2 October 2019

The Hon Christian Porter MP
Attorney-General and Minister for Industrial Relations
Attorney-General's Department
Canberra

(submitted by email: FoRConsultation@ag.gov.au)

Submission on Religious Freedom Bills

Justice Connect welcomes the opportunity to make a submission to the Attorney-General's Department on the draft package of legislative reforms on religious freedom. The package includes:

- *Religious Discrimination Bill 2019* (**Religious Discrimination Bill**)
- *Religious Discrimination (Consequential Amendments) Bill 2019,* and
- *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (**Human Rights Amendment Bill**).

Justice Connect is a charity providing legal services to bridge the justice gap. We connect people and community groups with the lawyers and the legal help they need. We identify where laws and systems are unjust and we advocate for system change.

Our Not-for-profit Law service

This submission draws on the experience of our specialist Not-for-profit Law service. This service provides free and low cost legal assistance to not-for-profit (**NFP**) community organisations and social enterprises. Not-for-profit Law provides services directly to NFPs (in the form of legal information, advice and training) and also connects NFPs with pro bono assistance from our member law firms and barristers.

By helping those involved in running NFPs to navigate the full range of legal issues that arise during the lifecycle of their organisation, we save them time and resources. This allows NFPs to focus on achieving their mission, whether that is helping vulnerable people, arts and culture, or working towards social cohesion.

Not-for-profit Law advocates for an improved legal and regulatory framework for the NFP and social enterprise sector, and to ensure law reform considers the impacts of regulation especially on small to medium sized organisations. Effective and appropriate regulation supports efficient and well run NFPs and social enterprises; a thriving sector benefits all Australians.

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Endorsement of Human Rights Law Centre and Equality Australia submissions

We have reviewed and support the submissions of the Human Rights Law Centre and Equality Australia. We agree that:

> 'People of faith should have legal protection from discrimination on the basis of their religion and other people should be free from having the religious beliefs of others imposed on them.
>
> However, in seeking to achieve this, the Bill goes too far and fails to strike a fair balance between freedom of religion and the rights of other people. In a range of the circumstances the Bill licences discrimination against other groups and includes provisions which are unorthodox and unprecedented…' *Human Rights Law Centre*
>
> 'It is essential when talking of freedom of religion that we are clear about what it is and what it is not. It is not, and has never been, a licence to discriminate against others.' *Equality Australia*

Recommendation 1: that the Religious Discrimination Bill and its related Bills not be introduced into Parliament in their current from.

Justice Connect's submission on amendments to the Charities Act

Our submission focusses on the amendments to s11 of the *Charities Act* (**Charities Act**) contained in Schedule 1 of the *Human Rights Amendment Bill*. We make an explicit recommendation on this amendment and then explain our reasoning.

Recommendation 2: that the planned amendments to s11 of the Charities Act be abandoned. The amendments are unnecessary and, if implemented, would create an untenable double standard resulting in greater confusion around the ability of charitable groups (including religious charities) to advocate in line with their charitable purposes.

1. Summary of reasons

The planned amendments to s11 of the Charities Act that explicitly allow activities to support a 'traditional' view of marriage are unnecessary and should be abandoned. In addition to being unnecessary, the wording of the proposed amendments leads to a number of highly problematic, and likely unintended, results, including:

- implying the existence of a novel charitable purpose

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- shielding charities undertaking activities in pursuit of that new purpose from the requirements to act lawfully, not contrary to public policy, and not for the purpose of promoting or opposing a political party or candidate for political office, and
- creating greater confusion for charities, including religious charities, acting in pursuit of all other charitable purposes about what does and does not constitute a disqualifying purpose.

2. Proposed amendments to the Charities Act

The amended s11 of the Charities Act would read as follows (amendment underlined):

Section 11 - Disqualifying purpose

(1) In this Act:

disqualifying purpose means:

(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or

(b) the purpose of promoting or opposing a political party or a candidate for political office.

(2) To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose.

3. The amendment is unnecessary

The planned amendment to s11 is unnecessary as it is widely recognised that under the current law, that activities of the kind described in the proposed s11(2) do not constitute a disqualifying purpose. This position is supported by the plain wording of s11 and the accompanying notes, namely:

> [Notes to s1(a) above, emphasis added]
>
> *Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.*
>
> *Note: Activities are not contrary to public policy merely because they are contrary to government policy.*
>
> [Notes to s1(b) above, emphasis added]
>
> *Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).*
>
> *Note: The purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country may be a*

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charitable purpose (see paragraph (l) of the definition of charitable purpose in subsection 12(1)).

The unnecessary nature of the amendments is further supported by s12(l) of the Act (extracted below), which specifically lists promotion or opposition to a change of any matter of law or policy as a recognised charitable purpose.

Section 12 - Definition of charitable purpose [emphasis added]

…

(l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:

(i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or

(ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

The current legal position was recognised by the Expert Panel in its report, which noted at [1.199, emphasis added]:

> 'The example and note appended to section 11 of the Charities Act emphasise that the public policy ground for disqualification is intended to apply only to restricted cases. Mere advocacy of a position contrary to government policy does not meet the threshold of a disqualifying purpose; and, indeed, advocating a change to law or policy in furtherance of another charitable purpose is itself a charitable purpose under the Charities Act as discussed above.'

It is our view that the drafting of the amendment stems from an erroneous conflation of the terms 'public policy' and 'government policy'.

As we noted in our submission to the Expert Panel, the distinction between the terms 'public policy' and 'government policy' is an essential one in the context of s11. The two concepts are explicitly distinguished in that section.

On a proper reading of the current Charities Act, activities in support of 'traditional' marriage would not qualify as a disqualifying purpose, unless those activities were:

- conducted unlawfully
- for the purpose of promoting or opposing a candidate for party for political office, or
- posed a threat the public policy of the Commonwealth (namely, a threat to fundamental things such as the rule of law, the constitutional system of government, the safety of the general public, or national security).

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It is commonplace for charities to advocate for changes to government policy or current law; indeed hundreds if not thousands of charities (religious and otherwise) do so every day on issues as diverse as reproductive rights, healthcare, immigration, and the environment. Many charities publically advocated in favour of same-sex marriage before the amendments to the *Marriage Act 1961* (Cth) made that position consistent with Commonwealth law and government policy. To our knowledge, no actions were taken against charities on the basis that such 'same sex marriage' advocacy was against public policy.

We also note that the High Court, sitting before the introduction of the *Charities Act*, found in *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 that the generation of public debate about government policy is beneficial to the public and that charities are able to advocate against the policy of a sitting government without losing their charity status on the grounds of public benefit or public policy.

If advocating for a position contrary to *government* policy is in breach of the existing requirements of s11, then huge numbers of charities could face having a disqualifying purpose (and consequent deregistration as a charity) every time there was a change of government.

If a charity supported something that was government policy or law before an election (eg. assisted dying or pill testing at festivals), but after an election it was no longer the (new) government's policy or law, then the charity could suddenly be in a position of opposing the (new) *government* policy or law.

This is clearly a flawed interpretation of the plain wording of the section and its explanatory notes.

4. The amendment would create greater confusion and double-standards

The proposed amendment of s11(2) creates a number of highly problematic, and likely unintended, consequences in relation to interpretation of the Act. It would undermine the existing position in relation to the protection of charities (including religious charities) in their ability to promote positions contrary to government policy.

The contemplated "traditional' marriage activities are not required to be lawful or consistent with public policy or political tests

The most problematic of these consequences is that, under the wording of the proposed s11(2), the purpose of 'engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life' would not be a disqualifying purpose even where such activities are undertaken:

- unlawfully
- contrary to public policy, or
- for the purpose of promoting or opposing a political party or candidate for political office.

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This arises because the class of activities contemplated by s11(2) is not restricted (for example, they seem to apply to all activities whether or not they are lawful), **and** because the wording seems to exclude those activities from the restrictions imposed by the disqualifying purposes provisions in the proposed s11(1).

While we assume this is an unintended consequence of the drafting − that the intent was not to grant charities engaging in such activities permission to act unlawfully, contrary to public policy or for an overly political purpose − this is not clear on the current wording of the provision. The Explanatory Memorandum of the *Human Rights Amendment Bill* further strengthens the assumption that this is an unintended consequence, stating at [42] (emphasis added):

> 'Accordingly, new subsection 11(2) does not make substantive amendments to the existing disqualifying purpose test in section 11 of the Charities Act, but rather inserts a provision to clarify that for the purposes of that test, engaging or promoting activities that support a view of marriage as the union of a man and a woman will not of itself constitute a disqualifying purpose. Therefore, a charity that advocates for a traditional view of marriage will not lose its charitable status solely due to such advocacy.'

Because the activities can be undertaken even if they breach the lawfulness, public policy and non-political limits (outlined above), we are of the view that they are 'substantive amendments' and are, therefore, contrary to the intention set out in the Explanatory Memorandum.

It is our submission that activities of the kind contemplated by the proposed s11(2) (advocating for a 'traditional' view of marriage):

i. do not currently constitute a disqualifying purpose, **and**
ii. must be subject to the lawfulness, public policy, and non-political requirements in s11.

Indirect creation of new charitable purpose

The suggestion in s11(2) that 'engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life' is not a disqualifying purpose could imply that those activities constitute a charitable purpose in the first instance. Activities to promote a view which supports 'traditional' marriage is not listed as a charitable purpose in s12 of the Charities Act. However, s12 is not an exhaustive list of charitable purposes so it may be possible to imply a new charitable purpose because of the amendment.

Not restricted to religious charities

The new provision is not restricted to bodies organised or operated in accordance with a particular faith tradition, or having the charitable purpose of advancing religion. The result is that the proposed s11(2) fails to reflect the recommendation of the Expert Panel.

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The amendment creates confusion and double-standards in relation to charitable advocacy generally

Not only is the amendment to s11 unnecessary to protect charities engaging in advocacy on marriage, but by providing an express provision, it creates legitimate questions about the ability of charities to oppose government policy and existing law on other issues.

By providing specific guidance on activities related to marriage, the amendment could be seen as creating a presumption that activities of a similar kind undertaken in relation to other policy issues are likely to fall foul of the public policy test.

This ambiguity will affect all charities, including religious charities, engaging in advocacy on issues outside of marriage, such as reproductive rights or education.

For example, this amendment provides no guidance to a religious charity advocating for a change in government policy on school funding; about what activities would constitute a contravention of the public policy requirement in s11. Indeed, that charity may hesitate to advocate for change to government school funding policy given the new wording could be taken to imply that such activities give rise to a disqualifying purpose under s11.

If a precedent is set in this ('traditional' marriage) instance, we can expect charities engaging in advocacy on other issues to begin lobbying for a similar type of protection through the 'listing' of other types of activities in s11.

This would be an untenable result for the Government and charities.

Achieving intent of the drafters

It is clear that the intent of the amendment is to provide clarity to charities engaging in the types of activities contemplated in the proposed s11(2). If it is accepted that ambiguity exists for those engaging in activities relating to marriage, it must also be accepted that the same ambiguity exists for those engaging in activities on **all** other issues.

To clarify advocacy on only one policy issue, is to ignore every other possible law reform or policy issue. It actually exacerbates the perceived problem by creating a double standard. One standard about the single policy issue of marriage. Another standard for all other issues involving positions contrary to existing law or government policy.

As discussed above, it is our view that no such clarification is needed as the current legal position is sufficiently clear in relation to those particular activities. However, if the Attorney-General remains concerned that the current wording of s11 provides insufficient guidance on what types of activities fall foul of the disqualifying purposes provisions of s11, it is our submission that there are better ways to achieve clarity.

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In our view, the only appropriate way to achieve clarification is to add to or amend the current clarifying notes to s11 (rather than the section itself) in a way that:

a) does not increase the scope of activities or purposes that would constitute a disqualifying purpose, and
b) is applied to activities conducted in accordance with all charitable purposes uniformly.

This approach is the most effective way to achieve the intention of the current amendment without significantly, and negatively, altering the meaning and effectiveness of s11 in the ways we have described above.

Conclusion

We urge the Federal Government to abandon the planned amendments to s11 of the Charities Act.

The amendments are unnecessary. If implemented, the amendments would create an untenable double standard and result in greater confusion around the ability of charitable groups, (including religious charities) to advocate in line with their charitable purposes.

We agree to our submission appearing on the public record.

Yours sincerely

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