



Australian  
Human Rights  
Commission

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# Religious Discrimination Bill 2021 and related bills

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Submission to the Parliamentary Joint Committee on Human Rights

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21 December 2021

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## 1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights in relation to its inquiry into the:
  - Religious Discrimination Bill 2021 (Cth) (the Bill)
  - Religious Discrimination (Consequential Amendments) Bill 2021 (Cth) (the Consequential Amendments Bill)
  - Human Rights Legislation Amendment Bill 2021 (Cth) (the HRLA Bill).
2. On 27 September 2019, the Commission made a submission to the Attorney-General's Department (AGD) in relation to the first exposure draft of these bills.<sup>1</sup> On 31 January 2020, the Commission made a submission to the AGD in relation to second exposure draft of these bills.<sup>2</sup>

## 2 Summary

3. The Commission strongly supports the introduction of enforceable protections against religious discrimination for all people in Australia. This has been the consistent position of the Commission for more than 20 years.<sup>3</sup>
4. While there are some protections against religious discrimination in Commonwealth, State and Territory law, these protections are incomplete. In some situations, such as complaints to the Commission of religious discrimination in employment, those existing legal protections do not provide for enforceable remedies where discrimination is established.
5. Just as Australians are provided with statutory protection against discrimination on the grounds of race, sex, disability and age, so too should they be provided with equivalent protection against discrimination on the ground of religious belief or activity. This reinforces the idea, reflected in article 2 of the Universal Declaration of Human Rights and in the objects clause for the Bill, that human rights are indivisible and universal.
6. Prohibiting discrimination on the ground of religious belief or activity (including beliefs about religion held by people who are atheists or

agnostics) is consistent with and supports the tolerant, pluralistic nature of Australian society.

7. 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.
8. 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.
9. 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 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.
10. The Bill includes a number of unique provisions that have no counterpart in other anti-discrimination laws and appear to be designed to address high-profile individual cases. As a matter of principle, the Commission considers that legislating for single instances is not good legislative practice. As a matter of substance, it may lead to unintended and undesirable consequences.
11. The Commission's main concerns regarding the Bill are as follows.
12. **First**, the Bill provides that 'statements of belief' that would otherwise contravene Commonwealth, State or Territory anti-discrimination laws would be exempt from the operation of those laws.
13. The Commission is concerned that clause 12 will permit discriminatory statements of belief to be made, whether they amount to racial discrimination, sex discrimination, discrimination on the ground of disability or on any other ground prohibited by law. The Commission is responsible for administering Commonwealth discrimination law and sees first-hand a broad range of discriminatory conduct, including discriminatory statements. Section 5.3 of this submission describes a

range of recent complaints to the Commission about discriminatory statements where the 'statement of belief' defence could operate.

14. For example, the Commission received a complaint from a woman who let her employer know that she had recently become pregnant. She alleged that her employer said: 'There is no room in [this] business for someone who is going to be a single mother'. Under this Bill, that statement may be exempt from discrimination laws if it was a statement of belief. The Bill would not protect related conduct, such as firing the woman if she ultimately had a child out of wedlock: that may still be discrimination if the woman could show that she was fired on the grounds of sex, pregnancy or marital status. However, the protection of the statement is incongruous and, in the view of the Commission, is not a result that Australians would expect.
15. 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.
16. **Secondly**, the Commission is concerned that under this Bill a corporation could make a complaint of religious discrimination against an individual or another organisation. This is a significant departure from domestic and international human rights laws which protect only the rights of individuals, that is, humans.
17. **Thirdly**, the Bill provides very broad exemptions that allow 'religious bodies' to engage in religious discrimination.
18. The Commission's view is that a Bill prohibiting religious discrimination should apply equally to the conduct of everyone in society, whether or not they are religious. In the context of a Bill that is seeking to eliminate religious discrimination, it is reasonable to expect as a starting point that everyone should have the same opportunity to apply for and retain a job, to be accepted into and retain a place at a school, and to obtain goods and services, including where the employers, educators and providers of goods and services are religious bodies.
19. Some exemptions for inherently religious practices are appropriate, particularly conduct that is closely related to religious worship, observance, practice and teaching. The Commission supports the

provision for ‘positive discrimination’ to meet particular religious needs and to reduce disadvantage faced by religious individuals and groups. It also supports preferencing or selecting people for employment where religious belief or activity is an inherent requirement of the job. However, 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 Commission makes some recommendations to ensure that where exemptions are available, they are necessary to achieve a legitimate purpose and limited to what is reasonable and proportionate to achieve that purpose.

20. The breadth of exemptions available is particularly concerning when it comes to schools, and other religious educational institutions. The Commission’s primary recommendation is the scope of these education exemptions should be considered by the ALRC as part of its existing reference. However, pending that consideration, the exemptions should be narrowed to permit only preferencing of teachers and students at the point of admission based on religious belief or activity, while prohibiting subsequent discrimination based on their religious belief or activities, whether that be through disciplinary action or dismissal.
21. It would be a simple task to remove the few highly problematic provisions of the Bill, leaving a Bill that is consistent with other Commonwealth discrimination laws and provides strong protections against discrimination on the ground of religious belief or activity. The Commission’s recommendations seek to achieve this outcome.

### **3 Recommendations**

22. The Commission makes the following recommendations.

#### **Recommendation 1**

The Commission recommends that clause 12, dealing with discriminatory statements of belief, be removed from the Bill.

#### **Recommendation 2**

The Commission recommends that the Attorney-General’s Department engage with equivalent departments at the State and Territory level to determine whether State and Territory anti-discrimination

Commissions have sufficient powers to promptly identify and terminate unmeritorious complaints.

### **Recommendation 3**

The Commission recommends that clause 16 of the Bill, dealing with associates, be amended to make clear that a complaint of discrimination may only be made by a natural person and not by a corporation.

### **Recommendation 4**

The Commission recommends that the Bill be amended to:

- (a) limit the definition of 'religious body' to 'bodies established for religious purposes'
- (b) provide that the general exemption from discrimination for religious bodies in clause 7 does not apply to conduct connected with commercial activities.

### **Recommendation 5**

The Commission recommends that clauses 7(4), 9(5)(c) and 40(5)(b) be amended to limit the application of the relevant exemptions to conduct that is 'necessary' to avoid injury to the religious susceptibilities of adherents of the relevant religion.

### **Recommendation 6**

The Commission recommends that:

- (a) clause 5 (definition of 'religious body') and clause 7 of the Bill be amended to remove the general exemption for religious educational institutions
- (b) the issue of exemptions granted under the Bill for religious educational institutions be referred to the Australian Law Reform Commission as part of its current review of religious exemptions in anti-discrimination law, along with any amendment to the ALRC's terms of reference as may be necessary for it to consider this issue.

### **Recommendation 7**

The Commission recommends that, pending the review by the Australian Law Reform Commission referred to in recommendation 6, the following exemptions for religious educational institutions apply:

- (a) religious educational institutions be permitted to give preference, in good faith, to persons of the same religion as the educational



institution when making decisions about who should be offered employment

- (b) religious educational institutions not otherwise be permitted to discriminate on the ground of religious belief or activity in employment in any of the ways described in clause 19 of the Bill (including the terms and conditions of employment or decisions about the termination of employment)
- (c) religious educational institutions be permitted to give preference, in good faith, to persons of the same religion as the educational institution when making decisions about a person's application for admission as a student, except where there is no alternative educational institution available
- (d) religious educational institutions otherwise not be permitted to discriminate on the ground of religious belief or activity in education in any of the ways described in clause 24 of the Bill (including the terms and conditions of admission or decisions about expulsion)
- (e) if a religious educational institution proposes to engage in conduct described in (a) or (c), this may only be done in accordance with a publicly available written policy that:
  - (i) outlines the institution's position in relation to particular religious beliefs or activities
  - (ii) explains how the position is or will be enforced by the religious body
  - (iii) is consistently applied.

### **Recommendation 8**

The Commission recommends that clause 11, providing for the overriding of State and Territory laws in relation to discrimination by religious educational institutions, be removed from the Bill.

### **Recommendation 9**

The Commission recommends that clause 9, dealing with exemptions from religious discrimination in employment and partnerships for religious hospitals, aged care facilities, accommodation providers and disability service providers, be removed from the Bill.

### **Recommendation 10**

The Commission recommends that clause 40(2)–(7), dealing with exemptions from religious discrimination relating to accommodation and facilities for religious camps and conference sites, be removed from the Bill.

### **Recommendation 11**

The Commission recommends that clause 15, dealing with the separate treatment of qualifying body conduct rules imposed by qualifying bodies, be removed from the Bill.

### **Recommendation 12**

The Commission recommends that further consideration be given to the breadth of operation of clause 35 of the Bill, dealing with the general exception for counselling or promoting a serious offence.

### **Recommendation 13**

The Commission recommends that clause 47(1) of the Bill be amended to remove the provision granting the Attorney-General the ability to vary or revoke temporary exemptions granted by the Commission.

### **Recommendation 14**

The Commission recommends that clause 75 of the Bill be amended, and that any review of the Act be carried out by a body external to the Commission.

### **Recommendation 15**

The Commission recommends that the protection against discrimination for unpaid workers provided by the Bill also be included in the existing four Commonwealth discrimination Acts, namely the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

### **Recommendation 16**

The Commission recommends that civil prohibition against victimisation also be included in the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

### **Recommendation 17**

The Commission recommends that Sch 1, clause 6 of the Human Rights Legislation Amendment Bill, which would insert a new s 47C into the *Marriage Act 1961* (Cth), be removed from that Bill and that consideration of this proposed amendment await the report of the Australian Law Reform Commission of its review of religious exemptions in anti-discrimination law (along with any amendment to the ALRC's terms of reference as may be necessary for it to consider this issue).

## **4 Existing laws in relation to religious discrimination**

23. There are a number of protections against religious discrimination in Australian law; however, these protections are limited.
24. At the federal level, a person may make a complaint to the Australian Human Rights Commission about discrimination in employment on the basis of religion.<sup>4</sup> The Commission will seek to conciliate those complaints. However, if the parties cannot reach an agreed outcome, the complainant does not currently have a right to go to court. In the Commission's view, the primary goal of the present Bill should be to provide enforceable remedies for discrimination on the ground of religious belief or activity that are equivalent to rights under other Commonwealth discrimination laws. This would address the existing asymmetry between the protection afforded to religious belief or activity ('discrimination in employment') and that afforded to other attributes currently protected under Commonwealth discrimination laws ('unlawful discrimination').
25. This section briefly outlines the current functions of the Commission and notes other existing protections for religious belief or activity.

### **4.1 Discrimination in employment: Australian Human Rights Commission**

26. The Commission can inquire into a complaint that a person has been discriminated against in employment on the basis of religion. The Commission's role is to inquire into and attempt to reach a settlement of such complaints through conciliation.

27. The Commission has received a total of 79 complaints of discrimination in employment on the basis of religion in the five years to 30 June 2021. The kinds of complaints received by the Commission include complaints about workplace harassment on the basis of religion, discrimination because of religious dress, and discrimination based on the complainant not having a religious belief.
28. Most complaints are successfully conciliated. If a matter cannot be conciliated, the Commission will inquire into whether or not the alleged conduct amounted to discrimination in employment. For the conduct to amount to discrimination, it must be a distinction, exclusion or preference made on the basis of religion. However, conduct will not amount to discrimination if:
- it is based on the inherent requirements of the job, or
  - the job is at an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the distinction, exclusion or preference was made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
29. If the Commission finds that there was discrimination in employment on the basis of religion, the Commission can issue a notice to the parties setting out the action that it recommends be taken to remedy the act of discrimination. These recommendations are not binding on the parties, but may form part of a public report to the Attorney-General. The most recent report of discrimination in employment on the basis of religion or belief was provided to the Attorney-General in 2013.<sup>5</sup>

**Case study: wearing religious articles or clothing at work**

A woman told the Commission that she was a convert to the Muslim faith and recently wore a headscarf to work. She claimed that her employer then asked to see her and threatened to try to remove her from the front desk as the headscarf made the employer uncomfortable. The woman made a complaint to the Commission.

Following the making of the complaint, the Commission was advised that the complainant resolved the complaint internally by speaking directly to her employer. The employer apologised for her reaction

and advised the complainant that she was welcome to wear the headscarf.

## 4.2 Commonwealth acts or practices contrary to freedom of religion

30. The Commission can also inquire into a complaint about acts or practices of the Commonwealth that are inconsistent with or contrary to:
  - the right to freedom of thought, conscience and religion in article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 14 of the *Convention on the Rights of the Child* (CRC)
  - the right to non-discrimination, including on the basis of religion, in article 26 of the ICCPR and article 2 of the CRC
  - the *Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, proclaimed by General Assembly of the United Nations on 25 November 1981.
31. These instruments provide for an absolute right to have or adopt a religion and to hold religious beliefs.
32. Under international law, while the right to hold religious beliefs is absolute and not subject to any limitations, the right to manifest one's religion may be subject to limitations in some circumstances. Any limitations must be prescribed by law and must be necessary to protect one or more other important goals. The ICCPR identifies these other public goals as the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>6</sup> When the achievement of one of these other goals interferes with the right to manifest one's religion, it is necessary to conduct a proportionality analysis to determine whether the right to manifest one's religion has been impermissibly infringed.
33. The manifestation of religion may be individual or in community with others and in public or private. It includes the following freedoms:
  - to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes
  - to establish and maintain appropriate charitable or humanitarian institutions

- to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief
  - to write, issue and disseminate relevant publications in the area of religion or belief
  - to teach a religion or belief in places suitable for these purposes
  - to solicit and receive voluntary financial and other contributions from individuals and institutions
  - to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief
  - to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief
  - to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.<sup>7</sup>
34. Again, when a complaint is made to the Commission, the Commission's role is to inquire into and attempt to reach a settlement of such complaints through conciliation. The Commission has received a total of 12 complaints about acts or practices of the Commonwealth that are contrary to freedom of religion or belief in the five years to 30 June 2021.
35. If a matter cannot be successfully conciliated, the Commission will inquire into whether or not the act or practice was contrary to human rights.
36. If the Commission finds an act or practice of the Commonwealth was contrary to the human rights protected by these instruments, the Commission can issue a notice to the parties setting out the action that it recommends be taken to remedy the breach of human rights. These recommendations are not binding on the parties, but may form part of a public report to the Attorney-General.

### **4.3 Fair Work Commission jurisdiction**

37. Under the *Fair Work Act 2009* (Cth), employers are prohibited from:
  - taking adverse action against an employee or prospective employee on the basis of a number of specified protected attributes, including religion
  - including terms in a modern award that discriminate against an employee for a number of reasons, including religion
  - terminating an employee's employment for reasons including their religion.
38. The *Fair Work Act 2009* (Cth) permits applicants to bring court proceedings that can result in legally binding determinations.

### **4.4 Religious exemptions from discrimination law**

39. Religious bodies and educational institutions have been granted exemptions from the operation of other Commonwealth discrimination laws.
40. Both the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Age Discrimination Act 2004* (Cth) (ADA) provide a broad exemption from discrimination to bodies established for religious purposes. Such bodies are able to engage in discrimination on the grounds of age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding or family responsibilities, provided the act or practice conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents to that religion.<sup>8</sup>
41. The SDA also allows religious educational institutions to discriminate in the employment of staff and the admission and provision of education to students on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy.<sup>9</sup> The exemptions explicitly permitting discrimination on the grounds of sexual orientation, gender identity and relationship status were added in 2013 by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) at the same time as discrimination on these grounds was prohibited in a range of other areas of public life.

42. Similar exemptions apply to discrimination laws at the State and Territory level. Section 7.3(a) of this submission describes current State and Territory exemptions for religious educational institutions in relation to discrimination against staff and students on the basis of religious belief or activity.
43. In April 2019, the then Attorney-General asked the Australian Law Reform Commission (ALRC) to consider reforms to anti-discrimination law to limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way that is consistent with their religious ethos. The history of the reference to the ALRC is discussed below in section 7.3(a).

#### **4.5 State and Territory bodies**

44. The anti-discrimination laws of each State and Territory, with the exception of NSW and South Australia, contain a prohibition against discrimination on the ground of religious belief. In NSW, it is prohibited to discriminate against a person on the basis of their 'ethno-religious origin'. In South Australia, there are protections from discrimination in employment and education on the grounds of religious dress.
45. Where those laws prohibit discrimination or vilification on the basis of a person's religion, an individual may make a complaint to a specialist anti-discrimination or human rights body in the States and Territories.
46. Queensland, Victoria and the ACT have also enacted statutory charters of human rights (or human rights Acts), which each include freedom of religion. Like the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), each of these State and Territory laws requires that for every proposed draft law (such as a Bill), the executive branch of government must produce a statement that assesses the compatibility of the draft law with human rights. The laws also allow the Supreme Court of the relevant jurisdiction to make a declaration where an existing law cannot be interpreted consistently with a human right. In those circumstances, the declaration is provided to the responsible Minister for them to consider whether to amend the draft law.
47. Since 1 January 2020, the Queensland Human Rights Commission has been able to take complaints under the *Human Rights Act 2019* (Qld) about conduct by public entities after that date that is not compatible



with human rights, including freedom of thought, conscience, religion and belief.

## 5 Statements of belief

48. The section of the Bill that is of most concern to the Commission is the section that permits statements to be made that would otherwise be contrary to anti-discrimination law.
49. The first page of the Explanatory Memorandum for the Bill says:

The Bill does not affect the operation of other Commonwealth anti-discrimination legislation or permit any discrimination on the grounds of an attribute protected by these laws.<sup>10</sup>
50. That statement is not correct. The *only* thing that clause 12 of the Bill does is to affect the operation of anti-discrimination legislation (both Commonwealth laws and State and Territory laws) to permit conduct that would otherwise amount to discrimination.
51. This clause was proposed in response to two complaints to anti-discrimination bodies about statements made in 2015 and 2017, during the public debate about the proposed change to the definition of 'marriage' in the *Marriage Act 1961* (Cth) (see section 5.2(b) below). The statements were made in documents that advocated for a 'traditional' view of marriage, and were based on a religious belief that marriage is only between a man and a woman.
52. In neither case was there a finding that the statements were contrary to anti-discrimination law. Nevertheless, some religious groups have raised concerns that the mere fact that complaints *could* be made may have a 'chilling' effect and discourage other people from advocating for a traditional view of marriage in accordance with their religious beliefs.<sup>11</sup>
53. The Commission supports the ability of people who are religious to profess their faith. This is particularly so in cases where questions of public policy and faith intersect. However, the Commission's view is that Australian law *already* permits this to be done and that it is a false dichotomy to say that there can be either freedom of religion or protections against discrimination.

54. In this context, the Commission is concerned about a provision that establishes a ‘statement of belief’ as a defence to any anti-discrimination law. This is so for a number of reasons.
55. First, the perceived need for this provision is symbolic rather than substantive. This issue is expanded on in section 5.2 below. The Commission is not aware of any cases where genuine statements of belief have been held to be contrary to Australian anti-discrimination law. Rather, the concern expressed is that potentially unmeritorious complaints could be made that engage the jurisdiction of an anti-discrimination Commission and that this, in turn, creates a chilling effect.
56. Secondly, the establishment of a new defence cannot prevent unmeritorious complaints from being made. If a complaint is made under anti-discrimination law it will need to be dealt with by the relevant complaint handling body by considering the substance of the complaint and all relevant and available defences. The same issues now complained of will still arise. The Commission considers that the real question is whether those bodies have sufficient powers to deal appropriately with unmeritorious complaints.
57. Thirdly, there is a real danger that establishing a new defence to anti-discrimination law will have significant adverse consequences that are unintended—and unnecessary. While the drafters of clause 12 have sought to limit the kinds of statements of belief that qualify for protection, the clause will only have any legal effect at the margins—where conduct that is currently unlawful discrimination will now be lawful by virtue of clause 12 (see section 5.1 below). Those who are advocating for this change in good faith no doubt intend to make statements that are not discriminatory. However, a review of actual complaints of discrimination made to the Commission indicates that the clause will be available in a range of cases that may not have been anticipated by its proponents and which have the potential to reduce real protections for people’s dignity in a range of areas of public life (see section 5.3 below).
58. Fourthly, the provision is likely to lead to significant additional time, cost and complexity when dealing with matters under State discrimination laws, because it would mean that specialist tribunals that ordinarily hear discrimination matters would need to transfer the complaints to a court so that the federal defence could be considered (see section 5.4 below).

59. Fifthly, the express preferencing of the manifestation of religious belief over protections against discrimination risks undermining the stated objects of the Bill (see section 5.5 below).

## **5.1 Defence for certain discriminatory statements**

60. Clause 12 of the Bill provides that a 'statement of belief' does not constitute discrimination for the purpose of the Religious Discrimination Act (once passed),<sup>12</sup> the *Racial Discrimination Act 1975* (Cth) (RDA), the SDA, the *Disability Discrimination Act 1992* (Cth) (DDA), the ADA or any State or Territory discrimination Act, providing the statement is also in accordance with clause 12(2).
61. If a person alleges that they have been discriminated against through speech, writing or gestures, clause 12(1) would provide the respondent with a defence if they are able to establish that the conduct was a statement of belief.
62. The definition of 'statement of belief' varies, depending on whether the maker of the statement is religious. For a person who is religious, a statement of belief is a statement:
- of a religious belief actually held by that person
  - made in good faith by that person, by written or spoken words or other communication (other than physical contact)
  - of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.
63. The statement need not be about religion. It could be about any subject that is covered by a religious teaching.
64. For a person who is not religious, a statement of belief is:
- of a belief actually held by that person
  - made in good faith by that person, by written or spoken words or other communication (other than physical contact)
  - of a belief that a person genuinely considers to relate to the fact of not holding a religious belief.
65. The Explanatory Memorandum provides that statements that are not made conscientiously or which are made for an improper purpose will not be made in 'good faith'.<sup>13</sup>

66. Clause 12(2) provides that the defence does not apply to discriminatory statements of belief that are malicious; that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or that amount to the urging of a serious criminal offence.
67. When the first exposure draft of the Bill was released, the word 'vilify' was not defined. As a result, it carried its ordinary meaning. A person would not have a defence for statements of belief that amounted to vilification.
68. The Shorter Oxford Dictionary defines 'vilify' as including:
  1. *trans.* To lower or lessen in worth or value; to reduce to a lower standing or level. ...
  2. To depreciate or disparage in discourse; to defame or traduce; to speak evil of ... .
  3. To regard as worthless or of little value; to condemn or despise.
69. A legal standard higher than the ordinary meaning of the word has been broadly adopted with respect to vilification prohibitions in Australia. For example, s 8(1) of the *Racial and Religious Tolerance Act 2001* (Vic) states that religious vilification occurs when a person engages in conduct that 'incites hatred against, serious contempt for, or revulsion or severe ridicule of' another person or class of persons on the ground of their religious belief or activity.<sup>14</sup>
70. In the current version of the Bill, 'vilify' is defined to mean 'incite hatred or violence'. This is a significantly higher standard than the ordinary meaning of the word. It is more closely (although not precisely) aligned with the legal meaning of the word as provided by most existing Australian vilification prohibitions. In the Bill, demonstrating that conduct will incite hatred requires more than words expressing hatred, contempt or ridicule. It is also necessary to show that the words would encourage or spur on others to harbour those emotions.<sup>15</sup>
71. The definition of 'vilify' now provides more scope for statements to be made that amount to vilification in their ordinary sense. This seems to be confirmed by the Explanatory Memorandum which provides that '[s]peech that is offensive or insulting towards a person or a group of persons, but does not incite hatred, violence or contempt, is not vilification' for the purposes of the Bill.<sup>16</sup> The definition more closely reflects the higher standard adopted with respect to most other existing vilification prohibitions.

## 5.2 Sufficient protection for statements of belief

72. Removing clause 12 from the Bill would not have any substantial impact on the ability of religious people to profess their faith. This is so for three reasons.
73. First, and most importantly, the status quo will be maintained in that people will continue to be permitted to make statements of belief that do not contravene anti-discrimination laws. Almost all genuine statements of belief will fall into this category. The Commission considers that clause 12 is simply not necessary for this kind of statement.
74. Secondly, while the Religious Freedom Review found 'high levels of community concern about religious freedom',<sup>17</sup> there is a significant data gap in terms of understanding the actual experience of freedom of religion in Australia. This review was conducted by an Expert Panel, appointed by former Prime Minister the Hon Malcolm Turnbull in 2017, to examine whether Australian law adequately protects the human right to freedom of religion. Following a comprehensive inquiry involving more than 15,000 submissions and consultations in every State and Territory, the Panel concluded that there was 'a lack of reliable information regarding the experience of religious freedom intersecting with other human rights'.<sup>18</sup> Despite many submissions 'repeat[ing] several well-known, high profile cases of perceived infringement of religious freedom',<sup>19</sup> the Panel concluded that there was 'insufficient evidence as to the frequency and impact of this type of discrimination within the community'.<sup>20</sup> The Panel went on to acknowledge that 'it is also possible that complaints do not arise because people are unaware of, or unwilling to exercise, their rights or because they adapt their behaviour so that issues stay beneath the surface but continue to cause a high degree of personal anxiety and stress'.<sup>21</sup> This may be considered an example of a 'chilling effect' referred to above at paragraph [52]. The Panel recommended that the Commonwealth collect and analyse quantitative and qualitative information on the experience of freedom of religion at a community level, including in relation to any unreasonable restrictions on the ability of people to express their faith.<sup>22</sup>
75. Thirdly, the other provisions of the Bill will strengthen the ability of people to make statements of belief in a range of areas of public life by prohibiting discrimination on the basis of religious activity (including

the professing of faith). So, for example, it will be unlawful for an employer to treat an employee less favourably because they made a religious statement, or to require employees to adhere to a code of conduct that unreasonably restricts the ability of employees to talk about their religious beliefs. These provisions provide strong protection for statements of belief that do not infringe the rights of others. In the absence of the data collection and analysis recommended by the Expert Panel, these provisions reflect a more tailored approach to the concerns that have been identified, and an approach that is consistent with the existing anti-discrimination framework.

(a) *Example in the Explanatory Memorandum*

76. The Explanatory Memorandum provides the following scenario which it says is an example of how clause 12 would work in practice:

Andrew is the manager of a business with a culturally diverse workforce. He sends his employees a Christmas greeting, referring to his beliefs about the birth of Jesus. Employees who are not religious say the message makes them feel alienated and uncomfortable. If Andrew's statements were made in good faith and were not malicious, he would have a defence against any potential discrimination claim.

77. The fundamental problem with this example is that it does not identify how the conduct would amount to discrimination under any of the anti-discrimination laws listed in clause 12(1)(a) of the Bill.
78. The sending of Christmas greetings is not unlawful under anti-discrimination laws and does not require legislative amendment to secure its protection. If this is the issue that clause 12 is directed at, then the clause itself is not actually necessary.

(b) *Examples described by the former Attorney-General*

79. As noted above, many of the submissions to the Religious Freedom Review repeated accounts of a small number of 'high profile cases of perceived infringement of religious freedom'.
80. In discussing the Bill at the launch of the first exposure draft at the Great Synagogue in Sydney in August 2019<sup>23</sup> and later at the National Press Club in Canberra in November 2019,<sup>24</sup> the then Attorney-General

identified two cases that he said formed the basis for the introduction of the 'statement of belief' provision.

81. The first case involved a complaint made to Equal Opportunity Tasmania under s 17 of the *Anti-Discrimination Act 1998* (Tas) (Tas ADA) against the Catholic Archbishop of Hobart, the Most Reverend Julian Porteous. The complaint related to a pamphlet published by the Australian Catholic Bishops Conference in 2015 titled 'Don't mess with marriage'. The second case involved a complaint to the then Queensland Anti-Discrimination Commission about an email sent by the Chief Executive of the Baptist Union of Queensland's care organisation 'Carinity' in 2017 during the Australian Marriage Law Postal Survey, in which he encouraged staff to vote 'no'.<sup>25</sup>
82. Both cases were ultimately withdrawn or discontinued.<sup>26</sup> There were no findings in either case that the conduct complained of was, in fact, contrary to any discrimination law. Moreover, the then Attorney-General said: 'the view of the Government – and I think legally, the correct view – is that they were both unmeritorious, probably invalid complaints'.<sup>27</sup> In relation to the second case, the Queensland Industrial Relations Commission found in a related proceeding that there was 'nothing discriminatory' in relation to the email sent by the CEO of Carinity.<sup>28</sup>
83. No legislative amendment is required to provide a defence to a discrimination claim that that is invalid or unmeritorious. Provisions already exist at both the Commonwealth level and the State and Territory level to deal with such complaints.
84. At the Commonwealth level, the *Australian Human Rights Commission Act 1986* (Cth) was amended in 2017, at the request of the Commission, to increase the threshold for the making of a valid complaint.<sup>29</sup> These changes have made it easier for the Commission to terminate invalid or unmeritorious complaints early in the complaint handling process.
85. The then Attorney-General recognised the effectiveness of these changes, including on unmeritorious complaints about religious statements. He observed:

At the Commonwealth level great effort has been made to eliminate and discourage unmeritorious complaints, and if the relevant State based processes had been similarly and appropriately stringent it would be [un]likely that this provision of the Commonwealth Bill [now clause 12] would have much, if any, work to do.<sup>30</sup>

86. It is an inherent aspect of any complaint-handling process that, from time to time, unmeritorious complaints will be made. Clause 12 of the Bill will not prevent unmeritorious complaints from being made. The only real concern raised by the then Attorney-General was whether the relevant discrimination bodies had sufficient powers to promptly identify and terminate unmeritorious complaints. The Commission considers that, rather than introducing legislation that is unsuited to this concern, it would be more productive to engage with relevant States and Territories to discuss whether their discrimination bodies have the powers that they need to deal appropriately with such complaints. This is the subject of recommendation 2 below.
87. When considering these complaints, the Commission recognises that the concern is not solely confined to the substantive legal outcome. There is also a broader risk of individuals limiting their own speech in an effort to avoid the risk of a complaint *potentially* being made. This can create a chilling effect on public debate and discussion.
88. Finally, dealing with the substance of the two examples described above, the Commission notes that the ALRC has been asked to consider whether any laws in Australia prevent a person from expressing a view of marriage as being between a man and a woman.<sup>31</sup> Clause 12 of the Bill appears to pre-empt the outcome of the review. The ALRC is now due to report 12 months from the date this Bill is passed.

(c) *Tasmanian legislation*

89. In addition to providing a general defence to all Australian discrimination laws, clause 12(1)(b) of the Bill provides a specific defence to s 17(1) of the Tas ADA. The Explanatory Memorandum claims that this section has a 'demonstrated ability to affect freedom of religious expression'.<sup>32</sup> This appears to be a reference to the complaint made against Archbishop Porteous, referred to above.
90. Section 17(1) of the Tas ADA provides:

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute [protected by the Tas ADA] in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.



91. As noted above, no findings were made in this case that the conduct complained of was in fact contrary to s 17(1). The Commission does not make any comment about either the facts of that case, or the relative merits of s 17(1) itself. The Commission's comments are limited to the legislative scheme from the perspective of its potential application to advocacy in good faith of a religious point of view on a matter of public policy.
92. Section 17(1) of the Tas ADA, in broad terms, provides that it is unlawful to vilify a person on the basis of a protected attribute. The Supreme Court of Tasmania has held that the threshold for making out a complaint against s 17(1) of the Tas ADA is 'more restricted than the literal meaning of the words would suggest'.<sup>33</sup> It said that s 17(1) of the Tas ADA should be interpreted in a way that is similar to the prohibition on offensive behaviour based on racial hatred in Part IIA of the RDA. That is, it should be limited to conduct that causes 'profound and serious effects, not to be likened to mere slights'.<sup>34</sup>
93. The Explanatory Memorandum for the Bill makes clear that clause 12 is not intended to protect statements of belief that would contravene the prohibition on offensive behaviour based on racial hatred in Part IIA of the RDA.<sup>35</sup>
94. Further, there are already existing free speech protections in the Tas ADA. Section 55(c)(ii) provides that s 17(1) does not apply if the person's conduct is a public act, done in good faith, for any purpose in the public interest. This protection for free speech has been interpreted broadly by the Supreme Court.<sup>36</sup> It seems clear that good faith advocacy of a religious point of view on a matter of public policy would satisfy this test.
95. Finally, it is worth noting the threshold for Equal Opportunity Tasmania to reject a complaint without conducting any investigation. The Commissioner may reject a complaint at the outset if it is trivial, vexatious, misconceived or lacking in substance.<sup>37</sup> The fact that a free speech defence such as s 55(c)(ii) of the Tas ADA (or, indeed, clause 12 of the Bill) may apply is unlikely to be a sufficient basis to reject a complaint without conducting an inquiry. Instead, it is likely that the Commissioner would 'accept' the complaint and seek a response from the respondent which may include asking questions to determine whether the conduct complained of was carried out in good faith.

96. This is what the Tasmanian Anti-Discrimination Commissioner said that she did in relation to the complaint against Archbishop Porteous. In evidence to this Committee in a previous inquiry, the Commissioner said:

[A]ll I did in accepting the complaint for our process was to say, on the face of it, it discloses a possibility; there is a possible defence available and I named that up very clearly to the parties. But I am not empowered to determine that defence, because it requires findings of fact that I am not empowered to make, so that is a matter for the tribunal.

That said, I offered them the opportunity to have a conciliation, and there were certainly some very encouraging and fulsome discussions about the words that were of concern to Ms Delaney, why she had those concerns and why the church had expressed things in the way it had. So, I think it did give people an opportunity to perhaps hear each other's perspectives in ways that they would not have otherwise. It creates a space for people to come together.<sup>38</sup>

97. The complaint against the Archbishop was ultimately withdrawn. The matter was not referred to the Anti-Discrimination Tribunal and no findings of breach were made. While the Commission acknowledges the potential for cases of this nature to have a possible chilling effect on the free expression of views, particularly in the absence of a finding by a Tribunal, if a good faith statement of religious belief would not actually breach s 17(1) of the Tas ADA then the additional protection *claimed* to be provided by clause 12 of the Bill is more illusory than substantive.

### **5.3 Adverse consequences from discriminatory statements of belief**

98. Statements may constitute discrimination if they amount to less favourable treatment on the ground of an attribute protected by discrimination law. For example, statements, regardless of whether there was any other accompanying conduct, can amount to racial discrimination<sup>39</sup> or sex discrimination.<sup>40</sup>
99. The Commission will also accept complaints based on statements in other areas including disability discrimination. For example, in a recent complaint a disability support worker went to a shop that one of her clients, who has a cognitive disability, had been asked to leave and she spoke with the owner. She said that the shop owner said to her:

- ‘He should not be allowed in public by himself.’
- ‘14 year olds [we hire] are unable to deal with disabled people.’

She also alleged that the shop owner said to her that in asking her client to leave the shop he had been ‘clearing some animals from the zoo’. The disability support worker made a complaint on behalf of her client. The statements allegedly made by the shop owner would be sufficient to ground a complaint to the Commission independently of any exclusionary conduct by the shop owner.

100. If a person wants to make a claim of discrimination under federal discrimination law they must make a complaint to the Commission. The Commission’s role is to inquire into and attempt to conciliate such complaints.<sup>41</sup>
101. The Commission regularly receives complaints about oral or written statements which could amount to unlawful discrimination. When the Commission prepared its submission on the second exposure draft of the Bill, it reviewed summaries of complaints that it received in the three months from 1 August 2019 to 31 October 2019. Over this three-month period, it received 558 complaints of discrimination. For the purposes of this analysis, complaints of racial hatred and sexual harassment were excluded. At least 35 of these complaints (6.2%) included at least one claim of discrimination based on an allegedly discriminatory statement.
102. The Commission repeated this analysis for the purposes of the present submission. In this case, the Commission reviewed summaries of complaints that it received in the three months from 1 September 2021 to 30 November 2021. In the last two years, complaints to the Commission have significantly increased and for this three month period there were almost twice as many discrimination complaints as the period previously examined. Over this three-month period, the Commission received 1,006 complaints of discrimination, excluding complaints of racial hatred and sexual harassment. At least 79 of these complaints (8%) included at least one claim of discrimination based on an allegedly discriminatory statement. Most of these occurred in the area of employment.
103. During each period, complaints about discriminatory statements were received under each of the four federal discrimination Acts (RDA, SDA, DDA and ADA).

104. In a number of cases, the alleged statements were of a nature that could be covered by clause 12 of the Bill. That is, the alleged statement was of a kind that arguably could be consistent with a 'statement of belief'.
105. Examples of complaints from 2019 and 2021 are set out below.

(a) *Complaints to the Commission in 2019*

106. A woman who had recently become pregnant told the Commission that when she advised her employer of her pregnancy her employer said: 'There is no room in [this] business for someone who is going to be a single mother'. Such a statement could amount to direct discrimination on the grounds of sex, marital status or pregnancy.<sup>42</sup> In some religions, having a child out of wedlock is considered to be sinful. If the Bill was passed with clause 12 in its proposed form, this statement may be protected from amounting to discrimination if it was a statement of belief (although any related conduct, such as firing the woman if she ultimately had a child out of wedlock would not be protected).
107. Other, more extreme, statements may not be protected by clause 12. For example, a second woman complained to the Commission about treatment by her boss after she disclosed her pregnancy. She claimed that her boss said to her: 'You fat old cow ... you are a worthless piece of s\*\*\* – all you'll ever be good at doing is getting f\*\*\*ed up'. This statement uses more derogatory language and, assuming it was made in those terms, the woman's boss may find it more difficult to characterise it as a statement of belief. Arguably, even if this was a statement of belief, it may be excluded from clause 12 on the ground that it was malicious. However, the comparison of these two cases highlights the scope for discriminatory statements that may currently be unlawful to be insulated by clause 12.
108. Another woman complained to the Commission that while she was at work her manager said to her: 'Women's best contribution to society is to have a baby. That being said, you're too old to have one'. She complained that this amounted to discrimination on the basis of her sex and her age.<sup>43</sup> It is conceivable that the alleged statement by her manager may be based on a genuinely held religious belief.
109. A fourth woman complained to the Commission that while she was at work her boss told her to: 'Behave like a female and do as you're told'.

She complained that this amounted to discrimination on the basis of her sex.<sup>44</sup> In parts of some religions, women are considered to have lower status than men and are expected to be subservient to men in a range of activities.

(b) *Complaints to the Commission in 2021*

110. A gay male complainant undertook voluntary administrative work for a church and leased accommodation from the church. He alleged that his boss, a church officer, treated him unfairly because of his sexual orientation by making derogatory remarks such as:

- ‘Homosexuals are not welcome.’
- ‘I am sick of LGBT this and that.’
- ‘When you refer to your husband, it’s wrong. I want you to say “partner”.’

Given the relationship between the two people, such statements could amount to direct discrimination in employment or the provision of accommodation, on the ground of the complainant’s sexual orientation.<sup>45</sup> At the same time, these statements may well be made ‘conscientiously’ in the sense that they reflect the speaker’s genuine animosity towards gay people. They also appear to reflect a ‘traditional’ view of marriage that may well be motivated by religious beliefs. If a ‘statement of belief’ defence had been available, it seems likely that it would be relied on in a circumstance like this.

111. In a second case, a gay man alleged that his colleagues made a number of comments about his sexual orientation including:

- ‘HIV comes from gay people. All gay men have AIDS.’
- ‘They should burn in fire, they are all sick.’

It is possible that the man’s employer could be vicariously liable for this conduct, if the employer had not taken all reasonable steps to prevent it, and that it could amount to less favourable treatment in employment on the basis of sexual orientation.<sup>46</sup> The reference to ‘burn[ing] in fire’ has religious overtones. It is possible that if statements of this nature were made, and a ‘statement of belief’ defence were available, it would be relied on.

112. A male complainant who identifies as homosexual and is married to his male partner alleges that a Board member asked him: ‘How do you

work with poofers on your team? I will need to ask my poofter mates how to work with them'. While this statement uses a well-known slur against homosexual men, it is not inconceivable that the maker of the statement may seek to argue that it was not malicious and did not meet the high threshold of conduct that threatens, intimidates or harasses, or would incite a bystander to hatred or violence. There is nothing on the face of the statement that suggests that it reflects a religious belief. However, if the defence were available, a respondent in a case like this may well say that such a statement is one that he 'genuinely considers to be in accordance with' the teachings of a religion that expresses animosity towards LGBTI people.

113. If the Bill was passed with clause 12 in its proposed form, the kinds of statements identified above may be protected from amounting to discrimination. In those circumstances, the complainants may lose the benefit of conciliation before the Commission in order to seek a resolution to their grievances.
114. These case studies are just a handful of complaints from two recent three-month periods examined by the Commission. They are not unusual and they indicate the real impact that clause 12 is likely to have on the ability of people who claim that they have been discriminated against to obtain a remedy.
115. Clause 12 does not apply to all statements of belief, excluding (for example) malicious statements, harassment or vilification, and statements encouraging the commission of a serious criminal offence. The defence is also limited to statements and does not operate to exempt associated conduct that may constitute discrimination.<sup>47</sup> While these limitations on the operation of clause 12 are significant, the above analysis of complaints received by the Commission highlights the potential impact that clause 12 may have on existing rights under anti-discrimination laws.

## **5.4 Increased cost and complexity in State matters**

116. 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 increased time, cost and complexity where this Commonwealth defence is relied on in matters brought in State and Territory tribunals.

117. Most first instance discrimination proceedings are brought in State and Territory tribunals. Many complainants prefer to use these tribunals, rather than federal courts, because the usual rule in the tribunals is that each side is responsible for their own legal costs. An unsuccessful party is usually not liable to pay the legal costs of the other side.
118. However, these State and Territory tribunals are not courts within the meaning of Ch III of the Australian Constitution and are not vested with Commonwealth judicial power. If an employee brings a discrimination claim under State law in one of these tribunals, and the employer relies the proposed Commonwealth defence in clause 12 on the basis that the conduct was a 'statement of belief', the Tribunal will not have jurisdiction to hear the claim.<sup>48</sup>
119. Most State and Territory jurisdictions now have legislation that allows such cases to be transferred to a court for determination if a federal defence is raised.<sup>49</sup> However, it does not appear that the coverage is universal.<sup>50</sup>
120. If a case can be validly transferred to a court, this would involve not only the additional time and cost of multiple proceedings, but would also expose the complainant to paying the costs of the respondent in the court proceedings if they were unsuccessful. This would deprive a complainant of one of the advantages of pursuing a State claim and would have the tendency to reduce access to justice.
121. If the case cannot be validly transferred to a court, the complainant may lose the right to have their complaint heard at all.<sup>51</sup> 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.<sup>52</sup> 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.

## **5.5 Inconsistent with objects of the Bill**

122. Finally, proposed clause 12 is inconsistent with the objects of the Bill in clause 3(2) and the amendments to be made to other federal discrimination laws.
123. The proposed HRLA Bill will amend the objects of each federal discrimination Act to reflect the 'indivisibility and universality of human

rights, and their equal status in international law'.<sup>53</sup> However, clause 12 stands in direct conflict with these principles by favouring one human right at the expense of others. In particular, it involves preferencing the manifestation of religion over the right to be protected from discrimination.

124. This is also inconsistent with how Article 19 of the ICCPR generally anticipates that conflicts will be reconciled between the right to manifest religion and laws that are necessary for the protection of the community more generally. While the right to religious belief is absolute, the right to manifest religious belief may be subject to restrictions that are necessary in order to respect of the fundamental rights and freedoms of others. Here, instead, longstanding existing rights that are necessary to protect the dignity of people in the community are being expressly overridden to expand the scope for the manifestation of religion.
125. In addition, clause 12 elevates one form of speech above others. Being able to freely express religious beliefs in public is an important aspect of manifesting belief. But providing a specific protection for statements of belief, in the absence of broader free speech guarantees, sits uneasily with the objects of the Bill outlined in clause 3(2) and provides religious speech with a measure of protection that is not available more generally.

#### **Recommendation 1**

The Commission recommends that clause 12, dealing with discriminatory statements of belief, be removed from the Bill.

#### **Recommendation 2**

The Commission recommends that the Attorney-General's Department engage with equivalent departments at the State and Territory level to determine whether State and Territory anti-discrimination Commissions have sufficient powers to promptly identify and terminate unmeritorious complaints.

## **6 Corporations alleging discrimination**

126. 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.

127. The way a cause of action for a corporation arises under the Bill is by allowing bodies corporate who have an 'association' with a person who holds a religious belief or engages in a religious activity to also make a claim of discrimination. The Bill provides that a body corporate will have an association with an individual if a reasonable person would closely associate the body corporate with that individual.<sup>54</sup>
128. The Commission supports the inclusion of a clause that allows discrimination complaints to be made by individuals who are associates of a person with a religious belief or associates of a person who engages in religious activity. For example, an individual should be entitled to make a complaint if they have been discriminated against because of the religious belief or activity of their spouse. However, the Commission does not support the extension of this principle to allow a corporation to make a claim of religious discrimination because of its association with an individual, whether that is the CEO, a director, shareholder, employee or customer.
129. 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.
130. 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'<sup>55</sup> 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.
131. At the federal level there are two statutes that provide protection for 'associates' of a person with a protected characteristic.
132. The RDA provides protection for associates in ss 5 (immigrants), 11 (access to premises), 12 (land, housing, accommodation), 13 (goods and services) and 15 (employment). The RDA does not provide a definition of 'associate'.

133. The provisions of the DDA are generally extended to associates by virtue of s 7. 'Associate' is defined in s 4 in a non-exhaustive way, but in a way that suggests that it is intended only to apply to individuals:
- associate**, in relation to a person, includes:
- (a) a spouse of the person; and
  - (b) another person who is living with the person on a genuine domestic basis; and
  - (c) a relative of the person; and
  - (d) a carer of the person; and
  - (e) another person who is in a business, sporting or recreational relationship with the person.
134. More generally, in the four Commonwealth discrimination laws, the term 'person' is used when speaking about both someone engaging in discriminatory conduct and someone who is discriminated against. However, it is clear from the context of those other laws that the person discriminated against can be only a natural person. In part, this is clear from the prohibited grounds of discrimination. A natural person can have a race, a sex, a sexual orientation, a gender identity, an intersex status, a marital or relationship status, or a disability. A natural person can be pregnant or breastfeeding. A corporation can have none of these characteristics.
135. The focus on individuals is clear from the constitutional basis for Commonwealth discrimination laws. The primary constitutional source is the external affairs power in s 51(xxix) of the Constitution, because the laws seek to enact into domestic law some of Australia's international obligations agreed through the ratification of human rights treaties.<sup>56</sup> The same is true of the present Bill.<sup>57</sup> Those human rights treaties, in turn, relate to the rights of natural persons within the territory or jurisdiction of Australia.<sup>58</sup>
136. Further, where the corporations power in s 51(xx) of the Constitution is relied on for validity in other Commonwealth discrimination laws, this is limited to ensuring that the relevant provisions apply to discrimination by a corporation, or by a person employed by a corporation.<sup>59</sup> The same is true of the present Bill, although it also extends the operation of the Bill so that its provisions are valid to the extent that they relate to discrimination by or against a person employed by a corporation.<sup>60</sup>

137. The clear policy intention in other Commonwealth discrimination laws is to rely on the corporations power only to permit claims to be made *against* corporations and not *by* them. The Commission considers that the same policy should govern complaints made by associates in this Bill.
138. The Explanatory Memorandum says that in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ‘the High Court found that an associate clause in section 12 of the [RDA] did extend to bodies corporate’.<sup>61</sup> However, the case is more complicated than this statement suggests. The quoted passage in the Explanatory Memorandum comes from the judgment of Gibbs CJ, with whom Aickin and Wilson JJ agreed.<sup>62</sup> Their Honours were in dissent as to the result: each of them would have held that ss 9 and 12 of the RDA were invalid, on the basis that they were not supported by a constitutional head of power. They all also considered that a corporation could *directly* claim under the RDA because all corporations have a ‘national origin’.<sup>63</sup> The Commission is not aware of any subsequent case in which this view has been put. Of the Justices who were in the majority in the result, each of Stephen, Murphy and Brennan JJ considered that Mr Koowarta had standing himself under s 12 of the RDA, without any need to consider his relationship with the Aboriginal Land Fund Commission.<sup>64</sup> As Stephen J said:

Mr Koowarta contends that the refusal of the Queensland Minister for Lands to approve of the transfer of the Crown leasehold, which he and other members of his group of Aboriginal people proposed to use for grazing and other purposes, makes him a person aggrieved. ... While it is not certain that when he refused approval of the transfer the Minister knew of the existence of Mr Koowarta, he clearly knew that the property was to be occupied by Aborigines. That was the very ground for his refusal. ... It is not, I think, to the point that, as a matter of form, what the Minister withheld was approval of a transfer to the Aboriginal Land Fund Commission. The Minister’s reasons for refusal disclose that he regarded approval as involving use of the property by Aborigines and refusal of approval as preventing that use.

Of the majority Justices, only Mason J considered that s 12 extended to corporations.<sup>65</sup> The Commission therefore considers that this case does not provide a strong basis for the inclusion of explicit rights in the Bill for corporations to sue for discrimination.

### **Recommendation 3**

The Commission recommends that clause 16 of the Bill, dealing with associates, be amended to make clear that a complaint of discrimination may only be made by a natural person and not by a corporation.

## **7 Exemptions for religious bodies**

139. The aim of the Bill is to introduce, for the first time, comprehensive protections against religious discrimination in core areas of public life. In that context, it is important to closely scrutinise what kinds of discrimination are included and what kinds of discrimination are excluded.
140. Part 2 of the Bill is titled 'Conduct etc. that is not discrimination' and, in broad terms, provides for exemptions for religious bodies to engage in certain kinds of discrimination on religious grounds.
141. It is important to acknowledge that religious institutions, religious charities and other religious organisations have a significant role in public life in Australia. They run schools, hospitals, welfare organisations and employment agencies. They employ a very large number of people. Many receive a significant amount of public funding to support them in carrying out their activities. The extent to which such organisations are permitted to engage in discriminatory conduct based on the religious belief or activity of individuals, that would otherwise be prohibited by other parts of the Bill, will have an impact on the lives of many Australians.
142. The Commission's view is that if religious bodies are participating in areas of public life where religious discrimination is to be prohibited, they should generally be held to the same standard as everyone else.
143. This would be consistent with the primary object of the Bill, namely, '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' (emphasis added).<sup>66</sup>
144. In the context of a Bill that is seeking to eliminate religious discrimination, it is reasonable to expect as a starting point that everyone should have the same opportunity to apply for and retain a job, to be accepted into and retain a place at a school, and to obtain

goods and services, including where the employers, educators and providers of goods and services are religious bodies.

145. If exemptions are to be granted to permit religious discrimination, they must be necessary to achieve a legitimate purpose and limited to what is reasonable and proportionate to achieve that purpose.

## **7.1 Scope of permissible religious discrimination**

146. There are undoubtedly intrinsic aspects of religious practice that involve discrimination against people who are not adherents of the relevant faith. The Explanatory Memorandum gives the examples of religious tests for the ordination of priests, a church requiring anyone taking communion to be Christian, or of a place of worship permitting entrance only to people who are adherents of that faith.<sup>67</sup>
147. 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, particularly in areas relating to worship, observance, practice and religious teaching.
148. However, 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>68</sup>
149. The key question is to identify where it is appropriate to draw the line. Should religious groups be permitted to discriminate on the basis of religious belief or activity in all areas of public life, provided that an ordinary member of that faith could reasonably consider such discrimination to be in accordance with the teachings of that religion? Or can more targeted exemptions be identified?
150. Over the three versions of the Bill to date, the definition of 'religious bodies' that are permitted to engage in religious discrimination has consistently expanded. In the current Bill, a religious body is one of the following kinds of bodies established in accordance with the doctrines, tenets, beliefs or teachings of a particular religion:
  - an educational institution

- a registered charity (whether or not it is engaged in commercial activities)
  - any other kind of body (other than a body that engages solely or primarily in commercial activities).<sup>69</sup>
151. Special rules that provide a more limited scope to engage in religious discrimination apply to religious educational institutions, hospitals, aged care facilities, accommodation providers, disability service providers and operators of camps or conference sites that provide accommodation. These particular rules are discussed in section 7.3 below. Importantly, religious hospitals, aged care facilities and bodies that ‘solely or primarily’ provide accommodation or disability services will not be able to discriminate in the provision of their services to clients.<sup>70</sup> However, they would be able to discriminate generally in the hiring of staff, regardless of whether religious belief or activity was an inherent requirement of the role, if this was in accordance with a publicly available policy.<sup>71</sup>
152. The Commission recommends that the Bill be amended to:
- (a) limit the definition of ‘religious body’ to ‘bodies established for religious purposes’
  - (b) provide that the general exemption from discrimination for religious bodies does not apply to conduct connected with commercial activities.
153. This would mean that a general exemption would be available for bodies that are necessary for the practice of religion, in a way that was targeted to their religious activities but not their commercial activities.
154. Under the test proposed by the Commission, bodies with a religious ethos that were also engaged in commercial activities including the provision of education, health care, aged care, disability services or accommodation would not have a general licence to discriminate on religious grounds in either employment or in the provision of their services. However:
- under clause 10 of the Bill they would have the ability to engage in differential conduct that was intended to meet the particular religious needs of their clients or to reduce disadvantage experienced by them on the basis of their religious belief or activity

- under clause 39 of the Bill they would have the ability to employ people of a particular faith if being of that faith was an inherent requirement of the relevant job
  - in the case of religious educational institutions (discussed below in section 7.3(a)), pending a review of religious exemptions to discrimination law by the ALRC, they would have the ability to preference staff or students on the basis of religious belief or activity provided this was in accordance with a public policy, but would not have a more general ability to engage in adverse conduct against existing staff or students on the basis of religious belief or activity.
155. The provision for ‘positive discrimination’ under the terms of clause 10 of the Bill allows religious service providers to meet the legitimate needs of members of their respective religious groups. This important, targeted provision that is focused on the needs of individuals should be carefully considered when assessing whether the current breadth of clause 7 is necessary.

(a) *Positive discrimination*

156. Clause 10 describes conduct that does not amount to religious discrimination for the purpose of the Bill. It provides that it is not discriminatory to engage in reasonable conduct, consistent with the purposes of the Bill, that is either:
- intended to meet a need arising out of a religious belief or activity of a person or group, or
  - intended to reduce a disadvantage experienced by a person or group on the basis of their religious beliefs or activities.
157. 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.

158. Equivalent provisions are contained in each of the other federal discrimination Acts, described variously as ‘special measures’ or ‘positive discrimination’.<sup>72</sup> They indicate that differential treatment (here, on the basis of religious belief or activity) is permissible, provided that it is directed towards the achievement of substantive equality in the enjoyment of human rights.
159. The Explanatory Memorandum identifies examples of differential conduct that is intended to meet a need arising out of a religious belief. This includes humanitarian programs that provide assistance to religious groups who have faced persecution. In the workplace, it may involve flexible work arrangements to take into account prayer times or religious holidays, or the provision of a dedicated prayer room.<sup>73</sup>
160. The Bill itself provides an example of differential conduct intended to meet religious needs. The note under clause 10 says that a residential aged care facility, retirement village or hospital does not engage in discrimination by providing services to meet the needs of minority religious groups, including dietary, cultural or religious needs. In the case of a Jewish hospital or aged care facility, it would not amount to discrimination to provide kosher food, or prayer facilities to Jewish patients and clients, or to observe Jewish holidays.
161. Similarly, programs that are designed to reduce disadvantage may include measures to alleviate unequal access to opportunities for a particular religious group who may be underrepresented in certain professions.<sup>74</sup>
162. A key aspect of the protection of positive discrimination in clause 10, which distinguishes it from the ability of religious bodies to engage in certain kinds of discrimination in clause 7, is that clause 10 is focused on individuals: meeting their needs and reducing disadvantage they face. By contrast, clause 7 is focused on institutions and provides them exemption from significant parts of the Bill, and in some cases (particularly registered charities that do not fit into one of the categories in clause 8) from the whole of the Bill. Granting such broad exemptions from the protections against discrimination that the Bill establishes has the potential to impact adversely on individuals.
163. Especially in light of clause 10, the Commission considers that clause 7 as currently drafted would limit human rights more than is necessary to achieve a legitimate purpose. The breadth of operation of clause 7 is highlighted by the inclusion of all religious registered charities in the



definition of 'religious bodies' and providing them with a general exemption, regardless of whether or not they are engaging in commercial activities.

(b) *Registered charities*

164. A 'registered charity' is an entity registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). Certain benefits flow from registration, including taxation concessions.
165. The Bill provides that all registered charities that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion would be permitted to engage in discrimination on the ground of religious belief or activity in all areas of public life covered by the Bill. For example, they would be allowed to discriminate in the provision of their services to people in need on the basis of the religious belief of those persons.
166. As noted above, some recipients of services are protected from discrimination. Religious hospitals and aged care facilities will not be able to discriminate in relation to the provision of their services. Neither will some religious accommodation and disability service providers (but only if they 'solely or primarily' provide accommodation or disability services). Recipients of other charitable services will not have the benefit of protection.
167. It is not clear whether particular charities have asked for this ability. The St Vincent de Paul Society, for example, made clear on a number of occasions that it had no intention of discriminating on the basis of religion when it came to engaging employees and volunteers in its shops or in its State and national secretariats.<sup>75</sup> The Society did identify some roles 'which have particular responsibility for overseeing our mission and Catholic ethos' which were usually filled by Catholics.<sup>76</sup> As noted above, the Bill already provides in clause 39 that if religious belief is an inherent requirement of a particular role, those roles may be filled by people of that faith.
168. Some charities will have a particular religious focus in relation to the provision of their services. As noted above, the provision of services to meet a need arising out of a religious belief, or to reduce a disadvantage experienced by a person or group on the basis of their religious beliefs or activities will be protected by clause 10 of the Bill.

169. The Commission considers that insufficient justification has been made for registered charities as a class to be granted a general exemption from all aspects of the Bill.

#### **Recommendation 4**

The Commission recommends that the Bill be amended to:

- (a) limit the definition of 'religious body' to 'bodies established for religious purposes'
- (b) provide that the general exemption from discrimination for religious bodies in clause 7 does not apply to conduct connected with commercial activities.

## **7.2 Test for exemption for religious bodies**

170. Religious bodies would be exempt from the prohibition against religious discrimination provided that their conduct is in good faith and either:
- (a) a person of the same religion as the religious body could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
  - (b) the religious body engages in the conduct in order to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.<sup>77</sup>
171. The first test in (a) above is intended to be an 'objective reasonableness test', from the perspective of a person who is part of the relevant religion.<sup>78</sup> The test would not be satisfied by a particular person from the same religion giving evidence of whether they in fact consider that the conduct is in accordance with the teachings of the religion in question.
172. Rather, it will involve the court considering the question from the point of view of a hypothetical reasonable member of the religion in question.<sup>79</sup> The ultimate decision is still one made by the Court, albeit from the perspective of a member of the relevant religion. The Court will ask whether such a hypothetical reasonable person could reasonably consider the conduct to be in accordance with the teachings, etc of the religion.<sup>80</sup>

173. The alternative test in (b) above picks up some of the language in ss 37 and 38 of the SDA and ss 153(2) and 195(2) of the *Fair Work Act 2009* (Cth) (Fair Work Act), and is similar to the language in s 35 of the ADA.
174. One difference is that under the Fair Work Act a respondent needs to show that it was acting in accordance with religious teachings *and* in order to avoid injury to religious susceptibilities, in order to qualify for an exemption. In s 37(1)(d) of the SDA, s 35 of the ADA and clause 7(2) and (4) of the Bill, these are alternatives.
175. A second difference is that in s 37(1)(d) of the SDA and in s 35 of the ADA, which are the provisions that apply to the broadest range of conduct, the conduct must be *necessary* to avoid injury to the religious susceptibilities of adherents of the religion for the exemption to apply. Section 38 of the SDA and the Fair Work Act provisions do not include the requirement of necessity, but are confined to a much narrower range of conduct (eg discrimination by educational institutions, in a modern award or in an enterprise agreement) and, as noted above, in the case of the Fair Work Act there is an additional requirement that the conduct must be in accordance with religious teachings.
176. This means that the exemption proposed in clause 7(4) of the Bill is broader than any other existing religious exemption in federal discrimination law.
177. The exemption in clause 7(4), for conduct aimed at avoiding injury to religious susceptibilities, applies in relation to all conduct engaged in by religious bodies. In order to be consistent with the way in which this test has been used in other Commonwealth legislation, the Commission recommends that the exemption be limited to conduct that is 'necessary' to avoid injury to religious susceptibilities. An equivalent change should be made to this test in clauses 9(5)(c) and 40(5)(b) if, contrary to the Commission's recommendations below, these clauses are retained in the Bill.

### **Recommendation 5**

The Commission recommends that clauses 7(4), 9(5)(c) and 40(5)(b) be amended to limit the application of the relevant exemptions to conduct that is 'necessary' to avoid injury to the religious susceptibilities of adherents of the relevant religion.

### **7.3 Special exemptions for particular religious organisations**

178. The Bill provides special exemptions to a range of organisations, namely, religious educational institutions, hospitals, aged care facilities, accommodation providers, camps and conference sites. Each of these groups is considered in more detail below.

#### *(a) Religious educational institutions*

179. Religious educational institutions would be provided with a broad exemption from the whole of the Bill for conduct that is in accordance with the test in clause 7 (see paragraph [170] above). Significantly, this would permit discrimination on the basis of religious belief or activity in decisions about the employment or dismissal of staff, and in decisions about the admission or expulsion of students.

180. The formal definition of 'educational institution' is in the same terms as the exemption in s 38 of the SDA. Both cover schools, colleges, universities and other institutions in which education or training is provided. In the case of schools, the scope of the proposed exemption is broad. Approximately 30 per cent of schools in Australia are faith-based schools.<sup>81</sup> In some remote areas, a faith-based school is the only one available.<sup>82</sup>

181. A note in the Bill says that this definition will extend to child care centres and early learning centres at which education or training is provided. It is not clear whether these centres are the kinds of bodies contemplated by the reference to 'other institutions' in the SDA. If child care centres and early learning centres are included in the scope of the exemption, this is likely to raise different considerations when examining the range of permissible discrimination on the basis of the religious belief or activity of students. Presumably in those circumstances any issues are likely to relate to discrimination on the basis of the religious belief or activity of the child's parents.<sup>83</sup>

182. Article 18(4) of the ICCPR and article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) both provide that States must respect the liberty of parents or guardians 'to ensure the religious and moral education of their children in conformity with their own convictions'. The Committee on Economic Social and Cultural Rights has said that article 13(3) of ICESCR has two elements. First, public education that includes instruction in a particular belief or religion

must ensure non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.<sup>84</sup> The Special Rapporteur on freedom of religion has expanded on this point, saying:

A minimum requirement would be that members of minorities have the possibility of “opting out” of a religious instruction that goes against their own convictions. Such exemptions should also be available for persons adhering to the very same faith on which instruction is given, whenever they feel that their personal convictions – including maybe dissenting convictions – are not respected.<sup>85</sup>

183. Secondly, parents and guardians should have the freedom to choose to enrol their children in private schools, including schools established on religious grounds, provided that the schools conform to minimum educational standards established by the State.<sup>86</sup> In relation to this element, the Special Rapporteur on freedom of religion has said:

[P]rivate schools, depending on their particular rationale and curriculum, might accommodate the more specific educational interests or needs of parents and children, including in questions of religion or belief. Indeed, many private schools have a specific denominational profile which can make them particularly attractive to adherents of the respective denomination, but frequently also for parents and children of other religious or belief orientation. In this sense, private schools constitute a part of the institutionalized diversity within a modern pluralistic society.<sup>87</sup>

#### Employment and dismissal of staff

184. In the case of employment decisions, the Bill provides that any religious discrimination would need to be in accordance with a publicly available policy.<sup>88</sup> The Bill does not say what needs to be in the policy. This is left to regulations to be made by the Minister.<sup>89</sup>
185. Significantly, permitted staffing decisions are not limited to preferencing the employment of staff of the same religion as the educational institution. It would also be permissible for an educational institution to dismiss an existing staff member based on their religious beliefs. The Explanatory Memorandum gives the following example:

Ali is a mathematics teacher at an Islamic school. Ali was previously Muslim, but has recently converted to Hinduism. The school considers it to be important for the school community that all teachers conform to the beliefs of Islam and do not conform to other religious beliefs. This view is set out in a publicly available policy, which is available on the school’s website and was provided to Ali when he was employed by the school. In light of this, the school terminates Ali’s employment on the basis of his

religious beliefs and activities. Subclauses 7(2) and (4) means that the school's conduct would not be unlawful if the actions conform to the doctrines, tenets, beliefs or teaching of Islam, or was done to avoid injury to the religious susceptibilities of Muslim people.<sup>90</sup>

186. In the example, the school's policy was published prior to the commencement of Ali's employment, but there is no requirement in the Bill for this to have been the case. What is more concerning is the prospect of a teacher losing their employment, not on the basis of any observable conduct, but on the basis of what they think or believe. This is the essence of religious discrimination. While the *manifestation* of religion is something that can be limited in certain circumstances, where this is necessary to protect the fundamental rights and freedoms of others, the right to hold a religion or belief is absolute. Article 18(2) of the ICCPR provides that no one shall be subject to coercion which would impair their freedom to have or adopt a religion or belief of their choice.
187. Even if the dismissal of Ali was based on some form of observable conduct that showed that he had converted, there are still real questions about whether it would be permissible under international law. Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to limitations that are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Ali, as a mathematics teacher, does not have a job that involves religious instruction of students. Any impact on the rights of others, for example on the morals of his students, from his continuing presence at the school would appear to be slight. The action taken by the school to terminate his employment does not appear to be sufficiently proportionate to the consequences of Ali's religious conduct on others to be permitted by a Bill directed at eliminating religious discrimination.
188. The Religious Freedom Review received many submissions dealing with employment in religious schools. It said that there was broad acceptance that schools should be free to select staff that adhere to and model their beliefs where the position involves the teaching of religion or responsibility for the overall culture of the school, for example, religious education teachers or principals. Submissions differed in their views about whether religious schools should be able to discriminate on the basis of religious belief or activity in the hiring of

staff not directly involved in the teaching or practices of religion, such as a mathematics teacher, office administrative staff with no face-to-face contact with students, or other support staff such as gardeners.<sup>91</sup>

189. Some religious schools emphasised the importance of being able to choose staff who would uphold the 'religious ethos' of a school. It appeared that this was a broader concept than merely being of the same religion. Instead, it incorporated modelling the religious and moral convictions of the school community and could be achieved by staff who were not of the same religion, provided that they did not take steps to undermine that religious ethos.<sup>92</sup>
190. As discussed below, the Commission's view is that the scope of all religious exemptions for educational institutions, including those proposed in this Bill, should be considered holistically by the ALRC as part of its existing reference. In the meantime, given that the Bill will be introducing prohibitions against discrimination on the basis of religious belief or activity, and given existing exemptions in State and Territory law (discussed below) it is reasonable for religious educational institutions to maintain the ability to preference staff based on their religious belief or activity provided this is done in accordance with a publicly available policy and is consistently applied. This would permit schools, through staff selection, to foster the ethos that they consider appropriate.
191. This is consistent with the approach taken by the Religious Freedom Review, which concluded that faith-based schools should have some discretion to positively select staff and contractors on the basis of religious belief, in order to foster the religious ethos of the school.<sup>93</sup>
192. However, the Commission does not consider that religious educational institutions should otherwise be permitted, through the general exemption in clause 7, to discriminate on the ground of religious belief or activity in employment in any of the other ways described in clause 19 of the Bill (including the terms and conditions of employment, decisions about the termination of employment, or subjecting teachers to any other detriment as a result of their religious beliefs or activities).
193. If there are genuine concerns raised by an educational institution about alleged moral failings of a teacher that result in the teacher engaging in misconduct, these should be able to be addressed directly, and not through the mechanism of discipline based on the teacher's religious belief or activity. For example, if a teacher has engaged in

conduct that is contrary to the school's Code of Conduct or the teacher's employment agreement, this could give rise to disciplinary action and, if the issues are serious and cannot be resolved, may form the basis of a termination decision. Codes of Conduct are often incorporated by reference into an Enterprise Agreement. In the case of an Enterprise Agreement registered under the *Fair Work Act 2009* (Cth), the terms of the agreement have statutory force and apply to all employees.<sup>94</sup>

#### Admission and expulsion of students

194. In the case of admission or expulsion of students on religious grounds, the Bill does not provide any requirement for a religious educational institution to have a published policy. Those decisions merely need to conform to the test in clause 7 (see paragraph [170] above).
195. The Explanatory Memorandum provides the following example of the kind of discrimination that would be prohibited by a secular educational institution:

Abbey recently graduated high school and hopes to become a mechanic. She is also Christian and wears rosary beads. Abbey applies to a training college for a position on its mechanic training program. During her interview with the admissions board, Abbey is asked inappropriate questions about her religious beliefs. She is then informed that she would not be a "good fit" for the program and her application is refused. In this example, Abbey could lodge a complaint under subclause 24(1) of the Bill on the basis that the training college has refused to admit her as a student (paragraph 24(1)(a)) on the ground of her religious beliefs or activities.<sup>95</sup>
196. However, as the Explanatory Memorandum also makes clear, the prohibition against discrimination in education 'is subject to clause 7, which provides that certain conduct engaged in by religious bodies, which includes religious educational institutions, does not constitute discrimination'.<sup>96</sup>
197. If the training college that Abbey was applying to was a religious educational institution, it appears that there would be no prohibition on the asking of questions about her religious beliefs or determining her "fit" for the course on the basis of her answers. Nor would a religiously based decision need to be justified based on a publicly available policy.
198. In the case of existing students, religious educational institutions are also provided with an exemption from clause 24(2) of the Bill (again,



provided that the test in clause 7 is satisfied). This could permit religious educational institutions to:

- deny a student access to a benefit
- expel a student, or
- subject the student to any other detriment,

on the ground of the student's religious belief or activity.

199. As discussed in paragraph [217] below, most State or Territory jurisdictions with prohibitions against religious discrimination do not permit this kind of discrimination against existing students by religious educational institutions. This illustrates the problems with such a broad general exemption for religious educational institutions envisaged by clause 7 of the Bill.
200. 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. A common phrase used by religious schools when describing the importance of maintaining the ethos of a school is that faith is 'caught not taught'.<sup>97</sup> Among other things, this phrase signifies that students acquire faith through the process of being in a supportive religious environment. What it also indicates is that students may not be religious when they first enrol, and that not all students will 'catch' the faith.
201. 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. Article 12(1) of the CRC provides that children have the right to express their own views in all matters affecting them, and that their views should be given due weight in accordance with their age and maturity. Article 14 of the CRC provides that States must respect the right of children to freedom of thought, conscience and religion. It also provides that States must respect the rights of parents to provide

direction to their children in the exercise of the child's right, in a manner consistent with the evolving capacities of the child. The Committee on the Rights of the Child has confirmed that:

[Article 14] highlights the right of the child to freedom of religion and recognizes the rights and duties of parents and guardians to provide direction to the child in a manner consistent with his or her evolving capacities ... . In other words, it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence. Freedom of religion should be respected in schools and other institutions, including with regard to choice over attendance in religious instruction classes, and discrimination on the grounds of religious beliefs should be prohibited.<sup>98</sup>

202. Similar comments have been made by the Special Rapporteur on freedom of religion or belief.<sup>99</sup>
203. The Religious Freedom Review heard that religious schools take different approaches to the issue of selecting, or preferencing, students from families that are of the same faith as the school.<sup>100</sup> Bearing in mind the existing exemptions in State and Territory laws in relation to admissions, and pending the outcome of the ALRC review, the Commission's view is that religious educational institutions should be able to maintain the ability to preference the admission of students based on their religious belief or activity, provided this is done in accordance with a publicly available policy and is consistently applied.
204. However, it is important that any assessment of 'religious activity' is not used as a way of indirectly discriminating against students on other protected grounds as part of the admissions process. Further, as recognised by the Religious Freedom Review, in remote locations where the only option may be a single faith-based school, there should not be room for any discrimination in admissions.<sup>101</sup>
205. The Commission does not consider that religious educational institutions should otherwise be permitted, through the general exemption in clause 7, to discriminate against students on the ground of religious belief or activity in any of the other ways described in clause 24 of the Bill (including the terms and conditions on which students are admitted, decisions about whether the student should be expelled, or subjecting students to any other detriment as a result of their religious beliefs or activities).

### Overriding of State and Territory law

206. Clause 11 of the Bill would permit the overriding of State and Territory laws that provide greater protection against religious discrimination to prospective staff of educational institutions. The clause would instead allow educational institutions to preference the employment of staff of a particular religion.<sup>102</sup>
207. This clause was not in any of the earlier exposure drafts. As is clear from the Consequential Amendments Bill, this clause is directed in particular at recent legislative amendments in Victoria but will also have application to any similar amendments in other jurisdictions.<sup>103</sup> Section 83A of the *Equal Opportunity Act 2010* (Vic) now provides that a religious educational institution may discriminate in employment if:
- conformity with the doctrines, beliefs or principles of the institution is an inherent requirement of the position
  - the person cannot meet that inherent requirement because of their religious belief or activity, and
  - the discrimination is reasonable and proportionate in the circumstances.
208. This is the same test that applies in Victoria in relation to employment by religious bodies generally.<sup>104</sup> The inherent requirements test is also the test of general application proposed in the present Bill for exceptions in relation to employment.<sup>105</sup>
209. However, the Bill proposes a different test for religious educational institutions where a State or Territory law like Victoria's applies. It would instead allow religious educational institutions to give preference, in good faith, to persons who hold or engage in a particular religious belief or activity.<sup>106</sup>
210. Under clause 11(2)(a) of the Bill (as amended by the Consequential Amendments Bill) the Victorian law is expressly overridden. The effect is that instead of applying an inherent requirements test, religious educational institutions would have greater freedom to discriminate against prospective staff on the basis of their religious belief or activity. It would not be necessary, for example, to show that having a particular religion was relevant to the role being applied for. In the example in paragraph [185] above in relation to Ali, a faith based entry requirement could be applied to him even though he was being employed to teach mathematics.

211. In the discussion above, the Commission has indicated that the Commonwealth Act should permit the preferencing of staff on the basis of their religious belief or activity, pending the outcome of the review being conducted by the ALRC.
212. However, education is primarily a responsibility for the States. If an individual State decides that prospective staff of educational institutions should be provided with greater protection against discrimination on the basis of their religious belief or activity, the Commission's view is that this choice should not be overridden by the Commonwealth. The choice made by Victoria appears to be a legitimate one that permits religious educational institutions to select staff based on their religious belief or activity where this is relevant to the role. Such a position is a narrower, and proportionate, interference with freedom of religion or belief that is tightly correlated to a legitimate purpose.

#### Existing religious exemptions for educational institutions

213. Religious educational institutions already have a number of religious exemptions from discrimination law.
214. At the Commonwealth level, s 38 of the SDA permits discrimination by religious educational institutions:
- in the employment (or dismissal) of staff and contract workers on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy
  - in the provision of education to students on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy<sup>107</sup>

if the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of the relevant religion.

215. In the case of students, the exemption allows educational institutions to discriminate:
- by refusing to accept applications for admission
  - by imposing conditions on the student's admission
  - by denying the student access to benefits provided by the educational institution
  - by expelling the student

- by subjecting the student to any other detriment.<sup>108</sup>
216. At the State and Territory level, in the case of employment decisions by religious educational institutions:
- most jurisdictions permit discrimination on the grounds of religious belief or activity<sup>109</sup>
  - in the ACT, there must be a published and readily accessible policy<sup>110</sup>
  - in Queensland, the religious belief must be a genuine occupational requirement (which the legislation appears to indicate will be satisfied generally for teachers at religious schools)<sup>111</sup>
  - in Victoria, the religious belief or activity must be an inherent requirement of the position<sup>112</sup>
  - in South Australia there is a prohibition against discrimination on the grounds of religious appearance or dress, but not on the grounds of religious belief or activity<sup>113</sup>
  - in New South Wales there is no prohibition against discrimination on the grounds of religious belief or activity.
217. At the State and Territory level, in the case of decisions by religious educational institutions in relation to the admission or expulsion of students:
- Tasmania and the ACT permit discrimination on the grounds of religious belief or activity when a student is applying for admission, but do not permit discrimination thereafter, for example in the way in which education is provided or in deciding whether a student should be expelled;<sup>114</sup> Tasmania and the ACT also require that there be a published and readily accessible policy in relation to admissions<sup>115</sup>
  - Queensland and the Northern Territory allow educational institutions to exclude 'applicants' who are not of the same religion as the school but does not permit discrimination towards existing students<sup>116</sup>
  - in Victoria, a religious educational institution may discriminate on the basis of a person's religious belief or activity in relation to admission or expulsion of students, provided the conduct is reasonable and proportionate in the circumstances and either: conforms with the doctrines, beliefs or principles of the religion; or

is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion<sup>117</sup>

- in Western Australia, an educational authority must *not* discriminate against a student on the ground of the student's religious conviction, including in decisions about admission or expulsion, unless the educational authority is prescribed by regulations, and it appears that no authorities are so prescribed;<sup>118</sup> but a separate provision allows for 'positive discrimination' by educational institutions in favour of adherents of a particular religion, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion<sup>119</sup>
- in South Australia, a religious educational authority may discriminate against a student or potential student who dresses in a manner required by, or symbolic of, a different religion;<sup>120</sup> and there is no prohibition against discrimination on the grounds of religious belief or activity
- in New South Wales there is no prohibition against discrimination on the grounds of religious belief or activity, and broad exemptions to private educational institutions to discriminate against students on a variety of other grounds.<sup>121</sup>

#### Review by ALRC

218. The Attorney-General has asked the ALRC to review s 38 of the SDA, along with religious exemptions in all other anti-discrimination laws, to determine whether these exemptions could be limited or removed altogether.
219. The first reference to the ALRC was given on 10 April 2019, and asked it to consider what reforms should be made to:
  - limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos.<sup>122</sup>
220. The ALRC was initially asked to report by 10 April 2020.
221. In August 2019, the terms of reference were amended. The ALRC was instructed to 'confine its inquiry to issues not resolved' by the Religious Discrimination Bill and to 'confine any amendment recommendations to legislation other than the Religious Discrimination Bill'. The reporting date for the inquiry was extended to 12 December 2020.<sup>123</sup>

222. In October 2019, the Hon Justice Sarah Derrington, President of the ALRC, reported that work on this reference had been 'paused because of the work that the government is undertaking in relation to its own anti-discrimination bill specifically in relation to religion'.<sup>124</sup>
223. On 2 March 2020, the then Attorney-General amended the ALRC's reporting deadline to be 12 months from the date the Religious Discrimination Bill is passed by Parliament.<sup>125</sup>
224. Clearly there are a broad range of exemptions from discrimination that religious educational institutions already have the benefit of. A key purpose of the ALRC review is to rationalise these exemptions and eliminate them where possible. Many of these exemptions are inter-related, including exemptions that relate to discrimination on the basis of religious belief or activity.
225. The Commission suggests that general exemptions that allow religious discrimination by religious educational institutions should be removed from the Bill and considered by the ALRC at the same time that it considers s 38 of the SDA. This would allow these exemptions to be considered in a comprehensive rather than a piecemeal way.
226. Pending that review, religious educational institutions should continue to be permitted to preference staff and students for admission based on their religious belief or activity, provided that this is done in accordance with a publicly available policy and is consistently applied.
227. Clause 11 permitting the override of State and Territory laws should be removed from the Bill.

### **Recommendation 6**

The Commission recommends that:

- (a) clause 5 (definition of 'religious body') and clause 7 of the Bill be amended to remove the general exemption for religious educational institutions
- (b) the issue of exemptions granted under the Bill for religious educational institutions be referred to the Australian Law Reform Commission as part of its current review of religious exemptions in anti-discrimination law along with any amendment to the ALRC's terms of reference as may be necessary for it to consider this issue.

### **Recommendation 7**

The Commission recommends that, pending the review by the Australian Law Reform Commission referred to in recommendation 6, the following exemptions for religious educational institutions apply:

- (a) religious educational institutions be permitted to give preference, in good faith, to persons of the same religion as the educational institution when making decisions about who should be offered employment
- (b) religious educational institutions not otherwise be permitted to discriminate on the ground of religious belief or activity in employment in any of the ways described in clause 19 of the Bill (including the terms and conditions of employment or decisions about the termination of employment)
- (c) religious educational institutions be permitted to give preference, in good faith, to persons of the same religion as the educational institution when making decisions about a person's application for admission as a student, except where there is no alternative educational institution available
- (d) religious educational institutions otherwise not be permitted to discriminate on the ground of religious belief or activity in education in any of the ways described in clause 24 of the Bill (including the terms and conditions of admission or decisions about expulsion)
- (e) if a religious educational institution proposes to engage in conduct described in (a) or (c), this may only be done in accordance with a publicly available written policy that:
  - (i) outlines the institution's position in relation to particular religious beliefs or activities
  - (ii) explains how the position is or will be enforced by the religious body
  - (iii) is consistently applied.

### **Recommendation 8**

The Commission recommends that clause 11, providing for the overriding of State and Territory laws in relation to discrimination by religious educational institutions, be removed from the Bill.



(b) *Religious hospitals, aged care facilities, accommodation providers and disability service providers*

228. Clause 9 of the Bill permits religious hospitals, aged care facilities, accommodation providers (such as religious camps or retirement villages) and disability service providers to discriminate on the ground of religious belief or activity in relation to employment (and the formation of partnerships), regardless of whether being religious is an inherent requirement of the particular job.
229. Instead, the only requirements would be that the religious discrimination in employment is engaged in in good faith, in accordance with a publicly available policy, and either:
- a person of the same religion could reasonably consider that the religious discrimination was in accordance with the doctrines, tenets, beliefs or teachings of that religion, or
  - the religious discrimination was done in order to avoid injury to the religious susceptibilities of adherents of that religion.<sup>126</sup>
230. While clause 9 permits the giving of preference to persons of the same religion,<sup>127</sup> it is not limited to those circumstances and also permits conduct that involves discrimination:
- in the terms or conditions of employment
  - by denying access to opportunities for promotion, transfer, training or any other benefits
  - by dismissing the employee
  - by subjecting the employee to any other detriment.<sup>128</sup>
231. The ‘inherent requirements’ test for discrimination in employment is well established. For example, under the SDA, it is permissible to discriminate in employment on the basis of sex if it is a ‘genuine occupational qualification’ to be of a particular sex.<sup>129</sup> Examples include jobs involving the conduct of searches of the clothing or bodies of persons of a particular sex, and jobs involving the fitting of clothing for persons of a particular sex where it is necessary for the employee to be of a particular sex in order to preserve the person’s decency or privacy.<sup>130</sup>
232. Similarly, under the DDA, it is permissible to discriminate in employment on the basis of disability if a person with a disability is unable to carry out the inherent requirements of a particular job as a

result of their disability, even if the employer were to make reasonable adjustments for them.<sup>131</sup>

233. Under the ADA, it is permissible to discriminate in employment on the basis of age if the person is unable to carry out the inherent requirements of the particular employment because of their age.<sup>132</sup>
234. Consistently with other federal discrimination law, the Bill includes an inherent requirements test in clauses 39(2)–(5) for discrimination in employment. The Commission supports this test.
235. However, the exemption in clause 9 goes significantly beyond this and permits religious discrimination in employment by religious hospitals, aged care facilities, accommodation providers and disability service providers, where religious belief or activity is not an inherent requirement of the particular job. The Commission considers that insufficient justification has been provided to depart from the ordinary inherent requirements test.
236. The rationale given in the Explanatory Memorandum is that the broader exemption is necessary to ensure that these bodies are able to maintain their religious ethos through decisions about staffing.<sup>133</sup> Only one example is given:

A Jewish hospital has a publicly available policy stating that all members of the hospital's governing committee are required to be Jewish. The governing committee is made up of senior medical practitioners employed at the hospital, who receive a salary increase as a result of participation on the committee. In accordance with subclauses 9(3) and (5), it would not be unlawful for that hospital to refuse to appoint someone to the committee if they were not Jewish, provided this was done in good faith and in accordance with the doctrines, tenets, beliefs and teachings of Judaism or to avoid injury to the religious susceptibilities of Jewish people. However, if the same hospital refused to employ a non-Jewish person in a junior administrative role, in a manner not covered by the policy, this conduct may constitute discrimination under subclause 19(2) of the Bill.

237. This example appears to distinguish between positions at a hospital where it is said that being Jewish is an inherent requirement of the role (being a member of the hospital's governing committee) and positions where it is not (a junior administrative role). This may be justifiable in particular circumstances – the example suggests that this may be in accordance with particular doctrines tenets, beliefs or teachings of

Judaism but does not elaborate on them. If so, then an inherent requirements test would be sufficient.

238. As the Explanatory Memorandum notes when talking about the inherent requirements test, ‘an employer cannot simply declare that it is an inherent requirement for an employee or partner to hold, or not hold, a religious belief or engage, or not engage, in a religious activity, unless this was, objectively in the circumstances, an essential element of the particular position’. There does not appear to be a principled reason to treat hospitals, aged care facilities or accommodation providers any differently from other employers.
239. Concerns about the breadth of this exemption, particularly in relation to employment decisions by large health care organisations that receive significant public funding, have been raised by the Australian Nursing and Midwifery Federation, which represents more than 300,000 nurses, midwives and carers across Australia.<sup>134</sup> Similarly, the Northern Territory Anti-Discrimination Commission has highlighted issues that can arise for potential employees where most services provided in particular area are provided by faith based organisations.<sup>135</sup>
240. In the Commission’s view, an employer’s imposition of blanket employment rules, which would otherwise be discriminatory on the basis of religious belief or activity, cannot be justified solely because those rules contribute to maintaining a ‘religious ethos’ in the workplace. More should be required to demonstrate the religious belief or activity set out in the employment rules is an essential part of the particular role.

### **Recommendation 9**

The Commission recommends that clause 9, dealing with exemptions from religious discrimination in employment and partnerships for religious hospitals, aged care facilities, accommodation providers and disability service providers, be removed from the Bill.

#### *(c) Religious camps and conference sites*

241. Clause 40(2)–(7) of the Bill allows religious camps and conference sites that provide accommodation to discriminate in the provision of that accommodation on the basis of the religious belief or activity of people seeking the accommodation.

242. In order to take advantage of this exception, the discrimination by the religious camp or conference site must be done in good faith, in accordance with a publicly available policy and either:
- a person of the same religion could reasonably consider that the religious discrimination was in accordance with the doctrines, tenets, beliefs or teachings of that religion, or
  - the religious discrimination was done in order to avoid injury to the religious susceptibilities of adherents of that religion.
243. 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.<sup>136</sup> There does not appear to be a principled reason why religious camps and conference sites have been treated differently.
244. As the Explanatory Memorandum acknowledges: ‘religious camps and conference sites often do not require that all persons seeking accommodation or other facilities be of their particular religious belief’.<sup>137</sup>
245. It appears that this proposed exemption is broader than necessary and that the need for the exemption has not been sufficiently justified.
246. 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. With the introduction of protections from discrimination on the basis of religious belief or activity, the commercial supply of goods and services should also be done in a way that does not discriminate on the basis of religious belief or activity. This includes the supply of accommodation services provided by camps and conference centres.
247. The Commission notes that there is a general exemption in clause 10 of the Bill which permits reasonable conduct, consistent with the purposes of the Act and which 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 people on the basis of the person or group’s religious beliefs or activities. It appears that this clause would permit camps and

conference sites to provide preference to people based on their religious belief or activity in the circumstances covered by that clause.

248. It is unclear why any further, more general exemption is required for religious camps and conference sites operating on a commercial basis.

### **Recommendation 10**

The Commission recommends that clause 40(2)–(7), dealing with exemptions from religious discrimination relating to accommodation and facilities for religious camps and conference sites, be removed from the Bill.

## **8 Qualifying bodies**

249. The version of the Bill that was introduced into Parliament excluded what was described as the ‘Folau clause’ which deemed certain codes of conduct by businesses to be unreasonable, without a need to take into account all of the relevant circumstances. The ‘Folau clause’ was unnecessary and an example of legislating for single instances. The Commission had recommended that it be removed from the Bill.
250. While that clause has been removed, a functionally equivalent clause in relation to qualifying bodies has been retained, albeit in a modified form.
251. Part 3 of the Bill deals with the concept of discrimination on the ground of belief or activity. Clause 13 deals with direct discrimination, clause 14 deals with indirect discrimination, clause 16 deals with discrimination in relation to associates and clause 17 deals with conduct engaged in for two or more reasons. With the exception of the extension of the concept of ‘associates’ to corporations (see section 6 above), these are all standard provisions common across other anti-discrimination laws.
252. The exception is clause 15 which provides special rules in relation to qualifying bodies. There is no need for a special rule because the conduct described could be effectively assessed under the test for indirect discrimination.
253. 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.

254. However, the imposition of the conduct rule does not amount to discrimination if:
- compliance with the conduct rule is an essential requirement of the profession, trade or occupation
  - the conduct rule regulates statements of belief that:
    - are malicious
    - that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group
    - promote, encourage or urge the commission of a serious offence.
255. A qualifying body is an authority or body that is empowered to confer an authorisation or qualification that is needed for the practice of a profession, trade or occupation. The Explanatory Memorandum says that this provision is aimed at bodies such as those that certify lawyers, teachers, accountants and health practitioners, as well as training providers such as TAFEs and universities.<sup>138</sup>
256. In essence, clause 15 is a deeming provision in relation to indirect discrimination. In the very specific circumstances set out, the conduct will be deemed to be discrimination.
257. Qualifying bodies are already separately prohibited from discriminating against a person on the ground of the person's religious belief or activity in the terms or conditions on which the qualifying body is prepared to confer, renew, extend or vary an authorisation or qualification.<sup>139</sup> The standard test for indirect discrimination provides that a qualifying body must not impose a condition, requirement or practice (such as a 'conduct rule') that has the likely effect of disadvantaging persons who hold a religious belief, where the condition, requirement or practice is not reasonable in the circumstances.
258. 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.

259. 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.

#### **Recommendation 11**

The Commission recommends that clause 15, dealing with the separate treatment of qualifying body conduct rules imposed by qualifying bodies, be removed from the Bill.

## **9 General exceptions**

### **9.1 Counselling or promoting a serious offence**

260. There is a general exception in clause 35 of the Bill that permits discrimination against a person if they have expressed a religious belief that amounts to counselling, promoting, encouraging or urging the commission of a serious offence.
261. The Commission is generally supportive of this exception; however, it appears that the exception may operate more broadly than intended.
262. The exception operates if three criteria are satisfied:
- a person has expressed a particular belief
  - it is reasonable to conclude that, by expressing that belief, the person is counselling, promoting, encouraging or urging the commission of a serious offence, and
  - at the time the discrimination occurs, it is reasonable to assume that the person holds the particular belief.
263. It appears that, if these criteria are met, it is not unlawful to discriminate against that person on the basis of *any* of their religious beliefs or activities. That is, the exception does not merely apply to

discrimination on the ground of the particular expression that encouraged the commission of an offence, but extends to discrimination on the basis of the person's religious beliefs or activities more generally.

264. If this interpretation is correct, then the qualifying conditions in (a) to (c) operate to open the gate to religious discrimination against the person, regardless of the basis for the religious discrimination.
265. On the basis of the Explanatory Memorandum, it appears that this broad operation may have been unintended. For example, at [356], the Explanatory Memorandum says that the provision has a limited application 'to only those beliefs which have been outwardly expressed by a person, and which counsel, promote, encourage or urge the commission of serious offences'. This suggests that there should be a link between the qualifying conditions for the operation of the section and the particular discrimination.
266. The Commission recommends that further consideration be given to the breadth of operation of this provision and, in particular, whether it should be limited to permit discrimination only on the ground of the particular belief that triggers the operation of the section. One way that could be done would be to amend the opening words of clause 35(1) to provide that:

Divisions 2 and 3 do not make it unlawful to discriminate against a person on the ground of the religious belief of a person to which this subsection applies. This subsection applies to a religious belief of a person if: ...

### **Recommendation 12**

The Commission recommends that further consideration be given to the breadth of operation of clause 35 of the Bill, dealing with the general exception for counselling or promoting a serious offence.

## **10 Temporary exemptions**

### **10.1 Variation or revocation by the Attorney-General**

267. The Bill makes provision for the Commission to grant temporary exemptions from the operation of the prohibitions against discrimination on the basis of religious belief or activity.<sup>140</sup> A temporary exemption may be granted for a period of up to five years and may be granted subject to particular terms and conditions.



268. Each of the SDA, DDA and ADA makes provision for temporary exemptions to be granted by the Commission.<sup>141</sup> Temporary exemptions may be granted to allow a person time to make changes in order to comply with anti-discrimination laws. The Commission has published guidelines on how it exercises its power to grant temporary exemptions.<sup>142</sup> A decision by the Commission to grant a temporary exemption is reviewable in the Administrative Appeals Tribunal.
269. The Bill differs from other Commonwealth discrimination laws in that it gives the Attorney-General the power to vary or revoke an exemption granted by the Commission.<sup>143</sup> There is no equivalent provision to this effect in the SDA, DDA or ADA.
270. None of the explanatory materials for any of the three versions of the Bill to date has offered an explanation for why the Attorney-General should be given the power to vary or revoke temporary exemptions in relation to religious discrimination, in circumstances where the Attorney has no equivalent power in relation to any other kind of temporary exemption.
271. In the absence of any explanation for this change, the Commission considers that it is more appropriate to leave the initial decision on varying or revoking temporary exemptions with the body that has conducted the inquiry into whether the exemption should be granted, a body that includes the proposed new Religious Discrimination Commissioner, and to leave any merits review of those decisions to an independent Tribunal with expertise in reviewing administrative decisions.

### **Recommendation 13**

The Commission recommends that clause 47(1) of the Bill be amended to remove the provision granting the Attorney-General the ability to vary or revoke temporary exemptions granted by the Commission.

## **11 Local government by-laws**

272. This Bill will introduce protections against discrimination on the ground of religious belief or activity. However, clause 5(2) of the Bill makes clear that the religious activity that is protected does not include an activity that is unlawful. For example, a person will not be entitled to make a claim that they have been discriminated against because they

engaged in female genital mutilation or trespass, even if this was done for religious purposes.<sup>144</sup>

273. Clause 5(3) of the Bill provides that an activity is not unlawful merely because a local by-law prohibits the activity. The effect is that if a person engages in activity contrary to local by laws, this could still be protected activity and form the basis of a claim if the person is discriminated against because of it.
274. The Explanatory Memorandum says that this may include religious activities such as street preaching which are made unlawful by the operation of local government regulations.<sup>145</sup> It appears that the kinds of regulations envisaged are those considered in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1. In that case, the High Court upheld as valid a by-law made by Adelaide City Council that prohibited persons from preaching, canvassing, haranguing or distributing printed material on any road (including a pedestrian thoroughfare or mall) without the permission of the Council. Under the Bill, a person may be able to make a claim for discrimination in relation to conduct prohibited by such a law, even if it is held to be constitutionally valid.
275. The rationale given in the Explanatory Memorandum is that local by-laws do not 'have the same levels of oversight and scrutiny as legislation made by the Commonwealth or a state and territory government'.<sup>146</sup>

## **12 Freedom of Religion Commissioner**

### **12.1 Establishment**

276. Part 6 of the Bill creates the new office of the Religious Discrimination Commissioner and Part 7 of the Bill grants new functions to the Commission. In broad terms, those functions relate to the avoidance of discrimination on the grounds of religious belief or activity.
277. The Explanatory Memorandum says that the Bill gives effect to, among other things, recommendation 19 of the Religious Freedom Review. Recommendation 19 was in the following form:

The 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.

278. The text of the report was more explicit, saying that ‘the Panel is of the view that the appointment of an additional commissioner is not necessary,’ including because the Human Rights Commissioner already has the capacity to perform many of the functions suggested for a Religious Discrimination Commissioner.<sup>147</sup> The panel suggested instead that there was value in ‘extending the remit of an existing commissioner to include responsibility for issues relating to religious freedom’.<sup>148</sup>
279. The Commission does not object to the creation of a new statutory office. In its previous submissions on the exposure drafts of the Bill, the Commission said that if there is to be a new Commissioner, this should be accompanied by sufficient additional budget for the Commissioner and a necessary support team of staff.
280. The introduction of a new Commonwealth discrimination Act could reasonably be expected to lead to an increase in discrimination inquiries and complaints and a corresponding increased workload for the Commission’s national information service and its investigation and conciliation service. Additional staff to handle complaints and field inquiries relating to the new law will be required.
281. The Commission notes that in the Mid-Year Economic and Fiscal Outlook 2020-21, the Commonwealth committed \$9 million over four years from 2021-22 (and \$2.2 million per year ongoing) to support the statutory office of the Religious Discrimination Commissioner.<sup>149</sup> The Commission welcomes this allocation of funding for the Commissioner and relevant support staff.

## **12.2 Review of the Religious Discrimination Act**

282. Clause 76 of the Bill provides that the Religious Discrimination Commissioner must conduct a review of the operation of the Act which is to be completed no later than 2 years after its commencement.
283. The Commission considers that there is merit in conducting a review of the operation of the Act following its commencement, but says that this should be done by a body external to the Commission. The Commission would participate in any such review.

#### **Recommendation 14**

The Commission recommends that clause 75 of the Bill be amended, and that any review of the Act be carried out by a body external to the Commission.

## **13 Positive changes to be included in other discrimination law**

### **13.1 Protection for volunteers and other unpaid workers**

284. The Bill includes a definition of employment that includes volunteer workers and unpaid interns.<sup>150</sup> The Commission commends the Government for this initiative.
285. The Commission has previously identified this as a gap in protection across existing Commonwealth discrimination laws.<sup>151</sup> A similar expansion was made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) in providing protection to volunteers and unpaid interns against sexual harassment and sex-based harassment.
286. The decision to provide protection to unpaid workers is significant in the context of this Bill, given that there are many volunteers who work for religious organisations.
287. The Commission is of the view that the protection for volunteers and unpaid interns in the Bill should be extended to the other grounds of discrimination covered by Commonwealth discrimination laws. There are many people who participate in public life as volunteers and they should have the benefit of protection from discrimination. Similarly, internships are now a common part of higher education courses and can be critically important for young people seeking to enter the workforce.
288. Making this protection uniform would also address potential inconsistencies that may arise in intersectional complaints. For example, a Buddhist woman who was volunteering for a particular organisation and claimed to be discriminated against on the grounds of her religious belief, and either her race or her sex, would only be able to bring a claim for discrimination on the grounds of her religious belief.

289. Uniform protection could be provided by inserting an equivalent definition of ‘employment’ into the other four Commonwealth discrimination Acts. This could be done, for example, through inserting appropriate amendments into the HRLA Bill.

### **Recommendation 15**

The Commission recommends that the protection against discrimination for unpaid workers provided by the Bill also be included in the existing four Commonwealth discrimination Acts, namely the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

## **13.2 Victimization**

290. Victimization involves retaliatory action, or the threat of such action, against a person because they sought to rely on their rights under discrimination law or because they took action in support of a complaint. For example, a casual employee who is refused overtime shifts because he made a complaint of religious discrimination against his manager would be entitled to make a claim of victimisation.
291. The Bill contains both a civil prohibition against victimisation,<sup>152</sup> and a criminal offence of victimisation.<sup>153</sup> Similar victimisation offences are found in each of the other Commonwealth discrimination Acts.<sup>154</sup> To date, only the SDA contains a separate civil prohibition.<sup>155</sup>
292. The reason for including a separate civil prohibition is to ensure that if a person makes a complaint of unlawful discrimination to the Commission, and the complaint is unable to be resolved through conciliation, the complainant has the right to make an application to a court that contains the victimisation allegation.
293. Such a provision will overcome the effect of some court cases that cast doubt on the ability of civil courts to hear claims of victimisation. More detail of the history of these provisions is included in the Commission’s submission on the first exposure draft for the current Bill,<sup>156</sup> and the Commission’s submission on the recent Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth).<sup>157</sup>
294. The Commission welcomes the clarification in this Bill of the position for victimisation under the Religious Discrimination Act.

295. The Explanatory Memorandum notes:

This approach is not intended to create ambiguity in relation to the existing victimisation provisions in other Commonwealth anti-discrimination Acts. The intention has always been that such provisions may form the basis of two causes of action – civil and criminal – which is made clear by their inclusion in the definition of ‘unlawful discrimination’ in the AHRC Act.<sup>158</sup>

296. While these amendments will create certainty in relation to victimisation under the Religious Discrimination Act and the SDA, without equivalent amendments being made in relation to the DDA, RDA and ADA, there is a risk that those Acts will be interpreted in a way that is different from what is intended. As a result, the Commission recommends that equivalent amendments be made to the RDA, DDA and ADA.

#### **Recommendation 16**

The Commission recommends that civil prohibition against victimisation also be included in the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

## **14 Human Rights Legislation Amendment Bill**

297. The HRLA Bill deals with three of the other recommendations from the Religious Freedom Review.

### **14.1 Objects clauses**

298. Recommendation 3 of the Religious Freedom Review was that:

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.

299. In response to this recommendation, the HRLA Bill would add clauses to the RDA, SDA, DDA and ADA to confirm that:

In giving effect to the objects of this Act, 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 human rights.
300. An equivalent clause is included in the Bill at clause 3(2).
301. In the case of the RDA, the HRLA Bill would also insert an objects clause as new s 2A.
302. The Commission supports these changes. The changes are more than merely preambles to the respective pieces of legislation. They reflect the way in which human rights law operates in practice and recognise that when there are competing human rights claims, there is a need to reconcile those claims in a way that best accommodates their different requirements.
303. When the Commission made its submission to the Religious Freedom Review, it observed that any reform designed to further protect religious freedom should be done in such a way that promotes human rights in their universality and indivisibility.<sup>159</sup>
304. For reasons discussed earlier, the Commission considers that the present Bill does not achieve this balance, particularly in the overriding of Commonwealth, State and Territory anti-discrimination law in clause 12 of the Bill. That clause seeks to advance one right at the expense of others.

## **14.2 Amendment to Charities Act**

305. The HRLA Bill would introduce a new s 19 into the *Charities Act 2013* (Cth) (Charities Act) that would create a conclusive presumption, when assessing whether an entity is a charity, that certain conduct promoting a 'traditional view of marriage' is for the public benefit and not contrary to public policy. In particular, the presumption would apply to:
- engagement in or promotion of activities advancing, expressing or supporting a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life
  - encouragement of others to engage in or promote activities that advance, express or support such a view.
306. Similar amendments were proposed but not passed during the parliamentary debate on the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth).<sup>160</sup> At the time those amendments were proposed, advice was tabled from the Commissioner of Taxation

and the Acting Commissioner of Australian Charities and Not-for-profits Commission (ACNC) to the effect that the amendments were not necessary in order to protect the status of religious charities.<sup>161</sup>

307. The Religious Freedom Review considered submissions in relation to this issue and recommended a change to the Charities Act, not because this would have the effect of changing existing legal rights, but rather to provide charities with some comfort, given the concerns that some had expressed in relation to what they suggested were comparable cases in other countries:

The Panel does not consider charities, established for a religious purpose, which continue to advocate their religious views, including a 'traditional' view of marriage, to be at risk of losing their charitable status under Australian law. The Panel was reluctant to draw too many inferences from overseas experience which turned on different legislation and specific facts in those cases. However, the Panel can see a benefit to assist certainty, and could see no particular harm, in an amendment similar to that suggested by the Acting Commissioner of the ACNC to put the immediate issue raised by the legalisation of same-sex marriage beyond doubt.<sup>162</sup>

308. Recommendation 4 of the Religious Freedom Review was that:

The Commonwealth should amend section 11 of the *Charities Act 2013* to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'.

309. Although the subject of a recommendation, the case for making this change was not strongly put by the Panel. In assessing whether the amendment proposed by the HRLA Bill should now be made, it would be necessary to weigh up the following issues.

310. First, based on the assessment of the Panel, there does not appear to be any legal need to make the amendment. The ACNC has since reaffirmed its advice that this amendment is unnecessary and offered to issue further guidance if there was any doubt.<sup>163</sup> While this would assist in addressing the concerns raised by religious charities, the Commission acknowledges that the same benefit to assist certainty could be achieved by the proposed amendment and notes that the Expert Panel could see no particular harm resulting from such an amendment.

311. Secondly, given the passage of time since the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) was enacted, the



concerns expressed by charities to the Religious Freedom Review may no longer be as pressing and may now be alleviated. The legislation was assented to on 8 December 2017. The terms of reference for the Panel were released the following week and submissions were called for by 31 January 2018 (later extended to 14 February 2018). The Panel conducted its review expeditiously and reported its findings to the Prime Minister on 18 May 2018. It has now been more than four years since the legislation was passed 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.

312. Thirdly, in assessing whether any harm would be caused by the amendment, the views of people who supported the marriage equality legislation should also be taken into account. The Attorney-General's Department received submissions from a range of bodies representing LGBTI people expressing their views on this proposed change.<sup>164</sup>

### **14.3 Amendment to Marriage Act**

313. Section 47B(1) of the Marriage Act provides:

A body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if the refusal:

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body; or
- (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

314. Subsection 47B(4) provides that 'a body established for religious purposes' has the same meaning as in s 37 of the SDA.
315. Recommendation 12 of the Religious Freedom Review was that this exemption be extended to religious schools. The HRLA Bill responds to this recommendation by proposing to insert a new s 47C into the Marriage Act.
316. The new exemption would permit, for example, a Catholic school that hires out its chapel to former students for use in weddings to refuse to hire the chapel to particular students if those students intended to use it for the solemnisation of a same-sex wedding or a wedding where

one of the partners was a divorcee.<sup>165</sup> In those circumstances, the refusal would not be contrary to the SDA because it would be done in direct compliance with the Marriage Act.<sup>166</sup>

317. The Panel noted that a religious school may not fall within the meaning of a 'body established for religious purposes' under s 37 of the SDA because educational institutions established for religious purposes are subject to a separate exemption in s 38 of the SDA.
318. Each of ss 37 and 38 of the SDA is the subject of the current review by the ALRC into religious exemptions in anti-discrimination law, referred to earlier in this submission. The Attorney-General has asked the ALRC to consider whether those exemptions should be limited or removed altogether (if practicable) while also guaranteeing the right of religious institutions to conduct their affairs in a way that is consistent with their religious ethos.
319. The terms of reference for the ALRC review may already include consideration of s 47B of the Marriage Act. This is because the terms of reference for the inquiry require the ALRC to consider reforms to 'relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law' in order to limit or remove religious exemptions to prohibitions on discrimination.<sup>167</sup>
320. The meaning of s 47B may well be affected by the ALRC review because it relies on the meaning of the religious exemptions in ss 37 and 38 of the SDA. The proposed new s 47C is of the same character.
321. In the circumstances, the Commission recommends that a new exemption to anti-discrimination law not be made while the ALRC is conducting a review that is aimed at limiting or removing existing exemptions to anti-discrimination law. The Commission recommends that s 47C be removed from the HRLA Bill and that full consideration of this exemption await the report of the ALRC.
322. This would treat recommendation 12 of the Religious Freedom Review in the same way as recommendations 1, 5, 6, 7 and 8.

### **Recommendation 17**

The Commission recommends that Sch 1, clause 6 of the Human Rights Legislation Amendment Bill, which would insert a new s 47C into the *Marriage Act 1961* (Cth), be removed from that Bill and that consideration of this proposed amendment await the report of the

Australian Law Reform Commission of its review of religious exemptions in anti-discrimination law.

## Endnotes

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- <sup>1</sup> Australian Human Rights Commission, *Religious Freedom Bills, Submission to the Attorney-General's Department*, 27 September 2019, <https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Australian%20Human%20Rights%20Commission.pdf>.
- <sup>2</sup> Australian Human Rights Commission, *Religious Freedom Bills second exposure draft, Submission to the Attorney-General's Department*, 31 January 2020, [https://www.ag.gov.au/sites/default/files/2020-05/australian-human-rights-commission\\_0.pdf](https://www.ag.gov.au/sites/default/files/2020-05/australian-human-rights-commission_0.pdf).
- <sup>3</sup> Australian Human Rights Commission, *Religious Freedom Review, Submission to the Expert Panel* (2018) at [11]-[14], <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>.
- <sup>4</sup> *Australian Human Rights Commission Act 1986* (Cth), ss 3 (definition of 'discrimination') and 31(b).
- <sup>5</sup> *Swarmy v Percival* [2013] AusHRC 66.
- <sup>6</sup> ICCPR, article 18(3).
- <sup>7</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55), article 6.
- <sup>8</sup> SDA, s 37; ADA, s 35.
- <sup>9</sup> SDA, s 38.
- <sup>10</sup> Explanatory Memorandum, Religious Discrimination Bill 2021, at [6].
- <sup>11</sup> Religious Freedom Review at [1.346]-[1.347].
- <sup>12</sup> The Consequential Amendments Bill, Sch 1, clause 19 will amend the list of anti-discrimination laws in the *Fair Work Act 2009* (Cth) to include the new *Religious Discrimination Act 2019* (Cth).
- <sup>13</sup> Explanatory Memorandum at [163]. For the various ways in which this term has been interpreted, see *Bropho v HREOC* (2004) 135 FCR 105 at [83]-[93] (French J).
- <sup>14</sup> See also *Discrimination Act 1991* (ACT), s 67A; *Anti-Discrimination Act 1977* (NSW), s 20C; *Anti-Discrimination Act 1991* (Qld), s 124A; *Racial Vilification Act 1996* (SA), s 4; *Anti-Discrimination Act 1998* (Tas), s 19. For a discussion of these thresholds, see Gelber and McNamara, 'Anti-vilification laws and public racism in Australia: Mapping the gaps between the harms occasioned and the remedies provided' (2016) 39(2) *University of New South Wales Law Journal* 488.
- <sup>15</sup> *Sunol v Collier (No 2)* [2012] NSWCA 44 at [26]-[28] (Bathurst CJ), [62] (Allsop P), [79] (Basten JA).
- <sup>16</sup> Explanatory Memorandum, Religious Discrimination Bill 2021, at [186].
- <sup>17</sup> Religious Freedom Review at [1.409].
- <sup>18</sup> Religious Freedom Review, *Report of the Expert Panel* (2018), at [1.408], <https://www.pmc.gov.au/domestic-policy/taskforces-past-domestic-policy-initiatives/religious-freedom-review>.
- <sup>19</sup> Religious Freedom Review at [1.400].
- <sup>20</sup> Religious Freedom Review at [1.408].
- <sup>21</sup> Religious Freedom Review at [1.409].
- <sup>22</sup> Religious Freedom Review, Recommendation 17.

- <sup>23</sup> The Hon Christian Porter MP, Attorney-General, *Religious Discrimination Bill 2019*, 29 August 2019, <https://www.attorneygeneral.gov.au/media/speeches/religious-discrimination-bill-2019-29-august-2019>, at footnotes 7 and 8 and accompanying text.
- <sup>24</sup> The Hon Christian Porter MP, Attorney-General, *Q&A from the Address to the National Press Club Canberra*, 20 November 2019, <https://www.attorneygeneral.gov.au/media/transcripts/qa-address-national-press-club-canberra-20-november-2019>.
- <sup>25</sup> *Phillips v Baptist Union of Queensland* [2019] QIRC 124 at [5].
- <sup>26</sup> The Hon Christian Porter MP, Attorney-General, *Religious Discrimination Bill 2019*, 29 August 2019, <https://www.attorneygeneral.gov.au/media/speeches/religious-discrimination-bill-2019-29-august-2019>.
- <sup>27</sup> The Hon Christian Porter MP, Attorney-General, *Q&A from the Address to the National Press Club Canberra*, 20 November 2019, <https://www.attorneygeneral.gov.au/media/transcripts/qa-address-national-press-club-canberra-20-november-2019>.
- <sup>28</sup> *Phillips v Baptist Union of Queensland* [2019] QIRC 124 at [61].
- <sup>29</sup> *Human Rights Legislation Amendment Act 2017* (Cth); Australian Human Rights Commission, *Inquiry into freedom of speech*, submission to the Parliamentary Joint Committee on Human Rights, 9 December 2016, <https://www.aph.gov.au/DocumentStore.ashx?id=d42f430a-869c-4706-9414-bf0cba934162&subId=461226>, recommendations 1-3 and text at [180]-[214].
- <sup>30</sup> The Hon Christian Porter MP, Attorney-General, *Religious Discrimination Bill 2019*, 29 August 2019, <https://www.attorneygeneral.gov.au/media/speeches/religious-discrimination-bill-2019-29-august-2019>, text accompanying footnote 28.
- <sup>31</sup> Australian Law Reform Commission, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation*, 10 April 2019, <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.
- <sup>32</sup> Explanatory Memorandum, Religious Discrimination Bill 2021, at [182].
- <sup>33</sup> *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 at [63](b) (Brett J).
- <sup>34</sup> *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 at [63](b) (Brett J), quoting *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [16] (Kiefel J).
- <sup>35</sup> Explanatory Memorandum, Religious Discrimination Bill 2021, at [178].
- <sup>36</sup> *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 at [74]-[75] (Brett J).
- <sup>37</sup> *Anti-Discrimination Act 1998* (Tas), s 64(1)(a).
- <sup>38</sup> Parliamentary Joint Committee on Human Rights, *Official Committee Hansard*, 30 January 2017, Hobart (Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania), p 4.
- <sup>39</sup> *Qantas Airways Limited v Gama* (2008) 167 FCR 537 at [76]-[77] (French, Branson and Jacobson JJ); *Murugesu v Australian Postal Corporation* [2015] FCCA 2852 at [245]-[247] (Burchardt J); *Ferguson v John A Martin & Kevin J Pendergast trading as Sharks Shire Pumping* [2021] FedCFamC2G 58 at [177]-[179] (Driver J).
- <sup>40</sup> *Horman v Distribution Group Ltd* [2001] FMCA 52 at [7], [30] and [57] (Raphael FM); *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 at [31]-[33] (Driver FM); *Poniatowska v Hickinbotham* [2009] FCA 680 at [303]-[306] (Mansfield J).
- <sup>41</sup> *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(aa).
- <sup>42</sup> SDA, ss 5, 6, 7 and 14.
- <sup>43</sup> SDA, ss 5 and 14; ADA, ss 14 and 18.
- <sup>44</sup> SDA, ss 5 and 14.

- <sup>45</sup> SDA, ss 5A, 14 and 23.
- <sup>46</sup> SDA, ss 5A, 14 and 106.
- <sup>47</sup> Explanatory Memorandum at [173].
- <sup>48</sup> *Burns v Corbett* (2018) 265 CLR 304.
- <sup>49</sup> *Civil and Administrative Tribunal Act 2013* (NSW), Part 3A; *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas), Part 9; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Part 3A; *State Administrative Tribunal Act 2004* (WA), s 50; *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 83; *Northern Territory Civil and Administrative Tribunal Act* (NT) s 99A. Note that the Queensland Civil and Administrative Tribunal has been held to be a court, and thus is able to exercise judicial power: *Owen v Menzies* [2012] QCA 170.
- <sup>50</sup> *South Australian Civil and Administrative Tribunal Act 2013* (SA), Pt 3A. In South Australia, a proceeding in SACAT can be transferred to the Magistrates Court if it involves exercise of jurisdiction under ss 75(iii) or (iv) of the Constitution (ie, in the case of residents of different States, or if the Commonwealth is a party) but does not appear to extend to cases where a federal defence has been raised.
- <sup>51</sup> This issue is currently raised in the *Citta Hobart Pty Ltd v Cawthorn* proceeding being heard by the High Court. The hearing is listed for 8 and 9 February 2022.
- <sup>52</sup> RDA, s 6A(2); SDA, s 10(4); DDA, s 13(4); ADA, s 12(4). See also clause 68(2) of the Bill.
- <sup>53</sup> HRLA Bill, Sch 1, items 2, 5, 7 and 9.
- <sup>54</sup> Bill, clause 16.
- <sup>55</sup> *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9 at 14 (Kitto, Taylor and Owen JJ).
- <sup>56</sup> In the case of the RDA, see proposed s 2A(1)(a) to be inserted into the RDA by the HRLA Bill, Sch 1, item 7, in the case of the other Acts, see SDA, s 3(a); DDA, s 12(8); ADA, s 10(7).
- <sup>57</sup> Bill, clause 64.
- <sup>58</sup> For example, see *International Covenant on Civil and Political Rights*, article 2(1).
- <sup>59</sup> SDA, s 9(11)-(14); DDA, s 12(9); ADA, s 10(9).
- <sup>60</sup> Bill, clause 65(2).
- <sup>61</sup> Explanatory Memorandum at [253].
- <sup>62</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 182 (Gibbs CJ), 243 (Aickin J), 244 (Wilson J).
- <sup>63</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 182 (Gibbs CJ), 243 (Aickin J), 244 (Wilson J).
- <sup>64</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 221 (Stephen J), 242 (Murphy J), 268 (Brennan J).
- <sup>65</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 236 (Mason J).
- <sup>66</sup> Bill, clause 3(1)(a).
- <sup>67</sup> Explanatory Memorandum at [103].
- <sup>68</sup> Religious Freedom Review at [1.165]
- <sup>69</sup> Bill, clause 5 (definition of 'religious body').
- <sup>70</sup> Bill, clause 8.
- <sup>71</sup> Bill, clause 9.
- <sup>72</sup> RDA, s 8(1); SDA, s 7D; DDA, s 45; ADA, s 33.
- <sup>73</sup> Explanatory Memorandum, at [134].
- <sup>74</sup> Explanatory Memorandum, at [139].
- <sup>75</sup> St Vincent de Paul Society, 'Religious Freedom Legislation', *Media Release*, 6 December 2019: 'In engaging staff and volunteers, the Society does not discriminate on the basis of religion, race, disability, gender or sexual orientation. It is not our intention to do so, even in the event of a

- change in legislation’,  
[https://www.vinnies.org.au/icms\\_docs/313010\\_Religious\\_Freedom\\_Legislation.pdf](https://www.vinnies.org.au/icms_docs/313010_Religious_Freedom_Legislation.pdf).
- <sup>76</sup> St Vincent de Paul Society, ‘Don’t use Vinnies in the religious freedom debate’, *Media Release*, 11 December 2019,  
[https://www.vinnies.org.au/icms\\_docs/313130\\_Don\\_t\\_use\\_Vinnies\\_in\\_the\\_religious\\_freedom\\_debate.pdf](https://www.vinnies.org.au/icms_docs/313130_Don_t_use_Vinnies_in_the_religious_freedom_debate.pdf).
- <sup>77</sup> Bill, clause 7.
- <sup>78</sup> Explanatory Memorandum, at [97].
- <sup>79</sup> Explanatory Memorandum, at [98]–[99].
- <sup>80</sup> By way of comparison, see how the impact of conduct on a group of people is considered for the purposes of s 18C of the RDA: *Eatock v Bolt* (2011) 197 FCR 261 at [251]–[252]; and how alleged misleading representations to the public at large were considered for the purposes of s 52 of the then *Trade Practices Act 1974* (Cth) (now s 18 of the Australian Consumer Law at Sch 2 of the *Competition and Consumer Act 2010* (Cth)): *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [102]–[103].
- <sup>81</sup> Jennifer Buckingham, *The Rise of Religious Schools*, Centre for Independent Studies (2010), p 8; Australian Bureau of Statistics, *Schools, Australia 2020*, Table 35b ‘Number of All Schools by States and Territories, Affiliation and School type, 2020’,  
<https://www.abs.gov.au/statistics/people/education/schools/2020>.
- <sup>82</sup> National Catholic Education Commission, *Submission to the Attorney-General’s Department consultation regarding legislative reforms on religious freedom*, 2 October 2019, p 2; Northern Territory Anti-Discrimination Commission, *Submission on the Religious Freedom Reforms*, 2 October 2019, p 10.
- <sup>83</sup> Note that parents fall within the scope of the ‘association’ provision in clause 16 of the Bill but it appears that guardians do not.
- <sup>84</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (1999) on the right to education*, UN Doc E/C.12/1999/10, 8 December 1999, at [28]. See also Human Rights Committee, *General Comment No. 22 (1993) on the right to freedom of thought, conscience and religion*, UN Doc CCPR/C/21/Rev.1/Add.4, 27 September 1993, at [6].
- <sup>85</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53, 15 December 2010, at [50].
- <sup>86</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (1999) on the right to education*, UN Doc E/C.12/1999/10, 8 December 1999, at [29].
- <sup>87</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53, 15 December 2010, at [54].
- <sup>88</sup> Bill, clause 7(6).
- <sup>89</sup> Bill, clause 7(7).
- <sup>90</sup> Explanatory Memorandum, at [109].
- <sup>91</sup> Religious Freedom Review at [1.211].
- <sup>92</sup> Religious Freedom Review at [1.210].
- <sup>93</sup> Religious Freedom Review at [1.246].
- <sup>94</sup> *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at 179–180 [89] (Jessup, Tracey and Perram JJ), referred to with approval in *Ridd v James Cook University* [2021] HCA 32 at [11] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).
- <sup>95</sup> Explanatory Memorandum, at [297].

- <sup>96</sup> Explanatory Memorandum, at [296].
- <sup>97</sup> Religious Freedom Review at [1.210].
- <sup>98</sup> Committee on the Rights of the Child, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20, 6 December 2016, at [43].
- <sup>99</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53, 15 December 2010, at [50]–[51].
- <sup>100</sup> Religious Freedom Review at [1.255].
- <sup>101</sup> Religious Freedom Review at [1.175] and [1.185].
- <sup>102</sup> Bill, clause 11.
- <sup>103</sup> Consequential Amendments Bill, Sch 2; *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).
- <sup>104</sup> *Equal Opportunity Act 2010* (Vic), s 82A.
- <sup>105</sup> Bill, clause 39(2)–(5).
- <sup>106</sup> Bill, clause 11(1)(a).
- <sup>107</sup> The SDA separately permits the establishment of single sex schools: s 21(3).
- <sup>108</sup> SDA, ss 38(3) and 21.
- <sup>109</sup> *Anti-Discrimination Act 1991* (Qld), s 25; *Anti-Discrimination Act 1998* (Tas), s 51(2); *Equal Opportunity Act 2010* (Vic), s 83A; *Equal Opportunity Act 1984* (WA), s 73(1)–(2); *Discrimination Act 1991* (ACT), s 44; *Anti-Discrimination Act 1992* (NT), s 37A.
- <sup>110</sup> *Discrimination Act 1991* (ACT), s 46.
- <sup>111</sup> *Anti-Discrimination Act 1991* (Qld), s 25.
- <sup>112</sup> *Equal Opportunity Act 2010* (Vic), s 83A.
- <sup>113</sup> *Equal Opportunity Act 1984* (SA), ss 85U, 85Z(4)(a), 85ZD, 85ZE.
- <sup>114</sup> *Anti-Discrimination Act 1998* (Tas), s 51A; *Discrimination Act 1991* (ACT), ss 32(2) and 46.
- <sup>115</sup> *Anti-Discrimination Act 1998* (Tas), s 51A(4); *Discrimination Act 1991* (ACT), s 46.
- <sup>116</sup> *Anti-Discrimination Act 1991* (Qld), ss 41 and 109(2); *Anti-Discrimination Act 1992* (NT), s 30(2).
- <sup>117</sup> *Equal Opportunity Act 2010* (Vic), s 83.
- <sup>118</sup> *Equal Opportunity Act 1984* (WA), s 61.
- <sup>119</sup> *Equal Opportunity Act 1984* (WA), s 73(3); see also *Goldberg v G Korsunski Carmel School* (2000) EOC 93-074.
- <sup>120</sup> *Equal Opportunity Act 1984* (SA), s 85ZE(5).
- <sup>121</sup> *Anti-Discrimination Act 1977* (NSW), ss 31A(3)(a) (sex), 38K(3) (transgender status), 46A(3) (marital or domestic status), 49L (disability), 49ZO(3) (homosexuality), 49ZYL(3)(b) (age).
- <sup>122</sup> Australian Law Reform Commission, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation, Terms of Reference*, 10 April 2019, <https://www.alrc.gov.au/wp-content/uploads/2019/04/Religious-Exemptions-Original-Terms-of-Reference-1.pdf>.
- <sup>123</sup> Australian Law Reform Commission, *Terms of Reference, Review into the Framework of Religious Exemptions in Anti-discrimination Legislation*, <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/>.
- <sup>124</sup> Senate Legal and Constitutional Affairs Legislation Committee, *Official Committee Hansard, Estimates*, 22 October 2019, p 50.
- <sup>125</sup> Australian Law Reform Commission, *Terms of Reference, Review into the Framework of Religious Exemptions in Anti-discrimination Legislation*, <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/>.
- <sup>126</sup> Bill, clause 9(3) and (5).



- <sup>127</sup> Bill, clause 9(4) and (6).
- <sup>128</sup> Bill, clause 19 (employment).
- <sup>129</sup> SDA, s 30.
- <sup>130</sup> SDA, s 31.
- <sup>131</sup> DDA, s 21A.
- <sup>132</sup> Eg, ADA, ss 18(4)-(5).
- <sup>133</sup> Explanatory Memorandum at [122].
- <sup>134</sup> Australian Nursing and Midwifery Federation, *Submission to the Attorney-General's Department Religious Freedom Bills – Second Exposure Draft*, 31 January 2020, pp 10–11.
- <sup>135</sup> Northern Territory Anti-Discrimination Commission, *Submission on the Second Exposure Religious Discrimination Reforms*, 31 January 2020, pp 18–20.
- <sup>136</sup> Clause 8; Explanatory Memorandum at [111].
- <sup>137</sup> Explanatory Memorandum at [453].
- <sup>138</sup> Explanatory Memorandum at [224].
- <sup>139</sup> Bill, clause 21(b).
- <sup>140</sup> Bill, clause 44.
- <sup>141</sup> SDA, s 44; DDA, s 55; ADA s 44.
- <sup>142</sup> Australian Human Rights Commission, *Exemptions*, <https://www.humanrights.gov.au/our-work/legal/exemptions>.
- <sup>143</sup> Bill, clause 47.
- <sup>144</sup> Explanatory Memorandum at [55]–[56].
- <sup>145</sup> Explanatory Memorandum at [53].
- <sup>146</sup> Explanatory Memorandum at [53].
- <sup>147</sup> Religious Freedom Review at [1.415].
- <sup>148</sup> Religious Freedom Review at [1.416].
- <sup>149</sup> The Hon Josh Frydenberg MP, Treasurer and Senator the Hon Simon Birmingham, Minister for Finance, *Mid-Year Economic and Fiscal Outlook 2020-21*, p 210, <https://budget.gov.au/2021-22/content/myefo/download/myefo-2021-22.pdf>.
- <sup>150</sup> Bill, clause 5, definition of 'employment'.
- <sup>151</sup> Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform*, October 2019, pp 9-10, <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>.
- <sup>152</sup> Bill, clause 33.
- <sup>153</sup> Bill, clause 50.
- <sup>154</sup> RDA, s 27(2), SDA, s 94; DDA, s 42; ADA, s 51.
- <sup>155</sup> SDA, s 47A.
- <sup>156</sup> Australian Human Rights Commission, *Religious Freedom Bills, submission to the Attorney-General's Department*, 27 September 2019, at [181]–[189], <https://www.ag.gov.au/sites/default/files/2020-05/Australian%20Human%20Rights%20Commission.pdf>.
- <sup>157</sup> Australian Human Rights Commission, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, submission to the Senate Education and Employment Legislation Committee*, 9 July 2021, at [88]–[96], <https://www.aph.gov.au/DocumentStore.ashx?id=e43e2f01-d09d-42c9-97c1-b89aa2db42f1&subId=710782>.
- <sup>158</sup> Explanatory Memorandum at [347].

- <sup>159</sup> Australian Human Rights Commission, *Religious Freedom Review*, Australian Human Rights Commission submission to the Expert Panel (2018) at [10], <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>.
- <sup>160</sup> See amendment (3) proposed by the Hon Scott Morrison MP and amendments (2), (7), (8) and (9) proposed by Mr Andrew Broad MP; Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, pp 13,064-13,072; 13,107-13,114 and 13,123-13,129.
- <sup>161</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, pp 13,068-13,069 (Mr Warren Entsch MP).
- <sup>162</sup> Religious Freedom Review at [1.200].
- <sup>163</sup> Australian Charities and Not-for-profits Commission, *ACNC Submission – Religious Freedom Bills*, 25 September 2019, at [10]–[19], <https://www.ag.gov.au/sites/default/files/2020-05/Australian%20Charities%20and%20Not-for-profits%20Commission.pdf>.
- <sup>164</sup> Equality Australia, *A freedom from discrimination, not a licence to discriminate*, submission to the Attorney-General's Department on the first exposure draft of the Religious Freedom Bills, pp 28–29; LGBTI Legal Service Inc, submission to the Attorney-General's Department on the first exposure draft of the Religious Freedom Bills, 10 October 2019, p 2. See also Justice Connect, submission to the Attorney-General's Department on the first exposure draft of the Religious Freedom Bills, 2 October 2019, pp 2-8.
- <sup>165</sup> See Explanatory Notes to the second exposure draft of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 at [61], <https://www.ag.gov.au/sites/default/files/2020-03/explanatory-notes-second-exposure-draft-human-rights-legislation-amendment-freedom-of-religion-bill-2019.pdf>.
- <sup>166</sup> SDA, s 40(2A).
- <sup>167</sup> The Hon Christian Porter MP, Attorney-General and Minister for Industrial Relations, 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation' *Media release*, 10 April 2019, containing the terms of reference for the ALRC inquiry, <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>.