Submission to the Exposure Draft of the Anti-Discrimination Amendment Bill 2022 (Northern Territory)

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 Anglican Church Diocese of Sydney, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, the Seventh-day Adventist Church in Australia, and the Fellowship of Independent Evangelical Churches. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia.

This submission was written by Dr Alex Deagon, Senior Lecturer in Law at the Queensland University of Technology, who assisted in a private capacity with input from the Freedom for Faith Board. The views expressed in the submission are his own and do not necessarily reflect the view of his employer.

Thank you for the opportunity to make a submission regarding the Exposure Draft of the *Anti-Discrimination Amendment Bill 2022* (NT) ('the Draft Bill'). In our view, the Draft Bill if enacted as drafted would significantly narrow religious freedom protections in the NT. As the recently released results of the 2021 national census evidence religious affiliation is declining in Australia. Only 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 Australian's 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]

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

As Christians become a minority in Australia and join other religious traditions as minorities, reducing protection for religious believers at this time is counter-intuitive as there has never been a greater need for the law to appropriately recognise the rights of religious minorities. Seeking to reduce those protections with the aim of better achieving equality treats religious freedom as an inferior right less deserving of protection, which is contrary to international law and human right instruments. We make submissions regarding the following matters.

Positive Duty to Advance Equality

Under proposed ss 18A and 18B, the Draft Bill includes the addition of a positive duty to eliminate discrimination to the greatest extent possible, where it is reasonable and proportionate. This duty will apply to persons prohibited under the Act from engaging in discrimination. Freedom for Faith supports equality through the elimination of unjust discrimination. However, this must not be at the expense of other human rights such as freedom of religion. Under international law, human rights are equal and indivisible. This means there is no hierarchy of human rights where equality is privileged above religious freedom, or vice versa. The framing of the positive duty risks implying that religious freedom must always be subservient to equality, especially given the 'reasonable' threshold. This threshold is inconsistent with the requirement under Article 18(3) of the International Covenant on Civil and Political Rights, which obliges states to only restrict the manifestation of freedom of religion where it is necessary for the achievement of a legitimate end. This is a higher threshold which requires substantive and cogent proof, and differentiation in accordance with reasonable and objective criteria (for example of the kind which occurs by religious bodies with respect to selection and regulation of employees) does not constitute unlawful or unjust discrimination under the Covenant.[2]

For example, in England, faith-based providers are under increasing constraints from an equivalent 'public sector equality duty', which requires public authorities (including private bodies exercising public functions) to have due regard to removing disadvantage, discrimination and other prohibited conduct between groups sharing protected characteristics in order to foster good relations and understanding between those groups.[3] However, the statutory equality duty means 'practically all organised social life comes under the influence of a state promotion of equality'.[4] Conscientious objection is not accommodated and the autonomy of religious groups is constricted.

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[2] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 52-53.
[3] Julian Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 282-283.
[4] Julian Rivers, 'Promoting Religious Equality' (2012) 1 *Oxford Journal of Law and Religion* 386, 399-400.

It has resulted in many religious organisations choosing to give priority to their religious beliefs and withdraw from service provision, which undermines the diversity of the public square, community choice, and the public good.[5] As Rivers notes, 'an exemption would surely be preferable to this sort of ideological bullying'.[6]

A better approach which appropriately recognises all human rights and contributes to social harmony and understanding and is more attuned to Australia's international law obligations is to acknowledge the equal importance of all human rights and to note that rights will only be infringed where it is necessary to achieve a legitimate purpose, in accordance with well established human rights norms such as the Siracusa Principles.[7] The second recommendation of the Religious Freedom Review was that "Commonwealth, State and Territory governments should have regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when drafting laws that would limit the right to freedom of religion." There is no evidence that this has occurred in the drafting of these proposed amendments.

Prohibiting Insulting and Offensive behaviour

Proposed ss 20A and 20B of the Draft Bill prevent public acts the "offend, insult, humiliate or intimidate" based on a person or group's protected attributes. It is certainly desirable to have limited provisions that prevent hate speech while also preserving our freedom to express our opinions with others. However, such provisions can go too far in limiting free speech on important matters. For example, section 17 of the Tasmanian Anti-Discrimination Act contains an equivalent provision which makes it unlawful to engage in conduct which 'offends, humiliates, intimidates, insults or ridicules' another on the basis of protected attributes. In particular, the terms 'offend' and 'insult' have been the subject of a number of proceedings against individuals, with the Anti-Discrimination Commissioner determining that the individuals did have a case to answer. The individuals in question are religious people who have made statements supporting traditional marriage. Catholic Archbishop Julian Porteous released a pamphlet containing the Catholic teaching of marriage to Catholics, and church workers Campbell Markham and David Gee have also made public statements advocating for Christian teachings on marriage and sexuality. These were considered as 'offensive' and 'insulting' to the LGBTI community and all three had cases to answer.

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[5] Kerry O'Halloran, *State Neutrality: The Sacred, the Secular and Equality Law* (Cambridge University Press, 2021) 473-474.

[6] Rivers, *Law of Organised Religions* (n 3) 334.

[7] In accordance with the Siracusa Principles, any restriction must be necessary to achieve one of the objects listed under Article 18(3) of the ICCPR, and must be proportionate to that object in the sense that it is the least restrictive means to achieve that object: "Siracusa Principles on the Limitation and Derogation of Provisions" in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984).

The terms ‘offend’ and ‘insult’ are far too broad. Notwithstanding the “reasonably likely” test in s20A, these terms are ultimately subjective, in that they turn on the inner feelings of the subject. A person who feels that they have been offended or insulted can make a complaint to the Commissioner and the Commissioner is in the invidious position of having to arbitrate whether it was reasonable for that person to have been offended or insulted. If the Commissioner determines there is a case to answer, the person who has allegedly engaged in the relevant conduct is summoned to the Commission at great expense and inconvenience. The system therefore encourages frivolous and vexatious complaints. Including offense and insult as unlawful vilification is out of step with all other Australian jurisdictions apart from Tasmania, and stifles freedom of speech by making people afraid to voice their opinions because they might be subject to a complaint. There are exemptions, which is commendable, but exemptions are of little assistance because the process is the punishment. Even if the claim is unsuccessful because of an exemption or another reason, the person complained against has wasted significant money, time and resources, which may well discourage them from speaking up again – contrary to the purpose of the exemptions which is to preserve freedom to express opinions. It should also be noted that s 20B(b), while it contains broad exemptions for a number of areas of discourse, does not (in contrast to most other such provisions in Australia) include an exemption for good faith religious discussion and teaching.

Removing the terms ‘offend’ and ‘insult’ and ensuring there is systemic prevention of frivolous and vexatious claims therefore need to be part of these proposed provisions.

Aside from the policy concerns, it is possible the proposed provisions are unconstitutional as they infringe the implied freedom of political communication. The implied freedom of political communication operates as a limit on Commonwealth, State or Territory legislative power which restricts political communication in a way which undermines the Constitutional requirement that members of the Parliament and the Senate be freely chosen by the people. The High Court articulated the relevant test in *McCloy v New South Wales* and *Brown v Tasmania*:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

Second, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government?

Third, is the law reasonably appropriate and adapted to achieve that legitimate object?

The law must be suitable, necessary and adequate in its balance; all three criteria must be satisfied.

The law is suitable if it has a rational connection to the purpose of the provision; the law is necessary if there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom; and the law is adequate in its balance if the importance of the purpose served by the restrictive measure is greater than the extent of the restriction it imposes on the freedom.

A law which renders 'offensive' or 'insulting' acts as unlawful certainly burdens communication about political matters. The examples cited above serve to highlight how such provisions might operate to restrict speech (this was also seen in application of similar provisions in the Commonwealth *Racial Discrimination Act* to render speech by Andrew Bolt unlawful). 'Political matters' is interpreted very broadly to mean any subject matter which may affect voting on any subject matter, which covers most conceivable subject matters. Communication can include speech or conduct (acts). Therefore, the first part of the test is satisfied.

There is no doubt protecting Territorians from hateful speech is a legitimate end. There is, however, a real question as to whether this legitimate end is served in a manner which is compatible with the maintenance of Australia's system of representative democracy. This means facilitating a space for people to freely communicate politically relevant views. However, the proposed amendment renders acts which are likely to 'offend' or 'insult' as illegal. The High Court and other academic commentators acknowledge that 'disagreement', 'offence' and 'irrationality' are necessary elements of a functioning democracy and are consistent with the Constitutional framework.[8] This implies restricting such acts may not be compatible with the maintenance of our constitutionally prescribed system of representative democracy.

Finally, in terms of the proportionality analysis, the law is obviously suitable. A law which restricts vilification has a rational connection to the purpose of protecting Territorians from harmful speech. But the law may not be adequate in its balance. The burden is extensive due to the broad nature of 'offend' and 'insult' as discussed above. This burden is decreased due to comprehensive exceptions. The object of protecting Territorians from harmful speech is important so this element is arguable. However, the law is clearly not the only reasonable model. An obvious and compelling, reasonably practicable alternative is to remove the words 'offend' and 'insult' from the proposed law. This would achieve the object of protecting Territorians from objectively harmful acts seeking to intimidate, humiliate, incite, or harass while decreasing the burden on political speech.

[8] See eg Arthur Glass, 'Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights' (1995) 17 *Sydney Law Review* 29, 32; *Levy v State of Victoria* (1997) 189 CLR 579, 622–23 (McHugh J); *Roberts v Bass* (2002) 212 CLR 1, 44 [110] (Gaudron, McHugh and Gummow JJ).

Therefore, the proposed law arguably infringes the implied freedom of political communication because it is not reasonably appropriate and adapted (i.e. is disproportional) and does not achieve its object in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Removing 'offend' and 'insult' will address this issue and also help to address the problem of frivolous and vexatious claims.

We recommend the following amendments to the proposed s20A and s20B, which are based on the anti-vilification amendments to the Religious Discrimination Bill 2021 proposed by the Hon Mark Dreyfus.

20A **Offensive behaviour because of attribute**
(1) A person must not do an act that:
(a) is reasonably likely, in all the circumstances, to ~~offend, insult, humiliate or intimidate~~ **threaten, intimidate, harass or vilify** another person or a group of people…

20B **Exemptions to section 20A**
Section 20A does not prevent anything said or done reasonably and in good faith ….
(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic, **religious** or scientific purpose or any other genuine purpose in the public interest; or

Conduct by Religious Bodies

The Draft Bill proposes changes to s 37A to remove the ability of religious educational institutions to discriminate against staff on the basis of sexuality. This is said to support greater inclusion. There are two proposed changes – the exception permitting discrimination on the basis of sexuality is deleted, and the standard test in subclause (b) – "is in good faith to avoid offending the religious sensibilities of people of the particular religion" is replaced with a novel new test – "enables, or better enables, the application of the doctrine in the educational institution."

There are a number of issues with the proposed changes.

It is not clear that the resulting provision will adequately protect the ability of religious educational institutions to maintain a distinct ethos through selection and regulation of staff in accordance with the beliefs and behaviour expected by the religion. Educational institution is defined extremely broadly under s 4 of the Draft Bill to include theological colleges and even religious gatherings (education and training can be provided in a church situation). Regulating the ability of churches to choose who will minister, as the Draft Bill functionally does, is a deeply troubling incursion of the state in the church. The definition of religious educational institution should be limited to entities providing primary and secondary education.

In the school context, many religious educational institutions require a critical mass of staff to teach the religion (both by words and conduct) as part of their educational duties in order to build the school culture as it is desired by the broader school community. Parents exercise choice to send their children to such schools and this should be supported by the law (especially as States are obliged to ensure parents can educate their children in conformity with their religious convictions under Article 18(4) of the ICCPR). This is not to say schools can or should be able to discriminate purely on the basis of sexual orientation. However, the Draft Bill also defines sexual orientation broadly under proposed s 4 to include behaviour ('intimate relations') as well as attraction. Preventing selection of staff on this basis would prevent regulation of conduct potentially viewed as sexual immorality by a religious employer, undermining freedom of religion. A better approach is for 37A(a) to provide an explicit right for the institution to select staff on the basis of religious belief and activity, including the ability to ensure staff behaviour is consistent with school expectations on these matters.[9]

Narrowing of exemptions for religious bodies is not inclusive. If passed, these changes may effectively prevent religious institutions from operating to provide public education in accordance with their convictions. The religious body then has a choice either to continue operating in accordance with their convictions and risk suffering legal penalty, compromise their convictions, or remove themselves from the area completely. The untenable nature of the first two options for many religious bodies may well produce a greater proportion choosing the third. Legislation which has the effect of excluding religious bodies from the public square is not inclusive, and the financial and practical implications for public schools if private schools close are considerable. In most circumstances there are other equivalent options reasonably available for those discriminated against. The harm against religious bodies and the public more broadly is therefore likely to be much greater than that suffered by discriminated persons.[10]

The Draft Bill actually recognises this principle in proposed s 47(1C):

> A club, the committee of management of a club or a member of the committee of management may discriminate against a person on the ground of religious belief or activity in membership of the club if the club provides association wholly or mainly for people with that specific religious belief or activity.

Here, discrimination is reasonable in the circumstances because the purpose of the association is linked to distinct religious belief and activity. The principle is the same for religious schools, which offers public services on its terms just as any other association does. The ability to associate necessarily entails the ability to exclude, otherwise it is meaningless.

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[9] See Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 23.
[10] Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35(2) *The University of Tasmania Law Review* 106, 126-128.

Regarding 37A(b), this is a unique provision which is out of step with religious exemptions in all other Australian jurisdictions. It is therefore not clear what the legal implications of this will be. The phrase itself contains ambiguity – what does it mean to enable (or better enable) the application of the doctrine? This needs explanation and examples.

The proposed amendments will result in a muddle of terminology in exemption clauses for religious bodies, with no obvious rationale for the variation. For example,

Section 37A
(a) is on the grounds of religious belief or activity; and
(b) enables, or better enables, the application of the doctrine in the educational institution.
Section 40(3)(b)
(i) is **in accordance with** the doctrines of the religion concerned; and
(ii) is necessary to avoid offending the religious sensitivities of **people** of the religion.

Section 51(d)
(i) is **done to conform to** the doctrines, **tenets, beliefs or teachings** of the religion; and
(ii) is necessary to avoid offending the religious sensitivities of **adherents** of the religion.

These anomalies indicate that more work needs to be done in the formulation of these exemptions. We recommend that the Act should use a consistent approach and terminology in exemption clauses for religious institutions. As a minimum, we recommend using the formula from section 37 of the Sex Discrimination Act 1984 in s51(d), rather than the new proposed definition:

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

More fully, we would prefer to see a more substantive reworking of the Act, so that instead of religious bodies being given permission to discriminate by means of exemption clauses, the Act would declare that it is not discrimination for a religious body when it "engaging, in good faith, in conduct … in accordance with the doctrines, tenets, beliefs or teachings of that religion" (s 7(2) of the Religious Discrimination Bill 2021.

Thank you for your consideration.