a "statement of belief" about legal decisions or court processes (by stating on social media, for example, that a decision is immoral or contrary to Christian teaching, or by suggesting that a judge's decision reflects a lack of morality), there is no mechanism whereby that practitioner could be the subject of investigation or disciplinary action. While clause 15(2) qualifies that a qualifying body will

not discriminate against a person if “compliance with the qualifying body conduct rule by the person is an essential requirement of the profession”, it is unclear what types of “statements of belief” would fall in or out of the exemption’s scope.

If passed, the Bill will allow lawyers to make statements of belief even when these comments could damage the reputation of the justice system.

Currently legal practitioners can be disciplined if they make a public comment that could undermine the community’s confidence in the administration of justice. However, clause 15 of the Bill restricts professional bodies from disciplining a lawyer or barrister who makes such a comment if it is a statement of belief made in a personal capacity.

For example, a senior legal practitioner could make a comment on social media that is highly critical of a judge’s decision and state that the decision is immoral and contrary to Christian teaching. The legal practitioner could then go further and suggest that the judge’s decision reflects a lack of morality in the legal system and even criticise the judge’s own character, stating that the judge will be subject to a higher judgement.

In our view, such a comment on social media, even in a personal capacity, could undermine public confidence in the administration of justice and therefore breach the professional conduct rules. However, any disciplinary sanction for such a breach could not be pursued if the Bill is passed, as the comments could be considered a statement of belief made in a personal capacity.

A lawyer’s paramount duty is to the court and the administration of justice. Any comments made by lawyers that undermine public confidence in the administration of justice are in breach of those duties. That duty should not be undermined by the ‘statement of belief’ provision in the Bill.

It should always be possible for state and territory legal regulatory bodies to investigate and respond to breaches of professional conduct rules.

### **Overriding of State and Territory laws**

The Bill is clear in that it seeks to override existing State and Territory anti-discrimination laws, particularly in relation to “statements of belief”. This is likely to reduce the authority of State tribunals, which hear the vast majority of the country’s discrimination claims.

Where a person is accused of discrimination claims they were making a “statement of belief”, State tribunals will be largely unable to deal with the claim. Rather, the victim will be required to take their claim to the Supreme Court, which is likely to be prohibitively expensive and take years to resolve.

### **Enshrining religious privilege in law**

It is our position that clause 10, effectively enshrines religious privilege in law. In other words, where religious bodies act “in good faith” in ways that can be justified as being in accordance with their beliefs, such acts cannot be deemed to be unlawful discrimination under any Australian discrimination law.

There will be no consequences for misconduct. Clause 15 of the Bill will make it difficult for professional bodies (such as legal associations and medical boards) to respond to members that make offensive, uninformed, insulting, demeaning or damaging statements based in or about religion outside work contexts. For example:

- A medical body may not be able to reprimand a nurse that tells a patient that their HIV is a punishment from God.
- A Law Society may have little flexibility to consider whether statements made outside work contexts can nonetheless cause harm to colleagues or clients, or undermine public confidence in the profession.

Will entrance already existing discriminatory policies on faith-based organisation's hiring and dismissal processes. Clauses 7 to 9 of the Bill will allow faith-based hospitals, aged care facilities, accommodation providers and disability service providers to discriminate against people with different or no religious beliefs in employment. These broad exemptions already exist, in some degree, in many State and Territory anti-discrimination laws.

Church-run institutions are collectively among the largest non-government employers in the nation. Hiring and firing in a considerable number of employment positions may now be based on a religious test, in accordance with the governing organisation's faith.

This Bill will establish double standards in the law, allowing religious organisations the ability to discriminate against others with different or no belief. It is unacceptable that this Bill creates protections for companies associated with religious individuals who are refused services, goods or facilities because of views or events that are offensive to many.

In addition, all faith-based service providers either receive government funding or are exempt from paying the full range of federal or state taxes. These taxpayer-funded institutions should not have the power to hire and fire based on their religious faith.

This essentially creates a form of legalised, government-sponsored "employment discrimination", where a significant proportion of the population is barred from employment at the largest non-government employers in the country.

Pride in Law holds significant concerns that religious organisations will be allowed to discriminate against others with different beliefs or non-belief. This places religion squarely in a position of legal privilege beyond any other discrimination legislation.

### **The need for an appropriate balancing of rights**

There is no doubt that freedom of religion is a fundamental human right that should be appropriately protected in any liberal democratic society. Australia is party to a number of international law instruments, including the *Universal Declaration of Human Rights (UDHR)*,<sup>1</sup> which, although not a binding treaty, affirms that:

[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>2</sup>

Article 2 of the UDHR grants each person such rights 'without distinction of any kind', including on the basis of religion.<sup>3</sup> Australia also signed and ratified the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>4</sup> Article 18 of the ICCPR guarantees religious freedom, and provides that the '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'<sup>5</sup>

Pride in Law acknowledges the right of all persons to hold and practice their beliefs as a fundamental human right. The Bill, however, fails to achieve an appropriate balance of rights between freedom of religion and other fundamental human rights, the most relevant being the right to equality before the law and the right to non-discrimination based on other factors (such as sex, gender identity, sexual orientation, or disability). Article 2(1) of

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<sup>1</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR').

<sup>2</sup> UDHR art 18.

<sup>3</sup> UDHR art 2.

<sup>4</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), which Australia ratified in 1980.

<sup>5</sup> ICCPR art 18(3).

the ICCPR requires that each party undertake 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as...religion...or other status'. Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>6</sup>

The right to non-discrimination and the equal protection of the law 'constitute a basic and general principle relating to the protection of human rights'.<sup>7</sup> While protecting people against discrimination on the grounds of religious belief (or non-belief) is an important objective, the Bill goes further, to override existing Federal, State and Territory anti-discrimination laws that provide "statements of belief" with immunity from legal consequence. In its quest to protect religious freedom, the Bill enshrines the right to discriminate against people for other reasons.

Accordingly, Pride in Law recommends that existing State and Territory legislative frameworks be reviewed to ensure they adequately protect freedom of religion.

### **Complexity of drafting and inappropriate use of language**

The Bill is bizarrely complicated and poorly drafted, and will lead to increases in complex, unnecessary and costly litigation. For example, at clause 7(1) the Bill provides that "it is not discrimination for a religious primary school to require all of its staff and students to practice that religion". It would be better if the Bill rightly acknowledged this as a form of discrimination, by providing instead that "it is lawful discrimination for a religious primary school to require all of its staff and students to practice that religion".

Other language used in the Bill should be clarified for legal certainty. For example, a "religious belief or activity", as defined in clause 5 of the Bill, arguably does not include "not holding a religious belief" or "not engaging in religious activity". Clause 7(4) is particularly unclear, providing that "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", yet notes that conduct that is not discrimination under the Bill might still be direct or indirect discrimination under some other anti-discrimination laws, unless it is a "statement of belief" in which case, by virtue of clause 12, it does not constitute discrimination for the purpose of any other Federal, State or Territory anti-discrimination legislation.

### **Other issues**

In addition to the above concerns, Pride in Law submits that the Bill has other significant issues, these include:

- The bill would be inconsistent with article 2 of the Universal Declaration of Human Rights international human rights law.
- Pride in Law warns that it could be unconstitutional because it curtails other rights.
- Under clause 11 of the Bill, the Commonwealth Attorney-General will be able to make changes to the law by using regulatory powers.
- The Religious Discrimination Bill as currently drafted does not validate Article 18(2) of the International Covenant on Civil and Political Rights (ICCPR), which gives equal rights to "freedom of thought and conscience" (including not having any religious beliefs); nor does it validate Article 20(2), "Advocacy of ...

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<sup>6</sup> ICCPR art 26.

<sup>7</sup> Human Rights Committee, *General Comment 18: Non-Discrimination*, 37<sup>th</sup> sess, UN Doc HRI/GEN/Rev.1 (10 November 1989) [1].

religious ... discrimination, hostility or violence shall be prohibited by law”, which includes discrimination by religion.

- The Bill’s reliance of using the term “statements of belief” as a way of offering protection for religious expression is also fraught with significant difficulty. Our submission is that this is not a well-understood concept and will lead to considerable confusion in the courts and community.
- The Commonwealth Government recently had a significant and important Royal Commission into Institutional Responses to Child Sexual Abuse. A key recommendation from that Royal Commission was the requirement into the disclosure of sexual abuse, even an admission during confession. However, the Vatican has reaffirmed that Catholic priests cannot reveal to outsiders what they learn in confession, as “this duty comes directly from God.” This openly defies the mandatory reporting laws now enacted in various Australian states and territories requiring priests to report all knowledge of child sex abuse -- even if gained through confession. Granting religions legal privilege will worsen this problem, resulting in people of different religions following different laws in preference to Australian law, based on their beliefs and the teachings of their religious leaders.
- The Bill would allow a person to use their religious belief as a cover for launching sexist and prejudiced attacks against women, and to undermine laws granting rights to women. Its unnecessarily complex clauses provide new avenues for religious “anti-choice” conservatives to attack access to abortion, promote patriarchal agendas and advance other forms of gender bias.
- The Religious Discrimination Bill is out of step with all other existing anti-discrimination legislation in that it protects a conscious choice (the conscious and changeable choice of belief over non-belief) rather than an innate trait (such as age, race, gender, disability or orientation) – and moreover, does so by reducing these other protections
- A Religious Freedom Commissioner is unnecessary. Further, it would isolate the LGBTQI+ community who remain without their own Commissioner or equivalent.
- It encompasses protections that are not needed and privileges that are harmful, overly complicated, open to abuse, socially divisive and morally wrong.

Pride in Law respects all communities, religions, beliefs and a person’s right to live according to their faith, or, indeed, of no faith. It is through this mutual respect that life can flourish.

Our Association does not support this bill. Overall, the second draft of the Religious Discrimination Bill goes too far in prioritising religious rights over all others. In our view, the second draft of the Religious Discrimination Bill goes well beyond the general indirect discrimination provision.

The idea behind the bill is a good one: to prohibit discrimination based on religious belief or non-belief. However, in its current form, the bill provides too many broad and special protections to those of religious faith. The best guarantee for religious freedom is human freedom.

Pride in Law supports members of all faith groups who wish to respectfully practice their faith, but Australian laws should protect all of us, equally. This Bill does not protect religious people or uphold the right to religious freedom. Rather, it enshrines in Australian law the right to discriminate.

We do not support the Bill and call for it to be withdrawn. If the government is serious about fulfilling its election commitment, it would end discrimination against LGBTQI+ students and staff in religious school by delivering simply legislation top stop schools from expelling students, discriminating against students and staff, or firing staff and educators for identifying as part of the rainbow community.

Pride in Law stands for equality, not privilege. Unfortunately, in our view, the Bill does not offer equality. It builds on the existing privilege of some organised religion to deny equal rights to LGBTQI+ Australians and other minorities. This Bill divides Australian communities, provides different standards for different people and will permit people with extreme views to stigmatise and cause harm.

In our view, the current Bill has gotten the balance wrong. It will privilege the *status quo* for homophobia and transphobia in any religious context. It will privilege protections for religious voices to make harmful statements that could currently be discriminatory under state law.

Pride in Law strongly submits that this Bill cannot be “fixed” through amendments. This Bill should be abandoned altogether. The Bill in its current form is unworkable and should be scrapped.

Thank you in advance for considering our submission. Pride in Law look forward to hearing from you. We hope our submission helps in building a more inclusive legal profession and society.

If you have any queries regarding the contents of this letter, please do not hesitate to contact me or our Pride in Law team by phone on [REDACTED] or by email to [director@prideinlaw.org](mailto:director@prideinlaw.org).

Yours sincerely,

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