Australian Capital Territory
Discrimination Law Reform
Exposure Draft Bill amending *Discrimination Act* 1991 (ACT)

Submission from Freedom for Faith

June 2022

About Freedom for Faith

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond.

It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Church Ministries, the Presbyterian Church of Australia, the Seventh-Day Adventist Church in Australia, the Fellowship of Independent Evangelical Churches, and the Anglican Church Diocese of Sydney. It has strong links with, and works co-operatively with, a range of other Churches, Christian organisations and faith groups in Australia.

Discrimination laws and religious freedom

Freedom for Faith is particularly concerned about protection of religious freedom in Australia, as exercised by both individuals and religious organisations. The fundamental right of freedom of religion and belief is spelled out clearly in art 18 of the International Covenant on Civil and Political Rights (to which, of course, Australia has committed itself in the international arena). Art 18 provides that:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. 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.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Australia currently has no over-arching protection for religious freedom. However, an important part of the current provisions that do protect religious freedom are the laws around our country which prohibit unjust discrimination.

Of course, a prohibition on religious discrimination alone does not fully meet the need to provide legal protection for "freedom of thought, conscience and religion". But discrimination laws around Australia, and in particular "balancing clauses" in those laws which recognise the need to balance non-discrimination rights with religious freedom rights, have long provided one of the main ways that religious freedom is protected in this country.

In this context we would like to make the following brief comments in relation to some of the proposals for reform of the ACT *Discrimination Act* 1991 ("DA"), put forward in an Exposure Draft Bill. The Australian Capital Territory government has invited public comment by 1 July 2022. The comments below mostly relate to the specific issues around religious belief and activities, and how these rights are protected or would be impacted by the changes suggested. However, we have also made some comments on one of the other proposals relating to additional "grounds of discrimination".

In our view, these proposed reforms will significantly narrow religious freedom protections in the ACT, and should not be adopted. As the recently released results of the 2021 national census released evidence, religious affiliation is declining in Australia, a minority of the population now self-identify as holding an affiliation with Christianity, and religious diversity is growing. The Australian Bureau of Statistics Snapshot summarises the position this way:

- "The percentage of Australians reporting no religious affiliation continues to grow. It's now at 38.9 per cent of the population compared to 30.1 per cent in the 2016 Census.
- Christianity remains the most common religion with 43.9 per cent of the population identifying as Christian, a decrease from 52.1 per cent in the 2016 Census.
- The top 5 religions outside of Christianity are Islam, Hinduism, Buddhism, Sikhism and Judaism."[1]

As Christians becomes a minority in Australia, and join other religious traditions as minorities, reducing protection for religious believers at this time is counter-intuitive. There has never been a greater need for the DA to appropriately recognise the rights of religious minorities.

Current ACT Law

The ACT DA already contains some of the narrowest religious freedom protections in the country, after amendments to the Act made in 2018. One result of these changes was that the previous freedom of religious faith-based schools and educational institutions to conduct their activities in accordance with their religious faith, was greatly reduced. Under s 32 of the DA as it now stands since 2018 (even before any further changes are made), "religious bodies" other than schools are generally allowed to apply their doctrines and beliefs in decision-making in

[1] https://www.abs.gov.au/statistics/people/people-and-communities/snapshot-australia/2021

(d) any other act or practice... of a body established for religious purposes, if the act or practice conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

However, this freedom is explicitly **not** applicable to a "defined act" by a religious body, which is defined in s 32(2) as follows:

(2) In this section:

"defined act", by a religious body, means an act or practice in relation to—

(a) the employment or contracting of a person by the body to work in an educational institution; or

(b) the admission, treatment or continued enrolment of a person as a student at an educational institution.

There is a provision, s 44, allowing religious faith-based schools and religious groups providing health care to make employment decisions based on **religious belief**, "if the duties of the employment or work involve, or would involve, the participation by the employee or worker in the teaching, observance or practice of the relevant religion". But this is narrowly drafted and would probably only apply to staff whose job was to actually teach religious studies or run religious services in hospitals. Section 46 allows enrolment and staffing decisions in religious faith-based schools to be based on religious belief, but only if clearly announced in a formal public policy document.

This means, however, that a religious faith-based school may not set out a policy requiring staff or students to comply with the **moral code** required by their religion. For example, where a staff member decides to move in with a de facto partner without being married, this would be contrary to classical Biblical teaching that sexual relations are only appropriate in marriage. The school may want all staff to set an example of living in accordance with the tenets of their faith (and parents may send their children expecting this.) But the staff member may be able to claim that dismissal or discipline in this situation would be discrimination on the grounds of "relationship status" under s 7(1)(s) (which term includes, according to the Dictionary at the end of the Act, being a "domestic partner" of someone else.) Or the school may expect students to adhere to a code of conduct that is consistent with the values of the faith, and students may decide to defy this code and claim that they are being discriminated against on one of the grounds under the Act.

The proposed amendments

(a) "Reasonable, proportionate and justified"- but who decides?

The proposed amendment**s** will, in effect, roll out similar limits to apply to religious bodies other than schools. The amendments to s 32 would mean that decisions of religious bodies made in accordance with their religious faith (other than a closely defined set of decisions relating to ordination, training for ordination, or religious services- though see below on this), will not only have to be justified by their religious faith, but now also be shown to be "reasonable, proportionate and justifiable in the circumstances" (new s 32(1)(d)(ii).)

While these adjectives all sound sensible and mild, the fact is that where this criterion is imposed, the decision on what is "reasonable" (etc.) will have to be made by a tribunal or a court which will not share the faith commitments of the body. There are *some* issues of "private law", involving contracts, torts (civil wrongs) or property held under trust, where secular courts will need to come to a view on religious matters.[2] These will almost always be cases where both parties have expressly or impliedly agreed to be bound by religious principles. But in other situations, where obligations are imposed on religious bodies externally, by the wider community, respect for religious freedom means that religious bodies should be allowed to determine for *themselves* the content of what their faith requires.

> Part of the respect that should be offered to a religious group, then, is that it be left to order its life in accordance with its own understanding of the religious doctrines that shape its existence. Of course, there are some circumstances where the living out of those doctrines may need to be controlled in the interests of fundamental rights of members of the group or members of the public- where a religious group, for example, inflicts physical or sexual abuse on children or other vulnerable persons. There are well recognised limits to religious freedom. But even in those cases, there are significant questions to be raised as to whether the State should be interpreting, or "re-interpreting" doctrine, or rather simply saying that "whatever your doctrine means, we cannot allow this behaviour". The latter response is more consistent with the dignity of the group, which is not undermined but actually affirmed when the group is held accountable for the lived consequences of its doctrines.[3]

There is another amendment to s 32 which may have a further narrowing effect. As noted, the current provision in section 32(1)(a)-(c) exempts ordination and training and religious service decisions altogether from the operation of the Act. But the new version of s 32(1) will add a requirement that the decision "conforms to the doctrines, tenets or beliefs of the body's religion". This means that even in the fundamental decision as to who can be a minister of religion, for example, a church will need to be able to show (again, to the satisfaction of a secular tribunal or court) that a criterion they use flows from their own "doctrine, tenets or beliefs". For example, given the deep differences of opinion among Bible scholars over whether women can be appointed to lead churches, even such a core matter as the Roman Catholic church only ordaining male priests might be challenged before an ACT tribunal.

(b) Restrictions on religious groups supplying "goods, services or facilities"

Under the proposed amendments, the existing removal of religious freedom protections under s 32 from schools, will now be extended further to all religious bodies in cases where "discrimination is not on the ground of religious conviction - [to] the provision of goods, services or facilities" (new s 32(2)(a)(iii)). This will have the effect that **any** religious body providing these things to others, will be forbidden from choosing not to provide those things on any other ground other than "religious conviction".

---

[2] See Neil J Foster. "Respecting the Dignity of religious organisations: Courts deciding theology?" *University of Western Australia Law Review* Vol. 47 (2020) p. 175 – 219, at: http://works.bepress.com/neil_foster/135/ .

[3] Foster, "Respecting the Dignity" (2020), above n 1, at 177.

This will mean, for example, that a local church which hires out its hall during the week may still be allowed not to hire it to another religious group (as this would be a matter of "religious conviction"). But if asked to provide the hall to a "same sex support group" whose aim is to present homosexual activity as a normal and accepted part of life (a belief contrary to the church's commitments to the Bible)- the church would now be required to do so.

The full reach of this new provision is unclear. Suppose, for example, that a church provides communion in its Sunday service- a formal religious service where bread and wine (or grape juice) are used to symbolise Christ's death and resurrection. Suppose that could be regarded as the provision of a "service" to congregation members. But one Sunday someone presents to receive communion who has been told by the leaders of the church that they are not to take communion because they are engaged in behaviour which rejects the teaching of the church. If that behaviour can be characterised as a prohibited ground of discrimination (such as living in a de facto relationship), the church may be required to offer communion to that person despite their deeply held religious beliefs.

(c) Religious groups and "functions of a public nature"

In a further restrictive move, protections under s 32(1) are removed under s 32(2)(b) from:

> (b) a religious body—
>
> (i) when performing a function of a public nature; or
>
> (ii) whose sole or main purpose is a commercial purpose.

A "function of a public nature" is defined in the exposure draft by reference to s 40A of the *Human Rights Act* 2004 (ACT) ("HRA"). That provision spells out that it includes a number of what might be called "public utilities" such as electricity, gas and water supply, "public education", and "public health services". But the definition under s 40A(1) provides a range of "matters to be considered" which are fairly open-ended, including under s 40A(1)(d) "whether the entity is publicly funded to perform the function". It might be possible for someone to argue that provision of health care by a religious hospital or aged care provider, if done with access to "public funds", transforms the provider into a body "performing a function of a public nature".

That this is a possible view of the law can be seen in the official "Fact Sheet" about the amendments issued by the ACT government, in which we read that:

> A religious *body providing public health services cannot rely on the exception* [in s 32].[4]

Related to this point, one of the new provisions inserted by the Exposure Draft would be s 23C:

> **23C Public functions**
>
> It is unlawful for a public authority to discriminate against another person when performing a function of a public nature.

[4] Fact Sheet, p 2.

Again, the definition of "public authority" is referred to the HRA (s 40 this time) and is fairly open-ended. In s 40(1)(g) it extends to:

> an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

While at the moment this may not include a religious health care provider, or aged care provider, there may be some pressure to see the definition interpreted in that way. It would be wise for the legislation to make it clear that these bodies are not included.

(d) Tightening decisions based on religious beliefs

The limited protections currently provided under s 44 (for employment decisions based on religious convictions) are now further narrowed under the new version of s 44, which will require that such decisions can only be made where

> (b) conformity with the doctrines, tenets or principles of the religion is a **genuine occupational qualification** for the position; and
>
> (c) the discrimination is **reasonable, proportionate and justifiable** in the circumstances.

These added requirements, again, will have to be judged by a secular tribunal or court. It is now also made clear under s 44(2) that these limited protections which will apply to "religious groups" do not apply to schools or bodies "whose sole or main purpose is a commercial purpose".

(e) Clubs and voluntary groups

Another provision which may have an impact on religious freedom is newly redrafted s 31:

> **31 Clubs and voluntary bodies**
>
> It is not unlawful for a club or voluntary body, or the committee of management or a member of the committee of management of the club or body, to discriminate against a person if—
>
> (a) the club or body is established to benefit people sharing a protected attribute; and
>
> (b) the discrimination—
>
> (i) is in relation to the provision of membership, benefits, facilities or services to the person; and
>
> (ii) occurs because the person does not have the protected attribute; and
>
> (iii) is reasonable, proportionate and justifiable in the circumstances.

A church or a religious club may be classified as a "voluntary body". It could be seen to be established to "benefit" people who share a specific religious belief. Any decision on membership, by excluding someone who does not share that religious belief, would now have to be justified as "reasonable, proportionate and justifiable in the circumstances" before a secular tribunal or court. This might apply, for example, to an Islamic Student Club at a university. The club may have been set up to serve the interests of Muslim students, but the committee may find themselves forced to defend their decision not to admit a Christian person to membership by showing why it is "proportionate".

(f) Genuine occupational requirements- but not religious belief

There is a further restrictive provision in proposed new s 33C. The section reads as follows:

> **33C Genuine occupational qualifications**
>
> (1) It is not unlawful for a person to discriminate against another person in relation to a position as an employee, commission agent, contract worker or partner if—
>
> (a) it is a genuine occupational qualification of the position that the position be filled by a person having a particular protected attribute; and
>
> (b) the discrimination is reasonable, justifiable and proportionate in the circumstances.
>
> (2) Subsection (1) **does not apply to discrimination on the ground of religious conviction**.

Sub-section (2) here excludes the application of sub-section (1) to any staffing decisions based on religious conviction. This means that **religious bodies** who are protected by s 32 may still apply their "doctrines, tenets or beliefs" (that they cannot rely on s 33C does not mean that they lose the protection of s 32.) But what it seems to mean is that any body or individual in the community who does not fall within the definition of "religious body" will not be able to apply religious conviction as a "genuine occupational qualification". A "religious body" is "a body established for religious purposes", under the new Dictionary definition.

Suppose a professional firm where the members would like the firm to be one with a "religious ethos"- all the members of the firm are Buddhists and they want to provide a service to the Buddhist community. But the firm is a group of doctors, or lawyers, or engineers (and so on one view are not established for "religious purposes" alone). Under this new provision, even if they would like to advertise for new members of the firm and make "commitment to Buddhist belief and practice" a requirement of the position, they cannot do so.

(g) Banning religious boycotts

Finally, while there are other proposed amendments, one that it seems worth briefly commenting on is proposed new section 20(2), which would seem to now make it unlawful in some cases for a member of the public to "boycott" a business because they disagree with a stance taken by that business on a moral issue. The provision reads:

> (2) It is unlawful for a consumer of goods or services, or a user of facilities, to discriminate against the provider of the goods, services or facilities—
>
> (a) by refusing to accept the goods or services or use the facilities; or
>
> (b) in the terms or conditions on which the goods or services are accepted or the facilities are used; or
>
> (c) in the way in which the goods or services are accepted or the facilities are used.

One of the "protected attributes" under the DA is "political conviction" (see s 7(n)). Suppose a place that someone regularly shops at, one day puts up a sign indicating that the shop-owner supports the "One Nation" political party. The customer strongly object to One Nation's policies. It seems that under this provision they will be acting unlawfully by deciding to switch their custom elsewhere.

Or suppose someone supports an airline as a regular customer, and one day the CEO of the airline announces that they have undergone a religious conversion and become a Presbyterian. The customer objects to Presbyterians and decides (and announces on social media) that they will never fly with that airline again. This would again seem to be unlawful behaviour under new s 20(2) (as it is a "protected attribute" that an entity has an "association (whether as a relative or otherwise) with a person who is identified by reference to another protected attribute"- s 7(1)(c)). This is a provision which intrudes far too much on the general right of persons to spend their resources in ways that they choose.

Conclusion

These proposals will further limit religious freedom in the ACT. There must also be some questions to be addressed as to whether they are legally valid. Where a subordinate jurisdiction like a Territory removes protections provided by a Commonwealth law, that Territory law may be invalid. The rules introduced here are narrower than the rules set out in the *Sex Discrimination Act* 1984 (Cth), sections 37 and 38. As a result, they may be inoperative pursuant to 28 of the Australian Capital Territory (Self-Government) Act 1988 (Cth). Section 28 echoes the principle in s 109 of the Constitution. It prevents Territory enactments having effect where they are inconsistent with other laws – including Commonwealth laws – in force, except where the two laws in contention are capable of concurrent operation.

There must also be a question whether these restrictions are so narrow that they clash with the Constitution. While there is some debate on the matter, most Constitutional scholars today take the view that s 116 of the Constitution is applicable to Territory laws. Any law “for prohibiting the free exercise of any religion” would be invalid, at least if, as it was expressed in the main authority on the provision, it was an “undue infringement” of religious freedom.

Both of those possibilities are additional reasons not to go ahead with these laws.

Freedom for Faith thanks the Commission for the opportunity to comment on the draft legislation.