**STANDARD BRIEFING NOTE 5**

**Broader Impact of Proposed Religious Freedoms Laws in SA**

This Briefing Note contains key points, key terms, background information and examples of practical application as well as links to further information and local contacts. It does not contain legal advice and should be used as a starting point for further research t rather than an authoritative source. Feedback on its contents is welcome.

**Key Points**

* The Federal Government has proposed to introduce a new [religious discrimination bill](https://www.theguardian.com/australia-news/2019/aug/29/what-is-the-religious-discrimination-bill-and-what-will-it-do) into Parliament that aims to provide legal protection for unlawful discrimination (unfair treatment) on the grounds of a person’s religion. Whilst this aim is generally supported by many as a positive step, the proposed laws contain other features that intersect with and in some cases override existing protections designed to guard against other types of unfair treatment, such as on the basis of sex, gender, sexual orientation, age, disability and race.
* Some of the most concerning aspects of the proposed laws are those that seek to override or remove protections for LGBTIQ South Australians. These aspects of the Bill have been discussed in other Briefing Notes and are detailed [here](https://equalityaustralia.org.au/equality-australias-submission/).
* However, the proposed laws will also have significant impacts on other groups in the South Australian community including: **women, those seeking to access health care, and older Australians and even sports clubs**. The proposed laws would also have an impact on the SA Equal Opportunity Commission’s role in resolving complains of discrimination and on South Australian workplaces who aim to implement or develop policies designed to promote equality and respectful behaviour.
* Particularly problematic is clause 41 of the proposed Bill, which provides that ‘statements of belief’ will fall outside the scope of existing State and Federal anti-discrimination law. In practice, this can mean religious people making statements of belief may be exempt from complying with other laws that non-religious people must comply with.
* This Briefing Note contains some examples of these impacts. Please contact the Network via facebook to provide any feedback or case studies that could assist others wanted to raise concerns about the proposed laws.

**Impact on Women**

The proposed new laws could impact on women in three key ways:

* SA women could face increasing levels of **gender-based abuse at work** and in other public places, because of the way the proposed law restricts what employers can do when it comes to developing and implement polices designed to provide safe work spaces or promote equality.
* SA women (particularly those in regional and remote locations) would face **new legal barriers to accessing and receiving health care**, because of the way the draft law singles out the right of health service providers to refuse to provide services if they would be contrary to their religious beliefs.
* South Australia may soon enact **laws decriminalising abortion** and preserving the right of doctors to conscientiously object to providing such services, but only if they also make this know to prospective patients and make a referral to another practitioner who does not have a conscientious objection. These laws could be challenged under the proposed new provisions on the grounds that it may be unlawful to require a doctor or health care provider to make a referral to another doctor, if to do so would be against their religious beliefs.

In addition, under the Bill a ‘statement of belief’ is broadly defined. While recognising that a statement must be ‘reasonably’ regarded as being in accordance with the doctrines, tenets, beliefs or teachings of particular religions, it is possible that the following statements may be recognised as such, given their origin in religious texts:

* that people must not commit adultery (eg teenage unwed mothers);
* that there are only two sexes, for ‘male and female He created them’;
* that gay sex is an abomination;
* that women who wear men’s clothing and vice versa are detestable to God;
* that women are ‘deficient in intelligence and religion’;
* that women who menstruate are ‘impure’; and
* that people with disability should not approach God. [See Law Council of Australia submission]

**HYPERTHETICAL CASE STUDIES**

Anne works for a South Australian supermarket. She is unmarried, a single mother, and enjoys attending raves late at night when can she can arrange babysitting. She is also a survivor of sexual assault. At a teabreak, her supervisor Carl has overheard her talking about an outfit she intends to wear at her next rave. Carl tells Anne and another staff member that ‘it’s no wonder you ran into trouble dressed like that, breaking Gods laws and living in sin.’ After work, Carl repeats the comment on the supermarket social-club facebook page. Under the existing South Australian laws, the supermarket can implement a safe work policy that requires employees to proactively support survivors of sexual assault and domestic violence, including setting guidelines for what types of comments should be made about these topics at work and online. Under the proposed new provisions, Carl could claim that his comments were a ‘statement of belief’. This could in turn result in a legal challenge to the supermarket’s safe work policy and preclude Anne from making a claim against Coles or Carl for discrimination.

Julie lives in Elliston on the Eyre Peninsula and has three children. She divorced her husband six months ago and has just started dating someone new. She wants to discuss birth control options with her GP. Her usual GP has gone to Adelaide for a 2 week training course and the locum, Dr Lyn, is a devout Catholic. Dr Lyn disapproves of birth control and divorce and refuses to prescribe Julie with any form of birth control. There are no other medical clinics in Elliston and Julie can’t arrange childcare to travel to Ceduna for a medical appointment. Under existing South Australian law, Julie could make a complaint of discrimination against Dr Lyn and the clinic. However, under the proposed new laws, Dr Lyn’s conduct would be protected, leaving Julie without any practical options of receiving health services in her home town.

**CASE STUDIES from Victorian Human Rights Commission submission**

Women’s Health Victoria’s 1800 My Options service has reported the following examples of women’s experiences accessing sexual and reproductive health services:

• A woman in rural Victoria whose General Practitioner (GP) told her they would not assist her and would not refer her on. The woman was then afraid to approach another local GP, in case of similar treatment. She could only find services that were more than four hours away when using Google.

• A woman seeking medical termination of pregnancy (MTOP) early in pregnancy was told by her GP that they do not provide these services. The GP said that the only services available are private, and that they cost several thousands of dollars. No referral was made.

• A woman had contacted 9 clinics looking for an MTOP before accessing 1800 My Options. By this time, she had exceeded the gestational limit for MTOP, and the only option was a surgical termination which had financial implications. Women’s Health Victoria’s 1800 My Options also reported women being told that abortion is not available after 12 weeks gestations; being given misinformation about MTOP (that it is dangerous, experimental and ineffective) and encountering hostility and judgment from GPs. The impact of such treatment has included preventing women from seeking services elsewhere, particularly women from rural and remote areas, young women and women from non-English speaking backgrounds, for fear of encountering similar treatment.

**Impact on Accessing Heath Care**

* The draft Bill protects the rights of health care providers to express their religious beliefs even if this mean refusing to treat a particular patient or refusing to provide a certain health care service. Some limits are placed on the scope of this provision – it cannot be used if it would use ‘unjustifiable adverse impact’ on the patient’s health (such as death or serious injury). Despite these limits, the proposed provisions have the potential to limit access to health care particularly for those people living in regional or remote areas where it may not be possible to ‘ask another doctor’ or pharmacist for help. For example, under the Bill,
  + Pharmacy chains and health centres may be unable to implement policies to require their doctors or pharmacists to disclose their religious objections in advance – so the only way women would know where they could get contraception, the morning after pill, or abortion care – is by seeking care from different doctors or pharmacists until they find one who won’t refuse.
  + In rural and regional areas where access to reproductive healthcare is already limited, this could lead to significant delays in access to care and cost, as women are forced to spend time and money travelling to find someone who will provide the care they need.
  + LGBTIQ+ people may not not feel safe to disclose information about their lives to their doctor, pharmacist or other health professional for fear they will be judged or turned away before receiving medical treatment.
  + Service providers who want to do the right thing, will be forced to accommodate staff with religious objections to treating LGBTIQ+ people. Despite those objections being contrary to an organisation’s mission of providing healthcare for all, even when that service is government-funded.
  + Professional guidelines or employer policies that seek to ensure patients’ access to care, or protect patients from obstruction by practitioner’s religious beliefs could be open to challenge.

**CASE STUDY FROM AMA SUBMISSION**

The Medical Board of Australia’s Code of Conduct for Doctors in Australia: Good Medical Practice, the Code by which all registered medical practitioners must abide, states the following in relation to conscientious objection:

Good Medical Practice involves:

2.4.6 Being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues, of your objection, and not using your objection to impede access to treatments that are legal.

2.4.7 Not allowing your moral or religious views to deny patients access to medical care, recognising that you are free to decline to personally provide or participate in that care.

If a medical facility requires doctors to abide by these professional obligations as determined by the Medical Board of Australia, they could be in breach of the draft legislation.

**CASE STUDIES from Victorian Human Rights Commission submission**

A transgender young person seeks Hormone Replacement Treatment 34 from a rural GP. The practitioner refuses to provide a prescription for hormone replacement treatment, order baseline blood tests or provide a referral to an endocrinologist. In explaining their position, the GP states they cannot assist the person because God created men and women, and it would be an affront to their religion to interfere with God’s plans. The GP does not provide a referral to a transgender specialist GP and the young person fails to receive treatment. The young person’s mental health deteriorates, and they continue to suffer unsupported as they are afraid to approach another health service in case they receive the same response.

A gay man seeks pre-exposure prophylaxis (PrEP) to prevent HIV A gay man attends his local GP to access information and a script for PrEP to avoid being exposed to HIV. His GP refuses to provide a script for PrEP or to provide any information about accessing the drug. The doctor does not disclose his religious views, but it is clear he is not comfortable discussing the matter with this patient because of his sexual orientation. The man is confused, embarrassed and unsure where to go for assistance. As a result, he does not access PrEP and risks contracting HIV.

It is noted that the proposed health care related provisions were not recommended by the Ruddock Review Expert Panel and appear to undermine its findings. The Panel stated:

*The Panel does not accept arguments that a right to discriminate in the provision of goods and services is required or proportionate to ensure the free and full enjoyment of Australians’ rights to freedom of religion under international law. Rather, the Panel is of the view that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights, and may cause significant harm to vulnerable groups in the community.* [Expert Panel Report, 49]

**Impact on Older Australians**

* The proposed law removes existing protections against discrimination on the grounds of sexual orientation or gender identity in the provision of aged care contained in the *Sex Discrimination Act*, meaning that aged care service providers that are currently receiving Commonwealth funding could lawfully discriminate in the provision of services CHECK or employment of staff, if doing so was in line with their religious beliefs.

**HYPOTHETICAL CASE STUDY**

Len and Harry have been a couple for 35 years. Len is in an aged care facility in Clare run by Anglicare. It is the only aged care facility close to where the couple previously lived, and is still a 1.5 hour drive from where Harry lives . Previously Harry had been able to visit Len and occasionally stay the night. Since the passage of the proposed laws, the aged care centre has told Harry he is not allowed to stay the night and has asked Len to take down his pictures of the couple together that previously hung on his door, stating that it goes against the Christian ethos of the organisation. If the proposed new laws remove the existing protections under the SDA, it may be very difficult for Len and Harry to challenge the decision of Anglicare under either State or Federal law.

**Impact on Workplaces**

* **There is a provision in the Bill that works to prevent employers from requiring their staff to adhere to policies or guidelines designed to promote inclusive work places.** The clause makes it difficult for employers to protect their staff and clients despite having created policies to ensure equality. Under the proposed legislation employees would have a very wide ability to argue that they should not have to comply with particular company policies.
  + For example, under s8(3), the Bill would make it unlawful for a private sector employer with revenues of at least $50 million to restrict or prevent an employee from making a ‘statement of belief’ outside of work hours unless compliance with that rule is necessary to avoid ‘unjustifiable financial hardship’ to the employer.

**HYPOTHETICAL CASE STUDY**

Under the proposed provisions, the $50 million threshold for a ‘relevant employer’ may capture private universities and even some private schools. For example, if a wealth private school like St Peters Boys College has an annual income of $50 million, teachers in such schools may be permitted to make public statements of belief outside work regarding eg girls being inferior, or gay people going to hell, in circumstances that may be considered likely to harm students’ wellbeing. To restrict these statements, the school would need to demonstrate that it is necessary to impose the requirement to avoid unjustifiable financial hardship to *the school and its annual turnover* – that is, that a number of parents may withdraw their students from the school – instead of the likelihood that a student’s or a group of students’ wellbeing is harmed.

**CASE STUDY FROM DIVERSITY COUNCIL OF AUSTRALIA**

The Australian Public Service Commission provides information on diversity and inclusion practices on its public facing website to support persons with disability, gender equality and indigenous employment. The Australian Government’s APS Jobs website include a commitment to diversity (gender, age, language, ethnicity, cultural background, sexual orientation, religious belief and family responsibilities) and provides that workplace diversity involves recognising the value of individual differences and managing them in the workplace. If enacted, the proposed law would undermines the ability of some employers to foster diverse and inclusive workplaces, prioritising freedom of religion over the equality rights of others who may be harmed by religious speech. In doing so, the Bill introduces unnecessary complexity into the regulation of speech by employers outside of work.

**Impact on SA Equal Opportunity Commission**

* **By expressly overriding existing anti-discrimination laws, clause 41 of the proposed Bill limits the sovereignty of state and territory governments to receive complaints under existing anti-discrimination laws or to strengthen their anti-discrimination laws.**
* **This is because it creates a federal defence to a claim of discrimination that must be dealt with in a federal court, rather than by a state commission. This removes one of the primary advantages of determination by state or territory tribunal – that it is a no-cost/low-cost arena – and thereby increases the financial impact of this legislation on complainants and respondents, including small business. Parties will also be unable to have their matters resolved in the less formal and more timely setting of a tribunal.**
* **The proposed laws also undermine State Commission’s very important *preventative*** work (such as training, distributing fact sheets and best practice guidance) by creating extensive legal uncertainty when it comes to anticipating how the new legal test set out in this draft law will apply, and the extent to which they will undermine, invalidate or work as a defence to complaints under State law.

**HYPOTHETICAL CASE STUDY**

The SA Equal Opportunity Commission is acutely aware of the pervasive problem of hate speech and community calls to reform legislation in South Australia to include protections for other groups, particularly women, LGBTIQ people and people with disabilities. It establishes a regular training program for businesses and government agencies designed to help organisations take preventative action against hate speech, and publishes a ‘best practice’ handbook with tips and examples that could be included in workplace policies. Under the draft provisions, if businesses and organisations implement these types of preventative practices they could be liable to claims of discrimination on the grounds of religious belief. In addition, if hate speech or other forms of verbal abuse occurs in the work place, it will not be able to form the basis of a complaint to the EOC if the perpetrator can show that it was a ‘statement of belief’ (subject to the limits that apply to that definition). Even if there is some doubt about the scope of the new religious discrimination laws, the EOC will be required to refer the matter to a federal court for determination, and will be unable to activate its standard, conciliation based approach to resolving complaints.

**Impact on Sports Clubs**

The Law Council submits that clause 41 may have a detrimental impact on sporting organisations who have worked towards creating safe and inclusive sporting environments. This will further place undue strain on organisations to amend their policies, monitor social media as to what conduct is within the ambit of the clause and ensure that those who may be impacted remain protected. This may also lead to a decline in participation in sport amongst certain groups.

**Further Information**

* Equality Australia Submission on the draft Bill <https://equalityaustralia.org.au/equality-australias-submission/>
* Human Rights Law Centre Submission on the draft Bill <https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Human%20Rights%20Law%20Centre.pdf>
* Simeon Beckett, ‘Key protection in religious discrimination bill is fatally flawed’, *Sydney Morning Herald*, 18 September 2019.

**Local Contacts**

* Dr Sarah Moulds (UniSA Law School) <https://people.unisa.edu.au/Sarah.Moulds>
* SARAA (Chair Matthew Morris <https://www.saraa.org.au/>