

PositiveLifeNSW

the voice of people with HIV since 1988

Freedom of Religion Consultation Committee
Attorney-General's Department
4 National Circuit
Barton ACT 2600
ForConsultation@ag.gov.au

Re: Submission into Freedom of Religion Legislative Reforms Consultation

Dear Freedom of Religion Consultation Committee,

Positive Life NSW (Positive Life) welcomes the opportunity to provide a submission into the Freedom of Religion Legislative Reforms Consultation.

Positive Life is the state-wide peer based non-profit organisation that speaks for and on behalf of people living with and affected by HIV in NSW. We provide leadership and advocacy in advancing the human rights and quality of life of all people living with HIV (PLHIV), and to change systems and practices that discriminate against PLHIV, our friends, family and carers in NSW.

Background:

At Positive Life, we believe that the Australian government can and should support the protection of all human rights, including freedom of expression, conscience, religion and belief, and freedom from discrimination. Freedom of Religion is one of five explicit individual rights protected in the Constitution of Australia (section 116).¹ The Australian Government's draft legislation package addressing Religious Discrimination has been developed on a basis that Positive Life supports: to prohibit discrimination based on religious belief or non-belief. **However, we do not support any legislation that promotes or elevates individual rights in any way that would override protections from discrimination for others.**

Existing federal discrimination laws already protect race, sex, disability and age, as well as state laws which protect against discrimination for other groups. It is apparent that these Religious Discrimination Bills as they are currently drafted aim to and will effectively override existing protections under state or federal laws and will not translate to positive outcomes and protections for all Australians equally. **Positive Life believes that the Religious Discrimination Bills package is conceptually flawed, and resources instead should be dedicated to the strengthening of current anti-discrimination legislation or the development of an Australian Charter of Human Rights.**² If these Bills move forward, we recommend that they be amended to align with the same scope and model of existing anti-discrimination laws, with no opportunity for overriding existing protections.

Our main areas for concern are detailed further below.

A. Objectives of the Draft Bills: Attorney-General Christian Porter stated in an August media release that the Religious Discrimination Bills are laws that "will protect people from being discriminated against but will not give them a licence to discriminate against other people or engage in harassing

¹ Australian Human Rights Commission, "How are human rights protected in Australian law?", (2019), accessible at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>

² National Human Rights Consultation Committee, "National Human Rights Consultation Report", (2009), accessible at <http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.html>

or vilifying speech".³ Positive Life agrees that the objective of the Bills is sound: to add protections of "religious belief or activity" to existing federal discrimination laws for race, sex, disability and age. However, these draft Bills are designed in such a way that they go much further than other existing discrimination laws and weaken protections for various groups of Australians including PLHIV, LGBTQIA+ people, people with disability, women, and people from diverse racial and cultural backgrounds. To achieve the objectives of the Bills in protecting all human rights equally, the legislation must stringently ensure that these religious discrimination protections do not provide any avenue for counter-discrimination allowed for under the guise of religious freedom.

The Human Rights Legislation Amendment (Freedom of Religion) Bill amends other federal discrimination laws to add new objectives: "the indivisibility and universality of human rights" and "the principle that every person is free and equal in dignity and rights". These amendments align with the principle that protections against religious discrimination should be in line with other federal anti-discrimination legislation and are sufficient in achieving the overall objectives of the draft Bills without the need for further protections over and above those of existing ones for other groups of Australian people.

The highly time-restricted consultation process for the legislation package must be utilised to make crucial changes, or the Religious Discrimination laws will ultimately privilege people of faith above all others, thus **not achieving the purported objectives**.

B. Statements of Belief: Section 41 of the draft Religious Discrimination Bill states that "a statement of belief does not constitute discrimination for the purposes of any anti-discrimination law or contravene subsection 17(1) of the Anti-Discrimination Act 1998 of Tasmania" unless it is "malicious or is likely to harass, vilify or incite hatred or violence against a person or group of persons or which advocate for the commission of a serious criminal offence". These provisions are not included in other Australian discrimination law, where federal and state systems are usually seen to be separate and concurrent. The outcome of this section means that statements based on religious belief that offend, humiliate, insult or intimidate PLHIV, people with disability, women, LGBTQIA+ people, people from diverse racial and cultural backgrounds or other groups of people would be lawful, regardless of what state laws stipulate.⁴

The draft Bill overrides and essentially raises the bar much higher than other Australian anti-discrimination and vilification laws usually set, where the threshold for a successful complaint requires the expression of religious belief be malicious or that it would harass, vilify or incite hatred against a group, rather than the existing threshold to offend, insult or humiliate. The effect of overriding existing federal, state and territory protections would be, for example, "to allow people to express harmful views to women entering a clinic seeing their doctor for an abortion. This kind of harassment and abuse is currently prohibited in 'safe access zones' outside abortion clinics in most states".⁵

³ Attorney General for Australia, "Morrison Government delivers on religious reforms", (2019), accessible at <https://www.attorneygeneral.gov.au/Media/Pages/morrison-government-delivers-on-religious-reforms-29-august-2019.aspx>

⁴ Elphick, L, Maguire, A, Hilkemeijer, A. (2019). The government has released its draft religious discrimination bill. How will it work? *The Conversation*, accessible at <https://theconversation.com/the-government-has-released-its-draft-religious-discrimination-bill-how-will-it-work-122618>

⁵ Human Rights Law Centre, "Explainer: Religious discrimination laws in Australia", (2019), accessible at <https://www.hrlc.org.au/religious-discrimination-laws-explainer>

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Positive Life asserts that protecting a person's right to freedom to make statements of belief must **not** also mean they are free to offend, insult, humiliate, harass, vilify or incite hatred against any other person or group of people, **nor** that they are free from the consequences of making this statement of belief if it contravenes other rules or laws or if it does offend, insult, humiliate, harass, vilify or incite hatred against any other person or group of people.

We agree with Human Rights Law Centre that: "hate speech undermines the right of every person in our society to be treated equally and be free from abuse, hatred, discrimination, intimidation or violence. If left unchecked, perceived acceptance or tolerance of hate speech serves to embolden or encourage discrimination by providing an 'authorising environment' for the escalation to violence. Anti-vilification laws necessarily restrict some people's right to free speech to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety".⁶ **These proposed Bills provide just such an environment for hate speech disguised as religious statements of belief to thrive.**

One such example of the effects of this section, is that stigmatising comments made by employees of health and HIV services, in their private lives and in public while not at work would be allowed. The legislation would prevent the employer service from disciplining the employee and protecting its reputation and reducing stigma, unless the employer can show it would cause unjustifiable financial hardship, which is difficult to quantify in such a situation. Stigmatising views expressed as statements of belief may lie outside the higher threshold of harassing, vilifying or inciting hatred. This provision also protects religious-based discriminatory, offensive, insulting and humiliating speech against community action, as it would remove the power of public pressure on an organisation to reign in a rogue employee who publicly practises bigot speech when rooted in religious statements of belief.

Under the Bill's definition of religious belief or activity in conjunction with the definition of statements of belief, it is foreseeable that this legislation could potentially be interpreted in such a way to enable hate speech and discriminatory practices under the guise of not only religious beliefs or non-religious beliefs that are adherent to reasonable community standards, but also anything in the realm of religious belief, religious non-belief, or non-religious beliefs that do not adhere to Australian community standards. This legislation could potentially open the flood gates to individuals claiming almost anything they do and say about or against another group or individual is based on their views under atheism, Christianity, Islam, Judaism, Hinduism, Sikhism, Wicca, Satanism, Jediism etc., as 'religion' is not defined and thus open to interpretation.

One such example of this is in section 19 of the Bill, regarding access to premises, whereby it would be unlawful for an individual to be denied entry or required to leave a) a gay bar where a person with religious beliefs was yelling at patrons that they were all sinners and would go to hell, as this is in accordance with their interpretation of their religious doctrine, or b) a Catholic church where a person with no religious beliefs was yelling at church-goers that they were all complicit in sanctioning child molestation by their continuing to align with Catholicism after the findings against Cardinal Pell, as this belief is directly in accordance with their **not** holding Catholic religious beliefs. In both instances, these individuals would be operating within the realms of "statements of belief" as defined in the legislation and would be protected against any actions taken against them, regardless of how offensive, humiliating, insulting or discriminatory their statements were. In the recently published HIV Futures 9: Quality of Life among PLHIV in Australia by the Australian Research Centre in Sex, Health

⁶ Human Rights Law Centre, "Explainer: Religious discrimination laws in Australia", (2019), accessible at <https://www.hrlc.org.au/religious-discrimination-laws-explainer>

and Society at La Trobe University, 'more than half of the HIV Futures 9 participants (56.6%) reported at least one experience of HIV-related stigma or discrimination in the past 12 months, while 38.0% reported that they had been treated differently by a healthcare worker due to their HIV in the past 12 months'.⁷

What is unclear is **if religious belief and non-belief will be treated equally under this legislation**. The definition above incorporates religious believers and non-believers, though it only covers not engaging in lawful religious activity; there is no mention of activities not condoned or possibly condemned by a religion that may be engaged in by non-religious believers. As one of the objectives of the Bills is to maintain that 'religious belief' should be understood to mean both religious belief and non-belief in religion, this definition seems to not be as broad for non-belief protections.

The Human Rights Legislation Amendment (Freedom of Religion) Bill also provides for religious charitable institutions advocating for 'traditional view of marriage' i.e. that marriage is between a man and woman only, does not constitute a disqualifying purpose under charity laws. This proposed amendment was previously voted down during the parliamentary debates on marriage equality in 2017.⁸ **Positive Life does not support these amendments to the Charities Act 2013.**

C. Equality of Anti-Discrimination Legislation: Positive Life strongly believes that the equality of all anti-discrimination legislation, without one taking precedence of exception over another, is vital to maintaining a fair, safe and equitable quality of life for all Australians. We agree with the Human Rights Law Centre that "Australia needs stronger protections from discrimination for people of faith, but the current bill introduces unjustified carve-outs for people to express discriminatory views and to override state and territory protections which ensure fair treatment, particularly for women accessing abortion services",⁹ as well as individuals who are part of marginalised or intersectionally oppressed populations within Australia, such as PLHIV, Aboriginal and/or Torres Strait Islander people, people from diverse racial and cultural backgrounds, people who identify as LGBTQIA+, sex workers, people who have experienced sexual and/or domestic violence, and people who inject drugs, among others. This draft bill elevates the protection of religious freedom above other rights, and Positive Life opposes this in concept and practice.

This concept is further highlighted as the draft Bills cover discrimination on the basis of an action, for example words spoken, refusal to perform services, etc. as well as discrimination on the basis of a static state or being, for example age, sex, sexual orientation, disability etc. In no other anti-discrimination legislation are individuals protected on this basis, thereby elevating religious opinions and resultant actions taken at the expense of other individual's fundamental human rights, such as the right to social security, including access to healthcare.¹⁰

Additionally, we agree with the Australian Human Rights Commission submission that: "unlike all other Commonwealth discrimination laws, which focus on the rights of natural persons (that is,

⁷ Power, J., Amir, S., Brown, G., Rule, J., Johnson, J., Lyons, A., Bourne, A. and Carman, M. (2019) HIV Futures 9: Quality of Life Among People Living with HIV in Australia, monograph series number 116, The Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, Australia, accessible at https://www.latrobe.edu.au/data/assets/pdf_file/0007/1058614/HIV-Futures-9.pdf

⁸ Human Rights Law Centre, "Explainer: Religious discrimination laws in Australia", (2019), accessible at <https://www.hrlc.org.au/religious-discrimination-laws-explainer>

⁹ Shi, E, Gordon, A. (2019). Women may find it tougher to get an abortion if the religious discrimination bill becomes law. *The Conversation*, accessible at <https://theconversation.com/women-may-find-it-tougher-to-get-an-abortion-if-the-religious-discrimination-bill-becomes-law-123089>

¹⁰ United Nations, "Universal Declaration of Human Rights", (1948), accessible at <https://www.un.org/en/universal-declaration-human-rights/>

humans) to be free from discrimination, the Bill provides that claims of religious discrimination may be made by corporations including religious institutions, religious schools, religious charities and religious businesses. This is a significant departure from domestic and international human rights laws which protect only the rights of natural persons. At the same time, the Bill provides that 'religious bodies'—including religious schools, religious charities and other religious bodies—are entirely exempt from engaging in religious discrimination if the discrimination is in good faith and in accordance with their religious doctrines, tenets, beliefs or teachings. This is a wide exemption that undercuts protections against religious discrimination, particularly in the areas of employment and the provision of goods and services.¹¹ **Positive Life asserts that the Bills should be amended to only cover discrimination against natural persons, and that religious bodies and charities are not afforded the overriding protections above others that this legislation is seeking to enable, which is inconsistent with the stated objectives of the Bill in recognising the indivisibility and universality of human rights.**

Holding a religious belief or engaging in religious activity, as well as not holding a religious belief or not engaging in religious activity are classed equal under the legislation is important, to ensure, for example, that an employer is also prohibited from dismissing an employee on the basis that they are not religious.¹² However, the proposed legislation allows for institutions such as religious schools to refuse to hire somebody who does not adhere to that religion.¹³ The contradictions between these objectives and clauses are obvious and striking. Positive Life asserts that the legislation should not be provided with an avenue of a broader defence or exemption from other commonwealth anti-discrimination legislation, such as the Sex Discrimination Act, so that even if an employer can refuse to hire someone based on their religious beliefs under these proposed Bills, which we disagree with, the Bill will not licence dismissing or refusing to hire an LGBTQIA+ teacher, for instance.

These contradictions are also seen in the Bill's override provisions for statements of religious belief, such that statements of belief retain priority over other discrimination laws. No other groups protected by discrimination law are provided with these exclusions or overrides. It is also unclear as to why these special provisions are included in the Bill if they will be interpreted under the "reasonable" clause in the context of other relevant legislation and community standards, and how then the assessment of "reasonableness" will be made. The unclear nature of this legislation and how it will be interpreted has the potential to substantially encourage litigation under this Bill, wasting government money and law courts' resources.

D. Conscientious Objections by Health Practitioners: Sections 8(5) and (6) of the draft bill prohibits any rule imposed by an employer on a health practitioner that would require them to perform services to which they have a religious objection, claiming that this is unreasonable and therefore discriminatory. In the few instances where States and Territories such as Victoria and NSW have allowed conscientious objection, the legislation has been developed to ensure patient care is not compromised, requiring health professionals to refer patients to another service if objecting on the basis of their religious beliefs.

¹¹ Australian Human Rights Commission, "Religious Freedom Bills", (2019) accessible at <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-bills>

¹² Elphick, L, Maguire, A, Hilkemeijer, A. (2019). The government has released its draft religious discrimination bill. How will it work? *The Conversation*, accessible at <https://theconversation.com/the-government-has-released-its-draft-religious-discrimination-bill-how-will-it-work-122618>

¹³ Karp, P. (2019). What is the religious discrimination bill and what will it do? *The Guardian*, accessible at <https://www.theguardian.com/australia-news/2019/aug/29/what-is-the-religious-discrimination-bill-and-what-will-it-do>

However, Sections 8(5) and (6) may override state laws by allowing conscientious objections on religious grounds with stronger legal protections without the necessity to onward refer patients to an alternative provider. The only situations where a health professional would be compelled to provide a service for which they would otherwise conscientiously object is if their employer would suffer “unjustifiable adverse impact” or if the patient would suffer “unjustifiable adverse impact”. We agree with statement made in *The Conversation* that “it is unclear how the courts will interpret these rules. The study¹⁴ found misuse occurred partly because people do not have to justify or register their conscientious objection. So, there is no way of knowing if someone’s conscientious objection is a genuine or deeply, consistently held religious position”.¹⁵

These laws are convoluted and may, in the end, allow individual medical practitioners from a range of professions to refuse to provide a wide range of services on religious grounds. This includes services to anyone who may be the subject of unfavourable religious views, including PLHIV, LGBTQIA+ people seeking sexual health, reproductive or transgender health services, women and girls seeking access to reproductive services, anyone seeking access to contraception, divorced people, unmarried couples, or single parents. We agree with Equality Australia’s statement that “patients should not live in the fear of their healthcare being denied or delayed because of the religious views of their health professional”.¹⁶

Essentially, **the Bill is protecting discriminating in the provision of treatment and services to patients based on a health practitioner’s religious beliefs.** Should an issue occur, it would be a complex dispute for an employer to enter to prevent the religious-based discrimination of service provision by the health practitioner. It would be even more complex should the complainant be a patient who is discriminated against. It is unclear how, for instance, the Sex Discrimination Act (Cth), Disability Discrimination Act (Cth) or Anti-Discrimination Act (NSW) would interact with this legislation. For example, a patient is discriminated against by a doctor, and the patient makes a complaint under the Anti-Discrimination Act (NSW). The doctor seeks to defend their case based on the Religious Discrimination Act (Cth) S8 (1). Jurisdictional issues and potential conflict of laws would ensure complex litigation, and in the meantime would leave multitudes of already vulnerable people in perilous situations that could result in life or death situations.

Of concern also is that there is no requirement on the health practitioner to tell the patient that the treatment or service is being provided (or not) is being modified based on religious views. For example, a doctor in a small rural town treats an HIV-positive gay male patient but does not and will not test for STIs as they have a view that extra marital/gay sex is a sin and they do not want to condone sin. However, the doctor does not tell the patient that STI testing might be recommended medically or available elsewhere, or that STIs are even an issue. At this stage, the legislation does not outline conduct rules requiring disclosure of a health practitioners’ religious objection and alternative options for the patient. Tort law (negligence) would likely also operate to resolve such issues, however, the real-time damage to individuals generated by this provision will continue. Considering that PLHIV already report high rates of stigma and discrimination in relation to accessing health services, this provision is likely to be a step backwards in addressing this issue.

¹⁴ Keogh, A, Gilliam, L, Bismark, M, McNamee, K, Webster, A, Bayly, C, Newton, D. (2019). Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers. *BMC Medical Ethics*, available at <https://bmcmedethics.biomedcentral.com/articles/10.1186/s12910-019-0346-1>

¹⁵ Shi, E, Gordon, A. (2019). Women may find it tougher to get an abortion if the religious discrimination bill becomes law. *The Conversation*, accessible at <https://theconversation.com/women-may-find-it-tougher-to-get-an-abortion-if-the-religious-discrimination-bill-becomes-law-123089>

¹⁶ Equality Australia, “Religious Discrimination Bill: Healthcare Fact Sheet”, (2019), accessible at <https://equalityaustralia.org.au/resources/religious-discrimination-bill-healthcare-fact-sheet/>

Positive Life recommends that sections 8(5) and (6) be removed from the draft Bill. Without these sections, the Bill will still provide adequate protections for personal religious views without compromising patient care. If the sections are to remain in the Bill, we recommend including obligations such as the requirement to refer a patient to an alternative service provider if a practitioner objects to providing services to them on religious grounds; and to treat a patient if the patient's health needs cannot be met adequately by another service provider due to available alternatives, delay, distance, or cost. This is particularly important for those people who live in rural, regional or remote areas of Australia, where access to adequate services and transport is substantially more limited than in cities.

E. Stigma and Discrimination: PLHIV have experienced significant stigma and discrimination for decades at the hands of ignorant and antagonistic people, including those who claim their views have a basis in their religious beliefs. Stigma and discrimination have been linked to poorer health and social determinants of health outcomes, increased risk for joblessness and homelessness, social isolation, mental health issues, and co-, multi- and early-morbidities. The effects of stigma and discrimination are greater and more acute when there are intersectional oppressions and multiple layers of discrimination, such as when an individual is living with HIV, as well as identifying as LGBTQIA+, a woman, and/or from a diverse racial or cultural background with English as an additional language for example. These experiences of oppression, stigma and discrimination cause far-reaching and often lifelong negative effects, as opposed to, for example, the experience of discrimination a religious person feels in delivering services to someone in a way that contravenes their religious views. For example, "in 2018 an International Women's Health Coalition study found a failure to provide abortions to women has terrible impacts by placing 'patients at risk of discrimination, physical and emotional harm, and financial stress'. Those possible harms included death."¹⁷

Further, sections 10, 26 and 28 relate to whether Government health and community services outsourced to religious-affiliated bodies and religious charities will be able to discriminate in provision of services. Section 10 (1) states that: a religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted, while section 10 (3) appears to override section 26 by virtue of: this section applies despite anything else in this Act. Under section 5 Definitions, religious belief or activity is defined as 'holding a religious belief' or 'engaging in lawful religious activity' or conversely 'not holding a religious belief' or 'not engaging in, or refusing to engage in, lawful religious activity.' The actual nature of a religious belief is not defined and is subject to a wide interpretation that varies within religions and religious bodies. Indeed, in the Religious Freedom Review: Report of the Expert Panel which informed the Australian Government's religious freedom reforms, the panel suggests in Recommendations 5 and 7 that religious schools may discriminate in relation to the employment of staff, engagement of contractors, or in relation to students on the basis of sexual orientation, gender identity or relationship status provided that 'the discrimination is founded in the precepts of the religion' which again is not further defined. Additionally, section 10 (2) is unclear in what defines a religious body, as 'commercial activities' and 'primarily' are not defined, thus the burden would lie with a complainant to prove the religious body engages solely or primarily in commercial activities.

¹⁷ Shi, E, Gordon, A. (2019). Women may find it tougher to get an abortion if the religious discrimination bill becomes law. *The Conversation*, accessible at <https://theconversation.com/women-may-find-it-tougher-to-get-an-abortion-if-the-religious-discrimination-bill-becomes-law-123089>

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Section 26 only covers Commonwealth funded programs; should the State outsource services to a religious-affiliated organisation then section 26 does not apply. Moreover, section 28 provides further cover for registered charities, stating that nothing in the legislation makes it unlawful for them to give effect to religiously discriminatory provisions in their rules. Overall, guards against discrimination by religious bodies delivering Commonwealth or State services appear weak and uncertain, and further threaten the human rights of multitudes of Australians by elevating the protections of religious individuals and institutions above other rights and protections.

The prevalence of ignorant stigmatising and discriminatory views, attitudes and beliefs held in opposition to scientific, factual realities contribute to the very real probability that **this legislation will be used as a weapon under the guise of religious freedom**. From the ongoing and widespread religiously-founded conflation of HIV with "gay activities", non-monogamy and an imminent death-sentence, to abortion with being irresponsible and "murder", it is clear that this legislation as it currently stands is woefully inadequate in providing a fair, equitable and robust legislative framework for the equal protection of all human rights all the way from policy into practice. For PLHIV whom Positive Life NSW represents, this has implications for both medical and social services that may be outsourced to religious organisations including aged care provision lawfully being able to refuse care to PLHIV on the basis of their religious beliefs. Under section 31 Exceptions relating to work in the draft Bill, subsection 4 states 'Section 15 (about qualifying bodies) does not make it unlawful for an authority or body to discriminate against a person, on the ground of the person's religious belief or activity, if the person is unable to carry out the inherent requirements of the profession, trade or occupation because of the person's religious belief or activity.'

The draft Religious Discrimination Bill package goes too far in **prioritising** religious rights over all others by providing unprecedented protections to those of religious faith **at the expense of others**.

Positive Life recommends that the bill should be abandoned entirely, and if not, scaled back comprehensively to equal other existing federal discrimination laws protecting race, sex, disability and age, and not supersede any existing state anti-discrimination protections for other groups. The Australia Government will fail to achieve its objective of "indivisibility and universality of human rights", and "principle that every person is free and equal in dignity and rights" if they continue to advocate and legislate for one standard of protection for religious people and a lesser standard for everyone else.

If this submission requires additional information or clarification, we can be contacted on 02 9206 2177 or at ceo@positivelife.org.au.

Yours respectfully,



Craig Andrews
Interim co-Chief Executive Officer

2 October 2019