



2 October 2019

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
www.alhr.org.au

Human Rights Unit, Integrity Law Branch
Integrity and Security Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: ForConsultation@ag.gov.au

Dear Human Rights Unit

The Religious Freedom Bills

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Exposure Drafts of the *Religious Discrimination Bill 2019 (RDB)*, *Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)*, noting that the focus of this submission will be on the RDB.

ALHR has made previous substantive submissions in relation to 'religious freedoms' issues in 2018 which form Annexures A and B to this submission, and on which this submission is also based, as follows:

Annexure A: Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion.*

Annexure B: Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.*

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Table of Contents

| | |
|--|----|
| Executive Summary - Problems | 3 |
| 1. International Human Rights Law Principles | 4 |
| General principles..... | 4 |
| Practical problems with privileging religious ‘rights’ | 5 |
| 2. Groups Affected by the RDB..... | 6 |
| 3. The RDB: Protections and Problems..... | 7 |
| Key Concerns | 7 |
| Employer Conduct Rules - ss 8(3) and 8(4)..... | 7 |
| Conscientious Objections by the Health Profession - ss 8(5) and 8(6) | 8 |
| Prioritising Statements of Belief - s 41 | 9 |
| 4. Relevant International Instruments | 11 |
| Right related to Health | 11 |
| Rights related to Employment..... | 13 |
| Principle of non-discrimination | 14 |
| 5. Where Rights Compete: What Should Prevail? | 15 |
| The balancing of indivisible and interdependent human rights..... | 15 |
| Rights must be balanced where they conflict | 15 |
| Taking account of context and other values..... | 16 |
| The good faith of those seeking protection | 16 |
| 6. Conclusion | 16 |

Executive Summary - Problems

1. ALHR supports a Religious Discrimination Act which provides protections against religious discrimination in areas of public life including employment, education, membership of sporting clubs and other areas of public life.
2. **However, ALHR does not support the following provisions in the RDB (due to the risk of subjugation of rights of vulnerable groups likely to be affected):**
 - **Employer Conduct Rules - ss 8(3) and 8(4)**
 - **Conscientious Objections by the Health Profession - ss 8(5) and 8(6)**
 - **Prioritising Statements of Belief - s 41**
3. **ALHR does not believe that Australian society should tolerate every behaviour that is religiously motivated, just by reason of that motivation, and strongly believes that our laws should not protect behaviour that is discriminatory and is likely to most heavily impact already vulnerable groups.** The 'right to believe' is an absolute personal right exercised internally, but there is no absolute right to manifest or act upon one's religious belief externally so as to impact upon others. **Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion.**
4. The RDB legislative package is **not consistent with international human rights law**, and indeed **creates the anti-human rights situation** whereby discrimination will be permitted on the basis of religious faith. It will:
 - privilege religiously-based discrimination over the rights of others to be free from discrimination;
 - **build a fundamental imbalance into our existing anti-discrimination legal system by privileging the rights of one group within society at the expense of everyone else;**¹
 - create Commonwealth exemptions in favour of so-called 'religious' statements which will override concurrent and more protective State anti-discrimination legislation, setting an undesirable precedent; and
 - undermine, *inter alia*, Section 18C of the Racial Discrimination Act.
5. Nor is it clear how the proposed legislation would work in relation to conflicts between, or within, different religions, unlike the situation under a balanced human rights regime. Indeed it may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
6. ALHR's primary concern is that Australian legislation and judicial decisions should adhere to **international human rights standards**. Human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights. That is not what would occur under the RDB legislative package, if passed. The proposed piecemeal legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights.

¹ Alastair Lawrie, at <https://alastairlawrie.net/2019/09/15/the-growing-list-of-problems-with-the-religious-discrimination-bills/>

7. Where State anti-discrimination legislation aligns more closely with international human rights law than does the proposed Commonwealth legislation (being the RDB and associated amending legislation) it is particularly objectionable for the Commonwealth legislation to override State human rights protections.
8. Australia is the only Western liberal democracy without a federal Human Rights Act or Bill of Rights. Australia is bound by the seven core international human rights conventions and has been elected to the UN Human Rights Council, yet our citizens and residents continue to live without the human rights protections enjoyed by others in comparable countries across the Western world.
9. ALHR submits that the human right to freedom of religion would best be protected by a Federal Human Rights Act or Bill of Rights and that the **RDB legislative package should not be passed.**

1. International Human Rights Law Principles

General principles

- 1.1 **ALHR recognises and calls the Department's attention to the following fundamental principles of international human rights law:**
 - All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**).
 - All rights should be protected together (**the principle of interdependence**).
 - Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).
- 1.2 ALHR supports legislative reform to improve human rights protections in Australia insofar as legislative reform offers protections to all citizens who may themselves face discrimination on the basis of their religion. However the proposed legislation here is more about giving a right to discriminate than enshrining protection against discrimination.
- 1.3 It is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. The right to express one's religious beliefs does not "trump" other rights, such as the right to be free from discrimination, but rather must be considered in context. **A secular democratic government should not privilege the right to act on religious views above other human rights.**
- 1.4 In this regard, where protection is desired for a particular group, it will be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.
- 1.5 Human rights entail **both rights and obligations**. Hence in so far as any person is entitled to the protection of 'human rights', that person must also respect the human rights of others. A secular democratic government should not privilege the right to act on 'religious' views above other human rights.
- 1.6 Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 1.7 Protection against behaviour that is inconsistent with our society's norms – as, we submit, discrimination on the basis of religious beliefs is inconsistent with Australian social norms - must only be granted where the protection ensures respect for the rights of others. That is not the case with the proposed legislation.
- 1.8 **ALHR does not support the subjugation of rights of other vulnerable groups in Australia**, including LGBTI Australians, Australian women and Australians with a disability, to the rights of religious Australians.

- 1.9 The full title of the right is the right to **“freedom of thought, conscience, religion or belief.”** This does not mean ‘freedom’ to follow only the majority religion or belief, and the right **includes freedom ‘from’ religion.** This interpretation is confirmed by human rights courts internationally and particularly in Europe. The right means freedom to:
- choose between different religions and beliefs,
 - convert between religions and beliefs,
 - leave a religion or belief, and
 - hold no religion or belief - following on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing (as any other situation would amount to compulsory religion).
- 1.10 Freedom of religion or belief is not limited to traditional religions. It also encompasses agnosticism, atheism, secularism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions (see paragraph **Error! Reference source not found.** in Annexure A).
- 1.11 It must also be recognised that while the right to believe is an absolute personal right which is exercised internally, the right to manifest or act upon one’s religious belief externally so as to impact upon others is never absolute. Religious freedom does not mean freedom to visit harm upon others in the name of one’s own religion. (This is discussed at paragraphs 6.48 and following, 6.5, 8.4 and 8.5 in Annexure A).
- 1.12 It is submitted that the balancing of competing rights through a human-rights-based process involving ‘reasonable accommodation’ is the best method of managing the practical problems resulting from these issues. **There can be no truly free religious life without respect for the freedoms and human rights of others.**
- 1.13 We refer the Department to the various resources relating to the international human rights concept of religion referred to at paragraph 3.2 of Annexure A ,to the discussion in Section 5 of Annexure A of the relevant international instruments enshrining the right to freedom of religion or belief, and to the discussion in Section 6 of Annexure A of how the human right to freedom of religion intersects with other rights, and indeed should support other rights, not restrict them.

Practical problems with privileging religious ‘rights’

- 1.14 In practice, the beliefs and hence the activities of those of different religions will often conflict, because “each person's religious freedom is dependent on and coextensive with everyone else's religious freedom.”²
- 1.15 It is unclear how the proposed legislation would work in relation to conflicts between different religions, or conflicts within a particular religion. Indeed the legislation may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
- 1.16 Freedom of/from religion also involves the principle of equality amongst religions. No religion should be legally privileged above any other religion, nor above secularism, as that would result in

² Dr Luke Beck in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 13, at http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22

inequality, and hence lack of freedom, of religion³. This principle is particularly important in multicultural Australia.

- 1.17 **ALHR urges the Australian Government to amend the RDB to maintain protections for religious Australians whilst avoiding the subjugation of rights of other groups, particularly including those currently protected under State anti-discrimination laws.**
- 1.18 It must be remembered that many religions have discriminatory aspects, both in relation to adherents of other religions and in relation to the religion's own adherents. See the discussion on this point in Section 7 of Annexure B. Adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity. Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs.
- 1.19 Nor should a secular democratic government privilege the right to act on 'religious' views above other human rights. As Professor Grimm explains:

*"... self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behavior that is religiously motivated. Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group's creed, but prevent the group from making it binding for society as a whole."*⁴

- 1.20 In the view of ALHR the promotion of other human rights in addition to the right to freedom of 'religion', and a more nuanced view of the accommodations that need to be made between competing human rights, can better assist Australian society. A federal Human Rights Act is the appropriate legislative vehicle to achieve this result.

2. Groups Affected by the RDB

- 2.1 Members of one or more of the following groups will be affected by the proposed RDB changes to existing legislation:
- People with a religious belief or who participate in religious activity;
 - Employees;
 - Employers;
 - Health practitioners; and
 - Patients.
- 2.2 Within the above groups, ALHR believes that LGBTI Australians and Australian women will be the following subgroups who will be most affected if the proposed legislation is enacted.
- 2.3 Further, the RDB particularly affects any Tasmanian coming within any category under s 17(1)(a)-(s) of the *Anti-Discrimination Act 1998 (Tas)*, including but not limited to:
- LGBTI and gender diverse Tasmanian;
 - Tasmanian woman; and
 - Disabled Tasmanians.

³ See Dieter Grimm, 'Conflicts between General Laws and Religious Norms', (2009) 30(6) *Cardozo Law Review* 2369, at 2374, <http://cardozolawreview.com/Joomla1.5/content/30-6/GRIMM.30-6.pdf>

⁴ *ibid*

Given that the rights of these groups are affected, the Government must therefore consider the relevant international instruments and principles which apply to each of the above groups and also to all groups generally, noting that (as discussed in more detail in Section 8 of Annexure A) there is no 'right of conscientious objection' under human rights law for persons holding discriminatory 'religious' beliefs. Relevant international instruments and principles are discussed in more detail in Section 4.

3. The RDB: Protections and Problems

Key Concerns

- 3.1 ALHR supports the RDB insofar as it seeks to protect Australians of all religions from direct discrimination as defined in the RDB.
- 3.2 However, **ALHR is very concerned that the RDB does not adhere to the principles of indivisibility, interdependence and proportionality** of human rights including by:
- Preventing employers from imposing 'reasonable' **conduct rules** which promote non-discrimination against other groups, for example LGBTI Australians and women.
 - Allowing health practitioners to **conscientiously object** to treatment, for example of LGBTI Australians and women seeking to terminate a pregnancy.
 - Privileging religious expression ("**statements of belief**") more broadly, where that expression has the potential to cause harm to other vulnerable group and where, as a result of the RDB, human rights protections previously afforded to those groups are no longer available to them, for example under s 17(1) of the *Anti-Discrimination Act 1998 (Tas)*.

Employer Conduct Rules - ss 8(3) and 8(4)

| | |
|---|--|
| The proposed sections have the effect that: | Preventing business with revenue of over \$50 million per year from imposing standards of dress, appearance, or behaviour which limit religious expression being if that business can provide that compliance with the condition is "necessary to avoid unjustifiable financial hardship" to the business. |
| Example of consequence: | An employer of a business with revenue of over \$50 million per year cannot impose rules on their employees which eliminate discrimination in that workplace. |

- 3.3 The RDB makes it unlawful for a private sector employer with revenues of at least \$50 million in the current or previous financial year to restrict or prevent an employee from making a 'statement of belief' outside of work hours unless compliance with that rule is necessary to avoid 'unjustifiable financial hardship' to the employer. There is an exception where that statement is malicious, or would likely harass, vilify or incite hatred or violence against another person. Employer conduct rules imposed by private sector employers with revenues of less than \$50 million per financial year, or in relation to conduct during work hours, are subject only to general indirect discrimination provisions.
- 3.4 ALHR understands this provision to have been introduced in response to the high profile case of Israel Folau. Mr Folau has taken Federal Court action against his employer Rugby Australia seeking to protect his ability to post content on social media which is deemed offensive to LGBTI Australians in what Ruby Australia say was a violation of his contract. ALHR urges the Parliament to make laws only based on relevant legal principles including fundamental human rights principles, not in response to individual high profile matters evoking an emotional public response.

- 3.5 ALHR is concerned that s 41 of the RDB fails to reflect the protections offered by Article 18(3) of the **ICCPR** which states that “*freedom 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*” or Article 2(1) of the ICCPR which states that “*each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.*”
- 3.6 ALHR is also particularly concerned at the concept of balancing human rights by reference to financial consequences. ALHR submits that such a concept is quite inappropriate.
- 3.7 ALHR requests the Australian government to consider the its obligations under the **ILO convention** to pursue *a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.*

Conscientious Objections by the Health Profession - ss 8(5) and 8(6)

| | |
|---|---|
| The proposed sections have the effect that: | If there is not otherwise State and Territory law providing for a doctor’s ability to conscientiously object, that doctor could refuse to undertake a health treatment if it would not impact on their employer’s ability (e.g. a hospital) to provide a health service OR compromise the health of the person accessing the service. |
| Example of consequence: | A woman has been admitted to hospital after a sexual assault. She asks a nurse where she can get the morning after pill. The nurse refuses to answer because her Catholic faith forbids contraception. Under the proposed laws, the right of women to have access to adequate health care facilities, including information, counselling and services in family planning is compromised, even if she is able to obtain that treatment from someone else or elsewhere. |

- 3.8 In Australia, State and Territory laws currently balance the health needs of patients with the right of health professionals to object to the provision of certain, limited health services on religious grounds, for example assisted dying and the termination of pregnancy, and subject to conditions which ensure the rights of a patient are not subjugated. For example, under current State and Territory legislation a health practitioner can conscientiously object to assisting assist in:
- abortion subject to a duty to refer and to assist when necessary to preserve life or in an emergency;
 - abortion subject to a duty to assist when necessary to preserve life of, or prevent grave injury to physical or mental health (or serious injury) to, a pregnant women;
 - Abortion subject to a duty to inform and to assist when necessary to preserve life;
 - Using excess assisted reproductive technology embryos;
 - Refusal to act in accordance with advance care directive on conscientious grounds; and
 - Voluntary assisted dying, subject to duty to inform.
- 3.9 ALHR submits that these State and Territory protections appropriately balance the right to manifest religion and the rights of patients who require the type of care in relation to which a health practitioner might conscientiously object. ALHR specifically notes the internationally recognised

human rights of all Australians to accessible, safe and legal abortion services⁵ and to freely determine the number and spacing of their children.⁶

- 3.10 The RDB extends the ability to conscientiously object on religious grounds beyond those circumstances allowed by States and Territories. The RDB provisions:
- Cover a wide range of health professionals - from doctors and nurses through to psychologists;
 - Are not limited to any particular type of health service in which a conscientious objection might be considered appropriate.
- 3.11 ALHR is concerned that the provisions in s 8 of the RDB raises the potential for right to health to be subjugated to the right to manifest religion in the following circumstances (non-exhaustive):
- A woman seeking emergency contraceptive following a rape;
 - A trans person seeking hormones from a pharmacist; or
 - A gay man seeking to be prescribed PREP, the HIV preventative medication.
- 3.12 It is insufficient to suggest that these people might gain access to the treatment they need from an alternate practitioner who does not uphold the same conscientious objection, as the lawful conduct of the first health practitioner may be the cause of them being fearful of seeking that treatment at all. This does not uphold Article 12 of the **ICESR**, which is the *right of everyone to the enjoyment of the highest attainable standard of physical and mental health*.
- 3.13 ALHR submits that when considering the limits of a health practitioner's right to manifest their belief by conscientiously objecting, legislators must keep at the forefront of their minds Article 18(3) of the **ICCPR** which states that: *Freedom 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*.
- 3.14 In terms of enforcement, ALHR also share the concern of others human rights advocates, including Equality Australia, in relation to the potential for conflicting claims being brought before the AHRC. It is foreseen that the conscientious objection provisions under the RDB may give rise to concurrent complaints of discrimination from patients who have been denied treatment and employees who have been required to provide health services which contradict their religious beliefs.

Prioritising Statements of Belief - s 41

- 3.15 Section 41 provides that 'statements of belief' do not constitute discrimination for the purposes of *any* anti-discrimination law, whether State, Territorial or Commonwealth. Thus a 'statement of

⁵ Convention for the Elimination of Discrimination Against Women [CEDAW], Art 16; CEDAW Art 2(f) and 5(a); see also Convention on the Rights of the Child, Art 24(3); Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, A/54/38/Rev 1 (1999) [11]; concluding Observations on Peru, CEDAW/C/PER/CO/7-8 (2014), para. 36; Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review (2014); UN Secretary-General, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254 (2011), para. 21; General Comment 14 (2000) on the right to the highest attainable standard of health, paras. 8, 12, 27; General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 70; Mr Peter Arnaudo, Attorney-General's Department, Hansard - Joint Standing Committee on Treaties Reference: Treaties tabled on 14 May and 4 June 2008 16 June 2008, p.7. <http://www.aph.gov.au/hansard/joint/commttee/J10940.pdf>.

⁶ United Nations Economic and Social Council, 'General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC.22, 2nd May 2016, 2.; General Comment No 22, above n 4, 4-6

belief' is exempt from all anti-discrimination legislation including each of the Racial, Sex, Disability and Age Discrimination Acts at Commonwealth level, and *all* equivalent State and Territory laws.

- 3.16 This means that a person can legally say something which may have previously been determined to amount to discrimination on the basis of race, sex, age disability or other status - so long as their statement is in 'good faith' and may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of their particular religion, unless the victim can show the perpetrator is malicious, or their statement is likely to harass, vilify, or incite hatred or violence.
- 3.17 **This is a totally unsatisfactory situation. Purported 'good faith' is no reason to permit the expression of harmful discriminatory statements. The RDB will make it easier to make comments that 'offend, humiliate, intimidate, insult or ridicule' minorities with impunity.**
- 3.18 Neither are the purported protections offered by ss 41(3)(a) and ss 41(3)(b) satisfactory. These subsections lack clarity in their application. The extent to which a statement of belief is or is not "malicious" or "would or is likely to harass, vilify or incite hatred or violence against another person or group of persons" will only be known after litigation is brought to test the interpretation of those provisions.
- 3.19 ALHR is further concerned that it is contemplated that the Commonwealth Attorney-General be allowed to override additional laws by future regulation, without needing the further approval of federal Parliament.⁷
- 3.20 Human rights groups and individuals in Australia have long fought to have the principle of non-discrimination in Article 26 of the **ICCPR** enshrined in law. Pursuant to Article 26, the law of Australia, as a signatory state, is to *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*. Pursuant to Article 2(1) of the **ICCPR**, all individuals within the territory of Australia, as a State Party to the ICCPR, undertakes to recognise and ensure all individuals are afforded the rights recognised in the ICCPR without *distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status*.
- 3.21 In Tasmania the parliament, informed by international human rights principles, passed laws offering the widest protection in the country against conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a range of attributes set out in s 17(1) of the *Anti-Discrimination Act (Tas) 1998*. Included amongst the attributes protected are sexual orientation, gender, gender identity, disability, religious belief or affiliation and religious activity.
- 3.22 However under the RDB, protections against conduct which offends, humiliates, intimidates, insults or ridicules will no longer be afforded to those formerly protected groups where that conduct is a "statement of religious belief" and where that statement is made in good faith and is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenants, beliefs or teachings of the religion.
- 3.23 When considering the rights of LGBTI Australians in particular, ALHR is concerned that the protections hard fought for this group and grounded in international human rights principles will be eroded and give rise to harmful comments without recourse.
- 3.24 Without the protection of s 17(1) of the *Anti-Discrimination Act 1998 (Tas)* the right of that person to *the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions* will be subjugated to the right of the religious person to state their belief no matter the consequence on the rights and wellbeing on another. Were the religious person not offered the protection of the RDB, the religious person can still hold that belief. They are only restricted from manifesting it, which is proportionate to the harm caused to the gay employee.

⁷ Alexander Lawrie, op cit.

- 3.25 ALHR is concerned that s 41 of the RDB was drafted in response to the case brought before Anti-Discrimination Commission against Tasmanian Archbishop Julian Porteous following the distribution of a pamphlet during the 2015 Tasmanian state same-sex marriage campaign titled “Don’t Mess with Marriage”, rather than in consideration of the **indivisibility** of human rights.
- 3.26 Again, ALHR submits that legislation should be made in accordance with proper international human rights law principles rather than as a response to high profile cases.

4. Relevant International Instruments

- 4.1 International instruments relating to freedom of religion are reviewed generally in Annexure A. We consider here the instruments relating to the rights to health and employment as well as to non-discrimination.

Right related to Health⁸

The following instruments deal with the subject of health:

| | |
|---|---|
| <p>Generally</p> <p><i>International Covenant on Economic, Social and Cultural rights</i></p> <p>(ICESR)</p> | <p>Article 12:</p> <p><i>States recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</i></p> |
| <p>Women</p> <p><i>Covenant on the Elimination of All Forms of Discrimination Against Women 1979</i></p> | <p>Art 11(f):</p> <p><i>The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.</i></p> <p>Art 12:</p> <p><i>States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.</i></p> <p>Art 14(2)(b):</p> <p><i>States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right To have access to adequate health care facilities, including information, counselling and services in family planning.</i></p> |

- 4.2 “While the right to health is sometimes understood to focus only on positive guarantees for the progressive realization of the availability, accessibility, acceptability, and quality of health care for all,” say Cohen and Ezer, “it also incorporates negative guarantees for the assurance of freedom from abuse and discrimination by the state and third parties within health care service delivery.” That is, the right to health (which Australia has agreed to uphold) also includes the right to “a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”⁹

⁸ OHCHR, The Right to Health, Fact Sheet No. 31, <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

⁹ CESCR General Comment No. 14, par 8.

- 4.3 Many rights relating to health issues in the context of patient treatment are implicit rights. Cohen and Ezer note that:

*The provisions of these treaties have been interpreted by human rights bodies to prohibit numerous forms of abuse in health settings. For example, the right to liberty and security of the person has been held to prohibit institutionalization without due process of people with mental illness; the right to privacy has been held to prohibit unauthorized disclosure of personal health data; the rights to bodily integrity and security of the person have been held to prohibit the administration of medicine to a child against parents' wishes; and the right to freedom from cruel, inhuman, or degrading treatment or punishment has been held to oblige governments to secure the adequate health and well-being of prisoners.*¹⁰

- 4.4 The CESCR, in paragraph 12 of its *General Comment No. 14*, describes a number of rights and implicit rights that it sees as integral to the rights to health and to bodily integrity (as does the European Charter of Patients' Rights, discussed below). These rights include:

- Availability (par 12(a)) of health treatment and the underlying determinants of health, without discrimination;
- Accessibility (par 12(b)) including the right to seek, receive and impart information and ideas concerning health issues ;
- Acceptability (par 12(c)): meaning that health services must be "respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, [and] sensitive to gender and life-cycle requirements";
- Quality (par 12(d)): to the observance of quality standards, with services being scientifically and medically appropriate.

- 4.5 The European Charter of Patients' Rights¹¹ drafted by the Active Citizenship Network puts the implicit right to health information as key to the health rights of patients, saying that every individual:

- "has the right to access to all kind of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available"¹²
- "has the right of access to all information that might enable him or her to actively participate in the decisions regarding his or her health"¹³
- "has the right to freely choose from among different treatment procedures and providers on the basis of adequate information"¹⁴ and
- "has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations."¹⁵

However it should be noted that this Charter, although influential in the European human rights context according to Cohen and Ezer, is written from the paradigm of patients as consumers, which is a different viewpoint from the broader (and in our view preferred) concept of patients as holders of human rights and as entitled to be treated with dignity.

¹⁰ Jonathan Cohen and Tamar Ezer, "Human rights in patient care: A theoretical and practical framework" (2013) 15 (2) *Health and Human Rights Journal*, available at <https://www.hhrjournal.org/2013/12/human-rights-in-patient-care-a-theoretical-and-practical-framework/>

¹¹ http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf

¹² Op cit, p 4.

¹³ Op cit, p 5.

¹⁴ Op cit, p 5.

¹⁵ Op cit, p 7. See also ICESCR (see note 13), Art. 15 as to the right to the benefits of scientific progress.

- 4.6 The Committee notes¹⁶ that inappropriate resource allocation can lead to “discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.” In addition, the Committee comments that “indigenous peoples have the right to specific measures to improve their access to health services and care,” saying that such health services “should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines.”¹⁷
- 4.7 A human-rights-based framework for patient care is increasingly being seen as a desirable alternative to consumer or contract-based ‘patient rights’ frameworks. A human rights framework considers the rights (and obligations) of both patient and provider, as well as wider social interests. As Cohen and Ezer say,

*the human rights in patient care concept refers not just to entitlements for actual patients, but also to human rights standards in the provision of care that concern health providers and the entire community. It calls for a pervasive human rights frame to govern the delivery of care to patients in all its aspects, which also highlights equality, participation, transparency, and accountability concerns.*¹⁸

Rights related to Employment

The following instruments deal with the subject of employment:

| | |
|--|---|
| <p>ICESCR</p> | <p>Article 6: The right to work, which includes the right of everyone to the opportunity to gain a living by work they freely choose to accept, with appropriate safeguards to be taken to protect that right.</p> <p>Article 7(b): The right of everyone to the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions.</p> <p>Article 7(c): The right of everyone to the enjoyment of just and favourable conditions of work which ensure equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.</p> |
| <p>International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention)</p> | <p>Article 2: Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.</p> <p>For the purpose if the ILO convention-</p> <p>The term discrimination includes:</p> |

¹⁶ CESCR, op cit, par 19.

¹⁷ Op cit, par 27. However Mpinga et al comment (text prior to footnote 56) that the CESCR “takes a reductionist view by framing the question of [non-conventional medicines] as a matter of interest and concern only for native people”, noting that “[i]n doing this, the Committee misses what current data show, namely that everybody (including urban populations) resorts to non-conventional and complementary medicines.”

¹⁸ Op cit.

| | |
|--|---|
| | <p>(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;</p> <p>(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.</p> <p>Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.</p> <p>For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.</p> |
|--|---|

4.8 The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* recognises two exemptions from its religious anti-discrimination provisions in the employment context: the first where a particular religion is an inherent requirement of the job, and the second where having a particular religion for a particular job is required by the tenets and doctrines of the religion, and the requirement is not arbitrary and is consistently applied (article 1.2).

Principle of non-discrimination

The following instruments deal with the subject of non-discrimination:

| | |
|--|---|
| <p>Generally</p> <p>ICCPR</p> <p>Article 26 is a 'stand-alone' right which forbids discrimination in <i>any law</i> and in <i>any field regulated by public authorities</i>, even if those laws do not relate to a right specifically mentioned in the ICCPR.</p> | <p>Article 2(1):</p> <p><i>Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.</i></p> <p>Article 26:</p> <p><i>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.</i></p> <p><i>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.</i></p> |
| <p>Health and work</p> | <p>ICESCR Art 2(2):</p> <p><i>The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race,</i></p> |

| | |
|--------------------|--|
| | <i>colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i> |
| Sexual orientation | <p>In <i>Toonen v Australia</i>, the Human Rights Committee held that the reference to 'sex' in Articles 2 and 26 of the ICCPR includes sexual orientation.</p> <p>Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under its 'other status' grounds. Similarly the ICEPSR.</p> |

5. Where Rights Compete: What Should Prevail?

The balancing of indivisible and interdependent human rights

5.1 International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. As mentioned, when it comes to the right to the right to religious belief and the right to participate in religious activity as might be protected by the RDB, it is important to differentiate between:

- The internal **right hold a belief** (the right to freedom, conscious and religion); and
- The external **right to manifest that belief**.

5.2 The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one's religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms for others and must be balanced against other rights, such as the right to be free from discrimination. To quote the current UN Special Rapporteur on Freedom of Religion and Belief:

*Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others*¹⁹

Rights must be balanced where they conflict

- 5.3 In general terms, no human right 'trumps' any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).
- 5.4 Some rights are expressed as absolutes, such as the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law.²⁰
- 5.5 Subject to those absolutes, all rights must be **balanced** where they conflict **so as to maximise the practice of other rights to the greatest possible extent**, in 'an atmosphere of mutual

¹⁹ Shaheed, op cit, par 46.

²⁰ See generally Attorney-General's Department Public Sector Guidance Sheet: *Absolute rights* at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

consideration'²¹ and so as to 'ensure that none is inappropriately sacrificed'.²² This is sometimes described as a process of providing **reasonable accommodation** to other rights and other persons: 'a fair balance needs to be struck between the rights of the individual and the rights of others.'²³ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

Taking account of context and other values

- 5.6 The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values (such as reasonableness or proportionality).
- 5.7 Human rights can validly be restricted if the restriction is prescribed by law and is necessary for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

The good faith of those seeking protection

- 5.8 Human rights entail **both rights and obligations. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.** Generally, behaviour should not be protected by Australian law, nor advocated by policy, where that behaviour itself infringes other human rights.
- 5.9 In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.
- 5.10 That is, where there is a conflict between human rights and other interests it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

6. Conclusion

- 6.1 Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights, democracy and the rule of law.**
- 6.2 Australia's international human rights treaty obligations should be enshrined in Commonwealth legislation. ALHR submits that this cannot be done on a piecemeal basis and we are concerned that the proposed legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect other human rights equally. The rights contained in Article 18 of ICCPR which establish the right to freedom of thought, conscience and religion, are not superior to other human rights.
- 6.3 There is no hierarchy of human rights. Human rights laws cannot be selectively applied. As noted earlier in this submission, fundamental principles of international law clearly establish that human rights are indivisible, interdependent and interrelated. They come as a package. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to everyone and with interconnection.
- 6.4 It is ALHR's submission that the appropriate balance between freedom of /from religion or belief and other freedoms would best be served by adoption at the federal level of a Bill of Rights or Human Rights Act.**

²¹ Grimm, op cit, 2382.

²² Alice Donald and Erica Howard, *The right to freedom of religion or belief and its intersection with other rights*, ILGA-Europe Research Paper, 2015, p i available at: <https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf>.

²³ Ibid, p i.

6.5 In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a *Human Rights Act* similar to legislation in place in Victoria and the ACT. Last year, Queensland passed a *Human Rights Act*. Eleven years later, Australia continues to lag behind the rest of the world at a federal level.

6.6 We would be happy to provide further submissions on the form that this legislation should take.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Kerry Weste', is placed over a light grey rectangular background.

Kerry Weste

President

Australian Lawyers for Human Rights

Contributors: Georgia Burke, Dr Tamsin Clarke, Kerry Weste, Nicholas Stewart