



# Freedom for some, discrimination for others: Comments on the Second Exposure Draft of the Religious Freedom Bill 2019

Submission by **Darwin Community Legal Service (DCLS)**

DCLS is a multi-disciplinary service providing general legal advice and assistance, a Tenancy Advice Service, and a specialised Seniors and Disability Rights Service providing advocacy support in the areas of ageing and disability. We create awareness and empower our community, support access to services and rights, and advocate for change that promotes fairness and justice.

DCLS is committed to providing a service that is accessible, culturally safe and responsive to the needs of our community.

This submission is informed by our work in providing advice and representation to vulnerable people in the NT, including outreach services to remote communities.

## NT CONTEXT

The NT is plagued by tyranny of distance: our population is dispersed over an area of 1.3 million square kilometres (six times the size of the UK). Approximately 26.5 per cent of the NT population identifies as Aboriginal or Torres Strait Islander, and the vast majority (79%) of Aboriginal or Torres Strait Islander peoples live in remote or very remote locations as defined by the 'The Australian Statistical Geography Standard (ASGS) Remoteness Structure'.<sup>1</sup>

Remote locations are characterised by small populations, minimal infrastructure, and a lack of ancillary services. Basic services are generally provided by government or not-for-profit providers. Health care, and the associated decisions around such care, are a significant issue for the NT, with long-term health conditions affecting 90% of Aboriginal and Torres Strait Islander people over the age of fifty-five.<sup>2</sup>

## SUMMARY

DCLS welcomes the opportunity to comment on the second exposure draft of the religious freedoms package and, in particular, the Religious Discrimination Bill 2019.

Unfortunately, the second exposure draft does little to allay the concerns expressed by DCLS in our submission of 2 October 2019. In summary, DCLS opposes the reforms in their entirety. This is on the basis that the reforms:

1. fail to consider the religious and cultural needs of Aboriginal and Torres Strait Islander communities;
2. have the potential to restrict access to basic services for people in the NT;
3. permit some forms of discrimination, contrary to the fundamental nature of anti-discrimination legislation and human rights; and
4. have the potential to adversely impact older LGBTI people and HIV positive people in the NT.

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<sup>1</sup> Australian Bureau of Statistics, *The Australian Statistical Geography Standard (ASGS) Remoteness Structure* (15 March 2018) <<https://www.abs.gov.au/websitedbs/D3310114.nsf/home/remoteness+structure>>

<sup>2</sup> Australian Institute of Health and Welfare, *Older Australia at a glance* (7 August 2018) <<https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diverse-groups-of-older-australians/aboriginal-and-torres-strait-islander-people>>

## 1. Failure to consider the rights of Aboriginal and Torres Strait Islander peoples

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The Religious Discrimination Bill 2019 (Religious Discrimination Bill) is unique in its attempt to create a positive right to manifest one's religion in public life. This contrasts with existing anti-discrimination laws which generally seek to protect against the negative impacts of discrimination.

For Australia to have a legitimate and sophisticated discussion about the right to manifest religion, this must include the voices of Aboriginal and Torres Strait Islander peoples.

Protecting and promoting the religious rights of Aboriginal and Torres Strait Islander peoples is consistent with Australia's obligations with respect to Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples:<sup>3</sup>

'Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.'

In a paper cited in the Report of the Expert Panel on Religious Freedom (the Religious Freedom Review), Associate Professor Katja Mikhailovich and Alexandra Pavli write:

'Everything about Indigenous society is inextricably woven with, and connected to, the land or sea. Understanding the importance of this connection is important for all Australians if freedom of religion is to be realised for Indigenous Australians.'<sup>4</sup>

There has been limited, if any, consideration given to the nature of Aboriginal and Torres Strait Islander cultural and religious rights and how these rights might be protected or manifested. Instead, the Religious Discrimination Bill appears to be primarily or solely concerned with protecting a subset of rights based in European-settler religious belief.

DCLS believes that the Religious Discrimination Bill has limited ability to achieve its object of ensuring 'equality before the law' because it does not appropriately consider or protect the complex rights of Aboriginal and Torres Strait Islander peoples.

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<sup>3</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007.

<sup>4</sup> Katka Mikhailovich and Alexandra Pavli, 'Freedom of Religion, Belief, and Indigenous Spirituality Practice and Cultural Rights <<https://www.humanrights.gov.au/sites/default/files/content/frb/papers/Indigenous%20Spirituality%20FINAL%20May%202011.pdf>>

## 2. Restricting access to services in the NT

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The NT population has the lowest average life expectancy in Australia,<sup>5</sup> a disparity caused by unacceptably high morbidity and mortality rates amongst Aboriginal and Torres Strait Islander peoples. Additionally, the NT has a significantly higher suicide rate than other locations in Australia: with 27 suicides per 100,000 people, compared to 15.9 suicides per 100,000 people in other areas.

Reducing mortality and suicide rates requires (among other things) access to health and mental health services. DCLS is concerned that the 'conscientious objection' provisions of the Religious Discrimination Bill have the potential to place additional constraints on what is already a constrained, under-funded and often inaccessible health services market in the NT.

Current codes of conduct which are applicable in the NT seek to balance the rights of patients to health care with the rights of health practitioners to hold personal views. For example, the '*Good medical practice: a code of conduct for doctors in Australia*' (*Good Medical Practice Code*)<sup>6</sup> contains the following principles:

- treat patients with respect at all times;
- refer a patient to another practitioner if it is in the patient's best interests;
- provide treatment options based on the best available information;
- ensure that personal views do not adversely affect the care of a patient;
- ensure that decisions about patients' access to medical care are free from bias and discrimination;
- ensure that the practitioner's right to not provide or directly provide a treatment on conscientious objection grounds does not impede access to patient treatments that are legal.

The basis for limiting the application of best practice medical codes is unclear and providing health practitioners with the ability to disregard principles such as non-discrimination and patient referral could be catastrophic in a remote context. Most remote communities have access to one health clinic and, in some cases, one health practitioner. Refusal of service without referral places vulnerable people at risk.

Subclauses 8(5) and 8(6) still afford wide scope for discrimination against unmarried couples, women, members of the LGBTI community and people with disability.<sup>7</sup> Concerningly, the 'unjustifiable adverse impact' exception in subclause 8(7) seems to indicate that *some level* of adverse impact on the health of a patient is justifiable or permissible.

In light of the NT context outlined above, DCLS believes that all governments should be working towards reducing harm by increasing access to basic services, rather than enabling further restrictions.

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<sup>5</sup> Australian Bureau of Statistics 'Life Tables, States, Territories and Australia, 2016-2018' <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/3302.0.55.001>>

<sup>6</sup> Medical Board of Australia, 'Good medical practice: a code of conduct for doctors in Australia' <<https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>>

<sup>7</sup> For example, holders of belief about the rules of Levitical priesthood which exclude persons with disability from the 'sanctuary of God'.

### 3. Permitting discrimination

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Clauses 5, 8, and 42 of the Religious Discrimination Bill grant an exclusive right to some people (i.e. those who hold a religious belief) to make public statements that may otherwise be offensive or discriminatory. For example, under the Bill an employer could repeatedly tell an employee with disability that 'disability is punishment by god'. If this statement aligns with the employer's religious belief the employee is left with little to no recourse despite the harms caused by such statements. This would similarly extend to derogatory statements against single-parent families, gay people, women, and gender-diverse people.

Granting this exclusive right to people who hold religious views is likely to come at a cost for vulnerable people in society, and it is unclear why a person's right to make a statement should outweigh another person's right to be free from discrimination or harm.

We know that, compared to the general population, LGBTI people are more likely to experience depression and psychological distress, and that specifically:

- LGBTI young people aged 16 to 27 are five times more likely to attempt suicide;
- Transgender people aged 18 and over are nearly eleven times more likely to attempt suicide;
- People with an Intersex variation aged 16 and over are nearly six times more likely to attempt suicide.<sup>8</sup>

At a time when mental health and suicide prevention is stated to be a 'national priority'<sup>9</sup> it is concerning that resources are being expended to introduce legislation with the potential to cause mental harm.

As a service that specialises in discrimination, DCLS is concerned that the bill:

- Makes discrimination harder to prove by preventing reliance on statements to establish racial discrimination, sex discrimination and disability discrimination;
- Creates significant legal uncertainty due to the interaction of state, territory and Commonwealth law, which is likely to place strain on victims of discrimination, legal services and the courts.

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<sup>8</sup> National LGBTI Health Alliance, 'Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI people' < <https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf> >

<sup>9</sup> Prime Minister of Australia 'Making Suicide Prevention a National Priority' < <https://www.pm.gov.au/media/making-suicide-prevention-national-priority> >

#### 4. Impact on older LGBTI or HIV positive Territorians

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DCLS is also concerned by the impact of the Religious Discrimination Bill on older LGBTI people and people living with HIV in the aged care environment.

As evidenced during the Royal Commission into Aged Care Quality and Safety, and the Australian Law Reform Commission Report 'Elder Abuse – A National Legal Response', the dignity, autonomy and rights of older Australians are frequently abused.

The combined effect of the conscientious objection provisions - which extend to nurses and allied staff providing services within an aged care environment – with the statement of belief provisions in clauses 5, 8 and 42 could see an older LGBTI person or an older person living with HIV refused access to certain treatments and subject to humiliating and harmful statements by those providing daily care. For example, care providers may limit access to pre-exposure prophylaxis (PrEP) due to religious beliefs, and instead make statements of belief that discourage sexual relationships. This can lead to serious physical and mental health issues and create an unhealthy environment.

This risk is potentially exacerbated by clause 32(8) which permits some aged care facilities and accommodation providers to hire only staff of a certain religious faith. As outlined above, services in remote parts of the NT are extremely limited, and an individual who is turned away from an aged care facility due to the religious faith of the staff has no other options.

These provisions exist in contrast to the National LGBTI Ageing and Aged Care Strategy<sup>10</sup> and the Aged Care Diversity Framework<sup>11</sup> which state that older people in rural, remote, regional and metropolitan Australia must have access to aged care services and support appropriate to their diverse characteristics and life experiences.

#### RECOMMENDATION

For the above reasons, DCLS opposes the reforms in their entirety. The Commonwealth Government should refrain from introducing the package of reforms into Parliament.

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<sup>10</sup> Department of Health, *National Lesbian, Gay, Bisexual, Transgender and Intersex Ageing and Aged Care Strategy* <<https://agedcare.health.gov.au/older-people-their-families-and-carers/people-from-diverse-backgrounds/national-lesbian-gay-bisexual-transgender-and-intersex-lgbti-ageing-and-aged-care-strategy>>

<sup>11</sup> Department of Health, *Aged Care Diversity Framework* (December 2017) <<https://www.health.gov.au/sites/default/files/documents/2019/12/aged-care-diversity-framework.pdf>>