SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT
Religious Discrimination Bill 2019

A Gender Agenda (**AGA**) welcomes the opportunity to make a submission to the Commonwealth Attorney-General's Department (**Department**) on the impact of the *Religious Discrimination Bill 2019* (**Bill**) on persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics.

I *ABOUT A GENDER AGENDA*

AGA is a unique, vibrant and peer-focussed community organisation that is actively engaged in increasing public awareness and understanding of issues regarding sex and gender diversity. Established in 2004, AGA is incorporated under the *Associations Incorporation Act 1991* (ACT) and is registered with the Australian Charities and Not-for-profits Commission. AGA supports intersex, trans and gender diverse communities as well as their families, friends and allies. AGA often facilitates training, education and advocacy programs across the ACT, and frequently contributes to human rights and law reform initiatives.[1]

II *SUBMISSION*

In preparing this submission, AGA has considered the second exposure draft of the Bill and its impact on persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics. Specifically, AGA has considered:

- treatment with dignity and respect when accessing healthcare;
- the operation of faith-based schools; and
- the effects of statement of belief in the workplace.

A *Treatment with dignity and respect when accessing healthcare*

AGA calls for the provisions purporting to regulate health practitioners and the medical profession to be removed from the final draft of the Bill.

1 *Jurisdictions with conscientious objection laws*

Subclause 8(6) of the Bill provides that, for the purposes of subclause 8(1)(c), if a State or Territory allows a health practitioner to conscientiously object to providing or participating in a particular kind of health service because of a religious belief or activity held or engaged in by the health practitioner, a health practitioner conduct rule that is not consistent with that law is not reasonable.

This means in effect, that it will be indirect religious discrimination to apply a health practitioner conduct rule (defined at clause 5 of the Bill) that is inconsistent with a State or Territory conscientious objection law.

Existing State or Territory conscientious objection laws pre-date the Bill. There has long been a tension between those laws and health practitioner conduct rules. Under those laws, it is open to a professional body to impose a conduct rule on health practitioners about the equal treatment of all patients, but the health practitioner can make use of conscientious objection laws if providing or performing a treatment is inconsistent with their beliefs.

Under the Bill, imposing the conduct rule itself in the above situation will be unlawful. By making rules of this nature unlawful, the Bill risks potentially discouraging professional bodies from seeking to regulate the conduct of their members in relation to equal treatment of patients. In turn, the effective treatment of persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, is jeopardised.

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[1] For example, in 2018 AGA and other intersex advocacy organisations wrote jointly to the Hon Andrew Barr MLA, Chief Minister of the ACT, calling for the ACT to become the most intersex-competent, inclusive and friendly jurisdiction in Australia, in line with international best practice. In 2019, AGA made detailed law reform submissions to Equality Australia, the Australian Human Rights Commission, and the Tasmania Law Reform Institute, on the rights of persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics.

For example, the Australian Medical Association (**AMA**)'s *Ethical Guidelines on Independent Medical Assessments 2010. Revised 2015* (**IMA Guidelines**)[2] is, for the purposes of the Bill, a health practitioner conduct rule on health practitioners when they undertake independent medical assessments. Clause 2.2 of the IMA Guidelines states (underline added):c

> Even though a therapeutic relationship does not exist when conducting an independent medical assessment, the doctor has a duty to conduct themselves in an ethical and professional manner, treating the examinee with respect and dignity at all times.

The duty to treat a patient with respect and dignity in these circumstances is potentially inconsistent with conscientious objection laws. Concepts of 'respect' and 'dignity' are imprecise, and, AGA submits, should be assessed with regard to the perception of those receiving, or subject to, the words or conduct of another. If:

(a) a health practitioner conscientiously objects to providing or participating in an independent medical assessment for a person with variations in sex characteristics, on the basis that their genuinely held religious belief is that 'God created humankind in his image as man and woman' (citing, *Genesis 1:27*); and

(a) the patient feels they have not been treated with respect and dignity,

then the IMA Guidelines will not have been adhered to by the health practitioner, and subclause 8(6) is enlivened such that the AMA may be found to have engaged in indirect discrimination for imposing a condition on health practitioners that is deemed by the Bill to be not reasonable.

In all of this, the voice of persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, is diminished, and the Bill complicates an already delicate interaction between patient wellbeing and conscientious objection.

2 *Jurisdictions without conscientious objection laws*

Subclause 8(7) of the Bill provides that a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact of the ability of the person imposing the rule to provide the health service, or on the health of any person who would otherwise be provided with the health service.[3]

AGA submits that this terminology in anti-discrimination legislation is dangerous and contrary to Article 12(1) of the *International Covenant on Economic Social and Cultural Rights*, to which Australia is a signatory. Article 12(1) provides that:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

By providing that health practitioner conduct rules will only be reasonable if there is an unjustifiable adverse impact on patients, subclause 8(7) must be read as contemplating circumstances in which there is a justifiable adverse impact on patients of diverse sexual orientations and gender identities, and those with variations in sex characteristics that the Commonwealth, through the Bill, is willing to accept.

Intersex people, for example, have health and medical needs like many others, but misconceptions and social stigma already often act as barriers to treatment.[4] This community does not need legislation, like the Bill, acting as a hindrance to attaining the highest standard of health (through unfettered access to healthcare).

AGA submits that anti-discrimination legislation enacted in a secular state like Australia should not foster a culture in which the health of some may be adversely impacted because a health practitioner's religious views do not align with the patients diverse sexual orientation or gender identity, or because the patient has

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2 Available at: https://ama.com.au/system/tdf/documents/AMA%20Ethical%20Guidelines%20on%20Independent%20Medical%20Assessments%202010.%20Revised%202015.pdf?file=1&type=node&id=43296.

3 Second Exposure Draft of the Religious Discrimination Bill 2019, *Explanatory Notes*, [181].

4 *Darlington Statement*, March 2017, [19].

variations in sex characteristics. Religion, or an indifference to religion, must not be preferred to the detriment of community healthcare.

B *The operation of faith-based schools*

AGA calls for clause 11 to adopt the language used in other anti-discrimination laws, to ensure religious bodies are held to the same standard across the legislative framework, and to reduce the detrimental impact of the Bill on students of diverse sexual orientations and gender identities, and with variations in sex characteristics.

1 *Exemptions for faith-based schools*

AGA submits that the broad exemption given to religious bodies in clause 11 of the Bill will detrimentally affect the rights of persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, in faith-based schools. Clause 11(5)(a) defines 'religious body' to include 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' (in effect, a faith-based school).

Subclauses 11(1) to (3) provide that a religious body does not discriminate against a person by engaging, in good faith, in conduct:

- that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
- to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body,

both of which may include giving preference to persons of the same religion as the religious body.

Clause 11 applies 'despite anything else in' the Bill, including clause 19, which provides that it is unlawful for an educational institution to discriminate against a person on the ground of the person's religious belief or activity by refusing or failing to accept the person's application for admission as a student, or in the terms or conditions on which it is prepared to admit the person as a student.

2 *How the exemption at clause 11 operates*

AGA submits clause 11 is excessively broad. The exemption in section 38(3) of the *Sex Discrimination Act 1984* (**SD Act**) for religious educational institutions already unjustifiably enables religious bodies to discriminate against current and prospective students by having regard to their sexual orientation, gender identity, marital or relationship status, or pregnancy status. Introducing further grounds in the Bill for faith-based schools to lawfully discriminate against students is repetitive and unnecessary.

Further, the introduction of the phrase 'reasonably consider' in clause 11 provides a lower threshold for religious bodies to satisfy when relying on the exemption. The exemption for religious bodies in the SD Act is limited to conduct undertaken 'in accordance with' religious doctrines, tenets, beliefs or teachings, or that is necessary to avoid injury to the religious susceptibilities of adherents of a religion. However, under the Bill, a broader range of conduct may be 'reasonably considered' to be 'in accordance' with religious doctrine than is actually in accordance with that doctrine, because it does not require a thorough interrogation of doctrines and tenets, but merely requires a 'reasonable' view of what they might entail.

This means that, in practice, clause 11 protects a broader range of discriminatory conduct by faith-based schools than is permitted under other anti-discrimination laws.

3 *Detrimental effects of clause 11*

There are several ways the breadth of clause 11 may detrimentally effect persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, in faith-based schools.

First, clause 11 will allow faith-based schools to discriminate against students under the guise of the adhering to the school's religious belief or activity. For example, a faith-based school may refuse to admit an intersex student on the basis that the student being intersex is inconsistent with the religious belief of the school. However, this conduct is predicated on the a misguided assumption that, for example, the intersex student

could not also adhere to the same religious belief as those held by the school. Clause 11 enables faith-based schools to avoid accountability for discriminatory conduct by framing the student's biological characteristics as inconsistent with the school's religious beliefs.

Second, faith-based schools may discriminate by, as mentioned above, referring to a religious belief that 'God created humankind in his image as man and woman', and by asserting that accepting an intersex or sex and/or gender diverse student is inconsistent with that belief. This broad exemption for faith-based schools is likely to have a detrimental effect on the wellbeing of children of diverse sexual orientations and gender identities, and those with variations in sex characteristics.

AGA submits that it should not be for schools to determine that, for example, children with gender dysphoria should be denied access to education in their institution. This issue is particularly poignant for children who live in remote and regional communities, where the options for schools are limited, and the only feasible option may be a faith-based school. Clause 11 facilitates a view of sex and gender variations which undermines the wellbeing and education of students, and the Bill should be amended to rectify this.

C *Statements of belief in the workplace*

AGA calls for a restriction on workers making statements of belief in the workplace, to protect those who may be adversely affected by the making of such statements, even if said without malicious intent.

1 *Employer conduct rules relating to statements of belief*

Clause 5 of the Bill provides that a statement is a 'statement of belief' if:

(a) the statement:
  (i) is of a religious belief held by a person (the ***first person***); and
  (ii) is made, in good faith, by written or spoken words by the first person; and
  (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or

(b) the statement:
  (i) is of a belief held by a person who does not hold a religious belief; and
  (ii) is made, in good faith, by written or spoken words by the person; and
  (iii) is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief.

A statement of belief does not constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*) and cannot contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas)),[5] so long as that statement is not malicious, likely to harass, threaten, seriously intimidate or vilify another person or group of person, or counsel, promote or encourage a serious offence.[6]

Subclause 8(1)(c) provides that the imposition of a condition, requirement or practice constitutes indirect discrimination on the ground of a person's religious belief where that condition, requirement or practice is not reasonable. Subclauses 8(3) provides that an employer conduct rule – for example, a social media policy – made by a relevant employer[7] that would restrict or prevent an employee from making a statement of belief, other than in the course of their employment, is not reasonable unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer.[8]

AGA submits that the Bill is likely to have a perverse effect on persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, in that it will permit people with religious beliefs to make statements that inadvertently harm others.

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5 *Religious Discrimination Bill 2019*, subclause 42(1).

6 *Religious Discrimination Bill 2019*, subclause 42(2).

7 'Relevant employer' is defined at clause 5 to mean an employer who has or had revenue for the current or previous financial year of at least $50 million, and is not the Commonwealth.

8 The Bill is framed in a way that makes it extraordinarily difficult for 'relevant employers' to establish an 'unjustifiable financial hardship', given the revenue they must earn to satisfy the definition of 'relevant employer'. While this issue is not elaborated upon in this submission, AGA submits that the Bill has been drafted to set 'relevant employers' up to fail, and makes the threshold for establishing financial hardship too high.

This is because in practice, clause 42 permits an employee to make a statement to, for example:

- a female colleague, that women should submit to their husbands (citing, *Ephesians 5:22-24*); or
- a homosexual colleague, that the colleague's relationship is sinful,

so long as that statement, for example, is not malicious and is not 'likely to harass'.

Further, while this conduct could be characterised as simply making a statement of belief, the protection afforded to the person making the statement under clause 42 fails to recognise the adverse psychological impacts such a statement may have on the colleague. The Bill must do more to acknowledge that statements of belief, even when made in the workplace and without malicious intent, have the capacity to cause harm.

The Bill, which is to become part of Australia's suite of anti-discrimination legislation, cannot be assessed in a factual vacuum where the unique challenges faced by persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, are ignored. For example, people with an intersex variation aged 16 and over are nearly six times more likely to attempt suicide in their lifetime, and transgender people aged 18 and over are nearly 11 times more likely.[9] Transgender and gender diverse people aged 18 and over are nearly five times more likely to be diagnosed with depression in their lifetime.[10]

AGA submits that a significant contributor to these poor statistics flows from the stigma and adverse social experiences faced by persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics. Going to work, and interacting with colleagues in the workplace, should not be one of those experiences.

While AGA acknowledges that workplaces are often a collection of unique and diverse individuals, the workplace should be a space in which all people can attend without hesitation or fear of exposure to harmful comments from others (whether harm is intended or not). Unless the expression of religious or non-religious views is an inherent part of a person's role, the workplace is not a location in which employees need to make statements of belief, particularly in circumstances where that statement has the potential to adversely impact others. The Bill should not facilitate statements of belief to be made in the workplace until greater authority is given to employers to manage the adverse impact these statements may have on already vulnerable employees.

III *CONCLUDING REMARKS*

AGA submits that the views and lived experiences of persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, must be considered in the drafting this Bill.

All elements of the Bill which may have a negative and discriminatory impact on the safety and rights of those persons should be removed in their entirety, in a step that would greatly improve respect for the rights of persons of diverse sexual orientations and gender identities, and those with variations in sex characteristics, in our communities.

Please contact Sel Cooper, Executive Director of AGA, if you require further information to better understand AGA's views on these issues discussed above.

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9 LGBTI Health, 'The Statistics At a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia', https://lgbtihealth.org.au/statistics/.

10 ibid.