

Submission by the Australia/Israel & Jewish Affairs Council (AIJAC) to the Religious Discrimination Bill Freedom of Religion Inquiry

September 27, 2019

Executive Summary

This document is the submission by the Australia/Israel & Jewish Affairs Council (AIJAC) to the Australian Federal Parliamentary Freedom of Religion Inquiry into the proposed Religious Discrimination Bill.

For over 40 years, AIJAC has furthered the policy and public affairs interests of the Australian Jewish community. We work with government, media and a broad array of community organisations and associations in the interest of building a strong, harmonious and multicultural Australia. AIJAC has long held a strong interest in, and has played a significant role contributing to, the national public debate regarding racial discrimination legislation and continues to take a firm stand against all forms of bigotry, including religious discrimination, the subject of this inquiry.

AIJAC appreciates the opportunity to provide a submission on the Exposure Draft of the Religious Discrimination Bill 2019 (the 'Bill') and the two further Bills regarding related amendments. AIJAC welcomes federal legislation that would make it unlawful to discriminate against others on the basis of their religious belief or activity. However, AIJAC also believes there are aspects of the Bill that require further refinement and consideration which are outlined below:

1. Freedom of Religion Commissioner

AIJAC supports the establishment of a Freedom of Religion Commissioner and believes that role should be established prior to the Bill being finalised in order to assist with further consultation and consensus building on key issues arising from the submissions. This role is well-suited to such consultation with stakeholder groups, especially those of religious communities which the Bill seeks to protect.

Recommendation 1: Bring forward Section 6 of the draft Religious Discrimination Bill (clauses 46-56) 'Freedom of Religion Commissioner' and separate this from the other parts of the legislation.

2. Clarity of definitions provided in the Religious Discrimination Bill

The terms “religion”, “religious belief”, “lawful religious belief” and “religious activity” are not clearly defined in the Bill. Further clarification of the definition of these terms is important to protect existing religious practices and customs while also defending against frivolous “religious” claims and/or dangerous cults which seek, or may be able, to exploit the spirit of the intended legislation.

Recommendation 2: An extended consultation period is required to settle definitions in the Bill to ensure clarity and protect against unintended consequences.

3. Further clarification of important terms

According to clause 10(1), no act of discrimination occurs under the Bill if “a religious body” is engaged “in good faith” in conduct “that may reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.” The issue is what standard of reasonableness will apply? If it is the “reasonable person” who is observant in that religion, denomination or stream of the religion, even this test can cause problems where a religion such as Judaism encourages debate and differing views. This has complexities similar to the aforementioned “lawful religious belief”, and the issues that arise out of what may or may not be considered lawful while protecting religious beliefs and practices.

Equally important, an individual or group must not be able to use the ‘in good faith’ argument in accordance with their religious beliefs, texts or doctrines to incite hatred against other religious communities. This would be in breach of existing discrimination laws such as the Racial Discrimination Act.

Recommendation 3: Further consultation is required on the ‘in good faith’ test, including the possibility of removing or limiting the ‘in good faith’ component in regards to clause 10 of the Bill.

4. The Australian Law Reform Commission Report

The Australian Law Reform Review Commission (ALRC) was tasked by the Australian Federal Government to conduct a Review into the Framework of Religious Exemption in Anti-

discrimination Legislation as per the terms of reference first proposed in April 2019 and further refined in August by the Attorney-General. The ALRC review is due to be released in April 2020 and may have significant findings relevant to the scope of the proposed *Religious Discrimination Bill*. It therefore should be considered by the Government and members of religious and faith-based communities prior to the Bill being finalised. These recommendations could have a significant impact on the proposed implementation of the Bill.

Recommendation 4: AIJAC recommends that the Government does not finalise the Bill until the ALRC review is considered and made publicly available for further consultation.

5. Impact on Religious Bodies that are not explicitly included under the scope of the Bill

Under the Explanatory Memorandum (para 180-181), clause 10 states the Bill protects a religious body in recruiting volunteers and employment, if it has a policy of requiring all staff and volunteers to be adherents of the religion according to which the body is conducted. A religious body having a preference for adherents of the religion, as opposed to a mandatory requirement, is not explicitly covered.

Unincorporated institutions such as youth movements, student organisations and sporting clubs fall into this ambiguous area and may not be clearly protected under the proposed legislation.

For example, an unincorporated Jewish sporting club, which may have a *preferential* policy of admitting Jewish players for either social reasons (desire to play with others from the same culture and background) or religious requirements, such as the separation of men's and women's teams, would not be explicitly protected unless they made it mandatory that *only* Jewish players could join their team.

As another example, a Jewish youth movement hosting a camp may choose to admit only Jewish participants to their summer and winter programs and only allow volunteer leaders from the Jewish community. Yet they may not explicitly prohibit non-Jewish participants or the hiring of non-Jewish staff (such as cooks), but it is a preference in order to promote Jewish values and ideas in a Jewish context and space, whether formally stated or not. This scenario too, would not be covered under the Explanatory Memorandum.

Recommendation 5:

The Bill should include an additional clause whereby unincorporated entities and voluntary providers, such as sporting clubs, youth/student associations and other similar purposed organisations which have a religious ethos and/or cater towards a religious community are explicitly protected under this Bill, and are able to use preferential and not merely exclusive hiring and participation criteria.

6. Exclusions of Religious Bodies which engage primarily or solely in commercial activities

Clauses 10 '*Religious Bodies may act in accordance with their faith*' is an important principle which AIJAC strongly supports. Clause 10 (2) (c) however excludes organisations which "*engages primarily or solely in commercial activities.*" This is of serious concern to the Australian Jewish community, in terms of the provision of faith-based Hospitals, Aged Care and Funeral Services, which all aim to provide culturally appropriate services catering to the religious needs of their patients and clientele.

If excluded from invoking the bill under the commercial services clause, these organisations could be interpreted as offering discriminatory practices in their employment practices, admission or otherwise general operations; when this may in fact be a requirement in order to service and cater towards the requirements of their religious communities.

For example, a registered charity aged care facility, designed to specifically cater towards the Jewish community, may not refuse non-Jewish residents. However, they may choose to prioritise admittance to members of the Jewish community that require the religious services of a Kosher, Jewish environment with specialist staff trained in Kashrut (Jewish Law) and the sensitivities and special needs of Holocaust survivors.

Such an aged cared facility must not be accused of discrimination by providing adequate, specialist services for a religious community that otherwise would not have access to these services if it operates on a fee-for-service basis.

As a further example, a private Jewish hospital, operating in a commercial manner, is open to people of all faiths and backgrounds but is also required to fill special requirements of Judaism as a Jewish hospital. This may range from mandating its facilities and dietary options being Kosher to stipulating a certain number of board members must be Jewish. Both policies are designed to protect and strengthen the Jewish ethos of the institution and should not be seen as discrimination against those not of Jewish background.

Recommendation 6: Create an additional clause or explanatory note which indicates that bodies that offer a service in relation to their client, patients or customers in accordance with a religious ethos, regardless of whether or not they operate on a fee-for-service model, shall also be covered by this Bill.

7. Existing anti-Discrimination legislation

The Australian Jewish Community, among other faith-based communities, requires assurance and clarification that the proposed Bill does not attempt to dilute existing protections designed to prevent hate speech, and needs further clarity regarding whether and how the term “vilify” will be defined in this context.

The existing protections are the outcome of extensive consultations with Australia’s faith communities and their maintenance is crucial to a continued harmonious and successful multicultural Australia.

Recommendation 7: Consultations and advice to be sought from members of the public to ensure that the proposed laws do not alter or infringe on any of the existing rights and protections offered by existing Commonwealth and State anti-discrimination laws, especially with respect to hate speech.