



# Parliamentary Joint Committee on Human Rights

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Inquiry report

Religious Discrimination Bill 2021 and related bills

4 February 2022

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ISBN 978-1-76093-341-8

PO Box 6100  
Parliament House  
Canberra ACT 2600

Phone: 02 6277 3823

Fax: 02 6277 5767

Email: [human.rights@aph.gov.au](mailto:human.rights@aph.gov.au)

Website: [http://www.aph.gov.au/joint\\_humanrights/](http://www.aph.gov.au/joint_humanrights/)

This report can be cited as: Parliamentary Joint Committee on Human Rights, Religious Discrimination Bill 2021 and related bills inquiry report; [2022] AUPJCHR 1.

This document was prepared by the Parliamentary Joint Committee on Human Rights and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

# Membership of the committee

## Members

Dr Anne Webster MP, Chair	Mallee, Victoria, Nats
Mr Graham Perrett MP, Deputy Chair	Moreton, Queensland, ALP
Mr Josh Burns MP	Macnamara, Victoria, ALP
Mr Ian Goodenough MP	Moore, Western Australia, LP
Ms Celia Hammond MP	Curtin, Western Australia, LP
Senator Andrew McLachlan CSC	South Australia, LP
Senator Deborah O'Neill	New South Wales, ALP
Senator Louise Pratt	Western Australia, ALP
Senator Janet Rice	Victoria, AG
Senator Benjamin Small	Western Australia, LP

## Secretariat

Anita Coles, Committee Secretary  
Fattimah Imtoul, Acting Committee Secretary/Principal Research Officer  
Rebecca Preston, Principal Research Officer  
Stephanie David, Senior Research Officer  
Diana Batchelor, Research Officer  
Ingrid Zappe, Legislative Research Officer  
Ella Ross, Administrative Officer

## External legal adviser

Associate Professor Jacqueline Mowbray



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## Chair's Foreword

It is evident that the right to freedom of thought, conscience and religion is a fundamental human right and is the essence of a free society. It was recognised in the Universal Declaration of Human Rights in 1948 and is now enshrined in article 18 of the International Covenant on Civil and Political Rights. It includes the freedom to have or to adopt a religion or belief, and the freedom, either individually or in community with others to manifest one's religion or belief in worship, observance, practice and teaching.

While we have a federal *Sex Discrimination Act 1984*, a *Race Discrimination Act 1975*, a *Disability Discrimination Act 1992* and an *Age Discrimination Act 2004*, there is no dedicated federal law to protect against discrimination on the ground of religious belief or activity, despite our international obligation to do so.

This is the basis on which the Religious Freedom Review recommended that the Commonwealth develop a Religious Discrimination Act to render it unlawful to discriminate on the basis of a person's religious belief or activity.

This is what this bill seeks to do – to remedy this gap in our discrimination laws and to protect people of faith against discrimination.

Australians have the right to enjoy religious freedoms, but as the Religious Freedom Review noted, the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance. This is particularly relevant for minority religious groups who are currently more likely to suffer from direct discrimination, but also for Christians whose genuinely held religious views are increasingly being silenced.

In this inquiry almost all submitters and witnesses recognised the importance of protecting the right to be free from discrimination on the grounds of religious belief and activity, as did 95 per cent of respondents to the committee's survey on this question.

However, significant differences arose in how these protections can best be achieved. The committee acknowledges this legislative package has been contentious and considers there has been substantial confusion and misinformation about parts of the legislation, particularly around statements of belief and the applicability of the legislation to schools and in workplace contexts. However, it is noteworthy that 82 per cent of the over 48,000 respondents to the committee's survey supported the religious discrimination legislative package currently before the Parliament.

In relation to religious schools, it is important to recognise that the ability for religious bodies to act in accordance with their faith is an essential element of the right to

freedom of religion. International human rights law recognises the importance of ensuring the autonomy of religious institutions. The ability of religious bodies, including schools, to uphold their ethos through employment and enrolment policies is a manifestation of the right to freedom of religion.

It is often said that religious values are 'more caught than taught'. Therefore, the ability for religious schools to recruit those who can model the religious values and beliefs of a school in their interactions with students and their families is essential to preserving the general ethos and values of religious schools. Human rights law also recognises the importance of respecting the liberty of parents in ensuring the religious and moral education of their children. The committee recognises the concerns raised around this issue, however, much of the concerns regarding teachers and students being adversely treated because of relationships or sexuality are not issues of direct relevance to this proposed legislation. It is important to note that these bills would prevent discrimination on the grounds of religion – differential treatment on other grounds, such as sexuality, may still constitute discrimination under other anti-discrimination laws. The *Sex Discrimination Act 1984* currently includes exemptions that mean it is not discrimination for religious bodies to discriminate on the grounds of sex or sexual orientation. This religious discrimination legislative package does not affect the operation of these current exemptions and, as such, questions regarding these exemptions are best dealt with as part of the proposed review by the Australian Law Reform Commission.

In relation to statements of belief (clause 12), the committee heard a variety of different perspectives from submitters and witnesses as to the likely impact of this provision. It is important to note upfront that freedom of expression is necessary for the meaningful enjoyment of the right to freedom of thought, conscience, and religion or belief. A person's religious belief, or indeed lack of belief, is often of significance to their identity and manner in which they live their life. As such, it is important that people be able to explain, discuss, share and express their moderate genuine faith-based beliefs without the fear of complaints being brought to silence them.

Of course, the right to freedom of religion must be balanced against other fundamental human rights. A human rights-based framework stresses the principles of universality, equality and freedom and where rights conflict it is important to ensure that all human rights are protected as far as possible.

This committee, which has a decade of experience in applying a human rights lens to proposed legislation, is well-placed to consider this important balancing act. The inquiry drew submissions and testimony from all sectors of Australian society to assist it in this task.

After having carefully considered this evidence, the committee has concluded that the religious discrimination legislative package is, on the whole, a sensible and balanced approach to protect the right to freedom of religion. It reflects a tolerant and inclusive

society that understands the importance of faith to a pluralist democracy, but does not seek to impose those beliefs on, or injure, others. The bills operate as a shield to protect those who genuinely, and in good faith, live their lives according to their religion, from being discriminated against on this basis. The committee considers the bills provide adequate and appropriate safeguards to ensure that any limitation on rights are reasonable, necessary and proportionate.

However, the committee appreciates there are a wide range of views on this important and difficult topic, and considers it important to continue the conversation with the Australian people as to how to balance these rights. In particular, clauses 11 and 12 have been raised as of significant concern to many with questions raised as to how the law will apply in practice. Noting these provisions are somewhat unique in the legislative landscape and given its relationship to the protection of fundamental human rights, the committee would urge future governments to monitor the impact of this legislation on society and individuals and continually review this significant piece of legislation.

Subject to the recommendations made by the committee, we are of the view that the passage of the religious discrimination legislative package remains essential to protect and uphold the fundamental right to freedom of religion and belief.



# Recommendations

## Recommendation 1

**3.88** The committee recommends that, consistent with other anti-discrimination legislation, clause 14 of the Religious Discrimination Bill 2021 be amended to require that in determining if a condition, requirement or practice imposed on a person resulted in indirect discrimination, the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving it was reasonable.

## Recommendation 2

**3.89** The committee recommends that paragraph 39(2)(b) of the Religious Discrimination Bill 2021 be amended to refer to the inherent requirements of the 'particular position', rather than the inherent requirements of the 'employment'.

## Recommendation 3

**3.90** The committee recommends that the government consider including a legislative note in the Religious Discrimination Bill 2021 that states that reasonable management action conducted within a reasonable manner will not constitute unlawful discrimination, and provide examples in the explanatory memorandum of the type of action that would likely constitute reasonable management action.

## Recommendation 4

**3.91** The committee recommends, consistent with other anti-discrimination legislation, that Division 4 of Part 4 of the Religious Discrimination Bill 2021 be amended to include a provision that the Australian Human Rights Commission and Attorney-General, in exercising powers under clauses 44 and 47, must include with the explanatory materials accompanying the instrument the following information:

- the Commission or Attorney-General's findings on material questions of facts in relation to the decision;
- the evidence on which those findings were based;
- the reasons for the decision; and
- the fact that an application may be made to the Administrative Appeal Tribunal for a review of the decision.

## Recommendation 5

**3.92** The committee recommends that subclause 69(1) of the Religious Discrimination Bill 2021 be amended to provide that the Australian Human Rights

Commission can only delegate the power to make an exemption to a Commissioner or an SES member of staff of the Commission.

#### **Recommendation 6**

**3.93** The committee recommends that clause 47 of the Religious Discrimination Bill 2021 be amended to provide that the Australian Human Rights Commission may vary or revoke an exemption by notifiable instrument, but the Attorney-General may only vary or revoke an exemption by disallowable legislative instrument (ensuring there is parliamentary oversight of any political decision to vary or revoke an exemption made by the Commission).

#### **Recommendation 7**

**4.121** The committee recommends that the explanatory memorandum to the Religious Discrimination Bill 2021 be amended to provide clarification as to the applicability of the bill to in-home care services, particularly in relation to aged care and disability services.

#### **Recommendation 8**

**5.109** The committee recommends that subclauses 7(6), 7(7) and 9(3) of the Religious Discrimination Bill 2021 be amended to set out what is required to be included in a publicly available policy, namely: that the policy must outline the religious body's position in relation to particular religious beliefs or activities, and explain how this position will be enforced by the religious body. These subclauses should also provide that the minister may, by legislative instrument, determine any other requirements ancillary to this, which the policy must comply with.

#### **Recommendation 9**

**6.135** The committee recommends that the government consider providing further explanation and examples with respect to clause 12 in the explanatory memorandum accompanying the Religious Discrimination Bill 2021, to provide greater clarity about what sort of statements or actions may, or may not, be considered to not constitute discrimination.

#### **Recommendation 10**

**6.136** The committee recommends guidelines relevant to qualifying body conduct rules in clause 15 are developed in consultation with relevant professional bodies.

#### **Recommendation 11**

**6.137** The committee recommends that the government give consideration to amending the explanatory memorandum, or clause 14 of the Religious

**Discrimination Bill 2021 to add a legislative note, to clarify that it may be indirect discrimination for a qualifying body to impose a qualifying body conduct rule that restricts or prevents a person from expressing their religious beliefs, unless the qualifying body can demonstrate the rule is reasonable.**

#### **Recommendation 12**

**6.138 The committee recommends that, following implementation of the recommendations in this report, the Religious Discrimination Bill 2019, the Religious Discrimination (Consequential Amendments) Bill 2021, and the Human Rights Legislation Amendment Bill 2021 be passed.**



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# Chapter 1

## Introduction

### Background

#### *Overview of legislative history*

1.1 On 22 November 2017, the Australian Government appointed an Expert Panel on Religious Freedom to examine whether Australian law adequately protects the human right to freedom of religion.<sup>1</sup> The Expert Panel received more than 15,500 submissions and conducted 90 consultation meetings with various stakeholders in each state and territory. The Expert Panel's final report was provided on 18 May 2018 and published on 13 December 2018.<sup>2</sup> The panel concluded that 'Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law'. But the panel also acknowledged that 'the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance', and provided specific recommendations on how Commonwealth, state and territory governments could further protect religious freedom.<sup>3</sup>

1.2 In response to a number of the report's recommendations, the Australian Government developed exposure drafts of the Religious Discrimination Bill 2019, the Religious Discrimination (Consequential Amendments) Bill 2019, and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.<sup>4</sup>

1.3 On 29 August 2019, the Attorney-General released the first exposure drafts of the religious discrimination legislation package. A public consultation process was held, which included public submissions and in-person discussions. Almost 6,000 submissions were received between 29 August 2019 and 2 October 2019 and discussions were held with 90 interested stakeholders.<sup>5</sup>

1.4 On 10 December 2019, the Attorney-General released the second exposure drafts of the bills, which addressed feedback received from the first consultation.

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1 The Expert Panel was chaired by the Hon Phillip Ruddock and comprised Emeritus Professor Rosalind Croucher AM, the Hon Dr Annabelle Bennett AC SC, Father Frank Brennan SJ AO and Professor Nicholas Aroney.

2 See: <https://www.pmc.gov.au/domestic-policy/taskforces-past-domestic-policy-initiatives/religious-freedom-review>

3 Hon Philip Ruddock, *Religious Freedom Review Report of the Expert Panel*, May 2018, p 104.

4 See <https://www.ag.gov.au/rights-and-protections/consultations/religious-discrimination-bills-first-exposure-drafts>

5 Over 270 of these submissions were published, which represented the majority of submissions received, including all submission from organisations and campaign-style based submissions. See: <https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-discrimination-bills-first-exposure-drafts-consultation>

Changes made included: broadening the definition of religious charities;<sup>6</sup> allowing religious bodies to expressly preference employing persons of the same faith;<sup>7</sup> protecting associates/spouses from religious discrimination;<sup>8</sup> and defining the term, 'vilify'.<sup>9</sup> A second public consultation process was held inviting submissions. Approximately 7,000 submissions were received between 10 December 2019 and 31 January 2020.<sup>10</sup>

### **Introduction of bills**

1.5 On 25 November 2021, the Prime Minister introduced the following three bills in the House of Representatives:

- Religious Discrimination Bill 2021;
- Religious Discrimination (Consequential Amendments) Bill 2021; and
- Human Rights Legislation Amendment Bill 2021.

1.6 Together, these bills comprise the religious discrimination legislative package.

1.7 In introducing the bills the Prime Minister noted that the bills are based on four years of work.<sup>11</sup>

### **Initiation of inquiry**

1.8 On 26 November 2021, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General wrote to the Parliamentary Joint Committee on Human Rights (the committee) to inquire into, and report on, the religious discrimination legislation package.

1.9 The Attorney-General requested the committee report to both Houses of Parliament by 4 February 2022.

### **Conduct of the inquiry**

1.10 Following referral to the committee, the Chair of the committee, Dr Anne Webster MP, issued a media release on 30 November 2021 to call for submissions and announce the committee's intention to hold a number of public hearings.

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6 Religious Discrimination Bill 2021, subclause 9(2).

7 Religious Discrimination Bill 2021, clause 7.

8 Religious Discrimination Bill 2021, clause 16.

9 Religious Discrimination Bill 2021, subclause 5(1)

10 Over 270 of these submissions were published, which represented the majority of submissions received, including all submission from organisations and campaign-style based submissions. See: <https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-discrimination-bills-second-exposure-drafts-consultation>

11 The Hon Scott Morrison MP, Prime Minister of Australia, *Committee Hansard*, 25 November 2021, 10812

1.11 The committee wrote to 146 relevant stakeholders inviting them to make a submission to the inquiry by 21 December 2021, and advertised the inquiry on its website. In their submissions, a number of submitters raised concerns regarding the short timeframe for the inquiry.<sup>12</sup>

1.12 The committee received 205 public submissions, and these were published on the committee's website, and one confidential submission. These submissions are listed in Appendix 1. The committee also resolved to publish one example of each form or campaign letter or submission or petition (together with the number received). These are listed in Appendix 3 and the example letters are available on the committee's website.<sup>13</sup>

1.13 In order to assist members of the public to express their views, and to do so as efficiently and effectively as possible, the committee considered it appropriate to conduct a survey. The survey included ten questions. Survey participants could select 'Yes' or 'No' and provide further information to support their view. The survey closed at 5pm AEDT on 21 December 2021 and the committee received 48,107 responses. 39,808 participants chose to respond to the question of whether they supported the current version of the bill, of which 7,239 respondents (18.18 per cent) indicated that they did not support the bill and 32,569 (81.82 per cent) indicated support for the bill. The survey questions and a sample of responses are listed in Appendix 4. It is noted that some submitters questioned the accuracy of the survey. The most common criticism was that the wording of the questions in the survey swayed participants towards one answer over another.<sup>14</sup> Further, some groups conducted their own survey or focus groups on the bill.<sup>15</sup> For example, Equality Australia organised 'The People's

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12 See Australian Lawyers Alliance, *Submission 2*, p. 5; Diversity Council Australia, *Submission 13*, pp. 6-7; Associate Professor Mark Fowler, *Submission 20*, p. 49; Law Council Australia, *Submission 28*, p. 8; Council of the Ageing, *Submission 29*, p. 2; National Tertiary Education Union, *Submission 35*, p. 2; Child Wise, *Submission 48*, p. 4; Australian Council of Trade Unions, *Submission 64*, p. 4; Disability Voices Tasmania, *Submission 68*, p. 5; Australian Health Promotion Association, *Submission 72*, p. 2; Relationships Australia, *Submission 99*, p.13; Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 105*, pp. 2-3; Kingsford Legal Centre, *Submissions 110*, p.12; Fair Agenda, *Submission 122*, p. 3; Dr Sean Mulcahy, *Submission 126*, p. 1; Buddhist Library, *Submission 135*, p. 1; Queensland Centre for Intellectual and Developmental Disability, *Submission 164*, p. 2; Centre for Women's Safety and Wellbeing, *Submission 179*, p. 2; NSW Council of Civil Liberties, *Submission 181*, pp. 4 and 18.

13 See the committee's [website](#).

14 Scarlet Alliance, Australian Sex Workers Association, *Submission 128*, p 2; Fair Agenda, *Submission 122*, p 3; Kingsford Legal Centre, *Submission 110*, p 13; Tasmanian Council of Social Services, *Submission 36*, p 10; Associate Professor Fiona Kate Barlow et. al, *Submission 146*; Equality Australia, *Joint Parliamentary Inquiry into Religious Discrimination Bill*, additional information received 21 December 2021, p 1.

15 See Australian Youth Affairs Coalition, *Submission 137*; Children and Young People with Disability Australia, *Submission 139*, p. 3.

Submission', which was signed by 6,108+ individuals and which contained a statement opposing the bill and set out a selection of personal stories and opinions.<sup>16</sup>

1.14 The committee held three public hearings in relation to this inquiry in Canberra, on 21 December 2021, 13 January 2022 and 14 January 2022. The committee heard evidence from a range of religious organisations, peak bodies and community groups, academics, legal experts and the Attorney-General's Department. A list of witnesses is included at Appendix 2, and the *Committee Hansard* transcript is available on the committee website.<sup>17</sup>

### **Consideration by other parliamentary committees**

1.15 On 2 December 2021, the Senate referred the Religious Discrimination Bill 2021, the Religious Discrimination (Consequential Amendments) Bill 2021 and the Human Rights Legislation Amendment Bill 2021 to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 4 February 2022.<sup>18</sup>

1.16 The Legal and Constitutional Affairs Legislation Committee's inquiry is distinct and separate from this committee's inquiry.

1.17 On 21 December 2021, the Senate Standing Committee for the Scrutiny of Bills (scrutiny committee) considered the legislation. The scrutiny committee drew attention to a number of significant issues addressed by the bill which were left to delegated legislation, reiterating its longstanding view that significant matters 'should be included in primary legislation unless a sound justification has been provided for the use of delegated legislation.'<sup>19</sup> The scrutiny committee also emphasised clauses which granted broad administrative powers<sup>20</sup> and reversed the evidential burden of proof for defendants.<sup>21</sup>

### **Structure of the report**

1.18 The report contains five Chapters, as follows:

- Chapter 1 sets out the introduction and background to the inquiry;

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16 Equality Australia, *Submission 31, Attachment 1*.

17 In this report, references to the *Committee Hansard* are to the proof transcript. Page numbers may vary between proof and official transcripts.

18 Parliament of Australia, '[Religious Discrimination Bill 2021 \[Provisions\]; Religious Discrimination \(Consequential Amendments\) Bill 2021 \[Provisions\] and Human Rights Legislation Amendment Bill 2021 \[Provisions\]](#)'.

19 Senate Standing Committee for the Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, 1 December 2021, p. 25–29

20 Senate Standing Committee for the Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, 1 December 2021, p. 29–30.

21 Senate Standing Committee for the Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, 1 December 2021, p. 32.

- Chapter 2 discusses the legislative framework of the religious discrimination legislation package and the key human rights principles;
- Chapter 3 discusses unlawful discrimination and related issues raised by submitters and witnesses to the inquiry;
- Chapter 4 discusses religious bodies, and the impact of the religious discrimination legislation package on employment, access to services, and related issues raised by submitters and witnesses to the inquiry;
- Chapter 5 discusses religious educational institutions, and the impact of the bill on students and teachers; and
- Chapter 6 discusses statements of belief and related issues raised by submitters and witnesses to the inquiry.

### **Acknowledgements**

1.19 The committee acknowledges and thanks the organisations and individuals who assisted with, and contributed to, the inquiry by making submissions, responding to the survey, giving evidence at the public hearings and providing additional information.

### **Note on references**

1.20 References to the *Committee Hansard* are to the proof Hansard. Page numbers may vary between the proof and official Hansard transcripts.



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## Chapter 2

### Legislative framework

#### Purpose of the religious discrimination legislative package

2.1 The stated purpose of the Religious Discrimination Bill 2021 (the bill) is to promote the rights to freedom of religion, and equality and non-discrimination (on the ground of religion), by prohibiting discrimination on the basis of religious belief or activity in specified areas of public life, including work, education and in the provision of goods, services and facilities.<sup>1</sup> The bill seeks to give effect to three recommendations made by the Expert Panel into Religious Freedom, including the recommendation that legislation be introduced to render discrimination on the basis of religion unlawful.<sup>2</sup> The explanatory memorandum notes that existing protections for discrimination on the basis of religion in federal and state and territory anti-discrimination legislation are piecemeal, have limited application and are inconsistent across jurisdictions.<sup>3</sup> This bill seeks to address this legislative gap by introducing comprehensive federal legislative protections for discrimination on the basis of religious belief or activity.<sup>4</sup> In addition, the explanatory memorandum notes that the bill is intended to promote attitudinal change, to ensure that people are judged on their capacity and ability, rather than on generally unfounded negative stereotypes about people who hold religious beliefs or undertake religious activities.<sup>5</sup>

2.2 The other bills in the religious discrimination legislative package seek to make consequential amendments necessary to support the implementation of the

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1 Religious Discrimination Bill 2021, statement of compatibility, p. 8.

2 Religious Discrimination Bill 2021, explanatory memorandum, p. 2. The bill seeks to implement recommendations 3, 15 and 19. Recommendation 3 states: 'Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion'. Recommendation 15 states: '[t]he Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's "religious belief or activity", including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities'. Recommendation 19 states: '[t]he Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position'. See Expert Panel, [Religious Freedom Review: Report of the Expert Panel](#), May 2018, pp. 1–7.

3 Religious Discrimination Bill 2021, explanatory memorandum, p. 2.

4 Religious Discrimination Bill 2021, explanatory memorandum, p. 2.

5 Religious Discrimination Bill 2021, explanatory memorandum, p. 3.

bill and give effect to various recommendations made by the Expert Panel on Religious Freedom. In particular, the Religious Discrimination (Consequential Amendments) Bill 2021 would extend the Australian Human Rights Commission's functions of inquiring into, and attempting to conciliate, complaints of unlawful discrimination, to discrimination on the basis of religion.<sup>6</sup> The Human Rights Legislation Amendment Bill 2021 seeks to make amendments to a number of federal Acts to better protect the right to freedom of religion.<sup>7</sup> In particular, this bill would amend the objects clauses of federal anti-discrimination legislation to recognise the indivisibility and universality of all human rights, and their equal status in international law, and the principle that every person is free and equal in dignity and rights.<sup>8</sup> The explanatory memorandum states that the amended objects clauses would recognise that, so far as is possible, anti-discrimination law should be interpreted in a manner which is consistent with all human rights.<sup>9</sup> In addition, the Human Rights Legislation Amendment Bill 2021 would make some other amendments to the *Charities Act 2013* and the *Marriage Act 1961*, including:

- clarifying that an entity that encourages or promotes the view of marriage as a union of a man and woman is presumed to be undertaking those activities for the public benefit and not contrary to public policy; and
- allowing religious educational institutions to refuse to provide facilities, goods or services in relation to the solemnisation of a marriage in accordance with their religious beliefs.<sup>10</sup>

### **Key provisions of the Religious Discrimination Bill 2021**

2.3 The bill comprises nine parts. Key parts of the bill include:

- Part 2, which sets out conduct that is not discrimination under the bill, including certain conduct engaged in by religious bodies and the expression of certain statements of belief;
- Part 3, which sets out the concept of discrimination on the ground of religious belief or activity;
- Part 4, which sets out when discrimination is unlawful, noting that certain conduct engaged in by religious bodies and the expression of certain statements of belief would not be discrimination under this bill; and

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6 Religious Discrimination (Consequential Amendments) Bill 2021, explanatory memorandum, p. 1.

7 The Human Rights Legislation Amendment Bill 2021 would amend the *Age Discrimination Act 2004*, *Charities Act 2013*, *Disability Discrimination Act 1992*, *Marriage Act 1961*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*.

8 Human Rights Legislation Amendment Bill 2021, items 2, 5, 7 and 9.

9 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 1.

10 Human Rights Legislation Amendment Bill 2021, items 3 and 6.

- Part 6, which would establish the Religious Discrimination Commissioner.<sup>11</sup>
- 2.4 The bill has four objects, namely:
- (a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and
  - (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and
  - (c) to promote the recognition and acceptance within the community of the principle that people of all religious beliefs, including people with no religious belief, have the same fundamental rights in relation to those beliefs; and
  - (d) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.<sup>12</sup>

2.5 In giving effect to these objects, subclause 3(2) of the bill requires regard is to be had to:

- (a) the indivisibility and universality of human rights, and their equal status in international law; and
- (b) the principle that every person is free and equal in dignity and rights.<sup>13</sup>

2.6 In interpreting this objects clause, referencing section 15AA of the *Acts Interpretation Act 1901*, the Attorney-General's Department stated that the bill should be 'interpreted in accordance with [its] objects' and 'all the other provisions...are to be read as being designed to carry out these objects as far as is possible'.<sup>14</sup> While submitters generally supported the objects clause, some raised concerns that, despite subclause 3(2), the objects clause privileges freedom of religion above other human rights.<sup>15</sup>

2.7 As to the concept of 'religious belief or activity', the bill defines this to mean holding or not holding a religious belief; or engaging in, or not engaging in or refusing to engage in, religious activity.<sup>16</sup> A religious activity does not include an unlawful activity, although noting an activity is not unlawful merely because a local by-law

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11 See Religious Discrimination Bill 2021, clause 4, which provides a simplified outline of the bill.

12 Religious Discrimination Bill 2021, subclause 3(1).

13 Religious Discrimination Bill 2021, subclause 3(2).

14 Attorney-General's Department, answer to written questions on notice, question 1 (received 11 January 2022).

15 See, e.g., Law Council of Australia, *Submission 28*, p. 15.

16 Religious Discrimination Bill 2021, subclause 5(1).

prohibits the activity.<sup>17</sup> The explanatory memorandum notes that the term 'religious belief or activity' is defined broadly and is not intended to be an exhaustive definition.<sup>18</sup> Further consideration of this is set out in Chapter 3.

### ***Conduct by religious bodies that is classified as not constituting discrimination***

2.8 Part 2 of the bill sets out the circumstances in which conduct by a religious body is not discrimination under the bill. The characterisation of conduct under part 2 as 'not discrimination' as opposed to conduct falling within an exception to ensure such conduct will not be *unlawful* discrimination is noteworthy. The explanatory memorandum states that this distinction 'ensures that nothing in this Bill affects the ability for inherently religious organisations to manifest their religious belief and operate in accordance with their religious ethos in good faith'.<sup>19</sup> It notes that the effect of framing the bill in this way is that '[b]ecause conduct is not discrimination, it is not unlawful under the Bill in any area of public life, whether or not it comes within an exception in Division 4 of Part 4'.<sup>20</sup> On this point, the Attorney-General's Department clarified that the 'practical effect of Part 2 is that it is not necessary to first consider whether the conduct is discrimination and then whether the conduct falls within the terms of an exception', noting that framing the bill in this way is 'intended to simplify the Bill and assist understanding'.<sup>21</sup> Some submitters supported the framing of part 2 of the bill. Professor Mark Fowler, for example, submitted that in his view 'clause 7 is correct when it states that a religious body "does not discriminate" when it exercises rights as outlined therein'.<sup>22</sup> The Australian Catholic Bishops' Conference also supported the framing of part 2, stating that:

To avoid the perception that religious freedom is a lesser right, and recognising that exemptions are often under review, our strong preference is that the law recognise religious freedom as a positive right in religious discrimination law, alongside other rights. The way that the [bill] is drafted gives effect to this by making clear that actions by religious bodies, for example preferencing the appointment of staff who adhere to the faith or support its values, does not constitute discrimination at all.<sup>23</sup>

2.9 Other submitters, however, did not support the framing of part 2 of the bill. Liberty Victoria, for example, stated that:

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17 Religious Discrimination Bill 2021, subclauses 5(2) and (3).

18 Religious Discrimination Bill 2021, explanatory memorandum, pp. 34–35.

19 Religious Discrimination Bill 2021, explanatory memorandum, p. 5.

20 Religious Discrimination Bill 2021, explanatory memorandum, p. 41.

21 Attorney-General's Department, answer to written questions on notice, question 3 (received 11 January 2022).

22 Professor Mark Fowler, *Submission 20*, p. 3.

23 Australian Catholic Bishops Conference, *Submission 185*, pp. 5–6.

[Part 2] is unique in Australian law in aiming to declare various aspects of conduct associated with a single type of attribute (in this case religious belief or activity) as pre-emptively not discrimination, in defiance of practice in every other jurisdiction. It should be omitted.<sup>24</sup>

2.10 The Law Council of Australia also described part 2 as 'unorthodox' insofar as it departs from the 'standard approach' in other federal anti-discrimination laws, which 'set out the key concepts of discrimination, followed by prohibitions on unlawful discrimination, followed by general and specific exceptions to those prohibitions'.<sup>25</sup> The Law Council raised concerns that part 2 'will not ensure that all Australians are protected from discrimination, and will instead enable such discrimination, including on the grounds of religious belief or activity'.<sup>26</sup> The Australian Discrimination Law Experts Group similarly described clause 7 as:

unorthodox, extremely wide in scope, and far easier to satisfy than any religious body exception test found in any other federal, state or territory discrimination law in Australia.<sup>27</sup>

2.11 As to the substantive provisions of part 2, the bill defines a religious body as an educational institution (including a school, college, university, and child care or early learning centre), a registered charity or any other kind of body (other than a body that engages solely or primarily in commercial activities) that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.<sup>28</sup> Subclause 7(1) provides that because conduct by a religious body 'is not discrimination, it is therefore not unlawful under this Act in any area of public life, including work, education, access to premises and the provision of goods, services and accommodation'.<sup>29</sup> Note 1 to subclause 7(1) illustrates this with an example:

it is not discrimination for a religious primary school to require all of its staff and students to practice that religion, if such a requirement is necessary to avoid injury to the religious susceptibilities of people of that religion.<sup>30</sup>

2.12 Specifically, subclauses 7(2) and (4) provide that a religious body does not discriminate against a person on the ground of religious belief or activity 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,

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24 Liberty Victoria, *Submission 186*, p. 5.

25 Law Council of Australia, *Submission 28*, p. 16.

26 Law Council of Australia, *Submission 28*, p. 17. See also Ms Katherine Eastman, Law Council of Australia, *Committee Hansard*, 14 January 2022, p.31.

27 Australian Discrimination Law Excerpts Group, *Submission 33*, p. 13.

28 Religious Discrimination Bill 2021, subclause 5(1).

29 Religious Discrimination Bill 2021, subclause 7(1)

30 Religious Discrimination Bill 2021, clause 7, note 1.

beliefs or teachings of that religion; and/or engaging in conduct in order to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.<sup>31</sup> Conduct in this context includes giving preference to persons of the same religion as the religious body.<sup>32</sup> The bill notes that while such conduct would not be discrimination under this bill, it may still constitute direct or indirect discrimination under other federal anti-discrimination laws.<sup>33</sup>

2.13 In addition, in relation to conduct by a religious educational institution in the context of employment, subclause 7(6) provides that such conduct must be in accordance with a publicly available policy; and in compliance with any requirements determined by the minister by legislative instrument.<sup>34</sup> Further, clause 11 provides that conduct relating to employment engaged in by religious educational institutions does not contravene a prescribed state or territory law if the institution gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and the conduct is in accordance with a publicly available written policy.<sup>35</sup>

2.14 In relation to conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability service providers, only certain conduct in the context of employment and partnerships would not be discrimination under this bill.<sup>36</sup> Specifically, if the body is either an employer or a partnership or partner, it would not discriminate against a person on the ground of religious belief or activity by:

- engaging in conduct in good faith; and
- a person of the same religion as the body could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or the body engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the body; and
- the conduct is in accordance with a publicly available policy; and
- the conduct complies with any requirements determined by the minister.<sup>37</sup>

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31 Religious Discrimination Bill 2021, subclauses 7(2) and (4).

32 Religious Discrimination Bill 2021, subclauses 7(3) and (5).

33 Religious Discrimination Bill 2021, note 1 to subclauses 7(2) and (4). For example, the *Sex Discrimination Act 1984*.

34 Religious Discrimination Bill 2021, subclauses 7(6) and (7).

35 Religious Discrimination Bill 2021, subclause 11(1).

36 Religious Discrimination Bill 2021, clause 9.

37 Religious Discrimination Bill 2021, subclauses 9(3) and (5).

2.15 Conduct in this context would include giving preference to persons of the same religion as these bodies.<sup>38</sup> However, other conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability service providers, as specified in clause 8, would not be exempted by clause 7 and so would be covered by part 4 of this bill, which deals with unlawful discrimination.<sup>39</sup> The explanatory memorandum notes that given these religious 'institutions generally provide services to the public at large and most often they do so on a commercial basis, it is not appropriate for their conduct in all areas of public life to not be covered by the Bill'.<sup>40</sup>

2.16 Further, clause 10 provides that a person does not discriminate against another person by engaging in conduct that is reasonable in the circumstances; and is consistent with the purposes of the bill; and either is intended to meet a need arising out of a religious belief or activity of a person or group of persons, or is intended to reduce a disadvantage experienced by a person or group of persons on the basis of their religious beliefs or activities.<sup>41</sup> This provision is stated to apply despite anything else in the bill.<sup>42</sup>

2.17 The provisions providing that certain conduct by religious bodies is not discrimination is considered further in Chapters 4 and 5.

### ***Statements of belief***

2.18 Clause 12 of part 2 of the bill deals with statements of belief. A statement of belief is a statement that:

- is of a religious belief held by a person, or is of a belief held by a person who does not hold a religious belief; and
- is made, in good faith, by written or spoken words or other communication (other than physical contact) by the person; and
- is of a belief that the person genuinely considers to either be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or relate to the fact of not holding a religious belief.<sup>43</sup>

2.19 Subclause 12(1) provides that a statement of belief, in and of itself, does not constitute discrimination for the purposes of this bill and other specified federal,

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38 Religious Discrimination Bill 2021, subclauses 9(4) and (6).

39 Religious Discrimination Bill 2021, clause 8.

40 Religious Discrimination Bill 2021, explanatory memorandum, p. 46.

41 Religious Discrimination Bill 2021, subclause 10(1).

42 Religious Discrimination Bill 2021, subclause 10(2).

43 Religious Discrimination Bill 2021, subclause 5(1).

state and territory anti-discrimination laws.<sup>44</sup> However, a statement of belief would not be protected if:

- it is malicious; or
- a reasonable person would consider that it would threaten, intimidate, harass or vilify a person or group (noting that a moderately expressed religious view that does not incite hatred or violence would not constitute vilification); or
- it is an expression of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsels, promotes, encourages or urges conduct that would constitute a serious offence.<sup>45</sup>

2.20 The bill notes that clause 12 does not protect statements that have no relationship to religious belief.<sup>46</sup> Statements of belief are considered further in Chapter 6.

***Concept of discrimination on the ground of religious belief or activity***

2.21 Part 3 of the bill sets out the concepts of direct and indirect discrimination. Direct discrimination on the ground of religious belief or activity would occur if the person treats, or proposes to treat, another person less favourably than someone else (in circumstances that are not materially different) because of the other person's religious belief or activity.<sup>47</sup> Indirect discrimination against another person on the ground of their religious belief or activity would occur where a person imposes a condition, requirement or practice that is not reasonable and that has the effect of disadvantaging persons who hold or engage in the same religious belief or activity as the other person.<sup>48</sup> Whether a condition, requirement or practice is reasonable will depend on the circumstances of the case, including the nature and extent of the disadvantage, the feasibility of overcoming or mitigating the disadvantage, and whether the disadvantage is proportionate to the result sought by the person imposing the condition, requirement, or practice.<sup>49</sup>

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44 Religious Discrimination Bill 2021, subclause 12(1).

45 Religious Discrimination Bill 2021, subclause 12(2).

46 Religious Discrimination Bill 2021, note to subclause 12(1) and note 1 to subclause 12(2).

47 Religious Discrimination Bill 2021, clause 13.

48 Religious Discrimination Bill 2021, subclause 14(1).

49 Religious Discrimination Bill 2021, subclause 14(2).

2.22 The bill also sets out specific circumstances in which a qualifying body conduct rule (a condition, requirement or practice imposed by a qualifying body)<sup>50</sup> would not be reasonable, including where it restricts or prevents a person from making a statement of belief other than in the course of the person practising in the relevant profession, trade or occupation (unless compliance with the rule is an essential requirement of the profession, trade or occupation).<sup>51</sup> This provision would not, however, protect a statement of belief that is malicious; threatens, intimidates, harasses or vilifies a person or group; or counsels, promotes, encourages or urges conduct that would constitute a serious offence.<sup>52</sup>

2.23 Further, the bill extends discrimination to persons associated with individuals who hold or engage in a religious belief or activity. Clause 16 makes it unlawful under the proposed Act to discriminate against a person on the basis of the person's association with someone else. It sets out that an association with another individual includes situations where a person is a near relative of another person, or is someone a person lives with or has an ongoing business or recreational relationship with, or where both are members of the same unincorporated association.<sup>53</sup> A 'person' is not defined in the bill, and as such the usual interpretation is that this includes a body politic or corporate as well as an individual.<sup>54</sup> Subclause 16(3) also provides that a person that is a body corporate will be considered to have an association with an individual if a reasonable person would closely associate the body corporate with that individual. This means a body corporate would be able to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely associated with.<sup>55</sup> This is considered further in Chapter 3.

### ***Unlawful discrimination***

2.24 Part 4 of the bill sets out the areas of public life in which it would be unlawful to discriminate against a person because of their religious belief or activity. The specified areas include: work (in relation to employment decisions, the formation of partnerships, and decisions by qualifying bodies, registered organisations and

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50 Religious Discrimination Bill 2021, paragraph 15(1)(a) defines a qualifying body conduct rule to mean a condition, requirement or practice that is imposed by a qualifying body on those seeking or holding an authorisation or qualification from the qualifying body and that relates to standards of behaviour of those persons. Subclause 5(1) defines a qualifying body as an authority or body that is empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates, the practice of a profession; the carrying on of a trade; or the engaging in of an occupation by an individual.

51 Religious Discrimination Bill 2021, subclauses 15(1) and (2).

52 Religious Discrimination Bill 2021, subclause 15(3).

53 Religious Discrimination Bill 2021, subclause 16(2).

54 *Acts Interpretation Act 1901* (Cth), section 2C.

55 Religious Discrimination Bill 2021, explanatory memorandum, p. 66.

employment agencies); education (in relation to prospective students and students); access to premises; the provision of goods, services and facilities; accommodation; land; sport; and clubs.<sup>56</sup> It would also be unlawful for a person to request or require another person to provide information for the purposes of engaging in conduct that would constitute unlawful discrimination in these areas of public life.<sup>57</sup> Additionally, it would be unlawful for a person to discriminate against another person on the ground of their religious belief or activity in the administration of Commonwealth laws and programs.<sup>58</sup>

### ***Exceptions and exemptions***

2.25 Division 4 of part 4 of the bill sets out a number of exceptions to the prohibition of discrimination on the ground of religious belief or activity, noting that certain conduct engaged in by religious bodies would not be discrimination and so does not need to come within an exception.<sup>59</sup> Division 4 includes general exceptions as well as specific exceptions relating to particular areas of public life. Clause 35, for example, would introduce a general exception to make it not unlawful to discriminate against a person on the ground of their religious belief or activity if:

- the person has expressed a particular religious belief; and
- a reasonable person, having regard to all the circumstances, would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence; and
- it is reasonable to assume the person holds the particular belief at the time of the discrimination.<sup>60</sup>

2.26 It would also not be unlawful to discriminate on the ground of religious belief or activity if the discrimination is in direct compliance with certain legislation.<sup>61</sup>

2.27 Division 4 also contains specific exceptions relating to work, accommodation and facilities, land, clubs and voluntary bodies.<sup>62</sup> For example, in the context of work, it would not be unlawful to discriminate against a person on the ground of their religious belief or activity if the discrimination is in connection with their position as

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56 Religious Discrimination Bill 2021, clauses 19–30.

57 Religious Discrimination Bill 2021, clause 31. The example under clause 31 states that it would be 'unlawful to ask a person in a job interview if they are religious if the question is asked for the purposes of determining whether to employ the person'.

58 Religious Discrimination Bill 2021, clause 32.

59 Religious Discrimination Bill 2021, clause 34.

60 Religious Discrimination Bill 2021, clause 35. A serious offence is one that involves harm or financial detriment that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a state or a territory.

61 Religious Discrimination Bill 2021, clause 37.

62 Religious Discrimination Bill 2021, clauses 39–43.

an employee or partner, and because of their religious belief or activity, they are unable to carry out the inherent requirements of the employment or partnership.<sup>63</sup> In the context of accommodation and facilities, it would not be unlawful for a person (the first person) to discriminate against another person on the ground of their religious belief or activity if:

- the discriminatory conduct (which includes preferential treatment) is undertaken in the course of establishing, directing, controlling or administering a camp or conference site that provides accommodation and is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and
- the conduct is engaged in good faith; and
- a person of the same religion as the first person could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or the first person engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the first person; and
- the conduct is in accordance with a publicly available policy; and
- the policy complies with any requirements determined by the minister by legislative instrument.<sup>64</sup>

2.28 In addition, clause 44 would allow the Australian Human Rights Commission (Commission), by notifiable instrument, to grant to a person or body an exemption from the operation of provisions making discrimination in work and other areas of public life unlawful.<sup>65</sup> The exemption may be granted for a period not exceeding five years and may be granted subject to such terms and conditions as are specified in the instrument, and may be expressed to apply only to certain circumstances or certain activities.<sup>66</sup> This power to grant exemptions, as well as any other power or function of the Commission under this bill, may be delegated to any person or body of persons.<sup>67</sup>

2.29 These exceptions and exemptions are considered further in Chapter 3.

### **Offences**

2.30 Part 5 of the bill would introduce a number of offences. For example, it would be an offence to commit an act of victimisation on the basis of religious belief

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63 Religious Discrimination Bill 2021, subclause 39(2).

64 Religious Discrimination Bill 2021, subclauses 40(2)–(7).

65 Religious Discrimination Bill 2021, clause 44.

66 Religious Discrimination Bill 2021, subclauses 44(2) and (3).

67 Religious Discrimination Bill 2021, clause 69.

involving actual detriment and an act of victimisation involving threat of detriment.<sup>68</sup> It is noted that victimisation may also be addressed as a civil matter under the bill.<sup>69</sup> It would also be an offence for a person to publish or display an advertisement or notice that indicates, or could reasonably be understood to indicate, an intention to engage in unlawful discriminatory conduct.<sup>70</sup>

### ***The Australian Human Rights Commission***

2.31 Part 6 of the bill would establish the office of the Religious Discrimination Commissioner and part 7 would confer on the Commission various functions relating to discrimination on the basis of religious belief or activity, such as promoting an understanding and acceptance of, and compliance with, this bill.<sup>71</sup> The Religious Discrimination (Consequential Amendments) Bill 2021 would make the necessary consequential amendments to allow the Commission to inquire into, and attempt to conciliate, complaints of discrimination on the basis of religious belief or activity.<sup>72</sup>

### ***Relationship with other laws***

2.32 There are several provisions contained in the bill which interact with other federal, state and territory laws. As noted above, clause 11 provides that conduct engaged in by religious educational institutions in the context of employment does not contravene a prescribed state or territory law if the institution gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and the conduct is in accordance with a publicly available written policy.<sup>73</sup> The minister may prescribe one or more state or territory laws for the purpose of this provision if satisfied the law has the effect of both prohibiting discrimination on the ground of religious belief or activity; and preventing religious educational institutions from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity when engaging in employment related conduct.<sup>74</sup> The Religious Discrimination (Consequential Amendments) Bill 2021 seeks to make contingent amendments to this bill in order to include the *Equal Opportunity Act 2010* (Vic) within the meaning of a prescribed state or territory law for the purposes of this provision.<sup>75</sup> Further, subclause 11(4) states that this provision is

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68 Religious Discrimination Bill 2021, clause 50.

69 Religious Discrimination Bill 2021, clause 33.

70 Religious Discrimination Bill 2021, clause 51.

71 Religious Discrimination Bill 2021, clauses 52–61.

72 Religious Discrimination (Consequential Amendments) Bill 2021, schedule 1, items 2 and 3.

73 Religious Discrimination Bill 2021, subclause 11(1).

74 Religious Discrimination Bill 2021, subclause 11(3).

75 Religious Discrimination (Consequential Amendments) Bill 2021, schedule 2, items 1–3. The effect of these contingent amendments would be to include the *Equal Opportunity Act 2010* (Vic) in the definition of a prescribed State of Territory law and to repeal subclause 11(4) (including the note).

intended to apply to the exclusion of a prescribed state or territory law insofar as it would otherwise apply in relation to the conduct of a religious educational institution. It notes that if a state or territory law is not prescribed, this provision is intended to operate concurrently to the extent that it is capable of doing so.<sup>76</sup>

2.33 Clause 12 would also affect the operation of other laws insofar as it provides that a statement of belief, in and of itself, does not constitute discrimination for the purposes of this bill and other specified federal, state and territory anti-discrimination laws as well as any provision of a law prescribed by the regulations.<sup>77</sup> The explanatory memorandum states that clause 12 'operates to create a federal exception to certain complaints under state and territory anti-discrimination law concerning a statement of belief'.<sup>78</sup>

2.34 More generally, subclause 68(1) of the bill provides that the bill is not intended to exclude or limit the operation of a state or territory law to the extent that the law is capable of operating concurrently, although noting that this provision does not detract from the operation of clause 12.<sup>79</sup> Subclause 68(2) provides that where a person has made a complaint, instituted a proceeding or taken any other action under a state or territory anti-discrimination law, they are not entitled to make a complaint to the Commission alleging unlawful discrimination under this bill in relation to the same conduct.<sup>80</sup> Additionally, where a person engages in conduct that constitutes an offence under both this bill and a state or territory anti-discrimination law, clause 68 would allow them to be prosecuted and convicted for that conduct either under either this bill or the state or territory law, but the person would not be punished more than once for the same conduct.<sup>81</sup>

### **Key human rights principles**

2.35 This section outlines the key human rights principles under international human rights law that are relevant to the religious discrimination legislative package, particularly the Religious Discrimination Bill 2021 (the bill). It sets out the key rights that may be promoted and limited, and how those rights apply, noting that rights

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76 Religious Discrimination Bill 2021, note to subclause 11(4).

77 Religious Discrimination Bill 2021, subclause 12(1).

78 Religious Discrimination Bill 2021, explanatory memorandum, p. 107.

79 Religious Discrimination Bill 2021, subclause 68(1) (including note).

80 Religious Discrimination Bill 2021, subclause 68(2). See also explanatory memorandum, p. 107.

81 Religious Discrimination Bill 2021, subclauses 68(3) and (4).

that are marginally engaged will not be the focus of this Chapter.<sup>82</sup> For those rights that may be limited, this section outlines the approach taken by the committee in assessing whether the limitation is permissible under international human rights law, such that it is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. Chapters 3–6 provide a more detailed assessment of the application of international human rights law to the various measures contained in the bill (including, where relevant, the views of submitters and witnesses on this question). As will be discussed below, the compatibility of the religious discrimination legislative package with international human rights law appears to be directly relevant to the constitutional validity of the package, noting that the stated constitutional basis of the bill is to give effect to Australia's international human rights law obligations.<sup>83</sup>

### ***Key human rights engaged***

2.36 In general terms, the bill promotes the right to freedom of religion, particularly the right to manifest one's religion, and the rights to freedom of expression and equality and non-discrimination (on the grounds of religious belief) in a number of ways, including by:

- making it unlawful to discriminate against a person on the ground of their religious belief or activity in various areas of public life;
- specifying conduct that is not discrimination, including conduct engaged in by religious bodies in accordance with their faith (which would include preferencing persons of the same religion as the religious body) and reasonable conduct intended to meet a need or reduce a disadvantage; and
- specifying that it may not be reasonable for a qualifying body conduct rule to prevent or restrict a person from making a statement of belief in their personal capacity.

2.37 The right to freedom of religion is protected by article 18 of the International Covenant on Civil and Political Rights, which provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of [their] choice, and freedom, either individually or in

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82 The religious discrimination legislative package promotes, and engages and may limit, a number of human rights, including freedom of religion or belief; freedom of expression; equality and non-discrimination; work; privacy and private life; and education. The statement of compatibility acknowledges that these rights are engaged. Additionally, insofar as the bill applies to various areas of public life, including education, and health, disability and aged care services, and may consequently have a disproportionate impact on certain groups, such as children, people with disability and older persons, it may also engage the rights of the child and rights of people with disability. Noting that some of these rights are marginally engaged, they will not be the focus of this Chapter.

83 Religious Discrimination Bill 2021, clause 64.

community with others and in public or private, to manifest [their] religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

2.38 The right to freedom of religion 'encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief' and protects equally the freedom of thought, conscience, religion and belief.<sup>84</sup> The United Nations (UN) Human Rights Committee has stated that 'the terms belief and religion are to be broadly construed' and not limited to traditional religions or beliefs.<sup>85</sup> The right protects religious, non-religious and atheist beliefs equally, as well as the right not to profess any religion or belief. Similarly, the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress, including distinctive clothing or head coverings,<sup>86</sup> and the observance of dietary regulations.<sup>87</sup> The terms 'observance' and 'practice' do not contain 'any spatial or institutional specificities and must be broadly applied', including in the workplace.<sup>88</sup> The practice and teaching of religion or belief includes acts undertaken by religious groups in conducting their affairs, such as choosing religious leaders, establishing religious schools, and preparing and distributing religious texts or publications.<sup>89</sup> The UN General Assembly has observed that the right to freedom to

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84 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [1].

85 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [2].

86 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.3]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.2]–[7.3]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.3].

87 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

88 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [31].

89 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

manifest religion 'includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life'.<sup>90</sup> The European Court of Human Rights has also observed that protection of religious groups is necessary for the realisation of the individual right to freedom of religion.<sup>91</sup>

2.39 In addition, the right to freedom of religion requires the state to respect the convictions of parents and guardians of children in the provision of education, and respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>92</sup> This allows public schools to teach particular religions or beliefs, but only if it is taught in a neutral and objective way or there is a non-discriminatory alternative for those children whose parents or guardians do not wish them to be educated in that religion or belief. On this matter, the UN Human Rights Committee has stated:

The Committee is of the view that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.<sup>93</sup>

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90 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

91 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014). At [127] the Court stated: '[w]here the organisation of the religious community is in issue, Article 9 [freedom of thought, conscience and religion] of the [European Convention on Human Rights] must be interpreted in the light of Article 11 [freedom of assembly and association], which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'.

92 International Covenant on Civil and Political Rights, article 18(4). See also International Covenant on Economic, Social and Cultural Rights, article 13(3).

93 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [6].

2.40 The Convention on the Rights of the Child also recognises children themselves as rights holders of the right to freedom of religion or belief and the associated rights and duties of a child's parents or legal guardians to provide direction to their child in the exercise of this right in a manner consistent with the evolving capacities of the child.<sup>94</sup> It also recognises the right of children from a minority religious or indigenous origin to profess or practise their religion and to do so in community with other members of their group.<sup>95</sup> The UN Special Rapporteur has observed that the concept of 'evolving capacities of the child' 'means that the child should always be respected...as having the gradually evolving capacities of forming his or her own thoughts, ideas and religious or belief-related convictions and taking his or her own decisions in that area'.<sup>96</sup> For instance, where a child has developed their own self-understanding on issues of religion or belief and has exercised their right to adopt a particular religion or belief, that decision must be respected and the child should not receive religious instructions against their will.<sup>97</sup> The UN Special Rapporteur acknowledged that the 'rights of children and parental rights in the area of freedom of religion or belief, although in practice not always consonant, should generally be interpreted as being positively interrelated', and cautioned against unjustified state interference with parental rights as such interference often simultaneously amounts to violations of the rights of the child.<sup>98</sup>

2.41 Further, when considering the rights of the child in the area of freedom of religion, it is also necessary to apply the principle of the best interests of the child. The Convention on the Rights of the Child requires States parties to ensure that the best interests of the child are taken as a primary consideration in all actions concerning children, including in the area of freedom of religion or belief.<sup>99</sup> This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.<sup>100</sup> The UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

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94 Convention on the Rights of the Child, article 14.

95 Convention on the Rights of the Child, article 30.

96 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [26].

97 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [54].

98 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [76].

99 Convention on the Rights of the Child, article 3(1).

100 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

considerations. This strong position is justified by the special situation of the child.<sup>101</sup>

2.42 The child's best interests includes the enjoyment of the rights set out in the Convention on the Rights of the Child, and, in the case of individual decisions, 'must be assessed and determined in light of the specific circumstances of the particular child'.<sup>102</sup>

2.43 The right to freedom of religion intersects with the right to hold opinions without interference and the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.<sup>103</sup> This right protects '[a]ll forms of opinion, including opinions of a political, scientific, historic, moral or religious nature' and includes the expression and receipt of religious discourse.<sup>104</sup> The UN Special Rapporteur has emphasised the 'mutually reinforcing nature' of the rights to freedom of religion and freedom of expression, stating that:

Freedom of expression is necessary for the meaningful enjoyment of the freedoms of thought, conscience, and religion or belief...One [right] cannot be fully enjoyed without the other or in the absence of the right to privacy, freedom of association and peaceful assembly. This suggests that the two rights are not only interdependent, but also exist in a legal continuum with myriad other rights.<sup>105</sup>

2.44 The UN Special Rapporteur has further noted that the right to manifest one's religion relies on the degree of protection afforded to freedom of expression and likewise, respect for freedom of thought and conscience is necessary for to ensure respect for freedom of opinion and expression.<sup>106</sup>

2.45 By prohibiting discrimination on the ground of religion, the bill also promotes the right to equality and non-discrimination on the ground of religion. This right provides that everyone is entitled to enjoy their rights without discrimination of any

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101 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

102 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) p. 3.

103 International Covenant on Civil and Political Rights, article 19.

104 UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

105 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [5], [14]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/31/18 (2015).

106 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [7].

kind, including on the grounds of religion,<sup>107</sup> and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>108</sup> The UN Human Rights Committee has stated that:

the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>109</sup>

2.46 The UN Human Rights Committee has further stated that discrimination is prohibited 'in law or in fact in any field regulated and protected by public authorities' and States parties have an obligation to ensure that all legislation and the application thereof is not discriminatory.<sup>110</sup>

2.47 However, affording greater protection to religious institutions to manifest their religion would also necessarily have the effect of limiting the rights to freedom of religion, freedom of expression and equality and non-discrimination for persons who do not share the same religion as the religious institution. The UN Special Rapporteur has noted that the rights to freedom of religion or belief and equality and non-discrimination are 'inextricably linked'.<sup>111</sup> In this way, Parts 2 and 4 (in relation to exceptions and exemptions) of the bill may have the effect of simultaneously promoting and weakening the above protections of the rights to freedom of religion,

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107 For jurisprudence of the European Court of Human Rights in relation to discrimination on the grounds of religion see *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.13]–[8.17]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.7]–[7.8]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.10]–[8.13].

108 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

109 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [7].

110 In considering the interaction between articles 2 and 26 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee has stated: 'article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory'. See UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [12].

111 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33].

freedom of expression and equality and non-discrimination as they would allow religious bodies to treat people differently on the basis of religion and, in the case of exceptions, would make lawful conduct that would otherwise be unlawful on the grounds that it was discriminatory=.

2.48 Additionally, some measures in the bill may have the effect of indirectly discriminating against persons on the basis of other protected attributes (namely, attributes other than religion). The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>112</sup> Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>113</sup> Indirect discrimination may occur, for example, if a religious body were permitted to refuse to hire a woman who was divorced, or dismiss a female employee who gets divorced while employed, on the ground that doing so is in accordance with the body's religious belief and/or to avoid injury to the religious susceptibilities of adherents of the same religion as the body (assuming that such conduct is also in accordance with any other legislative requirements, such as a publicly available policy). As a matter of international human rights law, such conduct may constitute indirect discrimination against the person on the basis of gender and marital status, as well as limit their rights to work, privacy and family life.<sup>114</sup> While the bill itself does not explicitly permit differential treatment on the basis of protected attributes other than religion, in practice, it may be difficult to differentiate between differential treatment on the basis of religion and other protected attributes such as sex and gender. On this issue, the Attorney-General's Department acknowledged that issues of sexuality may be relevant to religion, stating:

While a religious educational institution is not permitted by the Bill to discriminate on the basis of a protected attribute (such as the sexual

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112 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

113 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

114 Under the Convention on the Elimination of All Forms of Discrimination Against Women, article 11(2) provides that: 'In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'. See generally Anja Hilkemeijer, *Submission 5*, p. 2 and Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

orientation of a current or prospective teacher), the Bill would allow a religious school to consider a person's religious beliefs about issues such as sexuality (irrespective of the person's own sexuality) where the religious school could show that this was part of the doctrines, tenets, beliefs or teachings of their religion (see clause 7(2)). For example, a school could require holders of religious offices within the school such as a school chaplain to conform to the doctrines, tenets, beliefs and teachings of the religion in question with respect to marriage or sexuality.<sup>115</sup>

2.49 As discussed below (at paragraph [2.55]), differential treatment on the basis of a protected attribute, such as religion, gender or sexuality, will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>116</sup>

2.50 It is noted that, for the purposes of assessing the permissibility under international human rights law of possible indirect discrimination under this bill, it is not relevant whether such differential treatment may be lawful or unlawful under other federal anti-discrimination laws. In particular, it is acknowledged that under the *Sex Discrimination Act 1984* (Sex Discrimination Act) religious bodies are excepted from the prohibition of discrimination on the basis of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding in certain areas of public life, including accommodation and education.<sup>117</sup> This means that it is not unlawful under the Sex Discrimination Act for religious educational institutions (the employer) to discriminate against another person on certain grounds, such as sexual orientation or gender identity, in connection with their employment as a member of the staff or as

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115 Attorney-General's Department, *Submission 191*, p. 8.

116 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

117 See *Sex Discrimination Act 1984*, paragraph 23(3)(b) and subsection 38(1).

a contract worker of that educational institution, if the employer discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion.<sup>118</sup> The Attorney-General's Department submitted that this bill 'does not affect the operation of the Sex Discrimination Act', including the existing exemptions in section 38.<sup>119</sup> Notwithstanding this, and irrespective of what is lawful under other federal anti-discrimination law, for the purposes of this inquiry, the committee must assess whether this bill would have the effect of allowing indirect discrimination on the grounds of protected attributes other than religion and if so, whether such differential treatment is a permissible limitation on the right to equality and non-discrimination under international human rights law.

2.51 Further, international human rights law requires States parties to relevant international treaties to guarantee human rights to all persons without discrimination of any kind, including on the grounds of sex, religion and political or other opinion.<sup>120</sup> Thus, insofar as the bill prohibits discrimination on the ground of religious belief or activity in various areas of public life, including work and education,<sup>121</sup> it would not only promote the right to equality and non-discrimination, including Australia's obligation to guarantee rights in a non-discriminatory way, but it would also promote the substantive rights in question, such as the rights to work and education. The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work.<sup>122</sup> The right to education provides that education should be accessible to all.<sup>123</sup>

2.52 However, if allowing religious bodies to treat persons differentially on the basis of religion were to have the effect of restricting access to certain areas of public life, such as employment or education, there is a risk that the rights to work and education may be limited in these circumstances. For instance, by allowing religious employers to treat employees differentially, including by preferencing individuals who share the same religion as the employer and thereby potentially depriving others of work on the basis of their religious belief, this measure may limit the right to work.<sup>124</sup> Likewise, allowing religious schools to treat students differentially on the

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118 *Sex Discrimination Act 1984*, subsections 38(1) and (2).

119 Attorney-General's Department, *Submission 191*, p. 8.

120 See, e.g., International Covenant on Economic, Social and Cultural Rights, article 2; International Covenant on Civil and Political Rights, article 2; Convention on the Rights of the Child, article 2.

121 See, e.g., Religious Discrimination Bill 2021, clauses 19 and 24.

122 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

123 International Covenant on Economic, Social and Cultural Rights, article 13; Convention on the Rights of the Child, article 28.

124 See Religious Discrimination Bill 2021, clauses 7, 9 and 11.

basis of religion may limit the right to education and the rights of the child if it had the practical effect of restricting access to education for certain students, noting that in some remote locations in Australia the only available school may be a religious school.<sup>125</sup> To the extent that the bill removes protections against discrimination in the areas of education and work, for example by overriding protections under state and territory laws,<sup>126</sup> some provisions in the bill may constitute retrogressive measures.<sup>127</sup> Australia has obligations to progressively realise economic, social and cultural rights (including the rights to work and education) using the maximum of resources available,<sup>128</sup> and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.<sup>129</sup> Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective (as further discussed at paragraph [2.55]).

2.53 The statement of compatibility acknowledges that while the bill would promote the rights to freedom of religion, freedom of expression and equality and non-discrimination, it may also limit these rights. It states that the bill promotes these rights by prohibiting discrimination on the basis of religious belief or activity; allowing religious bodies to engage in conduct in accordance with their faith; and protecting the ability of individuals to express their religious beliefs or beliefs about not holding a religious belief.<sup>130</sup> The statement of compatibility notes that without the provisions allowing religious bodies to act in accordance with their faith as well as the other exceptions contained in the bill, the bill could restrict or interfere with the observance or practice of particular religions or the ability for religious bodies to conduct their affairs in accordance with their religious beliefs.<sup>131</sup> However, the statement of compatibility acknowledges that these provisions limit the right to

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125 See Northern Territory Anti-Discrimination Commission, *Submission 69*, p. 5. The Northern Territory Anti-Discrimination Commission stated that in the Northern Territory, 'there are a number of locations where there are no options but religious schools'. They were concerned that the 'reforms will impact on Aboriginal people whose communities this occurs in, by limiting employment opportunities in communities that already have very limited employment opportunities, and impacting on teaching a diverse curriculum, that reflects the need of maturing students, particularly in relation to sexuality and gender identity'.

126 See, e.g., Religious Discrimination Bill 2021, clause 11.

127 See Australian Discrimination Law Experts Group, *Submission 33*, p. 10.

128 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

129 International Covenant on Economic, Social and Cultural Rights, article 2.

130 Religious Discrimination Bill 2021, statement of compatibility, pp. 8–10.

131 Religious Discrimination Bill 2021, statement of compatibility, pp. 8–28.

equality and non-discrimination (on the ground of religious belief) of others.<sup>132</sup> The bill itself also acknowledges that certain conduct, while not discriminatory under this bill, may amount to discrimination under other federal anti-discrimination legislation, such as the Sex Discrimination Act.<sup>133</sup>

2.54 In addition, it is noted that the rights to freedom of religion and expression usually intersect with other human rights, and manifestations of religion and expressions of beliefs or opinions have the potential to adversely impact on the rights and freedoms of others. In this regard, those measures in the bill that afford greater protection to the right to manifest religion necessarily engage and may limit the rights and freedoms of others. Where the manifestation of religion or the expression of a religious opinion or belief limits the rights or freedoms of others, each right must be balanced against each other. As noted by the UN Special Rapporteur, manifestations of religion or belief 'must comply with the duty to respect the fundamental rights and freedoms of others and may be subject to limitations on those grounds'.<sup>134</sup> The applicable limitation criteria under international human rights law, including the approach to balancing rights in this context, is outlined below. The extent to which an appropriate balance has been struck between the right to freedom of religion and other rights in the context of specific measures in the bill is considered in Chapters 3–6.

### ***Limitation criteria***

2.55 International human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.<sup>135</sup> All other rights may be limited provided the limitation meets certain standards. This reflects the general understanding that States Parties have the power to regulate the exercise of human rights, but not extinguish them.<sup>136</sup> Noting that the measures in the bill engage multiple human rights and these rights intersect with, and may have the effect of limiting, each other, it is necessary to consider what may be a permissible limit on the rights to freedom of religion and expression, as well as the broader limitation criteria in relation to other human rights.

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132 Religious Discrimination Bill 2021, statement of compatibility, pp. 10–12, 14–25.

133 See e.g., Religious Discrimination Bill 2021, subclause 7(2), note 2.

134 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [16].

135 Some human rights obligations are absolute under international law, that is, a State cannot lawfully limit the enjoyment of an absolute right in any circumstances. For example, the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment may never be permissibly limited.

136 See, Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, pp. 184–185.

2.56 In general, human rights may be subject to permissible limitations where the limitation:

- (a) is prescribed by law (that is, it satisfies the 'quality of law' test);
- (b) pursues a legitimate objective (one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right);
- (c) is rationally connected to (that is, likely to achieve) that objective; and
- (d) is a proportionate means of achieving that objective.

2.57 With respect to proportionality, some matters that are necessary to consider include whether a proposed limitation: is sufficiently circumscribed, is flexible enough to treat different cases differently and is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review. Another relevant factor in assessing proportionality in the context of this bill is the degree to which an appropriate balance has been struck between competing limitable rights, noting that affording greater protection to the right to freedom of religion may have the effect of limiting other human rights and vice versa.

2.58 The application of this general test is further qualified by specific requirements that apply to the rights to freedom of religion and freedom of expression.

2.59 While the right to *hold* a religious or other belief or opinion is an absolute right and cannot be subject to any limitations,<sup>137</sup> the freedom to *manifest* one's religion or beliefs may be limited so long as such limitations are prescribed by law and are necessary to protect public safety,<sup>138</sup> order, health or morals,<sup>139</sup> or the fundamental rights and freedoms of others. The right to freedom of expression may also be subject to limitations that are necessary to protect the rights or reputations of others,<sup>140</sup> national security, public order, or public health or morals.<sup>141</sup>

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137 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [3]; UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [9].

138 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.7].

139 The UN Human Rights Committee has stated 'that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. See *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8].

140 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

Additionally, limitations on the rights to freedom of religion and expression must be rationally connected to the stated objective, and proportionate and non-discriminatory.<sup>142</sup> Article 20 of the International Covenant on Civil and Political Rights also places limits on the freedom to manifest religion, providing that any manifestation of religion or beliefs must not amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The UN Human Rights Committee has observed that the limitation clause in relation to the right to freedom of religion is to be strictly interpreted:

restrictions are not allowed on grounds not specified there [in article 18(3)], even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.<sup>143</sup>

2.60 In addition, the UN Special Rapporteur has noted that while limitations on religious manifestations in the context of work must generally satisfy the criteria set out in international human rights law, limitations imposed by religious institutions

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141 In considering the scope of permissible restrictions on the right to freedom of expression in the context of the right to freedom of religion, the UN Human Rights Committee has observed that it would be impermissible for 'laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers'. It would also be impermissible for laws to prohibit displays of lack of respect for a religion or other belief system, including blasphemy laws, and for such 'prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith'. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [48].

142 In assessing the permissibility of a restriction on the right to freedom of religion, it is also important to consider the necessity of the measure. See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5] where the Committee stated that it needed to 'assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory'. See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36]. Likewise, the Special Rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58* (2019) [17].

143 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49* (2018) [31], [44], [45].

'constitute a special category, as their *raison d'être* is, from the outset, a religious one'. The UN Special Rapporteur has observed:

Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life. For religious minorities this can even become a matter of their long term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace, much depends on the details of each specific case.<sup>144</sup>

2.61 Further, where the manifestation of religion or the expression of a religious opinion or belief has an adverse effect on the rights or freedoms of others, each right must be balanced against each other.<sup>145</sup> In this regard, the UN Human Rights Committee has stated that:

States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination...Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18 [in relation to freedom of religion]...Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>146</sup>

2.62 The UN Special Rapporteur has similarly highlighted the indivisibility of human rights and the need to balance competing rights, stating that:

The nature of a State's obligation to promote and protect the right to freedom of religion or belief must be understood within a wider human rights-based framework that stresses the principles of universality, equality and freedom, and which satisfy the duties to respect, protect and promote all human rights for everyone...there is no hierarchy of human rights and where freedom of religion clashes with the right to non-discrimination and equality, or laws of general effect, the focus should be

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144 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

145 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8].

146 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8].

on ensuring that all human rights are protected, including through reasonable accommodation.<sup>147</sup>

2.63 In resolving conflicts between the right to freedom of religion and other limitable human rights, the United Kingdom courts and the European Court of Human Rights have undertaken a balancing exercise – often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.<sup>148</sup> For example, in *Black and Morgan v Wilkinson*, the Court of Appeal of England and Wales considered a conflict between the right of a homosexual person not to suffer discrimination on the grounds of sexual orientation, and the freedom to manifest one's religion or belief. The court stated that:

Neither [right] is intrinsically more important than the other. Neither in principle trumps the other. But the weight to be accorded to each will depend on the particular circumstances of the case.<sup>149</sup>

2.64 The court noted that the balancing exercise to be undertaken depends on the context:

The overall balancing exercise will in many contexts (immigration is an obvious example) require the balancing of the interests of society as a whole with the interests of an individual or group of individuals. In other cases, the overall fair balancing that is required involves the competing rights and interests of groups of individuals.<sup>150</sup>

2.65 The European Court of Human Rights has also approached the balancing exercise differently depending on the circumstances of the case and the competing rights in question. For example, in a case involving a conflict between the right of a religiously motivated political party to manifest their religion and the rights of women not to be differentially treated, the European Court of Human Rights observed that 'very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention', noting that the 'advancement of the equality of the sexes is...a major

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147 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [30], [81].

148 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. The authors state that '[r]eligious freedom may be limited in favour of non-discrimination rules and vice versa, unless either result threatens the foundational values of the Convention or the *forum internum* of religious belief'. In addressing the conflict between these rights, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'.

149 [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35].

150 [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [37].

goal' of European member States.<sup>151</sup> The UN Special Rapporteur has similarly emphasised the relevance of the competing rights in question and the vulnerability of the persons involved, noting that:

the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.<sup>152</sup>

2.66 In relation to the rights of women and girls, the UN Special Rapporteur reiterated that:

freedom of religion or belief can never be used to justify violations of the rights of women and girls, and that it can no longer be taboo to demand that women’s rights take priority over intolerant beliefs used to justify gender discrimination. It would be contrary to both women’s human rights as well as freedom of religion or belief provisions to allow one set of rights (i.e. women’s rights) to be undermined on the basis of claims made in defence of the right to freedom of religion or belief.<sup>153</sup>

2.67 More generally, the UN Special Rapporteur has observed that the specific context of the case is important, stating that generally 'contentious situations should be evaluated on a case-by-case basis' and when developing a set of general criteria to balance competing human rights, 'the competing human rights and public interests put forward in national and international forums need to be borne in

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151 See *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]. While the application was ultimately found to be inadmissible on other grounds, the Court did observe that in light of the right to equality and non-discrimination, the political party's position that women should not be allowed to stand for elected officer was unacceptable regardless of the deeply-held religious conviction on which this position was based (see paragraphs [76]–[79]).

152 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'.

153 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [42]. See also *Rationalist Society of Australia Inc*, *Submission 42*.

mind'.<sup>154</sup> In a more recent report, the UN Special Rapporteur reiterated that when the right to freedom of religion or belief ultimately clashes with other rights, 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.<sup>155</sup>

### **Key issues raised by submitters and witnesses**

2.68 A number of submitters to the inquiry, and witnesses at the public hearings, were of the view that the religious discrimination legislative package generally promoted the right to freedom of religion, as well as associated rights. For example, Associate Professor Mark Fowler submitted that the package 'completes the suite of Australian equality protections' and noted that a number of key provisions aligned with international human rights law.<sup>156</sup>

2.69 However, other submitters and witnesses raised concerns that some provisions in the bill may not be consistent with international human rights law. For example, Professor George Williams submitted that the bill 'provides an elevated status to religious speech but fails to protect speech on matters of thought or conscience'. He stated that this approach 'finds no basis in international human rights' law.<sup>157</sup> The Australian Discrimination Law Experts Group also stated that the bill was inconsistent with international human rights law insofar as it inconsistently applied the right to freedom of religion and contained no means by which to balance rights.<sup>158</sup> The Law Council of Australia were similarly of the view that the bill does not consistently implement article 18, stating:

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154 UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, E/CN.4/2006/5 (2006) [51]–[52]. The Special Rapporteur noted some of the different ways in which rights may compete with one another: 'Freedom of religion or belief may be invoked both in terms of the positive freedom of persons who wish to wear or display a religious symbol and in terms of the negative freedom of persons who do not want to be confronted with or coerced into it. Another competing human right may be the equal right of men and women to the enjoyment of all civil and political rights, as well as the principle of the right to be protected from discrimination of any kind, including on the basis of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status'.

155 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [47].

156 Associate Professor Mark Fowler, *Submission 20*, p. 7. See also Professor Nicholas Aroney, *Committee Hansard*, 21 December 2021, p. 4.

157 Professor George Williams, *Submission 1*, pp. 1–2. See also Associate Professor Luke Beck, *Submission 38*.

158 Dr Cristy Clark, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 16. See also Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 71.

It's not a matter of cherrypicking in the sense of taking article 18, giving a tick to article 18(1) and leaving the rest behind; it's that balancing of the rights and the interaction with other rights, particularly the recognition of rights to equality before the law that we're concerned about—that the bill perhaps steps too far in not striking the appropriate balance.<sup>159</sup>

2.70 The views of submitters and witnesses in relation to the compatibility of specific measures in the bill with international human rights law are discussed further in Chapters 3–6.

### **Constitutional context**

2.71 The constitutional basis for the bill is set out in clause 64. It states that the bill gives effect to Australia's obligations under one or more of the following international instruments:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Rights of the Child;
- the International Convention on the Elimination of all Forms of Racial Discrimination;
- the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation; and
- the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer.<sup>160</sup>

2.72 The explanatory memorandum states that this provision clarifies that the external affairs power is the main constitutional basis for the bill.<sup>161</sup> Section 51(xxix) of the Constitution provides Parliament with the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs.

2.73 In addition to the external affairs power, clause 65 provides that the bill also has effect to the extent directly supported by a number of other constitutional heads of power, including the corporations power, the Commonwealth and territory matters power, the trade or commerce power, the banking and insurance power, the telecommunications power, and the defence power.<sup>162</sup>

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159 Ms Katherine Eastman, Law Council of Australia, *Committee Hansard*, 14 January 2022, pp. 31–32.

160 Religious Discrimination Bill 2021, clause 64.

161 Religious Discrimination Bill 2021, explanatory memorandum, p. 105.

162 Religious Discrimination Bill 2021, clause 65. See explanatory memorandum, pp. 105–106.

2.74 A number of submitters raised concerns regarding the constitutional validity of the bill.<sup>163</sup> One of these concerns relates to the reliance on the external affairs power as a head of power to support the bill. As Professor Anne Twomey explained, the external affairs power is a 'purposive' power, which means it is directed at, and confined to, the purpose of implementing the treaty.<sup>164</sup> As such, a number of submitters and witnesses noted that the consistency of key provisions in the bill with international human rights law was relevant to the question of constitutional validity. For example, Professor Anne Twomey commented that:

s 51(xxix) would not support the Bill if the provisions of the Bill were **substantially inconsistent** with the ICCPR as a whole, including the other rights and freedoms the ICCPR declares, taking into account that article 18 of the ICCPR states that the right to freedom of religion may **only** be limited where it is **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>165</sup>

2.75 Additionally, Professor Luke Beck submitted that:

To the extent that the statements of belief 'sword' provisions or particular applications of those provisions rely for their validity only on the external affairs power there must be significant constitutional doubt that those provisions or those applications are constitutionally valid.<sup>166</sup>

2.76 Further, queries were also raised in relation to clauses 11 and 12 of the bill regarding the operation of section 109 of the Constitution (which provides that Commonwealth law will prevail over any inconsistent State law, to the extent of the inconsistency). Professor Twomey noted that section 109 of the Constitution does not confer on the Commonwealth a power to repeal or alter state laws, or affect the interpretation of state laws or prohibit the state from enacting certain laws. Rather, the Commonwealth could enact a law to empower a person to do a specified thing, notwithstanding the operation of any state law, and this would create a direct inconsistency and, as a result of section 109, the Commonwealth law would prevail.<sup>167</sup> Professor Twomey submitted that clauses 11 and 12 do not follow this path of creating an inconsistency, stating that clause 11 'purports to alter the effect of the application of a State law' but that 'it is not within the Commonwealth Parliament's power to legislate to control the legal operation of a State law, including

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163 See, e.g., Professor Anne Twomey, *Submission 47*, p. 4; Professor Luke Beck, *Submission 38*, p. 6; Australian Lawyers Alliance, *Submission 2*, pp. 11–12; Ms Anja Hilke Meijer, *Submission 5*, p. 2; NSW Council for Civil Liberties, *Submission 181*, p. 17

164 Professor Anne Twomey, *Submission 47*, p. 4.

165 Professor Anne Twomey, *Submission 47*, p. 4 (emphasis in original). The Law Council of Australia endorsed Professor Twomey's submission, see Mr Beckett, Law Council of Australia, *Committee Hansard*, 14 January 2022, p. 39.

166 Professor Luke Beck, *Submission 38*, p. 6.

167 Professor Anne Twomey, *Submission 47*, p. 4.

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what conduct contravenes a State law'. In relation to clause 12, Professor Twomey stated that a Commonwealth law cannot 'dictate the interpretation of what amounts to discrimination under a State law: 'All it can do is enact its own law that gives rise to an inconsistency (e.g. by granting a right or conferring a power to do something, which a State law prohibits, limits or qualifies), rendering the State law inoperative to the extent of that inconsistency'.<sup>168</sup>

2.77 Professor Nicholas Aroney also noted the complexity of these clauses in relation to state law:

the bill does approach the question of its interaction with state and territory laws in an unusual way—in a way that, to my knowledge, is not common in Commonwealth laws. It does raise some questions about how it would operate, and I think that will be an interesting question—to see whether further consideration is given to that—because I think there are some questions about its operation in relation to state and territory laws.

...

To my mind the question is whether the Commonwealth has the power to determine how a state law is to be interpreted or its operation or effect, because when you look at clauses I think 11 and 12 they say that certain conduct does not contravene particular state and territory laws and could be interpreted as evincing an intention to cover the field and thus displace the operation of those laws. If it were interpreted that way, it would be effective under section 109. But, if it were interpreted so as to displace, as it were, the tenor and operation of the state law in and of itself, then that would raise a novel question for the court, in my opinion.<sup>169</sup>

2.78 In contrast, Mr Walter, Acting Deputy Secretary, Integrity and International Group, with the Attorney-General's Department stated:

we are confident, on the basis of the legal advice that we received, that the law is constitutional within the Commonwealth's constitutional power, subject to the current interpretations that the High Court takes to various provisions in the Constitution.<sup>170</sup>

### **Committee view**

2.79 The committee would like to thank the many stakeholders for their engagement in this inquiry, as well as the significant work that has been put into submissions, and from those appearing at the inquiry, to assist the committee in its consideration of the bill.

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168 Professor Anne Twomey, *Submission 47*, pp. 4–5. See also Mr David Mason, *Submission 50*, pp. 6–7.

169 Professor Nicholas Aroney, *Committee Hansard*, 21 December 2021, p. 12.

170 Mr Walter, Attorney-General's Department, *Committee Hansard*, 14 January 2022, p. 67.

2.80 The committee notes that the religious discrimination legislative package seeks to give effect to a number of recommendations made by the Expert Panel into Religious Freedom, including the recommendation that legislation be introduced to render discrimination on the basis of religion unlawful. Noting that existing protections for discrimination on the basis of religion in federal and state and territory anti-discrimination legislation are piecemeal, have limited application and are inconsistent across jurisdictions, the committee considers that it is important to address this legislative gap by introducing comprehensive federal legislative protections for discrimination on the basis of religious belief or activity. Issues raised by submitters and witnesses as to how this has been implemented, and an assessment as to the application of international human rights law to these provisions, is set out in detail in Chapters 3–6 of this report.

2.81 The committee notes that, as set out above, some submitters raised concerns as to the constitutionality of the bill. The committee notes that the main constitutional basis of the bill appears to be the external affairs power, insofar as the bill seeks to give effect to Australia's international human rights law obligations. The committee notes that the compatibility of the religious discrimination legislative package with international human rights law may therefore be relevant to the constitutional validity of the package. While the committee will consider the compatibility of this package with international human rights law in Chapters 3–6, it will not assess its constitutional validity, noting that this line of inquiry is more appropriately undertaken by the Legal and Constitutional Affairs Legislation Committee (who are also conducting an inquiry into the religious discrimination legislative package).

## Chapter 3

### Unlawful discrimination

3.1 This Chapter outlines the key issues raised by submitters and witnesses in relation to Parts 3 and 4 of the bill.<sup>1</sup> Submitters and witnesses were strongly in favour of there being protection against discrimination on the ground of religion, although there were some differences of opinion in how this should be achieved, as set out below. This Chapter also sets out specific concerns raised in relation to the concept of discrimination, including:

- the definition of religious belief or activity;
- the application of local by-laws;
- the burden of proof in determining if a condition imposed is reasonable;
- the test for indirect discrimination; and
- bodies corporate able to claim discrimination.

3.2 This Chapter also looks at issues raised by submitters and witnesses in relation to the exceptions and exemptions in Division 4 of Part 4 of the bill, and the role of the Religious Discrimination Commissioner. It concludes with an assessment of the application of international human rights law to these provisions, and provides the committee's view and recommendations.

#### Prohibiting discrimination on basis of religion

3.3 Submitters and witnesses overwhelmingly supported the idea of a federal law protecting individuals against discrimination on the ground of religious belief or activity.<sup>2</sup> While there is protection against discrimination on the grounds of religion in every state and territory apart from New South Wales and South Australia, there is limited protection at the federal level. The Attorney-General's Department stated that:

the primary purpose of this Bill is to protect ordinary people of faith from discrimination as they go about their daily lives. The Bill also protects those who experience discrimination because they do not adhere to any faith or

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1 Although it does not deal with clause 15 in Part 3, which is dealt with in Chapter 6.

2 See for example, Freedom for Faith, *Submission 10*, p. 4; Australian Christian Lobby, *Submission 16*, p. 4 and Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 19; Dr Denis Dragovic, *Submission 18*, pp. 5–6; Executive Council of Australian Jewry Inc, *Submission 19*, pp. 2–3; Associate Professor Mark Fowler, *Submission 20*, p. 7; Australian Christian Higher Education Alliance, *Submission 25*, p. 5; Council of the Ageing, *Submission 29*, p. 1–2; Australian National Imams Council, *Submission 27*, p. 3; Human Rights Law Alliance, *Submission 30*, p. 3; Mr Keysar Trad, Australian Federation of Islamic Councils, *Committee Hansard*, 21 December 2021, p. 28.

religious belief. Sadly, as the Religious Freedom Review chaired by Philip Ruddock heard, many Australians, particularly those from minority faiths, experience discrimination all too often on the basis of their religious beliefs or activities. At present, there are only limited protections for these people under the Commonwealth's anti-discrimination regime.<sup>3</sup>

3.4 The Australian Discrimination Law Experts Group noted that 'protections at a federal level against discrimination on the basis of religion and related characteristics is well overdue'.<sup>4</sup> Associate Professor Neil Foster, Board Member of Freedom for Faith, also noted that the overall framework of protection of religious freedom is patchy and there are gaps in protection:

There is no protection against religious discrimination in New South Wales at all at the moment under the discrimination laws. There's no protection in South Australia, except for a very minor one in relation to religious dress. There's limited protection under the Fair Work Act. So we think this is a gap and we think it ought to be filled.<sup>5</sup>

3.5 Ms Anna Brown, Chief Executive Officer, Equality Australia, noted that the organisation is 'very supportive of protections for people of faith', and of protections against discrimination for everyone.<sup>6</sup> A number of submitters and witnesses also gave examples of why the right to freedom of religion needs to be protected. The Presbyterian Church of Australia noted:

Freedom of Religion is widely accepted as a natural right. As Christians, this means we see that it is a freedom granted by God. Each person, made in God's image, has an instinct to respond to God, and a responsibility to do that. That response cannot, ultimately, be determined by other people (though it is mediated socially) nor should it be imposed by the state. The state should recognise this freedom and it should be extended to people of all religions and those who hold no religious convictions.

Religious convictions and practices are an important part of culture for millions of Australian citizens and residents. Allowing individuals and communities the freedom to express their religious convictions as fully as possible is an important way of treating them with dignity.<sup>7</sup>

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3 Mr Andrew Walter, Acting Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 14 January 2022, p. 61.

4 Ms Robin Banks, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 10.

5 Associate Professor Neil Foster, Freedom for Faith, *Committee Hansard*, 14 January 2022, pp. 13–14. See also Professor Nicholas Aroney, *Committee Hansard*, 21 December 2022, p. 8; Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2022, p. 19.

6 Ms Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 73.

7 The Presbyterian Church of Australia, *Submission 94*, p. 3.

3.6 The Catholic Women’s League of Australia, explained why they considered it was necessary for religious freedoms to be recognised in law:

Across the world and in our own country, many Christians have been unjustly taken to courts, and in onerous and expensive proceedings, have seen their freedom to follow religious conviction attacked, experienced the loss of livelihoods, and the loss of the freedom to share religious convictions and beliefs within the wider society – all because complainants were offended by their beliefs and have utilized anti-discrimination law to silence the Christian voice. It is the responsibility of a democratically elected government to ensure the freedom to practice religion, to enshrine in law the human right to practice one’s faith and encourage the willingness of the citizens to tolerate the beliefs of each other without the creation of a legal framework which can be used to suppress and punish the religious convictions of her citizens.<sup>8</sup>

3.7 The Executive Council of Australian Jewry Inc. set out statistics as to the incidence of antisemitism in Australia, stating that 'discrimination against Jews, is becoming more serious, and there have been worrying signs that it is creeping into mainstream institutions and society'. As such it stated:

It is therefore anomalous in our view that at present there is a Federal law dedicated to prohibiting discrimination on the ground of race, and Federal laws dedicated to prohibiting discrimination on the ground of certain other attributes, namely sex, age and disability, but not on the ground of religion.<sup>9</sup>

3.8 Similarly, the Australian National Imams Council set out examples of discrimination experienced by Australian Muslims, stating that the 'concept of the Bill offers a critical opportunity to address an urgent and pressing concern held by Australian Muslims and persons of other faith', and it 'sends a message that their faith is valued and they should not need to hide their religious identity or practices, be it wearing a hijab or attending congregational prayers on a Friday'.<sup>10</sup> The Muslim Women's Network also stated:

The issue of religious discrimination, and vilification even more so even though it is outside the scope of this legislation, is one of the most challenging issues facing Muslim women in this country. Muslim women, because of a range of factors not the least of which is how they dress, have become the most visible targets for bigots, racists and extremists. Muslim women have increasingly become the target for physical as well as verbal abuse, intimidation and even assault...Yet religion remains as the one

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8 Catholic Women’s League of Australia, *Submission 175*, pp. 1–2.

9 Executive Council of Australian Jewry Inc, *Submission 19*, pp. 2-3. See also Mr Peter Wertheim, Executive Council of Australian Jewry Inc, *Committee Hansard*, p. 52-53.

10 Australian National Imams Council, *Submission 27*, pp. 3 and 6. See also Mr Bilal Rauf, *Committee Hansard*, 21 December 2021, p. 27. See also Mr Keysar Trad, Australian Federation of Islamic Councils, *Committee Hansard*, 21 December 2021, p. 27.

glaring omissions from the Commonwealth legislative framework and is ad hoc and piece meal at a state level...

How can we say that all rights are equal when so many rights are protected but the right to practice one's faith without discrimination isn't? How can we say that religious freedom shouldn't take precedence over other rights when in fact it is the right that has no protection in law at a national level and arguably at a State level? How can we balance the competing interests of people's rights when some are given legal protection and others aren't? Yes, all rights are equal. So, the simple question then is, why isn't religion protected against discrimination like other rights if they are all equal? <sup>11</sup>

3.9 The Anglican Church Diocese of Sydney also stated:

People of faith are facing increasing hostility in Australia... Recent polling from McCrindle Research reveals that 29% of Australians have experienced discrimination for their religion or religious views. As the report notes, 'this equates to about half of those who identify with a religion which is six in ten Australians'.<sup>12</sup>

3.10 While there was broad support for religious discrimination to be prohibited by law, there were many differences of opinion as to how this should be achieved. A number of submitters raised concerns about legislating to protect against religious discrimination in a context where there is no overarching protection of rights, such as a Human Rights Act or Charter of Rights.<sup>13</sup> The Law Council submitted that it was 'preferable to embed freedom of religion in a comprehensive and coherent framework of substantial rights protection, which recognises that limitations on rights must be necessary, and proportionate to the specific need, in order to be justified and permissible'. They argued that this 'is best achieved through a federal human rights act'.<sup>14</sup> The Human Rights Law Centre also stated that human rights are indivisible and cannot be positioned in a hierarchical order, and that instead of 'unbalanced and

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11 Mrs Maha Krayem Abdo, Muslim Women Australia, *Committee Hansard*, 21 December 2021, p. 27.

12 The Anglican Church Diocese of Sydney, *Submission 158*, p. 3.

13 See, e.g., Emeritus Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, pp. 26-27; The Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 2; Australian Council for Trade Unions, answer to question of notice, question 1 from Senator Rice, 14 January 2022 (received 21 January 2022).

14 The Law Council, *Submission 28*, p. 8.

piecemeal pieces of legislation', all human rights should be protected through an Australian Charter of Rights.<sup>15</sup>

3.11 A number of submitters also raised concerns that the bill elevated the rights to freedom of religion over the right to equality and non-discrimination of other people.<sup>16</sup> Specific concerns in relation to this are set out in Chapters 4, 5 and 6.

3.12 A number of submitters considered that protection against discrimination on the grounds of religion should follow the model set out in other anti-discrimination legislation. For example, Ms Lisa Annese, the Chief Executive Officer of the Diversity Council Australia said:

We really are in favour of an act that protects people's right to their religion in the workplace. It should look similar to the other Commonwealth antidiscrimination laws so that it protects the right to religion and inherent in that there are limits on the expression of that religion in a workplace context, because that could impinge on the rights of others to be authentically safe.<sup>17</sup>

3.13 There were also some submitters who considered there was a need to consolidate all federal anti-discrimination law into one statute to better allow for a balancing of rights. The Public Affairs Commission of the Anglican Church of Australia stated:

Given the piecemeal nature of anti-discrimination laws, it is essential that such laws protecting against religious discrimination are designed in a way that is consistent with the operation of other anti-discrimination statutes and do not derogate in any way from those protections. It is essential to protect all human rights of vulnerable people.<sup>18</sup>

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15 Human Rights Law Centre, *Submission 190*, p. 8. See also The Law Council, *Submission 28*, p. 8; St Vincent de Paul Society Australia, *Submission 55*, p. 2; Just Equal Australia, *Submission 69*, p. 7; Legal Aid Queensland, *Submission 92*, p. 2–3; Children by Choice, *Submission 150*, p. 4; Uniting Network Australia, *Submission 153*, p. 4; Amnesty International, *Submission 157*, p. 6; Australian Lawyers for Human Rights, *Submission 171*, p. 4; Women's Health Victoria, *Submission 173*, p. 6; Centre for Women's Safety and Wellbeing, *Submission 179*, p. 6; NSW Council for Civil Liberties, *Submission 181*, p. 4; Australian Nursing and Midwifery Federation, *Submission 118*, p. 15; Human Rights Law Centre, *Submission 190*, p. 3; Parents for Transgender Youth Equity, *Submission 73*, p. 3; Kingsford Legal Centre, *Submission 110*, p. 1.

16 See, for example, Dr Cristy Clark, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 16; Equality Australia, *Submission 31*; Public Interest Advocacy Centre, *Submission 40*, p. 3; Australian Council of Trade Unions, *Submission 64*, p. 3; Kingsford Legal Centre, *Submission 110*, p. 2; Australian Council of Human Rights Authorities, *Submission 125*, p. 1; Australian Lawyers for Human Rights, *Submission 171*, p. 3; Human Rights Law Centre, *Submission 190*, p. 2; [Form letter type 1](#).

17 Ms Lisa Annese, Diversity Council, *Committee Hansard*, 13 January 2022, p. 35.

18 The Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 2.

3.14 Equality Rights Alliance also supported the consolidation of federal anti-discrimination law, noting that a combined statute could include a mechanism to balance competing rights, including in 'cases where the rights to express religious beliefs conflicts with a right to non-discrimination'.<sup>19</sup>

3.15 The Australian Women's Health Network stated that while all people have the right to freedom, religion, and belief, they did 'not see any need for a separate and specific piece of legislation to protect people from religious discrimination on the grounds of their religious belief or activity'.<sup>20</sup>

3.16 Other submitters raised concern as to the amount of anti-discrimination legislation and the possibility for inconsistent legislation across Commonwealth and state and territory laws, arguing that review of existing laws may be better than introducing a new bill.<sup>21</sup> For example, the Australian Industry Group noted that all states and territories, except New South Wales and South Australia, already protect against discrimination on religious grounds, and their preference would be for the gaps in state and territory legislation to be filled, rather than putting another piece of Commonwealth legislation on top.<sup>22</sup>

3.17 However, other submitters raised concerns that pursuing a charter of rights or consolidated anti-discrimination legislation is likely to be a complex exercise which would result in further delays to protect the right to freedom of religion. Right Reverend Doctor Michael Stead, Bishop of South Sydney, Chair of the Religious Freedom Reference Group, Anglican Church Diocese of Sydney stated:

We've been talking about a religious discrimination bill since 2018, since the Ruddock inquiry, and it's taken this long to get where we've got to. My concern is that any attempt to pursue a charter or an integrated antidiscrimination act is going to so delay the protection of religious discrimination that it's, if I can be blunt, kicking it off into the long grass rather than dealing with the issue as it presents.<sup>23</sup>

3.18 Further, the Institute of Public Affairs considered that the anti-discrimination framework was not the appropriate way to best protect religious liberty:

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19 Equality Rights Alliance, *Submission 166*, p. 9.

20 The Australian Women's Health Network, *Submission 83*, p. 2. See also Ms Emma Iwinska, The Australian Women's Health Network, *Committee Hansard*, 13 January 2022, p. 55; Equality Australia, *Submission 31*, p. 28; Marie Stopes Australia, *Submission 177*, p. 4; Human Rights Law Centre, *Submission 190*, p. 8; The Law Council, *Submission 28*, p. 8; Equality Rights Alliance, *Submission 166*, p. 4.

21 Ms Christine Cooper, Independent Education Union, *Committee Hansard*, 13 January 2022, p. 5.

22 Mr Stephen Smith, Australian Industry Group, *Committee Hansard*, 13 January 2022, p. 30.

23 Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 52.

While it is commendable that the Federal Government is giving attention to the serious and important question of how to protect the rights of Australians of faith, IPA research finds safeguarding these rights by expanding the anti-discrimination framework may be a counterproductive method to safeguard freedom of religion. Specifically, the research finds: the anti-discrimination legal framework is incompatible with religious liberty; the exemptions for statements of belief will fail to protect freedom of expression, and that exemptions for religious bodies are a narrow and unreliable mechanism to protect religious liberties.<sup>24</sup>

### **Concept of discrimination**

3.19 The bill sets out that discrimination includes the concept of direct discrimination: treating someone less favourably because of a person's religious belief or activity.<sup>25</sup> It also includes the concept of indirect discrimination: imposing a condition, requirement or practice, which is not reasonable, and which has the effect of disadvantaging persons with a particular religious belief or activity.

### **Defining religious belief or activity**

3.20 The bill defines 'religious belief or activity' as meaning:

- (a) holding, or not holding, a religious belief; or
- (b) engaging, or not engaging, in a religious activity, unless that activity is unlawful (however, an activity is not unlawful merely because a local by-law prohibits it).<sup>26</sup>

3.21 Some submitters raised concerns that this definition is largely undefined, and absent more detailed definition as to what constitutes a religious belief or activity, this may be defined narrowly by the courts to be restricted to private personal observance of religious worship,<sup>27</sup> and may not capture the communication of religious beliefs.<sup>28</sup> Some submitters also expressed concern that what constitutes a 'religion' is not defined in the bill. The Australian Christian Lobby stated:

For determining what is a "religious belief", the Court then becomes an arbiter of theology and religious adherents will need to adduce significant expert evidence to establish that a particular belief is part of their religion. These deficiencies in defining the nature of a "religious" belief or activity significantly weaken the protections afforded to those who seek to live and

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24 Institute of Public Affairs, *Submission 134*, p. 2.

25 Clause 13 of the Religious Discrimination Bill 2021.

26 See clause 5, definition of 'religious belief or activity' and subclauses 5(2) and (3).

27 See for example, Human Rights Law Alliance, *Submission 30*, p. 9.

28 See for example, Russell Blackford, *Submission 7*, pp. 2–3.

act in a way consistent with their religious beliefs, a right reflected in Article 18(1) of the ICCPR.<sup>29</sup>

3.22 The explanatory memorandum states that the term is defined broadly, and it is consistent with the approach taken in other anti-discrimination laws, and that the bill does not seek to comprehensively define the concept of 'religion' or 'religious belief or activity'. Instead, the bill relies on the approach taken by the High Court in determining what constitutes a religion, noting that faith traditions may emerge or develop over time.<sup>30</sup> A number of submitters supported this approach, noting that attempting to define it beyond the High Court's approach would potentially create the unwelcome issue of secular judges needing to determine and assess the content of religious doctrine.<sup>31</sup>

### **Local by-laws**

3.23 Some submitters also raised concern that while the bill will not apply to engaging in a religious activity that is unlawful, what is unlawful does not include activities that are only unlawful because a local by-law prohibits that activity.<sup>32</sup> The explanatory memorandum states that this will ensure persons are still protected under the bill even if their religious activity contravenes council by-laws, such as street preaching. It states that this recognises that a complaint under this bill should not be limited by delegated legislation, as this does not have the same levels of oversight and scrutiny as legislation made by the Commonwealth, or a state or territory government.<sup>33</sup> However, some submitters expressed concern that this will prevent local councils from introducing by-laws to protect public order, such as from street evangelists who harangue citizens in public places,<sup>34</sup> and that this may mean by-laws would not apply equally to all groups.<sup>35</sup>

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29 Australian Christian Lobby, *Submission 16*, p. 6. See also [Form letter type 1](#).

30 Religious Discrimination Bill 2021, explanatory memorandum, p. 35.

31 Australian Christian Higher Education Alliance, *Submission 25*, pp. 5–6. See also Law Council of Australia, *Submission 28*, p. 16.

32 Religious Discrimination Bill 2021, clause 5(1) definition of 'religious belief or activity' and subclauses 5(2) and (3).

33 Religious Discrimination Bill 2021, explanatory memorandum, p. 37.

34 Don't Divide Us, *Submission 108*, p. 3.

35 Kingsford Legal Centre, *Submission 110*, p. 4. See also TransGender Victoria, *Submission 112*, p. 2; Dr Sean Mulcahy, Associate Professor Kate Seear, Andrea Waling, *Submission 126*, p. 13; Uniting Network, *Submission 153*, p. 18; Australian Lawyers for Human Rights, *Submission 171*, p. 15; NSW Council for Civil Liberties, *Submission 181*, p. 14; Liberty Victoria, *Submission 186*, p. 4; Human Rights Law Centre, *Submission 190*, p. 20; Equality Australia, *Submission 31*, pp. 34–35; Public Interest Advocacy Centre, *Submission 40*, p. 24; Banyule City Council, *Submission 76*, p. 2; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 3.

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**Indirect discrimination if condition or practice is not reasonable**

3.24 Clause 14 provides that a person discriminates against another if they impose a condition, requirement or practice which is not reasonable and which disadvantages people who hold or engage in particular religious beliefs or activities. Subclause 14(2) provides whether a condition, requirement or practice is reasonable would depend on all the relevant circumstances of the case, including the nature and extent of the disadvantage imposed; the feasibility of overcoming or mitigating the disadvantage; and whether the disadvantage is proportionate to the result sought. The explanatory memorandum explains that this test is broadly consistent with the tests of indirect discrimination in other anti-discrimination legislation.<sup>36</sup>

3.25 Some submitters argued that clause 14 should be amended to provide that a person will discriminate if they impose a condition, requirement or practice which is not 'necessary', rather than which is not 'reasonable'.<sup>37</sup> Their argument was that this would be consistent with the international law standard, as article 18(3) of the International Covenant on Civil and Political Rights provides that limitations may only be placed on the right to freedom of religion 'as are prescribed by law and are *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. For example, the Australian Association of Christian Schools stated that, as currently drafted, clause 14:

requires a judge to determine whether an indirectly discriminatory act against a person is 'reasonable'. Although this customary test is appropriate in anti-discrimination law, in the unique context of religious discrimination its substantive operation should be aligned with the requirements of international law.<sup>38</sup>

3.26 Mr John Steenhof, Principal Lawyer, Human Rights Law Alliance, further argued:

The bill provides that you have protection from indirect discrimination where someone imposes a condition. But if, say, it's an employer and they can show that the condition is reasonable—and there's a very low bar test for reasonableness—then your religious discrimination claim will fail. That's really inconsistent with article 18 of the ICCPR, which says that rights can only be infringed where it is absolutely 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. So the bar for a discriminator to jump over to be able to suppress religious freedom is lower in this bill than it is in the international covenants. That is

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36 Religious Discrimination Bill 2021, explanatory memorandum, p. 61.

37 The Australian Association of Christian Schools, *Submission 23*, pp. 17–18. See also Anglican Church Diocese of Sydney, *Submission 158*, p. 18; Australian Christian Lobby, *Submission 16*, p. 8; Executive Council of Australian Jewry Inc, *Submission 19*, p. 9; Associate Professor Mark Fowler, *Submission 20*, pp. 25–26; Human Rights Law Alliance, *Submission 30*, p. 10.

38 The Australian Association of Christian Schools, *Submission 23*, pp. 17–18.

one of its major failings where it does not reflect the ICCPR and, further, does not reflect the Siracusa principles, which are the internationally respected principles that set out when rights can be derogated from or overridden, which was part of the recommendations of the Ruddock review. The expert panel report into religious freedom said that, if you're going to pass laws about religious freedom, they should have regard of the Siracusa principles, and they are completely absent from this bill.<sup>39</sup>

3.27 A discussion as to the application of international human rights law to these provisions is set out below (beginning at paragraph [3.61]).

3.28 Further, a number of submitters also argued that the bill did not go far enough and that the bill should include a 'reasonable adjustments' clause. This would place a positive requirement on employers to accommodate religious belief or activity, where this could be done without imposing an 'unjustifiable hardship' (similar to that taken in the *Disability Discrimination Act 1992*.<sup>40</sup> The Human Rights Law Alliance said:

Such accommodations have not been included in the case of religion in the Bill despite clear applications directly relating to religious beliefs (e.g. Sabbatarian Christians who don't wish to work on the Sabbath; Muslims who require accommodation for their daily prayers; religious dietary requirements of various kinds etc.) A reasonable adjustments clause would give a balanced and reasonable protection to religious Australians in cases where, for example, employers could easily make adjustments at little cost or hassle to accommodate religious beliefs but which would not place an undue burden where the adjustment would be costly or cause hardship.<sup>41</sup>

3.29 The Institute for Civil Society submitted:

The Bill should contain a 'reasonable adjustments' clause, equivalent to the Disability Discrimination Act provisions. Organisations would then be obliged to make reasonable adjustments to accommodate a person's genuine religious beliefs unless to do so would cause the organisation substantial hardship. E.g. If there are 12 staff and machinery running on Friday requires 8 to handle the machinery, it may be a reasonable adjustment to let 2 Muslim staff take time off for afternoon prayers and then work the extra time, rather than rostering them on during their prayer time. If an exceptional customer order or breakdown of other machinery requires all staff to work at that time the employer would not need to make

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39 Mr John Steenhof, Human Rights Law Alliance, *Committee Hansard* 21 December 2021, p. 87.

40 Freedom for Faith, *Submission 10*, p. 15; Australian Christian Lobby, *Submission 16*, p. 7; Associate Professor Mark Fowler, *Submission 20*, p. 27; Australian National Imams Council, *Submission 27*, p. 11; Human Rights Law Alliance, *Submission 30*, p. 6; Seventh-day Adventist Church in Australia, *Submission 82*, p. 7; Institute for Civil Society, *Submission 131*, p. 7; Presbyterian Church of Victoria, *Submission 133*, p. 4; Anglican Church Diocese of Sydney, *Submission 158*, p. 15; Australian Catholic Bishops Conference, *Submission 185*, p. 10.

41 Human Rights Law Alliance, *Submission 30*, p. 6.

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the adjustment to rosters that day because it would not be a reasonable one and/or would cause the employer substantial hardship.<sup>42</sup>

### **Burden of proof**

3.30 In the exposure draft versions of the bill, the bill provided that in determining if a condition, requirement or practice resulted in indirect discrimination, the person who imposes, or proposes to impose the condition, requirement or practice has the burden of proving that it was reasonable.<sup>43</sup> This aligns with the approach taken in other anti-discrimination legislation.<sup>44</sup> The explanatory notes to the exposure draft explained the reason for this:

Placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the complainant is unlikely to have access to the information required to prove that an action is unreasonable.<sup>45</sup>

3.31 However, the current bill does not include such a provision, meaning the normal rules of evidence would apply, such that the complainant would need to prove the conduct was unreasonable. A number of submitters raised concern about this, stating the approach taken in the exposure draft should be reinstated.<sup>46</sup> For example, the Institute for Civil Society stated:

If a person is discriminated against because a (facially equal) general condition, requirement or practice is more disadvantageous to them because of their religious belief or activity (e.g., a general rule that all employees have to work on the 4th Saturday of a month disadvantages employees whose religious Sabbath falls on Saturday), there is a defence if the discriminator can prove the rule is reasonable. But in the Religious Discrimination Bill alone that burden of proof rule is absent meaning the burden of proof is on the person discriminated against to prove that the rule is unreasonable. This needs to be changed so that the Bill uses the standard

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42 Institute for Civil Society, *Submission 131*, p. 7.

43 Second exposure draft, Religious Discrimination Bill 2019, subclause 8(8).

44 See *Sex Discrimination Act 1984*, section 7C; *Disability Discrimination Act 1992*, subsection 6(4); *Age Discrimination Act 2004*, subsection 15(2).

45 Religious Discrimination Bill 2019, explanatory notes, second exposure draft, p. 24.

46 See for example: Freedom for Faith, *Submission 10*, p.15; Associate Professor Mark Fowler, *Submission 20*, p. 26; Australian Christian Higher Educational Alliance, *Submission 25*, p. 18; Seventh-day Adventist Church in Australia, *Submission 82*, p. 7; Institute for Civil Society, *Submission 131*, p. 6.

burden of proof provision in relation to the reasonableness of indirect discrimination.<sup>47</sup>

### ***Bodies corporate able to claim discrimination***

3.32 Clause 16 of the bill makes it unlawful under the proposed Act to discriminate against a person on the basis of the person's association with someone else. It sets out that an association with another individual includes a near relative, someone they live with, have an ongoing business or recreational relationship or where they are members of the same unincorporated association. A 'person' is not defined in the bill, and as such the usual interpretation is that this includes a body politic or corporate as well as an individual.<sup>48</sup> Subclause 16(3) also provides that a person that is a body corporate will be considered to have an association with an individual if a reasonable person would closely associate the body corporate with that individual. The explanatory memorandum explains that this means a body corporate would be able to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely associated with. It states this is important 'to protect the religious freedoms of individuals who may be associated with bodies corporate'.<sup>49</sup>

3.33 Some submitters considered it was important to protect corporate bodies from discrimination. Associate Professor Mark Fowler stated:

There are sound policy reasons why religious corporations should be clearly protected under the Bill: religious belief is most often expressed in associational form. To allow that a sole trader could take the benefit of religious discrimination protections, but not where they subsequently incorporated the business would be arbitrary.<sup>50</sup>

3.34 The Association of Christian Schools also stated:

The inclusion of clause 16 pertaining to "associates" is a welcome addition as it provides that protection from religious discrimination is extended to persons on the basis that they have an association with an individual who holds or engages in a religious belief or activity, for example members of the same unincorporated association or a business relationship. This "associates" clause could allow Christian schools to benefit from the protection of religious discrimination in the areas listed under the Act, for example accessing premises, goods, services, facilities and accommodation.<sup>51</sup>

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47 Institute for Civil Society, *Submission 131*, p. 6.

48 *Acts Interpretation Act 1901*, section 2C.

49 Religious Discrimination Bill 2021, explanatory memorandum, p. 66.

50 Associate Professor Mark Fowler, *Submission 20*, pp. 27–28. See also Institute of Civil Society, *Submission 131*, p. 3.

51 Australian Association of Christian Schools, *Submission 23*, p. 19.

3.35 Dr Alex Deagon, a Senior Lecturer in the School of Law at the Queensland University of Technology, also stated there is no impediment to empowering religious corporations as litigants in a law protecting against religious discrimination, and 'indeed such is required as a means to give adequate effect to the protections afforded to individuals and groups against religious discrimination in international law'.<sup>52</sup>

3.36 However, a number of other submitters raised concerns that extending discrimination protection to bodies corporate is inconsistent with the human rights treaties which protect the rights and dignity of individuals, and in some cases groups of individuals, rather than bodies corporate or governments. For example, Ms Anna Brown, Chief Executive Officer of Equality Australia, said 'traditionally discrimination law protects the individual against unfair treatment on the basis of a protected attribute. So we're quite alarmed by the inclusion of these sorts of provisions that protect entities as well as individuals'.<sup>53</sup> The Australian Human Rights Commission noted that it 'is axiomatic that only humans have human rights'. The Commission stated that it supports the inclusion of a clause allowing discrimination complaints to be made by individuals who are associates of a person with a religious belief or those who engage in religious activity, but does not support the extension of this to allow a corporation to make a claim of religious discrimination because of its association with an individual:

International law and the domestic law of comparable jurisdictions makes clear that human rights law protects only humans. This principle has been adhered to in all of Australia's federal, state and territory human rights laws, including the existing federal discrimination laws. In the Commission's view, there is no justification for the Bill to depart from this settled and fundamental principle.

Corporations cannot possess innately human qualities, such as dignity, which human rights law is designed to protect. More specifically, corporations have 'neither soul nor body' and cannot have a religious belief that is somehow disconnected from the religious belief of an individual or group of individuals that are involved with the corporation. The legitimate rights and interests of corporations can be, and are, legally protected in other ways—for example, in statutes dealing with competition law.<sup>54</sup>

3.37 Similarly the Law Council of Australia said:

the Bill should protect natural persons, not bodies corporate. Human rights protect characteristics which are innately human, such as sex, race and religion. The intention that the protections in the Bill should be extended to bodies corporate, does not appear to have been recommended by the Expert Panel or supported by the ICCPR, or accord well with the Bill's objects

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52 Dr Alex Deagon, *Submission 3*, p. 6.

53 Ms Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 69.

54 Australian Human Rights Commission, *Submission 97*, p. 33.

regarding the 'indivisibility and universality of human rights'. It could result in an uneven landscape of rights protection in which the rights of natural persons based on certain attributes are weighed against those of potentially large corporations.<sup>55</sup>

3.38 Associate Professor Luke Beck also raised concerns that, given the ability of bodies corporate to make complaints of discrimination, the bill may mean governments would be unable to require their contractors providing welfare services to refrain from some forms of discrimination.<sup>56</sup> The Australian Council of Trade Unions also noted its concern that this provision could affect the ability of people to take action protesting against the actions of a commercial body.<sup>57</sup> Equality Australia also raised concerns as to the potential for large damages to be sought by companies who experience a secondary boycott based on their association with certain individuals.<sup>58</sup>

### **Exceptions and exemptions**

3.39 Division 4 of Part 4 of the bill also sets out a number of exceptions and exemptions, which specify that certain conduct will not be unlawful under the legislation (see Chapter 2 for further detail). This is separate to conduct by religious bodies that is stated to be 'not discrimination' under Part 2 of the bill (and is considered in Chapters 4 and 5 of this report).

3.40 Most submitters did not raise concerns regarding this Division of the bill, noting that it is the orthodox approach to anti-discrimination legislation to set out specific, limited exceptions to what constitutes unlawful discrimination. Issues that were raised by some submitters are set out below.

#### ***Clause 35 – counselling, promoting a serious offence***

3.41 The Australian Human Rights Commission raised concerns about the breadth of operation of clause 35 of the bill. This clause provides that it is not unlawful to discriminate against a person on the ground of their religious belief or activity if the person has expressed a particular religious belief and a reasonable person, having regard to all the circumstances would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence (being an offence punishable by two or more years imprisonment).

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55 Law Council of Australia, *Submission 28*, p. 44. See also: Associate Professor Luke Beck, *Submission 38*, p. 17; Fair Agenda, *Submission 122*, pp. 11–12; LGBTI Legal Service Inc, *Submission 161*, pp. 5–6; Australian Lawyers for Human Rights, *Submission 171*, pp. 11–12; NSW Council for Civil Liberties, *Submission 181*, pp. 16–17; Human Rights Law Centre, *Submission 190*, p. 20; ACT Government, *Submission 192*, paragraphs 8-12, recommendation 1.

56 Associate Professor Luke Beck, *Submission 38*, p. 18.

57 Australian Council of Trade Unions, *Submission 64*, p. 22. See also Equality Australia, *Submission 31*, p. 36.

58 Mr Kassisieh, Equality Australia, *Committee Hansard*, 21 December 2021, p. 71.

The Australian Human Rights Commission raised concerns that if these criteria are met, it would not be unlawful to discriminate against a person on the basis of any of their religious belief or activities – not just on the basis of their religious beliefs or activities generally.<sup>59</sup>

***Clause 37 – conduct by law enforcement, national security and intelligence bodies***

3.42 Some submitters raised concerns regarding the exception in subclause 37(2). That subsection provides that it will not be unlawful under the bill for persons exercising law enforcement, national security or intelligence powers to discriminate on the grounds of a person's religious belief or activity where the discrimination is reasonably necessary to the exercise of those powers. The explanatory memorandum provides that this is intended to provide clarity that Australian law enforcement, security and intelligence bodies can continue to lawfully perform their powers and functions in circumstances where a person's religious beliefs or activities may have a connection to law enforcement, national security or intelligence.<sup>60</sup>

3.43 The Islamic Council of Victoria raised concerns about this exception, noting that there 'is no correlation between any religious belief or activity and conduct which may be unlawful'. They were of the view that Muslims had 'been subjected to racial profiling and targeting under the guise of national security' and that clause 37 will continue that.<sup>61</sup> The Australian National Imams Council also raised concerns about the breadth of the exception, noting that it 'risks alienating Muslims and creating a sense of mistrust given the experiences of coercive and investigative powers being misused'. They submitted that 'there ought to be a review or capacity to seek redress through the Commissioner'.<sup>62</sup>

***Clause 39 – exceptions in relation to inherent requirements for employment***

3.44 The bill sets out that it is unlawful for an employer to discriminate against another person on the ground of the person's religious belief or activity when hiring or dismissing employees or in their terms and conditions of employment.<sup>63</sup> However, the bill also provides that it is not unlawful if, because of the person's religious belief or activity, they are unable to carry out the inherent requirements of the employment or partnership.<sup>64</sup> This reflects existing exemptions in other anti-discrimination

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59 Australian Human Rights Commission, *Submission 97*, pp. 63–64.

60 Religious Discrimination Bill 2021, explanatory memorandum, p. 84.

61 Islamic Council of Victoria, *Submission 111*, pp. 4–5.

62 Australian National Imams Council, *Submission 27*, p. 11. See also Australian Muslim Advocacy Network, *Submission 93*, p. 9.

63 Religious Discrimination Bill 2021, clause 19.

64 Religious Discrimination Bill 2021, subclause 39(2).

legislation.<sup>65</sup> The explanatory memorandum states that in order for a requirement to constitute an inherent requirement it must meet the high threshold set by the High Court, namely that the requirements are 'something essential' to or an 'essential element' of the particular position.<sup>66</sup>

3.45 Some employer groups raised concerns as to the complexity of the proposed exception for employers. The Australian Chamber of Commerce and Industry (ACCI) supported the exception but raised concerns as to the drafting of the provision. For example, it noted there were small differences in the drafting of this exception and that contained in the *Fair Work Act 1996* and other anti-discrimination legislation. It noted that other legislation, and international law, refers to the 'inherent requirements of the *particular job/employment*', whereas subclause 39(2) refers to the 'inherent requirements of the employment or partnership'. The ACCI suggested that the more general term 'employment' should be replaced with the more specific term 'particular position'.<sup>67</sup>

3.46 The Australian Industry Group stated that the inherent requirements exception is appropriate to address circumstances where an employee may not be able to perform the job because of a religious belief or activity, but it is not adequate to address unreasonable religious activity in the workplace:

For example, the exception would not be relevant where an employee complains to the employer about a co-worker who leaves religious pamphlets on the employee's desk every day, despite the employee communicating to the co-worker that this is unwanted, or a co-worker who makes constant unwelcome attempts to convince the employee to follow their religion.<sup>68</sup>

3.47 The Australian Industry Group therefore recommended that the bill be amended to enable employers to take reasonable management action to deal with unreasonable religious activity in the workplace.<sup>69</sup>

3.48 However, the Attorney-General's Department said this was unnecessary as this type of conduct is likely to come up only as potential indirect discrimination and it is already a requirement in clause 14 that, if it's reasonable, it does not constitute discrimination. In response to questions on notice, the Department further noted that the bill will not override work health and safety laws, and:

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65 See *Age Discrimination Act 2004*, subsection 18(4); *Disability Discrimination Act 1992*, section 21A; and *Sex Discrimination Act 1984*, section 30.

66 Religious Discrimination Bill 2021, explanatory memorandum, p. 88. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

67 Australian Chamber of Commerce and Industry, *Submission 199*, pp. 5–7.

68 Australian Industry Group, *Submission 142*, p. 4.

69 Australian Industry Group, *Submission 142*, p. 5.

employers would continue to have a duty to ensure, so far as is reasonably practicable, the health and safety of workers and others in the workplace under the model laws. This includes managing risks to psychological health, such as harassment. It is intended that action taken by employers that is necessary to comply with their duties under work health and safety law would not be unlawful under the Religious Discrimination Bill, in accordance with subclauses 37(1) and (3) of the Bill [which provide that it is not unlawful if the conduct constituting discrimination is in direct compliance with a law of the Commonwealth or a State or Territory].<sup>70</sup>

3.49 Some submitters also expressed concern as to how broad the exception relating to the inherent requirements of the employment may be. Harmony Alliance stated:

the term 'inherent requirements' is not defined and provides scope for employers to define tasks that are contrary to an individual's religious or cultural beliefs as 'inherent requirements' even if they do not pertain to the core business of the employing institution. This clause will disproportionately disadvantage migrant and refugee women by allowing employers to use religious or cultural beliefs as a barrier to employment.<sup>71</sup>

***Clause 40 – Exceptions relating to camps and conference sites***

3.50 The bill provides that it is unlawful for a person to discriminate on the grounds of religious or activity in making facilities available and in relation to accommodation.<sup>72</sup> However, subclause 40(2) provides that it will not be discrimination if the conduct constituting the discrimination is in the course of establishing, directing, controlling or administering a camp or conference site that:

- (a) provides accommodation and is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and
- (b) the conduct is done in good faith and a person of the same religion as the alleged discriminator could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or it is done to avoid injury to the religious susceptibilities of adherents of the same religion of the alleged discriminator; and
- (c) the conduct is in accordance with a publicly available policy.

3.51 A number of submitters raised concerns as to the breadth of this exception and what this would mean for those wishing to hire out camps and conference sites. Particular concerns were raised that this may disproportionately impact those in rural

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70 Attorney-General's Department, answer to question on notice 22003, 14 January 2022 (received 21 January 2022).

71 Harmony Alliance, *Submission 106*, p. 3.

72 Clauses 26 and 27 of the Religious Discrimination Bill 2021.

and remote areas of Australia where alternative venues may be more limited.<sup>73</sup> Some submitters raised concerns that this would allow religious camp and conference sites to refuse to provide accommodation or services to certain groups:

This would mean, for instance, that a religious camp could refuse to provide accommodation to a youth group that supports queer youth, unmarried or sole parents, people who have left marriages due to family violence, and others.<sup>74</sup>

3.52 A number of submitters raised concerns that the hiring out of conference and camping sites is a commercial activity, and it is not clear why the bill, which otherwise prohibits discrimination in a commercial context, allows discrimination on the grounds of religion in this instance. For example, the ACT Government noted that this is inconsistent with existing ACT law and raised concerns that this would allow discrimination on the basis of religion for individuals and groups seeking to book accommodation or facilities at religious camps and conference sites in the ACT.<sup>75</sup> The Australian Human Rights Commission stated:

The proposed exemption is broad enough to cover camps and conference sites where accommodation is offered to the public at large and on a commercial basis. By contrast, under the Bill, religious hospitals, aged care facilities and disability service providers that offer their services to the public at large on a commercial basis are, for that reason, not granted an exemption that would allow them to discriminate against people who acquire their services. There does not appear to be a principled reason why religious camps and conference sites have been treated differently...

In general, organisations that offer goods and services to the public at large on a commercial basis should do so on terms that are non-discriminatory.<sup>76</sup>

3.53 Some submitters also questioned the application of the provision to conduct done in good faith that accords with the doctrines of a religion, or to avoid injury to the susceptibilities of adherents of the religion – rather than to conduct that is necessary to maintain the religious ethos of the camp or conference.<sup>77</sup> This wording is the same as that used in clauses 7 and 9 and the concerns raised in relation to this wording is considered in more detail in Chapter 4.

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73 See for example, Kingsford Legal Centre, *Submission 110*, p. 10; Uniting Network, *Submission 153*, p. 19.

74 See for example, Sean Mulcahy, Associate Professor Kate Seear, Andrea Watling, *Submission 126*, pp. 8–9.

75 ACT Government, *Submission 192*, p. 23.

76 Australian Human Rights Commission, *Submission 97*, p. 60.

77 Sean Mulcahy, Associate Professor Kate Seear, Andrea Watling, *Submission 126*, pp. 8–9; Amnesty International, *Submission 157*, p. 22.

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**Exemptions granted by the Australian Human Rights Commission**

3.54 Clause 44 of the bill provides that the Australian Human Rights Commission may grant to a person or body an exemption from the requirements not to discriminate under Division 2 or 3 of Part 4 of the bill. Such exemptions could not exceed five years. Clause 47 provides that such exemptions may be varied or revoked by the Commission or the minister. Clause 69 also provides that the Commission may delegate all or any of its functions under the bill (including the power to grant exemptions) to any person or body of persons.

3.55 The Senate Standing Committee for the Scrutiny of Bills raised concerns that these powers give the Commission and the minister a broad power to grant, vary or revoke an exemption.<sup>78</sup> It also expressed concerns as to the breadth of power that may be delegated to 'any person' under clause 69.<sup>79</sup> The Law Council of Australia stated that it considered it appropriate that the Commission should be able to make exemptions, however, considers there should be a requirement on the Commission to publish in the Gazette notices and reasons with respect to the variation or revocation of exemptions granted.<sup>80</sup> The Australian Human Rights Commission also noted that other anti-discrimination legislation enables temporary exemptions to be made by the Commission, but that no other legislation gives the Attorney-General the power to vary or revoke an exemption granted by the Commission. In the absence of any explanation for this change, the Commission recommended that the power of the Attorney-General be removed so that the decision remain with the body that has conducted the inquiry into whether the exemption should be granted.<sup>81</sup>

3.56 Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Group, Attorney-General's Department, explained the reason for giving the Attorney-General this power:

I think the concern there was really that religion is a slightly different ground to some of those other grounds that are protected by the four existing discrimination laws. It has more of a quality which goes to aspects such as freedom of expression and manifestation of the terms of article 18 of the ICCPR as well. This provision allows that flexibility, essentially from a political aspect, and perhaps the commission may not have taken into account the broad range of equities that are in play when we're talking about exemptions in this type of field. I think it's just a different ground for protection and different to those for existing laws which go much more to

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78 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2021* (1 December 2021), p. 29; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 60–64.

79 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2021* (1 December 2021), pp. 30–31; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 64–66.

80 Law Council of Australia, *Submission 28*, p. 46.

81 Australian Human Rights Commission, *Submission 97*, p. 65.

the kind of personal characteristics and attributes of an individual which are immutable.<sup>82</sup>

### **Role of Religious Discrimination Commissioner**

3.57 Part 6 of the bill seeks to introduce a Religious Discrimination Commissioner (Commissioner) who would have responsibilities under the bill, including to promote an 'understanding and acceptance of' and compliance with this legislation.<sup>83</sup>

3.58 The introduction of a Religious Discrimination Commissioner was endorsed in some submissions.<sup>84</sup> For example, the Australian Christian Churches stated that this 'will be a positive step towards promoting protection against religious discrimination and freedom of speech on religious matters'.<sup>85</sup> The Association of Heads of Independent Schools of Australia submitted that introducing the new Commissioner 'would signal to the community that Australia values religious freedom and diversity and is prepared to act against religious discrimination. It would also establish a point of contact for those experiencing religious discrimination as well as provide leadership of research on religious activity in Australia and of promotion of religious tolerance'.<sup>86</sup> Conversely, others submitted that introducing a Commissioner was inappropriate given the lack of other Commissioners, particularly in relation to LGBTQI+ rights.<sup>87</sup>

3.59 Additionally, other submitters queried whether the establishment of a Commissioner was an efficient use of government funding, particularly in light of Religious Freedom Review findings that an additional Commissioner was not

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82 Mr Andrew Walter, Attorney-General's Department, *Committee Hansard*, 14 January 2022, pp. 64–65.

83 Religious Discrimination Bill 2021, Part 6-7.

84 Association of Heads of Independent Schools of Australia, *Submission 71*, p. 3; Australian Sangha Association, *Submission 84*, attachment 1; Presbyterian Church of Australia, *Submission 94*, p. 9; Relationships Australia, *Submission 99*, p.13; Queensland Advocacy Incorporated, *Submission 115*, p. 4; Uniting Church in Australia Assembly, *Submission 152*, p. 8.

85 Australian Christian Churches, *Submission 63*, p. 4.

86 Association of Heads of Independent Schools of Australia, *Submission 71*, p. 8.

87 Equality Australia, *Submission 31*, p. 41; Pride in Law, *Submission 37*, p. 6; Public Interest Advocacy Centre, *Submission 40*, p. 25; Just Equal, *Submission 69*, p. 5; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 4; Kingsford Legal Centre, *Submission 110*, p. 10; Transgender Victoria, *Submission 112*, p. 2; Children and Young People with Disability Australia, *Submission 139*, p. 5; Activate Church, *Submission 145*, p. 6; Planet Ally, *Submission 160*, p. 3; LGBTI Legal Service Inc, *Submission 161*, p. 2; Australian Lawyers for Human Rights, *Submission 171*, p. 3; NSW Council for Civil Liberties, *Submission 181*, p. 13; Human Rights Law Centre, *Submission 190*, p. 20.

necessary, as the Australian Human Rights Commission already has the capacity to perform the functions of protecting freedom of religion.<sup>88</sup>

3.60 Some submitters also expressed concerns as to the impact a Commissioner would have on free speech and the relationship between state and religious institutions.<sup>89</sup> For example, the Presbyterian Church of Victoria submitted:

The PCV has reservations about the creation of this role. Our concerns revolve around the possible interference by the State in adjudicating and judging religious theology.<sup>90</sup>

## **International human rights law**

### ***Rights to freedom of religion, freedom of expression and equality and non-discrimination***

#### *Prohibiting religious discrimination*

3.61 By making it unlawful to discriminate against a person on the ground of their religious belief or activity in various areas of public life the bill promotes the right to freedom of religion, particularly the right to manifest one's religion, and the rights to freedom of expression and equality and non-discrimination (on the grounds of religious belief) (see Chapter 2 for further details on the content of these rights). This is an important step in realising Australia's international human rights obligations in the areas of freedom of religion and anti-discrimination. In this regard, the UN Human Rights Committee has previously recommended that Australia:

take measures, including by considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and inter-sectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.<sup>91</sup>

3.62 Further, international human rights law requires States parties to relevant international treaties to guarantee human rights to all persons without discrimination

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88 Expert Panel, *Religious Freedom Review: Report of the Expert Panel*, May 2018, pp. 102-103, recommendation 19; Equality Australia, *Submission 31*, p. 41; Just Equal, *Submission 69*, p. 5; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 4; Pride in Protest & National Union of Students, *Submission 85*, p. 1; AIVL, *Submission 141*, p. 7; Uniting Network Australia, *Submission 153*, p. 6; Rainbow Families, *Submission 182*, p. 5; Liberty Victoria, *Submission 186*, pp. 12–13.

89 Presbyterian Church of Victoria, *Submission 133*, p. 2; see also, Institute of Public Affairs, *Submission 134*, p. 3.

90 Presbyterian Church of Victoria, *Submission 133*, p. 2.

91 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017)[17]–[20].

of any kind, including on the grounds of sex, religion and political or other opinion.<sup>92</sup> Thus, insofar as the bill prohibits discrimination on the ground of religious belief or activity in various areas of public life, including work and education,<sup>93</sup> it would not only promote the right to equality and non-discrimination, including Australia's obligation to guarantee rights in a non-discriminatory way, but it would also promote the substantive rights in question, such as the rights to work and education (see Chapter 2 for further details on the contents of these rights).

3.63 To ensure compliance with Australia's international obligations, it is important that the concept of discrimination, as defined under the bill, aligns with international human rights law. In this regard, as discussed above (at paragraphs [3.24] to [3.26]), some submitters raised concerns that the concept of indirect discrimination in clause 14 does not align with the limitation clause set out in article 18(3) of the International Covenant on Civil and Political Rights.

3.64 Noting that the rights to freedom of religion or belief and equality and non-discrimination are 'inextricably linked',<sup>94</sup> in practice, were a person indirectly discriminated against on the basis of their religion, their right to freedom to manifest religion would also be limited. Under international human rights law, in assessing a claim of indirect religious discrimination and a limitation of an individual's right to manifest religion, regard would be had to the limitation clause in article 18(3) as well as whether the differential treatment was based on reasonable and objective criteria

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92 See, e.g., International Covenant on Economic, Social and Cultural Rights, article 2; International Covenant on Civil and Political Rights, article 2; Convention on the Rights of the Child, article 2.

93 See, e.g., Religious Discrimination Bill 2021, clauses 19 and 24.

94 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33].

such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>95</sup>

3.65 As outlined in Chapter 2, article 18(3) provides that the freedom to manifest one's religion or beliefs may be limited so long as such limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>96</sup> This limitation clause is to be strictly interpreted and limitations 'may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated'.<sup>97</sup>

3.66 Further, where the manifestation of religion or the expression of a religious opinion or belief has an adverse effect on the rights or freedoms of others, each right must be balanced against each other.<sup>98</sup> For example, if a claim of indirect discrimination involved a clash between the rights of the complainant and the rights of others, including the rights of religious groups to institutional autonomy, these competing rights would need to be balanced. As outlined in Chapter 2, this balancing

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95 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

96 International Covenant on Civil and Political Rights, article 18(3).

97 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [31], [44], [45].

98 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8]; United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8]; UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [16].

exercise is often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.<sup>99</sup>

3.67 In the context of this bill, clause 14 provides that a person discriminates against another if they impose a condition, requirement or practice which is not reasonable and which disadvantages people who hold or engage in particular religious beliefs or activities. Assessing whether a condition, requirement or practice is reasonable would be a relevant consideration in determining whether any limitation on the rights to freedom of religion and equality and non-discrimination was proportionate. However, the necessity of the measure is also a relevant consideration. This is most often considered as part of a broader analysis of whether the limitation serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In the case of *Yaker v France*, for instance, the UN Human Rights Committee assessed whether the restriction was 'prescribed by law, pursue[ed] a legitimate objective, [was] necessary for achieving that objective, and [was] proportionate and non-discriminatory'.<sup>100</sup> Therefore, under international human rights law, both the concepts of reasonableness and necessity are important considerations in assessing any limitation on the rights to freedom of religion and equality and non-discrimination. Were clause 14 to incorporate both the concept of reasonableness and necessity it would likely be brought into closer alignment with international human rights law.

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99 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. The authors state that '[r]eligious freedom may be limited in favour of non-discrimination rules and vice versa, unless either result threatens the foundational values of the Convention or the *forum internum* of religious belief'. In addressing the conflict between these rights, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'. For European Court of Human Rights jurisprudence see *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [123], [125]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113].

100 *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5]. See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36]. Likewise, the Special rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [17].

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*Exceptions and exemptions*

3.68 The exceptions and exemptions in the bill may also promote the right to freedom of religion to the extent that they afford greater protection to individuals and religious bodies to manifest their religion. However, as outlined in Chapter 2, the rights to freedom of religion and expression usually intersect with other human rights, and manifestations of religion and expressions of beliefs or opinions have the potential to adversely impact on the rights and freedoms of others.

3.69 In this way, the exceptions and exemptions in the bill may have the effect of simultaneously promoting and weakening the above protections of the rights to freedom of religion, freedom of expression and equality and non-discrimination as they would make lawful otherwise discriminatory conduct and allow people to be discriminated against on the basis of their religion or belief. As discussed in Chapter 2, permitting differential treatment on the basis of religion would not only constitute discrimination on the basis of religion but may also have the effect of indirectly discriminating on the basis of other protected attributes. Further, noting the broad discretion conferred on the Australian Human Rights Commission to grant exemptions, the potential scope of any future exemptions and its impact on human rights is not clear.

3.70 As previously noted, the rights to freedom of religion, freedom of expression and equality and non-discrimination may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. Noting that limitations on the right to freedom to manifest religion must be strictly interpreted, it is necessary to consider whether the exceptions and exemptions contained in the bill, which would have the effect of restricting the right to manifest religion, are based on grounds specified in article 18(3) – namely, necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

3.71 While most exceptions set out in Part 4 of the bill appear to broadly align with the grounds specified in article 18(3), there are some questions regarding clauses 37 and 40. As outlined above, subclause 37(2) provides that it will not be unlawful under the bill for persons exercising law enforcement, national security or intelligence powers to discriminate on the grounds of a person's religious belief or activity where the discrimination is reasonably necessary to the exercise of those powers. The ground of 'national security' is not a specified ground under article 18(3). The UN Human Rights Committee has made clear that:

paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be

imposed for discriminatory purposes or applied in a discriminatory manner.<sup>101</sup>

3.72 The UN Special Rapporteur has similarly stated that "national security" may not be invoked as a ground for limiting the freedom to manifest one's religion or belief under international human rights law'.<sup>102</sup> They noted:

Increasingly, security-related arguments are deployed to suppress religion or belief. New religious groups are often declared "dangerous" to "national security", even though article 18 (3) of the Covenant does not include national security as a legitimate limitation ground for restricting the manifestation of religion or belief. Arrests for religious activities are carried out and religious officials or members may suffer from continued detention or harassment.<sup>103</sup>

3.73 As noted above (at paragraphs [3.42] to [3.43]), some submitters raised concerns that this exception will be used in a discriminatory manner to target minority religious and racial groups. Noting the clear position under international human rights law that the right to freedom of religion may not be limited on the ground of national security, it appears that subclause 37(2) would not be a permissible exception to the prohibition on religious discrimination. The more general exception relating to compliance with a provision under Commonwealth, state or territory laws would only be permissible if the provision in question related to a ground specified in article 18(3).

3.74 Regarding the exceptions relating to accommodation and facilities, conduct relating to making available religious camps and conference sites would not be discrimination if it meets the test set out in subclause 40(2). As set out above, this test is similarly worded to the tests set out in Part 2 of the bill relating to conduct engaged in by religious bodies that is not discrimination. As discussed in Chapter 4 and 5, there are questions as to whether the threshold tests (including the reasonableness test (in paragraph 40(2)(c)) and the religious susceptibilities test (in paragraph 40(5)(b)) as well as the requirement that conduct be in accordance with a publicly available policy and comply with any requirements determined by the minister (in subclauses 40(2) and (5)), meet the quality of law test and are sufficiently circumscribed such that any limitation on rights is proportionate.

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101 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [31], [44], [45].

102 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [45]. The Special Rapporteur further noted 'with concern the prevalence of countries that have adopted a complex set of regulations that unlawfully restrict various manifestations of freedom of religion or belief on the basis of vague and broad concepts such as "national identity", "national unity" or "culture"'.

103 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [72].

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*Bodies corporate able to claim discrimination*

3.75 As outlined above, clause 16 would have the effect of allowing a body corporate to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely associated with.

3.76 Under international human rights law, States Parties have a general obligation to respect rights and ensure them to all *individuals* in their territory and subject to their jurisdiction.<sup>104</sup> The UN Human Rights Committee has made clear that the beneficiaries of human rights are individuals, while noting that certain rights, such as the right to freedom to manifest religion or belief, may be enjoyed in community with others.<sup>105</sup>

3.77 In this regard, as discussed in Chapter 2, international human rights law has recognised the importance of protecting religious groups and their institutional autonomy in realising the individual right to freedom of religion.<sup>106</sup> While there is a communal element to the right to freedom of religion, individuals remain the beneficiaries of human rights and therefore may not be consistent with international human rights law that anti-discrimination law be extended to protect bodies corporate.

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104 See, e.g., International Covenant on Civil and Political Rights, article 2. See also UN Human Rights Committee, *General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004).

105 UN Human Rights Committee, *General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004) [9]. The Committee further noted: 'The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights'.

106 See, e.g., UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41]. See also *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014). At [127] the Court stated: '[w]here the organisation of the religious community is in issue, Article 9 [freedom of thought, conscience and religion] of the [European Convention on Human Rights] must be interpreted in the light of Article 11 [freedom of assembly and association], which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'.

## Committee view

3.78 The committee notes that almost all submitters and witnesses to this inquiry recognised the importance of protecting the right to be free from discrimination on the grounds of religious belief and activity. This also accords with the committee's survey results, where 95 per cent of respondents considered there should be legislation to protect people from religious discrimination in certain areas of public life on the grounds of their religious belief or activity.<sup>107</sup>

3.79 The committee considers the right to freedom of religion is a fundamental human right and welcomes enhancements to the statutory protection of the right to freedom of religion in Australia. The committee considers this brings legislative protections for religious belief and activity to the same standard as that already afforded under federal law on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status. The committee is also pleased to see the recognition of the importance of Australia enshrining the right to freedom of religion as contained in the International Covenant on Civil and Political Rights, noting for the past decade this committee has considered the rights in this treaty, and others, when assessing the human rights compatibility of Commonwealth legislation before the Parliament.<sup>108</sup>

3.80 The committee therefore considers that Part 4, in setting out that discrimination on the ground of a person's religious belief or activity in certain areas of public life is unlawful, is an important and necessary step in protecting the right to freedom of religion. The committee considers that Part 4, in general, is consistent with other protections in Australian anti-discrimination law. The committee considers Part 4 promotes the rights to freedom of religion, freedom of expression and equality and non-discrimination (on the grounds of religion).

3.81 The committee considers it appropriate that the bill defines the term 'religious belief or activity' broadly. Adopting a broad, principled approach to the concept of religion, as informed by the approach developed by the High Court, is more appropriate than seeking to definitely set this out in legislation, noting that faith traditions may emerge or develop over time.

3.82 The committee considers that the bill appropriately defines the concept of direct and indirect discrimination. In particular, the committee is of the view that it is appropriate to define indirect discrimination as imposing a condition, requirement or practice which is not reasonable and which disadvantages people who hold or engage in particular religious beliefs or activities. However, the committee is concerned that the burden of proving if a condition, requirement or practice is reasonable would rest

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107 See Appendix 4.

108 See the *Human Rights (Parliamentary Scrutiny) Act 2011*.

on the person bringing the discrimination complaint, not on the person imposing it, and considers this should be amended to bring it in line with other anti-discrimination legislation.

3.83 The committee further notes that the bill seeks to introduce exceptions and exemptions to the prohibition of discrimination on the ground of religion. The committee considers these are reasonable and appropriate and allow for limited bases on which would justify allowing otherwise discriminatory conduct (for example, to reflect the distinction between public and private life). In relation to exceptions relating to work, the committee considers it appropriate that the bill sets out that it is not unlawful for a person to discriminate where, because of the person's religious belief or activity, they are unable to carry out the inherent requirements of the job. The committee notes that in order for a requirement to constitute an 'inherent requirement' it must meet the high threshold set by the High Court, namely that the requirements are 'something essential' to or an 'essential element' of the particular position. The committee considers this is appropriate. However, the committee considers that, for the sake of clarity and consistency across other legislation, the reference to the 'inherent requirements of the employment' should be replaced with the more specific 'inherent requirements of the particular position'.

3.84 While the committee considers it essential that employees be guaranteed the right to freedom of religion in the workplace, it is also important that unnecessary burdens are not placed on employers, and that this legislation not create confusion as to what reasonable management action employers can take. The committee agrees with submitters, such as the Australian Industry Group, that employers should be able to take reasonable management action in a reasonable manner, and that this should not constitute discrimination. The committee appreciates that the bill is unlikely, as a matter of law, to classify reasonable management action as discrimination (for example, it may be necessary to take management action against employees who continually leave religious pamphlets on their colleagues' desks as this would remain part of an employer's duty to ensure workers and others are not harassed). However, the committee considers it would be preferable, for the avoidance of any doubt, that the bill and explanatory memorandum be amended to clarify that the bill will not make it unlawful for reasonable management action to be undertaken by employers.

3.85 Further, the committee considers it appropriate that the Australian Human Rights Commission be able to grant temporary exemptions, in the same way as it does under existing anti-discrimination law. However, in the interests of transparency, the committee considers that the bill should require that, in making such exemptions, the Commission should publish the evidence on which its findings were made and its reasons for making the exemption. The committee notes that this would be consistent with requirements set out in other anti-discrimination legislation.<sup>109</sup> In addition, given

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109 See *Sex Discrimination Act 1984*, section 46; *Disability Discrimination Act 1992*, section 57; and *Age Discrimination Act 2004*, section 46.

the importance of the power to grant exemptions – which would mean that conduct which would otherwise be unlawful discrimination should be permitted on a temporary basis – this should not be a power that the Commission should be able to delegate to any level staff member, or indeed, 'any person'. The committee considers only a Commissioner, or the very senior executive members of staff of the Commission, should be able to make such exemptions.

3.86 The committee also notes the concerns raised by the Australian Human Rights Commission as to why the Attorney-General should be able to vary or revoke an exemption made by the Commission. The committee appreciates the importance of protecting the independence of the Commission and considers it would generally be best placed, having granted the initial exemption, to consider any need for a variation or revocation of the exemption. However, the committee notes that any exemption would make it lawful for those granted an exemption to discriminate on the grounds of religion. Noting the importance of protecting the right to freedom of religion, the committee considers there may be circumstances where the Attorney-General is best placed to consider the broader equities around the making of such an exemption, and considers it important that the Attorney-General retain the flexibility to vary or revoke an exemption. However, the committee recognises the importance of parliamentary oversight of any decision to vary or revoke an exemption by the Attorney-General. On that basis, the committee considers it would be appropriate that should the Attorney-General vary or revoke an exemption, this be done by way of a legislative instrument (rather than a notifiable instrument), so that Parliament has some oversight of this decision via the disallowance process.<sup>110</sup>

3.87 The committee acknowledges that there are a wide range of views regarding some of the other issues raised in this Chapter. However, the committee considers that in relation to these issues, the bills generally strike the appropriate balance between upholding the important right to be free from discrimination on the basis of religion and respecting the rights of others.

### **Recommendation 1**

**3.88 The committee recommends that, consistent with other anti-discrimination legislation, clause 14 of the Religious Discrimination Bill 2021 be amended to require that in determining if a condition, requirement or practice imposed on a person resulted in indirect discrimination, the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving it was reasonable.**

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110 See *Legislation Act 2003*, section 42. Note also that if primary legislation declares an instrument to be a legislative instrument, it becomes a legislative instrument (even if it is not legislative in character), see *Legislation Act 2003*, subsection 8(2).

## **Recommendation 2**

**3.89** The committee recommends that paragraph 39(2)(b) of the Religious Discrimination Bill 2021 be amended to refer to the inherent requirements of the 'particular position', rather than the inherent requirements of the 'employment'.

## **Recommendation 3**

**3.90** The committee recommends that the government consider including a legislative note in the Religious Discrimination Bill 2021 that states that reasonable management action conducted within a reasonable manner will not constitute unlawful discrimination, and provide examples in the explanatory memorandum of the type of action that would likely constitute reasonable management action.

## **Recommendation 4**

**3.91** The committee recommends, consistent with other anti-discrimination legislation, that Division 4 of Part 4 of the Religious Discrimination Bill 2021 be amended to include a provision that the Australian Human Rights Commission and Attorney-General, in exercising powers under clauses 44 and 47, must include with the explanatory materials accompanying the instrument the following information:

- the Commission or Attorney-General's findings on material questions of facts in relation to the decision;
- the evidence on which those findings were based;
- the reasons for the decision; and
- the fact that an application may be made to the Administrative Appeal Tribunal for a review of the decision.

## **Recommendation 5**

**3.92** The committee recommends that subclause 69(1) of the Religious Discrimination Bill 2021 be amended to provide that the Australian Human Rights Commission can only delegate the power to make an exemption to a Commissioner or an SES member of staff of the Commission.

## **Recommendation 6**

**3.93** The committee recommends that clause 47 of the Religious Discrimination Bill 2021 be amended to provide that the Australian Human Rights Commission may vary or revoke an exemption by notifiable instrument, but the Attorney-General may only vary or revoke an exemption by disallowable legislative instrument (ensuring there is parliamentary oversight of any political decision to vary or revoke an exemption made by the Commission).



## Chapter 4

### Conduct by religious bodies

4.1 This chapter outlines the key issues raised by submitters and witnesses in relation to clauses 7–10 (in Part 2) of the bill regarding certain conduct by religious bodies (other than religious educational institutions, which is dealt with in Chapter 5). A number of faith-based organisations were strongly supportive of ensuring that religious bodies should not be considered to be discriminating on the basis of religion if acting in accordance with their faith (although there were some concerns as to what test should apply). Conversely, there was strong opposition raised by a number of other groups about these provisions, as set out below. This chapter considers:

- clause 7, which makes it 'not discrimination' for religious bodies to act in accordance with their faith, including considering the definition of 'religious body'; the reasonableness test; and the test of avoiding injury to religious susceptibilities;
- the effect of Part 2 on employment by religious bodies (not including schools, which is set out in Chapter 5);
- the effect of Part 2 on access to services offered by religious bodies (such as services from faith-based charities), and the effect of clause 10, allowing reasonable conduct intended to meet a need or reduce a disadvantage; and
- amendments to the Charities Act regarding views taken by religious bodies in relation to marriage.

4.2 The chapter concludes with an assessment of the application of international human rights law to these provisions and provides the committee's view and recommendations.

#### Religious bodies acting in accordance with their faith

4.3 As set out in Chapter 2, Part 2 of the bill sets out conduct that will not constitute discrimination under the bill. Clause 7 (within Part 2) sets out the circumstances in which a religious body may generally act in accordance with their faith such that it will not be discrimination on the grounds of religion. Specifically, clause 7 provides that a religious body does not discriminate against a person on the ground of religious belief or activity by engaging, in good faith:

- (a) 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; and/or

(b) in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.<sup>1</sup>

4.4 Conduct in this context includes giving preference to persons of the same religion as the religious body. Clause 8 provides that subclauses 7(2) and (4) do not apply to certain conduct by religious hospitals, aged care facilities, accommodation providers and disability service providers. The explanatory memorandum states that this reflects the public benefit and important role of hospitals, aged care and disability facilities in the community.<sup>2</sup> The bill also notes that conduct that is not discrimination under this bill (as a result of Part 2 of the bill) 'may still constitute direct or indirect discrimination under other anti-discrimination laws of the Commonwealth'.<sup>3</sup>

4.5 The explanatory memorandum sets out that clause 7 is intended to apply to conduct that has an intrinsically religious character or is fundamental to the practice of religion.<sup>4</sup>

4.6 A number of submitters welcomed the inclusion of clause 7. For example, Associate Professor Mark Fowler noted that this declares the long-settled principle of international human rights law that the legitimate exercise of religious freedom is not discrimination.<sup>5</sup> The Australian Association of Christian Schools noted that clause 7:

positively protects the right of religious bodies and religious schools to choose to employ people whose religious beliefs will uphold the religious ethos of their organisation. This will allow religious bodies and schools to freely express who they are and allows for an alignment of values and 'mission fit' between the religious organisation and the individuals employed to represent the organisations in the public delivery of its services.<sup>6</sup>

4.7 The Institute of Civil Society argued:

This is a long overdue recognition that religious bodies when applying religious belief filters to membership and employment decisions are expressing their freedom of association – they can choose to prefer to have as members and employees those who agree with the beliefs of the religion and who live it out.<sup>7</sup>

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1 Religious Discrimination Bill 2021, subclauses 7(2) and (4).

2 Religious Discrimination Bill 2021, explanatory memorandum, p. 46.

3 Religious Discrimination Bill 2021, note 2 to subclauses 7(2) and (4). See also the Attorney-General's Department, Answers to written questions on notice, received 11 January 2022, question 5.

4 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

5 Associate Professor Mark Fowler, *Submission 20*, p. 10.

6 Australian Association of Christian Schools, *Submission 23*, p. 12.

7 Institute for Civil Society, *Submission 131*, p. 3.

4.8 However, a number of other submitters questioned the need for the clause, and its breadth. For example, Equality Australia stated that 'these sections place an ambiguous, uncertain and unwieldy hole in the legislation, allowing religious bodies to discriminate within their organisations against people who hold different religious beliefs (including those who are not religious)'.<sup>8</sup> The Law Council considered that clause 7 'is not concerned with prohibiting discrimination on religious grounds, it is aimed at *permitting* religious discrimination in the name of religion'.<sup>9</sup> It queried whether clause 7 is reasonable, proportionate and necessary:

The clause has the potential to enable a wide range of religious bodies to discriminate on religious grounds against people of other faiths, or with no faith. In turn, this is likely to undermine their rights including to equality and non-discrimination, work and education. This discrimination is likely to operate most strongly against already disadvantaged people who are least likely to be able to find alternative services or employment. This undermines the Bill's expressed intention to promote a tolerant, diverse and inclusive Australia, by providing that many religious bodies, including those who engage daily with, serve, teach or employ a broad cross-section of the public, are exempt from its prohibitions for a wide range of conduct which would otherwise constitute religious discrimination. In those States where religious discrimination is currently prohibited it will have the effect of making it easier to discriminate on the grounds of religion.<sup>10</sup>

4.9 Specific issues raised by submitters are considered in further detail below.

#### ***Definition of 'religious body'***

4.10 Clause 7 sets out that religious bodies may generally act in accordance with their faith. A 'religious body' is defined as meaning any of the following that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion:

- (a) an educational institution (which means a school, college, university or other institute at which education or training is provided);
- (b) a registered charity;
- (c) any other kind of body (other than a body that engages solely or primarily in commercial activities).<sup>11</sup>

4.11 A number of submitters raised concerns about this definition, with some arguing it was too restrictive and others arguing it was too broad.

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8 Equality Australia, *Submission 31*, p. 25.

9 Law Council of Australia, *Submission 28*, p. 23.

10 Law Council of Australia, *Submission 28*, p. 24. See also, Australian Discrimination Law Experts Group, *Submission 33*, p. 14.

11 Religious Discrimination Bill 2021, clause 5.

4.12 For example, Associate Professor Mark Fowler noted that not-for-profit charities that engage solely or primarily in commercial activities would not be captured by the definition of 'religious body'. He argued that many charities undertake fundraising, and this definition risks 'preventing a sizeable proportion of the not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake.'<sup>12</sup>

4.13 In contrast, a number of other submitters raised concerns about the breadth of the definition of 'religious body' (particularly as it applies in clause 7). For example, the Law Council of Australia noted that there is no requirement that a religious body be established for religious purposes, only that it is 'conducted in accordance with' the doctrines etc of a particular religion. The Law Council also noted that with respect to religious charities, there is no requirement that it have the sub-purpose of advancing religion and that this is broader than that set out in the second exposure draft which referred instead to 'registered public benevolent institutions'. The Law Council also noted that multiple bodies may fall within the 'any other kind of body' limb, and it may be difficult for bodies to determine if they are engaging solely or primarily in commercial activities. The Law Council concluded:

Clause 7 would extend the protection to discriminate on religious grounds to a large number of organisations which are not strictly engaged in providing religious services (such as mass, weddings, funerals, baptisms etc). It would include a broad number of organisations run by religions, such as clothes and second hand goods charities, health bodies which are not hospitals, advocacy organisations, organisations providing youth or crisis support (outside of accommodation), schools, universities, child care and early learning centres. Many of these organisations receive public funding and provide critical services to the community.<sup>13</sup>

4.14 A number of submitters raised similar concerns, particularly noting that this definition contrasts with exceptions in other anti-discrimination legislation, which apply the exceptions only to bodies 'established for religious purposes'.<sup>14</sup>

### ***Reasonableness test***

4.15 Subclause 7(2) states that a religious body does not discriminate 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'. The explanatory memorandum to the bill states that this

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12 Associate Professor Mark Fowler, *Submission 20*, p. 9.

13 Law Council of Australia, *Submission 28*, p. 19.

14 *Sex Discrimination Act 1984* (Cth), paragraph 37(1)(d) and *Age Discrimination Act 2004*, section 35. See, e.g., Australian Discrimination Law Experts Group, *Submission 33*, p. 15. See also Public Interest Advocacy Centre, *Submission 40*, p. 10; Australian Council of Trade Unions, *Submission 64*, p. 18; Australian Human Rights Commission, *Submission 97*, pp. 40–42.

imports an objective reasonableness test, and that the courts would then not need to determine whether particular conduct is in accordance with the doctrines etc of a particular religion, but whether members of the same religion would reasonably consider that to be so. The explanatory memorandum states that a court may still have regard to any foundational documents that a religious body considers supports the conduct, including the particular religion's doctrines, tenets, beliefs or teachings.<sup>15</sup> In relation to the 'good faith' limb, the Attorney General's Department noted that a court is likely to apply a broad interpretation, encompassing both subjective and objective considerations.<sup>16</sup>

4.16 A number of submitters raised concerns that the 'reasonableness test' of religious belief was inconsistent with the 'genuineness test' of religious belief that applies to statements of belief (see Chapter 6 for discussion of this alternate test). For example, the Australian Association of Christian Schools stated that the reasonableness test 'gives rise to the difficult scenario of judges having to interpret questions of theology or religious doctrines to determine if statements of belief by a corporate body conform to religious doctrine, and is inconsistent with common law precedents.<sup>17</sup> The Human Rights Law Alliance also stated:

There is no good reason for this inconsistency and protections for religious bodies should not be frustrated by the possibility of disputes within religious communities over doctrine and theology that a judge would need to adjudicate. Just as with an individual, the Courts should have regard to the evidence of genuine doctrinal standards that are asserted and practiced by a religious body.<sup>18</sup>

4.17 The Institute for Civil Society stated that when determining the religious beliefs of a religious body 'the test should not require a judge to identify and interpret the doctrines of the religion, thus breaking the well-established convention of excluding the judiciary from assessing questions of theology. Instead, the body should be able to adopt a statement of its religious beliefs and that should be sufficient evidence of what they are'.<sup>19</sup>

4.18 In contrast, a number of submitters raised concern as to the effectiveness of enabling the test to be met by ensuring just one other person of the same religion

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15 Religious Discrimination Bill 2019, explanatory memorandum, p. 44.

16 Attorney-General's Department, answer to written questions on notice, question 4 (received 11 January 2022). The Attorney-General's Department noted that this is an approach that was set out in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

17 Australian Association of Christian Schools, *Submission 23*, p. 12.

18 Human Rights Law Alliance, *Submission 30*, pp. 9–10.

19 Institute for Civil Society, *Submission 131*, pp. 7–8.

could reasonably consider the conduct to be in accordance with doctrines etc.<sup>20</sup> The Australian Discrimination Law Experts Group stated that the bar set by this test is so low as to be entirely ineffective:

The religious body would not be required to establish any recognised religious doctrinal basis for its act; even in relation to adducing evidence from a single individual adherent of the same faith, the religious body would not be required to establish that the individual agreed the act was in accordance with the beliefs of that religion. Rather, the religious body would only need to establish that an individual—any individual—might consider the act, reasonably, to be in accordance with the beliefs of that religion.<sup>21</sup>

4.19 The Public Affairs Commission of the Anglican Church of Australia acknowledges the difficulties of a court determining the doctrines of religion but considered this was common in legislation and that courts have usually given a great degree of deference to leaders of religion on what the doctrines are. It stated:

We believe the test requires more than just the views of any person of the same religion, no matter how uninformed or peculiar those views may be. We note that person has to “reasonably” consider the matters to be within the doctrines, tenets, beliefs or teachings of the religion. However, this RDB test is only what is reasonable from the perspective of a potentially uninformed individual, which does not assist in narrowing the exception to any great extent.<sup>22</sup>

4.20 The Law Council of Australia stated that they were not aware that this test appears elsewhere in Australian legislation, and it moves the relevant lens away from whether the conduct conforms to the doctrines etc, to an assessment by a person of the same religion as the religious body:

The Law Council considers that there may be multiple ‘reasonable’ interpretations amongst adherents of a religion as to what is in accordance with the doctrines, tenets, beliefs or teachings of a religion. Some religions have very large numbers of followers. This may undermine the certainty and clarity of the relevant provisions and broaden their scope. Further, there is no requirement that the relevant religious adherent be particularly well informed or senior within the religion, or that the reasonable interpretation

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20 See, e.g., Council of the Ageing, *Submission 29*, p. 3; Kingsford Legal Centre, *Submission 110*, pp. 3–4; Human Rights Law Centre, *Submission 190*, p. 12; ACT Government, *Submission 192*, paragraphs [46]–[48]; Equality Australia, *Submission 31*, p. 26; Public Interest Advocacy Centre, *Submission 40*, pp. 8–9; Amnesty International, *Submission 157*, p. 22; Anja Hilkemeijer, *Submission 5* (quoting Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', 93, *Australian Law Journal* 2019, pp. 764–756; Liberty Victoria, *Submission 186*, pp. 4–5.

21 Australian Discrimination Law Experts Group, *Submission 33*, p. 13.

22 Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 8.

be correct. This goes to the balance and proportionality struck in this provision.<sup>23</sup>

4.21 A number of submitters recommended that the test used in other anti-discrimination legislation be used, namely to ensure it is not unlawful discrimination for religious bodies to do something 'that conforms to the doctrines, tenets or beliefs of that religion'.<sup>24</sup> The Public Affairs Commission of the Anglican Church of Australia agreed with this and also suggested that at least the test should be whether the conduct or belief is such that a substantial number of persons in senior positions or leadership roles or with authority to determine such matters in that same religion could reasonably consider it to be in accordance with the doctrines, tenets, beliefs or teachings of the religion. It also stated this 'would not require unanimity or even a majority view but to ensure that it is not just a bizarre misinterpretation of doctrine by a very small minority, possibly of two persons, within the religion'.<sup>25</sup>

### ***Avoid injury to religious susceptibilities***

4.22 Subclause 7(4) of the bill also provides that a person does not discriminate under this bill by engaging in good faith 'in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body'. A number of submitters noted that this differs from the exception in the *Sex Discrimination Act 1984*, which provides an exception for acts or practices of religious bodies that is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.<sup>26</sup> As such, a number of submitters recommended that subclause 7(4) (and associated clauses) be amended to include the word 'necessary'.<sup>27</sup>

### **Employment by religious bodies (clause 7, 9 and 10)**

4.23 In setting out when a religious body will not discriminate against a person under the bill, subclauses 7(3) and (5) explain that this includes giving preference to persons of the same religion as the religious body. This would apply to all religious bodies, as set out above, including educational institutions. Further, clause 9 provides that a religious hospital, aged care facility, accommodation provider or disability

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23 Law Council of Australia, *Submission 28*, p. 21.

24 See, *Sex Discrimination Act 1984*, paragraph 37(1)(d); *Age Discrimination Act 2004*, paragraph 35(a), and see for example, Law Council of Australia, *Submission 28*, p. 21 and 25; Equality Australia, *Submission 31*, p. 6; Children and Young People with disability Australia, *Submission 139*, pp. 4–5; Amnesty International, *Submission 157*, pp. 22–23; Planet Ally, *Submission 160*, p. 3; Uniting Church in Australia, answer to question on notice, 14 January 2022 (received 21 January 2022).

25 Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 8.

26 *Sex Discrimination Act 1984*, paragraph 37(1)(d).

27 See, for example, Public Interest Advocacy Centre, *Submission 40*, pp. 8; Australian Human Rights Commission, *Submission 97*, p. 43; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 8; Equality Australia, *Submission 31*, p. 6; Law Council of Australia, *Submission 28*, p. 25.

service provider does not discriminate in relation to employment if it does so on the basis set out above (e.g. where a person of the same religion could reasonably consider it to be in accordance with doctrines etc, or to avoid injury to religious susceptibilities), as well as in accordance with a publicly available policy. The issue of educational institutions is considered in detail in Chapter 5, as are views in relation to requirements for a publicly available policy setting out the body's views in relation to employment.

4.24 A number of submitters expressed their support for enabling religious bodies to discriminate on the basis of religion in employment related decisions, noting the importance of this in ensuring the body was able to maintain its religious ethos. The Australian Christian Churches stated:

In any jurisdiction that has a prohibition on religious discrimination, it is necessary to have provisions that address the employment rights of faith-based organisations. A prohibition on religious discrimination can never be comprehensive... Freedom of religion necessitates that faith-based organisations have a right to select staff who are not only adherents of that faith but support the doctrines and practices of the religious faith to which the organisation is committed. This is no different from any other organisation that has a mission or purpose.<sup>28</sup>

4.25 Freedom for Faith argued:

Just as a political party can “prefer” to employ members of that party in head office, or an environmental lobby group can “prefer” to employ those who share its commitments, so religious bodies should generally be able to “prefer” to employ staff of the same faith, or support causes which match its faith commitments. Inclusion of “preference” is an important principle which recognises that occasionally a religious body may need specialist skills which are not easily available in its faith community, and so in some circumstances may choose to employ someone not in that community. Doing so should not undermine its general policy of preference.<sup>29</sup>

4.26 Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, explained that the Church has a worldwide statement of fundamental beliefs relating to health, lifestyle and biblical principles and they seek to have people on staff who will choose to align themselves with those beliefs and teachings of the church, and as such it would be contrary to their beliefs to, for example, employ someone in a same-sex marriage or relationship.<sup>30</sup>

4.27 Archbishop Peter Comensoli, Chair, Bishops Commission for Life, Family and Public Engagement, Australian Catholic Bishops Conference explained why it is

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28 Australian Christian Churches, *Submission 63*, p. 4.

29 Freedom for Faith, *Submission 10*, p. 6.

30 Pastor Michael Worker, Seventh Day Adventist Church, *Hansard*, 13 January 2022, pp. 27–28.

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important to be able to employ people in accordance with the ethos of an organisation, from the Catholic point of view:

Whether it's within welfare services, health services, direct faith services or educational services, we approach that from the perspective of what our understanding of the human person is. That's informed by our beliefs, our teachings, our culture and our practices. In a sense, it's a proposal. We propose; we're not imposing. We propose and people can be a part of that, if they wish to, or not. So that sort of sense in which to develop an ethos that is something that people can understand and accept or not then becomes something that is available for them. An area which I just mentioned is some services that we provide which would be provided differently by other organisations in a similar sort of area. If people know that this is where we're coming from and this is our perspective and we carry with it a certain sense of the positivity of the human person, there's an openness to them understanding what they're involved in.<sup>31</sup>

4.28 The Right Reverend Doctor Michael Stead, Bishop of South Sydney, Anglican Church Diocese of Sydney stated:

We believe that the people who work in these organisations actually shape the ethos. It's not good enough just to have a statement of belief plastered on the wall; we actually have it embodied. We believe that Anglicare does what it tries to do, which is to love people in the name of Jesus. It does that by having people who believe in Jesus doing their work. It's very hard to do that with people who don't have a faith commitment as Christians. Now, lots of people who are not Christians and who are of very different religions work for Anglicare, but they understand that they're working for an organisation with a strong Christian ethos and they embrace that.<sup>32</sup>

4.29 In contrast the Uniting Church in Australia Assembly told the committee:

In our community service activity across the country, which is quite significant in size and scope, we are still able to keep the integrity of the organisation as a Christian faith based organisation without having to have that opportunity to employ people from a particular faith, because, in fact, as a Christian and Uniting Church community service activity, the diversity of our workforce is central to the work that we do in providing person centred care and providing for the needs of individuals. In fact, it's almost counterintuitive to that, in that we want the opportunity to be able to provide, as we've said, not only the best person for the job but a diversity of people and a workforce that reflects the community in which the service is being delivered ... We can still maintain the integrity of the organisation

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31 Archbishop Peter Andrew Comensoli, Australian Catholic Bishops Conference, *Committee Hansard*, 13 January 2022, pp. 18–19.

32 The Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 48.

as a faith based organisation without having to have that in our back pocket; we don't need that in order to do that.<sup>33</sup>

4.30 A number of other submitters raised concerns as to the effect of these provisions on the rights of workers. For example, the Australian Council of Trade Unions argued that '[t]hese provisions will mean that workers in religious organisations with differing religious beliefs to their employer will have little protection at work'. They submitted that the bill extends the 'right to discriminate... not just to giving priority to applicants of a certain faith in recruitment practices, but to any kind of discrimination in employment on religious grounds, including refusing an existing staff member a promotion or a pay-rise, or terminating their employment'. The Australian Council of Trade Unions were concerned that the bill gives 'significant power to religious employers to dictate via a policy document what a particular religious ethos or teaching must mean to individual workers'.<sup>34</sup>

4.31 In answers to questions taken on notice, the Australian Council of Trade Unions added that the 'exemptions are too broad and the protections and safeguards in the Bill are not sufficient to ensure that these exemptions will not be used to victimise workers who stand up for better rights at work'.<sup>35</sup>

4.32 Similarly, the Australian Medical Association raised concerns that 'these provisions may limit the education, training and career development opportunities for many doctors should they be discriminated against by religious hospitals and aged care facilities for not adhering to a particular faith'.<sup>36</sup>

4.33 Ms Lori-Anne Sharp, Acting Federal Secretary, Australian Nursing and Midwifery Federation, argued that this 'could potentially have a negative impact on recruiting and retaining a future carer workforce and nursing workforce'.<sup>37</sup>

4.34 The Centre for Women's Safety and Wellbeing stated that these provisions will overwhelmingly impact women, as health care and social assistance and education and training are female dominated industries, and will compound the current employment experiences of women.<sup>38</sup>

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33 Ms Sharon Hollis, Uniting Church in Australia Assembly, *Committee Hansard*, 14 January 2022, pp. 57–58.

34 Australian Council of Trade Unions, *Submission 64*, pp. 18–19.

35 Australian Council for Trade Unions, answer to question on notice, question 1 from Senator Rice, 14 January 2022 (received 21 January 2022). See also Australian Services Union, *Submission 101*, p. 6; Rainbodhi LGBTQIA+ Buddhist Community, *Submission 8*, p. 5.

36 Australian Medical Association, *Submission 96*, p. 3. See also ACON, *Submission 34*, p. 10; National Association of People with HIV Australia, *Submission 132*, p. 5.

37 Ms Lori-Anne Sharp, Australian Nursing and Midwifery Federation, *Committee Hansard*, 14 January 2022, p. 3.

38 Centre for Women's Safety and Wellbeing, *Submission 179*, p. 4. See also Australian Women's Health Network, *Submission 83*, p. 3.

4.35 The Buddhist Council of NSW raised concerns that these provisions would disadvantage people of Buddhist and other minority religious faiths, stating:

Our community members may be locked out of employment opportunities in education, hospitals, aged care, disability services and charities run by religious bodies, even when these are government contracts or publicly funded and even when there is no inherent religious aspect to this work.<sup>39</sup>

4.36 Other submitters raised particular concerns for those located in remote and rural communities where employment opportunities may be limited. For example, Rainbow Territory stated:

In remote communities in the NT, where there may only be one or two employers in a particular industry, and all are religiously affiliated, the Bill will significantly limit employment opportunities for LGBTQI community members, who may face unfair treatment in the workplace on the grounds of the employers' religious beliefs.<sup>40</sup>

4.37 The Law Council of Australia recognised the need for religious institutions to preserve their ethos, including by ensuring certain staff, such as chaplains, were of the same faith. However, they noted that clause 9 applies to all employments, including junior roles, and it 'may enable discrimination against hospital orderlies or occupational therapists, whose religious views are irrelevant to their effective performance in their role'.<sup>41</sup>

4.38 Further, the Australian Discrimination Law Experts Group argued that requiring doctors, aged care workers and employees at accommodation and disability service to be of the same faith as the religious organisation 'is an unwarranted limitation on freedom of speech, opinion and belief' and employment decisions should be based on merit'. They noted that as religious organisations receive government funding and are primarily conducted for commercial or service provision purposes, they should not enjoy special exceptions.<sup>42</sup>

4.39 The Australian Human Rights Commission argued that the existing exception in clause 39 of the bill (to allow for discrimination on the basis of religion if a person would otherwise not be able to meet the inherent requirements of the position) is sufficient, and there does not appear to be a principled reason to treat hospitals, aged care facilities or accommodation providers any differently to other employers.<sup>43</sup> Mr Graeme Edgerton, the Deputy General Counsel for the Australian Human Rights Commission stated that the bill provides religious bodies with the 'right to preference'

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39 Buddhist Council of NSW, *Submission 51*, pp. 2–3. See also Australian Sangha Association, *Submission 84*, p. 2.

40 Rainbow Territory, *Submission 193*, p. 1.

41 Law Council of Australia, *Submission 28*, p. 28.

42 Australian Discrimination Law Experts Group, *Submission 33*, p. 18.

43 Australian Human Rights Commission, *Submission 97*, p. 59.

as well as the 'right to discriminate once people are already employed', including in relation to the terms and conditions that can be imposed on an employee and termination of employment. He noted that the prohibition on religious discrimination 'should apply equally to religious organisations and to secular organisations once people are employed'.<sup>44</sup>

### **Access to services from religious bodies**

4.40 As clause 7 provides it will not be discrimination on the grounds of religion for religious bodies to act according to their faith, this would also apply to charities that provide services such as welfare, second-hand clothes, food, and child-care to the public. As such, these charities could legitimately differentiate between people on the grounds of their religion in the provision of their services. For further discussion about the bodies this provision applies to, see the discussion about the definition of 'religious bodies' above. It is noted that this would not apply to hospitals, aged care facilities, accommodation providers (such as those providing homelessness services) and disability service providers (see clause 8). Equality Australia queried the extent to which faith-based organisations providing mixed services can discriminate, given they may provide a mixture of accommodation, disability and other services. It also noted that the meaning of a 'hospital' is not clear, given the explanatory memorandum used the example of a medical centre, and not a hospital, to illustrate the exemption applicable to hospitals.<sup>45</sup>

4.41 The Australian Council of Social Service was particularly concerned about faith-based organisations being allowed to discriminate against people who may fairly and reasonably access certain services or seek employment:

People who access community services include those experiencing low income, poverty, disadvantage, marginalisation and other forms of hardship. The proposed exemptions for faith-based organisations may leave people stranded without adequate assistance, especially in regional, rural and remote communities where there are fewer providers in operation.<sup>46</sup>

4.42 A number of charitable service providers also raised concerns about the impact of the bill on people in accessing essential services. Sacred Heart Mission considered the bill 'will cause harm and distress to people who are already vulnerable within our society' and noted:

Faith-aligned institutions, such as ours have demonstrated that it is possible to uphold the religious faith on which our work is founded, providing

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44 Mr Graeme Edgerton, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, p. 28.

45 Equality Australia, *Submission 31*, pp. 26–27.

46 Australian Council of Social Service, *Submission 62*, p. 2.

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services to anyone who needs them, while at the same time respecting the diverse faith of our workforce, volunteers, clients and residents.<sup>47</sup>

4.43 The Uniting Church in Australia gave evidence that as a provider of education and community services across Australia 'we are concerned certain provisions within this Bill may act as a barrier to vulnerable people accessing essential services'.<sup>48</sup> Ms Claerwen Little, National Director, UnitingCare Australia, further elaborated as to their concern about the impact of the bill:

Most of our services are provided to people who are in the most vulnerable of circumstances and, if they believe that, because they're coming to a faith based organisation—and sometimes they have no choice about that, because that's the organisation in the community that they need to come to—then they may be fearful that they will be discriminated against when they get there, and that is really not okay, because that is not what happens in our services at the moment. So I think this opens up the sense that, if you're faith based, you are going to be discriminating, and I think that's a really deeply difficult and dangerous place to be.<sup>49</sup>

4.44 Women with Disabilities Australia noted that women and girls with disability already face a multitude of barriers to accessing services, and noted that there are few domestic and family violence services that are equipped to support individuals with disability, and in many cases the only support available may be from religious charities.

If charities providing essential services like these are able to deny support to individuals based on religious belief, this would only further limit the already sparse supports available to women with disability; a situation which is even worse for women with disability who are First Nations, LGBTIQ+, from CaLD backgrounds and from rural, regional and remote communities.<sup>50</sup>

4.45 The Youth Affairs Council of Western Australia raised concerns as to the impact of this on LGBTIQ+ people:

For LGBTIQ+ young people of faith, there is a risk that as a result of this Bill that they will be unable to access services or other institutions that are in accordance with their faith if those services are openly hostile towards LGBTIQ+ people. Many LGBTIQ+ community members are also people of faith, with one study estimating this to be almost 30% of all young LGBTIQ+ people.<sup>51</sup>

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47 Sacred Heart Mission, *Submission 58*, p. 1.

48 Uniting Church in Australia, Opening Statement, *Committee Hansard*, 14 January 2022, p. 52.

49 Ms Claerwen Little, UnitingCare Australia, *Committee Hansard*, 14 January 2022, p. 55.

50 Women with Disabilities Australia, *Submission 100*, p. 5.

51 Youth Affairs Council of Western Australia, *Submission 155*, p. 13. See also LGBTIQ+ Health Australia, *Submission 155*.

4.46 The ACT Government also noted its concern that:

communities, particularly LGBTQIA+ and HIV positive communities who may need to disclose their identities in order to receive appropriate services, will self-select out of seeking services from religious bodies which appear to have greater and more ambiguous powers to discriminate.<sup>52</sup>

4.47 The Australian Human Rights Commission noted that while it is reasonable for religious bodies to exclude those who are not of their faith when this is necessary for the practice of their religion:

it is less defensible to permit organisations participating in the general economy or in the provision of goods and services to the public at large to exclude others based on their faith (or lack of faith). This is particularly so where the organisations are recipients of public funding. The Religious Freedom Review did 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 Australian's rights to freedom of religion under international law.<sup>53</sup>

4.48 However, Mr Peter Wertheim, Co-Chief Executive Officer, the Executive Council of Australian Jewry, explained that while most organisations that provide services, like soup kitchens, open them to everybody, there may be small organisations that have a particular need and want to look after their own members. Mr Wertheim stated:

It's not directed specifically against your community or any other community; it's something that we have set up to look after our community. There's a difference between that negative discrimination which is directed specifically at Jews because they're Jews or at Muslims because they're Muslims and something that says, 'Look, we've set up a youth camp for Anglican kids, and it's only for Anglican kids because we want them to have that religious experience.' It's not directed against anyone in particular. I think there's a big difference there.<sup>54</sup>

4.49 Mrs Wendy Francis, National Director, Politics, Australian Christian Lobby, also agreed that giving preference to persons of the same religion as the religious body was an important part of this legislation, and it would be acceptable to have a soup kitchen of one faith turning away members of another faith, as 'the law needs to be a broad enough law to be able to say that you are able to have people of your own ethos come in'.<sup>55</sup>

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52 ACT Government, *Submission 192*, paragraph [45].

53 Australian Human Rights Commission, *Submission 97*, p. 37.

54 Mr Peter Wertheim, Executive Council of Australian Jewry, *Committee Hansard*, 21 December 2021, p. 56.

55 Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 25.

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**Reasonable conduct intended to meet a need or reduce a disadvantage**

4.50 Clause 10 of the bill also provides that it is not discrimination for anyone to engage in conduct that is reasonable in the circumstances and intended to meet a need arising out of a religious belief or activity or to reduce a disadvantage experienced because of a person's religious beliefs or activities. The explanatory memorandum states that this recognises the concept of legitimate differential treatment.<sup>56</sup>

4.51 The Australian Human Rights Commission agreed with this, noting:

This provision is based on an understanding of the need for substantive, rather than merely formal, equality. It recognises that there is not currently a level playing field for everyone in society. Some people face individual disadvantage as a result of attributes that are personal and intrinsic to them, and some groups face structural barriers to equal participation in public life. Discrimination legislation needs to address both the prevention of negative conduct that causes disadvantage, and the facilitation of positive conduct that is directed towards achieving equality.<sup>57</sup>

4.52 The Commission noted that this provision would allow religious service providers to meet the legitimate needs of members of respective religious groups, and that this important targeted provision that is focused on the needs of individuals should be carefully considered when assessing whether the breadth of clause 7 is necessary.<sup>58</sup>

4.53 Mr Wertheim, Executive Council of Australian Jewry, noted the importance of clause 10, saying:

In the Jewish community, such bodies have been operating with a high reputation for decades, in one case for more than a century, meeting religious and cultural needs within our community which would otherwise not be met, including the supply of kosher food, participation in Jewish community events and observance of Jewish festivals. One should not underestimate the importance of catering to religious and cultural needs in meeting the overall care needs of members of our community who use the services of these bodies.<sup>59</sup>

4.54 However, the Law Council of Australia noted that clause 10 does not seek to ensure that persons with religious belief or who engage in religious activities have equality of opportunity with other persons, and so departs from the usual approach

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56 Religious Discrimination Bill 2021, explanatory memorandum p. 50.

57 Australian Human Rights Commission, *Submission 97*, p. 39.

58 Australian Human Rights Commission, *Submission 97*, p. 39.

59 Mr Peter Wertheim, Executive Council of Australian Jewry, *Committee Hansard*, 21 December 2021, p. 52.

taken in anti-discrimination legislation.<sup>60</sup> It stated that clause 10 is objectionable because it has the effect of requiring that the conduct be reasonable to meet the need or reduce the disadvantage, but does not require that the conduct be reasonable to achieve equality.<sup>61</sup> The Kingsford Legal Centre similarly stated that clause 10 is not proportionate and overly broad: 'and risks providing cover for those who argue that they have a "need" to discriminate against others and are "disadvantaged" by an inability to do this'.<sup>62</sup>

4.55 The Attorney-General's Department, however, were of the view that the reasonableness requirement in clause 10 would act as a 'safeguard to ensure this provision is not used to, for example, justify measures that would unreasonably disadvantage other persons'.<sup>63</sup> They stated that:

The requirement that conduct be reasonable in the circumstances is necessary because the nature of the protected attribute, religious belief or activity, cannot be precisely described (noting that it is not defined in the Bill) which means that the protected attribute is one which can affect areas of a person's life in ways that are likely to vary depending on the particular religious beliefs of the person. For example, strict dietary requirements may be necessary under one religion, but not under another.<sup>64</sup>

4.56 The Attorney-General's Department considered that 'determining reasonableness may include examining whether there was any disadvantage to other persons resulting from the conduct'.<sup>65</sup>

### **Amendments to Charities Act regarding views on marriage**

4.57 The Human Rights Legislation Amendment Bill 2021 seeks to amend the *Charities Act 2013* (Charities Act) to clarify that an entity that encourages or promotes the view of marriage as a union of a man and woman to the exclusion of all others, is presumed to be undertaking those activities for the public benefit and not contrary to public policy.<sup>66</sup> The statement of compatibility states that individuals and organisations should generally be able to present and promote their beliefs, including religious charities being able to manifest their faith publicly, lawfully and without

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60 See *Disability Discrimination Act 1992*, section 45 and *Sex Discrimination Act 1984*, section 7D.

61 Law Council of Australia, *Submission 28*, p. 29.

62 Kingsford Legal Centre, *Submission 110*, p. 8. See also Liberty Victoria, *Submission 186*, p. 7.

63 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

64 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

65 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

66 Human Rights Legislation Amendment Bill 2021, Schedule 1, item 3.

threat to their charitable status.<sup>67</sup> The explanatory memorandum states that this is not intended to do anything other than codify the policy position under the Charities Act and seek to avoid any doubt that such activities, done so lawfully, is not a disqualifying purpose.<sup>68</sup>

4.58 A number of submitters explicitly supported this amendment.<sup>69</sup> For example, Freedom for Faith submitted:

It seems a very good idea for Parliament to recognise that this traditional belief is one that can be held by sincere believers who also engage in active charitable activity.<sup>70</sup>

4.59 The Australian Association of Christian Schools considered the gaps within the Charities Act that the amendment would fill:

It is important to note that the proposed amendment is not limited to charities registered with a purpose of 'advancing religion' but extends to entities with other charitable purposes, including schools with the purpose of 'advancing education'. It will thus protect religious schools from the loss of their charitable status and is welcomed by AACS for that reason.<sup>71</sup>

4.60 However, other submitters raised concerns about this amendment,<sup>72</sup> including that the amendment is unnecessary. The Australian Human Rights Commission noted previous advice from the Commissioner of Taxation and the Acting Commissioner of the Australian Charities and Not-for-Profit Commission that the amendments were not necessary to protect the status of religious charities. It also noted that it has been four years since same-sex marriage became lawful 'and the Commission is not aware of any suggestion that a charity has been at risk of losing its charitable status as a result of advocating for a "traditional" view of marriage'.<sup>73</sup>

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67 Human Rights Legislation Amendment Bill 2021, statement of compatibility, p. 8.

68 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 16.

69 Freedom for Faith, *Submission 10*, p. 13; Australian Association of Christian Schools, *Submission 23*, p. 23; Christian Schools Australia and Adventist Schools Australia, *Submission 24*, p. 13; Australian Christian Churches, *Submission 63*, p. 8; Associated Christian Schools, *Submission 74*, p. 3.

70 Freedom for Faith, *Submission 10*, p. 13.

71 Australian Association of Christian Schools, *Submission 23*, p. 23.

72 See e.g., Equality Australia, *Submission 31*, p. 7; Equal Voices, *Submission 32*, p. 9; Australian Discrimination Law Experts Group, *Submission 33*, p. 20; ACON, *Submission 34*, p. 11; Tasmanian Council of Social Services, *Submission 36*, p. 2; Public Interest Advocacy Centre, *Submission 40*, p. 27; Professor Tiffany Jones, *Submission 44*, p. 9; Family Planning NSW, *Submission 88*, p. 7; Dr Sean Mulcahy, *Submission 126*, p. 2; Children and Young People with Disability Australia, *Submission 139*, p. 7; Amnesty International, *Submission 157*, p. 7; NSW Council for Civil Liberties, *Submission 181*, p. 13; Rainbow Families, *Submission 182*, p. 6; Human Rights Law Centre, *Submission 190*, p. 20; Legal Aid Queensland, *Submission 92*, p. 9.

73 Australian Human Rights Commission, *Submission 97*, p. 73.

However, the Seventh-day Adventist Church in Australia noted that while (unsuccessful) challenges to public benefit and similar issues have been made to faith-based organisations in New Zealand, 'it seems a very good idea for Parliament to recognise that this traditional belief is one that can be held by sincere believers who also engage in active charitable activity'.<sup>74</sup>

4.61 Other criticisms related to the language of the proposed amendment. The Public Interest Advocacy Centre submitted:

It is inappropriate to single out one particular perspective about one particular social issue. No equivalent protection of pro-marriage equality charities was considered before 2017. Nor does the Bill propose equivalent protections for contrary views.<sup>75</sup>

4.62 Rainbow Families submitted:

Rainbow Families also queries how this definition of 'traditional marriage' was reached. We see two people having a ceremony to express their love and enter into a legal union, forsaking all others, as a traditional display. Which religious texts were consulted to conclude that traditional marriage is a voluntary union between a man and a woman, considering the history of gender imbalance in marriage, dowries and intent behind marriage?<sup>76</sup>

## **International human rights law**

### ***Rights to freedom of religion or belief, freedom of expression, equality and non-discrimination, work, private and family life***

4.63 Insofar as Part 2 of the bill characterises certain conduct by religious bodies as not constituting discrimination, it would have the effect of affording greater protection to religious bodies to act in accordance with their faith. This would allow, for example, religious hospitals, aged care facilities, accommodation providers and disability service providers to preference persons of the same religion as the religious body in employment decisions.

4.64 As noted in Chapter 2 of this report, by affording greater protection to religious bodies to manifest their religion, this measure would promote the rights to freedom of religion and freedom of expression. The right to freedom of religion includes the freedom to manifest one's religion or belief in worship, observance, practice and teaching.<sup>77</sup> The terms 'observance' and 'practice' do not contain 'any spatial or institutional specificities and must be broadly applied', including in the

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74 Seventh-day Adventist Church in Australia, *Submission 82*, p. 6.

75 Public Interest Advocacy Centre, *Submission 40*, p. 27.

76 Rainbow Families, *Submission 182*, p. 6.

77 International Covenant on Civil and Political Rights, article 18(1).

workplace.<sup>78</sup> International human rights law recognises the importance of protecting religious groups for the realisation of the individual right to freedom of religion.<sup>79</sup>

4.65 The UN General Assembly has observed that the right to freedom to manifest religion 'includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life'.<sup>80</sup> The right to freedom to manifest religion, including in the workplace, intersects with, and has a mutually reinforcing relationship with, the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds.<sup>81</sup>

4.66 However, by allowing religious bodies to treat persons differentially on the basis of their religious belief or activity (including by preferencing persons in employment decisions and restricting access to charitable services on the basis of religion), this measure also necessarily engages and limits the rights to freedom of religion or belief, freedom of expression, equality and non-discrimination, work and private and family life for others. As observed by the UN Special Rapporteur:

Religious discrimination does not only take place when an individual's right to manifest their religion or belief freely is restricted or interfered with by the State or non-State actors. It can also take place when an individual's enjoyment of other fundamental rights — for example the right to health, education, expression — is restricted or interfered with by State or non-

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78 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [31].

79 See, e.g., *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014). At [127] the Court stated: '[w]here the organisation of the religious community is in issue, Article 9 [freedom of thought, conscience and religion] of the [European Convention on Human Rights] must be interpreted in the light of Article 11 [freedom of assembly and association], which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'.

80 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

81 International Covenant on Civil and Political Rights, article 19. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

State actors in the name of religion, or on the basis of a person's religion or belief.<sup>82</sup>

4.67 Discrimination involves any distinction, exclusion, restriction or preference which is based on a protected attribute (such as religion or belief) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (such as the right to work). The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>83</sup>

4.68 This measure not only permits differential treatment on the basis of religion or belief, but it may also have the effect of allowing indirect discrimination against persons on the basis of other protected attributes, such as gender and sexuality. Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>84</sup> In the context of this measure, indirect discrimination may occur, for example, if a religious body were to refuse to hire a woman who was divorced or dismisses a female employee who gets divorced while employed on the ground that engaging in such conduct is in accordance with the body's religion and/or to avoid injury to the religious susceptibilities of adherents of the same religion as the body (assuming that such conduct is also in accordance with any other legislative requirements).

4.69 While it is acknowledged that the bill itself does not explicitly permit differential treatment on the basis of protected attributes other than religion and the bill conceptually characterises such conduct as 'not discrimination', as a matter of international human rights law, such conduct would likely constitute direct discrimination on the basis of religion or belief and possibly indirect discrimination on the basis of other protected attributes such as gender and marital status.<sup>85</sup> However,

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82 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33], [37].

83 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

84 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

85 Under the Convention on the Elimination of All Forms of Discrimination Against Women, article 11(2) provides that: 'In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'.

international human rights law also recognises that differential treatment on the basis of a protected attribute, such as religion, gender or sexuality, will not constitute *unlawful* discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>86</sup>

4.70 The statement of compatibility acknowledges that conduct permitted under Part 2 of the bill could limit a person's right to equality and non-discrimination by preventing a person accessing the services and education or employment opportunities from a religious body on the basis of their religious belief or activity.<sup>87</sup> Regarding clause 10 (see paragraph [4.50]), the statement of compatibility states that it could limit a person's right to equality and non-discrimination by permitting the beneficial treatment of persons of certain religious belief, while not providing such treatment to persons of other religious belief.<sup>88</sup> While noting that the bill does not permit discrimination on the basis of a protected attribute such as sexuality, the Attorney-General's Department did acknowledge that issues of sexuality may still be relevant to religion, submitting that a religious body would be allowed to consider a person's religious beliefs about issues such as sexuality (irrespective of the person's own sexuality) where they could show that this was part of the doctrines, tenets, beliefs or teachings of their religion.<sup>89</sup>

4.71 In practice, this would likely have a disproportionate impact on LGBTIQ+ persons, noting that international human rights law jurisprudence has emphasised the 'need for particularly convincing and weighty reasons to justify a difference in

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86 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

87 Religious Discrimination Bill 2021, statement of compatibility, pp. 10–12.

88 Religious Discrimination Bill 2021, statement of compatibility, pp. 14–15.

89 Attorney-General's Department, *Submission 191*, p. 8.

treatment' on the grounds of sex and sexual orientation.<sup>90</sup> It is noted that the bill itself states that conduct that is not discrimination under this bill may still constitute direct or indirect discrimination under other anti-discrimination laws.<sup>91</sup> However, as noted in Chapter 2 (at paragraph [2.50]) in assessing the permissibility under international human rights law of possible indirect discrimination under this bill, it is not relevant whether such differential treatment may be lawful or unlawful under other federal anti-discrimination laws.

4.72 In addition, the rights to work, privacy and family life may be limited by the measure to the extent that it would deprive persons of certain religious belief of employment opportunities and permit arbitrary interference with a person's private and family life. The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work.<sup>92</sup> Relevantly, the right must be made available in a non-discriminatory manner. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home life, regardless of whether such interferences emanate from State authorities or from natural or legal persons.<sup>93</sup> A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

#### *Limitation criteria*

4.73 The above rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

4.74 This general test is further qualified by specific requirements that apply to the rights to freedom of religion and freedom of expression. The freedom to manifest one's religion or beliefs may be limited so long as such limitations are prescribed by

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90 *EB v France*, European Court of Human Rights, Grand Chamber, Application No 43536/02 (2008) [91]. See also *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35]; [Bull & Anor v Hall & Anor](#) [2013] UKSC 73 (27 November 2013) [52]–[53]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [39]–[40].

91 See, e.g., Religious Discrimination Bill 2021, subclause 7(2), note 2.

92 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

93 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4]. See also Anja Hilkmeyer, *Submission 5*, p. 2; and Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

law and are necessary to protect public safety,<sup>94</sup> order, health or morals,<sup>95</sup> or the fundamental rights and freedoms of others. The right to freedom of expression may also be subject to limitations that are necessary to protect the rights or reputations of others,<sup>96</sup> national security, public order, or public health or morals.<sup>97</sup> Additionally, limitations on the rights to freedom of religion and expression must be rationally connected to the stated objective, and proportionate and non-discriminatory. The necessity of the measure is also relevant in assessing the permissibility of a restriction on the rights to freedom of religion and freedom of expression.<sup>98</sup> The limitation clause in relation to the rights to freedom of religion and freedom of expression is to be strictly interpreted. The UN Human Rights Committee has stated that:

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- 94 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.7].
- 95 The UN Human Rights Committee has stated 'that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. See *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8].
- 96 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].
- 97 In considering the scope of permissible restrictions on the right to freedom of expression in the context of the right to freedom of religion, the UN Human Rights Committee has observed that it would be impermissible for 'laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers'. It would also be impermissible for laws to prohibit displays of lack of respect for a religion or other belief system, including blasphemy laws, and for such 'prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith'. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [48].
- 98 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5] where the Committee stated that it needed to "assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory". See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36]. Likewise, the Special Rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [17]. See also Associate Professor Mark Fowler, *Submission 20*.

Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.<sup>99</sup>

4.75 Further, where the manifestation of religion or the expression of a religious opinion or belief limits the rights or freedoms of others, each right must be balanced against each other.<sup>100</sup> This is because manifestations of religion or belief 'must comply with the duty to respect the fundamental rights and freedoms of others and may be subject to limitations on those grounds'.<sup>101</sup> The UN Special Rapporteur has noted that:

there is no hierarchy of human rights and where freedom of religion clashes with the right to non-discrimination and equality, or laws of general effect, the focus should be on ensuring that all human rights are protected, including through reasonable accommodation.<sup>102</sup>

4.76 In the context of this measure, the competing rights in question are the rights of religious bodies (and their adherents) to manifest their religion and the rights of others, including the right to manifest religion or express a belief contrary to that of the religious body; the right to work and access employment opportunities in a non-discriminatory manner; the right to equality and non-discrimination; and the rights to a private and family life. In resolving conflicts between competing limitable human rights, the United Kingdom courts and the European Court of Human Rights have undertaken a balancing exercise – often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.<sup>103</sup>

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99 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [31], [44], [45].

100 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8]; United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8].

101 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [16].

102 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [81].

103 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. In addressing the conflict between the rights to freedom of religion and equality and non-discrimination, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'. See also Anja Hilkemeijer, *Submission 5*, p. 2 and Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

4.77 The specific circumstances of the case, the competing rights in question and the vulnerability of the persons involved are relevant considerations in undertaking this balancing exercise.<sup>104</sup> Regarding the latter, the UN Special Rapporteur has emphasised that where vulnerable groups are involved, 'religious liberty' can never be used to justify violations of their rights.<sup>105</sup> They noted that:

the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.<sup>106</sup>

4.78 While international human rights law recognises that religious institutions 'constitute a special category, as their *raison d'être* is, from the outset, a religious one', the circumstances of the specific case are still relevant in assessing whether the conduct of religious institutions constitutes a permissible limitation on the rights of others.<sup>107</sup> The UN Special Rapporteur has stated:

The autonomy of religious institutions...undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a broader margin of discretion when imposing religious norms of

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104 See, e.g., [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, Asma Jahangir, E/CN.4/2006/5 (2006) [51]–[52].

105 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [42].

106 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'.

107 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

behaviour at the workplace, much depends on the details of each specific case.<sup>108</sup>

### *Prescribed by law*

4.79 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.<sup>109</sup> In the context of limitations on the right to freedom of religion, the European Court of Human Rights has stated that:

The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, referring to the quality of the law in question, it requires that it be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law...The phrase thus implies, inter alia, that the terms of domestic law must be sufficiently clear to enable individuals to foresee the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention.<sup>110</sup>

4.80 While the measure clearly has basis in domestic law, namely the religious discrimination legislative package, there may be questions as to whether the quality of law test is met. As currently drafted, the rights of others may be limited in the following circumstances:

- a religious body engages, 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 (the 'reasonableness test');
- a religious body engages, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body (the 'religious susceptibilities' test); and

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108 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

109 *Pinkney v Canada*, United Nations (UN) Human Rights Communication No.27/1977 (1981) [34].

110 *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [78]. See also *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64], where the Court stated that to meet the quality of law test, the law must be 'accessible to the persons concerned and formulated with sufficient precision to enable them...to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct'.

- a person engages in conduct that is reasonable in the circumstances; and is consistent with the purposes of the bill; and either is intended to meet a need arising out of a religious belief or activity of a person or group of persons, or is intended to reduce a disadvantage experienced by a person or group of persons on the basis of their religious beliefs or activities (the 'need or disadvantage' test).<sup>111</sup>

4.81 In relation to conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability service providers, the conduct must also be in accordance with a publicly available policy; and comply with any requirements determined by the minister.<sup>112</sup>

4.82 In assessing whether the measure meets the quality of law test, it is necessary to consider the scope and clarity of the threshold tests contained in the relevant provisions – the reasonableness test, the religious susceptibilities test and the need or disadvantage test. The explanatory memorandum states that the reasonableness test (in subclauses 7(2), 9(3) and 40(2)) is an objective test that asks whether persons of the same religion or relevant religious denomination as the religious body would reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of the particular religion.<sup>113</sup> The test is framed so as to avoid courts determining whether the conduct is in accordance with the religion, although courts may have regard to any foundational documents that a religious body considers supports the conduct under consideration.<sup>114</sup> The explanatory memorandum notes that it is intended that conduct be of an intrinsically religious character or be fundamental to the practice of religion, as well as including other conduct engaged in by a religious body in good faith in accordance with the doctrines, tenets, beliefs or teachings of that religion.<sup>115</sup> A number of submitters have raised concern with the breadth of this test, see discussion above at paragraphs [4.18] to [4.21].

4.83 The explanatory memorandum does not provide any information on the meaning of 'religious susceptibilities' or the kind of conduct that would meet the test of avoiding injury to the religious susceptibilities of adherents. It is also not clear what level of injury would need to occur in order for conduct to meet this test. Jurisprudence from the European Court of Human Rights may be helpful in this regard. In considering the competing rights of freedom of religion (of a religious institution) and freedom of association (of individual members of the religious institution), the European Court of Human Rights observed that, in order to justify interference with individual rights,

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111 Religious Discrimination Bill 2021, clause 10.

112 Religious Discrimination Bill 2021, subclauses 9(3) and (5).

113 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

114 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

115 Religious Discrimination Bill 2021, explanatory memorandum, pp. 44–45.

there must be a real and substantial risk that the rights of others may threaten the autonomy of the religious institution. It stated:

a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.<sup>116</sup>

4.84 The religious susceptibilities test does not import any requirement that there be a real and substantial risk to the autonomy of the religious body in order to justify the body interfering with, and limiting, the rights of others. Rather, the test is formulated at a much lower threshold, only requiring conduct to be engaged in good faith to avoid injury to religious susceptibilities of adherents. Given that there may be vast diversity in the views and susceptibilities of adherents, it may be difficult for individuals to foresee under what circumstances the religious susceptibilities of any adherent may be injured or likely to be injured. In their analysis of a similarly worded test in the *Sex Discrimination Act 1984*, Anja Hilkemeijer and Amy Maguire stated that the test of avoiding injury to religious susceptibilities is an 'imprecise test' and likely 'falls short of the "legality" requirement of international human rights law'.<sup>117</sup> As noted above at paragraph [4.22], a number of groups also noted that unlike the test in the *Sex Discrimination Act 1984*, the test under this bill omits that conduct be 'necessary' to avoid injury to religious susceptibilities of adherents.

4.85 The need or disadvantage test under clause 10 also imports a reasonableness requirement. The explanatory memorandum states that whether conduct is reasonable requires consideration of whether it is necessary to meet the identified need. It explains that this reasonableness requirement is intended to act as a safeguard to ensure the provision is not abused to justify otherwise discriminatory conduct where it is not reasonable, or where there is no relevant need.<sup>118</sup> The conduct must also be consistent with the objects of the bill, set out in clause 3, including the indivisibility and universality of human rights, their equal status in international law,

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116 *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013) [159].

117 Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, p. 757. See generally Ms Anja Hilkemeijer, *Submission* 5.

118 Religious Discrimination Bill 2021, explanatory memorandum, pp. 50–51.

and the principle that every person is free and equal in dignity and rights.<sup>119</sup> Regarding the test in clause 10, the Attorney-General's Department stated that:

The requirement that conduct be reasonable in the circumstances is necessary because the nature of the protected attribute, religious belief or activity, cannot be precisely described (noting that it is not defined in the Bill) which means that the protected attribute is one which can affect areas of a person's life in ways that are likely to vary depending on the particular religious beliefs of the person. For example, strict dietary requirements may be necessary under one religion, but not under another. A reasonableness requirement also acts as a safeguard to ensure this provision is not used to, for example, justify measures that would unreasonably disadvantage other persons.<sup>120</sup>

4.86 Noting that clause 10 does not contain any guidance as to the matters to be considered in assessing reasonableness, the Attorney-General's Department stated that 'a number of considerations would be relevant', including 'whether there was any disadvantage to other persons resulting from the conduct'.<sup>121</sup> Some submitters have, again, raised concerns regarding the breadth of this test, as set out above at paragraph [4.54].

4.87 Noting that the circumstances in which an individual's rights may be limited by the measure are drafted in broad and imprecise terms, there are questions as to whether the measure meets the quality of law test. It is not clear that the measure is drafted in such a way as to be sufficiently clear to enable individuals to foresee the circumstances in which a religious body may limit their rights. While the requirement for conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers to be in accordance with a publicly available policy may assist in clarifying the circumstances in which the rights of individuals may be limited, without knowing the content of such policies, it is difficult to assess the extent to which this requirement may assist in narrowing the scope of the measure. The breadth of the measure is also relevant to questions of proportionality (as discussed below).

*Legitimate objective and rational connection*

4.88 The statement of compatibility states that the overall objective pursued by the bill is to promote the rights to freedom of religion and equality and non-discrimination (on the ground of religion) by prohibiting discrimination on the

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119 Religious Discrimination Bill 2021, explanatory memorandum, pp. 51–52.

120 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

121 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

basis of religious belief or activity in specified areas of public life, including work, education and in the provision of goods, services and facilities.<sup>122</sup>

4.89 Regarding the objective pursued by Part 2 of the bill, the statement of compatibility states that the measure seeks to enable religious bodies to conduct themselves in accordance with their religion, which also promotes an individual's rights to manifest religion in community with others and freedom of association.<sup>123</sup>

4.90 Regarding clause 10, the statement of compatibility states that the objective of this provision is to allow affirmative and beneficial measures to be taken to meet the genuine needs of individuals and groups based on their religious beliefs and activities, and in doing so, remove barriers to equality and conditions that may perpetuate discrimination based on those beliefs or activities.<sup>124</sup>

4.91 The statement of compatibility states that the provisions in Part 2 appropriately balance the right to freedom of religion with other rights and seek to protect certain conduct engaged in for legitimate and inherently religious purposes, which would otherwise be adversely impacted by the prohibition of discrimination.<sup>125</sup> The statement of compatibility notes that without these provisions, the bill could restrict or interfere with the observance or practice of particular religions or the ability for religious bodies to conduct their affairs in accordance with their religious beliefs.<sup>126</sup>

4.92 International human rights law has recognised protection of religious institutional autonomy – an aspect of the right to freedom of religion – as a legitimate objective.<sup>127</sup> Thus, insofar as the provisions in Part 2 of the bill seek to protect the right of religious bodies to act in accordance with their faith, the measure appears to pursue a legitimate objective.

4.93 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved.

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122 Religious Discrimination Bill 2021, statement of compatibility, p. 8.

123 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

124 Religious Discrimination Bill 2021, statement of compatibility, p. 15.

125 Religious Discrimination Bill 2021, statement of compatibility, pp. 8 and 14. See also Attorney-General's Department, *Submission 191*, p. 8.

126 Religious Discrimination Bill 2021, statement of compatibility, p. 10.

127 See, eg, *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [86]; *Siebenhaar v Germany*, European Court of Human Rights, Grand Chamber, Application No 18136/02 (2011) [41]; *Obst v Germany*, European Court of Human Rights, Application No 425/03 (2010) [44]; *Hasan and Chaush v Bulgaria*, European Court of Human Rights, Grand Chamber, Application No 30985/96 (2000) [62]. See also Anja Hilkemeijer, *Submission 5*, quoting Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, p. 756; Associate Professor Mark Fowler, *Submission 20*, p. 34–36.

The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this regard, the statement of compatibility states:

The provisions have been carefully balanced to ensure they only exempt conduct engaged in in good faith by inherently religious bodies, which relates to the fundamental tenets underpinning the religious body and is necessary for that body to continue to act in accordance with their religious beliefs and to maintain their religious ethos. This ensures that there is a rational connection between the limitation and the objective, and that the measure will be effective at targeting and achieving the objective.<sup>128</sup>

4.94 In general terms, affording greater protection to religious bodies to act in accordance with their faith would likely be effective to achieve the stated objective of protecting the institutional autonomy of religious organisations and their right to manifest religion.<sup>129</sup>

#### *Proportionality*

4.95 In assessing proportionality, some matters that are necessary to consider include:

- whether the proposed limitation is sufficiently circumscribed;
- whether the measure is flexible enough to treat different cases differently;
- whether any less rights restrictive alternatives could achieve the same stated objective;
- the degree to which an appropriate balance has been struck between competing limitable rights; and
- whether the measure is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review.

4.96 As discussed above (at paragraphs [4.79]–[4.87]), there are some concerns that the measure is drafted in broad terms and the threshold tests to determine whether conduct by a religious body is not discrimination may not be sufficiently clear as to enable individuals to foresee the circumstances in which their rights may be limited by conduct engaged in by religious bodies. The breadth of the measure raises questions as to whether the proposed limitation is sufficiently circumscribed.

4.97 A related consideration is the flexibility of the measure. As currently drafted, the measure imposes a blanket approach, specifying conduct that is not discrimination, without regard to the merits of individual cases. Importantly, the measure does not allow for an assessment, on a case-by-case basis, of whether the

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128 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

129 Although, some submitters have raised concerns that the measure may not be rationally connected to the objects of the bill itself, namely, to prohibit religious discrimination, because Part 2 of the bill permits discrimination in the name of religion, see Australian Discrimination Law Experts Group, *Submission 33*, p. 14; Law Council of Australia, *Submission 28*, pp. 23–26.

differential treatment of individuals based on their religion or other belief is based on reasonable and objective criteria or, where other rights are limited, whether the proposed limitation is reasonable, necessary and proportionate, having regard to the specific circumstances of the case.<sup>130</sup>

4.98 Without flexibility to treat different cases differently, it is difficult in practice to assess whether the limitation of rights in each individual case would satisfy the limitation test under international human rights law. There may be circumstances, for instance, where a religious body acts in accordance with their faith and, for the purposes of this bill, the conduct is *not* discrimination, however under international human rights law, that same conduct may constitute unlawful discrimination. This lack of flexibility also makes it difficult to ensure that the least rights restrictive approach is taken to achieve the stated objective of protecting religious institutional authority, noting that where a religious body interferes with the rights of others, such interference should be based on a 'real and substantial' risk to institutional autonomy and should 'not go beyond what is necessary to eliminate that risk'.<sup>131</sup> On this point, the Australian Human Rights Commission submitted that it considers 'clause 7 as currently drafted would limit human rights more than is necessary to achieve a legitimate purpose'.<sup>132</sup>

4.99 Further, the flexibility to have regard to the individual circumstances of the case is particularly important in circumstances where competing rights must be balanced, as it is necessary in the context of this measure. Noting that affording greater protection to the right to freedom of religion may have the effect of limiting other human rights and vice versa, the degree to which an appropriate balance has been struck between competing limitable rights is a key factor in assessing proportionality.

4.100 As noted, the specific circumstances of the case, the competing rights in question and the vulnerability of the persons involved, are relevant considerations in

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130 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

131 *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013) [159]. See also *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.8] regarding the need to take the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.

132 Australian Human Rights Commission, *Submission 97*, p. 40.

undertaking this balancing exercise.<sup>133</sup> For example, in cases involving the competing rights of a religious institution and the rights of individual members or employees of that institution, relevant circumstances that have been considered by the European Court of Human Rights in balancing these rights include the nature of the employment, including the 'degree of loyalty' owed by the individual employee to the religious employer; the incompatibility of the religious beliefs of the employee and religious employer; the risk or threat to the institutional autonomy of the religious organisation; the degree of harm caused to the individual; and the possibility of finding other work (where the individual was dismissed).<sup>134</sup> Regarding the latter, Anja Hilkmeyer and Amy Maguire summarised the case law as follows:

even in relation to those employees with a heightened duty of loyalty to the religious organisation (eg teachers of religion) who may be dismissed because of a breach of the religious organisation's moral precepts, the ECtHR, in considering the reasonableness of the dismissal, takes into account, among other factors, the likelihood of that complainant finding alternative employment. This particularised approach to the possibility of finding alternative employment was evident in the case of *Schüth* where difficulties for a church organist in finding suitable employment outside of the church were key to the Court's finding that his dismissal by the church on the ground of adultery was unjustifiable. In contrast, in the case of *Travas*, the fact that a teacher of Catholicism could find other work because

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133 See, e.g., [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, Asma Jahangir, E/CN.4/2006/5 (2006) [51]–[52]. Regarding the wider margin of appreciation afforded to religious institutions, see UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

134 See, e.g., *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013); *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014); *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017); *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010). Regarding international human rights jurisprudence on this issue see, e.g., Associate Professor Mark Fowler, *Submission 20*, pp. 34–36; Anja Hilkmeyer, *Submission 5*, quoting Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

he was also qualified to teach the secular subject of ethics contributed to the Court's finding that his dismissal was reasonable.<sup>135</sup>

4.101 The jurisprudence of the European Court of Human Rights indicates that the permissibility of any limitation of rights turns on the specific circumstances of the case. The UN Special Rapporteur has also reiterated the necessity of 'careful case-by-case analysis...to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.<sup>136</sup> Notwithstanding the importance of this balancing exercise under international human rights law, the measure, as currently drafted, does not provide for a form of balancing exercise to be undertaken where the right of a religious body to manifest religion competes with the rights of others. While the objects clause in the bill refers to the indivisibility and universality of human rights, and their equal status in international law, it is not clear the extent to which this clause will facilitate the balancing of rights in practice, noting that the measure itself does not require such an exercise to be undertaken.<sup>137</sup> On this issue, the Attorney-General's Department drew attention to section 15AA of the *Acts Interpretation Act 1901*, which provides that:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.<sup>138</sup>

4.102 The Attorney-General's Department stated that in drafting the bill 'the Government has been careful to strike an appropriate balance, including by ensuring that these provisions are limited in their application and subject to a variety of safeguards set out in the terms of each provision'.<sup>139</sup> The statement of compatibility states that Part 2 'appropriately balances the right to freedom of religion with other rights' by limiting the circumstances in which conduct is not covered by the prohibition of discrimination to 'instances where there is a clear rationale for allowing the differential treatment of individuals on the basis of their religious belief or activity'.<sup>140</sup> However, no information was provided as to how this balance is appropriately struck in each individual case.

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135 Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 761–762.

136 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [47].

137 Religious Discrimination Bill 2021, clause 3.

138 *Acts Interpretation Act 1901*, section 15AA.

139 Attorney-General's Department, answer to written question on notice, question 2 (received 11 January 2022).

140 Religious Discrimination Bill 2021, statement of compatibility, p. 8.

4.103 While it may be the intention of the bill to ensure the right to freedom of religion is appropriately balanced with the rights of others, as a matter of legislative interpretation, there is no clear mechanism by which this balancing exercise can occur under the bill. A number of submitters raised concerns about the inability to effectively balance rights in relation to this measure. For example, Dr Cristy Clark, member of the Australian Discrimination Law Experts Group, stated:

it's an unequal protection of people's rights to manifest their religion or beliefs because only some people get that protection. In some cases it might be that institutions get that protection over and above individuals with religious beliefs, for example, in the school or employment contexts. But it also means that those rights are elevated above the rights to non-discrimination and equality of other people, and that's fundamentally inconsistent with international human rights law and the way that it's supposed to be implemented...Things have to be done: a single article obviously needs to be implemented in its entirety but also the indivisibility of human rights is why they're recognised and so you can't elevate one and ignore the other in the context of implementing international human rights. The whole idea is that they're supposed to balance carefully against each other.<sup>141</sup>

4.104 In the absence of the ability to consider the individual circumstances of the case and balance competing human rights, there appears to be a risk that the measure may not be proportionate in all circumstances.

4.105 Finally, another factor in assessing proportionality is whether the measure is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review. The Attorney-General's Department noted that safeguards are set out in the terms of each provision.<sup>142</sup> In relation to clause 7, the statement of compatibility indicates that the requirement that conduct be engaged 'in good faith' and relate to the doctrines, tenets, beliefs or teachings of the religion underpinning the religious body would operate as a safeguard.<sup>143</sup> In relation to clause 9, the statement of compatibility states that the provision is limited to employment decisions and the requirement that the conduct be in accordance with a publicly available policy would operate as a safeguard.<sup>144</sup> In relation to clause 10, the statement of compatibility states that by requiring conduct to be reasonable and consistent with the purposes of the bill, the clause is appropriately limited to only capture conduct consistent with the broader beneficial purposes for which the bill was established.<sup>145</sup> The explanatory memorandum notes that reasonableness in this context includes

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141 Dr Cristy Clark, Australian Discrimination Law Expert Group, *Committee Hansard*, 21 December 2021, pp. 15–16. See also Liberty Victoria, *Submission 186*, pp. 4–5.

142 Attorney-General's Department, answer to written question on notice, question 2 (received 11 January 2022).

143 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

144 Religious Discrimination Bill 2021, statement of compatibility, p. 12.

145 Religious Discrimination Bill 2021, statement of compatibility, p. 15.

whether the conduct is necessary to meet the identified need.<sup>146</sup> The Attorney-General's Department stated that this requirement would act as a safeguard.<sup>147</sup>

4.106 The requirement that conduct be engaged in good faith may have some safeguard value, although the strength of this safeguard will depend on how it is interpreted and applied in practice. On this issue, the Attorney-General's Department stated:

The department's view is that a court is likely to apply a broad interpretation of the good faith requirement, encompassing both subjective considerations (the person making a statement of belief considers they are behaving honestly and with a legitimate purpose) as well as objective considerations (the person has taken a conscientious approach to honouring the values asserted by the Bill, which may include considering the effect of their speech given the overall purpose of the Bill). This is an approach that was set out in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.<sup>148</sup>

4.107 The explanatory memorandum further states that 'good faith' is intended to take its ordinary legal meaning and not reflect a religious concept of faith.<sup>149</sup> Some submitters and witnesses noted the importance of the good faith requirement but raised concerns with its breadth in the context of this measure.<sup>150</sup> For instance, Robin Banks, a member of the Australian Discrimination Law Experts Group, noted that '[i]t is very hard to establish something not being made in good faith'.<sup>151</sup>

4.108 The requirement that conduct be in accordance with a publicly available policy issued by the religious body may also assist with proportionality. The explanatory memorandum states that this requirement would ensure that clause 9 only permits conduct in circumstances where a religious body has a publicly articulated policy.<sup>152</sup> It notes that this is intended to provide a safeguard for the general community noting the broader impact this provision could have on people employed by, or seeking to be employed by, these religious bodies. For example, a religious hospital may have a policy that states certain positions will only be filled by adherents of the same religion

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146 Religious Discrimination Bill 2021, explanatory memorandum, p. 50–51.

147 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

148 Attorney-General's Department, answer to written question on notice, question 4 (received 11 January 2022).

149 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

150 See, e.g., Law Council of Australia, *Submission 28*, p. 20;

151 Ms Robin Banks, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 13.

152 Religious Discrimination Bill 2021, explanatory memorandum, p. 49.

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as the hospital, thus providing certainty and transparency to the public and potential employees.<sup>153</sup>

4.109 It is also noted that the minister has the power to determine additional requirements for the purposes of a publicly available policy. The explanatory memorandum states that this would provide further clarity for religious bodies around the nature and scope of this requirement if needed.<sup>154</sup>

4.110 While there is currently no guidance as to how this power would likely be exercised, the explanatory memorandum anticipates that guidance would be passed on the kinds of matters set out in the Religious Freedom Review Report. In particular, a publicly available policy should outline the precepts of the religion that relate to preferencing employees; outline the position of the religious body; explain how the body's policy will be enforced; and that this policy should be publicly available, so that prospective employees can make choices about making an application.<sup>155</sup> The explanatory memorandum states that guidance would be limited to the form, presentation and availability of policies.<sup>156</sup>

4.111 Subject to any additional requirements set out by the minister, the public policy requirement would likely enhance transparency and may help to ensure the measure is sufficiently circumscribed, which could assist with proportionality. However, without knowing the substance of the policy, it is difficult to assess the extent to which it would serve as an adequate safeguard to protect the rights of others.

4.112 In this regard, some submitters have raised concerns that a publicly available policy may in practice facilitate discrimination rather than act as a safeguard. The Australian Discrimination Law Experts Group, for example, submitted:

Having a publicly available policy that advocates for preferencing or expressly states an intention to discriminate on the grounds of religion does not ameliorate any of the disadvantages that those people who are excluded from employment in religious institutions will suffer. Maintaining a publicly available policy accepting and advocating for discrimination on any basis has the capacity to further exacerbate stigma of individuals based on attributes they hold by indicating that discrimination on that basis is legitimate and justifiable...Explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harms that individuals will face as a consequence

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153 Religious Discrimination Bill 2021, explanatory memorandum, p. 49.

154 Religious Discrimination Bill 2021, explanatory memorandum, p. 49.

155 Religious Discrimination Bill 2021, explanatory memorandum, p. 49.

156 Religious Discrimination Bill 2021, explanatory memorandum, p. 49.

of a religious organisation's refusal to employ persons on the basis of an attribute but instead has the capacity to exacerbate such stigmas.<sup>157</sup>

4.113 Further, as to the availability of oversight and access to review, while complaints made under this bill or other federal anti-discrimination laws would be dealt with by the Australian Human Rights Commission, there are questions as to how the complaints process would operate in practice in circumstances where conduct may not be discrimination under this bill but may constitute discrimination under another anti-discrimination law. On this point, the Attorney-General's Department stated:

There may be circumstances where the nature of the conduct a person wishes to complain about may provide the basis for claims under a number of different anti-discrimination laws. As is the case at present, a person making a complaint would need to identify what they consider are the relevant grounds for the complaint. Depending on the circumstances of the complaint and the terms of the relevant anti-discrimination laws, conduct may amount to unlawful discrimination under one law but not under another law. The AHRC's existing process of assessing claims of unlawful discrimination would be extended to the Bill once it is enacted.<sup>158</sup>

4.114 The potential complexity of this process was of concern to some submitters and witnesses. For instance, the Australian Discrimination Law Experts Group stated that 'given the complex interaction between this Bill and existing federal discrimination laws, parties are likely to become mired in complex litigation about the various ways in which these laws interact with each other'.<sup>159</sup> It submitted that the note to clause 7(2) 'renders the question more murky and makes it more likely that clause 7 can be used as an alternative route to discriminate on the basis of race, age, sex, LGBTQ+ status and disability'.<sup>160</sup> While some form of review appears to be available, there are questions as to whether the potential complexity of this process undermines its safeguard value in practice.

4.115 In conclusion, while the measure pursues the legitimate objective of seeking to protect religious institutional autonomy, there are some questions as to whether the measure would meet the quality of law test and would be proportionate in all circumstances, noting the inability to have regard to the individual circumstances of each case and appropriately balance competing limitable rights. Under international human rights law, the ability to consider the individual circumstances of the case is critical to ensuring that rights are appropriately balanced and any limitation on individual rights is reasonable, necessary and proportionate in each case.

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157 Australian Discrimination Law Experts Group, *Submission 33*, p. 18. See also discussion in Chapter 5.

158 Attorney-General's Department, answer to written question on notice, question 5 (received 11 January 2022).

159 Australian Discrimination Law Experts Group, *Submission 33*, p. 14.

160 Australian Discrimination Law Experts Group, *Submission 33*, p. 14.

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## Committee view

4.116 The committee considers it an essential aspect of the right to freedom of religion that religious bodies are able to act in accordance with their faith. It is important that religious bodies be able to continue to run and administer their churches, mosques, temples, schools, hospitals, charities and missions according to their faith. The committee considers it is appropriate to have an expansive definition of what constitutes a religious body to ensure most bodies that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion are able to act, in good faith, in accordance with their faith.

4.117 In order to properly fulfil this right it may be necessary for religious employers to impose religious rules of conduct on the workplace, which may lead to conflicts with the right to freedom of religion or belief, and the right to equality and non-discrimination, of employees. The committee acknowledges there is a difficult balancing act to be undertaken. However, for many religious groups, being able to organise and maintain important aspects of their religious community life includes being able to run their faith-based organisations according to their religion. The committee considers that the right to freedom of religion requires that faith-based organisations have a right to select staff, who are not only adherents of that faith, but who also support the organisation's religious doctrines and practices.

4.118 The committee notes, in practice, most religious organisations are not likely to make their employment decisions based on faith. As currently occurs, hospitals, aged care facilities and charities consider, first and foremost, a person's qualifications for the role. However, in order to adequately protect the right to freedom of religion it may be occasionally necessary for such bodies, acting in good faith, to operate in accordance with their faith, and this should not constitute discrimination on the basis of religion. It is noted that conduct that is not considered to be discrimination under the Religious Discrimination Bill 2021 may still constitute discrimination under other anti-discrimination laws, which the committee considers appropriate.

4.119 The committee also notes that where hospitals, aged care facilities, accommodation providers and disability service providers act in accordance with their faith in relation to employment, they must do so in accordance with a publicly available policy (this issue is discussed in more detail in Chapter 5). The committee considers this provides the necessary transparency and clarity around such conduct.

4.120 As such, the committee considers that the provisions in clauses 7–10 of the Religious Discrimination Bill 2021 have been carefully balanced to ensure they only exempt conduct engaged in, in good faith, by bodies that are inherently religious, and where it is necessary for the body to properly maintain its religious ethos. In doing so the committee considers it promotes and upholds the fundamental right to freedom of religion and belief and strikes the right balance.

**Recommendation 7**

**4.121** The committee recommends that the explanatory memorandum to the Religious Discrimination Bill 2021 be amended to provide clarification as to the applicability of the bill to in-home care services, particularly in relation to aged care and disability services.

## Chapter 5

### Religious educational institutions

5.1 This chapter outlines the key issues raised by submitters and witnesses in relation to the provisions that deal with religious educational institutions. The issues raised are similar to those raised in Chapter 4 on religious bodies more broadly. A number of faith-based organisations were strongly supportive of ensuring that religious educational institutions should not be considered to be discriminating on the basis of religion if acting in accordance with their faith, and considered it integral to ensuring the religious ethos of a school. Conversely, a number of other groups strongly opposed these provisions. This Chapter considers:

- clause 7 (within Part 2), which makes it 'not discrimination' for religious bodies, including educational institutions, to act in accordance with their faith;
- the effect of Part 2 on employment by religious educational institutions;
- subclause 7(6) and the requirement for conduct to be in accordance with a publicly available policy in relation to employment;
- clause 11, which provides that the conduct of a religious educational institution does not contravene a prescribed state or territory law in certain circumstances; and
- the proposed amendment to allow religious educational institutions to refuse to provide facilities, goods or services for the purposes of, or incidental to, the solemnisation of a marriage in accordance with their religious belief.

5.2 The Chapter concludes with an assessment of the application of international human rights law to these provisions and provides the committee's view and recommendations.

#### Preserving an educational institution's religious ethos

5.3 As discussed in Chapter 4 of this report, Part 2 of the bill sets out conduct that will not constitute discrimination under the bill. Clause 7 (within Part 2) sets out the circumstances in which a religious body may generally act in accordance with their faith such that it will not be discrimination on the grounds of religion. Specifically, clause 7 provides that a religious body does not discriminate against a person on the ground of religious belief or activity by engaging, in good faith:

- (a) 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; and/or

(b) in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.<sup>1</sup>

5.4 Conduct in this context includes making employment decisions (including giving preference to persons of the same religion as the religious body).

5.5 A number of submitters and witnesses were in favour of these provisions, arguing that they are essential to preserving the general ethos and values of religious educational institutions by allowing them to favour the employment of people holding a particular faith.<sup>2</sup> It was considered that it was necessary for schools to broadly be able to determine who they employ across all their staff rather than just particular positions, as preserving the general ethos of a school was about the broader infusion of a particular faith and values.<sup>3</sup> Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, stated:

values are often more caught than taught. Ensuring that there are those protections in place is important, so that we can recruit people who will be able to not just deliver the curriculum with excellence but also model values and beliefs in teachings in their interactions with students and with their families.<sup>4</sup>

5.6 Mr Mark Spencer, Director of Public Policy of Christian Schools Australia Limited explained:

If we don't maintain the ethos of the schools, we cease to be the schools we claim to be. Schools are an education business. Schools are a people business. It's about the staff we have who can share our faith and beliefs and model those to the students and to the community, and reflect that in all we do and all we are.<sup>5</sup>

5.7 The Australian Catholic Bishops' Conference also submitted:

The ability of Catholic institutions to uphold their ethos through employment and enrolment policies is more appropriately described as the manifestation of the freedoms of religion and association of the individuals who use the services of these institutions. People often seek services provided by Catholic institutions because of their Catholic culture

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1 Religious Discrimination Bill 2021, subclauses 7(2) and (4).

2 Reverend Christopher Duke, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 40; Mr Gregory Bondar, Family Voice Australia, *Hansard*, 21 December 2021, p. 82.

3 Christian Schools Australia & Adventist Schools Australia, *Submission 24*, p. 2.

4 Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, p. 27.

5 Mr Mark Spencer, Christian Schools Australia Limited, *Committee Hansard*, 21 December 2021, p. 36.

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and failing to protect institutional freedoms results in an undermining of the rights of individuals.<sup>6</sup>

5.8 The Executive Council of Australian Jewry Inc. submitted that it was necessary to be able to employ teachers who share the school's religious ethos, and that this should not be contingent on the subject matter of what they teach:

Teachers are role models and moral examples, in addition to being educators. A religious school may wish to operate not only as a strictly educational facility but also as a community of faith, with daily prayer meetings and other religious observances, so that students have before them the example of the religion as a way of life.<sup>7</sup>

5.9 Additionally, the Hon Jacinta Collins, Executive Director of the National Catholic Education Commission, commented that it is an issue of choice and freedom of association: '[i]t's associating around our faith so that we can meet our mission about the transference of faith at the same time as delivering a high-quality education'.<sup>8</sup>

5.10 Many submitters were of the view that these religious exemptions have nothing to do with discriminating against individuals based on particular characteristics, like their sexuality, gender identity or marital status. Instead, these submitters were of the view that the bill was about protecting against religious discrimination, and allowing religious schools to preserve their ethos in accordance with their teachings.<sup>9</sup>

5.11 The Attorney-General's Department submitted that the 'Government considers that ensuring religious schools can continue to make employment choices that maintain the religious ethos of the school enables parents of faith to confidently make choices for the education of their children'.<sup>10</sup>

### ***Impact on employment for staff of schools***

5.12 Many in favour of the provisions commented that, like other areas of employment, religious or not, employers hire staff whose values align with the organisation.<sup>11</sup> They submitted that staff employed by religious institutions know the terms on which they are entering those institutions and agree to abide by the

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6 Australian Catholic Bishops' Conference, *Submission 185*, p. 3.

7 Executive Council of Australian Jewry Inc, *Submission 19*, p. 4.

8 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 61.

9 Seventh-day Adventist Church in Australia, *Submission 82*, p. 4.

10 Attorney-General's Department, *Submission 191*, p. 10.

11 Archbishop Peter Andrew Comensoli, Australian Catholic Bishops' Conference, *Committee Hansard*, 13 January 2022, p. 19; Seventh-day Adventist Church in Australia, *Submission 82*, p. 4.

particular values of that workplace.<sup>12</sup> The Hon Jacinta Collins, Executive Director of the National Catholic Education Commission, emphasised that employees have a choice as to whether they work at a religious school, stating:

If people don't want to work in an environment which is operating within a faith based ethos, they can work in a public school or a school of another ethos or faith. It is an issue of choice, or, in my view, it's actually freedom of association...It's associating around our faith so that we can meet our mission about the transference of faith at the same time as delivering a high-quality education.<sup>13</sup>

5.13 A number of submitters and witnesses stated that while they did not have a general ban on employing staff with particular characteristics, issues were dealt with on a case-by-case basis and in a 'pastoral' way, considering whether the individual was able to still conduct themselves in alignment with, and share the views of, the values of the institution.<sup>14</sup> Mr Mark Spencer, Director of Public Policy of Christian Schools Association Limited stated: '[i]n the context of the school, we see a school as a learning community—a community of believers who hold a particular view. When someone ceases to have that view, they cease to share those beliefs of that community'.<sup>15</sup>

5.14 Some submitters held that even if the schools or bodies did not choose to dismiss staff based on some of these issues, they were of the view that schools should have the ability to do this if staff did not align with the values of the school.<sup>16</sup> The Australian Christian Higher Education Alliance, for instance, submitted that:

The fundamental missions of FBHEI [faith-based higher educational institutions] require that staff and academics maintain the institution's specific religious culture and ethos. Without the ability to select and maintain according to belief in employment, the institution could not exist as a distinctive religious entity.<sup>17</sup>

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12 Archbishop Peter Andrew Comensoli, Australian Catholic Bishops' Conference, *Committee Hansard*, 13 January 2022, p. 19.

13 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 61.

14 Reverend Doctor Ross Clifford, Morling Theological College, *Committee Hansard*, 21 December 2021, p. 40; The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 63; Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, p. 24.

15 Mr Mark Spencer, Christian Schools Association Limited, *Committee Hansard*, 21 December 2021, p. 43.

16 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 40.

17 Australian Christian Higher Education Alliance, *Submission 25*, p. 8.

Community codes of conduct, publicly available, allow FBHEI to hold clear expectations based on their statements of belief and the integrity of their staff to upholding those beliefs. An example of where this is necessary is a hypothetical case where a College President was found to be committing adultery. This act itself is not illegal, nor would necessarily be an issue affecting one's employment role in a secular institution. However, in a FBHEI which held a belief in marriage as a fundamental sacrament, their continued employment in that role would likely be untenable (unless the faith community were satisfied the person was repentant). If not legally allowed to act upon, the FBHEI would potentially experience significant damage across their stakeholders, staff, student body, and wider religious community.<sup>18</sup>

5.15 Additionally, the Australian Christian Higher Education Alliance were of the view that as there is no 'clear vocational separation of faith and work', it is important that all employees uphold the ethos of the institution. They stated:

from dishwashing to directing, all tasks within an institution can be viewed as service to God and to community – done in an intentional spirit of worship and dedication. This can be demonstrated by vast swathes of biblical evidence, but 1 Corinthians 10:31 captures the position adequately when stating, 'So whether you eat or drink or whatever you do, do it all for the glory of God'.<sup>19</sup>

5.16 Conversely, other witnesses and submitters commented that it was not necessary for teachers to follow a particular faith in order to be able to teach.<sup>20</sup> Some submitters stated that educational institutions should only be able to selectively employ people on religious grounds where this is an inherent requirement of the specific position or in specific leadership or governance roles.<sup>21</sup> As Rainbow Families submitted, '[i]t matters whether a maths teacher knows trigonometry and calculus, not who the maths teacher loves'.<sup>22</sup> Ms Jessica Munday, Secretary of Unions Tasmania said that what matters when selecting staff is their suitability for the job, and not their sexuality.<sup>23</sup>

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18 Australian Christian Higher Education Alliance, *Submission 25*, p. 11.

19 Australian Christian Higher Education Alliance, *Submission 25*, p. 8.

20 Dr Terri MacDonald, National Tertiary Education Union, *Committee Hansard*, 14 January 2022, pp. 5 and 8.

21 See e.g., ACT Government, *Submission 192*, p. 18; Uniting Network Australia, *Submission 152*, p. 6.

22 Rainbow Families, *Submission 182*, pp. 3-4.

23 Ms Jessica Munday, Unions Tasmania, *Committee Hansard*, 14 January 2022, p. 44.

5.17 Further, it was raised that these provisions did not just apply to hiring new staff, but also applied to staff who were already working in the school, and therefore went beyond the ability to preference staff.<sup>24</sup>

5.18 Concerns were also raised regarding additional negative implications for staff once employed, including the possibility of teachers being denied promotion or advancement on the basis of religious grounds if the teacher becomes pregnant, gets married or enters a de facto relationship, or transitions gender.<sup>25</sup> Submitters stated that concern regarding the treatment of teachers has led to some individuals avoiding employment at religious educational institutions or seeking advice about their employment status.<sup>26</sup> Parents for Transgender Youth Equity submitted that one of their parents of a transgender child, 'has already rejected a senior role offer by a religious organisation, as they could be terminated immediately for supporting their child if these bills are enacted'.<sup>27</sup>

5.19 Examples were also provided of teachers who had been fired after it came to light they were in same-sex relationships, and of teachers who had been fired for not signing statements pertaining to the values of the school.<sup>28</sup> Submitters commented that the potential for LGBTIQ+ teachers to be sacked increases stigma and poor mental health outcomes.<sup>29</sup>

### **Requirement for publicly available policy**

5.20 Subclause 7(6) provides that a religious educational institution, in engaging in conduct under subclauses 7(2) and (4) in relation to employment, must do so in accordance with a publicly available policy. This policy must also comply with any requirements set out by the minister in a legislative instrument. A requirement for a publicly available policy also applies if an educational institution is not to contravene state or territory laws (clause 11) and to religious hospitals, aged care facilities,

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24 Australian Human Rights Commission, *Submission 97*, p. 47. See also Mr Graeme Edgerton, Australian Human Right Commission, *Committee Hansard*, 14 January 2021, p. 28.

25 Dr Terri MacDonald, National Tertiary Education Union, *Committee Hansard*, 14 January 2022, p. 5; Australian Education Union Federal Office, *Submission 21*, p. 7; Independent Education Union, *Submission 127*, p. 6.

26 Parents for Transgender Youth Equity, *Submission 73*, p. 2; Tasmanian Council of Social Services, *Submission 36*, p. 9.

27 Parents for Transgender Youth Equity, *Submission 73*, p. 2.

28 Equality Australia, *Submission 31*, pp. 29-32; Equal Voices, *Submission 32*, pp. 13-18; Tasmanian Council of Social Services, *Submission 36*, p. 9; Dr Sean Mulcahy, *Submission 126*, p. 6; Independent Education Union, *Submission 127*, pp. 10-16; COTA SA, *Submission 144*, pp. 4-7; Independent Education Union, *Submission 127*, pp. 39-44; Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, Friday, 14 January 2022, p. 28-29.

29 Australian Education Union Federal Office, *Submission 21*, p. 7; Mental Health Australia, *Submission 67*, p. 2.

accommodation providers and disability service providers in the context of employment (see subclause 9(3) and Chapter 4). The explanatory memorandum states:

A policy must be available to prospective and existing employees or partners. It may be issued publicly through a variety of means, such as being provided online at the point of application or by a copy being provided upon request or as part of the recruitment package. The publicly available policy requirements do not affect the employment arrangements for existing staff, but are intended to provide information for current and prospective employees on the position of the school in relation to the use of these exceptions.<sup>30</sup>

5.21 The Attorney-General's Department submitted that this policy requirement: increases certainty and transparency and ensures that prospective or existing employees as well as the general public would be able to ascertain and understand the position of a religious body in relation to the particular matter dealt with in the relevant provision of the Bill (i.e., employment, partnerships, or accommodation facilities).<sup>31</sup>

5.22 A number of submitters expressed support for this provision, praising the requirement for such a policy as a proportionate approach to protecting the ethos of faith-based institutions.<sup>32</sup> The Australian Association of Christian Schools commented that the policy is a necessary mechanism for fostering transparency, and submitted:

Although this is a novel proposal for Commonwealth anti-discrimination law, it is one that is welcomed by AACCS, as it will provide transparency and certainty for schools and their staff and volunteers about the school's religious beliefs.<sup>33</sup>

5.23 Freedom for Faith also echoed this support for the provision, stating that public policies will assist in preserving the values of religious schools in a predominately secular system. They submitted:

This means that those approaching schools for employment will be able to determine beforehand whether the school has a policy of preference for

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30 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

31 Attorney-General's Department, *Submission 191*, p. 11.

32 See Freedom for Faith, *Submission 10*, p. 6; Executive Council of Australian Jewry, *Submission 19*, p. 4; Australian Association of Christian Schools, *Submission 23*, p. 10; Christian Education National, *Submission 41*, p. 2; Association of Heads of Independent Schools of Australia, *Submission 41*, p. 6; Presbyterian Church of Australia, *Submission 94*, p. 7; Association for Reformed Political Action, p. 3; Australian Christian Lobby, *Submission 16*, p. 4 and Mrs Wendy Francis, Australian Christian Lobby *Committee Hansard*, 21 December 2021, p. 19; Seventh-day Adventist Church in Australia, *Submission 82*, p. 7; Institute for Civil Society, *Submission 131*, p. 6.

33 Australian Association of Christian Schools, *Submission 23*, p. 10.

fellow believers, and so avoid the embarrassment of being turned down on that basis if they don't meet the requirement.<sup>34</sup>

5.24 Other submitters and witnesses, while generally supportive of the provision, raised concerns about subclauses 7(6) and (7), which would grant the minister expansive power to 'determine requirements' for 'the policy, including in relation to its availability'.<sup>35</sup>

5.25 For example, the Executive Council of Australian Jewry stated:

Sub-clauses 7(6)(b) and 7(7) of the Bill, whilst apparently intended to empower the relevant Minister to determine the kinds of matters that must be addressed in such a policy, and how it is to be made available, are expressed in such broad terms that they might empower the Minister to determine the content of the school's policy. We believe this should be ruled out in the Explanatory Memorandum.<sup>36</sup>

5.26 Similarly, the Australian Association of Christian Schools submitted:

AACS is concerned that this expansive power could be exercised to limit the scope of the exception provided to schools by a Minister in the absence of sufficient Parliamentary scrutiny. There is no equivalent delegated power given under any other Commonwealth discrimination law that could so substantively affect the operation of an exception or exemption applying to religious institutions or schools. The comments made in the Explanatory Memorandum at paragraph 129 do not provide adequate protection against such an exercise of that power.<sup>37</sup>

5.27 Reverend Doctor John McClean, Convenor, Church and Nation Committee, Presbyterian Church of Australia, gave evidence that the minister should not be granted power to make requirements about the employment policies of religious institutions:

It seems to open the door for arbitrary or unexpected and unreviewed requirements which don't go through the scrutiny of the parliament...It's easier to support a bill where you know what it's going to contain than these possibilities where I'm not quite sure how it could be used.<sup>38</sup>

5.28 However, a number of other submitters argued that the requirement for a publicly available policy does not alleviate their concerns with clause 7 or 11 in

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34 Freedom for Faith, *Submission 10*, p. 6.

35 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

36 Executive Council of Australian Jewry, *Submission 19*, p. 4.

37 Australian Association of Christian Schools, *Submission 23*, p. 11.

38 Reverend Doctor John McClean, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 39.

allowing religious bodies to act in ways that would not constitute discrimination.<sup>39</sup> The Law Council of Australia, for example, stated that:

it does not consider that the requirement for an institution to have a policy in place provides a sufficient safeguard. While this would increase transparency, it may nevertheless enable blanket discrimination against individuals on the basis of their 'particular religious belief or activity' in the context of employment preferences.<sup>40</sup>

### Overriding certain state and territory laws

5.29 Clause 11 provides that a religious educational institution does not contravene a prescribed state or territory law in certain circumstances. It further provides that the minister may prescribe one or more laws of a state or territory where satisfied the law to be prescribed prohibits discrimination based on religious belief or activity and prevents religious educational bodies from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity when engaging in employment decisions.

5.30 Further, the Religious Discrimination (Consequential Amendments) Bill 2021 provides that a 'prescribed state or territory law' includes the Victorian *Equal Opportunity Act 2010*. The explanatory memorandum to the Religious Discrimination (Consequential Amendments) Bill 2021 states that the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) amends the existing religious exemptions 'in a manner which interferes with an educational institution's ability to preference people in employment decisions'.<sup>41</sup>

5.31 A number of submitters and witnesses commented on the ability of the minister to prescribe state and territory laws. A number of submitters stated that this was necessary in order to achieve the purposes of the bill, namely, to recognise the freedom of all people to have or adopt a religion or belief of their choice and the freedom to manifest this religion or belief. For example, the Islamic Council of Victoria submitted that the overriding of state and territory laws is crucial to the bill's efficacy and that '[e]mploying teachers and staff who model the moral codes of the

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39 See Buddhist Council of NSW, *Submission 51*, p. 6; Australian Council of Trade Unions, *Submission 44*, p. 18; Australian Medical Association, *Submission 96*, p. 3; Queensland Advocacy Incorporated, *Submission 115*, p. 6; Equality Australia, *Submission 31*, pp. 34; Public Interest Advocacy Centre, *Submission 40*, p. 24; Banyule City Council, *Submission 76*, p. 2; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 3; Just Equal Australia, *Submission 69*, p. 7; Legal Aid Queensland, *Submission 92*, p. 2; Children by Choice, *Submission 150*, p. 4; Uniting Network Australia, *Submission 153*, p. 4; Amnesty International, *Submission 157*, p. 6; NSW Council for Civil Liberties, *Submission 181*, p. 4; Commissioner for Children and Young People, *Submission 120*, p. 5; Kingsford Legal Centre, *Submission 110*, p. 7.

40 Law Council of Australia, *Submission 28*, p. 32.

41 Religious Discrimination (Consequential Amendments) Bill 2021, explanatory memorandum, p. 20.

faith is the key to a school being able to live and implement its ethos'.<sup>42</sup> Further, Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, when asked whether he supported overriding state and territory laws, stated:

One of the tensions I think we face is, as a nation, we've given assent to the incorporation of ICCPR article 18 into our legislative framework, and have done for a very long time, but we actually haven't practically implemented it in tangible ways. What I would see as the role of the Commonwealth ... is to ensure that the Commonwealth does fulfil its responsibility to ensure that we are aligned with those international covenants. If one of the mechanisms in order to ensure that we are discharging our responsibilities with those covenants is to include some override provisions, if that's the best way to do it, then we would be happy to see those provisions included, understanding that that has the potential to create some challenges...<sup>43</sup>

5.32 Likewise, Freedom of Faith supported clause 11 and the power to override certain state and territory laws. It submitted:

This provision is necessary because some States and Territories have imposed very restrictive rules which interfere with the religious freedom of faith-based schools (which as noted above are a key mechanism to implement parental rights under art 18(4) of the ICCPR).<sup>44</sup>

5.33 Freedom of Faith were of the view that amendments to the *Fair Work Act 2009* would be more appropriate to achieve the federal override power, stating:

Our view is that this would best be achieved by amendments to the Fair Work Act, which already deals with employment by faith-based institutions, to establish a nationally consistent principle, consistent with that contained in clause 7 of this Bill, to the effect that religious faith-based organisations may prefer to select staff who adhere to its faith and mission, and may require adherence to codes of conduct consistent with that faith. However, the Government has chosen the s.11 mechanism instead.

We support s.11 as a step forward in protecting the religious rights of schools even if it is not as satisfactory a mechanism as clarifying the position in the Fair Work Act. Under s.11, the Minister will be able to apply the over-ride by regulation to other State and Territory legislation which seeks to restrict the religious freedom of faith-based schools in the employment of staff.<sup>45</sup>

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42 Islamic Council of Victoria, *Submission 111*, p. 2.

43 Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, p. 26.

44 Freedom of Faith, *Submission 10*, p. 7.

45 Freedom of Faith, *Submission 10*, p. 9.

5.34 The Australian Discrimination Law Experts Group stated that this bill is the first time in forty years of discrimination laws in Australia where federal discrimination law has been drafted specifically to override other federal, state and territory discrimination law.<sup>46</sup> The ACT Government raised concern that this would undermine anti-discrimination law that had been considered appropriate in various jurisdictions.<sup>47</sup> The Australia Council of Trade Unions stated that clause 11 'purports to allow these carefully considered State protections to be completely overridden. The way in which this 'override' will work in practice is extremely unclear'.<sup>48</sup> Reverend Christopher Duke, Member, Church and Nation Committee, Presbyterian Church of Australia also queried whether this bill would give a clear exemption from the Victorian legislation.<sup>49</sup>

5.35 Some submitters also stated that a religious body relying on clause 11 would be raising a federal defence, which would need to be heard in a Chapter III-invested court and not in the low-cost and quicker state and territory tribunals. It was argued that this would likely limit the ability of complainants to access timely and efficient mechanisms to resolve complaints of unlawful discrimination.<sup>50</sup> Access to the resolution of procedural complaints is discussed further in Chapter 6 in relation to clause 12.

5.36 Regarding the purpose of clause 11, the Attorney-General's Department submitted that it was intended to preserve state and territory exemptions that allow religious educational institutions to make employment decisions that preference people of faith. They stated that:

it would only be necessary to prescribe a state or territory law if a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment. The criteria by which the power to prescribe a state or territory law would be exercised is clearly laid out in clause 11(3) of the Bill.<sup>51</sup>

5.37 With the exception of the Victorian *Equal Opportunity Act 2010*, the Attorney-General's Department were not aware of any state or territory law that would otherwise satisfy the criteria in subclause 11(3).<sup>52</sup>

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46 Australian Discrimination Law Experts Group, *Submission 33*, p. 5.

47 ACT Government, *Submission 192*, pp. 17-18.

48 Australia Council of Trade Unions, *Submission 64*, p. 17.

49 Reverend Christopher Duke, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 41.

50 See, e.g., Australian Discrimination Law Experts Group, *Submission 33*, pp. 11-12.

51 Attorney-General's Department, *Submission 191*, p. 10.

52 Attorney-General's Department, *Submission 191*, p. 10.

### **Victorian Equal Opportunity Act 2010**

5.38 There was considerable commentary in relation to the Victorian *Equal Opportunity Act 2010* being specified as a prescribed law. The *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) (which amends the *Equal Opportunity Act 2010* (Vic)) provides that religious educational institutions may only discriminate in relation to employment if:

- (a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and
- (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
- (c) the discrimination is reasonable and proportionate in the circumstances.<sup>53</sup>

5.39 A number of submitters and witnesses noted their support for prescribing this law, arguing that the Victorian law was too restrictive in that it required religious schools to demonstrate the intrinsic characteristics of a role if they are to employ staff on the basis of religious belief. Many felt this negatively impacted the ability of the school to ensure the appropriate religious ethos.<sup>54</sup> Some felt that the Victorian legislation was targeting religious schools and asking of them higher standards in relation to who they chose to employ,<sup>55</sup> and is 'a level of interference by the state that is unnecessary and unjustified in our operations'.<sup>56</sup> As the Hon Jacinta Collins, Executive Director of the National Catholic Education Commission, commented:

our schools operate on the basis that we would want a critical mass of staff that are in sympathy with the religious ethos; but, if we need to demonstrate that staff have such sympathy as an inherent requirement of their roles, then that's quite a difficult challenge.<sup>57</sup>

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53 *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic), section 8, new section 83A of the *Equal Opportunity Act 2010* (Vic).

54 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, pp. 62 and 65; Mr John Steenhof, Human Rights Law Alliance, *Committee Hansard*, 21 December 2021, p. 86; Pastor Michael Worker, Seventh-day Adventist Church in Australia, *Committee Hansard*, 13 January 2022, pp. 25-26; Mr Mark Sneddon, Institute for Civil Society, *Committee Hansard*, 14 January 2022, p. 14; Lutheran Education Australia, *Submission 86*, p. 4; Islamic Council of Victoria, *Submission 111*, p. 3.

55 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 62.

56 Mr Mark Spencer, Christian Schools Australia Limited, *Committee Hansard*, 21 December 2021, p. 39; Anglican Church Diocese of Sydney, *Submission 158*, pp. 9-10.

57 The Hon Jacinta Collins, National Catholic Education Commission, *Committee Hansard*, 21 December 2021, p. 62.

5.40 Reverend Christopher Duke of the Presbyterian Church of Australia stated:

Recent legislation argues that maybe you just need your board of management, your principal and maybe your chaplain to hold to our tenets of belief and that it's not important for your maths teacher, your science teacher or your sports teacher to hold to them. We argue that all the staff should not only believe in and agree with our tenets but also live them out in their conduct. That's vitally important for our mission, because we want to present a Christian world view in our education environments.<sup>58</sup>

5.41 Mr Mark Spencer, Director of Public Policy, Christian Schools Australia Limited stated:

Amendments have been passed to the Equal Opportunity Act down there which impose quite draconian, quite onerous requirements on faith based schools in Victoria and allow the government there to really reach into faith based schools. That's particularly from our perspective, but also religious bodies more broadly. The legislation and the second reading speech on the amendments to the Equal Opportunity Act down there talk about affecting the employment of religious bodies themselves. So that legislation really goes to the heart, to the core, of who we are as Christian Schools. It would affect tertiary bodies in Victoria and also religious bodies more broadly in Victoria.<sup>59</sup>

5.42 Conversely, other submitters argued that the Victorian law was an appropriate limit on religious schools and should not be overridden by these federal bills.<sup>60</sup> For example, Mr Ghassan Kassisieh, Legal Director, Equality Australia, said that the Victorian law sets out that the employer can decide what a role involves as to whether the role is inherently religious.<sup>61</sup> The Australian Education Union Federal Office stated:

The [Religious Discrimination Bill], in purporting to override and remove the protection of...[the Victorian] legislation, would re-permit the discriminatory dismissals of teachers and expulsion of teachers. The extreme harms caused to a teacher sacked or student expelled on discriminatory grounds cannot be overstated.<sup>62</sup>

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58 Reverend Christopher Duke, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 40.

59 Mr Mark Spencer, Christian Schools Australia Limited, *Committee Hansard*, 13 January 2022, p. 39.

60 Australian Education Union Federal Office, *Submission 21*, p. 9; People With Disability Australia, *Submission 79*, p. 3; Dr Sean Mulcahy, *Submission 126*, p. 5; Human Rights Law Centre, *Submission 190*, p. 10.

61 Mr Ghassan Kassisieh, Equality Australia, *Committee Hansard*, 21 December 2021, p. 73.

62 Australian Education Union Federal Office, *Submission 21*, p. 9.

5.43 The Victorian Government also raised concerns that the bill would override reforms consulted on and passed in the Victorian Parliament:

The Victorian Government has significant concerns about clause 11, given it would directly undermine recent reforms in Victoria. The Victorian Government considers that the RD Bill is an inappropriate and unwarranted intervention by the Commonwealth, which seeks to undermine a policy position that reflects a longstanding Victorian Government election commitment. The EO Amendment Act reflects a clear mandate from the Victorian people, received strong support in the Victorian Parliament and was developed in close consultation with key stakeholders in Victoria. The Victorian Government consulted with faith groups, LGBTIQ+ groups, education peak bodies and other members of our community on the development of these reforms to ensure that they struck an appropriate balance.<sup>63</sup>

5.44 However, the statement of compatibility accompanying the Religious Discrimination (Consequential Amendments) Bill 2021 explained that prescribing the Victorian law promotes the right to freedom of religion:

by ensuring that the right is not unduly limited by Victorian legislation which could restrict or interfere with the ability of religious educational institutions to maintain the religious ethos of their institution by preferencing people on the basis of their religious belief or activity in relation to employment.<sup>64</sup>

### **Students of religious educational institutions**

5.45 Maintaining a particular ethos or value system in a religious education institution was considered by many submitters to be important to ensuring that specific values and beliefs are instilled in the children who attend those schools. 98.5 per cent of respondents to the committee's survey believed that parents should be able to choose to send their children to a school of their choice which aligns with their religious values.<sup>65</sup> A number of submitters were similarly of the view that parents have a right for their children to be educated in accordance with their religious and moral convictions, and parents choose to send their children to religious schools to receive this kind of education.<sup>66</sup> As such, some submitters said that it was essential to choose staff willing to uphold the ethos of the school. Mrs Vanessa Cheng, Executive Officer, Australian Association of Christian Schools said:

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63 Victorian State Government, *Submission 195*, p. 4.

64 Religious Discrimination (Consequential Amendments) Bill 2021, statement of compatibility, pp. 4–5.

65 Appendix 4, Survey questions and sample of responses, answers to question 4.

66 See, e.g., Dr Alex Deagon, *Submission 3*, p. 7; Freedom for Faith, *Submission 10*, p. 3; Australian Association of Christian Schools, *Submission 23*, pp. 5-6; Christian Schools Australia & Adventist Schools Australia, *Submission 24*, pp. 4-5.

From our school's perspective, we take the role and the responsibility of parents really seriously to ensure the education and religious education of their children... We believe this bill would deliver on protecting the right of parents to choose a school that reflects their values and beliefs—Christian values and beliefs—that they would like their children to be taught.

The way schools deliver on that protection—that international standard, so to speak—is through choosing staff that are willing to uphold the ethos and the mission and the values of the schools. That's why our schools were established. In many cases our schools were started by parents who put money into starting a school that was going to deliver a holistic Christian education. Christianity was not going to be taught as a separate subject but was going to be imbued and embedded in all parts of the Australian Curriculum and taught through that perspective.<sup>67</sup>

5.46 Some submitters stated that religious educational institutions do not expel students based on their sexuality or gender identity. They argued that the focus on religious schools' treatment of LGBTIQ+ students was misleading when the purpose of the bill is to protect religious educational institutions from religious discrimination by allowing them to practice and teach their faith.<sup>68</sup> The Australian Catholic Bishops' Conference submitted:

Catholic schools want to continue to be able to teach the Catholic faith. This faith-based education is a vital part of the identity and mission of Catholic schools. Catholic schools do not expel students or sack staff simply on the grounds of sexual orientation, gender identity or any other protected status. Suggestions that they do have gravely misrepresented and undermined the good work of Catholic schools and unnecessarily caused anxiety in the community. Where there is a discipline issue or a disagreement, principals or other senior members of staff will work to try to resolve the issue pastorally.<sup>69</sup>

5.47 Mrs Wendy Francis, National Director of the Australian Christian Lobby also commented:

Expelling students on the basis of their sexuality is just not something that we do, both of the major Christian organisations that run Christian schools. We have been in conversations with the Islamic Council as well. It is just not something that happens at all.<sup>70</sup>

5.48 However, a number of other submitters and witnesses raised concerns that a religious educational institution being able to act in accordance with their faith could

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67 Mrs Vanessa Cheng, Executive Officer, Australian Association of Christian Schools, *Committee Hansard*, 21 December 2021, p. 37.

68 Anglican Church Diocese of Sydney, *Submission 158*, p. 9; FamilyVoice Australia, *Submission 22*, pp. 2-3.

69 Australian Catholic Bishops' Conference, *Submission 185*, p. 2.

70 Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 22.

have negative implications for some students, including students whose faith changed over the course of their schooling, and in particular, LGBTIQ+ young people.<sup>71</sup> Submitters noted that for some religions, aspects of an individual's personal life or inherent characteristics may be relevant to whether the religion considers the person is acting in accordance with the doctrines, tenets or beliefs of the religion, and this may raise questions as to indirect discrimination on other protected grounds. By characterising conduct of religious educational institutions based on their faith as not constituting discrimination, this could indirectly impact young LGBTIQ+ people and suppress their ability to explore and be open about who they are. A number of submitters and witnesses argued that the implications of the bill package will likely increase the bullying and mental health distress experienced by LGBTIQ+ students and could result in expulsion from school.<sup>72</sup>

5.49 Mental Health Australia commented:

the Religious Discrimination Bill has the potential to further increase the stigma and discrimination experienced by LGBTIQ+ people resulting directly in further deterioration of their mental health. The potential of students and teachers being expelled from a religious school has increased under the Bill with no protection for LGBTQ+ students and teachers from being discriminated against by religious schools. Increase in stigma is also likely to have a direct impact on the willingness of LGBTIQ+ people experiencing mental health difficulties to seek help. Without appropriate treatment, mental health conditions are likely to deteriorate.<sup>73</sup>

5.50 Child Wise further commented that there is a risk the bill package 'would lead to discrimination of children and young people based on their sexuality' and the bill does not align with the National Principles For Child Safe Organisations.<sup>74</sup>

### ***Enrolment and expulsion of students***

5.51 The Australian Human Rights Commission submitted that, while religious educational institutions are required under the bill to have a publicly available policy

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71 Equal Voices, *Submission 32*, pp. 9-12; Aleph Melbourne, *Submission 4*, p. 1; A Gender Agenda, *Submission 81*, p. 3; Rainbodhi LGBTQIA+ Buddhist Community, *Submission 8*, p. 8.

72 Equal Voices, *Submission 32*, pp. 9-12; Prof Tiffany Jones, *Submission 44*, pp. 12-15; Parents for Transgender Youth Equity, *Submission 73*, pp. 1-3; Ms Sharon Hollis, President, Uniting Church in Australia Assembly, *Hansard*, 14 January 2022, p. 57; Commissioner of Children and Young People, *Submission 120*, pp. 1-2; Public Health Association, *Submission 123*, p. 6; Youth Pride Network, *Submission 124*, pp. 7-8; Amnesty International Australia, *Submission 157*, p. 19; Ms Elise Christian, Equal Voices, Committee Hansard, 21 December 2021 p. 75, 76 and 79; Child Wise, *Submission 48*, p. 3.

73 Mental Health Australia, *Submission 67*, p. 2.

74 Child Wise, *Submission 48*, p. 3.

in relation to employment, there is no similar requirement in relation to the admission and expulsion of students on religious grounds.<sup>75</sup>

5.52 Some submitters raised it was not appropriate to prohibit the enrolment of a child on the basis of their personal characteristics.<sup>76</sup> Others submitted that currently in some jurisdictions students could be denied enrolment, but that once a child is enrolled in a school, schools should not then be able to discriminate on the grounds of religion.<sup>77</sup> In addition to LGBTIQ+ students who may be expelled for not living in accordance with a particular faith, submitters noted that students who change or reject faith over the course of their studies may be expelled.<sup>78</sup>

5.53 Ms Sharon Hollis, President, Uniting Church in Australia Assembly, gave evidence that once a student is enrolled at a school, they should be able and free to explore the range of their faith and world view as an educational process:

In any good education system, exploring your world view, your faith and all that you're being taught should lead you to question, to disagree and to discern how you as a young adult growing into adulthood view the world. If we start to allow discrimination throughout the education process it actually hinders the capacity for students to engage fully in the education that they're meant to be getting. They may enter a school with one position and their parents may enter a school with one position and that may change for a variety of reasons. It may have to do with an awareness of their sexuality. It may have to do with the fact that they no longer hold to a key tenet of the faith of the school their parents enrolled them in. But their education should not be cut short or disadvantaged, as a result almost of participating in the education process, because they come to a view different from the school they're enrolled in. It just seems very unfair to young people.<sup>79</sup>

5.54 The Australia Discrimination Law Experts Group noted that a student's faith may change as they progress through school and subclause 7(2) 'would allow the school to expel that student or treat that student differently than other students on the basis that they do not share the same religious beliefs as required by the school'. They submitted that 'rather than protecting a child's right to religious belief in accordance with article 14 of the UN Convention on the Rights of the Child', the bill

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75 Australian Human Rights Commission, *Submission 97*, p. 48.

76 See, e.g., Mr Jason Masters, Uniting Network Australia, *Committee Hansard*, 14 January 2022, p. 53.

77 Australian Discrimination Law Experts Group, *Submission 33*, p. 17; Australian Human Rights Commission, *Submission 97*, p. 49; ACT Government, *Submission 192*, pp. 15-16; Ms Sharon Hollis, Uniting Church in Australia Assembly, *Hansard*, 14 January 2022, p. 55.

78 Law Council Australia, *Submission 28*, p. 23; Australian Discrimination Law Experts Group, *Submission 33*, p. 16.

79 Ms Sharon Hollis, Uniting Church in Australia Assembly, *Committee Hansard*, 14 January 2022, p. 55.

would limit 'their rights by privileging the rights of religious educational institutions over and above the rights of children'.<sup>80</sup>

5.55 Additionally, numerous submitters and witnesses were of the view that treatment of students or staff on the basis of sexual orientation or gender identity was an issue relevant to subsection 38(3) of the *Sex Discrimination Act 1984* (Cth). The Australian Law Reform Commission is tasked with reviewing this provision as part of its review of all religious exemptions in federal anti-discrimination legislation. The reporting deadline for this review is to be one year after the passage of the Religious Discrimination Bill 2021.<sup>81</sup>

5.56 A number of submitters were of the view that the issue of students being discriminated against on grounds other than religion was not directly relevant to the discussion of this bill, which focuses on religious discrimination.<sup>82</sup> Some submitters noted that their support for these bills was contingent on whether proposed amendments to the *Sex Discrimination Act* (Cth) were made.<sup>83</sup>

5.57 The Attorney-General's Department submitted:

The Bill does not affect the operation of the current religious exemptions in the Sex Discrimination Act. As part of the Government's response to the report of the Religious Freedom Review, the Government asked the Australian Law Reform Commission (ALRC) to inquire into religious exceptions in all Australian laws. The Government's position was made very clear at the time and in the terms of reference for the inquiry that it does not support discrimination. The Government is concerned to get the balance right between ensuring religious schools can maintain their religious ethos and ensuring people are free from discrimination. More recently, the Attorney-General wrote to the ALRC President, the Hon. Justice Sarah Derrington, to ask that the ALRC report with detailed drafting for legislative reform that will strike the right balance.<sup>84</sup>

### **Refusal to provide facilities, goods or services for solemnisation of marriage**

5.58 The Human Rights Legislation Amendment Bill 2021 seeks to amend the *Marriage Act 1961* to allow religious educational institutions to refuse to provide facilities, goods or services for the purposes of, or incidental to, the solemnisation of

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80 Australian Discrimination Law Experts Group, *Submission 33*, p. 16.

81 See <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.

82 Mr Gregory Bondar, Family Voice Australia, *Committee Hansard*, 21 December 2021, p. 82; Mr Mark Sneddon, Australian Christian Higher Education Alliance, *Committee Hansard*, 21 December 2021, p. 38; Anglican Church Diocese of Sydney, *Submission 158*, p. 6.

83 Australian Christian Lobby, *Submission 16*, p. 8; Australian Association of Christian Schools, *Submission 23*, pp. 3-4.

84 Attorney-General's Department, *Submission 191*, p. 5.

a marriage in accordance with their religious beliefs.<sup>85</sup> This would apply whether the facilities, goods or services are made for payment or not. The *Marriage Act 1961* already provides that a body established for religious purposes may refuse to make facilities available or provide goods or services in such circumstances.<sup>86</sup>

5.59 The explanatory memorandum states that the Religious Freedom Review noted the possible ambiguity around whether this existing protection applied to religious educational institutions, and as such explains that this provision mirrors the existing provision but applies it to educational institutions. The explanatory memorandum states that this provision 'requires a close nexus between the facilities, goods or services and the solemnisation of marriage.'<sup>87</sup> This ensures that people are not unfairly discriminated against where there is only a distant or tenuous connection between the facilities, goods or services and the solemnisation of marriage'.<sup>88</sup>

5.60 A number of submitters supported this amendment.<sup>89</sup> For example, the Australian Christian Churches noted that the same protection needs to be given to:

educational institutions established for religious purposes, particularly where the educational institution has been established by a specific religious body. To omit these institutions leaves a gaping hole for religious bodies with educational arms and will require them to act in a manner contrary to their beliefs.<sup>90</sup>

5.61 Freedom for Faith considered the impact of the amendment stating that:

It seems a good recognition of the religious freedom rights of schools where many other venues for solemnisation of marriages will be available.<sup>91</sup>

5.62 However, a number of other submitters raised concerns with this amendment, a common one being that existing protections were sufficient, and that

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85 Human Rights Legislation Amendment Bill 2021, Schedule 1, items 3 and 6.

86 *Marriage Act 1961* (Cth), section 47B.

87 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 17.

88 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 18.

89 Freedom for Faith, *Submission 10*, p. 13; Christian Schools Australia & Adventist Schools Australia, *Submission 24*, p.13; Australian Christian Churches, *Submission 63*, p. 8; Associated Christian Schools, *Submission 74*, p. 3.

90 Australian Christian Churches, *Submission 63*, p. 7.

91 Freedom for Faith, *Submission 10*, p. 13.

this amendment would lead to adverse consequences.<sup>92</sup> The Public Interest Advocacy Centre stated no 'compelling argument has been provided to justify permitting organisations operating commercial services in this area to discriminate against LGBTI-inclusive couples'.<sup>93</sup> Dr Sean Mulcahy, La Trobe University, also submitted:

The Bills stipulate that religious schools and universities may refuse to make facilities available, or provide goods and services, for same-sex marriages if doing so would not conform to their religious beliefs or would injure the religious feelings of adherents of their religion...<sup>94</sup> On the other hand, a secular organisation, such as a pride centre, could not refuse to rent its venue to a religious group.<sup>95</sup> This creates unevenness in the law.<sup>96</sup>

5.63 Noting that the broader issue of religious school exemptions remain, Equality Australia submitted that this proposed amendment 'highlights a lack of balance in the approach to exemptions generally and a prioritisation of religious privilege over and above the interests of LGBTIQ+ people'.<sup>97</sup>

### **International human rights law**

#### ***Rights to freedom of religion or belief, freedom of expression, equality and non-discrimination, work, private and family life, education and rights of the child***

5.64 By affording religious educational institutions greater protection to act in accordance with their faith, this measure promotes the rights to freedom of religion and freedom of expression. As outlined in Chapter 2, the right to freedom of religion includes the freedom to have or to adopt a religion or belief, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching.<sup>98</sup> The right includes the right of religious institutions to establish religious infrastructure, such as religious

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92 Equality Australia, *Submission 31*, p. 7; Equal Voices *Submission 32*, p. 9; Australian Discrimination Law Experts Group, *Submission 33*, p. 20; ACON, *Submission 34*, p. 11; National Tertiary Education Union, *Submission 35*, p. 4; Tasmanian Council of Social Services, *Submission 36*, p. 2; Public Interest Advocacy Centre, *Submission 40*, p. 27; Professor Tiffany Jones, *Submission 44*, p. 15; Humanists Victoria, *Submission 52*, p. 2; Australian Human Rights Commission, *Submission 97*, p. 74; Dr Sean Mulcahy, *Submission 126*, p. 9; Children and Young People with Disability Australia, *Submission 139*, p. 6; LGBTIQ+ Health Australia, *Submission 156*, p. 8; Amnesty International, *Submission 157*, pp. 24–25; Planet Ally, *Submission 160*, p. 3; LGBTI Legal Service Inc, *Submission 161*, p. 6; NSW Council for Civil Liberties, *Submission 181*, pp. 3–4, 14; Just Equal Australia, *Submission 69*, p. 3.

93 Public Interest Advocacy Centre, *Submission 40*, p. 27.

94 Human Rights Legislation Amendment Bill 2021, clause 6.

95 Religious Discrimination Bill 2021, clause 25.

96 Dr Sean Mulcahy, *Submission 126*, p. 9.

97 Equality Australia, *Submission 31*, p. 44.

98 International Covenant on Civil and Political Rights, article 18(1).

schools, and to decide who may teach religion and in what manner it should be taught.<sup>99</sup> The right to freedom of religion also requires Australia to respect the convictions of parents and guardians of children in the provision of education, and respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>100</sup> The right to freedom to manifest religion, including in the workplace, intersects with, and has a mutually reinforcing relationship with, the right to freedom of expression.<sup>101</sup>

5.65 However, by allowing religious educational institutions to treat persons differentially on the basis of their religious belief or activity (including in relation to employment decisions, restricting access to schools for students of certain religions and treating students differently based on their religion or beliefs, including in relation to admission and expulsion decisions), this measure also necessarily engages and limits the rights to freedom of religion or belief, freedom of expression and equality and non-discrimination for others (see Chapters 2 and 4 for an overview of the content of these rights and Australia's obligations under international human rights law).

5.66 The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>102</sup> This measure not only permits differential treatment on the basis of religion or belief, but it may also have the effect of allowing indirect discrimination against persons on the basis of other protected attributes, such as gender and sexuality.<sup>103</sup>

5.67 Differential treatment on the basis of a protected attribute, such as religion, gender or sexuality, will not constitute *unlawful* discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate

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99 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41]; *William Eduardo Delgado Páez v. Colombia*, UN Human Rights Committee Communication No. 195/1985 (1990) [5.7]–[5.8]. See also Associate Professor Mark Fowler, *Submission 20*, p. 13.

100 International Covenant on Civil and Political Rights, article 18(4). See also International Covenant on Economic, Social and Cultural Rights, article 13(3).

101 International Covenant on Civil and Political Rights, article 19. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

102 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

103 See Attorney-General's Department, *Submission 191*, p. 8, regarding the extent to which religious educational institutions may consider issues of sexuality.

means of achieving that objective.<sup>104</sup> As discussed in Chapter 2 (at paragraph [2.50]), in assessing the permissibility under international human rights law of possible indirect discrimination under this bill, it is not relevant whether such differential treatment may be lawful or unlawful under other federal anti-discrimination laws, such as the *Sex Discrimination Act 1984*.<sup>105</sup>

5.68 The measure may also limit the rights to work, education, privacy and family life to the extent that it would deprive persons of certain religious belief of employment opportunities at religious educational institutions; restrict access to education for certain students, noting that in some remote locations in Australia the only available school may be a religious school;<sup>106</sup> and permit arbitrary interference with a person's private and family life.<sup>107</sup> The content of these rights are discussed in Chapter 2.

5.69 Noting its application to students, the measure may also engage and limit the rights of the child, particularly the rights to education, equality and non-discrimination and freedom of religion or belief. Under the Convention on the Rights of the Child, children themselves hold the right to freedom of religion or belief.

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104 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

105 See *Sex Discrimination Act 1984*, paragraph 23(3)(b) and subsection 38(1).

106 See Northern Territory Anti-Discrimination Commission, *Submission 69*, p. 5. The Northern Territory Anti-Discrimination Commission stated that in the Northern Territory, 'there are a number of locations where there are no options but religious schools'. They were concerned that the 'reforms will impact on Aboriginal people whose communities this occurs in, by limiting employment opportunities in communities that already have very limited employment opportunities, and impacting on teaching a diverse curriculum, that reflects the need of maturing students, particularly in relation to sexuality and gender identity'.

107 See UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33], [37], which noted that the rights to education, expression and other human rights can be limited by institutions in the name of religion or on the basis of a person's religion.

Associated with this right are the rights and duties of a child's parents or legal guardians to provide direction to their child in the exercise of this right in a manner consistent with the evolving capacities of the child.<sup>108</sup> While the rights of the child and parental rights in the area of freedom of religion or belief may, at times, be in tension, these rights 'should generally be interpreted as being positively interrelated'.<sup>109</sup>

5.70 Further, when considering the rights of the child in the area of freedom of religion, it is necessary to apply the principle of the best interests of the child. Australia has obligations to ensure that the best interests of the child are taken as a primary consideration in all actions concerning children, including in the area of freedom of religion or belief.<sup>110</sup> This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.<sup>111</sup> A child's best interests and their enjoyment of their Convention rights 'must be assessed and determined in light of the specific circumstances of the particular child'.<sup>112</sup>

5.71 In addition, to the extent that the measure removes existing protections against discrimination in the area of work under state and territory laws (noting clause 11 overrides certain state and territory laws to allow religious educational institutions to preference people in employment), it may constitute a retrogressive measure under international human rights law. This is because clause 11 would have the effect of making otherwise discriminatory conduct under state or territory laws lawful under this bill, thus removing protections against discrimination for certain employees.<sup>113</sup>

5.72 Australia has obligations to progressively realise economic, social and cultural rights (such as the rights to work and education) using the maximum of resources available,<sup>114</sup> and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.<sup>115</sup>

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108 Convention on the Rights of the Child, article 14.

109 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [76].

110 Convention on the Rights of the Child, article 3(1).

111 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013). See also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

112 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013), p. 3.

113 On this issue, see, e.g. Australian Discrimination Law Experts Group, *Submission 33*, pp. 10–11.

114 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

115 International Covenant on Economic, Social and Cultural Rights, article 2.

Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective. In this context, the UN Committee on Economic, Social and Cultural Rights has stated that:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.<sup>116</sup>

5.73 The statement of compatibility acknowledges that conduct permitted under Part 2 of the bill could limit a person's right to equality and non-discrimination by preventing the person accessing education or employment opportunities from the religious body in question on the basis of the person's religious belief or activity.<sup>117</sup> The statement of compatibility notes that the rights to work, education and freedom of expression are engaged by the bill but does not acknowledge that this specific measure may limit these rights.<sup>118</sup> The statement of compatibility does not address the rights to private and family life or the rights of the child.

#### *Limitation criteria*

5.74 The above rights may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. As discussed in Chapters 2 and 4, this general test is further qualified by specific requirements that apply to the rights to freedom of religion and freedom of expression.

5.75 Relevantly in the context of this measure, the freedom to manifest one's religion or beliefs may be subject only to specific limitations set out in the limitation clause (article 18(3)), including, where necessary, to protect the fundamental rights and freedoms of others.<sup>119</sup> Limitations are to be strictly interpreted and 'may be applied only for those purposes for which they were prescribed and must be directly

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116 UN Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) [45].

117 Religious Discrimination Bill 2021, statement of compatibility, pp. 10–12.

118 Religious Discrimination Bill 2021, statement of compatibility, p. 28.

119 See International Covenant on Civil and Political Rights, article 18(3); UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8] and UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [32].

related and proportionate to the specific need on which they are predicated'.<sup>120</sup> The necessity of the measure is also relevant in assessing the permissibility of a restriction on the right to freedom of religion.<sup>121</sup>

5.76 Further, where the manifestation of religion or the expression of a religious opinion or belief limits the rights or freedoms of others, each right must be balanced against each other.<sup>122</sup> Noting that there is no hierarchy of human rights, where limitable rights clash, 'the focus should be on ensuring that all human rights are protected, including through reasonable accommodation'.<sup>123</sup>

5.77 In the context of this measure, the rights of religious educational institutions to manifest their religion must be balanced against the rights of others (particularly staff and students). Under international human rights law jurisprudence, a balancing exercise is undertaken to resolve conflicts between competing limitable human

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120 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49* (2018) [31], [44], [45].

121 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5] where the Committee stated that it needed to 'assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory'. See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36]. Likewise, the Special rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58* (2019) [17]. See also Associate Professor Mark Fowler, *Submission 20*.

122 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8]; United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8]; UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58* (2019) [16].

123 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49* (2018), [81].

rights – often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.<sup>124</sup>

5.78 For instance, in the case of *Fernández Martínez v Spain*, the European Court of Human Rights balanced the right of religious institutional autonomy against the right to private and family life. The case involved the non-renewal of a teaching contract of a married Catholic priest, who taught Catholic religion and ethics at a state high school in Spain, after he had been granted dispensation from celibacy and attended a public event displaying his active commitment to a movement opposing church doctrine. The court held that the right to private and family life was applicable because the non-renewal of the applicant's contract, which had seriously affected his chances of carrying on his specific professional activity, was based on events mainly relating to personal choices he had made in the context of his private and family life.<sup>125</sup> Noting the positive obligation to adopt measures to secure respect for private life, the court found the conduct of the public authorities had interfered with the applicant's right, although as noted below, this interference was considered not to be disproportionate.<sup>126</sup> In relation to the balancing exercise undertaken, the court reiterated that:

when it is called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weigh up the interests at stake...In the present case, this balancing exercise concerns the applicant's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other. The State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued.<sup>127</sup>

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- 124 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. In addressing the conflict between the rights to freedom of religion and equality and non-discrimination, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'. See also Ms Anja Hilgemeijer, *Submission 5*, p. 2 and Anja Hilgemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.
- 125 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [109]–[113].
- 126 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [114]–[116].
- 127 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [123].

5.79 In balancing these rights, the court ultimately found there had been no violation of the right to private and family life as the interference with this right was not disproportionate.<sup>128</sup>

5.80 As evidenced in the above case, international human rights law jurisprudence has considered the specific circumstances of the case, the competing rights in question and the vulnerability of the persons involved in undertaking this balancing exercise.<sup>129</sup> Regarding the latter, international human rights law jurisprudence has held that:

it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.<sup>130</sup>

5.81 International human rights law has also recognised the 'special category' of religious institutions, particularly in the context of employment. While religious institutions 'must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace', the circumstances of the specific case are still relevant in assessing whether the conduct of religious institutions constitutes a permissible limitation on the rights of others.<sup>131</sup>

#### *Prescribed by law*

5.82 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and

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128 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [152]–[153].

129 See, e.g., *Black and Morgan v Wilkinson*, Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, E/CN.4/2006/5 (2006) [51]–[52].

130 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'.

131 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.<sup>132</sup> While the measure clearly has basis in domestic law, namely the religious discrimination legislative package, there are questions as to whether the quality of law test is met.

5.83 In assessing whether the quality of law test is met, it is necessary to consider whether the circumstances in which an individual's rights may be limited by the conduct of a religious educational institution are sufficiently clear. In answering this question, it is relevant to consider the scope and clarity of the threshold tests contained in the relevant provisions, namely, the reasonableness test (in subclause 7(2)) and the religious susceptibilities test (in subclause 7(4)), as well as the requirement that conduct be in accordance with a publicly available policy and comply with any requirements determined by the minister (in subclause 7(6)). Subclauses 7(2) and (4) are discussed in detail in Chapter 4.

5.84 In relation to the requirement for conduct to be in accordance with a publicly available policy, this may assist in clarifying the circumstances in which the rights of individuals (in the context of employment) may be limited. The explanatory memorandum states that:

A policy must be available to prospective and existing employees or partners. It may be issued publicly through a variety of means, such as being provided online at the point of application or by a copy being provided upon request or as part of the recruitment package. The publicly available policy requirements do not affect the employment arrangements for existing staff, but are intended to provide information for current and prospective employees on the position of the school in relation to the use of these exceptions.<sup>133</sup>

5.85 The matters set out in paragraph 11(1)(b) provide some guidance as to the contents of such policies. It requires a written policy to outline the religious educational institution's position in relation to the particular religious belief or activity; to explain how the position will be enforced; and to be publicly available, including at the time employment opportunities with the educational institution become available. The manner in which the policy is to be made public is not specified in the bill. The Attorney-General's Department stated that a 'policy may be made public through any appropriate means, such as being provided online at the point of application, or as part of a package of relevant material associated with a job

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132 *Pinkney v Canada*, UN Human Rights Communication No.27/1977 (1981) [34]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [78]; *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64].

133 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

advertisement, or by a printed copy being provided to a person who requests the policy'.<sup>134</sup>

5.86 The public policy requirement may clarify the circumstances in which the rights of employees or prospective employees may be limited. However, it does not appear to assist children or students in understanding the circumstances in which their rights may be limited by a religious school, noting that the requirement only applies to conduct in the context of employment.<sup>135</sup> It thus remains unclear whether the measure is drafted in such a way as to be sufficiently clear to enable all persons, particularly children, to foresee the circumstances in which a religious school may limit their rights. The breadth of the measure is also relevant to questions of proportionality (as discussed below).

*Legitimate objective and rational connection*

5.87 The statement of compatibility states that Part 2 of the bill seeks to enable religious bodies to conduct themselves in accordance with their religion, thereby promoting an individual's rights to manifest religion in community with others and freedom of association.<sup>136</sup> The stated objective of this particular measure is to 'ensure that religious bodies are able to maintain their religious ethos through staff, admission and other decisions'.<sup>137</sup> Regarding clause 11, the Attorney-General's Department stated that its purpose is to:

preserve these exemptions, as provided in state and territory laws. The Government considered that it would only be necessary to prescribe a state or territory law if a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment.<sup>138</sup>

5.88 As noted in Chapter 4, international human rights law has recognised protection of religious institutional autonomy – an aspect of the right to freedom of religion – as a legitimate objective.<sup>139</sup> Insofar as the measure affords greater protection to religious educational institutions to act in accordance with their faith,

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134 Attorney-General's Department, *Submission 191*, p. 11.

135 See, e.g., Australian Human Rights Commission, *Submission 97*, p. 48.

136 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

137 Religious Discrimination Bill 2021, explanatory memorandum, p. 45.

138 Attorney-General's Department, *Submission 191*, p. 10.

139 See, e.g. *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [86]; *Siebenhaar v Germany*, European Court of Human Rights, Grand Chamber, Application No 18136/02 (2011) [41]; *Obst v Germany*, European Court of Human Rights, Application No 425/03 (2010) [44]; *Hasan and Chaush v Bulgaria*, European Court of Human Rights, Grand Chamber, Application No 30985/96 (2000) [62]. See also, Ms Anja Hilkemeijer, *Submission 5*, quoting Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, p. 756; Associate Professor Mark Fowler, *Submission 20*, pp. 34–36.

including by overriding any state or territory laws that would interfere with the ability of educational institutions to preference people in employment on the basis of religion, the measure appears to be rationally connected to the stated objective.<sup>140</sup>

### *Proportionality*

5.89 As discussed above and in Chapter 4, there are some concerns that the measure is drafted in overly broad terms. In particular, the threshold tests to determine whether conduct by a religious educational institution is not discrimination may not be sufficiently clear as to enable individuals, particularly children, to foresee the circumstances in which their rights may be limited. The breadth of the measure raises questions as to whether the proposed limitation is sufficiently circumscribed. Some submitters and witnesses raised concerns about the broad scope of the measure. For example, the Australian Discrimination Law Experts Group stated:

Clause 11 applies not only to determinations or preferences as to who should be employed but also determinations once someone is employed or in the determination to remove staff. This is because clause 11 applies to conduct that would otherwise be unlawful in both clause 19(1) in relation to hiring and in clause 19(2) in relation to terms and conditions in employment and preferencing in employment. Clause 11 allows religious educational institutions an extremely wide exception with respect to both hiring staff as well as making determinations about their conditions of ongoing employment after they have commenced work.<sup>141</sup>

5.90 The requirement that conduct be in accordance with a publicly available policy may assist in circumscribing the measure, although the extent to which it may assist will depend on the content of such policies. As noted above, this requirement only applies in the context of employment and does not apply to matters relating to students (such as admission or expulsion of students). The explanatory memorandum identified this requirement as a key safeguard, stating:

Paragraph 11(1)(b) is intended to provide an additional safeguard for the general community noting the broader impact this provision could have on people who are employed by, or seeking to be employed by, these bodies. The requirement to have a written, publicly available policy would increase certainty and transparency and ensure that the general public is able to ascertain and understand the position of a religious body in relation to

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140 Although, some submitters have raised concerns that the measure may not be rationally connected to the objects of the bill itself, noting that part 2 permits discrimination in the name of religion rather than prohibiting religious discrimination, see Australian Discrimination Law Experts Group, *Submission 33*, p. 14; Law Council of Australia, *Submission 28*, pp. 23–26.

141 Australian Discrimination Law Experts Group, *Submission 33*, p. 17. See also Australian Human Rights Commission, *Submission 97*.

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preferencing in employment prior to seeking employment or otherwise engaging with the religious body.<sup>142</sup>

5.91 Some submitters, however, were of the view that conferring a broad power on the minister to determine requirements in relation to the publicly available policy would not assist to circumscribe the measure (as set out above at paragraph [5.28]).

5.92 Subject to any additional requirements set out by the minister, the public policy requirement would likely enhance transparency and may help to ensure the measure is sufficiently circumscribed, which could assist with proportionality. However, as discussed in Chapter 4, the extent to which the requirement would serve as an adequate safeguard to protect the rights of others is unclear, noting that a policy setting out when a person's rights may be limited does not prevent the limitation occurring. In this regard, some submitters and witnesses were concerned that a publicly available policy may in practice facilitate discrimination rather than act as a safeguard.<sup>143</sup>

5.93 A related consideration is the flexibility of the measure. This is discussed in Chapter 4. As noted, the flexibility to have regard to the individual circumstances of the case is particularly important in circumstances where competing rights must be balanced, as is necessary in the context of this measure.

5.94 In the context of religious schools, while international human rights law has recognised the right of religious schools to decide who may teach religion and in what manner it should be taught, distinctions have been drawn between employees teaching religion and other employees who may owe a lower degree of loyalty to the school.<sup>144</sup> For example, in *Fernández Martínez v Spain* (see paragraph [5.78]), the European Court of Human Rights stated that:

as a consequence of their autonomy religious communities can demand a certain degree of loyalty from those working for them or representing them. In this context the Court has already considered that the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned...In particular, the specific mission assigned to the person concerned in a religious organisation is a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty.

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142 Religious Discrimination Bill 2021, explanatory memorandum, p. 52. See also Attorney-General's Department, *Submission 191*, p. 11.

143 See, e.g., Australian Discrimination Law Experts Group, *Submission 33*, p. 18; Law Council of Australia, *Submission 28*, p. 32; Professor Luke Beck, *Submission 38*, p.16.

144 See, e.g., *William Eduardo Delgado Páez v. Colombia*, UN Human Rights Committee Communication No. 195/1985 (1990) [5.7]–[5.8]; *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014); *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017); *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010).

That being said, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with [the right to privacy] of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.<sup>145</sup>

5.95 In applying the above test to the circumstances of the case, the court considered the status of the applicant, noting that by signing successive employment contracts, the teacher had accepted a heightened duty of loyalty to the church; the fact that the teacher had publicly campaigned in favour of a way of life that was contrary to the views of the church; the specific content of the teaching, noting that religious education teachers have a heightened duty of loyalty and 'religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question'; and the severity of the sanction, including the teacher's ability to find other employment and the availability of a less rights restrictive option.<sup>146</sup> Regarding the latter, in the case of *Schüth v Germany*, the inability of a church organisation to find a new job outside the church was a factor the court considered in finding that the applicant's rights had been violated.<sup>147</sup>

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145 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [131].

146 At [137], the Court stated that 'it is not unreasonable for a Church or religious community to expect particular loyalty of religious-education teachers in so far as they may be regarded as its representatives. The existence of a discrepancy between the ideas that have to be taught and the teacher's personal beliefs may raise an issue of credibility if the teacher actively and publicly campaigns against the ideas in question'. At [141], the court held that 'the applicant was voluntarily part of the circle of individuals who were bound, for reasons of credibility, by a duty of loyalty towards the Catholic Church, thus limiting his right to respect for his private life to a certain degree. In the Court's view, the fact of being seen as campaigning publicly in movements opposed to Catholic doctrine clearly runs counter to that duty. In addition, there is little doubt that the applicant, as a former priest and director of a seminary, was or must have been aware of the substance and significance of that duty'.

147 *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010). See also, Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

5.96 These cases indicate that in signing an employment contract with a religious institution, employees accept a duty of loyalty towards that institution, noting it has been held that contractual limitations on individual rights are permissible so long as they are freely accepted.<sup>148</sup> However, the demands of loyalty must still be reasonable, having regard to the individual circumstances of the case.

5.97 The jurisprudence of the European Court of Human Rights indicates that where the right of religious institutional autonomy, including that of religious educational institutions, conflicts with individual rights, each right must be balanced against the other and the permissibility of any limitation of rights turns on the specific circumstances of the case.<sup>149</sup> For example, in circumstances where the only available school in a remote location is a religious school, greater weight may be given to the rights of individuals (such as teachers or students) against the right of the religious school to institutional autonomy, noting that it may be more difficult to find alternative employment and educational opportunities.<sup>150</sup> The vulnerability of the individuals involved would also be a relevant factor, noting jurisprudence has held that 'religious liberty' cannot be invoked to justify discrimination against vulnerable groups, including women, girls and LGBTIQ+ persons.<sup>151</sup> In addition, where children are involved, strong regard would need to be given to the best interests of the child. On this issue, the UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

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148 See, e.g., *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010) [71].

149 See also, UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [47].

150 See Northern Territory Anti-Discrimination Commission, *Submission 69*, p. 5. The Northern Territory Anti-Discrimination Commission stated that in the Northern Territory, 'there are a number of locations where there are no options but religious schools'. They were concerned that the 'reforms will impact on Aboriginal people whose communities this occurs in, by limiting employment opportunities in communities that already have very limited employment opportunities, and impacting on teaching a diverse curriculum, that reflects the need of maturing students, particularly in relation to sexuality and gender identity'. See also Australian Human Rights Commission, *Submission 97*, p. 44.

151 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke "religious liberty" concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'. See also Ms Anja Hilgemeijer, *Submission 5* and Professor Luke Beck, *Submission 38*.

considerations. This strong position is justified by the special situation of the child.<sup>152</sup>

5.98 Some submitters raised concerns that the measure does not give sufficient weight to the rights of the child, instead privileging the rights of religious educational institutions.<sup>153</sup> The ACT Government, for instance, submitted:

Whereas section 46 of the ACT Discrimination Act allows schools to discriminate against students on the grounds of religion only at the time of admission, [clause] 7 of the Bill would appear to allow schools to discriminate on the grounds of religion after a student is enrolled in a school...This approach, particularly given the lack of human rights safeguards discussed below, may unreasonably limit students' human rights. This is despite the Convention of the Rights of the Child requiring that the best interests of the child be a primary consideration in both public and private institutions. It permits a school to prioritise religious freedoms to expel a child who, for example, converts to a different religion during their studies, yet requires no balancing consideration by the school of the child's welfare or rights to education. This approach may also limit the rights in the ACT Human Rights Act to education without discrimination.<sup>154</sup>

5.99 The Australian Human Rights Commission also raised concerns about potential discrimination against children, stating:

Permitting discrimination against students on the basis of religious belief or activity, either at the point of admission or thereafter, is more difficult to justify than preferencing the hiring of staff of a particular faith where those staff are responsible for providing the leadership of the institution and creating its ethos.

...

Many students may not have chosen the school in which they are enrolled; it may have been a decision by a parent or guardian. Young people are at a formative stage of development and their religious beliefs may change over time. The Commission's view is that they should not be penalised for this in either the terms or conditions on which they are enrolled, or in decisions about expulsion. Such an approach would be consistent with the importance accorded by the *Convention on the Rights of the Child* to children's agency and their ability to make their own decisions, including in relation to questions of religion.<sup>155</sup>

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152 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

153 See, e.g. Australian Discrimination Law Experts Group, *Submission 33*, p. 16.

154 ACT Government, *Submission 192*, [54].

155 Australian Human Rights Commission, *Submission 97*, pp. 49–50.

5.100 The measure, as currently drafted, does not allow for this balancing exercise to occur. As discussed in Chapter 4, it is not clear that the objects clause (which refers to the indivisibility and universality of human rights, and their equal status in international law) would necessarily facilitate this balancing exercise in practice. Thus, in the absence of the ability to consider the individual circumstances of the case and balance competing human rights, there appears to be a risk that the measure may not be proportionate in all circumstances.

5.101 Further, it is not clear that the measure represents the least rights restrictive way of achieving the stated objective. The breadth of the measure and inability to consider individual circumstances makes it difficult to ensure that the least rights restrictive approach is taken, noting that where a religious body interferes with the rights of others, such interference should be based on a 'real and substantial' risk to institutional autonomy and should 'not go beyond what is necessary to eliminate that risk'.<sup>156</sup>

5.102 In relation to children, a less rights restrictive option may be to allow religious schools to treat students differentially on the ground of religion at the time of admission to the school but not in respect of their continuing enrolment. The Australian Discrimination Law Experts Group noted that this approach has been adopted in state and territory legislative schemes and 'provides a more balanced protection of the right of religious educational institutions to operate in accordance with their faith, but also respects a child's individual right to explore their own faith and beliefs'.<sup>157</sup>

5.103 In relation to staff, a less rights restrictive option may be to limit the scope of the exemption so as to allow religious educational institutions to discriminate on the basis of religion in the context of employment where the role in question is an inherently religious one or where the employee would owe a heightened degree of loyalty to the religious institution.<sup>158</sup>

5.104 In conclusion, while the measure pursues a legitimate objective of protecting the autonomy of religious educational institutions and appears to be rationally connected to that objective, there are questions as to whether the measure would meet the quality of law test and would be proportionate in all circumstances. Under international human rights law, the ability to consider the individual circumstances of the case is critical to ensuring that rights are appropriately balanced and any limitation on individual rights is reasonable, necessary and proportionate in each case.

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156 *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013) [159]. See also, *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.8] regarding the need to take the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.

157 Australian Discrimination Law Experts Group, *Submission 33*, p. 17.

158 See, e.g., Law Council of Australia, *Submission 28*, p. 22.

## **Committee view**

5.105 The committee considers it is essential for religious educational institutions to be able to maintain the religious ethos of their school. The ability of a religious educational institution to conduct itself according to its faith and values is an important aspect of the right to freedom of religion or belief. The committee also emphasises the importance of safeguarding parents' rights to ensure the religious and moral education of their children in accordance with their religious convictions.

5.106 The committee acknowledges the concerns that have been raised that staff and students in religious schools would not be afforded protection under this legislation for any discrimination they may experience on the basis of their religion. As stated, the right to freedom of religion requires that faith-based organisations have a right to select staff, who are not only adherents of that faith, but who also support the organisation's religious doctrines and practices. This is even more important in schools, where values are often more caught than taught. Therefore, the ability for religious schools to recruit those who can model the religious values and beliefs of a school in their interactions with students and their families is essential to preserving the general ethos and values of religious schools. The power to override certain state and territory laws that prevent this from occurring is also essential to adequately protecting this right. While acknowledging that this issue remains contentious and noting the different views received by the committee regarding the necessity and appropriateness of this override provision, on balance, the committee considers that it is an important measure to protect the right of religious educational institutions to manifest their religion and maintain the religious ethos of the school and educational community. The committee acknowledges that this may limit the right to freedom of religion and equality and non-discrimination for some, and that there is a difficult balancing act to undertake. The committee considers that the bill includes important safeguards, with conduct by religious bodies only captured if it is engaged in in good faith by bodies that are inherently religious, and where that conduct is necessary for the body to properly maintain its religious ethos.

5.107 Another important safeguard in the bill is the requirement that schools that engage in differential treatment on the basis of religion in relation to the employment of staff must do so in accordance with a publicly available policy. The committee considers this increases certainty and transparency and ensures that prospective or existing employees, as well as the general public, would be able to ascertain and understand the position of a religious body on such matters. The committee supports this measure, although it retains some scrutiny concerns that the bill specifies that the minister can determine the requirements for such a policy in delegated legislation. No further detail is provided in subclauses 7(6), 7(7) and 9(3) as to what the minister may require of such a policy. The committee considers these are potentially significant matters that are best dealt with in primary legislation and not left to delegated legislation which has a much lower level of parliamentary

oversight. As such, the committee considers these clauses should, similarly to clause 12, at least set out the basic requirements for the policy, namely that it outline the religious body's position in relation to particular religious beliefs or activities, and explains how this position will be enforced by the religious body. The committee considers this would provide clarity around what the policy should contain, and should it be necessary to prescribe additional requirements, the minister could do so, but this would be ancillary to what is set out on the face of the bill.

5.108 Further, the committee emphasises that conduct that is not discrimination under this bill may still constitute discrimination under other anti-discrimination laws. In particular, these bills do not affect the operation of the current religious exemptions in the *Sex Discrimination Act 1984*. The committee notes that the Australian Law Reform Commission has been tasked with inquiring into religious exceptions in all Australian laws. In doing so the government has expressly stated that it is concerned to get the balance right between ensuring religious schools can maintain their religious ethos and ensuring people are free from discrimination. The committee considers that questions regarding exemptions from the *Sex Discrimination Act 1984* (which currently means it is not discrimination for religious bodies to discriminate on the grounds of sex or sexual orientation) are best dealt with as part of this broader review.

#### **Recommendation 8**

**5.109 The committee recommends that subclauses 7(6), 7(7) and 9(3) of the Religious Discrimination Bill 2021 be amended to set out what is required to be included in a publicly available policy, namely: that the policy must outline the religious body's position in relation to particular religious beliefs or activities, and explain how this position will be enforced by the religious body. These subclauses should also provide that the minister may, by legislative instrument, determine any other requirements ancillary to this, which the policy must comply with.**



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## Chapter 6

### Statements of belief

6.1 This Chapter outlines the key issues raised by submitters and witnesses to the inquiry in relation to statements of belief. It looks in particular at clause 12 of the bill (regarding statements of belief) and clause 15 (regarding qualifying body conduct rules). A number of faith-based groups and organisations strongly supported the inclusion of provisions to better protect statements of genuinely held religious belief. However, a number of other groups and organisations were strongly critical of these provisions, particularly of existing anti-discrimination laws being overridden. This Chapter sets out the views provided by submitters and witnesses as to these issues, and looks in detail at:

- the interaction of the statement of belief clause with existing discrimination law;
- the scope of clause 12;
- the potential impact on particular groups, including people with disability; women; LGBTIQ+ people; on race; on people of faith; in accessing health care; and in the workplace;
- how the defence of a statement of belief will impact on the resolution of discrimination complaints; and
- clause 15 and the qualifying body rules.

6.2 It concludes with an assessment of the application of international human rights law to these provisions and provides the committee's view and recommendations.

#### Protection of statements of belief

6.3 The bill provides that a statement of belief, in and of itself, does not constitute discrimination for the purposes of a number of listed anti-discrimination legislation, and does not contravene a Tasmanian law prohibiting certain conduct,<sup>1</sup> or any law prescribed by the regulations.<sup>2</sup> A statement of belief is a religious belief (or a belief held by someone who does not hold a religious belief), made in good faith, which the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (or of the fact of not holding a religion).<sup>3</sup> It does not apply to a statement of belief that is malicious; that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or where a person is

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1 *Anti-Discrimination Act 1998 (Tas)*, subsection 17(1).

2 Religious Discrimination Bill 2021, clause 12.

3 Religious Discrimination Bill 2021, clause 5, definition of 'statement of belief'.

counselling, promoting etc the commission of a serious offence.<sup>4</sup> A number of submitters and witnesses supported the inclusion of clause 12 and were of the view that statements of belief, as manifestations of religion, required greater protection. Amongst this group it was generally submitted that clause 12 was needed in order to ensure that religious people could freely profess their faith without fear of complaints being made against them.<sup>5</sup>

6.4 For example, Associate Professor Mark Fowler characterised the protection contained in clause 12 as 'a shield against discriminatory complaints against "moderately" expressed religious views, not a sword'. He submitted that it may be:

seen as an exercise attempting to conserve the tolerant approach to religious discourse that has long been characteristic of our open and liberal democracy and operates in with neutrality between religious and non-religious worldviews in a manner that is consistent with international law'.<sup>6</sup>

6.5 Reverend Doctor John McClean, Convenor, Church and Nation Committee, Presbyterian Church of Australia explained why he considered it necessary to protect statements of religious belief:

I think it also goes to the character of religion that, by its nature, religion requires statements and expression, and so it's appropriate that that be protected particularly in the area of religion; whereas, obviously, in disability discrimination the concerns are about access to services, access to buildings. So, to realistically protect freedom of religion, expression—both expression in action and expression in statement—is inherent and intrinsic to the character of what religion is.<sup>7</sup>

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4 Religious Discrimination Bill 2021, subclause 12(2).

5 Dr Alex Deagon, *Submission 3*, p. 18; Dr Russell Blackford, *Submission 7*, p. 3; Freedom for Faith, *Submission 10*, p. 10; Dr Denis Dragovic, *Submission 18*; Executive Council of the Australian Jewry, *Submission 19*, p. 8; Associate Professor Mark Fowler, *Submission 20*, p. 23; Australian Association of Christian Schools, *Submission 23*, p. 11; Australian Christian Higher Education Alliance, *Submission 25*, p. 6; Human Rights Law Alliance, *Submission 30*, p. 10; Christian Education National, Tasmania, *Submission 41*, p. 2; Australian Christian Churches, *Submission 63*, p. 5; Associated Christian Schools, *Submission 74*, p. 2; Catholic Women's League of Victoria and Wagga Wagga, *Submission 87*, p. 2; Presbyterian Church of Australia, *Submission 94*, p. 8; Islamic Council of Victoria, *Submission 111*, p. 4; Australia/Israel & Jewish Affairs Council, *Submission 119*, p. 7; Presbyterian Church of Victoria, *Submission 133*, p. 3; The Anglican Church Diocese of Sydney, *Submission 158*, p. 11; Christian Media and Arts Australia Limited, *Submission 163*, p. 7; Catholic Women's League Australia Inc., *Submission 175*, p. 1; Australian Catholics Bishops Conference, *Submission 185*, p. 10; Australian Muslim Advocacy Network, *Submission 93*, p. 11.

6 Associate Professor Mark Fowler, *Submission 20*, p. 4.

7 Reverend Doctor John McClean, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 42.

6.6 The Presbyterian Church of Australia also noted that 'very few good faith statements of religious faith could be fairly construed as discriminatory'.<sup>8</sup> Similarly, Right Reverend Doctor Michael Stead, Bishop of South Sydney, Anglican Church Diocese of Sydney, while supporting clause 12 noted:

we don't think the first part of clause 12 is actually doing anything new because any statement that is not malicious, not vilifying and not all those other things is not going to be discrimination. To the question of whether it's a sword or a shield, my question would be: are there examples of Christians who are currently saying things which have been found to be discrimination that the bill is now going to permit? And the answer is no. I've trawled through every judgement I can find and I can't find any example of somebody having made a genuine good-faith statement of belief that has been held to be discrimination under any state or federal act which would therefore be permitted by clause 12. Why clause 12 is important is because of the places where it has been used, where other antidiscrimination law has been used as a sword against statements of belief—and I'm thinking particularly of section 17 of the Tasmanian antidiscrimination legislation. So we don't want clause 12 because it's a sword for us against others; it's a shield against the overreach of insult and offend laws in other jurisdictions.<sup>9</sup>

6.7 The Islamic Council of Victoria considered the statement of belief clause is vital to securing the right to religious freedoms for all Australians:

The freedom to express religious beliefs without fear is a hallmark of a free democracy affording equality to all. Muslims, as a religious group, overwhelmingly support and wish to see enacted legislation which confers unto them the right to express their religious views, a core component of our faith, without fear of discrimination.<sup>10</sup>

6.8 The Australia/Israel & Jewish Affairs Council (AIJAC) argued:

In Australia, religious-based bodies should be legally protected to publish the beliefs on which they were established or operate. Similarly, individuals should be able to exercise their right to express their religious beliefs. So many of the world's religions – Judaism included – are based on making the world a better place, caring for those less fortunate and loving your neighbour as yourself, so it must be said that, in general, these statements strengthen our communities and enrich our lives.

6.9 In the limited examples where these statements do not contribute to community cohesion or may be unpleasant to those who don't share that faith, a responsibility exists for those with genuinely held religious beliefs to cause no harm, or at the very least, to minimise the harm caused by expressing their beliefs. AIJAC

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8 Presbyterian Church of Australia, *Submission 94*, p. 8.

9 Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 49.

10 Islamic Council of Victoria, *Submission 111*, p. 4.

acknowledges that clause 12 of the Religious Discrimination Bill seeks to strike this balance.<sup>11</sup> Further, in the committee's survey in relation to the bill, 68 per cent of respondents said they did not believe religious people would be comfortable to share their beliefs in public life without the Religious Discrimination Bill 2021, and 97 per cent considered it should be lawful for a person to make a statement of belief so long as it is made in good faith and is not malicious, threatening, intimidating, or harassing and does not vilify a person or group or advocate the commission of a serious offence.<sup>12</sup>

6.10 Some submitters and witnesses also noted that this clause also protects non-religious statements of belief and in this way does not elevate religious speech above non-religious speech.<sup>13</sup> Professor Nicholas Aroney submitted:

I don't think it prioritises religious speech, if that is meant by 'prioritises the speech of people who hold religious beliefs' but it does focus on speech which is about religion, whether it is by somebody who holds religious belief or somebody who does not hold religious belief, and it appears that the reason for that is that this is a bill directed at or addressing religious discrimination. So, in that sense, its subject matter is religion, and it's intended to protect people of religious faith and those who have no religious faith, because that freedom is a freedom not just of religion but of belief as well.<sup>14</sup>

6.11 On this issue, the Attorney-General's Department stated that clause 12 'equally protects the expression of atheist and agnostic beliefs, as well as religious beliefs'.<sup>15</sup>

6.12 Conversely, a number of submitters and witnesses argued that clause 12 was not necessary, likely to be divisive and should be removed from the bill. Specific concerns raised by these submitters are set out in further detail below. Amongst this group it was felt that clause 12 seeks to elevate religious speech above other rights which was not appropriate in a secular society and unduly imposed on the rights of other people.<sup>16</sup> Submitters and witnesses stated that the clause does not protect

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11 Australia/Israel & Jewish Affairs Council, *Submission 119*, p. 7.

12 See Survey Questions and sample of responses, Appendix 4, questions 8 and 9.

13 Associate Professor Mark Fowler, *Committee Hansard*, 21 December 2021, pp. 5-6; Australian Christian Churches, *Submission 63*, p. 3.

14 Professor Nicholas Aroney, *Committee Hansard*, 21 December 2021, p. 7.

15 Attorney-General's Department, *Submission 191*, p. 11.

16 Law Council Australia, *Submission 28*, p. 10; Australian Discrimination Law Experts Group, *Submission 33*, p. 9; Dr Bruce Baer Arnold, *Submission 43*, p. 4; Humanists Australia, *Submission 98*, p. 4; LGBTI Legal Service Inc, *Submission 161*, pp. 2-3; Australian Lawyers for Human Rights, *Submission 171*, pp. 9-10; NSW Council for Civil Liberties, *Submission 181*, p. 8; Mr Corey Irlam, Council of the Ageing Australia, *Committee Hansard*, 21 December 2021, p. 45.

religious and non-religious statements equally.<sup>17</sup> Equal Opportunity Tasmania submitted:

For a person who is not religious, for them to be protected they must have made a statement that they genuinely consider to relate to the fact of not holding a religious belief. For a person who is religious, the statement can be about anything, so long as they genuinely consider it to be in accordance with their religion (which would be a subjective test). This has the effect of creating unequal rights and privileging religious speech over other speech.<sup>18</sup>

6.13 Some submitters argued that, by elevating religious speech above other human rights, this clause goes against the objects of the bill itself as it is not in line with Australia's international obligations with respect to freedom of religion and freedom of expression, and to the indivisibility and universality of human rights.<sup>19</sup> The application of international human rights law to these provisions is set out below.

6.14 A number of submitters also argued that religious people can currently express their faith, to the extent that it does not interfere with anti-discrimination law as it exists now, and therefore there is no need for this clause.<sup>20</sup> The Australian Human Rights Commission stated that moderate statements of religious belief can already be made and therefore this clause does not address an existing legal concern. The Australian Human Rights Commission further commented:

In our written submissions we certainly do recognise the importance of symbolism here and the importance of ensuring that people do have that reassurance that they are able to make moderately expressed statements of religious belief and faith. In our view, the best way to provide that reassurance isn't through clause 12, which, in our view, has a range of unintended consequences and impacts on other rights and freedoms; rather, as we've noted in the submission, it is through the protection that is provided by adding in protection against discrimination for religious belief and faith. In addition, there is the recommendation we've made, recommendation 2, in which we ask the Attorney-General's Department to engage with equivalent departments at state and territory levels to look at the way state and territory tribunals deal with vexatious or unmeritorious

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17 Equality Australia, *Submission 31*, p.13; Associate Professor Luke Beck, *Submission 38*, pp. 4-5; Rationalist Society of Australia, *Submission 42*, p. 2; Youth Affairs Council of Western Australia, *Submission 155*, p. 8; Amnesty International Australia, *Submission 157*, p. 14.

18 Equal Opportunity Tasmania, *Submission 56*, p. 11. See also Ms Robin Banks, Australian Law Discrimination Experts Group, *Committee Hansard*, 21 December 2021, p. 12.

19 Australian Human Rights Commission, *Submission 97*, p. 18, NSW Council for Civil Liberties, *Submission 181*, p. 8.

20 Dr Renae Barker, *Submission 6*, p. 7; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 3; Australian Human Rights Commission, *Submission 97*, p. 17; Human Rights Law Centre, *Submission 190*, p. 17.

complaints. That provides a level of protection and reassurance that we think is probably a better way to go about it.<sup>21</sup>

6.15 Dr Carolyn Tan, Chairperson of the Public Affairs Commission of the Anglican Church of Australia, argued that 'if in fact clause 12 doesn't do anything useful it's better to take it out, because it only causes greater division'.<sup>22</sup>

6.16 As to the purpose of clause 12, the Attorney-General's Department gave evidence that it 'clarifies the existing operation of anti-discrimination laws'.<sup>23</sup> More specifically, it stated:

This clause is intended to protect the ability of individuals to explain, discuss, share and express their fundamental beliefs. Religion is a fundamental part of Australia's strong and diverse social fabric. A person's religious belief, or lack of belief, is of significance to their identity, sense of self and the manner in which they live their life. The Government is of the view that it is appropriate for this Bill to clarify the ability of people of faith to express their religious beliefs in good faith.<sup>24</sup>

### **Interaction with existing discrimination law**

6.17 A key issue raised by submitters and witnesses is that clause 12 overrides existing federal, state and territory anti-discrimination legislation, as well as any other provisions of a law prescribed by the regulations. Some submitters and witnesses commented that the overriding of other anti-discrimination legislation was an appropriate balancing of rights to ensure the freedom to share religious beliefs.<sup>25</sup> Some submitters also emphasised that clause 12 operated as a shield to allow people to express their faith, rather than a sword to harm others.<sup>26</sup> For example, Mr John Steenhof, Principal Lawyer, Human Rights Law Alliance gave evidence:

I have been quite surprised by the opposition to [clause 12] around statements of belief. The hypothetical examples that have been raised, to my mind, have been quite incredible and certainly not warranted under that clause. Indeed, it provides very, very limited protection for statements of

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21 Ms Lorraine Finlay, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, p. 26.

22 Dr Carolyn Tan, Chairperson of the Public Affairs Commission of the Anglican Church of Australia, *Committee Hansard*, 13 January 2022, p. 49.

23 Attorney-General's Department, answer to question on notice, 22008, 14 January 2022 (received 21 January 2022).

24 Attorney-General's Department, answer to written question on notice, question 8 (received 11 January 2022). See also Attorney-General's Department, *Submission 191*, p. 11.

25 Christian Media and Arts Australia Limited, *Submission 163*, p. 7.

26 See, e.g., Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 22; Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 49; Associate Professor Mark Fowler, *Submission 20*, p. 4.

belief, and that's in two ways. Firstly, what qualifies as a statement of belief that will get protection has to be a very reasonable, very banal statement which is not causing ridicule or harassment to another person, which does not threaten or demean that person and which is a genuine statement of someone's sincerely held religious beliefs. So there's a very narrow category of statements that are even going to qualify to come under that clause.

Secondly, the scope of that clause's application is very, very narrow...So when I look at the clause, when I look at the narrow definition of 'statements of belief', when I look at its narrow application across the states and territories, it just doesn't compute with some of the statements that have been made in advertisements and in campaigns about the bill to suggest this is going to allow people to make fire and-brimstone pronouncements without penalty.<sup>27</sup>

6.18 The Anglican Church Diocese of Sydney also stated that clause 12 'should be understood as nothing more than a provision "for the avoidance of doubt", not as a provision that "takes away existing anti-discrimination protections"'.<sup>28</sup>

6.19 Other submitters argued that overriding existing anti-discrimination legislation is an undue and unprecedented overstep into anti-discrimination protections.<sup>29</sup> They argued this would weaken anti-discrimination protections, and licence offensive statements and incidents of discriminatory and offensive behaviour towards people with particular protected attributes.<sup>30</sup> For example, Ms Anna Brown, Chief Executive Officer of Equality Australia, stated that:

I just think no discrimination protection should be overridden by any federal law. It's anathema to our democracy that state laws could be overridden in this way and that these hard-fought-for protections that have existed for decades, in many cases, could be unwound and overridden and undermined by this bill which purports to protect people of faith, but it does much more than that—sadly, at the expense of other groups.<sup>31</sup>

6.20 Similarly, the Law Council of Australia noted:

Clause 12 is highly unusual in that it seeks to override existing anti-discrimination laws at the Commonwealth, State and Territory level. This does not appear in other Commonwealth anti-discrimination laws which are

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27 Mr John Steenhof, Human Rights Law Alliance, *Committee Hansard*, 21 December 2021, p. 84.

28 Anglican Church Diocese of Sydney, *Submission 158*, p. 12.

29 Australian Lawyer Alliance, *Submission 2*, p. 8; Diversity Council of Australia, *Submission 13*, p. 12; Law Council of Australia, *Submission 28*, p. 35; Equality Australia, *Submission 31*, p. 19; Australian Lawyers for Human Rights, *Submission 171*, pp. 8-9.

30 Women's Health Tasmania, *Submission 39*, p. 5; Australian Health Promotion Organisation, *Submission 72*, p. 2; Equality Australia, *Submission 31*, p. 13; Legal Aid Queensland, *Submission 92*, p. 6.

31 Ms Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, pp. 2-3.

generally intended to operate concurrently with State and Territory laws. Clause 12 stands alone in this respect.<sup>32</sup>

6.21 A related concern raised by submitters and witnesses was that in overriding anti-discrimination laws, clause 12 would create legal uncertainty and complexity. A number of submitters and witnesses proposed instead that a religious discrimination bill should be implemented in line with other anti-discrimination bills in order to protect people of faith in the same way as other protected attributes.<sup>33</sup>

6.22 Regarding the operation of clause 12 and its interaction with existing anti-discrimination law, the Attorney-General's Department submitted that it clarifies 'that a person should not be subjected to a discrimination complaint under any Commonwealth, state or territory anti-discrimination law simply for expressing their genuine religious beliefs in good faith'.<sup>34</sup> It stated:

Clause 12 provides a defence to a complaint of discrimination made under anti-discrimination law. It is, however, not intended to impact the meaning or interpretation of other anti-discrimination laws, or the tests of direct or indirect discrimination. This protection applies only to statements – it does not extend to conduct which may be discriminatory.<sup>35</sup>

6.23 The Attorney-General's Department submitted that, in practice, it was unlikely that a statement, in and of itself, would 'constitute the basis for a claim of discrimination without some other behaviour that would be either less favourable treatment (for direct discrimination) or a requirement to comply with a condition, requirement or practice that would disadvantage the person and was not reasonable (for indirect discrimination)'.<sup>36</sup> It further noted that clause 12 does not override the prohibition of sexual harassment or other harassment provisions in anti-discrimination law.<sup>37</sup>

### **Tasmanian anti-discrimination law**

6.24 Paragraph 12(1)(b) of the bill provides that a statement of belief, in and of itself, does not contravene subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998* (the 'Tasmanian law'). The Tasmanian law provides that a person must not engage in any conduct which 'offends, humiliates, intimidates, insults or ridicules another person' on the basis of a protected attribute, in circumstances 'in which a

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32 Law Council of Australia, *Committee Hansard*, 14 January 2022, p. 20.

33 See, e.g., Diversity Council of Australia, *Submission 13*, p. 8; Council of the Ageing Australia, *Submission 29*, p. 4.

34 Attorney-General's Department, *Submission 191*, p. 11. See also Attorney-General's Department, answer to question on notice, 22008, 14 January 2022 (received 21 January 2022).

35 Attorney-General's Department, *Submission 191*, p. 12.

36 Attorney-General's Department, *Submission 191*, p. 12.

37 Attorney-General's Department, *Submission 191*, p. 12.

reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed'.<sup>38</sup> Some submitters and witnesses argued that overriding the Tasmanian law was appropriate since that law is too broad and stifles the expression of religious belief in public life.<sup>39</sup> For example, Associate Professor Neil Foster, Board Member, Freedom for Faith, noted that the Tasmanian law is beyond the sort of protection that is provided in other parts of discrimination law in Australia:

That legislation allows speech that is offensive to be unlawful. We see that bar as far too low. In fact, there are very plausible arguments to say that that Tasmanian legislation already is in some respects unconstitutional, as a prohibition on the freedom of political speech in Australia. So we think that this clarity from the Commonwealth—to say, 'Yes, that particular provision won't operate'—is sensible. We think that, rather than making people fight their way through to the High Court and deal with that, that particular piece of legislation ought to be limited by Commonwealth law.<sup>40</sup>

6.25 In particular, some submitters noted examples of cases brought under the Tasmanian law which they submit related to the ability of religious people to express 'traditional Catholic doctrines of marriage'.<sup>41</sup> In doing so, they noted that even if the complaints may not make it to the courts or tribunals, there is a cost involved in hiring lawyers to defend such claims.<sup>42</sup> Some submitters also argued that the Tasmanian law contravenes Australia's international obligations under the International Covenant on Civil and Political Rights.<sup>43</sup> Professor Nicholas Aroney stated:

When one examines the Tasmanian law that is in question, it is arguable and, I think, the case that the Tasmanian law does not align with those guidelines that are set out in the Rabat Plan of Action, so it's understandable why the Commonwealth might take the view that that specific law needs to be overruled in this specific respect to accord with Australia's obligation

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38 *Anti-Discrimination Act 1998* (Tasmania), Subsection 17(1)

39 Dr Alex Deagon, *Submission 3*, p. 5; Freedom for Faith, *Submission 10*, p. 9.

40 Associate Professor Neil Foster, Freedom for Faith, *Committee Hansard*, 14 January 2022, p. 14.

41 See Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 19. See also Mr John Steenhof, Human Rights Law Alliance, *Committee Hansard*, 21 December 2021, p. 84; Dr Alex Deagon, *Submission 3*, p. 18; Australian Christian Churches, *Submission 63*, p. 3; Institute for Civil Society, *Submission 131*, p. 4; Institute of Public Affairs, *Submission 134*, p. 3; Anglican Church Diocese of Sydney, *Submission 158*, p. 12. However, in contrast see Mr Rodney Croome, President, Equality Tasmania, *Committee Hansard*, 14 January 2022, pp. 49–50.

42 See e.g. Reverend Doctor John McClean, Convenor, Church and Nation Committee, Presbyterian Church of Australia, *Committee Hansard*, 13 January 2022, p. 44.

43 See for example Anglican Church Diocese of Sydney, *Submission 158*, p. 12.

under article 19 of the international covenant to protect freedom of expression—in this instance, specifically in relation to religion.<sup>44</sup>

6.26 Conversely, other submitters and witnesses raised concerns with the weakening of protections that have been debated and legislated for in Tasmania.<sup>45</sup> Equal Opportunity Tasmania argued that section 17(1) is in reality not broad in scope, and is limited to particular kinds of conduct.<sup>46</sup> They submitted that the debate regarding exclusion of religious speech from section 17(1) had already been undertaken in Tasmania in 2017 and the Tasmanian Parliament had voted to maintain the protections as they are, and it would be wrong for the Commonwealth to now step in and override the democratic decision of the Tasmanian Parliament.<sup>47</sup>

6.27 For example, Mr Rodney Croome AM, President of Equality Tasmania, commented:

Given that the Tasmanian Supreme Court, as well as all three major political parties in Tasmania, as well as all of us, find that section 17(1) is a useful section and is not an impediment to freedom of speech or freedom of religion, I find it hard to understand why the Commonwealth, unbidden, wants to step in and override that section.<sup>48</sup>

6.28 Equality Australia noted that a defence already exists within the Tasmanian legislation and it was not clear why the government believes clause 12 would provide a better defence than the current one, specifically section 55 which 'allows the public expression of religious, political and other views, with the benefit that this defence can be raised in the context of a relatively informal, inexpensive and no-costs jurisdiction'.<sup>49</sup>

6.29 The Tasmanian Government also submitted that while it supports prohibiting discrimination on the grounds of religious belief, the Tasmanian Parliament had already considered amendments to their law (which were defeated in the Legislative Council). As such, it reiterated its concerns about invalidating the operation of the Tasmanian law:

the Tasmanian Government's view is that the Religious Discrimination legislative package as drafted would diminish the ability of the Tasmanian Anti-Discrimination Tribunal to deal with certain complaints and that, as a

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44 Professor Nicholas Aroney, *Committee Hansard*, 21 December 2021, p. 9.

45 Women's Health Tasmania, *Submission 39*, p. 6; Mr Dattaraj Mahambrey, Multicultural Council of Tasmania, *Committee Hansard*, 14 January 2022, p. 45.

46 Equal Opportunity Tasmania, *Submission 56*, p. 10.

47 See, e.g., Equal Opportunity Tasmania, *Submission 56*, p. 10.

48 Mr Rodney Croome AM, President, Equality Tasmania, *Committee Hansard*, 14 January 2022, p. 49.

49 Equality Australia, *Submission 31*, p. 19.

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Government, we continue to strongly advocate for no weakening of our Anti-Discrimination laws.<sup>50</sup>

6.30 As to the reason for specifying subsection 17(1) of the *Tasmanian Anti-Discrimination Act*, the Attorney-General's Department submitted:

Tasmania is the only state or territory jurisdiction with a provision which operates to capture conduct in relation to protected attributes that a person may find offensive. This provision is specifically included in the scope of clause 12 given the broad scope and demonstrated ability of subsection 17(1) to affect freedom of religious expression.<sup>51</sup>

***Power to prescribe additional laws***

6.31 A number of submitters and witnesses also raised concern with paragraph 12(1)(c), which provides that statements of belief do not contravene a provision of any law prescribed by regulations. The explanatory memorandum states that this regulation making power 'provides flexibility and acts as a safeguard in the event that other Commonwealth, state or territory laws are considered to unreasonably limit freedom of expression'. It notes such regulations would be subject to disallowance, and this would ensure appropriate parliamentary scrutiny of any additional provisions.<sup>52</sup>

6.32 The Senate Standing Committee for the Scrutiny of Bills has raised concerns about significant matters, such as these, being left to delegated legislation.<sup>53</sup> Similarly, Associate Professor Luke Beck proposed that any legislation that overrides federal, state or territory laws, if it should be done at all, should be enacted by Parliament and not by executive decision.<sup>54</sup> Professor Rosalind Croucher, President of the Australian Human Rights Commission, similarly stated that provisions that override state and territory laws should be set out in the primary legislation.<sup>55</sup>

6.33 Some submitters raised concerns that this power could be used to override protections debated and legislated at the state and territory level, including new reforms to anti-discrimination law currently being considered in the Australian Capital Territory.<sup>56</sup> The Australian Lawyers Alliance submitted:

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50 Tasmanian Government, *Submission 178*, p. 2.

51 Attorney-General's Department, *Submission 191*, p. 12.

52 Religious Discrimination Bill 2021, explanatory memorandum, pp. 56–57.

53 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022* (4 February 2022) p. 58.

54 Associate Professor Luke Beck, *Submission 38*, p. 9.

55 Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, p 25.

56 ACT Government, *Submission 192*, p. 11.

There is no right of review for the affected state or territory, only the Commonwealth Parliament may disallow the regulations. It is arguable that the Minister's power to override state or territory laws is not appropriately circumscribed – being based only on their personal satisfaction that the law prevents religious educational institutions from giving preference to religious employees – and lacks adequate review.<sup>57</sup>

6.34 Some specific examples of concern include the power to override prohibitions on sexuality and gender identity conversion practices that have been introduced in Victoria, the Australian Capital Territory and Queensland.<sup>58</sup> Uniting Network Australia submitted:

We cannot support such a broad power being given to future Attorneys-General to override State and Territory laws that allow for seeming arbitrary powers of the Attorney-General to remove State and Territory legislation to provide protections for the people, often minorities in a community.

An Attorney-General could use this power to override State and Territory bans on the devastating and inhumane sexual orientation and gender identity conversion practices introduced in Victoria and the ACT, and partially in Queensland (only in health settings), with bans under consideration in other jurisdictions.<sup>59</sup>

6.35 Some submitters also raised the potential for this paragraph to be used to override section 18C of the *Racial Discrimination Act 1975*.<sup>60</sup> Professor Luke Beck stated that the Tasmanian law prohibits the very same conduct prohibited by section 18C, and so the 'override of the Tasmanian provision would really only be effective in practice if section 18C of the Racial Discrimination Act was also overridden'.<sup>61</sup> A number of witnesses commented that while it is possible to prescribe section 18C for the purposes of section 12(1)(c) of the bill, it is unlikely to occur in practice at this point in time, given the statements that have been made in the explanatory memorandum.<sup>62</sup> Some concerns were further raised that paragraph 12(1)(c) could be used to override work health and safety laws which make it unlawful to engage in or permit insulting, offensive, ridiculing or humiliating comments in the workplace.<sup>63</sup>

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57 Australian Lawyers Alliance, *Submission 2*, p. 5.

58 Public Interest Advocacy Centre, *Submission 40*, p. 6; Uniting Network Australia, *Submission 153*, pp. 17-18; Youth Affairs Council of Western Australia, *Submission 155*, p. 9; Equality Australia, *Submission 31*, p. 17.

59 Uniting Network Australia, *Submission 153*, pp. 17-18.

60 Mr Steenhof, Human Rights Law Alliance, *Committee Hansard*, 21 December 2021, p. 7.

61 Associate Professor Luke Beck, *Submission 38*, p. 10. See also Equality Tasmania, *Submission 198*, p. 17.

62 Emeritus Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, p. 25.

63 Associate Professor Luke Beck, *Submission 38*, p. 10.

6.36 In response to this matter, the Attorney-General's Department asserted that at the time of the public hearing on 14 January 2022, no proposals to list further provisions for the purposes of paragraph 12(1)(c) had been made.<sup>64</sup>

## Scope of clause 12

### ***Safeguards in subclause 12(2) – no malicious, vilifying etc statements***

6.37 A key issue raised by submitters and witnesses was the appropriateness of the safeguards in subclause 12(2). Subclause 12(2) provides that the override provisions in subclause 12(1) do not apply where a statement of belief is malicious; or where a reasonable person would consider the statement would threaten, intimidate, harass or vilify a person or group; or where a reasonable person, having regard to all the circumstances, would conclude the statement is counselling, promoting etc conduct that would constitute a serious offence.

6.38 A number of submitters and witnesses were of the view that these were important safeguards that helped ensure the statement of belief provisions would not unnecessarily limit the rights and freedoms of others.<sup>65</sup> Associate Professor Mark Fowler considered that the drafters of the bill 'built within clause 12 quite a series of rigorous tests to be satisfied by any statement' which with existing law around all of the concepts set out in subclause 12(2) will 'set quite stringent standards on statements that could be made'.<sup>66</sup> Archbishop Peter Comensoli, Chair, Bishops Commission for Life, Family and Public Engagement, Australian Catholic Bishops Conference also told the committee:

I want to say that having a statement of belief or faith is important and that that might be a protection, but I note most particularly that that's not a free-for-all reality. It's been couched in language of condition, such that statements are reasonable—and there's the question of the test of reasonableness in this regard... but also that statements cannot be vilifying or threatening and so on. So it's not as if a statement can be made willy-nilly or inappropriately and so on. It's a reasoned statement.<sup>67</sup>

6.39 Some suggested these provisions were necessary in order to ensure that public discussion and debate is not stifled,<sup>68</sup> for example the Catholic Women's League of Victoria & Wagga Wagga commented that:

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64 Mr Walter, Acting Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 14 January 2022, p. 68.

65 Australian Christian Churches, *Submission 63*, p. 5; Islamic Council of Victoria, *Submission 111*, p. 4; Christian Media and Arts Australia Limited, *Submission 163*, p. 7.

66 Associate Professor Mark Fowler, *Committee Hansard*, 21 December 2021, p. 4.

67 Archbishop Peter Comensoli, Australian Catholic Bishops Conference, *Committee Hansard*, 13 January 2022, p. 23.

68 See for example, Russell Blackford, *Submission 7*, p. 5; Presbyterian Church of Australia, *Submission 94*, p. 9.

Allowing statements of belief by stating they are not discriminatory also encourages healthy debate – which our democracy needs to flourish. Malicious, threatening or deliberately intimidating actions are already covered by law and are not part of robust healthy debate.<sup>69</sup>

6.40 The Australia/Israel & Jewish Affairs Council submitted that these safeguards were appropriate, but noted that in addition to these legislative provisions, there is a role for community and political leaders to publicly call out statements that are disrespectful to other Australians in order to ensure people of faith did not make disparaging or disrespectful remarks to people who do not share their view.<sup>70</sup>

6.41 Dr Russell Blackford further suggested amending Note 1 to subclauses 12(2) and 15(3) to change the language from 'moderately expressed' religious beliefs to 'robustly expressed' religious beliefs to more accurately reflect the intention of the clauses.<sup>71</sup>

6.42 However, other submitters and witnesses raised concerns that the limitations in clause 12 were not enough to prevent real harm being felt by those subject to statements of belief. They noted that the limitations as they currently are do not prevent statements that can offend, humiliate, insult, ridicule or otherwise harm others and this can be incredibly damaging.<sup>72</sup>

6.43 It was further noted that unlike other discrimination law, the reasonableness test in subclause 12(2) (whether a reasonable person would consider the statement would threaten, intimidate, harass or vilify a person or group) focuses on the mindset of the person making the statement of belief, rather than the harm felt by those subject to the statement.<sup>73</sup> Some submitters argued that the inclusion of the

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69 Catholic Women's League of Victoria and Wagga Wagga, *Submission 87*, p. 2.

70 Australia/Israel & Jewish Affairs Council, *Submission 119*, pp. 7-8.

71 Dr Russell Blackford, *Submission 7*, p. 4.

72 Law Council of Australia, *Submission 28*, p. 37; Australian Education Union Federal Office, *Submission 21*, p. 5; Equality Australia, *Submission 31*, p. 15; Associate Professor Luke Beck, *Submission 38*, p. 9; Women's Health Tasmania, *Submission 39*, p.6; Public Interest Advocacy Centre, *Submission 40*, p. 4; Buddhist Council of NSW, *Submission 51*, p. 6; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 3; Australian Medical Association *Submission 96*, p. 4; Dr Sean Mulcahy, *Submission 126*, p. 11; Uniting Church in Australia Assembly, *Submission 152*, p. 7; LGBTQ+ Health Australia, *Submission 156*, p. 8; Amnesty International, *Submission 157*, p. 14; Australian Association for Social Workers, *Submission 159*, p. 5; Equality Rights Alliance, *Submission 166*, p. 6; Women's Electoral Lobby, *Submission 188*, pp. 13–14.

73 Australian Council of Human Rights Authorities, *Submission 125*, p. 2; Uniting Network Australia, *Submission 153*, p. 14; Australian Association for Social Workers, *Submission 159*, p.5; Equality Rights Alliance, *Submission 166*, p. 6; Rainbodhi LGBTQIA+ Buddhist Community, *Submission 8*, pp. 6–7.

reasonableness test does not consider how a particular group may be impacted by particular statements.<sup>74</sup> The Human Rights Law Centre commented:

This is an objective test that doesn't allow for consideration of the background or experiences of the person or group targeted. Understanding the person or group targeted and "sociological context" in which their identity occurs is pertinent to whether a statement causes them to feel threatened, harassed, intimidated or vilified.<sup>75</sup>

6.44 Some submitters also raised concerns that paragraph 12(2)(c) only limits statements that encourage the commission of a *serious* criminal offence, rather than any offence against Australian law.<sup>76</sup>

6.45 A number of submitters also noted that it was unclear what speech would be allowed under clause 12,<sup>77</sup> and this uncertainty would need to be tested in the courts, which would be an expensive and difficult process.<sup>78</sup> Ms Robin Banks from the Australian Anti-Discrimination Law Experts Group gave evidence stating:

there is no guidance on who will be required to establish that the statement of belief falls within the permitted scope that it's good faith, that it's their belief. That is not difficult, I guess—the question of who determines that or proves that is one thing, but then who has got to prove that it's not vilifying, inciting or malicious? It's a defence to a defence, I think. This is where the complexity of these bills is really at the heart of many of the concerns. We've never seen anything like this, and there is no guidance on whether it will be up to the complainant in the discrimination complaint to prove that the statement of belief was made maliciously or whether it will be up to the person making the statement to prove that it wasn't. Proving maliciousness is extremely difficult, as far as I can see from case law. You have to show it was made with an intention to cause harm and that it was unfounded. I don't know how you prove a statement of belief is unfounded. That, in and of itself, is a difficult conundrum. There is no clarity of who has to prove it,

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74 Equality Australia, *Submission 31*, p. 15; Human Rights Law Centre, *Submission 190*, p. 16.

75 Human Rights Law Centre, *Submission 190*, p. 16.

76 Law Council Australia, *Submission 28*, p. 37; Australian Lawyers for Human Rights, *Submission 171*, p. 10; Equal Opportunity Tasmania, *Submission 56*, p. 11; Equal Opportunity Tasmania, *Submission 56*, p. 11.

77 Beyond Blue, *Submission 12*, p. 3; Diversity Council of Australia, *Submission 13*, p. 10; Australian Education Union Federal Office, *Submission 21*, p. 5; ACON, *Submission 34*, p. 6; Australia Council of Trade Unions, *Submission 64*, p. 11; Family Planning NSW, *Submission 88*, p. 4; Commissioner for Children and Young People SA, *Submission 120*, p. 3; The Satanic Temple Australia, *Submission 154*, p. 4; Australian Lawyers for Human Rights, *Submission 171*, pp. 9-10; NSW Council for Civil Liberties, *Submission 181*, p. 8.

78 See for example, Australian Lawyers for Human Rights, *Submission 171*, pp. 9–10.

and that is a huge gap in this legislation that makes it even more complex in case law terms.<sup>79</sup>

6.46 Ms Sophie Ismail, Legal and Industrial Officer, from the Australian Council of Trade Unions also stated that it is 'very unclear what the threshold of a malicious statement or a harassing statement is', noting that the provision does not prevent degrading, inappropriate, hostile or harmful statements. Ms Ismail was concerned that it would 'allow a free-for-all...in terms of what comments are allowed to be made under the banner of religion' and that the introduction of 'untested and new concepts...is going to create confusion and chaos in workplaces'.<sup>80</sup>

6.47 Further, some submitters and witnesses argued that clause 12 would ultimately protect statements that would currently be considered discrimination,<sup>81</sup> and many went further to argue that protecting statements of belief would encourage discriminatory language and conduct.<sup>82</sup> Concerns raised as to the potential impact of statements of belief on specific groups are discussed further below.

### **'Good faith' requirements and 'genuine belief'**

6.48 The definition of 'statement of belief' in clause 5 includes a subjective test for determining whether a statement is a statement of belief. Numerous submitters and witnesses commented on the subjective tests in subparagraphs 5(a)(ii) and (iii), whereby a person making a statement of belief must make the statement in 'good faith' and must 'genuinely' consider the belief to be in accordance with the doctrines, tenets, beliefs or teachings of their religion. Many of those in favour of introducing protections for statements of belief argued that these subjective tests are appropriate in order for people of faith to be able to express their beliefs and avoids the issue of debating differing theological beliefs within denominations.<sup>83</sup> Some submitters argued this also avoids the difficulty and inappropriateness of a judge needing to interpret

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79 Ms Robin Banks, Australian Anti-Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 16.

80 Ms Sophie Ismail, Australian Council of Trade Unions, *Committee Hansard*, 14 January 2022, p. 6.

81 ACON, *Submission 34*, p. 6; Public Interest Advocacy Centre, *Submission 40*, p. 4; Buddhist Council of NSW, *Submission 51*, p. 6; Australian Human Rights Commission, *Submission 97*, p. 30; Women's Electoral Lobby, *Submission 188*, p. 12; Human Rights Law Centre, *Submission 190*, p. 17

82 Victorian Trades Hall Council, *Submission 11*, p. 1; Buddhist Council of NSW, *Submission 51*, p. 6; Equality Australia, *Submission 31*, p. 13; Youth Affairs Council of Western Australia, *Submission 155*, p. 7.

83 Australian Christian Higher Educational Alliance, *Submission 25*, p. 7; Associated Christian Schools, *Submission 74*, p. 2.

religious doctrine to determine if the statement conformed with that doctrine.<sup>84</sup> The Institute for Civil Society submitted:

This avoids dragging secular courts into determinations of what are the doctrines or beliefs of a religion for which they are ill-suited and the invidious outcome of a secular court telling a religious person or religious body that their religious beliefs are not part of the religion's doctrines as determined by the court.<sup>85</sup>

6.49 Nevertheless, some groups in favour of statements of belief were concerned about the subjectivity tests, notably that judges may be able to determine whether an individual's subjective beliefs are legitimate expressions of religious belief.<sup>86</sup> In addition, there was concern that judges may be able to apply their own discretion as to what constitutes a statement made in 'good faith'.<sup>87</sup>

6.50 Conversely, a number of submitters and witnesses argued that the 'genuine belief' and 'good faith' requirements were highly subjective. It was raised that the 'genuine belief' requirement could result in any range of statements being argued to be genuine religious beliefs, and it would be practically impossible to disprove whether a belief was genuine or not.<sup>88</sup> As explained by Ms Robin Banks of the Australian Discrimination Law Experts Group:

The way 'statement of belief' is defined...it has to be made in good faith. It is very hard to establish something not being made in good faith. Secondly, it permits a statement as long as the person considers it themselves to be in accordance with the doctrines et cetera of the religion. That's an entirely subjective test. We don't see tests of that nature in any other area of discrimination law. The test for harassment, the tests under section 17(1) and the test for discrimination in all discrimination laws in Australia are objective tests. This is an entirely subjective test because it's in the eyes of the person making the statement. I think it is impossible to establish that a statement of that sort is not being made in good faith. If the person believes it, they are making it in good faith.<sup>89</sup>

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84 Australian Association of Christian Schools, *Submission 23*, p. 11; Presbyterian Church of Australia, *Submission 94*, p. 8; Human Rights Law Alliance, *Submission 30*, pp. 9-10.

85 See for example, Institute for Civil Society, *Submission 131*, p. 4.

86 See for example, Australian Association of Christian Schools, *Submission 23*, p. 11.

87 See for example, Institute of Public Affairs, *Submission 134*, p. 3.

88 Australian Education Union Federal Office, *Submission 21*, p. 5; Australian Discrimination Law Experts Group, *Submission 33*, p. 7; Public Interest Advocacy Centre, *Submission 40*, p. 5; Just Equal Australia, *Submission 69*, p. 3; Queensland Advocacy Incorporated, *Submission 115*, p. 4; ACT Government, *Submission 192*, p. 9.

89 Ms Robin Banks, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 13.

6.51 A number of submitters and witnesses raised concern that statements of belief could be used as a cover to make homophobic, racist, sexist or ableist remarks under the guise of religion.<sup>90</sup> It was also raised that, given the statutory construction of the definition of statement of belief, the 'good faith' requirement only pertains to the way in which a statement is made ('a statement must be made, in good faith, by written or spoken words'), and does not constrain the content of the statement itself.<sup>91</sup>

6.52 Nevertheless, the Attorney-General's Department was of the view that the 'good faith' requirement included objective elements as well as subjective considerations, noting:

a court is likely to apply a broad interpretation of the good faith requirement, encompassing both subjective considerations (the person making a statement of belief considers they are behaving honestly and with a legitimate purpose), as well as objective considerations (the person has taken a conscientious approach to honouring the values asserted by the Bill, which may include considering, and minimizing, the harm that may be caused by their speech given the overall purpose of the Bill) see *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.<sup>92</sup>

6.53 The Attorney-General's Department elaborated on the relevant findings in *Bropho*, stating that this case:

considered that 'good faith' required "honest action and fidelity" that may extend beyond mere compliance with "the black letter of the law" (at 131 [93]). The court considered that a person seeking to rely on the 'good faith' defence under section 18D of the Racial Discrimination Act 1975 must demonstrate that they are "subjectively honest, and objectively viewed, [have] taken a conscientious approach...in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it" (at 133 [102]).<sup>93</sup>

6.54 At the committee's public hearing on 14 January 2022, Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Group, Attorney-General's Department, gave further evidence regarding the good faith requirement, stating:

Good faith, in our reading, as a broad application has two aspects to it. The first aspect is that it's a kind of genuineness. You are genuinely making a belief or fidelity to that belief. The second goes to the conscientiousness and the circumstances in which you are actually making that statement, that

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90 See for example, Diversity Council Australia, *Submission 13*, p. 10.

91 Equality Australia, *Submission 31*, p. 16; Amnesty International Australia, *Submission 157*, p. 14.

92 Attorney-General's Department, *Submission 191*, p. 12.

93 Attorney General's Department, answer to question on notice, 22011, 14 January 2022 (received 2 February 2022), p. 1.

you're having regard to the circumstance of the person you're making the statement to and so forth.<sup>94</sup>

6.55 The Attorney-General's Department further submitted:

In accordance with general principles of anti-discrimination law, the department considers that the legal and evidential burden of proof for establishing all the elements in clause 12 (including showing that the exceptions in subclause 12(2) do not apply) rests with the respondent to a discrimination claim, as the party seeking to rely upon this defence.<sup>95</sup>

### Potential impact on particular groups

6.56 As stated, those who expressed support for the protection of statements of belief argued that the limitations within the clause itself were enough to prevent harm, and that allowing for statements of belief to be made would allow for a more tolerant and diverse society.<sup>96</sup> Some submitters also noted that the type of comments raised by groups opposing clause 12 would not currently constitute discrimination under most anti-discrimination laws, and therefore clause 12 would not have the effect that had been claimed.<sup>97</sup> Mr Mark Sneddon, Executive Director, Institute for Civil Society, submitted that clause 12 has attracted 'a vast amount of misinformation and criticism', noting that it only protects statements of belief from being discrimination under other anti-discrimination law or from complaints under the Tasmanian law or other prescribed laws:

It would not protect statements of belief from employer sanction. It does not protect statements of belief from being a breach of a contract of employment. It does not protect statements of belief from being contrary to a code of conduct by an employer. It will not protect statements of belief from regulation by professional bodies. So the suggestion the section 12 protects statements of belief and unbelief left alone, as if it protects them from every consequence and sanction, is completely wrong, and I think it misled a number of submitters.<sup>98</sup>

6.57 The Attorney-General's Department noted that it is difficult to respond to hypothetical examples as 'the application of anti-discrimination law can be dependent on the circumstances, context of the interaction or relationship of the parties'. It

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94 Mr Andrew Walter, Attorney-General's Department, *Committee Hansard*, 14 January 2022, p. 62.

95 Attorney General's Department, answer to question on notice, 22011, 14 January 2022 (received 2 February 2022), p. 1.

96 Australian Christian Churches, *Submission 63*, p. 5; Islamic Council of Victoria, *Submission 111*, p. 4; Christian Media and Arts Australia Limited, *Submission 163*, p. 7.

97 Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 49.

98 Mr Mark Sneddon, Executive Director, Institute for Civil Society, *Committee Hansard*, 14 January 2022, p. 19.

further stated that 'repeated or insistent statements may amount to a course of conduct or may constitute harassment or, depending on the context, may be considered threatening by a person'. The department noted:

With that caveat in mind, the department considers that it would be difficult for a respondent to satisfy a court that a statement such as "disability is the work of the devil", made by a disability support worker in the context of a disability care relationship, was made in good faith and is not malicious.<sup>99</sup>

6.58 Conversely, the committee received a range of evidence regarding the potential negative impact clause 12 may have on various groups, including people with disabilities, women, LGBTIQ+ individuals, people of different races, single mothers, divorced people, de facto couples and people of different faiths. It was argued that words can, even unintentionally, cause real harm to people and create cultures and attitudes where hurtful behaviour is accepted, which in turn can lead to further harm.<sup>100</sup>

6.59 It was noted that many of the people likely to lose protection as a result of the overriding of existing anti-discrimination legislation are some of the most vulnerable in the community.<sup>101</sup> Further, protected statements may be particularly harmful to children and young people.<sup>102</sup> It was also noted that marginalised groups already deal with substantial pressures and frequent 'micro-aggressions' or repeated and cumulative statements, which are likely to not be deemed harassment or vilification (and so will be protected by clause 12), and which still impact on the wellbeing of those subject to such statements.<sup>103</sup> Legal Aid Queensland noted the impact this may have on participation in public life more broadly, and in seeking access for particular services:

the expression of harmful beliefs about people's protected attributes is detrimental to society, in that it reduces participation in public life, has serious negative mental health impacts, has a silencing effect on the most

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99 Attorney General's Department, answer to question on notice, 22002, 14 January 2022 (received 2 February 2022), p. 2.

100 Equality Rights Alliance, *Submission 166*, p. 7; Rainbodhi LGBTIQ+ Buddhist Community, *Submission 8*, p. 6; Mr Michael Douglas, *Submission 9*, p. 2; A Gender Agenda, *Submission 81*, p. 4; The Satanic Temple Australia, *Submission 154*, p. 5; Human Rights Law Centre, *Submission 190*, p. 17; Victorian State Government, *Submission 195*, p. 5.

101 Australian Education Union Federal Office, *Submission 21*, p. 5; Ethnic Council of Shepparton and District Inc., *Submission 66*, p. 2; National Secular Lobby, *Submission 129*, p. 3; Uniting Church in Australia Assembly, *Submission 152*, p. 7; Australian Association for Social Workers, *Submission 159*, p. 5; Australian Lawyers for Human Rights, *Submission 171*, p. 9; NSW Council for Civil Liberties, *Submission 181*, p. 6; Women's Electoral Lobby, *Submission 188*, p. 3.

102 Commissioner for Children and Young People SA, *Submission 120*, p. 4; Mr Michael Douglas, *Submission 9*, p. 2; Youth Pride Network, *Submission 124*, p. 5

103 Amnesty International Australia, *Submission 157*, p. 15.

vulnerable, inhibits access to services, reduces the capacity of people to engage with and contribute to society, and threatens social harmony.<sup>104</sup>

### **People with disability**

6.60 A number of submitters commented on the high level of discrimination faced by people with disabilities. Data from Equal Opportunity Tasmania reflected that the majority of discrimination complaints received are from people with a disability.<sup>105</sup> Concerns were raised that allowing for statements of belief will substantially impact this group, including people with psychosocial disabilities,<sup>106</sup> and will provide an avenue for harmful and demeaning comments under the guise of religion. For example, Disability Voices Tasmania noted:

People with disability constantly experience ridicule, offensive assumptions, bias, and intimidation. It does not matter whether this arises from hate, prejudice, misguided assumptions, and attitudes towards disability, or because of religious belief – or one person’s interpretation of religious belief. What matters is the hurt, humiliation, and long-term impact we experience as a result of it.<sup>107</sup>

6.61 Conversely, the Australian Christian Lobby rejected the assertion that the bill would discriminate against other groups, including people with disability:

Again, the religious organisations that look after disabled people—it's largely religious organisations that have been set up to do that, and there's no way that this bill will change any existing protections against discrimination on the grounds of disability at all. This bill is just looking at protecting religious people. This is not actually changing any of the other discrimination acts at all.<sup>108</sup>

### **Women**

6.62 A number of submitters and witnesses commented on the potential negative implications for women of clause 12, given many religions hold particular positions on the role of women in the family and in society.<sup>109</sup> In particular, it was argued that harm and retrogressive steps for gender equality could be caused by these views originating from religious teachings.<sup>110</sup>

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104 Legal Aid Queensland, *Submission 92*, p. 7.

105 Equal Opportunity Tasmania, *Submission 56*, p. 5.

106 Queensland Advocacy Incorporated, *Submission 115*, p. 4.

107 Disability Voices Tasmania, *Submission 68*, pp. 2-3.

108 Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 20.

109 Feminist Legal Clinic Inc, *Submission 45*, p. 1; Harmony Alliance, *Submission 106*, p. 2; Women’s Electoral Lobby, *Submission 188*, p. 12.

110 Women’s Health Victoria, *Submission 173*, p. 4.

6.63 Examples were provided to the committee where it was argued that the protection of statements of belief would have negative effects on those experiencing domestic violence, accessing contraception and health services, and accessing disability services. Equality Rights Alliance commented:

In its current form, the Bill is capable of providing protection to people who express views which contribute to sexist cultures in workplaces and in public through the provision of goods and services. The effect of 'moderately expressed' negative views on the ability of marginalised people to break barriers to equality is well documented, but 'benevolent' or 'friendly' statements will not be caught by s. 12(2). Benevolent sexism is a key reinforcing factor in cultures which are unsupportive to gender equality... The most concerning element of benevolent sexism is that its effects are slow but deep, like the dripping of water on stone. Regular, low-level reiteration of well-intentioned sexism wears away at an individual's ability to envisage and implement change. For an individual in a workplace or seeking access to goods and services, tackling deliberately hostile sexism is difficult enough, but tackling benevolent sexism requires a high level of insight, energy and perseverance, a job that will be made significantly harder under this Bill if the sexism is expressed as a religious belief and is therefore protected.<sup>111</sup>

### **LGBTIQA+ individuals**

6.64 The potential impacts of clause 12 on LGBTIQA+ individuals was raised by a number of submitters and witnesses, who noted that many religions hold that homosexuality is wrong. Further, allowing for statements of belief in relation to LGBTIQA+ people, will exacerbate the already high rates of poor mental health and suicide attempts amongst this group.<sup>112</sup> As an example of harmful statements, some submitters argued that the Australian postal marriage survey caused significant distress and harm to this community particularly from the 'no' campaign messaging.<sup>113</sup> Youth Pride Network submitted:

By explicitly allowing statements that otherwise would be discriminatory, YPN believes this provision will serve to increase the amount of discriminatory statements that LGBTIQA+ young people experience on a day to day basis. Particularly we are concerned about how this provision will disempower LGBTIQA+ young people to address discrimination they experience in their educational institutions, their workplaces and any services they may access...By allowing statements that would otherwise

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111 Equality Rights Alliance, *Submission 166*, p. 7.

112 Australian Education Union Federal Office, *Submission 21*, p. 5; Australian Health Promotion Association, *Submission 72*, p. 1; Human Rights Law Centre, *Submission 190*, p. 17.

113 Australian Education Union Federal Office, *Submission 21*, p. 5; ACON, *Submission 34*, pp. 6-7.

breach discrimination law, the proposed Bill will likely have an incredibly detrimental impact on the mental health of LGBTIQ+ young people.<sup>114</sup>

6.65 Concerns were also raised that allowing for statements of belief would in effect allow for gender and sexuality conversion practices, even though they have been prohibited in the ACT, Victoria and in Queensland.<sup>115</sup> Mr Croome AM, President, Equality Tasmania, stated that:

In states that have taken legislative action on this issue [of conversion practices]—Queensland, the ACT and, in particular, Victoria—there are provisions which deal with the kinds of statements that are consistent with conversion ideology and which would inflict deep damage on people who are pushed into undertaking those conversion practices.<sup>116</sup>

### **Race discrimination law**

6.66 Concerns were also raised regarding the protection of statements of belief overriding race discrimination law and the negative implications of racist statements, which particularly affect certain religious groups. In particular, concerns were raised about statements of belief overriding the *Racial Discrimination Act 1975*. The Public Interest Advocacy Centre commented:

For 46 years, the *Racial Discrimination Act 1975* (Cth) has operated without religious exceptions, on the accepted premise that religious beliefs do not justify racism. The Religious Discrimination Bill undermines that foundation, introducing de facto ‘religious exceptions’ into the Act for the first time, for the purpose of protecting harmful speech.<sup>117</sup>

6.67 Uniting Network of Australia raised concern that racist comments would be protected under the bill:

A white supremacist or neo-Nazi would be protected under these bills when they made demeaning and derogatory comments about people of other races if they genuinely (but unreasonably) considered those comments formed part of their faith.<sup>118</sup>

6.68 However, others argued that given the limitations within clause 12 this would not occur. The Executive Council of Australian Jewry, for example, noted that the anti-vilification and racial hatred provisions in the *Racial Discrimination Act 1975* would not be overridden by clause 12 and thus would continue to offer protection to the Jewish

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114 Youth Pride Network, *Submission 124*, pp. 5-6.

115 ACON, *Submission 34*, pp. 8-9; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 3; Amnesty International Australia, *Submission 157*, p. 20; Transgender Victoria, *Submission 112*, p. 2; Youth Pride Network, *Submission 124*, p. 12.

116 Mr Rodney Croome, President, Equality Tasmania, *Committee Hansard*, 14 January 2022, p. 49.

117 Public Interest Advocacy Centre, *Submission 40*, p. 6.

118 Uniting Network Australia, *Submission 153*, p. 14.

community.<sup>119</sup> While acknowledging that under paragraph 12(1)(c) an anti-vilification or racial hatred provision of the *Racial Discrimination Act 1975* could be prescribed by the regulations for the purposes of clause 12, the Executive Council of Australian Jewry were of the view that this was unlikely to occur given the statement in the explanatory memorandum that clause 12 does not apply to harassment, vilification or incitement provisions under anti-discrimination laws.<sup>120</sup>

6.69 The Attorney-General's Department provided some guidance as to the types of behaviour that could constitute vilification for the purposes of subclause 12(2), including speaking about a person's race or religion in a way that could make other people hate or ridicule them; repeated or serious spoken or physical abuse about the race or religion of another person; encouraging violence against people of a particular race or faith; and encouraging people to hate a racial or religious group using different forms of speech and communication.<sup>121</sup>

### **People of faith**

6.70 It was also submitted that the impact of the bill extends to increasing the potential for discrimination against people on the basis of their religion, as clause 12 protects derogatory or demeaning statements by other people of faith, and this will increase the risk of harm towards people of different faiths or minority religions.<sup>122</sup> For example, the Public Interest Advocacy Centre commented that minority religious groups, atheists and agnostics may be 'subjected to harmful religiously-motivated comments on the basis of who they are', including antisemitic and Islamophobic comments, which are currently prohibited under State and Territory anti-discrimination laws.<sup>123</sup>

6.71 However, as noted above, many religious groups were supportive of this provision. For example, the Australia/Israel & Jewish Affairs Council noted that '[s]o many of the world's religions – Judaism included – are based on making the world a better place, caring for those less fortunate and loving your neighbour as yourself' and so most statements 'strengthen communities and enrich lives', and in the limited examples where statements do not contribute to community cohesion clause 12 seeks to strike the right balance.<sup>124</sup>

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119 Mr Peter Wertheim, Executive Council of Australian Jewry, *Committee Hansard*, 21 December 2021, p. 52.

120 Mr Peter Wertheim, Executive Council of Australian Jewry, *Committee Hansard*, 21 December 2021, p. 57; Religious Discrimination Bill 2021, explanatory memorandum, p. 56.

121 Attorney-General's Department, answer to written question on notice, question 12 (received 11 January 2022).

122 Australian Education Union Federal Office, *Submission 21*, p. 6; Uniting Church in Australia Assembly, *Submission 152*, p. 8; Buddhist Council of NSW, *Submission 51*, p. 6.

123 Public Interest Advocacy Centre, *Submission 40*, p. 4.

124 Australia/Israel & Jewish Affairs Council, *Submission 119*, p. 7.

### **Accessing health care**

6.72 In the health context, a number of submitters argued that where health professionals make statements of belief that negatively impact on individuals of a particular group, those individuals are likely to feel unwelcome and may not feel like they will receive appropriate and adequate health care, or will be judged while receiving care.<sup>125</sup> It was submitted that this is likely to lead to individuals not seeking or delaying care, and in turn will lead to poor physical and mental health outcomes.<sup>126</sup> Submitters argued that this may be particularly difficult for those accessing essential disability support services as these are often provided by faith-based organisations,<sup>127</sup> and may be an issue for individuals entering aged care and fearing discrimination.<sup>128</sup> It was also raised that these issues are heightened in small communities, and regional or remote areas where it may be difficult or impossible to seek alternative care.<sup>129</sup> The Centre for Women's Safety and Wellbeing commented:

When discrimination occurs, it places the physical, mental, and emotional wellbeing of the individual(s) at risk. In health and community services settings, discrimination can exacerbate the presenting issue, can compound existing issues, and can cause new conditions to develop. The Bill has the potential to reduce access to timely, appropriate, and safe services; deter or prevent individuals from seeking services due to fear of experiencing discrimination; and cause additional negative health and wellbeing impacts. It is important to acknowledge that these consequences of the Bill will disproportionately impact marginalised women who experience intersecting forms of disadvantage, including women with disability, young women, LGBTIQ+ people, Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, and women in regional, rural and remote areas.<sup>130</sup>

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125 ACON, *Submission 34*, p. 8; Professor Danielle Mazza and Professor Heather Douglas, *Submission 75*, p. 2.

126 Family Planning NSW, *Submission 88*, p. 4; LGBTQ+ Health Australia, *Submission 156*, p. 7; Amnesty International Australia, *Submission 157*, p. 16; Women's Health Victoria, *Submission 173*, p. 4; Rainbow Territory, *Submission 193*, p. 2.

127 Queensland Advocacy Incorporated, *Submission 115*, p. 5; A coalition of disability advocacy organisations, *Submission 167*, p. 2.

128 Mr Corey Irlam, Council of the Ageing Australia, *Committee Hansard*, 21 December 2021, pp. 46 and 50.

129 Queensland Centre for Intellectual and Developmental Disability, *Submission 164*, p. 3; Health Services Union, *Submission 15*, p. 9; ACON, *Submission 34*, p. 8; Uniting Network Australia, *Submission 153*, p. 16; Amnesty International Australia, *Submission 157*, p. 17; Marie Stopes Australia, *Submission 177*, p. 5; Rainbow Territory, *Submission 193*, p. 2.

130 Centre for Women's Safety and Wellbeing, *Submission 179*, p. 3

### **Statements of belief in the workplace**

6.73 A number of submitters expressed confusion regarding the practical operation of statements of belief in the workplace context.<sup>131</sup> While clause 15 operates to provide the circumstances in which a qualifying body can discriminate against a person on the grounds of religious belief or activity (as discussed further below), it is noted that this is distinct from the ability of employers to make codes of conduct for employees.

6.74 Some submitters argued that clause 12 does not prevent employers making codes of conduct within the workplace that may limit the ability of religious employees to make statements of belief as long as, in accordance with clause 14, any condition, requirement or practice in the code is reasonable and does not subject employees to disadvantage on the basis of religious belief. The Attorney-General's Department stated:

The Bill does not limit the ability of employers to impose a reasonable condition, requirement or practice on staff for conduct at work, provided all employees are treated equally and not subjected to a disadvantage on the ground of their religious belief or activity...

An employer does not discriminate against an employee under the Bill by disciplining that employee for conduct at work to the extent that the employer would similarly discipline another employee who did not have that religious belief or engage in that religious activity.<sup>132</sup>

6.75 Nevertheless, other submitters argued that clause 12 will have a negative impact on conduct in the workplace as employers may change their policies in fear of being accused of religious discrimination and may be reluctant to discipline employees for making any kind of statement of belief.<sup>133</sup> Many submitters argued that it was inappropriate for statements of belief to be able to be made in the workplace.<sup>134</sup> It was argued that where individuals make statements of belief, employers are not able to know whether these statements are made in 'good faith' or are genuinely held beliefs, and this could lead to unwelcome changes in workplace culture due to an inability of employers to address issues.<sup>135</sup> Equality Australia submitted:

The effect of section 12 will be to lower-the-bar for acceptable conduct in the workplace and in education settings, as organisations change their

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131 Law Council of Australia, *Submission 28*, p. 38; Kingsford Legal Centre, *Submission 110*, p. 9; Legal Aid Queensland, *Submission 92*, p. 7.

132 Attorney-General's Department, answer to written question on notice, question 11 (received 11 January 2022).

133 See, e.g., Equality Australia, *Submission 31*, p. 13.

134 Australian Services Union, *Submission 101*, p. 7; Fair Agenda, *Submission 122*, p. 7; Unions Tasmania, *Submission 176*, p. 5

135 Women's Health Tasmania, *Submission 39*, p. 5.

policies and approach to accommodate offensive, harmful or demeaning speech in the workplace for fear that they will be sued for religious discrimination if they do not. So, beyond its legal effect, section 12 will have a detrimental and practical effect in enabling and authorising discrimination that may be unlawful today. The provision will also discourage people from calling out discriminatory statements as inappropriate or unwelcome. This is because section 12 clearly sends the message that discriminatory speech based on a religious view or about religion is protected and privileged over other forms of discrimination, including protections for people of faith.<sup>136</sup>

6.76 Some submitters argued that the operation of clause 12 would result in an unclear application of anti-discrimination laws in the workplace. Submitters were concerned that anti-discrimination law has operated to ensure inclusive and safe workplace cultures but that these changes would lower workplace standards for acceptable conduct.<sup>137</sup>

6.77 The Australian Council of Trade Unions submitted that the bill 'may impact on an employer's capacity to take action under a policy, code of conduct, contract or enterprise agreement to prevent discriminatory and harmful statements from being made at work'. It noted that workplace codes of conduct or similar policies often prohibit discriminatory statements and commit an employer to working to prevent discrimination in the workplace. These codes or policies are generally founded on anti-discrimination laws. It argued that if, under this bill, certain religiously based statements do not constitute discrimination, it is 'entirely unclear whether a "sexist or discriminatory" statement would still amount to a breach of that provision of the code, contract, policy or enterprise agreement, casting doubt on an employer's capacity to act effectively to create safe and inclusive workplaces'.<sup>138</sup>

6.78 Some submitters raised concern particularly about the place of women in the workplace and argued that well-established protections would be undermined.<sup>139</sup> Chief Executive Women stated:

we believe these Bills undermine tolerant, fair, safe and inclusive workplaces. Unconscious bias and discriminatory assumptions, norms, and cultures in workplaces are key barriers to women's workforce participation, progression into leadership and to closing the gender pay gap.<sup>140</sup>

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136 Equality Australia, *Submission 31*, pp. 13-14.

137 Youth Affairs Council of Western Australia, *Submission 155*, p. 11; LGBTIQ+ Health Australia, *Submission 156*, p. 8; Human Rights Law Centre, *Submission 190*, p. 18.

138 Australia Council of Trade Unions, *Submission 64*, pp. 12-13.

139 Victorian Trades Hall Council, *Submission 11*, p. 2; Law Council Australia, *Submission 28*, p. 36; Equality Rights Alliance, *Submission 166*, p. 7.

140 Chief Executive Women, *Submission 65*, p. 1.

6.79 A number of submitters sought further clarity on the interaction of clause 12 and the *Fair Work Act 2009*, and raised concerns that the bill caused additional confusion in this area.<sup>141</sup>

6.80 The Attorney-General's Department stated that proposed amendments in this legislative package to the *Fair Work Act 2009* would mean that conduct that is not unlawful under the Religious Discrimination Act (as a result of clause 12) would also not be unlawful under section 351 of the *Fair Work Act 2009* (which makes it unlawful for an employer to take adverse action against an employee on a number of grounds, including religion). It submitted:

a statement of belief made by an employer to an employee or prospective employee that meets the definition in section 12 of the Religious Discrimination Act would not be unlawful under section 351 of the Fair Work Act, in the absence of other conduct that caused a detriment to the employee or prospective employee.<sup>142</sup>

6.81 In relation to this, the Australian Council for Trade Unions submitted:

The scope of the exemptions in s 351 are different to those in the [bill]...meaning employers will now have to navigate three different types of religious exemptions at the Commonwealth level. The [bill] may also prevent a worker from bringing a cause of action under s 351(1) of the [Fair Work] Act, because conduct that is 'not unlawful' under any anti-discrimination law in force in the place where the action is taken is not covered by the adverse action protections in that section. In circumstances where a discriminatory statement by an employer to an employee constituted 'adverse action' within the meaning of s 342 (for example where the statement 'discriminated between the employee and other employees of the employer'), and amounted to 'less favourable treatment' of that employee, a claim that might otherwise have been available under s 351 may be effectively blocked by this Bill, leaving the employee without effective legal recourse under either discrimination laws or the [Fair Work] Act.<sup>143</sup>

### **Access to resolution of discrimination complaints**

6.82 In establishing that a statement of belief will not contravene other anti-discrimination provisions, a defence against a claim made under anti-discrimination laws is created. Numerous submitters and witnesses raised concerns as to the

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141 Health Services Union, *Submission 15*, p. 9; Australian Council of Trade Unions, *Submission 64*, pp. 8-9; Equality Australia, *Submission 31*, p. 34; Equal Voices, *Submission 32*, p. 3; Legal Aid Queensland, *Submission 92*, pp. 7 and 9.

142 Attorney-General's Department, answer to question on notice, 22010, (received 21 January 2022).

143 Australia Council of Trade Unions, *Submission 64*, p. 9.

potential for practical difficulties if a statement of belief defence was raised in response to a discrimination complaint. The Law Council of Australia explained:

protection from discrimination is provided through a combination of federal, State and Territory laws. Discrimination complaints are overwhelmingly heard and determined in State and Territory tribunals, rather than through the federal court system. The primary reason is that each of the State and Territory tribunals currently operates on a ‘no costs’ basis in the area of discrimination law. In all states and territories save Queensland, the tribunal which hears antidiscrimination complaints is not a Chapter III court and cannot exercise Federal jurisdiction or determine a question of federal law.<sup>144</sup>

6.83 A number of submitters noted that while most states and territories have processes for transferring cases to courts that have federal jurisdiction, not all do, and even where they can be transferred it will add to the time, cost and complexity of the case.<sup>145</sup> Ms Katherine Eastman SC, Chair of the Equal Opportunity Committee, Law Council of Australia, gave evidence that if a case needs to be transferred to the federal jurisdiction this will add significantly to the costs for a discrimination complaint, as the federal jurisdiction is a costs jurisdiction. Ms Eastman SC noted:

One thing that has always been a feature of discrimination law—and it's echoed by a comment made by Justice Lockhart many years ago in a case called Mount Isa Mines—is that discrimination law should not just be the province of experts or lawyers. These are laws that need to be accessible to people to be able to exercise their rights quickly, cheaply and effectively. And, whenever we have this conflict between state and federal laws, who has got jurisdiction to deal with different claims? It does become very legal and very complex. Frankly, the persons whom the complaints concern are often left behind in the legal argument.<sup>146</sup>

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144 Law Council Australia, *Submission 28*, p. 39. See also Equality Australia, *Submission 31*, p. 18; Associate Professor Luke Beck, *Submission 38*, p. 14; Public Interest Advocacy Centre, *Submission 40*, p. 7; Wimmera Pride Project, *Submission 90*, p. 2; Australian Human Rights Commission, *Submission 97*, pp. 30-31; ACT Government, *Submission 192*, p. 11; Ms Katherine Eastman, SC, Chair, Law Council of Australia Equal Opportunity Committee, Law Council of Australia, *Committee Hansard*, 14 January 2022, p. 37.

145 Australian Lawyers Alliance, *Submission 2*, p. 9; Diversity Council of Australia, *Submission 13*, p. 14; Law Council Australia, *Submission 28*, p. 39; Equality Australia, *Submission 31*, p. 18; Public Interest Advocacy Centre, *Submission 40*, p. 7; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 3; Australian Human Rights Commission, *Submission 97*, pp. 30-31; Anti-Discrimination NSW, *Submission 113*, p. 5; Women's Electoral Lobby, *Submission 188*, p. 4; Rainbow Families Queensland, *Submission 194*, p. 3; Ms Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 67; Ms Elise Christian, Equal Voices, *Committee Hansard*, 21 December 2021, p. 76; Ms Josephine Flanagan, Women's Health Tasmania, *Committee Hansard*, 14 January 2022, p. 49.

146 Ms Katherine Eastman, Law Council of Australia, *Committee Hansard*, 14 January 2022, p. 33.

6.84 The Australian Discrimination Law Experts Group submitted:

This delay and complexity is at odds with the approach adopted in all discrimination laws to enable complaints to proceed more quickly, informally and inexpensively to the parties than other claims. This will significantly increase the costs and delay of discrimination litigation, undermining the international human rights law right to an effective remedy for a discrimination complaint. Numerous, if not the majority of, discrimination complaints would be forced to cease their complaint for reasons of cost and time.<sup>147</sup>

6.85 The ACT Government further explained that this could add significantly to the time taken to assess the complaint.<sup>148</sup> Submitters raised that this would likely see few complainants continue with their complaint due to these difficulties and would make the complaints process far less accessible.<sup>149</sup> Associate Professor Luke Beck submitted:

by setting up "statements of belief" as a defence to State anti-discrimination laws section 12 has the effect of depriving many discrimination victims of access to the State tribunal systems. Discrimination cases involving breaches of State anti-discrimination laws are usually dealt with by the State tribunal systems. State tribunal systems are less formal than courts, often quicker than courts, and less expensive than courts. A particularly important feature of the State tribunal systems is that ordinarily a party who loses a case is not subject to an adverse costs order. This allows ordinary people who are victims of discrimination to seek justice without having to risk their homes or financial livelihood in the event they lose on a technicality. By contrast, the losing party in a court case is ordinarily ordered to pay the other side's legal costs. Section 12 significantly impedes access to the State tribunal systems.<sup>150</sup>

6.86 However, it was submitted by Associate Professor Mark Fowler that once the law around clause 12 had developed over time, there would be less need for matters to be heard in a federal court, '[o]nce we have a body of law around clause 12, the state will simply apply that law.'<sup>151</sup>

6.87 It was further raised that a complaint initiated at the state or territory level is barred from being heard at the federal level, and therefore there would be no option for complainants who had initiated their complaint at the state or territory level to

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147 Australian Discrimination Law Experts Group, *Submission 33*, p. 12.

148 ACT Government, *Submission 192*, p. 11.

149 Australian Lawyers Alliance, *Submission 2*, p. 9; Equality Australia, *Submission 31*, p. 18; Associate Professor Luke Beck, *Submission 38*, p. 14; Public Interest Advocacy Centre, *Submission 40*, p. 7; Dr Bruce Baer Arnold, *Submission 43*, p. 3; Wimmera Pride Project, *Submission 90*, p. 2; NT Anti-Discrimination Commission, *Submission 169*, p. 7.

150 Associate Professor Luke Beck, *Submission 38*, p. 14.

151 Associate Professor Mark Fowler, *Committee Hansard*, 21 December 2021, p. 7.

seek resolution in the federal jurisdiction.<sup>152</sup> The Australian Human Rights Commission explained:

If the case cannot be validly transferred to a court, the complainant may lose the right to have their complaint heard at all. This is because, once a complaint has been made to a State or Territory anti-discrimination body, the complainant is prevented from making the same complaint to the Australian Human Rights Commission. In those cases, the result of raising the 'statement of belief' defence would be to entirely defeat what might be a legitimate discrimination claim without any consideration of the merits of the claim.<sup>153</sup>

6.88 The Attorney-General's Department explained how the statement of belief defence would operate in practice:

This provision will operate as a federal defence to a claim of discrimination under Commonwealth, state or territory anti-discrimination law. Tribunals may therefore be unable to consider matters where a defence under this clause is raised. However, states and territories each have competent courts. If their arrangements for hearing discrimination claims provide a barrier to complainants accessing a court instead of a tribunal, it is open to states and territories to make amendments to their legislation.<sup>154</sup>

### **Qualifying bodies**

6.89 Clause 15 of the bill provides that a qualifying body discriminates against a person on the grounds of religious belief or activity if:

- (a) the qualifying body imposes, or proposes to impose, a condition, requirement or practice (a qualifying body conduct rule) on persons seeking or holding an authorisation or qualification from the qualifying body that relates to standards of behaviour of those persons; and
- (b) the qualifying body conduct rule has, or is likely to have, the effect of restricting or preventing the person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation.

6.90 However, it further provides that a qualifying body does not discriminate against a person if compliance with the qualifying body conduct rule by the person is an essential requirement of the profession, trade or occupation. A qualifying body is defined as meaning an authority or body empowered to confer, renew, extend,

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152 Australian Human Rights Commission, *Submission 97*, pp. 30-31; Anti-Discrimination NSW, *Submission 113*, p. 5.

153 Australian Human Rights Commission, *Submission 97*, p. 31.

154 Attorney-General's Department, answer to written question on notice, question 10 (received 11 January 2022).

revoke, vary or withdraw an authorisation or qualification needed for (or facilitates) the practice of a profession, the carrying on of a trade, or the engaging in of an occupation.<sup>155</sup>

6.91 Previous exposure drafts of the religious discrimination package also included a provision known as the 'Folau clause', which operated to prohibit employers terminating an individual's employment for expressing a statement of belief. This has been removed from the current legislative package, allowing employers to continue to set standards of conduct expected of employees in and outside of the workplace. The inclusion of clause 15 and the removal of the 'Folau clause' means that employers can generally set standards of conduct for employees, but qualifying bodies cannot include rules that prohibit the making of a statement of belief, unless the rule is an essential requirement of that profession, trade or occupation.

6.92 While a number of submitters supported the removal of the 'Folau clause', a number of other submitters expressed disappointment at its removal and raised concern about the impact this would have on people of faith to make statements of belief.<sup>156</sup> The Australian Catholics Bishops Conference submitted that the ability of employers to place restrictions on religious speech meant that workers would fear making statements of belief outside the workplace, commenting that:

The clause 12 provision still does not operate to protect religious speech in other circumstances. It should be noted that the failure to place any meaningful constraint on an employer's right to discriminate on the basis of religious belief will mean that workers are still not protected for statements of belief outside the workplace. The lack of employment protections contributes to a fear amongst ordinary people of faith of adverse action from employers, such that they engage in self-censorship. This chilling effect on freedom of religion is in addition to reported incidents of religious discrimination in the workplace and other areas.<sup>157</sup>

6.93 The Presbyterian Church of Victoria considered clause 15 should be extended to cover employers as well as qualifying bodies:

the effect of this clause is that a professional association cannot discipline a member of that association for making a statement of belief, while an employer can. This glaring omission has and will continue to result in employers coercing their employees to not to practice their religious beliefs outside of work.<sup>158</sup>

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155 Religious Discrimination Bill 2021, clause 5, definition of 'qualifying body'.

156 See, e.g., Presbyterian Church of Victoria, *Submission 133*, p. 4; Australian Christian Churches, *Submission 63*, p. 6; Association for Reformed Political Action, *Submission 104*, p. 4; Australian Christian Lobby, *Submission 16*, p. 6.

157 Australian Catholic Bishops Conference, *Submission 185*, p. 10.

158 Presbyterian Church of Victoria, *Submission 133*, p. 4.

6.94 Some submitters and witnesses held that it was appropriate that qualifying bodies should not be able to impose conditions preventing individuals from making statements of belief. It was argued that making such statements outside the workplace has no bearing on an individual's ability to undertake their job professionally, and expressing religious beliefs should not impact on an individual's career. For example, Freedom for Faith set out why it considered this clause is necessary:

An example of a situation where this has arisen in the past can be seen in the UK case involving social work student Felix Ngole, who was removed from his social work course based on comments he made opposing same-sex marriage on a social media site which was not in any way connected with his social work studies. Of course there will still be room for debate about what is an "essential requirement" for a profession, but at least this provision may provide some food for thought when professional bodies purport to lay down conduct requirements penalising members of their profession speaking on controversial issues outside their professional context.<sup>159</sup>

6.95 The Executive Council of Australian Jewry stated:

In our view, the making of a moderate statement of belief outside the work context may cause offence to some but would not impinge on their fundamental rights in terms of Article 18.3 of the ICCPR, and should not be used as a pretext for denying a person the means to pursue their chosen career in order to earn a livelihood.<sup>160</sup>

6.96 Other submitters argued that clause 15 did not go far enough. For example, the Australian Christian Churches argued that clause 15 should be amended to ensure that moderate statements of belief could be made within and outside the work context.<sup>161</sup> The Australian Christian Higher Educational Alliance submitted that the definition of 'qualifying bodies' should be expanded 'to cover discrimination by bodies that have power over an authorisation or qualification needed for the establishment, operation or funding of a religious educational institution and discriminate against the institution on the basis of its religious beliefs or activity'.<sup>162</sup>

6.97 Numerous submitters and witnesses, however, were opposed to the inclusion of clause 15. They argued that it was necessary for qualifying bodies to be able to determine the rules that regulate the conduct of a profession, and necessary for a qualifying body to be able to consider whether an individual upholds particular values

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159 Freedom for Faith, *Submission 10*, p. 11.

160 Executive Council of Australian Jewry, *Submission 19*, p. 10.

161 Australian Christian Churches, *Submission 63*, p. 6.

162 Australian Christian Higher Educational Alliance, *Submission 25*, p. 14.

to ensure trust and integrity in the profession.<sup>163</sup> It was argued that clause 15 is confusing and uncertain in its application,<sup>164</sup> and in particular subclause 15(2), which provides that 'a qualifying body does not discriminate against a person if compliance with the qualifying body conduct rule by the person is an essential requirement of the profession, trade or occupation', is uncertain in its application as an 'essential requirement' is not a term used elsewhere in anti-discrimination law.<sup>165</sup> The Attorney-General's Department further explained the term 'essential requirement':

Whether compliance with a qualifying body conduct rule is an 'essential requirement' of the profession, trade or occupation must be determined objectively based on the evidence and the circumstances of the case. In general terms, the department considers that this will require consideration of whether compliance with the rule is an essential element of the profession, such as whether compliance is clearly necessary to carry out the particular profession, or whether the practice of that profession would be essentially the same if that rule were dispensed with. This may include considering not just the specific services provided by the profession, but the general effect of the rule on the public reputation and community standing of members of that profession, trade or occupation.<sup>166</sup>

6.98 It was further raised that in practice, it would be impossible for qualifying bodies to know whether a statement was based in religious belief, and more broadly the clause creates difficulty in appropriately responding to complaints and disciplining members.<sup>167</sup> Some submitters also raised concern that the status of some professionals, in relation to their patients, students or other service users, increases the likelihood of harm arising from statements of belief,<sup>168</sup> and that statements of

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163 Law Council Australia, *Submission 28*, pp. 41-42; NSW Council for Civil Liberties, *Submission 181*, p. 10; Rainbow Families, *Submission 182*, p. 5; Human Rights Law Centre, *Submission 190*, p. 18.

164 Australian Health Promotion Association, *Submission 72*, p. 2; Medical Insurance Group Australia, *Submission 109*, p. 1; Liberty Victoria, *Submission 186*, p. 11

165 Equality Australia, *Submission 31*, pp. 20-21; Pride in Law, *Submission 37*, p. 3; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 11; Legal Aid Queensland, *Submission 92*, p. 8; ACT Government, *Submission 192*, p. 13; Australian Medical Association, *Submission 96*, p. 6.

166 Attorney-General's Department, *Questions on Notice*, p. 15.

167 Equality Australia, *Submission 31*, pp. 20-21; Pride in Law, *Submission 37*, p. 2; Anti-Discrimination NSW, *Submission 113*, p. 6; Queensland Advocacy Incorporation, *Submission 115*, p. 6; Fair Agenda, *Submission 122*, p. 9; Youth Affairs Council of Western Australia, *Submission 155*, p. 11; Australian Association for Social Workers, *Submission 159*, p. 6; Women's Electoral Lobby, *Submission 188*, p. 17; ACT Government, *Submission 192*, p. 13.

168 Tasmanian Council of Social Service, *Submission 36*, p. 8; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 11; A coalition of disability advocacy organisations, *Submission 167*, p. 3; Australian Medical Association, *Submission 96*, p. 5.

belief made by professionals could lead to undermining confidence in, and the standing of, the profession and individuals' willingness to access services.<sup>169</sup> Legal Aid Queensland submitted:

For example, based on our recent experience dealing with queries about religious discrimination and COVID-19 vaccination mandates, it is envisioned that persons may seek to share COVID-19 misinformation under the guise of a religious 'statement of belief', which could have undesirable public health consequences when promoted by persons occupying particular roles. It may be difficult for qualifying bodies to anticipate how these types of scenarios may arise, but it would be obviously concerning if people occupying professional roles were permitted to engage in the sharing of misinformation in this manner that could promote social division and public harm. By placing a restriction on qualifying bodies to respond to offensive and harmful statements of belief that are made outside the workplace it will have an impact across the relevant industries that the qualifying body has coverage of.<sup>170</sup>

6.99 Submitters and witnesses also argued that clause 15 would pose particular problems for legal, health, education and social worker professional bodies.<sup>171</sup> The Law Council of Australia expressed concerns about the impact clause 15 may have on the duty of legal practitioners to the court and administration of justice,<sup>172</sup> and the legal profession's 'historical commitment to ensure equality before the law and defend the rights of all persons'.<sup>173</sup>

6.100 A number of medical bodies considered that clause 15 created confusion for health practitioners as to what professional code or legislation they should adhere to.<sup>174</sup> The Australian Medical Association stated:

the provisions in the Bill do not necessarily guarantee the application of [the Australian Health Practitioner Regulation Agency's] professional standards were a doctor to speak publicly in a private capacity. A doctor could be subject to a notification under Ahpra should they act in a way inconsistent with standards set by Ahpra and the Medical Board. Currently, such a

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169 Just Equal Australia, *Submission 69*, p. 4; Family Planning NSW, *Submission 88*, p. 5; Dr Sean Mulcahy, *Submission 126*, p. 12; Amnesty International Australia, *Submission 157*, p. 24; Australian Association for Social Workers, *Submission 159*, p. 6; LGBTI Legal Service Inc, *Submission 161*, p. 4; Australian Lawyers for Human Rights, *Submission 171*, p. 113; Women's Health Victoria, *Submission 173*, p. 5.

170 Legal Aid Queensland, *Submission 92*, p. 8.

171 See, e.g. Australian Association for Social Workers, *Submission 159*, p. 6.

172 See also, Australian Lawyers Alliance, *Submission 2*, p. 10; Pride in Law, *Submission 37*, p. 3; Australian Lawyers for Human Rights, *Submission 171*, p. 113.

173 Law Council Australia, *Submission 28*, pp. 41–42.

174 Health Services Union, *Submission 15*, pp. 6–7; Australian Nursing and Midwifery Federation, *Submission 118*, p. 9; Australian Medical Association, *Submission 96*, p. 6.

notification could have potential employment implications for the doctor including possible dismissal; however, under the Bill the doctor would be protected from such dismissal even though they breached their professional standards.

Legislation that conflicts with professional standards may cause serious confusion in the real world where doctors, patients and employers will not know, in their daily work at the coalface, whether professional standards are enforceable, potentially leading to as yet unclear, and possibly adverse, patient outcomes.<sup>175</sup>

6.101 Some submitters also argued clause 15 put people's health at risk, negatively impacts the level of trust individuals needing health care have in medical professionals, and would reduce access to individuals seeking health services.<sup>176</sup> In relation to educational professional bodies, the Australian Education Union Federal Office expressed concern that clause 15 would undermine the regulation of the teaching profession and put students and teachers at risk of harm.<sup>177</sup> The Australian Education Union also argued that application of the provision was unclear, and it was not certain whether the clause overrides state and territory statutory requirements relating to 'suitability' or 'fit and proper' person tests.<sup>178</sup>

6.102 A number of submitters and witnesses also commented that this provision was unnecessary, as clause 14 on indirect discrimination, which includes a standard reasonableness test, is enough to make unlawful any rules which limit freedom of religion during or outside work.<sup>179</sup> For example, the Australian Human Rights Commission stated that clause 15 is essentially a deeming provision in relation to indirect discrimination, such that 'in the very specific circumstances set out, the conduct will be deemed to be discrimination'. It went on to note that qualifying bodies are already separately prohibited from discriminating against a person on the ground of the person's religious belief or activity and under the standard test for indirect discrimination would not be able to impose an unreasonable condition, requirement or practice (such as a 'conduct rule') that has the likely effect of disadvantaging persons who hold a religious belief. The Commission went on to state:

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175 Australian Medical Association, *Submission 96*, p. 6.

176 Kingsford Legal Centre, *Submission 110*, p. 9; Youth Pride Network, *Submission 124*, p. 11; LGBTI Legal Service Inc, *Submission 161*, p. 4; Women's Health Victoria, *Submission 173*, p. 5; Centre for Women's Safety and Wellbeing, *Submission 179*, p. 6; Rainbow Families Queensland, *Submission 194*, p. 3.

177 Australian Education Union Federal Office, *Submission 21*, p. 7.

178 Australian Education Union Federal Office, *Submission 21*, p. 7.

179 Law Council Australia, *Submission 28*, p. 42; Public Interest Advocacy Centre, *Submission 40*, p. 20; Equality Australia, *Submission 31*, pp. 23; Australian Human Rights Commission, *Submission 97*, p. 63; Uniting Network Australia, *Submission 153*, p. 17; Human Rights Law Centre, *Submission 190*, p. 18.

An assessment of whether the conduct rule is reasonable is likely to take into account the very elements of the special test in clause 15, including whether the rule is an essential requirement of the profession, trade or occupation. It appears that it would be much less likely for a conduct rule to be considered reasonable where (as described in clause 15) the conduct sought to be regulated is conduct engaged in other than when a person is carrying on a relevant trade or engaging in a relevant occupation. The assessment of reasonableness would also be likely to take into account whether the rule would prohibit conduct that is malicious or that would threaten, intimidate, harass or vilify a person or group.

There is no principled reason to depart from the standard test of reasonableness or to create a separate test of indirect discrimination for qualifying body conduct rules. It is a further example of legislating for single instances. It should be removed from the Bill because it is not necessary.<sup>180</sup>

6.103 The explanatory memorandum stated in relation to this clause:

This clause recognises that individuals, including, for example, teachers, lawyers, health professionals and tradespeople, should not be at risk of losing their registration or qualifications by reason of the expression of their religious beliefs in their personal capacity. In addition, students of universities and other vocational education and training institutions, to the extent that those bodies are qualifying bodies, should not be at risk of not receiving their qualification due to the expression of their religious beliefs.

This presumption only operates in relation to conduct rules that restrict or prevent a person from making a statement of belief other than in the course of practising their profession, trade or occupation. Nothing in this subclause affects the ability of qualifying bodies to regulate religious expression by persons in the course of engaging in their profession, trade or occupation.<sup>181</sup>

## International human rights law

### ***Rights to freedom of religion, freedom of expression and equality and non-discrimination***

6.104 By affording greater protection to individuals to make statements of belief, the measure promotes the rights to freedom to manifest religion and freedom of expression.<sup>182</sup> As outlined in Chapter 2, the right to freedom of religion includes the freedom, either individually or in community with others and in public or private, to

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180 Australian Human Rights Commission, *Submission 97*, pp. 62-63.

181 Religious Discrimination Bill 2021, explanatory memorandum, p. 63.

182 Although, as discussed above, some submitters and witnesses were of the view that clause 12 inconsistently implemented the right to freedom of religion (article 18) by prioritising religious speech over non-religious speech. See, e.g. Professor George Williams, *Submission 1*, pp. 1–2; Equality Australia, *Submission 31*, p.13; Associate Professor Luke Beck, *Submission 38*, pp. 4-5; Rationalist Society of Australia, *Submission 42*, p. 2; Youth Affairs Council of Western Australia, *Submission 155*, p. 8; Amnesty International Australia, *Submission 157*, p. 14.

manifest one's religion or belief in worship, observance, practice and teaching.<sup>183</sup> Freedom to manifest religion encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress, including distinctive clothing or head coverings,<sup>184</sup> and the observance of dietary regulations.<sup>185</sup> The terms 'observance' and 'practice' do not contain 'any spatial or institutional specificities and must be broadly applied', including in the workplace.<sup>186</sup>

6.105 The right to freedom to manifest religion intersects with, and has a mutually reinforcing relationship with, the right to freedom of expression.<sup>187</sup> As outlined in Chapter 2, the right to freedom of expression protects '[a]ll forms of opinion, including opinions of a political, scientific, historic, moral or religious nature' and includes the expression and receipt of religious discourse.<sup>188</sup> The UN Special Rapporteur on freedom of religion or belief has observed that the right to manifest one's religion relies on the degree of protection afforded to freedom of expression and likewise, respect for freedom of thought and conscience is necessary for respect for freedom of opinion and expression.<sup>189</sup> They stated each right is 'necessary for the meaningful enjoyment' of the other, and 'the two rights are not only interdependent, but also exist in a legal continuum with myriad other rights'.<sup>190</sup>

6.106 It is well established that the right to freedom of religion or belief 'does not include the right to have a religion or belief that is free from criticism or ridicule' and where such criticism offends or hurts the feelings of religious people, 'it does not necessarily or at least directly result in a violation of their rights, including their right

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183 International Covenant on Civil and Political Rights, article 18(1).

184 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.3]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.2]–[7.3]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.3].

185 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

186 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [31].

187 International Covenant on Civil and Political Rights, article 19. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

188 UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

189 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [7].

190 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [5], [14]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/31/18 (2015).

to freedom of religion'.<sup>191</sup> Indeed, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has reiterated that 'the right to freedom of expression includes expression of views and opinions that offend, shock or disturb'.<sup>192</sup> The UN Human Rights Committee has also stated that the right to freedom of expression encompasses expression that may be regarded as deeply offensive and insulting, although such expression may be restricted in accordance with the limitation clause in article 19(3) and article 20 of the International Covenant on Civil and Political Rights.<sup>193</sup> In this regard, statements of belief made pursuant to clause 12 that may be regarded as offensive or insulting would likely be protected speech under the right to freedom of expression, noting the important status of this right under international human rights law.<sup>194</sup>

6.107 However, insofar as the measure overrides existing federal, state and territory anti-discrimination laws and so may have the effect of making otherwise discriminatory behaviour lawful, it may engage and limit the right to equality and non-discrimination if such behaviour were to also constitute discrimination under international human rights law. As outlined in Chapter 2, this right provides that everyone is entitled to enjoy their rights without discrimination of any kind.<sup>195</sup>

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191 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance*, A/HRC/2/3 (2006) [36]–[37].

192 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/17/27 (2011) [37].

193 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [11] and [38]. Article 20 of the International Covenant on Civil and Political Rights also places limits on the freedom to manifest religion, providing that any manifestation of religion or beliefs must not amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

194 UN Human Rights Committee, *General comment No. 34: Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011) [2]–[3]. The UN Human Rights Committee stated that: 'Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.

195 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

6.108 The term 'discrimination' is understood to 'imply any distinction, exclusion, restriction or preference which is based on any [protected attribute]...and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>196</sup> The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>197</sup> This right may be limited to the extent that the measure makes lawful behaviour that would constitute either direct or indirect discrimination under international human rights law.<sup>198</sup>

6.109 In addition, if a statement of belief was considered to be so offensive to persons or groups with a protected attribute such that the enjoyment or exercise of their rights and freedoms was impaired, there could be a risk that the measure may result in indirect discrimination against such persons or groups, noting that states have an obligation to guarantee rights in a non-discriminatory way. For example, some submitters and witnesses were of the view that if health professionals made statements of belief that adversely impacted vulnerable groups, this may make these groups feel unwelcome and may impair their access to health care (see paragraph [6.72]).

6.110 Further, if the measure engages and limits the rights of women, people with disability, racial and ethnic minority groups, and children and young people, it is noted that international human rights law affords special protection to these groups taking into account their particular vulnerabilities.<sup>199</sup> It is noted that many statements of belief made pursuant to clause 12 are unlikely to rise to the level of actionable discrimination under international human rights law, noting that the right to freedom of expression protects offensive and insulting statements. However, there may be some risk that the measure may allow discrimination in certain circumstances, depending on the content of the statement and the context in which it is made.

6.111 Further, noting that the measure provides a federal defence to discrimination claims made under state and territory anti-discrimination laws, and as set out at paragraphs [6.82] to [6.87] may impact the determination of such claims, it may have implications on the right to an effective remedy. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political

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196 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [7].

197 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

198 The measure would make otherwise discriminatory statements lawful but would not alter the effect of harassment, vilification or indictment provisions in existing anti-discrimination laws. See Religious Discrimination Bill 2021, explanatory memorandum, p. 56.

199 Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of Persons with Disability; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child.

Rights.<sup>200</sup> It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), state parties must comply with the fundamental obligation to provide a remedy that is effective.<sup>201</sup> While a person whose right to equality and non-discrimination is limited has access to a complaints process, it is unclear the extent to which this measure will frustrate this process such that it limits their right to an effective remedy.

6.112 The statement of compatibility states that the measure promotes the right to freedom of expression and protects the ability of individuals to explain, discuss, share and express their fundamental beliefs.<sup>202</sup> It does this by overriding Commonwealth, state and territory anti-discrimination laws that may otherwise make such statements unlawful. However, the statement of compatibility does not acknowledge that the measure may engage and limit the right to equality and non-discrimination, noting that the mere stating of a belief, subject to the requirements in subclause 5(1) and clause 21, should not amount to discrimination.<sup>203</sup> It states that the measure is not intended to capture discriminatory conduct, which reflects that the right to freedom of expression is subject to restrictions and carries with it special duties and responsibilities.<sup>204</sup> The explanatory memorandum further states that the measure:

will not operate to exempt discriminatory conduct, or a series of conduct, merely because it has been accompanied by a statement of belief. Although the statement of belief is not, in and of itself, discriminatory, this clause will not affect the determination of whether associated conduct constitutes discrimination.<sup>205</sup>

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200 International Covenant on Civil and Political Rights, article 2(3). See, *Kazantzis v Cyprus*, UN Human Rights Committee Communication No. 972/01 (2003) and *Faure v Australia*, UN Human Rights Committee Communication No. 1036/01 (2005), State parties must not only provide remedies for violations of the ICCPR, but must also provide forums in which a person can pursue arguable if unsuccessful claims of violations of the ICCPR. Per *C v Australia* UN Human Rights Committee Communication No. 900/99 (2002), remedies sufficient for the purposes of article 5(2)(b) of the ICCPR must have a binding obligatory effect. Regarding remedies for violations of social, economic and cultural rights, see UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: the domestic application of the covenant* (1998).

201 See UN Human Rights Committee, *General Comment 29: States of Emergency (Article 4)* (2001) [14].

202 Religious Discrimination Bill 2021, statement of compatibility, p. 26.

203 Religious Discrimination Bill 2021, statement of compatibility, p. 26.

204 Religious Discrimination Bill 2021, statement of compatibility, p. 26.

205 Religious Discrimination Bill 2021, explanatory memorandum, p. 55.

6.113 In this regard, the explanatory memorandum noted that statements of belief could be used as evidence in support of a discrimination complaint concerning separate conduct.<sup>206</sup>

#### *Limitation criteria*

6.114 If the right to equality and non-discrimination were limited, under international human rights law, differential treatment on the basis of a protected attribute will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>207</sup>

6.115 Further, where the manifestation of religion or the expression of a religious opinion or belief has an adverse effect on the rights or freedoms of others, each right must be balanced against each other.<sup>208</sup> Noting that there is no hierarchy of human rights, where limitable rights clash, 'the focus should be on ensuring that all human rights are protected, including through reasonable accommodation'.<sup>209</sup> In the context of this measure, the rights to freedom of religion and expression of those making the statement of belief must be balanced against the rights of others (to the extent that such statements would limit the rights of others). International human rights law jurisprudence indicates that the specific circumstances of the case, the competing

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206 Religious Discrimination Bill 2021, explanatory memorandum, p. 55.

207 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

208 See, e.g. *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8]; United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8]; UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [16].

209 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [81].

rights in question and the vulnerability of the persons involved are relevant considerations in undertaking this balancing exercise.<sup>210</sup>

*Legitimate objective*

6.116 The explanatory memorandum states that the purpose of the measure 'is to ensure that genuine and sincerely held religious views may be freely expressed without legal repercussion, provided they are expressed in good faith and are not malicious'.<sup>211</sup> This is reflected in the objects clause of the bill itself, which provides that one object of the bill is to 'ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief'.<sup>212</sup>

6.117 As to the necessity of the measure, the Attorney-General's Department stated that it is appropriate for the bill to 'clarify the ability of people of faith to express their religious beliefs in good faith' given that 'a person's religious belief, or lack of belief, is of significance to their identity, sense of self and the manner in which they live their life'.<sup>213</sup>

6.118 The general objective of protecting the rights to manifest religion and express religious beliefs is a legitimate objective (as noted in Chapters 4 and 5). However, there are some questions as to whether the objective of this specific measure addresses a pressing and substantial concern for the purposes of international human rights law. Subclause 12(1), in particular, was stated by the Attorney-General's Department to 'clarif[y] the existing operation of anti-discrimination laws'.<sup>214</sup> As discussed above (at paragraphs [6.14]–[6.15]), some submitters and witnesses were also of the view that this measure is unnecessary, as statements of belief can already be made, to the

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210 See, eg, [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, E/CN.4/2006/5 (2006) [51]–[52].

211 Religious Discrimination Bill 2021, explanatory memorandum, p. 55.

212 Religious Discrimination Bill 2021, paragraph 3(1)(d).

213 Attorney-General's Department, answer to written question on notice, question 8 (received 11 January 2022).

214 Attorney-General's Department, answer to question on notice, 22008, 14 January 2022, (received 21 January 2022).

extent that it does not interfere with anti-discrimination law as it currently exists.<sup>215</sup> If subclause 12(1) is intended to clarify the existing law, it is not clear that it addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights.<sup>216</sup>

### *Proportionality*

6.119 In considering whether the measure is sufficiently circumscribed, it is relevant to consider the scope of the measure. As currently drafted, the measure overrides several federal, state and territory laws and confers power to prescribe other laws by regulations. Regarding this latter power, the Attorney-General's Department stated that while no other laws have yet been identified, the power provides 'flexibility and acts as a safeguard in the event that future Commonwealth, state or territory laws are identified as unreasonably limiting the ability of a person to make a statement of belief'.<sup>217</sup>

6.120 As noted above (at paragraphs [6.31]–[6.35]), some submitters and witnesses raised concerns at the breadth of this power and the ability for the executive to override federal, state or territory laws. International human rights law jurisprudence states that laws conferring discretionary powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.<sup>218</sup> This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights. Without knowing what other laws may be prescribed, it is not clear whether other human rights may be engaged and limited by the measure. It is also noted that as the measure overrides all anti-discrimination law without regard to the individual circumstances of the case, it contains no flexibility to treat different cases differently.

6.121 The statement of compatibility identifies two main safeguards in relation to clause 12: the requirement in subclause 5(1) that statements be made in 'good faith' and that beliefs be 'genuinely' held, and the requirement in subclause 12(2) that statements not be malicious, or harass, threaten, intimidate or vilify a person or group

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215 See, e.g., Dr Renae Barker, *Submission 6*, p. 7; Diversity Council Australia, *Submission 13*, p. 12; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 3; Australian Human Rights Commission, *Submission 97*, p. 17; Human Rights Law Centre, *Submission 190*, p. 17.

216 Attorney-General's Department, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 21 January 2022, p. 67.

217 Attorney-General's Department, answer to written question on notice, question 9 (received 11 January 2022).

218 *Hasan and Chaush v Bulgaria*, European Court of Human Rights App No.30985/96 (2000) [84].

of persons.<sup>219</sup> Regarding the former, the Attorney-General's Department stated that in interpreting the 'good faith' requirement:

a court is likely to apply a broad interpretation of the good faith requirement encompassing both subjective considerations (the person making a statement of belief considers they are behaving honestly and with a legitimate purpose), as well as objective considerations (the person has taken a conscientious approach to honouring the values asserted by the Bill, which may include considering the harm that may be caused by their speech given the overall purpose of the Bill.<sup>220</sup>

6.122 As to the requirement that beliefs be 'genuinely' held, the Attorney-General's Department stated that:

the definition of a statement of belief in this Bill would also require a court to do more than merely accept a person's claim that their statement satisfies the requirements of the definition. A statement must be of a belief that a person 'genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion' or 'genuinely considers to relate to the fact of not holding a religious belief'. A court is likely to interpret this requirement as involving an inquiry into whether a person's beliefs are sincerely held (for example, consistent with the person's past statements or personal behaviour). A court would be particularly concerned to determine whether a person's statement was a mere artifice to, for example, claim special rights or avoid responsibility.<sup>221</sup>

6.123 The safeguard value of this requirement depends on how the concepts of 'good faith' and 'genuinely considers' are interpreted and applied in practice, as discussed in Chapter 4.<sup>222</sup> The subjective nature of these concepts may mean that they are broadly interpreted and difficult to refute (see above at paragraphs [6.50]–[6.51]). While the Attorney-General's Department stated that a court would consider whether a statement was an artifice to avoid responsibility, such a consideration is not required as a matter of law under the bill.

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219 Religious Discrimination Bill 2021, statement of compatibility, p. 26.

220 Attorney-General's Department, *Submission 191*, p. 12.

221 Attorney-General's Department, *Submission 191*, p. 12.

222 In another context, in considering manifestations of religion, the European Court of Human Rights has held that in order to count as a 'manifestation' within the meaning of the right to freedom of religion, the act in question must be 'intimately linked' to the religion or belief, having a 'sufficiently close and direct nexus between the act and the underlying belief'. This will be determined on the facts of each case. The court noted that there is no requirement to establish that a person acted in fulfilment of a duty mandated by their religion. See *Eweida & Ors v The United Kingdom*, European Court of Human Rights, Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (2013) [82].

6.124 Regarding subclause 12(2), the terms 'harass', 'threaten' and 'intimidate' are intended to be interpreted in accordance with their ordinary meaning.<sup>223</sup> The term 'vilify' is defined in the bill to mean incite hatred or violence towards a person or group of persons.<sup>224</sup> The explanatory memorandum states that speech that is offensive or insulting but does not incite hatred, violence or contempt is not vilification.<sup>225</sup> To assist with interpretation, the explanatory memorandum provides examples of behaviour that could constitute vilification, including speaking about a person's race or religion in a way that could make other people hate or ridicule them.<sup>226</sup> This provision would likely operate as an important safeguard and may also assist Australia to realise its obligation under article 20 of the International Covenant on Civil and Political Rights, which provides that any manifestation of religion or beliefs must not amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>227</sup>

6.125 Finally, the extent to which the measure allows for competing limitable rights to be balanced is an important factor in assessing proportionality (as outlined in Chapters 2 and 4). The Attorney-General's Department were of the view that an appropriate balance between rights had been struck, including by ensuring the relevant provisions (clauses 12 and 15) are limited in their application and subject to various safeguards. They stated:

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223 Religious Discrimination Bill 2021, explanatory memorandum, p. 57.

224 Religious Discrimination Bill 2021, subclause 5(1).

225 Religious Discrimination Bill 2021, explanatory memorandum, p. 57.

226 Religious Discrimination Bill 2021, explanatory memorandum, p. 57. See also Attorney-General's Department, answer to written question on notice, question 12 (received 11 January 2022).

227 Regarding states' obligations under article 20, the Special Rapporteur has stated: 'States may wish to review legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, so as to ensure that the legislation is explicit in its definitions, in particular of the terms: (a) "hatred" and "hostility", which should refer to "intense and irrational emotions of opprobrium, enmity and detestation towards the target group"; (b) "advocacy", which should be understood as requiring an intention to publicly promote hatred towards the target group; and (c) "incitement", which should refer to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. Furthermore, States may wish to ensure (d) that the promotion, by different communities, of a positive sense of group identity does not constitute "hate speech". See UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [34].

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Clause 12 has been specifically developed to balance between the rights of freedom of religion and freedom of expression with other rights, and is subject to appropriate limitations.<sup>228</sup>

6.126 The Attorney-General's Department were of the view that applying the test of reasonableness, necessity and proportionality under international human rights law was not appropriate as it would not 'provide the certainty required to create an environment conducive to good faith discussions of religious belief'.<sup>229</sup> The measure, as currently drafted, does not allow for a balancing exercise to occur. As discussed in Chapter 4, it is not clear that the objects clause (which refers to the indivisibility and universality of human rights, and their equal status in international law) would necessarily facilitate this balancing exercise in practice. Thus, in the absence of the ability to consider the individual circumstances of the case, particularly where vulnerable persons are involved, and balance competing human rights, there appears to be a risk that the measure may not be proportionate in all circumstances.<sup>230</sup>

6.127 In conclusion, in affording greater protection to people to make statements of belief, the measure promotes the right to manifest religion and the right to freedom of expression. However, insofar as the measure overrides existing federal, state and territory anti-discrimination laws and so has the effect of making otherwise discriminatory behaviour lawful, it may engage and limit the right to equality and non-discrimination if such behaviour were to also constitute discrimination under international human rights law, and there are questions as to whether this would be a permissible limit. It is noted, however, that many statements of belief made pursuant to clause 12 are unlikely to rise to the level of actionable discrimination under international human rights law, noting that the right to freedom of expression protects offensive and insulting statements.

### **Committee view**

6.128 The committee considers it important that all people in Australia be able to exercise their right to freedom of expression. The right to freedom of religion is strongly linked to the right to freely express and manifest one's religious beliefs. Religion is a fundamental part of Australia's strong and diverse social fabric, and a person's religious belief, or lack of belief, is often of significance to them to their identity, sense of self and the manner in which they live their lives.

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228 Attorney-General's Department, answer to written question on notice, question 1 (received 11 January 2022).

229 Attorney-General's Department, answer to written question on notice, question 8 (received 11 January 2022).

230 The vulnerability of the individuals involved is a relevant factor. International human rights law jurisprudence has held that 'religious liberty' cannot be invoked to justify discrimination against vulnerable groups, including women, girls and LGBTIQ+ persons. See UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40].

6.129 The committee has heard evidence that, increasingly, people of faith feel constrained in what they can express in relation to their religious beliefs – beliefs which form a core component of who they are. The committee considers it important that individuals can feel free, in good faith, to explain, discuss, share and express these deeply felt beliefs. Clause 12 seeks to do this by stating that a moderate statement of belief should not amount to discrimination. The committee considers this strongly promotes not only the right to freedom of religion, but also the related right to freedom of expression.

6.130 However, the committee also acknowledges that clause 12 is contentious and that numerous submitters raised concerns about the range of statements that could be protected by clause 12 and the impact of such statements on certain groups, in particular LGBTIQ+ individuals. There was evidence of significant confusion among submitters and witnesses as to the scope of clause 12 and how it would operate in practice. The committee notes that many submitters and witnesses gave examples of statements that would be protected by clause 12 – yet the committee considers few of these statements would be protected in reality. The committee notes that clause 12 includes some vital safeguards to ensure that only reasoned statements will be protected. In particular, the committee considers it important to note that any statement, in order to be protected, must be made in good faith, and cannot be malicious; threatening, intimidating, harassing or vilifying; or promote the commission of a serious offence. The committee additionally considers there are few statements that, in and of themselves, would currently be considered to be discriminatory. As such, paragraph 12(1)(a) operates, in the main, to give reassurance to people of faith that they are able to make moderately expressed statements of religious belief and faith. However, to alleviate some of the confusion surrounding clause 12, the committee considers that it would be of assistance if the explanatory memorandum was amended to provide greater clarity about what sort of statements or actions may or may not be considered to not constitute discrimination.

6.131 The committee notes that the Tasmanian Anti-Discrimination law has an extremely broad application and prohibits conduct that 'offends, humiliates, intimidates, insults or ridicules' another person on a protected ground. This is the only provision of this nature in anti-discrimination law in Australia. The committee considers it likely that the Tasmanian law breaches the rights of Tasmanians to freedom of expression by capturing such a broad range of speech. This view was supported by a number of submitters and witnesses who were concerned about the overreach of the Tasmanian law. Nevertheless, the committee acknowledges that there were others who were supportive of the broad scope of the Tasmanian law and were concerned that overriding it would adversely impact other rights. Taking into account these different views, the committee considers that, on balance, by ensuring that a statement of belief will not contravene the Tasmanian law, the federal government is upholding its obligations to protect and promote the right to freedom of expression and religion for all Australians.

6.132 The committee also considers it important to protect people of faith from discrimination by qualifying bodies in the imposition of qualifying body rules (for example, a university conferring a degree, which is required for the practice of a profession, would not be able to discriminate against a student for making a moderate statement of belief). It also includes an important qualifier that there will be no discrimination if compliance with the rule is an essential requirement of the profession, trade or occupation. This clause is appropriate, as a person of faith, whose moderately expressed views, while perhaps offending some, should not deny a person the means to pursue their chosen career. The committee notes that a number of witnesses and submitters expressed confusion as to how these rules would operate in practice, in particular in relation to existing professional requirements, and as such guidance should be developed to help alleviate these concerns. The committee also considers there should be greater clarity as to the interaction between clauses 14 (indirect discrimination) and 15 (qualifying body conduct rules).

6.133 The committee notes that the bill provides that the Australian Human Rights Commission must conduct a review into the operation of this legislation, no later than two years after its commencement. Noting these provisions are somewhat unique in the legislative landscape and given its relationship to the protection of fundamental human rights, the committee would urge future governments to monitor the impact of this legislation on society and individuals and continually review this significant piece of legislation.

6.134 However, ultimately the committee remains of the view that the passage of these bills remains central to remedying the weakness in our existing anti-discrimination legislation, and to protecting the fundamental right to freedom of religion, conscience and belief.

#### **Recommendation 9**

**6.135 The committee recommends that the government consider providing further explanation and examples with respect to clause 12 in the explanatory memorandum accompanying the Religious Discrimination Bill 2021, to provide greater clarity about what sort of statements or actions may, or may not, be considered to not constitute discrimination.**

#### **Recommendation 10**

**6.136 The committee recommends guidelines relevant to qualifying body conduct rules in clause 15 are developed in consultation with relevant professional bodies.**

#### **Recommendation 11**

**6.137 The committee recommends that the government give consideration to amending the explanatory memorandum, or clause 14 of the Religious Discrimination Bill 2021 to add a legislative note, to clarify that it may be indirect discrimination for a qualifying body to impose a qualifying body conduct rule that**

restricts or prevents a person from expressing their religious beliefs, unless the qualifying body can demonstrate the rule is reasonable.

**Recommendation 12**

**6.138** The committee recommends that, following implementation of the recommendations in this report, the Religious Discrimination Bill 2019, the Religious Discrimination (Consequential Amendments) Bill 2021, and the Human Rights Legislation Amendment Bill 2021 be passed.

**Dr Anne Webster MP**

**Chair**

## **Additional comments from Australian Labor members**

### **Introduction**

1.1 Consistent with Labor's long-standing support for the International Covenant on Civil and Political Rights – including the protection and promotion of the right to freedom of thought, conscience and religion – Labor Members of this committee have been guided by three principles in considering the Religious Discrimination Bill:

- First, as the International Covenant on Civil and Political Rights makes clear, religious organisations and people of faith have the right to act in accordance with the doctrines, beliefs or teachings of their traditions and faith.
- Second, we support the extension of the federal antidiscrimination framework to ensure Australians are not discriminated against because of their religious beliefs or activities.
- And, third, consistent with the international covenant, the extension of the federal antidiscrimination framework in this way should not remove protections that already exist in the law to protect Australians from other forms of discrimination.

1.2 A Commonwealth Religious Discrimination Act would not exist in a vacuum.

1.3 Most Australian state and territory jurisdictions have already legislated to provide protection for their citizens from discrimination on the basis of religious beliefs and practice. Overwhelmingly, those protections have been put in place by Labor Governments – in Queensland, Western Australia, the Australian Capital Territory, Victoria, South Australia and Tasmania.

1.4 The freedom to have or adopt a religion or belief is absolute and cannot be limited. As the Ruddock Review noted, these rights ‘cannot be departed from even in times of national emergency’. Labor acknowledges this in our 2021 Platform:

Labor recognises that the freedom to have or adopt a religion or belief, to change a religion or belief, or not to have or adopt a religion or belief, is absolute. Moreover, Labor believes in and supports the right of all Australians to have and to manifest their religion or beliefs, and the right of religious organisations to act in accordance with the doctrines, tenets, beliefs or teachings of their faith. Such rights should be protected by law and, in accordance with Article 18 of the International Covenant on Civil and Political Rights, subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

1.5 The Labor members of the Human Rights Committee believe it is totally appropriate – and should not be at all controversial – for a modern Australian Parliament to legislate to protect people of faith from discrimination. The committee

heard almost unanimous support for legislative protection for people of faith. However, many people questioned whether the Bill that Prime Minister Morrison personally introduced to parliament will be workable and provide the necessary protection for people of faith that he promised and whether the Bill appropriately balances freedom of religion with other rights and freedoms.

### **Inquiry Process**

1.6 In December 2018, in his formal response to the Ruddock Review, the Prime Minister promised to 'work with the Opposition, crossbench and stakeholders in a spirit of bipartisanship, and ... introduce legislation into the Parliament that enjoys broad cross-party support'. That did not happen.

1.7 For reasons that only he can explain, the Prime Minister spent almost three years ignoring calls for a bipartisan approach to this legislation –thus breaching his election commitment – only to introduce complex legislation into the Parliament on the eve of a federal election.

1.8 The Attorney-General allowed this committee only 71 days to conduct this inquiry and report to both Houses of Parliament. There were at least twelve religious celebrations during that period including Christmas and Hanukkah. Almost the entire 71 days fell during the school holidays. As the majority report confirms, many submitters raised concerns regarding the short timeframe for the inquiry. In fact, even the Attorney General's own Department was unable to comply with the completely unrealistic timetable imposed by the Attorney General. Witnesses during the public hearings, including organisations relying on volunteers to prepare their submissions, also commented on the timing of the inquiry. The first public hearing was held four days before Christmas Day and the second and third took place early in January when many stakeholder organisations had not yet returned to work from holidays.

1.9 This bill is important to Australians of faith and no faith alike. All fair-minded people in our pluralist democracy reject discrimination in all its forms. It is therefore disappointing that this bill has suffered in its design from the Government's failure to work across the Parliament – and, indeed, across the Federation – to ensure it is fit for purpose and provides the legislative protection promised. Many of the concerns raised by stakeholders have arisen because some aspects of the proposed protections are not well thought through. This rushed process after so much inaction since 2018 is a failure of governance, and all Australians deserve better.

### **Key areas of controversy**

The two most contentious aspects of the Government's Religious Discrimination Bill are clauses 11 and 12.

#### **Clause 11**

1.10 Submitters to this inquiry raised a range of concerns about clause 11, which provides that conduct relating to employment engaged by religious educational institutions does not contravene a prescribed state or territory law if the institution

gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and the conduct is in accordance with a publicly available written policy.

1.11 Labor members of the Committee support the right of a religious educational institution to preference staff in employment with a view to ensuring that the institution is able to reasonably conduct itself in a way that is consistent with its religious ethos.

1.12 The need to preserve that right is the legitimate concern underlying clause 11. But a number of concerns have been raised about how clause 11 would operate in practice.

1.13 Clause 11 is explicitly designed to override State and Territory anti-discrimination law – specifically, recent changes to the law in Victoria. As the Law Council of Australia said in their submission: -

It departs from orthodox Commonwealth anti-discrimination law, which is generally designed not to exclude or limit the operation of State or Territory law that is capable of operating concurrently with it.

1.14 Other submitters have also described the clause as 'novel'.

1.15 Clause 11 was the subject of much dispute among submitters and in the limited number of days allowed for public hearings, widely varying views about the likely and unlikely effects of the clause took a significant portion of the Committee's time. Given the significant uncertainty about the practical impact of this clause in its interaction with State and Territory laws, it was disappointing to learn from the Attorney-General's Department that:

The department did not have meetings with any state or territory government to discuss any part of the Religious Discrimination legislative package between the conclusion of the second exposure draft consultation process and the introduction of the Religious Discrimination legislative package.

1.16 It was also somewhat alarming to learn that the Government had given little – if any – detailed consideration to whether clause 11 would actually achieve its objective.

1.17 For example, when the Attorney-General's Department was asked whether a state parliament could simply circumvent clause 11 by enacting a standalone law that prevented religious schools from giving preference to persons who hold or engage in a particular religious belief or activity in an employment context, the Department said that it was not able to provide the Committee with 'technical legal advice on hypothetical examples'.

1.18 With respect, this 'hypothetical example' goes to the heart of whether clause 11 would actually achieve its apparent purpose. The fact that the Department does not appear to have even considered whether a state parliament could easily

circumvent clause 11 raises serious questions about whether the Government has properly considered any of the range of other concerns that have been raised about the provision, including in relation to its constitutionality.

1.19 Labor members also note that the Attorney-General's Department has refused to provide the Committee with basic information about the drafting process for clause 11, including how long the Government spent developing the provision and who was consulted in the drafting process.

1.20 This is a far cry from the Morrison Government's election commitment to 'work with the Opposition, crossbench and stakeholders in a spirit of bipartisanship, ... to introduce legislation into the Parliament that enjoys broad cross-party support.'

1.21 Labor members urge the Government to work across the Parliament – if not across the Federation – to address the serious concerns that have been raised about clause 11 and consider whether there are better approaches to addressing the legitimate concern that clause 11 is intended to address (i.e. the need to ensure that religious schools can reasonably conduct themselves in a way that is consistent with their religious ethos).

#### ***Clause 12: Statements of Belief***

1.22 Australia rightly prides itself on being a dynamic and successful pluralist nation.

1.23 Unfortunately, the Human Rights committee heard evidence that many people of faith do not currently feel free to share their religious beliefs. The Ruddock Review heard 'troubling examples of social hostility' directed towards people of faith. The National Catholic Education Commission expressed concern about the rise in threats to that pluralism regarding religion.

1.24 A number of serious concerns were raised by stakeholders in relation to clause 12, including but not limited to:

- concerns that, in its current form, it elevates religious speech above other human rights while also undermining existing protections against discrimination;
- relatedly, the fact that it overrides existing federal, State and Territory anti-discrimination laws;
- that the provision is unconstitutional;
- that it provides a Minister with the power to prescribe other laws to be overridden; and
- that discrimination complaints relating, in whole or in part, to a 'statement of belief' under state anti-discrimination laws will face a much more complicated and expensive process as a result of this provision.

1.25 These are genuine concerns that should have been worked through in a proper, public and bipartisan consultation process well before this bill was introduced into Parliament.

1.26 Labor members believe that the national parliament has a role to play in reassuring people of faith that the mere expression of what the Bill describes as 'moderately expressed religious view' do not contravene any Australian law. However, we also believe that this can and should be done in a way that does not remove—protections that already exist in the law to protect Australians from other forms of discrimination, or lead to the perception that they have been removed. We also think it can and should be done in a way that is not constitutionally uncertain, and which does not make it more difficult and expensive to make – or defend – legitimate anti-discrimination complaints under state and territory anti-discrimination laws.

1.27 As with clause 11, Labor members urge the Government to work across the Parliament – if not across the Federation – to address the serious concerns that have been raised about clause 12 and consider whether there are better approaches to addressing the legitimate concern that clause 12 is intended to address.

#### ***Clause 15: Qualifying Body Conduct Rules***

1.28 Clause 15 provides that a qualifying body engages in discrimination if it imposes a 'conduct rule' relating to standards of behaviour that is likely to restrict or prevent persons seeking or holding a qualification from making a statement of belief, other than in the course of the person practising the relevant profession, carrying on the relevant trade or engaging in the relevant occupation. The committee heard from healthcare professionals their concerns that clause 15 would impact the care received by patients. Other evidence to the committee said that clause 15 was unnecessary because conduct would already be caught under the indirect discrimination provisions.

1.29 The majority report recommends 'guidelines relevant to qualifying body conduct rules in clause 15 are developed in consultation with the relevant professional bodies.' Consultation should occur before legislation is developed rather than after it becomes law. It is difficult to see how 'guidelines' could assist professional bodies who would be subject to this provision. This is another matter on which the Government should be seeking to work constructively and in a bipartisan manner across the Parliament.

#### ***Publicly Available Policy***

1.30 Clauses 7(6), 7(7) and 9(3) provide the Minister with power to determine, by legislative instrument, the requirements of the publicly available policy of a religious educational institution required to protect conduct that would otherwise be discrimination under the Act.

1.31 Many submitters were uncomfortable with the Minister having this power. The majority report of this committee has recommended that an amendment be made

to the bill to 'set out what is required to be included in a publicly available policy, namely: that the policy must outline the religious body's position in relation to particular religious beliefs or activities and explain how this position will be enforced by the religious body.' It also recommends that the clauses provide that the minister may, by legislative instrument determine any other requirements ancillary to this, which the policy must comply with.

1.32 One of the concerns of stakeholders was that the Minister's power under these provisions was too broad and may allow for interference in religious ethos. The recommendation does not address this concern.

### ***Religious Vilification***

1.33 The constrained timeframe for this inquiry resulted in many stakeholders not being able to appear at the public hearings or their time to give evidence was severely curtailed. Some important issues were not able to be ventilated as they should have been.

1.34 This bill will protect people of faith from religious discrimination but it does nothing to protect against vilification of people who are targeted because of their religious beliefs or activity.

1.35 This protection has been called for over many years. The calls have become more urgent since the shocking Christchurch attack by an Australian terrorist, and the rise in Islamophobic, Hinduphobic and Antisemitic incidents.

1.36 The current Bill presents the Parliament with an opportunity to provide people of faith – particularly those of minority faiths – with protection against vilification. The Government should work with Labor and religious stakeholders to address this shortfall in protections for people of faith.

### ***Section 38(3) of the Sex Discrimination Act 1984***

1.37 Three years ago, Scott Morrison promised he'd change the law to protect kids. There is widespread support for this change in the Parliament and there's no excuse for further delays.

### **Conclusion**

1.38 Since 1901 the House of Representatives has commenced with a prayer. In 2010, a Labor government added an Acknowledgement of Country to proceedings. Now our Commonwealth Parliament recognizes daily these two ancient traditions of wisdom.

1.39 It is not compulsory for any parliamentarian to pray or to be present in the Chamber while these exhortations are recited. Moreover, the fact that Australia is a secular nation is acknowledged in clause 116 of our Constitution: 'Commonwealth not to legislate in respect of religion'. Nevertheless, this longstanding tradition of daily prayer in the 'People's House' reflects this nation's duality: we are a secular nation that values and respects the religious life of our people.

1.40 Australia is a successful multicultural and multi-faith country. That success has been built on mutual respect. This value should not be taken for granted. Good leadership requires patient attention to detail. Good leadership is about uniting not dividing our nation.

1.41 What we have seen with Prime Minister Morrison's bill is a rushed process without proper consultation and without the care and attention to detail deserving of such important human rights protections. The Human Rights Committee now knows that the bill was introduced with at least one serious drafting error. This fact only emerged after the Attorney-General's Department provided evidence to this committee on three occasions and failed each time to point out the error. It was only when the Department later appeared before the Senate committee inquiring into this same bill, and that committee was told about the drafting error. The Department admitted, 'we picked it up pretty fast after introduction'. It is remarkable that the Department knew of this serious error and failed to make it known to the Human Rights Committee. The majority report of this committee recommends an amendment to correct this serious error which essentially reversed the onus of proof for indirect discrimination.

1.42 Labor members of this committee understand the importance of this bill to protect people of faith against discrimination. We understand that there are real fears held by people of faith about not being able to practice their faith freely. We also understand that many of the concerns repeatedly raised about this legislation have not been addressed by the Morrison Government. Labor members fear that these unresolved concerns will lead to division in the community.

1.43 There is consensus from many stakeholders, the Attorney-General's Department, other members of this committee, and even the Prime Minister that the religious discrimination legislative package requires amendments before it can be passed. The Australian Labor Party has a long history of fighting to prevent discrimination against people of faith. The legislation that Prime Minister Morrison introduced should unite our nation, not divide. Labor members urge the Government to work with Labor and the State and Territory governments to resolve the outstanding issues identified in these Additional Comments and in the majority report of this committee as a matter of urgency.

**Graham Perrett MP**  
**Deputy Chair**  
**Member for Moreton**

**Josh Burns MP**  
**Member for Macnamara**

**Senator Deborah O'Neill**  
**Senator for Queensland**

**Senator Louise Pratt**  
**Senator for Western Australia**

## **Dissenting report by Australian Greens member**

### **Recommendation 1**

- 1.1 That further consideration of the bills be delayed until:**
- (a) an appropriate consultation process has been undertaken, and**
  - (b) until the *Sex Discrimination Act 1984* has been amended to provide protection for LGBTIQ+ students.**

### **Recommendation 2**

- 1.2 That clause 12 be removed in its entirety.**

### **Recommendation 3**

- 1.3 The Australian Government should work towards full implementation of the United Nations Declaration on the Rights of Indigenous Peoples into Australian domestic law.**

### **Recommendation 4**

- 1.4 That the current bills not proceed.**

### **Recommendation 5**

- 1.5 That the Australian Government develop a Charter of Rights, to protect religious belief amongst other protected attributes.**

### **Recommendation 6**

- 1.6 That any new Religious Discrimination bill adopt a similar approach to other anti-discrimination legislation, operating as a shield not a sword.**

## **The importance of protecting human rights**

**1.7** The Australian Greens want greater international respect for and protection of human rights, and for Australia to ratify and adhere to, both locally and abroad, all human rights conventions. That should include an Australian bill of rights that incorporates Australia's international human rights obligations into domestic law.

**1.8** In line with that commitment to human rights, the Australian Greens support legislation that protects the rights of people to hold and practice their religious beliefs.

**1.9** There are, however, significant shortcomings in the process that has led to the development of the Religious Discrimination Bill 2021 ('the Bill') and associated bills ('the package of Bills'), which are reflected in the significant flaws in the bill as introduced.

## The flawed process to date

### *Limited time for Parliamentary scrutiny*

1.10 A significant number of submissions noted that despite releasing exposure drafts two years ago, in 2020, the inquiry process for the package of Bills introduced into the Parliament has been extremely short. This has made consultation for many organisations difficult, particularly amidst the ongoing challenges of the pandemic.

1.11 As the Law Council of Australia noted:

The Law Council regrets the short inquiry timeframes for these bills, particularly noting that they fall over the summer holiday period. It recognises that these timeframes are largely outside the control of parliamentary committees. Its constituent bodies are concerned that the timeframes for responding to such complex legislation are not reasonable, and that their volunteer members have not had the capacity to consider all of the issues or provide a comprehensive response.<sup>1</sup>

1.12 Representatives of People With Disability Australia noted that due to the short period for the inquiries, they had not been able to undertake adequate consultation with their members.<sup>2</sup> Similarly, the Australian Discrimination Law Experts Group noted that:

The time available for submissions to this parliamentary inquiry has been very short and there have been no accessible format materials made available by the Australian Government to ensure that people with disabilities that affect their communication needs can fully engage with this legislative process. Despite this, the current (and previous exposure draft processes) have not provided sufficient time for effective engagement by people with disability or ensured that information, etc, was provided in accessible formats. This has prevented many people with disability from exercising their article 29 rights to participation in political and public life.<sup>3</sup>

1.13 The rushed process for this current bill contrasts especially poorly with the longer consideration given to other bills, which received a longer, more appropriate period of parliamentary consideration and scrutiny; in the most recent instance, the bill to establish the Age Discrimination Act was introduced on 26 June 2003, and following a Parliamentary inquiry, passed almost a year later, on 15 June 2004.

1.14 While exposure drafts were released two years before the introduction of the bill, the Government showed little effort at genuine consultation, as reflected in the

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1 Law Council of Australia, *Submission 28*.

2 Legal and Constitutional Affairs Committee, Inquiry into the Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions], *Committee Hansard*, 21 January 2022.

3 Australian Discrimination Law Experts Group, *Submission 33*.

bills as introduced. Large numbers of submissions which raised significant concerns, including from State and Territory governments, were ignored or disregarded. There was no public consultation process, or transparency about how consultation forums were organised.

### ***Comparison with other policy commitments***

1.15 As outlined earlier in this dissenting report, the Government's approach to this Bill has been rushed and lacked adequate consultation. Despite the push to ensure this Bill is considered quickly, without adequate consultation, the Government has failed to deliver on other long-held commitments, including the much-delayed promises to amend the *Sex Discrimination Act 1984*.

1.16 In October 2018, the Prime Minister was asked what he would say to gay teens who faced the threat of expulsion from schools because of their sexuality. The Prime Minister said that he "understands and is going to take action to fix it".<sup>4</sup> More than three years later, no action has been taken and no amendments introduced. The proposed review by the Australian Law Reform Commission<sup>5</sup> is set to report a year after the passage of any Religious Discrimination Bill, meaning that in the intervening period between the Prime Minister's promise and the reporting date, an entire cohort of students will have entered high school and graduated.

### **Recommendation 1**

**1.17 That further consideration of the bills be delayed until:**

- (a) an appropriate consultation process has been undertaken, and**
- (b) until the *Sex Discrimination Act 1984* has been amended to provide protection for LGBTIQ+ students.**

### **Flaws in the government's proposed bill**

#### ***Implementation of international agreements***

1.18 A number of submissions have noted that the approach of the Bill to implementing recommendations from the International Covenant on Civil and Political Rights raise significant concerns.

1.19 As Associate Professor Luke Beck outlined:

It is not consistent with international human rights law to give greater protection to religious beliefs than to non-religious beliefs ... Because the definition of statement of belief (i) very clearly discriminates between religious and non-religious people and between religious and non-religious beliefs and (ii) does not ensure the enjoyment of rights freedoms on an

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4 The Hon Scott Morrison MP, [Media release](#), 13 October 2018.

5 [Review into the Framework of Religious Exemptions in Anti-discrimination Legislation](#).

equal footing, there is a sufficient basis for a conclusion that the provisions of the Bill dealing with statements of belief are inconsistent with international human rights law.<sup>6</sup>

1.20 Similarly, Professor George Williams stated in his submission that:

I also have concerns about the Bill on free speech grounds. In his second reading speech to the Bill, the Prime Minister highlighted the need to protect four fundamental freedoms:

“The freedom to worship is not merely the freedom to believe.

It's the freedom to think. It is the freedom to exercise our conscience.

It is the freedom to doubt.

Indeed, it's the freedom not to believe.”

These freedoms are inseparable, but the Bill fails to reflect this. Statements of belief in the Bill only encompass statements relating to a religious belief or a belief relating to the fact of not holding a religious belief. In other words, it only protects statements connected to religious belief. No protection is provided other beliefs, such as matters of conscience.

This is inconsistent with article 18 of the International Covenant on Civil and Political Rights. It does not separate out religious speech for protection, but instead provides that:

Everyone shall have the right to freedom of thought, conscience and religion. By contrast, the Bill provides an elevated status to religious speech but fails to protect speech on matters of thought or conscience.

The consequence of this is that a person may make a statement, perhaps about another group or expressing a belief such as pacifism, but the statement will only receive protection if it has a religious basis. A person making exactly the same statement as a matter of conscience without a religious basis will receive no protection. This Bill prioritises religious speech over other forms of speech in Australia. This is deeply problematic in a secular nation. It also finds no basis in the international human rights conventions that the Bill purports to implement.<sup>7</sup>

1.21 Ms Kate Eastman, Law Council of Australia, stated:

While article 18 of the International Covenant on Civil and Political Rights recognises the freedom of religion, that freedom comes with certain exceptions, and the exceptions are part of the way in which one looks at the character of the right and the extent to which Australian law reflects that relevant international law. The second point is that article 18 of the ICCPR cannot be read and considered in isolation in the context of the human

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6 Associate Professor Luck Beck, *Submission 38*.

7 Professor George Williams AO, *Submission 1*.

rights law, and, to the extent that this bill gives precedence to article 18 rights and freedom of religion, to the [inaudible] important rights in the ICCPR, particularly equality and nondiscrimination on a range of grounds, then, in that respect, the question of whether the bill would be [inaudible] by the international law is a live issue, and we agree with Professor Twomey's submissions in this respect.<sup>8</sup>

1.22 In turn, the failures in implementing international law have implications for the constitutionality of the bill. As Constitutional law expert Professor Anne Twomey submitted

From a constitutional point of view, therefore, s 51(xxix) would not support the Bill if the provisions of the Bill were substantially inconsistent with the ICCPR as a whole, including the other rights and freedoms the ICCPR declares, taking into account that article 18 of the ICCPR states that the right to freedom of religion may only be limited where it is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>9</sup>

1.23 Similarly, Associate Professor Luke Beck concluded:

As noted at 1.2 above, it appears that key provisions in the Bill are inconsistent with international law. Accordingly, to the extent that the statements of belief 'sword' provisions or particular applications of those provisions rely for their validity only on the external affairs power there must be significant constitutional doubt that those provisions or those applications are constitutionally valid.<sup>10</sup>

### ***Constitutional issues associated with the override of state and territory legislation***

1.24 Unfortunately, the constitutional issues associated with the implementation of international agreements are not the only constitutional flaws in the bill's drafting. As Professor Anne Twomey noted:

Where the Commonwealth has the power to enact a valid Commonwealth law, s 109 of the Constitution provides that the Commonwealth law will prevail over any inconsistent State law, to extent of the inconsistency. The State law is rendered inoperative to the extent that it is inconsistent with the Commonwealth's law. If the inconsistency later disappears because the Commonwealth has repealed or amended its law, the previously inconsistent part of the State law again becomes operative.

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8 Legal and Constitutional Affairs Committee, Inquiry into the Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions], *Committee Hansard*, 20 January 2022.

9 Professor Anne Twomey, *Submission 47*.

10 Associate Professor Luck Beck, *Submission 38*.

Section 109 only operates in relation to an inconsistency between valid Commonwealth and State laws. It does not confer upon the Commonwealth Parliament a power to repeal State laws or alter State laws or affect the interpretation of State laws or prohibit the State from enacting certain laws. The Commonwealth Parliament has no legislative power to interfere in State laws in this way ...

The Commonwealth Parliament could, however, enact a law that empowers a person to do X notwithstanding the operation of any State law, or the operation of specified State laws. This would create a direct inconsistency between the laws (i.e. the Commonwealth law empowers a person to do X and the State law prohibits it or limits the power to do X). Section 109 would then operate so that the Commonwealth law prevailed and the State law was inoperative to the extent of the inconsistency.

The problem with ss 11 and 12 of the Religious Discrimination Bill is that they do not follow this path of creating an inconsistency by stating that a person is authorised to do X despite a State law. Instead, s 11 purports to alter the effect of the application of a State law by stating that 'A religious body that is an educational institution does not contravene a prescribed State or Territory law if' the body does X in a particular manner. But it is not within the Commonwealth Parliament's power to legislate to control the legal operation of a State law, including what conduct contravenes a State law. All it can do is enact its own law which gives rise to an inconsistency (eg by authorising the religious body to do X in a particular manner despite the operation of a State law), rendering the State law inoperative to the extent of the inconsistency. If the State law is inoperative, there can be no contravention of it. But this outcome arises because of the inconsistency, not because the Commonwealth Parliament can legislate to determine which actions contravene a State law and which do not.<sup>11</sup>

1.25 Similarly, Associate Professor Luke Beck concluded that:

While federal laws can override State laws in some circumstances, federal laws cannot alter or amend State laws ... Section 12(1)(a) purports to control the content of State laws rather than simply overriding the operation of State laws. This is bad legislative drafting and the result is that section 12(1)(a) is most likely unconstitutional.<sup>12</sup>

### ***Overriding state and territory law will limit access to justice***

1.26 Even beyond the issues of constitutionality, the override of state and territory law in clause 12 and other parts of the bill is unprecedented and profoundly concerning. As the Australian Discrimination Law Experts Group noted:

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11 Professor Anne Twomey, *Submission 47*.

12 Associate Professor Luck Beck, *Submission 38*.

This Bill is the first instance that provisions in a federal discrimination law in Australia have been drafted to explicitly override and weaken other federal, state and territory discrimination laws. It has never previously occurred in over forty years of discrimination laws in Australia, yet in this Bill there are two examples of such overrides. Australia's legislative framework is designed to create two concurrent systems of discrimination law—federal, and state/territory—that can operate alongside each other. This is reflected in provisions made in every federal discrimination law explicitly stating that they do not exclude or limit the operation of state or territory laws that are capable of operating concurrently.

There has long been bipartisan consensus to maintain these complementary and concurrent discrimination law systems, which allow claimants to pursue appropriate causes of action, and allow states and territories to pass laws that reflect their own values and principles.<sup>13</sup>

1.27 Multiple submissions noted profound concerns at this approach to stripping away existing protections in antidiscrimination law at multiple levels around the country. The Australian Human Rights Commission stated that:

The Commission considers that the explicit overriding of all other Australian discrimination laws is not warranted, sets an alarming precedent, and is inconsistent with the stated objects of the Bill, which recognise the indivisibility and universality of human rights. By contrast, this provision seeks to favour one right over all others, and to additionally elevate one form of speech above others.<sup>14</sup>

1.28 The ACT Government stated in their submission:

The ACT and other stakeholders condemned these unprecedented override clauses in our previous submission, and are concerned that this has been retained in the current Bill ... There is no reasonable justification to elevate the right to freedom from religious discrimination and freedom of religious expression above other Federal freedoms from discrimination on the basis of sex, age, disability and race ... . Further, this approach is contrary to the cooperative framework of discrimination law generally. It sets a dangerous precedent that the Federal government may seek to continue eroding robust, local discrimination protections in States and Territories, that reflect the will of residents of those jurisdictions. It is particularly concerning that the federal government may seek to do this through regulations rather than further legislation, reducing the amount of scrutiny on future parliamentary action seeking to extend religious freedom.<sup>15</sup>

1.29 Similarly, the Tasmanian government's submission stated:

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13 Australian Discrimination Law Experts Group, *Submission 33*.

14 Australian Human Rights Commission, *Submission 97*.

15 ACT Government, *Submission 192*.

... while I can confirm the Tasmanian Government's support for prohibiting discrimination on the grounds of religious belief, I do wish to reiterate our concerns raised with the previous Commonwealth Attorney-General in relation to the provisions of the principal which appear to effectively invalidate the operation of the Tasmanian Anti-Discrimination Act, and specifically section 17(1) of that Act, to the extent that the conduct complained of amounts to a statement of belief ... I would like to reiterate that the Tasmanian Government's view is that the Religious Discrimination legislative package as drafted would diminish the ability of the Tasmanian Anti-Discrimination Tribunal to deal with certain complaints and that, as a Government, we continue to strongly advocate for no weakening of our Anti-Discrimination laws.<sup>16</sup>

1.30 These concerns were shared by the Australian Council of Human Rights Authorities, comprising key anti-discrimination officials in each jurisdiction, stating that the bill:

... undermines the coherence of Australia's anti-discrimination framework by overriding state and territory anti-discrimination legislation (cl 11 and 12).<sup>17</sup>

### ***The impacts of clause 12***

1.31 While the Bill has profound and extensive flaws, a key issue highlighted consistently in multiple submissions were the problems associated with clause 12.

1.32 As the Australian Discrimination Law Experts Group explained:

Clause 12 would have wide-ranging consequences in limiting liability for discrimination, vilification and otherwise harmful comments against others which target protected attributes. For instance, it is currently unlawful for a person in Tasmania to use a racial epithet or slur to offend, ridicule, insult, intimidate or humiliate another person on the basis of their race. Under clause 12, this behaviour would become lawful – but only for those who do so on the basis of a religious belief ...<sup>18</sup>

1.33 The Public Interest Advocacy Centre submitted that:

Religiously-motivated demeaning and derogatory comments will be protected in all areas of public life: in workplaces, in schools, colleges and universities, in hospitals and aged care facilities, on buses and trains, and in cafes, restaurants and shops.<sup>19</sup>

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16 Tasmanian Government, *Submission 178*.

17 Australian Council of Human Rights Authorities, *Submission 125*.

18 Australian Discrimination Law Experts Group, *Submission 33*.

19 Public Interest Advocacy Centre, *Submission 40*.

1.34 In particular, the impacts of clause 12, in interaction with Australia's legal system, will profoundly reduce people's access to justice. As the Australian Discrimination Law Experts Group explained:

... the override of state and territory discrimination laws will significantly limit access to justice for victims of discrimination in Australia.

The overwhelming majority of discrimination claims are made through state and territory systems, rather than the federal system, largely owing to state and territory statutory authorities having a local presence and state and territory tribunals operating on a presumptive 'no costs' basis in the area of discrimination law. As such, a state and territory tribunal will not award the payment of an unsuccessful party's legal costs, other than in exceptional circumstances. However, state and territory tribunals are not Chapter III courts under the Commonwealth Constitution and cannot exercise federal jurisdiction or determine a federal question of law. A matter will involve the exercise of federal judicial power if a party has a defence that owes its existence to a law of the federal Parliament.<sup>20</sup>

1.35 Similarly, the Public Interest Advocacy Centre noted that this flaw remained in the Bill as introduced, despite being raised repeatedly in submissions on the exposure drafts:

It is therefore extremely disappointing this significant flaw remains in the final version of the Bill.

It undermines one of the primary advantages of the existing anti-discrimination framework – that State tribunals offer a no-cost/low-cost, accessible option for people affected by discrimination to have their complaints resolved (and indeed a no-cost/low-cost method for respondents to have matters resolved too).

By requiring that matters involving statements of belief defence be resolved only by courts, all parties will see their costs increase, as well as other impacts in terms of resources and timeliness. This will put the ability to make a discrimination complaint out of reach for many people.

The statement of belief provision will therefore deny access to justice to the groups who are most likely to experience discrimination, including women, people with disability, LGBTI people and people of minority faiths.<sup>21</sup>

1.36 The Australian Human Rights Commission shared this concern, stating:

There is a further reason why the introduction of a new federal defence to all Australian discrimination laws is problematic. It is likely to lead to

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20 Australian Discrimination Law Experts Group, *Submission 33*.

21 Public Interest Advocacy Centre, *Submission 40*.

increased time, cost and complexity where this Commonwealth defence is relied on in matters brought in State and Territory tribunals.<sup>22</sup>

1.37 The Australian Greens support the concerns highlighted in the main Committee report in relation to the impact of clause 12, including that:

... there may be some risk that the measure may allow discrimination in certain circumstances, depending on the content of the statement and the context in which it is made.

Further, noting that the measure provides a federal defence to discrimination claims made under state and territory anti-discrimination laws, and as set out at paragraphs [6.82] to [6.87] may impact the determination of such claims, it may have implications on the right to an effective remedy ... While a person whose right to equality and non-discrimination is limited has access to a complaints process, it is unclear the extent to which this measure will frustrate this process such that it limits their right to an effective remedy.

...

The general objective of protecting the rights to manifest religion and express religious beliefs is a legitimate objective (as noted in Chapters 4 and 5). However, there are some questions as to whether the objective of this specific measure addresses a pressing and substantial concern for the purposes of international human rights law ... If subclause 12(1) is intended to clarify the existing law, it is not clear that it addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting human rights.

1.38 The Australian Greens strongly disagree with the statement in the main Committee report, arguing in relation to Tasmanian anti-discrimination protections, that:

... the Tasmanian Anti-Discrimination law has an extremely broad application and prohibits conduct that 'offends, humiliates, intimidates, insults or ridicules' another person on a protected ground. This is the only provision of this nature in anti-discrimination law in Australia. The committee considers it likely that the Tasmanian law breaches the rights of Tasmanians to freedom of expression by capturing such a broad range of speech. This view was supported by a number of submitters and witnesses who were concerned about the overreach of the Tasmanian law. Nevertheless, the committee acknowledges that there were others who were supportive of the broad scope of the Tasmanian law and were concerned that overriding it would adversely impact other rights. Taking into account these different views, the committee considers that, on balance, by ensuring that a statement of belief will not contravene the Tasmanian law, the federal government is upholding its obligations to

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22 Australian Human Rights Commission, *Submission 97*.

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protect and promote the right to freedom of expression and religion for all Australians.

1.39 In fact, extensive evidence to the Committee from a wide range of human rights and other organisations in Tasmania indicated broad community support for those protections in Tasmanian law, as well as from the Tasmanian government. The evidence provided to the Committee indicates that the Tasmanian legislation provides an important benchmark in protecting human rights, and sets the standard for other jurisdictions around Australia. The main Committee report adopts a wilful and ideological disregard for the evidence in pursuit of an agenda, at the cost of human rights protections in Tasmania and elsewhere.

### **Recommendation 2**

**1.40 That clause 12 of the Religious Discrimination Bill 2021 be removed in its entirety.**

#### ***The extension of human rights law to corporations***

1.41 Another unprecedented component of the bill is the expansion of protections provided by human rights law from humans, to corporations. As the Australian Human Rights Commission noted:

It is axiomatic that only humans have human rights. However, the Bill takes the highly unusual step of enabling corporations to make claims of religious discrimination. This would permit corporations to bring proceedings against people (or other organisations) and allege that they have been discriminated against ...

International law and the domestic law of comparable jurisdictions makes clear that human rights law protects only humans. This principle has been adhered to in all of Australia's federal, state and territory human rights laws, including the existing federal discrimination laws. In the Commission's view, there is no justification for the Bill to depart from this settled and fundamental principle.

Corporations cannot possess innately human qualities, such as dignity, which human rights law is designed to protect. More specifically, corporations have 'neither soul nor body' and cannot have a religious belief that is somehow disconnected from the religious belief of an individual or group of individuals that are involved with the corporation. The legitimate rights and interests of corporations can be, and are, legally protected in other ways—for example, in statutes dealing with competition law.<sup>23</sup>

1.42 Similarly, the Australian Council of Human Rights Authorities noted their concern that the Bill:

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23 Australian Human Rights Commission, *Submission 97*.

... departs from anti-discrimination law by enabling body corporates and religious bodies or institutions protections against discrimination, ordinarily provided only to individuals (cl 16). For example, if an employee of a company with a religious belief makes a statement of belief that is offensive, and a supplier terminates their supply arrangement with the company because the supplier found the remarks offensive, the employing company could possibly make a complaint of discrimination against the supplier, on the grounds that the company is an associate of the employee with the religious belief.<sup>24</sup>

### **Exceptions for religious bodies are too broad**

1.43 A further failure of the drafting is that rather than adopting a standard anti-discrimination approach, the Bill provides extremely broad exemptions for religious organisations, enabling them to engage in religious discrimination. As the Australian Human Rights Commission noted:

the Bill provides very broad exemptions that allow ‘religious bodies’ to engage in religious discrimination ... broad exemptions that allow religious bodies to engage in religious discrimination across a range of areas of public life undermines the rationale for the introduction of the Bill ... The breadth of exemptions available is particularly concerning when it comes to schools, and other religious educational institutions.<sup>25</sup>

1.44 The Australian Council of Human Rights Authorities concurred that the Bill:

... provides religious bodies with broader freedom to discriminate against people of different or no faith (cl. 9). For example, contrary to some state and territory anti-discrimination law, it will not be discrimination for religious bodies such as educational institutions, hospitals, aged care facilities, certain accommodation providers, religious camps and conference sites to seek to preserve a ‘religious ethos’ among staff by making faith-based decisions in relation to employment.<sup>26</sup>

1.45 The Law Council of Australia shared those concerns, stating:

The Bill is also unorthodox as it begins, under Part 2, by permitting a wide range of conduct that will not constitute discrimination on the grounds of religious belief or activity, and will not engage its prohibitions on discrimination in key areas of public life. Several of its provisions are overly broad in scope. The Law Council is concerned that Part 2, as drafted, will undermine the Bill’s core objects of eliminating discrimination against persons on the ground of religious belief or activity in a range of areas of

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24 Australian Council of Human Rights Authorities, *Submission 125*.

25 Australian Human Rights Commission, *Submission 97*.

26 Australian Council of Human Rights Authorities, *Submission 125*.

public life, and ensuring equality before the law, regardless of religious belief or activity. It considers that Part 2 should be removed.<sup>27</sup>

## **This bill will have a devastating impact on people's lives**

### ***LGBTIQ+ communities***

1.46 The Religious Discrimination Bill in its current form has devastating impacts on several socially marginalised communities that we have heard from, across the hearings. The Bill has the ability to act to the detriment of hard-fought protected rights of women, people with disabilities, LGBTQIA+ people, the elderly, and other communities to be treated with respect, dignity and equality.

1.47 As highlighted by Equality Australia, the Bill seeks to:

allow people to discriminate against others by protecting offensive, derogatory and demeaning statements based in or about religion in the places we work, study and access goods and services ... [and] protect religious beliefs and activities of people and organisations in ways that do not adequately protect the rights of others.<sup>28</sup>

1.48 The right to practice one's religion should not come at the cost of harm to socially marginalised groups or overriding hard-fought discrimination protections. As it stands, the Bill has the potential of causing harm to the health and safety of LGBTQIA+ people. According to LGBTQIA+ Health Australia:

Australian research ..demonstrate(s) that exposure to religious anti-gay prejudice (the disapproval of homosexuality on religious grounds) predicted higher levels of anxiety, depression, stress, and shame; more harmful alcohol use; and more instances of both physical and verbal victimisation.<sup>29</sup>

1.49 LGBTQIA+ Health Australia also noted that this Bill:

“provides the possibility that older LGBTI people will be forced to use aged care services provided by faith-based organisations where discrimination against them will be lawful”.<sup>30</sup>

1.50 This fear reflects LHA's consultations to report on the Royal Commission into Aged care Quality and Safety, where:

many people reported experience of discrimination and exclusion where workers express and act on faith-based convictions that being LGBTI is sinful. Participants reported being actively told to suppress their identity and experienced loss of connection with their LGBTI community.

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27 Law Council of Australia, *Submission 28*.

28 Equality Australia, *Submission 31*.

29 LGBTQIA+ Health Australia, *Submission 156*.

30 LGBTQIA+ Health Australia, *Submission 156*.

1.51 The Bill also essentially offers a freedom from consequence to spewing hateful comments against members of the LGBTIQ+ community. Equality Australia, endorsed by other peak LGBTIQ+ bodies, explained that:

Section 15 of the Religious Discrimination Bill will allow people who wish to express prejudiced, harmful or dangerous views based in or about religion to do so without facing consequences for their conduct even when it impacts on other employees, clients or customers or diminishes public trust in a profession. These provisions undercut the ability of professional bodies to promote inclusive and respectful workplace cultures by putting them in complex legal straitjackets with a test that is one-sided, and almost impossible to apply or understand, let alone meet.<sup>31</sup>

1.52 The LGBTIQ+ community has fought for their rights for a long time, and there is a long journey still remaining to ensure full equality before the law. This Bill is a huge step backward, undermining the rights and freedoms of LGBTIQ+ community to exist and express their identity.

1.53 Mental Health Australia also notes that:

... statistics show a clear need to reduce stigma, prejudice and discrimination, the Religious Discrimination Bill has the potential to further increase the stigma and discrimination experienced by LGBTIQ+ people resulting directly in further deterioration of their mental health ... Increase in stigma is also likely to have a direct impact on the willingness of LGBTIQ+ people experiencing mental health difficulties to seek help. Without appropriate treatment, mental health conditions are likely to deteriorate.<sup>32</sup>

### **Women**

1.54 The Australian Women's Health Network similarly noted significant concerns about the impact of the bill on women's rights, and the potential to erode and undermine key protections. As noted in their submission:

The Bill will most certainly reduce access to sexual and reproductive health services for women and men which is already an area of health that is highly stigmatised and has a higher level of conscientious objectors.

The Bill will affect access to sexually transmitted infection screening and prevention, contraception and abortion, genomic screening to prevent chronic illness, fertility treatments and maternal healthcare, all of which are vital public health services. There will also be broader impacts for gender equity and measures that prevent abuse and violence such as relationships

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31 Equality Australia, *Submission 31*.

32 Mental Health Australia, *Submission 67*.

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and sexuality education, respectful relationships education and responses to abuse, including institutional child sexual abuse and exploitation.<sup>33</sup>

1.55 In the workplace, where women experience high rates of sexual assault and harassment, the impact of this Bill will be particularly devastating. Victorian Trades Hall Council noted:

Every day we see new examples of the harms of sexual harassment and gendered violence. Yet this Bill would protect a range of Statements of Belief that would widely be considered examples of sexual harassment or gendered violence. VTHC believes that every person deserves to feel safe at work, yet this Bill would seek to deny women workers protection from gender-based hostility at work.

1.56 Faith-based community service organisations are amongst the largest providers of support services for women and children, including crisis accommodation, counselling and financial support for those fleeing abusive relationships. A number of submitters (e.g Women's Health Network, WWDA), raised concern that allowing staff and volunteers within those faith-based organisations to make statements of belief regarding, for example, the sanctity of marriage or the right for a husband to control his partner, could discourage women from leaving dangerous situations. As Women With Disability Australia noted in their submission, such views:

instead of supporting women experiencing violence to access safety or leaving the relationship, could encourage reconciliation, which may further place them at physical and psychological harm, and serious injury or death.<sup>34</sup>

1.57 The Centre for Women's Safety and Wellbeing also expressed concern that the Bill will:

allow workplaces, educational institutions, community and healthcare services and other parts of our community to foster cultures that are unsafe, unsupportive, non-inclusive, and working against efforts to achieve gender equality.<sup>35</sup>

1.58 The Australian Women's Health Network shared the concern:

The concern with having the bill is that, while we have fought for years and years for gender equality and for women to have sexual and reproductive health rights and bodily autonomy as a human right, the new Religious Discrimination Bill, where statements of belief—and it just has to be a

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33 Australian Women's Health Network, *Submission 83*.

34 Women With Disability Australia, *Submission 100*.

35 Centre for Women's Safety and Wellbeing.

statement of belief by a person—become protected, reinforces and pushes that trajectory and that advancement backwards, not forwards.<sup>36</sup>

### **Disabled people**

1.59 For people with disabilities living in Australia, this Bill poses threats to the *Disability Discrimination Act 1992*, and according to People With Disability Australia

will override existing federal, state and territory anti-discrimination laws by making so-called statements of belief immune from legal consequences under said Commonwealth laws.<sup>37</sup>

1.60 The Bill, if enacted, will replace the ‘social model of disability’ upon which all pieces of disability policy and legislation current in Australia are based on through Australia’s ratification of the United Nations Convention on the Rights of Persons with Disability (UN CRPD), with the ‘religious model of disability’, where disability is often viewed as a ‘sin’. PWDA has reported:

This means that service providers will be able to refuse to accommodate people with certain disabilities within the providers' settings based entirely upon a subjective notion of good faith.<sup>38</sup>

1.61 Children and Young People with Disabilities Australia (CYDA) uses anecdotal evidence from LivedX, a focus group they conducted for young LGBTQIA+ people with disabilities:

“I think this bill could kill people. If you grew up in a religious household who constantly told you, you were going to hell for your sexuality, and then suddenly a medical professional is legally able to? That feels like it could cause some significant mental health risks.<sup>39</sup>

### **Multicultural communities**

1.62 For multicultural communities across Australia, a key concern is that the rushed nature of this Bill has not allowed for appropriate community consultation. For example, the Federation of Ethnic Community Councils of Australia (FECCA) said:

The Bill review process has involved inadequate timeframe and inappropriate processes for public submission ...

Given the complicated nature of the proposed legislation, the timeframe given for this inquiry is inadequate and the process inappropriate.

The timeframe given to respond to this Bill has been exceedingly short for organisations and members of the public. Given this Bill has the potential to

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36 Ms Hill, *Committee Hansard*, 13 January 2022.

37 People With Disability Australia, *Submission 79*.

38 People With Disability Australia, *Submission 79*.

39 Children and Young People with Disabilities Australia, *Submission 139*.

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override existing anti-discrimination laws across the country, ample time should be available to ensure the public understand the implications.<sup>40</sup>

1.63 FECCA also noted particular concerns about the online survey run by the Parliamentary Joint Committee on Human Rights, stating:

FECCA is concerned with the nature of the online survey allowing members of the public to express their views on the religious discrimination legislative package. The survey design appears to lead respondents to a predetermined outcome and how this reason we reject the validity of the results.

1.64 FECCA also expressed profound concerns about the Bill, urging that it not be passed:

The Religious Discrimination Bill 2021 poses a risk that people in Australia will lose discrimination protections at work, school and when accessing goods and services like healthcare to accommodate people who make discriminatory statements based on 'religious beliefs'. FECCA is concerned the Religious Discrimination Bill will open doors for discrimination by taking away existing anti-discrimination protections, including on the grounds of race, religion, sex, marital status, disability, sexual orientation, gender identity or intersex status.

As the peak, national body representing people in Australia from culturally and linguistically diverse backgrounds, FECCA rejects all forms of discrimination.

We urge the Committee to ensure any Religious Discrimination Bill does not remove existing discrimination protections. It must ensure all workers, students, customers and clients are equally protected from discrimination, no matter who they are, whom they love or what they believe. It must not privilege the rights and beliefs of one group over another.<sup>41</sup>

1.65 The Diversity Council Australia has expressed similar concerns, noting:

...this proposed legislation, as drafted, could stop Australian employers fostering inclusive cultures, eroding any business benefit derived from inclusion, ...[and] goes beyond protecting people from discrimination on the basis of religion and undermines protections afforded under other anti-discrimination legislation.<sup>42</sup>

### ***First Nations people***

1.66 The rushed nature of the inquiries considering this bill also mean that there was inadequate time to fully scrutinise a number of issues raised in submissions on

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40 Federation of Ethnic Community Council of Australia, *Submission 105*.

41 Federation of Ethnic Community Council of Australia, *Submission 105*.

42 Diversity Council Australia, *Submission 13*.

earlier drafts of the Bill. In particular, inquiries into this Bill have not had adequate time to scrutinise the protection provided to First Nations beliefs by the Bill, or ensure that they are adequate. For example, Democracy in Colour wrote in a submission on an earlier exposure draft:

It is particularly concerning that the Bill doesn't mention whether the cultural and spiritual practices of First Nations' people would be protected.<sup>43</sup>

1.67 Similarly, the North Australian Aboriginal Justice Agency wrote in a submission on an earlier exposure draft:

NAAJA is further concerned that the Bill may not sufficiently or specially protect Aboriginal communities' belief and spirituality, particularly given the comments on Aboriginal spirituality made by the Religious Freedom Review Panel in its report dated May 2018. NAAJA notes the Panel's comment that further and specific consultation on the special protection of Aboriginal spiritual beliefs is necessary but has not yet taken place.<sup>44</sup>

1.68 Given the importance of providing culturally appropriate protections for First Nations' belief, it is important that for any Bill to proceed it should be very clear that it is based on the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples and provides strong, culturally appropriate protections for First Nations belief systems in their full diversity across the continent.

### **Recommendation 3**

**1.69 The Australian Government should work towards full implementation of the United Nations Declaration on the Rights of Indigenous Peoples into Australian domestic law.**

#### ***People of faith***

1.70 While a number of religious communities have argued in support of the Bill, a number of others have opposed it on the basis of significant concerns. In particular, while many supported the broad attempt to protect people of faith, they noted that the approach adopted in this bill (including the flaws outlined above) will create significant problems.

1.71 For example, the Uniting Church in Australia Assembly outlined clear concerns, leading to an opposition to the Bill overall:

We commend the Australian Government for proposing to make religious belief and activity, as well as the absence of religious belief and activity, a

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43 [Democracy in Colour submission to the Religious Discrimination Bill - Exposure Draft.](#)

44 [Northern Australian Aboriginal Justice Agency submission in Response to Proposed Legislative Reform on Religious Freedom.](#)

protected attribute in discrimination law at the federal level. However, based on our commitment to human dignity and the common good, the Uniting Church in Australia does not support provisions that would permit statements and actions that demean and unjustly diminish the rights of others on religious grounds. People should be able to enjoy their right to freedom of thought, conscience, religion and belief – however, the manifestation or expression of their religion and beliefs should not harm or demean others, nor should it be privileged over other rights.

We believe there are certain provisions in this Bill that actually increase the likelihood of discrimination against people of minority faiths and also people from more vulnerable groups within society. We believe it does this by privileging powerful religious voices at the expense of minority and vulnerable voices in society, which seems to be the exact opposite of its purpose, and by providing what we see as extraordinary and excessive religious exceptions. We are concerned such provisions could have the effect in the wider community of emboldening discrimination by providing an authorising environment for demeaning statements or actions. Rather than building harmony and tolerance it would have a corrosive effect on society ...

Ultimately, the Uniting Church believes the right to freedom of religion is vital to a diverse society but must always be balanced and bound together with the "due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

We do not believe the Bill, in its current form, achieves this balance and therefore would not support this Bill's progress into law.<sup>45</sup>

1.72 Similarly, the Public Affairs Commission of the Anglican Church of Australia submitted:

We believe the RDB still gives too much unnecessary scope and encouragement for harmful discriminatory behaviour in the name of religion in a manner that unfairly overrides other equally important human rights to be free from discrimination.

We therefore urge that the RDB be amended as outlined below as we cannot support it in its current form.<sup>46</sup>

1.73 The Hindu Council of Australia also noted significant concerns, and sought amendments to the Bill:

We are concerned that some provisions of the bill which exempt religion inspired organisations will restrict religious freedom rather than protecting

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45 Uniting Church Australia, *Submission 152*.

46 Public Affairs Commission of the Anglican Church of Australia, *Submission 78*.

it. If the bill is passed as proposed, it will curtail religious freedom and its expression by the vulnerable older people, students and the unemployed.

We are concerned that provision of employment and services by religion inspired organisations will force vulnerable people to change their religion (against their own will) so that they can qualify to receive school admission, hospital admission, accommodation in aged care facilities and employment. This discrimination based on religion sanctioned by law will lead to exploitation of minority religions by powerful organisations being run by other religions.<sup>47</sup>

1.74 The Buddhist Council of NSW similarly said:

We do not support this bill as it currently stands. Whilst we welcome limited protections for religious freedom, it is our view that the bill does not strike the right balance between religious freedom and the right to equal treatment and to be free from discrimination.<sup>48</sup>

1.75 The Australian Sangha Association, representing Buddhist monks and nuns, echoed the importance of preventing religious discrimination, but outlined a broad range of concerns with the Government's approach in the current bill, concluding:

... the ASA believes that the Government has not adequately made the case for a Religious Discrimination Bill of this nature and the ASA wishes to put on record that it cannot support the present bill.<sup>49</sup>

**Workers in religious schools and institutions**

1.76 The Bills also pose significant risks to people of faith who are employed as workers in religious schools and institutions. As the Independent Education Union noted in their submission:

The proposed provisions of ss 7 and 19 would operate as an effective exemption from the provisions of the Bill for religious educational institutions in employment. In doing so they would variously deny freedom of religion and religious expression to the employees of those institutions whose religious views differed from those of their employer, whether or not they were members of the same faith as that employer. This is both unnecessary and a direct negation of the human rights to freedom of religion and freedom of expression that the Bill purports to protect.<sup>50</sup>

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47 Hindu Council of Australia, *Submission 104*.

48 Buddhist Council of NSW, *Submission 18* to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions].

49 Australian Sangha Association, *Submission 84*.

50 Independent Education Union, *Submission 127*.

1.77 The IEU outlined in powerful terms the risks that their members are already facing, simply in relation to public debate on the bill, before it extends the ability of institutions to discriminate against employees:

This Bill will do nothing however to prevent a small minority of employers in faith-based schools from continuing to discriminate against their employees. This capacity to discriminate will simply be extended, where it does not already exist, to include the capacity to discriminate on the basis of religious belief or not holding a religious belief.

We are particularly concerned that in the past three years some employers have utilised their immunity from prosecution to take adverse action against members in the context of the federal parliament considering legislation.

Following the referendum and subsequently the passage of the Marriage Amendment (Definition and Religious Freedoms) Act 2017 members, in many schools and in more than one state, were required to sign declarations presented to them that amended school charters and statements of faith to include terms stating that homosexuality and statesanctioned same sex unions were morally wrong. They were frequently disciplined and dismissed if they refused to do so.

In our submission to the Attorney General's Department in respect of the 2019 Bills we noted that it was of particular concern to the IEU that there had been requests from members for assistance following criticism of the draft Religious Freedoms Bills in IEU publications. Members were aggrieved that: they were directed by their employer to contact the union to ask that this content be removed; informed by their employer in various terms that they owed a primary duty to their employer to do so and threatened with disciplinary action by their employer if they did not. Identical grievances have been referred to us by members following the publication of the Religious Discrimination Bill 2021.

IEU members are still receiving warnings, losing salary and/or positions of leadership, being suspended from their employment and being dismissed solely for reasons directly associated with and attributable to their sex, sexual orientation, gender identity, marital or relationship status and/or pregnancy.<sup>51</sup>

### ***Intersectionality***

1.78 As the Diversity Council Australia notes:

Intersectionality refers to the ways in which different aspects of a person's identity can expose them to overlapping forms of discrimination and marginalisation. It is therefore critical when drafting and implementing anti-discrimination legislation that legislators, policymakers and those

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51 Independent Education Union, *Submission 127*.

implementing such policies, understand intersectionality, and take an intersectional approach to implementing such policies.<sup>52</sup>

1.79 This Bill, which prioritises religious rights over other rights to equality and anti-discrimination, ignores the multiple facets of one's identity, such as LGBTQIA+ people from multicultural and multifaith communities.

1.80 Similarly, the Australian GLBTIQ Multicultural Council noted:

...we [must] strike the right balance between protecting LGBTQ+ people from multicultural and multifaith backgrounds, so we can coexist as LGBTQ+ people of faith. We also support other diversities within the multicultural and multifaith communities so that they may also coexist.<sup>53</sup>

1.81 The approach taken in drafting these Bills disregards the importance of intersectionality, creating a profound policy and legislative failure, and risking severe damage to multiple communities, as outlined throughout this submission.

### ***Workplace impacts, including social cohesion***

1.82 Everyone deserves to be safe in the workplace. Unfortunately, this Bill, as it currently stands, makes it difficult to protect everyone at work from discrimination. The Australian Council of Trade Unions (ACTU), while affirming 'work is absolutely central to human dignity and our ability to live a decent life', raised concerns about this Bill making workers susceptible to discrimination in their means of livelihood'. They explained that:

The RDB departs from the usual framework of anti-discrimination laws and introduces a series of untested concepts into discrimination law which are of uncertain effect. This will create a risk of increased confusion, conflict and harm in Australian workplaces. The RDB will increase, not decrease, the prospect of discrimination against workers on the grounds of their religious beliefs; it will increase job insecurity in religious organisations, and undermine workers' health and safety at work. We are extremely concerned that the RDB will impact negatively on employers' ability to meet existing duties to create safe, healthy, respectful and inclusive workplaces for all workers.<sup>54</sup>

1.83 This Bill's placing of religious rights over other rights to equality and non-discrimination is also particularly concerning to workers, reports the ACTU:

It is contrary to the basic principles of human rights law to privilege one category of rights over another: in this case, the right to make religious 'statements of belief' over the right to equality and non-discrimination, particularly for women, LGBTQ+ people, people with disability, single

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52 Diversity Council Australia, *Submission 13*.

53 Australian GLBTIQ Multicultural Council, *Submission 80*.

54 Australian GLBTIQ Multicultural Council, *Submission 80*.

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mothers, and other groups susceptible to condemnation or discrimination on religious grounds. The RDB allows religious employers to discriminate against individual workers who have differing (or no) religious beliefs to their employer – even where religion is not relevant to the role – privileging the rights of religious employers over their workers.<sup>55</sup>

1.84 Victorian Trades Hall Council echoed this concern and recorded in their submission:

The carve-out in the Bill to protect Statements of Belief, including those that are hostile, offensive, inappropriate and harmful, gives a green light to discriminatory language and actions. The low bar of what constitutes a Statement of Belief leaves significant scope for hostile and harmful statements made at work to become exempt from being identified as discriminatory. These provisions give workers limited access to external antidiscrimination bodies if they have been subject to hostile statements. This is especially harmful in situations where the employer is the alleged perpetrator of discrimination, where the use of internal processes would be prejudiced.<sup>56</sup>

1.85 The National Tertiary Education Union also expressed a similar concern about discrimination against workers:

The RDB (section 7) also allows religious employers to discriminate against individual workers who have differing (or no) religious beliefs to their employer – even where religion is not relevant to their role – privileging the rights of religious employers over their workers. The rights to discriminate provided by the RDB extend not just to giving priority to applicants of a certain faith in recruitment practices, but to any kind of discrimination in employment on religious grounds, including refusing an existing staff member a promotion or a pay-rise, or terminating their employment.<sup>57</sup>

### ***The false dichotomy between people of faith and LGBTIQ+ communities***

1.86 This Bill also places a false dichotomy between people of faith and LGBTIQ+ people. In reality, LGBTIQ+ communities of faith, who were engaged in little to no consultation in this rushed Bill, experience these conflicts in their lives and expressions of gender, sexuality, and faith, much to their detriment.

1.87 Statistically, according to Equal Voices, a national organisation of LGBTIQ+ people and allies from Christian faith backgrounds, LGBTIQ+ people with faith affiliations in Australia number over one million, and this population is most at risk from adverse outcomes if the Bill as framed, becomes law.

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55 Australian Council of Trade Unions, *Submission 26*.

56 Victorian Trades Hall Council, *Submission 11*.

57 National Tertiary Education Union, *Submission 35*.

1.88 Equal Voices noted in their submission:

We are concerned that this Bill would further embolden those who currently wield so much institutional power, to wield this power to the detriment of ordinary Christians in churches and schools who find themselves the target of harassment and bullying for their sex, marital status, sexual orientation or gender identity - ordinary Christians who are there in every congregation and school, and who ask only to be accepted and supported in their faith journeys as they grow into the people they are called by God to be.<sup>58</sup>

1.89 The Australian GLBTIQ Multicultural Council echoes this concern for LGBTQIA+ people from multicultural and multifaith backgrounds:

The legislative package fundamentally frames the right of LGBTQIA+ people to practice religion in diametric opposition to our LGBTQIA+ identities and intersecting identities, such as gender, race, culture and disability. We have a right to feel safe in all the communities we are a member of, and this legislative package threatens this.<sup>59</sup>

### **Broad community opposition**

1.90 The fundamental flaws in the Government's approach to this Bill are reflected in the broad, consistent concerns and opposition raised across an extremely diverse range of communities and organisations, in their evidence to inquiries on the bills.

1.91 As outlined throughout this dissenting report, an entire cross section of society opposes the provisions in these bills that would undermine human rights and provide a 'sword' for attacks on others. Concerns and oppositions have been expressed by unions, corporations, non-profit organisations, health organisations, legal experts, human rights advocates, as well as groups representing women, disabled people, LGBTQIA+ communities, multicultural communities, and large communities of people of faith.

1.92 The Australian Council of Trade Union noted in their submission:

... the ACTU remains deeply concerned about a number of provisions of the RDB, as well as the government's approach to these important matters. We are concerned that despite the changes made, the RDB will still hamper the ability of employers to create safe and healthy workplaces, as well as enabling and encouraging further unreasonable discrimination against workers by religious employers.<sup>60</sup>

1.93 In their evidence to the Legal and Constitutional Affairs Committee, the Australian Industry Group confirmed that:

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58 Equal Voices, *Submission 32*.

59 Australian GLBTIQ Multicultural Council, *Submission 80*.

60 Australian Council of Trade Unions, *Submission 26*.

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We don't support the bill in its current form. But we recognise that this has been a longstanding policy position of the government, so we're not opposing a bill in this space, but we do think the bill needs to be amended to make it workable for workplaces.<sup>61</sup>

1.94 As a national peak body for the community services sector, ACOSS noted significant concerns, and recommended that the Bill not proceed:

We remain deeply concerned that this Bill, even with revisions made to the previous iteration, continues to privilege religious interests and beliefs over the rights, interests and beliefs of all other people in a way that creates a detrimental impact on the community overall ... Even with revisions, the Bill retains fundamental problems in its proposed approach to discriminations.<sup>62</sup>

1.95 The Australian Medical Association noted that while the current Bill is an improvement on exposure drafts, there were still significant concerns, and that the Bill should only proceed if amended:

While the AMA welcomes the removal of provisions in relation to one of our major concerns being conscientious objection, other concerns have not been addressed in the Religious Discrimination Bill 2021, meaning the legislation maintains the potential to impact adversely on the medical profession and patient care ... The AMA strongly advocates that should the Bill proceed, it be further amended to reflect the AMA's recommendations.<sup>63</sup>

1.96 The Public Health Association of Australia concurred, noting:

PHAA RECOMMENDS THAT THE BILLS NOT BE SUPPORTED, because of the potential to perpetuate a range of harm, vilification and discrimination in our society. The Bills may widen the gap in health status and access to health services for marginalised groups in society.<sup>64</sup>

1.97 The Australian Federation of Aids Organisations agreed, arguing that:

... we are deeply concerned by the Bill because its provisions prioritise the religious beliefs of healthcare workers to the detriment of marginalised individuals and communities living with or at increased risk of HIV and who

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61 Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions], *Committee Hansard*, 21 January 2022, p.44.

62 ACOSS, *Submission 62*.

63 Australian Medical Association, *Submission 96*.

64 Public Health Association of Australia, *Submission 123*.

require sensitive and specialist health services free from stigma and discrimination.<sup>65</sup>

1.98 Human rights organisations such as the Human Rights Law Centre opposed the Bills, noting:

... the Government's Religious Discrimination Bill 2021 (the Bill) repeats the patterns of the first and second exposure drafts of the Bill and fails to strike the right balance between the freedom to manifest religion and the right of everyone to equal treatment and non-discrimination.

The removal of a provision from the second exposure draft that would have allowed doctors with a religious objection to certain health services to abandon their ethical duties to their patients is welcome, as well as the removal of the so-called 'Folau clause'. However, there remain a number of provisions that are unprecedented, unjustified and inconsistent with international human rights laws ... The effect is to give a greater licence to discriminate on religious grounds than already exists in law, to the detriment of people of minority faiths, women, LGBTIQ+ people, people with disability, First Nations people, people of colour and many others. For people who face multiple and intersecting forms of discrimination, such as ableism, racism and sexism, this Bill is an even greater threat. The Bill is inconsistent with Australia's international human rights obligations and should be opposed by the Committee. It is also inconsistent with the commitment made by former Attorney General Christian Porter to draft a bill that does not provide a licence to discriminate ...<sup>66</sup>

1.99 Amnesty International Australia (AIA) shared those concerns, stating:

AIA has serious concerns that this Religious Discrimination Bill (the Bill) in its current form will condone behaviour, statements and environments that create unsafe or potentially harmful environments for some people and communities who are attempting to access essential services such as health, mental health, education, accommodation, crisis support services, aged care and nemployment. This Bill will particularly impact on LGBTQIA+ people, people with a disability and/or lived experience of mental illness, Aboriginal and Torres Strait Islander people, rural and remote communities, single parents, divorcees, people of minority faiths and beliefs, people with limited support or resources, women, children and young people.<sup>67</sup>

1.100 Education sector unions also expressed profound concerns, with the National Tertiary Education Union noting:

The NTEU opposes this Bill. It will increase, rather than decrease, discrimination. It is not in-line with existing anti-discrimination measures in

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65 Australian Federation of Aids Organisations, *Submission 147*.

66 Human Rights Law Centre, *Submission 190*.

67 Amnesty International Australia, *Submission 157*.

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other areas but raises rights of religious expression above all other rights. It creates additional powers for organisations to discriminate against employees (and students) in cases when it is not necessary for performance of a job. Instead of imposing this complex, confusing and inconsistent system over the top of state laws, a new federal protection against discrimination for workers and other individuals on the grounds of religion could be achieved by a simple amendment to an existing discrimination act.<sup>68</sup>

1.101 The Council of the Ageing, advocating for older Australians, also noted its concerns, stating that:

... there are some elements of the religious discrimination legislative package that do not appear to meet this core test of equal rights amongst its peer attributes. Accordingly, we recommend the bill only be supported with amendments.<sup>69</sup>

### **Fundamental flaws in the government's approach**

1.102 As outlined by numerous witnesses, the approach adopted by the Government goes significantly beyond a standard anti-discrimination Act. That approach would have had widespread support across the community, been significantly less controversial and damaging to social cohesion, and would have involved a much more straightforward drafting approach, reducing the risks of constitutional questions and other flaws.

1.103 As the Australian Human Rights Commission noted in its submission:

Many provisions of the Bill are consistent with the objective of providing protection against discrimination on the ground of religious belief or activity that is equivalent to the protection against

discrimination on other grounds such as race, sex, disability and age in existing Commonwealth laws. The Bill prohibits direct and indirect discrimination on the ground of religious belief or activity in areas of

public life covered by those other Commonwealth discrimination laws.

The Bill also provides for general and specific exemptions, most of which are broadly consistent with other discrimination law. The Commission endorses these elements of the Bill. They represent a conventional means of incorporating certain protections from international human rights law into Australia's domestic law.

However, the Commission is concerned that, in other respects, the Bill would provide protection to religious belief or activity at the expense of other rights. The Commission considers that those provisions of the Bill

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68 National Tertiary Education Union, *Submission 25*.

69 Council of the Ageing, *Submission 29*.

need to be amended or removed, because they limit other human rights in a way that is unnecessary and disproportionate, or are otherwise inconsistent with international human rights law.<sup>70</sup>

1.104 Similarly, the Public Interest Advocacy Centre noted that:

There is a clear role for a Commonwealth Religious Discrimination Act to provide effective protection against discrimination on the grounds of religious belief in public life, consistent with the protection afforded other grounds such as sex, race, disability, age and sexual orientation. Such an Act would play an important role in supporting a tolerant, diverse and fair community and help prevent discrimination against religious minorities in Australia.

This Bill is not that Act.

Unfortunately, the Religious Discrimination Bill is a radical departure from existing antidiscrimination law principles and norms. If passed, it would undermine the rights of women, LGBTI people, people with disability and people of minority faiths to live their lives free from discrimination. It is excessively complicated and contains a range of novel provisions that seek to privilege religious views over other rights in ways that will corrode, rather than build, tolerance and harmony.<sup>71</sup>

#### **Recommendation 4**

**1.105 That the current bills not proceed.**

#### **Recommendation 5**

**1.106 That the Australian Government develop a Charter of Rights, to protect religious belief amongst other protected attributes.**

#### **Recommendation 6**

**1.107 That any new Religious Discrimination bill adopt a similar approach to other anti-discrimination legislation, operating as a shield not a sword**

**Senator Janet Rice**  
**Senator for Victoria**

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70 Australian Human Rights Commission, *Submission 97*.

71 Public Interest Advocacy Centre, *Submission 40*.

## **Appendix 1**

### **Submissions received**

- 1 Professor George Williams
- 2 Australian Lawyers Alliance
- 3 Dr Alex Deagon
- 4 Aleph Melbourne
- 5 Ms Anja Hilkemeijer
- 6 Dr Renae Barker
- 7 Dr Russell Blackford
- 8 Rainbodhi LGBTQIA+ Buddhist Community
- 9 Mr Michael Douglas
- 10 Freedom for Faith
- 11 Victorian Trades Hall Council
- 12 Beyond Blue
- 13 Diversity Council Australia
- 14 Clubs Australia
- 15 Health Services Union
- 16 Australian Christian Lobby
- 17 Dr Timothy Jones
- 18 Dr Denis Dragovic
- 19 Executive Council of Australian Jewry
- 20 Associate Professor Mark Fowler
- 21 Australian Education Union Federal Office
- 22 FamilyVoice Australia
- 23 Australian Association of Christian Schools
- 24 Christian Schools Australia & Adventist Schools Australia
- 25 Australian Christian Higher Educational Alliance
- 26 National Catholic Education Commission
- 27 Australian National Imams Council
- 28 Law Council Australia

- 29 Council of Ageing
- 30 Human Rights Law Alliance
- 31 Equality Australia
- 32 Equal Voices
- 33 Australian Discrimination Law Experts Group
- 34 ACON
- 35 National Tertiary Education Union
- 36 Tasmanian Council of Social Service
- 37 Pride in Law
- 38 Associate Professor Luke Beck
- 39 Women's Health Tasmania
- 40 Public Interest Advocacy Centre
- 41 Christian Education National (CEN), Tasmania
- 42 Rationalist Society of Australia
- 43 Dr Bruce Baer Arnold
- 44 Professor Tiffany Jones
- 45 Feminist Legal Clinic Inc
- 46 Albany Free Reformed Church Education Association
- 47 Professor Anne Twomey
- 48 Child Wise
- 49 Santi Forest Monastery
- 50 Mr David Mason
- 51 Buddhist Council of NSW
- 52 Humanists Victoria
- 53 Amitabha Foundation Australia
- 54 Federation of Australian Buddhist Councils
- 55 St Vincent de Paul Society Australia
- 56 Equal Opportunity Tasmania
- 57 Public Interest Advocacy Centre
- 58 Sacred Heart Mission
- 59 Intersex Human Rights Australia

- 60 Commissioner for Children and Young People WA
- 61 Civil Liberties Australia
- 62 Australia Council of Social Service (ACOSS)
- 63 Australian Christian Churches
- 64 Australia Council of Trade Unions
- 65 Chief Executive Women
- 66 Ethnic Council of Shepparton and District Inc
- 67 Mental Health Australia
- 68 Disability Voices Tasmania
- 69 Just Equal Australia
- 70 Women's Health and Equality Queensland
- 71 Association of Heads of Independent Schools of Australia
- 72 Australian Health Promotion Association
- 73 Parents for Transgender Youth Equity
- 74 Associated Christian Schools
- 75 Professor Danielle Mazza and Professor Heather Douglas
- 76 Cr Elizabeth Nealy
- 77 Australian Family Coalition
- 78 Public Affairs Commission of the Anglican Church of Australia
- 79 People with Disability Australia
- 80 Australian GLBTIQ Multicultural Council (AGMC)
- 81 A Gender Agenda
- 82 Seventh-day Adventist Church in Australia
- 83 Australian Women's Health Network
- 84 Australian Sangha Association
- 85 Pride in Protest & National Union of Students
- 86 Lutheran Education Australia
- 87 Catholic Women's League Victoria and Wagga Wagga
- 88 Family Planning NSW
- 89 GLBTI Rights in Ageing Inc
- 90 Wimmera Pride Project

- 91 Professor David Kinley and Professor Simon Rice
- 92 Legal Aid Queensland
- 93 Australian Muslim Advocacy Network
- 94 Presbyterian Church of Australia
- 95 Yarra City Council
- 96 Australian Medical Association
- 97 Australian Human Rights Commission
- 98 Humanists Australia
- 99 Relationships Australia
- 100 Women with Disabilities Australia (WWDA)
- 101 Australian Services Union
- 102 New City Church
- 103 Queensland Council of Social Services
- 104 Association for Reformed Political Action (ARPA)
- 105 Federation of Ethnic Communities' Council of Australia (FECCA)
- 106 Harmony Alliance
- 107 Concerned Catholics Tasmania Inc
- 108 Dont Divide Us
- 109 Medical Insurance Group Australia (MIGA)
- 110 Kingsford Legal Centre
- 111 Islamic Council of Victoria
- 112 Transgender Victoria
- 113 Anti-Discrimination NSW
- 114 Islamic Council of Australia
- 115 Queensland Advocacy Incorporated
- 116 IKEA Australia
- 117 Perinatal Anxiety and Depression Australia (PANDA)
- 118 Australian Nursing and Midwifery Federation
- 119 Australia/Israel & Jewish Affairs Council
- 120 Commissioner of Children and Young People
- 121 Rainbow Catholics InterAgency for Ministry

- 122 Fair Agenda
- 123 Public Health Association of Australia
- 124 Youth Pride Network
- 125 Australian Council of Human Rights Authorities
- 126 Dr Sean Mulcahy
- 127 Independent Education Union of Australia (IEU)
- 128 Scarlet Alliance, Australian Sex Workers Association
- 129 National Secular Lobby
- 130 ColourFull Abilities
- 131 Institute for Civil Society
- 132 HIV/AIDS Legal Centre and the National Association of People with HIV Australia
- 133 Presbyterian Church of Victoria
- 134 Institute of Public Affairs
- 135 Buddhist Library
- 136 Tasmanian Labor State Member for Clark Ella Haddad
- 137 Australian Youth Affairs Coalition
- 138 Multicultural Council of Tasmania
- 139 Children and Young People with Disability Australia
- 140 Catholic Education Tasmania
- 141 AIVL
- 142 The Australian Industry Group
- 143 Bisexual Alliance Victoria
- 144 COTA SA
- 145 Activate Church
- 146 Associate Professor Fiona Barlow
- 147 AFAO
- 148 Church of the Flying Spaghetti Monster Australia
- 149 HillSide Christian College
- 150 Children by Choice
- 151 WEstjustice
- 152 Uniting Church in Australia Assembly

- 153 Uniting Network Australia
- 154 The Satanic Temple Australia
- 155 Youth Affairs Council of Western Australia
- 156 LGBTIQ+ Health Australia
- 157 Amnesty International
- 158 Anglican Church Diocese of Sydney
- 159 Australian Association for Social Workers
- 160 Planet Ally
- 161 LGBTI Legal Service Inc
- 162 Western Sydney Community Forum
- 163 Christian Media and Arts Australia Limited (CMAA)
- 164 Queensland Centre for Intellectual and Developmental Disability
- 165 National Civic Council
- 166 Equality Rights Alliance
- 167 A coalition of disability advocacy organisations
- 168 Professor Douglas Ezzy and Dr Bronwyn Fielder
- 169 NT Anti-Discrimination Commission
- 170 Full Stop Australia
- 171 Australian Lawyers for Human Rights
- 172 Commissioner for Children and Young People TAS
- 173 Women's Health Victoria
- 174 The Clem Jones Group
- 175 Catholic Women's League Australia Inc
- 176 Unions Tasmania
- 177 Marie Stopes Australia
- 178 Tasmanian Government
- 179 Centre for Women's Safety and Wellbeing
- 180 Centre for Human Rights Education, Curtin University
- 181 NSW Council for Civil Liberties
- 182 Rainbow Families
- 183 Star Observer

184	Working it Out
185	Australian Catholic Bishops Conference
186	Liberty Victoria
187	Australian Medical Students Association
188	Womens Electoral Lobby
189	Go Gentle Australia
190	Human Rights Law Centre
191	Attorney-General's Department
192	ACT Government
193	Rainbow Territory
194	Rainbow Families Queensland
195	Victorian State Government
196	Catholics for Renewel
197	Leaders of minority faith groups in Tasmania
198	Equality Tasmania
199	Australian Chamber of Commerce and Industry
200	Dr Rodney Croome
201	Confidential
202	Salesforce
203	The Twenty-Ten Association
204	Australian Baha'i Community
205	Minority Faith Groups in Tasmania
206	Rainbow Atheists



## Appendix 2

### Public hearings

**Friday, 21 December 2021**  
**Parliament House, Canberra**

**Professor Nicholas Aroney**, Private capacity *[by video link]*

**Mr Mark Fowler**, Private capacity *[by video link]*

**Australian Discrimination Law Experts Group**

Ms Robin Banks, Member

Dr Cristy Clark, Member

Mr Liam Elphick, Member

Dr Alice Taylor, Member

**Australian Christian Lobby**

Mrs Wendy Francis, National Director, Politics

**Australian Federation of Islamic Councils**

Dr Rateb Jneid, President

Mr Keysar Trad, Chief Executive Officer *[by video link]*

**Australian National Imams Council**

RAUF, Mr Bilal, Spokesperson and Adviser *[by video link]*

**Muslim Women Australia**

Mrs Maha Krayem Abdo, Chief Executive Officer *[by video link]*

**Christian Schools Australia Limited**

Mr Mark Spencer, Director of Public Policy

**Australian Association of Christian Schools**

Mrs Vanessa Cheng, Executive Officer *[by video link]*

**Australian Christian Higher Education Alliance**

Mr Mark Sneddon, Executive Director, Institute for Civil Society and Legal Representative, Australian Christian Higher Education Alliance *[by video link]*

Reverend Doctor Ross Clifford, Principal, Morling Theological College *[by video link]*

Mr Nick Jensen, Political Liaison

**Council on the Ageing Australia**

Mr Corey Irlam, Deputy Chief Executive

**Executive Council of Australian Jewry**

Mr Peter Wertheim, Co-Chief Executive Officer *[by video link]*

**National Catholic Education Commission**

The Hon. Jacinta Collins, Executive Director

Ms Sally Egan, Deputy Director

**Equality Australia**

Ms Anna Brown, Chief Executive Officer *[by video link]*

Mr Ghassan Kassisieh, Legal Director *[by video link]*

**Equal Voices**

Ms Elise Christian, Advocacy Spokesperson *[by video link]*

**FamilyVoice Australia**

Mr Gregory (Greg) Bondar, NSW/ACT State Director and Religious Discrimination Bill Project Leader *[by video link]*

**Human Rights Law Alliance**

Mr John Steenhof, Principal Lawyer *[by video link]*

**Thursday, 13 January 2022**

**Parliament House, Canberra**

**Independent Education Union**

Ms Christine Cooper, Acting Federal Secretary *[by audio link]*

Mr John Spriggs, Senior Industrial Officer, Queensland and Northern Territory Branch *[by audio link]*

**Association of Heads of Independent Schools of Australia**

Ms Beth Blackwood, Chief Executive Officer

Reverend Chris Ivey, National Chair

**Australian Catholic Bishops Conference**

Archbishop Peter Andrew Comensoli, Chair, Bishops Commission for Life, Family and Public Engagement

Professor Rocque Reynolds

Mr Jeremy Stuparich, Deputy General Secretary

**Seventh Day Adventist Church**

Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, *[by video link]*

**Australian Industry Group**

Mr Stephen Smith, Head of National Workplace Relations Policy *[by video link]*

**Diversity Council**

Ms Lisa Annese, Chief Executive Officer *[by video link]*

Ms Catherine (Cathy) Brown, Director, Communications and Advocacy *[by video link]*

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### **Presbyterian Church of Australia**

Reverend Doctor John McClean, Convenor, Church and Nation Committee *[by video link]*

Reverend Christopher Duke, Member, Church and Nation Committee *[by video link]*

### **Public Affairs Commission of the Anglican Church of Australia**

Dr Carolyn Tan, Chairperson *[by video link]*

### **Anglican Diocese of Sydney**

Right Reverend Doctor Michael Stead, Bishop of South Sydney, Chair of the Religious Freedom Reference Group, *[by video link]*

### **Australian Women's Health Network**

Dr Helen Keleher, Deputy Chair *[by video link]*

Ms Emma Iwinska, Board Member, Australian Women's Health Network; and Chief Executive Officer, Women's Health and Equality Queensland *[by video link]*

Ms Dianne Hill, Board Member, Australian Women's Health Network; and Chief Executive Officer, Women's Health Victoria *[by video link]*

### **Australian Medical Association**

Dr Omar Khorshid, Federal President, Australian Medical Association *[by video link]*

## **Friday, 14 January 2022**

### **Parliament House, Canberra**

#### **Australian Council of Trade Unions**

Ms Lori-Anne Sharp, Acting Federal Secretary, Australian Nursing and Midwifery Federation *[by video link]*

Dr Micah Peters, National Policy Research Adviser, Australian Nursing and Midwifery Federation *[by video link]*

Dr Terri MacDonald, Director, Policy and Research, National Tertiary Education Union *[by video link]*

Mr Liam O'Brien, Assistant Secretary, Australian Council of Trade Unions *[by video link]*

Ms Sophie Ismail, Legal and Industrial Officer *[by video link]*

#### **Freedom for Faith**

Associate Professor Neil Foster, Board Member *[by video link]*

#### **Institute for Civil Society**

Mr Mark Sneddon, Executive Director *[by video link]*

#### **Australian Human Rights Commission**

Ms Lorraine Finlay, Human Rights Commissioner *[by video link]*

Emeritus Professor Rosalind Croucher, President *[by video link]*

Mr Graeme Edgerton, Deputy General Counsel *[by video link]*

### **Law Council Australia**

Ms Leonie Campbell, Deputy Director of Policy

Ms Katherine (Kate) Eastman, SC, Chair of Law Council of Australia Equal Opportunity Committee

Mr Simeon Beckett, Co-Chair, Human Rights Committee, New South Wales Bar Association; and Law Council of Australia

### **Disability Voices Tasmania**

Fiona Strahan, Spokesperson on the Religious Discrimination Bill *[by video link]*

Ms Robin Banks, Adviser *[by video link]*

### **Women's Health Tasmania**

Ms Josephine Flanagan, Chief Executive Officer *[by video link]*

### **Unions Tasmania**

Ms Jessica Munday, Secretary *[by video link]*

### **Equality Tasmania**

Mr Rodney Croome, AM, President *[by video link]*

### **Multi-Cultural Council of Tasmania**

Mr Dattaraj Mahambrey, Chairperson *[by video link]*

### **Uniting Church in Australia Assembly**

Ms Sharon Hollis, President *[by video link]*

Ms Claerwen Little, National Director, UnitingCare Australia *[by video link]*

### **Uniting Network Australia**

Mr Jason Masters, Co-Convenor *[by video link]*

Mr Elliot Nicholas, Spokesperson *[by video link]*

### **Attorney-General's Department**

Mr Stephen Still, Assistant Secretary, Employment Standards Branch *[by video link]*

Mr Colin Minihan, Acting Assistant Secretary, Human Rights Branch *[by video link]*

Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Group *[by video link]*

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## **Appendix 3**

### **Tabled documents, additional information, questions on notice and form letters**

#### **Tabled documents**

- 1 Tabled at public hearing 14 January 2021 by Senator Deborah O'Neill - article - 'Religious discrimination bill: moderate Liberals strike deal to protect gay students' dated 1 December 2021

#### **Additional information**

- 1 Opening Statement for Religious Discrimination Bill Inquiry by Professor Nicholas Aroney
- 2 Opening Statement for Religious Discrimination Bill Inquiry by Equal Voices
- 3 Opening Statement for Religious Discrimination Bill Inquiry by the National Catholic Education Commission
- 4 Opening Statement for Religious Discrimination Bill Inquiry by Equality Australia
- 5 Opening Statement for Religious Discrimination Bill Inquiry by the Australian Christian Lobby
- 6 Opening Statement for Religious Discrimination Bill Inquiry by the Independent Education Union (IEC)
- 7 Opening Statement for Religious Discrimination Bill Inquiry by the Association of Heads of Independent Schools of Australia
- 8 Opening Statement for Religious Discrimination Bill Inquiry by the Seventh Day Adventist Church
- 9 Opening Statement for Religious Discrimination Bill Inquiry by the Presbyterian Church of Australia
- 10 Opening Statement for Religious Discrimination Bill Inquiry by the Public Affairs Commission of the Anglican Church of Australia
- 11 Opening Statement for Religious Discrimination Bill Inquiry by the Australian Catholic Bishops Conference
- 12 Opening Statement for Religious Discrimination Bill Inquiry by the Law Council of Australia

- 13 Opening Statement for Religious Discrimination Bill Inquiry by Uniting Network Australia
- 14 Opening Statement for Religious Discrimination Bill Inquiry by the Attorney-General's Department
- 15 Opening Statement for Religious Discrimination Bill Inquiry by the Australian Human Rights Commission
- 16 Opening Statement for Religious Discrimination Bill Inquiry by the Disability Voices Tasmania
- 17 Opening Statement for Religious Discrimination Bill Inquiry by the Freedom of Faith
- 18 Opening Statement for Religious Discrimination Bill Inquiry by the Uniting Church Australia

### **Answers to Questions on notice**

- 1 Answers to questions on notice, Equality Australia, received 7 January 2022
- 2 Answers to questions on notice, National Catholic Education Commission, received 23 December 2021
- 3 Answers to questions on notice, Australian Christian Lobby, received 1 January 2022
- 4 Answers to written questions on notice, Attorney General's Department, received 11 January 2022
- 5 Answers to questions on notice, IEU, received 19 January 2022
- 6 Answers to questions on notice, Australian Council of Trade Unions, received 21 January 2022
- 7 Answers to questions on notice, Uniting Church in Australia, received 21 January 2022
- 8 Answers to questions on notice, Law Council Australia, received 21 January 2022
- 9 Answers to questions on notice, Freedom of Faith, received 21 January 2022
- 10 Answers to questions on notice, Attorney-General's Department, received 21 January 2022
- 11 Answers to questions on notice, Institute Civil Society, received 21 January 2022

- 12 Answers to questions on notice, Attorney-General's Department, received 27 January 2022
- 13 Answers to questions on notice, Australian Medical Association, received 24 January 2022
- 14 Answers to questions on notice, Australian Human Rights Commission, received 20 January 2022
- 15 Answers to questions on notice, Attorney-General's Department, received 2 February 2022
- 16 Answers to questions on notice, Christian Schools Australia, received 6 January 2022
- 17 Answers to questions on notice, Australian Discrimination Law Experts, received 28 January 2022
- 18 Answers to questions on notice, COTA, received 28 January 2022
- 19 Answers to questions on notice, Tasmanian Organisations, received 28 January 2022

### **Form letters**

- 1 Form letter type 1: 84 received
- 2 Form letter type 2: 968 received
- 3 Form letter type 3: 93 received
- 4 Form letter type 4: 86 received
- 5 Form letter type 5: 89 received



## Appendix 4

### Survey questions and sample of responses

The survey received 48,107 responses in total. For each question respondents were asked to answer 'yes' or 'no' and could choose to respond with 'why' or 'why not'.

- 1. Do you believe there should be legislation to protect people from religious discrimination in certain areas of public life on the grounds of their religious belief or activity? This will include protecting people who don't hold a religious belief as well.**

Yes: 94.91 per cent; No: 5.09 per cent

#### **Sample of comments of submitters who answered yes:**

*As Australian we have always protected the right of everyone to have their own opinion/belief. I believe that is what democracy is all about. Other countries have put protections in place. I see my beliefs are as who I am as a Human something that is fundamental to my existence. Life has become complicated our heritage is no longer to only norm now we need it spelled out in law and protected what it means to be human.*

*Everyone has a right to believe what they choose to believe. No one should have to be discriminated for what they choose to believe in. For some, religious practices can be a comfort and help others find support when they need it.*

*My faith impacts every aspect of my life, my concern is that there is a lack of national protection for those of faith. I believe the Bill needs to be passed to protect religious freedom and to fill the gap that currently exists in Commonwealth discrimination law.*

*Everybody has a right to their own beliefs and should not be prevented from sharing them and living them out from fear of discrimination and legal action as we have begun to witness in recent times.*

*Yes, because without this law of protection, people who have religious belief or activity will not be treated or regarded fairly, and with respect. Their freedom in equal participation in public life, to believe, or to act religiously, would be taken away from them, and that is unjust way to treat fellow human beings for any human society or community.*

*Religious belief (or unbelief) is a human right in a free society. We are also a litigious society, so legislation on what does (or doesn't) constitute religious discrimination has now become a necessity for the protection of people who are simply acting in accord with their rightful (and legal) religious beliefs. It will promote harmony and social order.*

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*Yes, there should be legislation to protect people from religious discrimination in certain areas of public life on the grounds of their religious belief or activity; just like there is protection for many other areas and activities.*

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*This is crucial as religious belief shapes a world view and in a multicultural society varying and even opposing views need to be free to be voiced. To seek a plateau of views essentially robs our society of competing and varying ideas.*

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*I think people should be able to practice their faith without discrimination and not be forced to go against their beliefs either in private or in public.*

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*Religious belief is endemic to man, and people should have the freedom to practice what they believe without fear of prosecution. Not everyone will agree with everyone else, this just isn't possible.*

**Sample of comments of submitters who answered no:**

*Various State and Federal laws already exist to protect religious beliefs and activities. No further protection is required. Furthermore, working in public life comes with responsibilities and consequences which should be upheld regardless of personal belief.*

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*Religion is an idea not a characteristic. There are already laws in place to protect people following and practicing their beliefs as long as it doesn't impact others.*

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*If Australia had a "charter of freedoms and responsibilities" which included freedom of speech, race, ethnicity, religious belief, sexual orientation, gender, etc (and maybe stupidity), there would be no need for an individual Bill for each specific condition considered as a necessity for being human and alive to become our full potential. It is too difficult to lay out all the conditions of being human needing to be outside the law.*

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*I believe our current laws are sufficient in protecting religious freedom and in fact our laws already grant greater and unfair privilege to the religious. I do*

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*not believe this additional Bill is necessary to further privilege the religious. On many levels the Bill continually fails to acknowledge the rights of the non-religious. The Bill even seeks to pit larger religions against smaller religions. I believe the Bill is divisive and seeks to identify people religiously, instead of just seeing us as people first. There has certainly been no consideration given to equality for all people.*

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*To my old mind this is a loaded question, you are damned if you do and damned if you don't. Why only refer it to people in public life? Legislation must protect all society. We all share the same planet. We are taught by a higher being to live in peace and harmony with each other.*

---

*I believe that there should be Freedom of Religion legislation to allow people of faith to live their lives in accordance with their genuinely held religious beliefs. The current religious discrimination legislation package is marketed at doing this but does not actually do so. The current religious discrimination legislation package extends to protect those that expressly don't hold a religious belief, so the legislation is at best confusing and at worse disingenuous. There are also so many exceptions and conditions in the legislation package curtailing/restricting a person who has a genuine religious faith to live in accordance with their religious belief, that religious people have in reality little protection to live their lives in accordance with their faith.*

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*I believe that there should be Freedom of Religion legislation to allow people of faith to live their lives in accordance with their genuinely held religious beliefs peaceably and in harmony with everyone else. This legislation does not do this. It is important to recall that the impetus for this legislation was the concern that people of faith had with the passing of the Same Sex marriage amendment. (i.e., It was promised that legislation would be passed to protect people with a religious belief, (whose religious beliefs did not allow them to agree with same sex marriage), giving them the freedom to practice their faith and not be discriminated against. This current Bill goes much further than this mandate. This is not only confusing but is also disingenuous to those who think that this legislation is being enacted to protect those who profess an actual religious faith. (Please see the definitions of Statement of Belief and Religious Belief which includes those "without a religious belief").*

**2. We currently have a Sex Discrimination Act, Age Discrimination Act and Racial Discrimination Act, do you believe it is important to also have a Religious Discrimination Act as well?**

Yes: 93.64 per cent; No: 6.36 per cent

**Sample of comments of submitters who answered yes:**

*Yes. Freedom of religion (including the right to manifest that religion) is a human right and ought to be protected. The most important reason is that people who are religious ought to be able to hold and practise their religion without fear of persecution. As a Christian, I don't feel like I have a "choice" to hold the views I do or live my life according to the Bible. To me, being a Christian is living out what is objectively true. To reject certain tenets because they are unpopular would be accepting lies... There is a misplaced animosity toward religion (esp. Christianity) that has grown at the same time the LGBTIQ+ movement has gained mainstream traction. There is no reason why religion should be sidelined - in certain and very important ways, particular religious beliefs challenge the worldviews offered by some in the LGBTIQ+ movement (and more broadly, the secular world), and that is definitely not a bad thing. As a society, we cannot make progress by silencing different voices and perspectives for the sake of paternalistic 'safetyism' (see Jonathan Haidt & Greg Lukianoff's 'The Coddling of the American Mind'). It compromises our ability to engage in a robust dialectic, and fosters tribalism and extremism. We need to be able to disagree civilly and respectfully in order to grow as individuals and make social progress. We need to enrich the next generation's engagement with the plethora of perspectives and discourse, rather than to encourage them to think of people who offer alternative views as "violent" and their words as "unsafe". We also need to ensure that religion remains available to them, and is viewed as good and valuable, rather than as a set of worldviews that are inherently violent or unsafe. If we fail to protect religious freedom, we will alienate religious people, who form a significant proportion of the Australian population. We will also fail our broader community by allowing the silencing of differing voices, which enrich our cultural and social fabric and discourse.*

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*In the same way that we protect the individual regarding sex, age and race we should protect the beliefs of religious people. It is very important to have a Religious Discrimination Act in Australia as 69.5% of the people indicated they are religious or have faith in the last census.*

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*A Religious Discrimination Act matches existing protections under other Discrimination Acts. It contributes to protections and further affirms people's right to live free of discrimination. Religious freedom is increasingly threatened or erased under State law, so the Federal government should ensure consistency and fairness in this area.*

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*The religious discrimination bill fills a gap in Commonwealth discrimination law. Australia has an obligation to protect religious freedom under*

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*international treaties such as the International Covenant on Civil and Political Rights.*

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*Many people, even in Australia, consider their religious beliefs one of the main, if not the main, defining features as a person. These beliefs, in many cases, address the big questions of life, provide a sense of purpose, and guide relationships with other people. In this sense, they cross boundaries of other defining features, such as sex, age or ethnicity, encompassing them. If these features have been deemed worthy of protection, I believe so much more are religious beliefs. (Note: I believe agnostic or atheist beliefs are also valid and worthy of protection. But they don't seem to be under any kind of opposition, not in Australia anyway.)*

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*In the absence of a bill of rights there would seem to be no other way of protecting the fundamental and crucial right of freedom to practice one's religion. It is important that religious institutions such as schools and hospitals be allowed to maintain their ethos through freedom to employ staff that share the beliefs of the institution and also be allowed to display artifacts, art work and emblems.*

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*The cancel culture of the 21st century demands that religious beliefs be protected. Regretfully, most citizens don't realise our whole history is underpinned by Judeo Christian beliefs. If they are not protected, we will lose them and we will be poorer off society.*

---

*Along with age, race and sex the outstanding element that is a common point of discrimination is religion. Religion has been a pivotal part of many cultures. When committed to a religion people are willing to die for their beliefs. Introducing the Religious Discrimination Act will give believers of all religion a piece of mind when it comes to celebrating all elements of their culture and beliefs.*

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*It was a 2019 election promise, and for credibility it needs to be in place before the next election. Current protections in Commonwealth, state and territory laws for discrimination on the basis of a personal religious belief or activity are piecemeal, have limited application and are inconsistent across jurisdictions. This package will address the gaps. It is necessary to ensure that all people are able to hold and manifest their faith, or lack thereof, in public without interference or intimidation. It would bring legislative protections for religious belief and activity to the same standard as those already afforded under federal anti-discrimination law to discrimination on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities,*

*marital or relationship status, pregnancy or potential pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status.*

---

*Because we already see people being discriminated against because of their religious beliefs, being abused because they disagree with something. Once people could disagree without a problem now it's becoming violent in some situations.*

**Sample of comments of submitters who answered no:**

*I believe protections already exist and should be clarified under existing legislation. Sex and race are things we cannot control for nor dictate how we should act towards people. Religions often have discrimination as part of their teachings and I do not want to create a separate group of people who are exempt from current anti-discrimination laws.*

---

*Religion is an idea not a characteristic. There are already laws in place to protect people following and practicing their beliefs as long as it doesn't impact others.*

---

*I don't believe in the right to discriminate against people based on my religious views. This proposed bill is designed to give people the right to discriminate based on sex, age, race, gender identity and sexual orientation.*

---

*Sex, age and race are innate. Religion on the other hand is by choice (or indoctrination after birth). I strongly believe that everyone has a right to their own religious belief or non-belief. And that each individual should have the freedom to practice that religious belief or non-belief to the extent that it does not impose on or harm others and is within the law.*

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*Because there is no evidence of a problem with existing laws that need fixing by an RDA, particularly an Act which is so patently a protection for institutions wanting exemptions from laws protecting actual human rights.*

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*There are already so many laws. If we can uphold the rights of people of faith to practise their faith, and to maintain their institutions (e.g. palliative care, religious gatherings, schools, social care) without extra Acts, I would prefer this. Our society too quickly turns to legislation.*

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### 3. Do you support the religious discrimination legislative package that is currently before the Parliament?

Yes: 81.82 per cent; No: 18.18 per cent

#### **Sample of comments of submitters who answered yes:**

*I believe an appropriate balance has been struck between protecting holding and expressing religious belief alongside minimizing or preventing such protections from being used maliciously.*

---

*If the Bill is intended to afford power to schools/entities to employ persons who can both express and be held to account for a set of beliefs and activities in accordance with a statement of faith, I can support it's intent. It should not be a mechanism to restrict access to all services that might be available in a community (broadly) to a person.*

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*Yes, it is a good start, however there the bill could go further and be more robust in its protections. It is also critical to keep the protection for faith-based schools to teach and operate their schools in accordance with their religious beliefs in 38(3) of the Sex Discrimination Act.*

---

*The package is a moderate response to the increasing vilification and discrimination now being routinely directed towards people of faith in Australia. It is better than nothing but does not go far enough in protecting these freedoms.*

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*There has been thorough consultation, and the package as it stands is good, and reflects submissions already made during the consultation process; it should not be tampered with at the last minute by politicians. People who have contributed to the process will feel betrayed if the package is watered down, especially of this is by individuals wanting to score political points.*

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*It is a well-reasoned response to an increasingly secular society that not only chooses not to hold any religious beliefs but seeks to prevent people from holding and living by their own beliefs.*

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*While we have reservations about the Bill, we ask you to support it. We do not want freedoms for religious people watered down by amendments. We are concerned that the "Folau" clause, which was in previous drafts of the Bill, has been removed. It would have prevented a person from being sacked for expressing their moral views on issues like marriage, even if expressed outside*

*of work hours. Protection for religious identity must be preserved and must not be overridden by secular laws imposing views on marriage, family and sexuality that are hostile to a person's religious beliefs.*

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*The religious discrimination package currently before the parliament brings religious discrimination in line with the legislation on sex, age and racial discrimination. This is of critical importance in providing a balance consideration for the wellbeing of the nation.*

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*Without this bill, there is the potential for people of certain beliefs to be ostracised even to the point of exclusion from the workplace, roles in community leadership, and various other avenues of society on the basis of their particular belief. This leads to situations as extreme as the Coptics in Egypt, Falun Gong in China, and in its extreme, Jews in 1940s Germany.*

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*It is very important that religious institutions (including places of worship, faith-based organisations, religious schools/hospitals/nursing homes and religious support services for the general public) are all permitted by the Religious Discrimination Act 2021 to employ people who adhere to the same faith of the religious organisation itself so that these institutions can continue to represent the people of faith that set them up and for those who participate to do so in good conscience that they will not be required by law to function in a way that contravenes their religious beliefs. It is also important that those who choose to send their children to faith-based schools can be confident that those who work at such schools will faithfully teach and model the faith to which the school is committed. However, the Religious Discrimination Act 2021 needs to include extra protections for individuals of faith to be able to speak respectfully about their beliefs in both private and public settings and online without being verbally or legally targeted for their beliefs.*

**Sample of comments of submitters who answered no:**

*This legislation goes beyond merely protecting persons from discrimination. It authorised religious persons and institutions to discriminate against those who do not share their belief system. This has no place where public money is used to support those institutions - such as schools and hospitals. Receiving public money to permit such institutions to operate necessitates that those institutions and organisations must not discriminate against those outside of their belief system.*

---

*It sets religion above other rights, and other belief systems. It entrenches the privilege that religion has seen since this country's discovery. At one time we*

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*thought that religion benefited society and privileged it accordingly, but we have seen that religious groups have caused much damage in the past (see the Royal Commission for example) and we shouldn't be extending their status in society. Even the Ruddock report found minimal examples of religious discrimination, and this far exceeds anything needed to tackle that. It also privileges buildings and organisations (which themselves have no beliefs, even if their members do), and allows them the right to discriminate against otherwise protected classes, even when accepting taxpayer funding to provide government services.*

---

*The legislation decreases protections for those of no faith or those whose lifestyle may not match the religious beliefs of others. We currently have a situation where successful job application is no longer based solely on merit but on compliance with the religious beliefs of some organisations as well. This legislation will further weaken EEO opportunities in religious institutions/ organisations. There has not been enough Parliamentary oversight/ review to exclude any potential loopholes that may open others up to Discrimination from religious organisations.*

---

*There needs to be consideration of the current medical environment in Australia. The vaccine mandates are contrary to many people's religious beliefs and are preventing them from observing their religion freely and without exclusion from services available to the rest of the population. Religious exemption to medical procedures should be available.*

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*Shocking legislation. It should not be voted on before the next election. It has not been thought through carefully, and will cause distress to vulnerable people.*

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*I feel it's diluted down...once upon a time having a religious foundation was considered the basis for building wholesome family values, tolerance, compassion and so forth. Now the religious fabric of our country has become so battered that it's led to the breakdown of both family systems and social behaviours.*

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*It is too vague. It will not properly protect individuals from prosecution, abuse, loss of income etc if they want to talk about their beliefs.*

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*It is not needed. The vast majority of people in Australia support the right of the minority of committed religious people to practice their faith. Australians are tolerant of religion. The only time people become intolerant is when there*

*is hateful speech, child abuse and discrimination against vulnerable groups. Australians can and should stand up to religious views that urge discrimination against people's fundamental human rights. For example, being LGBTQIA. Another example, is LGBTQIA students or teachers. There should be strong protections in place to prevent discrimination. Religion should never be a shield for human rights abuse. A particular concern is that the majority of Australians are not religious, and it is essential that everyone can access public services without having to deal with religion.*

**4. Do you believe that parents should be able to choose to send their children to a school of their choice which aligns with their religious values?**

Yes: 98.5 per cent; No: 1.5 per cent

***Sample of comments of submitters who answered yes:***

*Of course. That is why parents do that and pay the extra cost, because the public school system has no notion of morality and actively pursues an immoral position. If public schools just stuck with reading, writing and arithmetic there wouldn't be a problem but they don't. They only want to indoctrinate our children with their own corrupting secular values. But it is even more than secular it is now clearly hostile to any notion of God.*

---

*It gives them a chance to ensure that the children are exposed to adults or authority figures who are, ideally, conducting their lives in accordance with the beliefs of their religion. Ideally it offers the chance to show that sincere individuals can co-exist and show respect and tolerance to each other, even when their religious beliefs differ.*

---

*A parent is the person responsible for their own child and how they are taught and brought up. A child is not property of the state. Of course, a parent should be able to choose the values and beliefs that are instilled in their child alongside, and intertwined with, their education. Schools and teachers are employees of the parent (using the taxes they have paid, along with their own funds in the case of private schools), and parents have every right to choose how their child will be educated. If parents decide to send their child to a religious school, it is because they want something different or additional to what a secular public school provides, and that should be totally up to them.*

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*It is the role of a parent to guide, protect, and direct their children in the way that they believe will be most beneficial to their child and to their growth as a contributing member of society. Parents must have the choice so that they can't lose their voice in the early years of their children's development.*

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*However, such schools should not be permitted to proselytise children and should accommodate children from all religious backgrounds if they accept government funding.*

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*It's a parent's job to raise their children in the way they should go, a lot of this stems from their schooling and education environments, parents should be able to make decisions surrounding where they send their children in the same way we make other daily decisions for the safety & upbringing of our children.*

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*If schools are able to exist that provide religious instruction, then parents should be free to choose. Making all options available to people empowers them to make better decisions. I fully support ethics classes in schools for those that want to teach their children moral decency and community minded thinking. (we can ignore for the moment that without religious grounds behind such ethics the basis for ethics does not actually exist).*

---

*Each parent has the duty and privilege to love and train their children. Religion will usually inform and direct those values which the parents instil in their children. Therefore, schools aligned to their religion should be accessible as part of their children's training. Non-religious parents already have that option in our public school system.*

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*A family has their own religion. Schools that align with their religious values will allow children to explore and practice this religion. It is up to the child once they are of understanding to choose to comply or deny their parent's beliefs.*

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*Children need the security of consistent teaching from parents and teachers. This provides a basis for them if they wish to consider the alternatives after school that will face them in a multicultural society. Social media is already bombarding them with a minefield of ethical choices. Children need to be grounded in a belief framework which they understand and can apply in their lives.*

**Sample of comments of submitters who answered no:**

*Children should be free to make up their own minds, not forced into a religion by a school. Children should be protected by the state, not indoctrinated, and abused. Children have human rights too.*

---

*I do not believe that schools should be an extension of religious institutions. If parents want to teach their children their religion, they can do so at home or in*

*their church communities. Schools should be left to teach all the other subjects. So we should not have religious schools.*

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*Whilst I acknowledge religious schools, my firm belief is that all children should be given a broad-based view of religion. The opportunity for specific instruction in a specific creed is the responsibility of parents, not teachers.*

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*The curriculum should be the same, no matter what school parents chose. Children should be taught how to think and not what to think.*

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*I think that education should serve the purposes of social cohesion and egalitarianism, among others. Religious schools naturally strengthen division and sow social discord.*

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*All children should receive a well-rounded secular education and be exposed to a wide range of ideas and ideologies. Religious education should be an extracurricular activity (not conducted by schools).*

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*Not if this means they will discriminate against people on the basis of who they are. This is not religion - this is out and out discrimination. Religions used to argue that people of colour were inferior and God did not want them to mix with white people. Presumably this would now be acceptable once again under this law. No-one should be discriminated against on the basis of who they are. Schools should only have this right if they are fully self-funded. Taxpayer funds must not be used to discriminate.*

---

*Education should be a wholly secular activity. The idea that a child needs to be educated through a religious context flies in face of all the hard won scientific knowledge we have acquired over the centuries; despite religious intervention. If parents wish for their child to be educated in their chosen religion that should be done entirely separately to their formal education. I see no justifiable reason why their education in maths need be delivered by someone who happens to share their parents religious views.*

- 5. Do you consider that religious schools should be able to require all students to practice the religion affiliated with that school, if this requirement is necessary to avoid injury to the religious susceptibilities of people of that religion?**

Yes: 79.81 per cent; No: 20.19 per cent

**Sample of comments of submitters who answered yes:**

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*If a parent sends their child to an Islamic school, it is reasonable to assume that they are agreeable to their child having to conform to the religious practices of that school. It would be odd for Hindu parents who send their child to an Islamic school to object to their child being expected to conform to Islamic practices. I note that the question is asking about 'beliefs'. This might have elicited a different answer.*

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*If a school is based and representing a particular faith it makes sense that school should be free to expect students to practice their particular religion. Parents are free to send their child somewhere more suitable if this does not align with their religious beliefs. The school should be able to make this a requirement of entry on their enrolment so there should not be any misunderstandings or misconceptions. There are many faith-based schools that don't have strict religious requirements.*

---

*In much the same way you would expect a construction worker to comply to certain rules to get a job done safely - if a Religious Education Institution has requirements to deliver the curriculum and 'delivery of service' they have implemented, then they should be allowed to enforce certain expectations.*

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*Families should be expected to adhere to the codes of conduct/behavioural expectations and religious beliefs/practices that align with the school they have chosen to enroll their children in. Where religious schools hold particular beliefs based on their faith, these schools (and their families) would suffer great injury if they were not able to protect the beliefs that are important to their faith. There are numerous educational options available to families who do not wish to align themselves with religion - which logically serves to remove this tension for religious schools.*

---

*I think it's fair that if students are enrolled in a particular school of their choice, they also choose to follow the requirements of being part of the school. As long as this is clear in the application process and both students and parents understand what is being asked of them, and they choose to sign up to this willingly, then I think it's acceptable for the school to have certain requirements in place to build and develop their culture.*

---

*In order for a religious school to create an environment that is consistent with the beliefs of that religion, it should be possible to require students to behave in a way that is consistent with that religion, bearing in mind that they will always have access to public schools or private unaffiliated schools.*

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*This question goes to what "religious susceptibilities" means. Students enrolled in a religious school should respect the "genuine" beliefs of the faith the school is affiliated with. If a student doesn't respect the genuine beliefs of the religion affiliated with the school, one would have to question why the student would want to be at that school.*

---

*Religious schools, and Christian schools in particular, should be able to require all students to practice the religion affiliated with that school as that is the reason that the school exists. Otherwise, why pay for something you want and then not get it.*

---

*Parents exercise free will and choice when sending their children to school. If they acknowledge the values and faith of the school as they register the child, they should not then punish a school for practising those same faiths and values, especially when the school has provided all disclosures as to their faith values and practices. This same principle applies to any organisation, sports club, hobby club etc that we select for our children. If in practice it does not feel comfortable, the parent are always free to withdraw their child from the school or entity.*

---

*Absolutely, as parents have a choice which school to send their child / children to. If a school clearly states its religious vision and mission statement, then parents have a choice if they wish to send their child to that school or not, knowing the school's stance. If it doesn't align with the parent's religious views then they shouldn't send they need to find another school that does align with their views. Trying to change an existing school's policy to suit prospective students defeats the purpose of the school's vision and mission. If this occurred, then the school could just as well become a secular school.*

**Sample of comments of submitters who answered no:**

*It is wrong that schools should be able to force this on children. Following this logic, would it be ok for secular state schools to bar religious children from schools? People must learn to live with people of all religions, not force their religions on others.*

---

*Schools are meant to be a place of learning and development of understanding. Allowing children to gain a broader perspective and develop their own worldview - segregating children based on religion assists in perpetuating misunderstanding, instead of opening up a conversation to establish our differences.*

---

*I'm not sure what is defined by "injury". As students are themselves individuals, while I believe they ought to be encouraged to practice the beliefs of the religious school they attend, they however ought not to be forced or coerced to behave in a manner contrary to their conscience.*

*I don't necessarily agree with this statement. I consider religious schools should have the right to choose appropriate staff to support their beliefs but to me that does not translate to students being required to adhere. Students need to find their own level of belief or engagement and are not clones of their parents will or beliefs.*

*From a Christian perspective, Christianity is about having a relationship with Christ. You can't force someone to do that. Kids should be required to participate in relevant classes and behave in an acceptable manner but forcing them to participate in practices they don't believe in just makes them do something religious for the sake of it. As Jesus showed, religious practice for the sake of looking religious (like the religious leaders of his day) was to be treated with contempt.*

*I believe schools should be allowed to promote certain values (religious or otherwise). But I don't believe they should force children to follow a certain religion. Across all religions, faith is an individual and unique experience. It is a choice. Forcing certain rituals, routines or rules on children may compromise the free-will behind their faith. Schools should promote open expression of faith, not enforce beliefs.*

*Students should be free to make their own decisions and be supported with love and grace. You cannot force a religion on a student. However, staff of a religious school should practice the religion affiliated with that school.*

*For children, schools can model and provide a framework of belief. Religious ceremonies and forms can be utilised, and should be respected by students. But one cannot be made to agree or participate.*

- 6. Do you believe religious schools, hospitals, aged care facilities, accommodation providers and disability service providers should be able to preference the hiring of staff of the same religious belief, as long as this is in accordance with a publicly available written policy?**

Yes: 93.28 per cent; No: 6.72 per cent

**Sample of comments of submitters who answered yes:**

*The hiring of staff of the same religious belief, as long as this is in accordance with a publicly available written policy, is essential to project the culture, ethos and goals of the institution; just as a political party would hire staff with commitment to its culture ethos and goals.*

---

*On many occasions, services given to the public are influenced by religious values. And the public themselves, may wish to be serviced specifically by someone of the same faith, as this allows for closer relationships and understanding. It is therefore fair, that businesses and public services should be able to choose staff of a specific faith or religious affiliation, which suits their business model.*

---

*I broadly agree. However, I am concerned that there are risks here in certain health and aged care settings. Inability to recruit staff from a particular faith group should never be allowed to trump safe or critical staffing requirements. For example, an aged care home could reasonably preference employing registered nurses from a particular faith group. But if it finds that it cannot recruit enough, this should never provide it with any excuse or exemption from regulations on safe staffing requirements. It should be closed or penalised under other relevant law and regulations if it then refuses to employ non-adherent staff in such a situation.*

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*Yes. If the business benefits from hiring people with the same beliefs it makes sense. I.e. a church hiring only Christians makes sense as it could actually destroy the church if they didn't have the same belief as the church. Same with all other religions. But I'm a business owner myself. I own a cleaning business that has nothing to do with religion. I would not and I shouldn't be allowed to discriminate against who I hire. As it does not affect the business at all.*

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*For the sake of harmony in the workforce and success in meeting the agreed goal/s. Dissension and conflict will naturally result if people are not of the same mind. Political parties themselves are filled with workers who align themselves to the beliefs of the party. No different for religious schools.*

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*These institutions are the way they are because they have been established as part of a system within the religion that they are affiliated with. For many they are an expression of the requirements of the religion. This is core to the work that they engage in and the way that they go about it. Preferencing people who hold the same religious belief is therefore a key part in ensuring a continued quality of care in line with the core values of the institution. How can religious schools, which parents send their children to in order that they be educated in the faith, teach the religion that they advertise if the teaching*

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*staff do not have a belief in the religion? You cannot require an atheist to teach that there is a God against their conscience, this is why religious schools need their ability to preference staff of the same religion. Similarly, hospitals, aged care providers etc. with religious affiliations need to be able to maintain the values of their religion, otherwise they may as well be in a secular facility. Do not get me wrong on this point though, secular facilities are necessary and do a lot of good for society, however when a facility advertises or is established with certain core values (affiliated with a religion), they need to be able to uphold them in order to lay claim to such values. The most sure way of them being able to maintain this work is to preference those who hold the same religious beliefs to continue delivering care in line with these core values.*

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*An organisation with people that have beliefs contrary to the culture and values of the organisation will not last. For example, a political party exists for particular reasons and beliefs which are publicised. Anyone who joins that party holding beliefs in conflict with the very existence of that party will not be able to make a positive contribution to the organisation and will ultimately experience internal conflict and sooner or later find themselves at odds. The same principle applies to any organisation. An organisation is not necessarily looking for the best person at that role, but the one that fits the organisation well and supports the organisation's mission and vision.*

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*Many such institutions have been established upon the altruistic import of religious beliefs, and, with notable exceptions, their care has been governed by overriding articles of faith. Until recently, these structures were seen as strong controls that undergirded the care for the individual, irrespective of who that might be. To negate what are seen by the institutions as essential components of their care, would be to create internal conflict that would ultimately have a destructive outcome to the integrity of the institution. Anyone considering applying for a position would be fully aware of the job description and the constraints from the institute's policy. Therefore, they would be at liberty to not apply for the position, and not waste their time and others by going through a pointless interview exercise.*

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*Yes, this is the most important part of this bill. Religious schools/providers must be able to hire staff of their own same religious belief and practice, to model and teach the religion to the students. It is similar to a corporation wanting all employees to abide by the corporation's values. I work for a corporation that I know its values and policies, and if I act contrary to them and breach a corporate policy, I know I will be sacked/asked to leave. All that religious schools want with this bill, is the same situation - to be able to positively hire staff of their same religious beliefs - or if a staff member can no*

*longer ascribe to the school's beliefs, then they can leave and find another school that they can work in. Why should religious schools/providers be any different? As parents, we send our kids to a religious school because the teachers are an extension of the home and model and teach Christian values/teachings to our kids. It's not just a mere academic exercise. Religious schools must be allowed to choose staff based on their religious beliefs, because that is the core condition of employment. This is the core issue that this bill is seeking to protect. Without it, and if exemptions in Discrimination Acts continue to be eroded, the future of religious schools is seriously in doubt.*

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*Religious belief is an ideological worldview and "colours" (or at least should colour) every decision a religious person/institution makes, (i.e., how they see and live in the world). If a school or other organisation is founded and operated according to a religious faith, then they should have the freedom to prefer or even only hire staff of that same religious belief. I can see that it makes good sense that the school or organisation make their policy publicly available so that there is clarity and transparency. However, .... I can understand how a religiously founded and operated school or organisation may be reticent to state publicly their policy on say the important matter of marriage, sex and gender as it might give opportunity for their opponents to "make trouble" for them, dragging them through the court/tribunal for contravention of the Sex Discrimination Act.*

**Sample of comments of submitters who answered no:**

*They should not if they are state funded. In many regional and rural areas there is not much choice of hospital or age care facility. This should not affect and impact in employment of healthcare staff and not be a source of discrimination. Employment should be based on ability not due to beliefs which can be faked.*

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*Because they must, under the current arrangements in Australia, provide services to everyone since everyone is paying them for their services via GST & other taxes. And more people do not practise their religion than do. So should be looked after by non-religious as well as religious people. If they did have such a policy, they would not get enough workers.*

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*They should employ the staff with the best skills. This is particularly so as most are highly subsidised by taxpayers. I want my tax money going to the best doctors and teachers, not the religiously correct.*

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*That effectively excludes well qualified people from a wide range of potential employment opportunities in those places. By the way, a well-qualified doctor, for instance, should be able to work in any medical environment, regardless of any so called preferred religion.*

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*To exempt religious schools, hospitals, aged care facilities, accommodation providers and disability service providers with a policy that excuses it from hiring people of other faiths or no faiths is contrary to good governance. The criteria from hiring should focus on the best qualified, not on religious beliefs.*

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*Should a car dealer be able to preference the hiring of staff to people who own their brand of motor vehicle?*

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*This would create a segregation. People need to relax and understand and learn to live with other non-believers of religion.*

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*We live in a secular society. Religion is a private matter. Employment should be on the basis of skill and experience to ensure the best people are in the right place. Religious people should not have privileged access to employment.*

**7. Do you consider that religious charities (not covered by question 6) should be able to preference persons who share their religious beliefs when making employment decisions or offering services?**

Yes: 91.02 per cent; No: 8.98 per cent

***Sample of comments of submitters who answered yes:***

*Charities offer a service within an ethos that needs all staff supporting it. Many charities today are integrated with religions, working internationally within international religious freedoms. Obstructing charities from serving religious individuals in a way that allows the exercising of religious freedoms would limit their freedoms and persecute the vulnerable who access these charities' welfare.*

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*Society has an expectation that there is authenticity. We choose to attend organisations based on the values we desire and would expect their employees to at least adhere to those values, not for profit charities exist for their charitable purpose, so even more so they need to be able to demonstrate to society that their personal hold and implement the organisation's purpose and belief system.*

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*Yes and no. Yes to allowing hiring of people that adhere to their religious beliefs because values will usually align. No to discriminating against offering services if that service was to e.g. Help an atheist with at home care, it shouldn't matter that the receiving person has different beliefs.*

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*People should be free to employ whoever they like in their own organisations, and they should be free to extend their services to whoever they like. In a free society, people should not be forced to do work that they don't want to do - for any reason whatever. There are usually plenty of other service providers around who offer the same or similar services.*

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*Religious charities are really no different to those institutions mentioned in Q6. If those seeking employment have been given a publicly available written policy they will be aware of those beliefs and can decide for themselves whether or not they wish to be employed there. Ultimately, it is up to the employer to decide who they wish to employ as they need to ensure they have the right person performing that job.*

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*Faith is not limited to a particular area of life. If someone is working for a charity, they are representing all the charity stands for and why the charity is motivated to do what they do, in the way they do it. If you believe that everyone is created in the image of God, it influences how you see everyone i.e. everyone is of equal importance. Faith-based charities do what they do because they are motivated by their faith. What they do is an integral part of what they believe.*

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*I think that religious charities should be able to preference likeminded people when making employment decisions, and to some extent when offering services. I would like to think most religious charities will assist others with differing worldviews but they must not be forced to fund/assist a service that is contrary to their belief (i.e. euthanasia/abortions etc for Christian charities).*

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*Yes, because one's religious values impact our ethics, code of conduct and why these charities exist. It goes to the heart of what we think charity is, what good is and why religious people are disproportionately more likely to support charitable work. To insist that people who do not share those values can be employed to carry out the work, risks undermining the confidence of those who give to the charities and may compromise the integrated way in which lives impacted by religious commitments are not defined by single issues.*

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*It makes sense. It avoids confusion and reduces possible tension further down the line if they've not been transparent from the start about their religious affiliation. It's a matter of trust. Being free to talk about organisational goals knowing they are shared. Common goals and purposes are clear from the start, and everyone is on the same page, creates an awareness of expectations and harmony.*

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*The very existence of these charities and the magnificent work they do (which in fact relieves government of needing to do this essential work) hinges on their religious beliefs and the convictions of staff. To water this down and not give these charities the ability to preference persons of the same religious belief will ultimately diminish such charities and (a) hurt the vulnerable people needing these services and (b) shift the burden back to government.*

**Sample of comments of submitters who answered no:**

*Provision of care for the disadvantaged is the responsibility of such organisations, and not the promotion or propagation of their personal beliefs. What individuals managing or working for charitable organisations believes has nothing to do with his/her professional work.*

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*I think that religious charities should be available to everyone that is in need in the community. Some communities may only have one charity operating in their town - so its services should be available to everyone. The same goes to staff - most of the charities not mentioned in the previous question are run by volunteers, and a lot of times, there may not be enough available to keep the charity open all of the time, especially in small regional communities, people who have received help come back to serve with the charity that served them.*

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*Charities are service providers. If an organisation's sole purpose is to inculcate into a particular faith, it is a church, not a charity. Therefore, charities provide services, the nature of which is not religious in nature. Therefore, the belief or non-belief of an employee should not affect the provision of that service. Again, service providers in regional or remote areas may be the only available option, to allow them to discriminate on religious grounds may cause inconvenience, hardship or emotional or financial hurt to the public. Unacceptable.*

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*It would be appalling if a charitable organisation - which, presumably, if a registered NFP, would benefit from the tax advantages/exemptions that come with the designation - were able to legally deny (the practical effect of 'preferencing' some over others on an ideological basis) services to people in*

*need because of the latter's religious beliefs/lack of belief. If this were to be allowed, the legislation designating as charities organisations engaging in this practice should be amended so that they are no longer defined as such.*

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*Religion is a personal choice. As such religion has no rightful place in the shared community sphere. Charities, whether religious affiliated or not, enjoy tax concessions in exchange for providing community support. It is despicable to suggest a charity supported by the Australian people could ever act to deny services or support to anyone based on religious affiliation.*

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*My experience as a volunteer in a Catholic charity is that we don't know the faiths of the people we serve and our volunteers and paid workers are from a broad range of backgrounds. The question of the workers' beliefs doesn't seem to come up and seems irrelevant. We are not teaching any doctrine, just serving.*

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*My position is mid-way: on balance, the private religious views of the staff should not be allowed to preclude the offering of services that contribute to the well-being of any people or the planet and its other creatures, provided that all staff, if asked before employment, should agree to respect the prevailing religious ethos of fellow-workers and relevant clients.*

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*Yes and no. Definitely yes to employment decisions.... I'm less sure about the offering services part. If it's a charitable organisation, then I think they probably need to offer that charity to anyone who fits with their mission. I don't think Meals on Wheels should be able to refuse to feed Hindus or Christians. And I don't think a women's shelter should be able to refuse service to Muslim or Buddhist women. On the other hand, if the organisation's publicly stated mission is to serve Jewish widows (for example), then why should they be forced to use funds they've raised for that purpose to serve Sikh widows (or vice versa)? That's a tricky issue.*

**8. Do you believe religious people would be comfortable to share their beliefs in public life without the Religious Discrimination Bill 2021?**

Yes: 31.59 per cent; No: 68.41 per cent

**Sample of comments of submitters who answered yes:**

*Religious people are not all the same. Some are open to talk and share. Others are silent. I do not know what exactly the religious Discrimination Bill is meant to help. I do not speak any differently to friends of religion or no religion. Who gains by the Bill?*

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*I believe people are very open talking about their religion in comparison to a few years ago. I think that if the bill is passed it will create more freedom but not much difference than what there is now.*

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*This already happens because we have Freedom of Speech in this nation. This Bill will not stop people sharing their beliefs (religious or not) but may prevent people from being discriminated against when they do.*

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*It does not stop or prevent anyone stating their personal beliefs at the moment. What it would do is allow individuals protections to prevent others in stating theirs in return. I believe that this legislation is seeking to bestow a privilege to one section of society over another.*

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*The entire gospel is about the good news of salvation through faith in the completed work of Jesus Christ. Sharing the love God has for others only comes naturally. This Bill will not stop the work of Christ and the gospel will continue to spread here in Australia and around the globe.*

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*Most religious beliefs are fairly widely accepted by society. Only a small number of religious beliefs that are socially seen as unacceptable (such as refusing to acknowledge the legitimacy of same-sex relationships) would cause problems if expressed.*

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*Religious people have always shared their beliefs for thousands of years regardless of whether there has been protection for religious beliefs or not. Quite often religious people have shared their beliefs during the most severe government opposition, or even when the State controlled Religion. Think of the centuries during the Medieval period when people like John Wycliffe, Jan Huss, Martin Luther and many others spoke out against what they believed was wrong or corrupt in the State run Church. Many of these were killed for sharing their beliefs. Then also think of religious people living in Communist or oppressive totalitarian countries who shared their beliefs at the risk of their lives. History shows us that despite the attempts of these totalitarian regimes to wipe out religion, they were unsuccessful. Faith (religious belief) cannot be stopped. Nor can it be legislated.*

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*I say yes because it's what we are called to do as faithful Christians no matter what the circumstances. But to be outlawed from sharing our faith would be wrong. Without a religious discrimination Bill I think that sharing one's faith eventually become unlawful without the Bill.*

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**Sample of comments of submitters who answered no:**

*The current cultural climate, particularly as promoted on the majority of mainstream media, tends to the far left and anti-religious to the point that employees and athletes might reasonably fear for their continued livelihood if they express their beliefs openly. This current left leaning cultural situation is essentially un-Australian in that it moves away from everyone being given a fair go, even as regards to their beliefs. Thus, legal protection of such basic rights is now required.*

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*Religious views are being marginalised, ridiculed, and effectively silenced within much of society today. It has become a case of identity politics, where who you identify as is more important than what you're saying. My research, perspectives and beliefs have been immediately discredited when an audience knows of my faith. It becomes not only a reason to stop listening, but to mock and belittle me. This has occurred across social and academic settings, and it's both demoralising and hurtful.*

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*At the moment, I am becoming more and more fearful of stating my faith in public. I know at various organisations/institutions it is best if I do not say anything for fear of being misunderstood and labelled as "old-fashioned", "a religious nut" and "intolerant".*

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*Unfortunately, the state of our society and media currently doesn't allow this to happen. Other communities and people groups can have a loud voice in public life, yet sadly, Christians are attacked if they dare say something that is considered contrary to the loud voices in society. Note - the loud voices are not necessarily what majority of the population thinks/agrees with.*

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*Some people are always willing to express they views no matter what the cost. Such people are very valuable members of the community. However, while there is no suggestion that this new legislation will radically alter things, I do believe it will help many more find more a voice. There will be new responsibilities for people in this, to express themselves persuasively and compassionately, and to also allow themselves to be accountable in putting their case forward.*

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*Unfortunately, there have already been cases where people have been discriminated against for beliefs they hold and expressed. They have unnecessarily suffered emotional and mental stress, loss of employment, financial costs etc just for stating their personal religious beliefs. This is sad. It should not be so in a democracy like Australia. It is actually a basic human*

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*right to have, practise and express one's beliefs. That includes even people with no religious beliefs.*

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*Religious views are being increasingly marginalised in our culture. Allowing people to be discriminated against based on their beliefs is unacceptable for a modern country, as it gives an imbalanced amount of power to those with a different ideology.*

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*It's already not ok to say Merry Christmas we are now saying it's "happy holidays". It's completely silly because Christmas is about the birth of Christ- mythical or not- and yet non-religious people enjoy this holiday. It would be akin to saying I don't believe in the calendar year so saying happy new year is an affront to my beliefs- but I'll take the holiday thanks.*

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*I believe religious people are already feeling under siege and very wary of discussing their beliefs, even with friends. One only has to look at media and social media comments to see how much vitriol can be aimed at people of any faith, but particularly the Christian faith. As evidenced by the appalling comments aimed at ABC's Richard Glover (not a Christian himself) when he dared to broadcast a 7 minute interview with an academic about the real meaning of Christmas, two weeks before the Christmas holiday which everyone is happy to take advantage of!*

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*As society has moved away from Christian principles, many Christians, without the Religious Discrimination Bill 2021, would not be comfortable sharing their beliefs in public, because of the threat of legal action, losing their job or not being promoted. Many valuable employees could be lost and our nation's prosperity, suffer.*

- 9. Do you think it should be lawful for a person to be able to make a statement of belief so long as it is made in good faith and is not malicious, threatening, intimidating, or harassing and does not vilify a person or group or advocate the commission of a serious offence?**

Yes: 97.45 per cent; No: 2.55 per cent

***Sample of comments of submitters who answered yes:***

*Absolutely because I believe in the freedom of speech. Without it we cannot hear other perspectives, learn from different world-views, work together in a melting pot that is Australia. Everyone can tell the difference between someone who is sharing something that might be taking offensively and*

*someone who is being a belligerent, rude, mean, nasty jerk. It's all about the manner of speech and attitude of the person speaking.*

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*Yes, otherwise how are we to live in a multicultural society? Everyone has a set of beliefs by which they live, even if they don't call it their religion, it is what they live by and follow. It's only fair if we can all speak openly about our beliefs and be ok to talk and disagree.*

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*However, definitions of harassment, vilification etc need to be objective not subjective. At present anyone can be offended by anything. A difference of opinion is not harassment or vilification. We don't act that way in politics. Both sides can criticise the other. So why prevent dialogue and debate on religious or philosophical grounds? If a philosophy is so fragile that it cannot handle debate it needs to rethink its foundations.*

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*But I worry about who gets to judge the end of that question. Who gets to judge whether a statement of faith is not malicious, threatening, intimidating, or harassing and does not vilify a person or group or advocate the commission of a serious offence? It seems that some groups, are especially good at saying they are hurt by simple statements.*

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*People should be able to say what they want to say. Hurting someone's feelings is not a good enough reason to cancel free speech in Australia. The moment the government starts controlling what people can and can't say, we become a country who must obey what the government says, rather than their God that they believe in. It's not the government's role to play God in people's lives and dictate how they can carry out their beliefs. The government exists to serve the people, not the other way around.*

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*At the end of the day, it's about respect and you wouldn't go and talk to somebody about your beliefs unless you want to help them as they may be going through a hard time and for them having faith in our God above has helped me get through a lot of bad times. Sharing with somebody else could help them move in a positive way to get through the hard times a day going through as I said at the start it's all about respect and if they don't except that that's fine and it's on my part it's about respecting what they believe is well.*

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*Is it in any way reasonable that it should not be? This question goes directly to the core of having an opinion at all. Nobody has a moral or ethical structure that could be explained or acted upon in nobody was permitted to refer to their belief system. A person could never explain why they did something, or*

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*liked something, or why they helped someone or thought something. Denying an individual the right to say they believe something - especially in the above conditions - is a great crime far worse than potentially offending someone. There are people in the world who will take mortal offense at anything said by anyone. Those people cannot be the bar by which we measure a person's right to expression. Provided the above is true, how can a reasonable person refuse the expression - especially when to explain their refusal itself would be in contravention to the rule.*

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*This is describing a Democracy. People should be free to express their opinions on many issues and if another disagrees, they are also able to express their views in a courteous manner. It is called 'debate' and is one of the basic foundations that democracies are built on.*

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*Accusations will always be there. With this protection in place and the public made aware of what constitutes a statement of belief that is not made in good faith, then should one feel those negative emotions, one can always have crucial conversations, asking for clarification so that there is no misunderstanding of intent. It will also prevent one from taking the law into one's own hands and executing punishment. Court time and other unnecessary expenses and consequences can be avoided if such situations can be dealt with peaceably.*

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*Being able to do this is good and healthy for society and relationships in general. I do not think a society is better off without this. Indeed, this would only be allowing the "beliefs" of the majority to be able to be voiced.*

**Sample of comments of submitters who answered no:**

*It implies that such freedom of speech is restricted to religious speech. Freedom of speech should not be constrained to religious speech.*

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*Quite the opposite. A belief cannot be protected by law and should not because it is not a "real thing". What a persons says and what they actually believe cannot be established beyond reasonable doubt. Beliefs change with time and evidence. If you don't want malice, threats, intimidation, or harassment, then people should keep their beliefs to themselves unless they are causing them a conflict of interest.*

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*Ignorance and doctrine thinking can appear not threatening to the speaker but may cause harm and may shift cultural views towards greater discrimination and non-acceptance.*

*This discriminates the person to be silenced and not have free speech that every other minority group has.*

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*A person should be able to make a statement of belief no matter what. All of the extra qualifications are unnecessary and open to all kinds of interpretations. Freedom of speech is very important. The government cannot, and should not try to, legislate against things being said which may cause offense. A person should have the right to say that they disagree with something or think a particular thing is wrong. Otherwise, the values of one group will be placed higher than those of another and open, constructive debate and interrogation of ideas will be impossible.*

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*The definition of "good faith" is not defined clearly enough. For example, a teacher could tell their students that they believe gay people are sinful and will go to hell unless they change their ways, and claim that the statement was in "good faith" because they were trying to protect the students' souls.*

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*The threshold is too high for malicious, threatening, intimidating, harassing or vilifying behaviour. Micro-aggression from such religious statements of belief are psychologically damaging in the longrun. I have endured micro-aggressive racism for a long time. I wouldn't want to endure micro-aggressive religious statements and behaviour on top of that.*

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*Statements that are not malicious, intimidating or harassing nor vilifying do not require special protections. They enjoy the same protections as all other innocent statements, and do not require an 'exceptional' status because they come from a belief or faith.*