# Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Religious Discrimination Bill 2021 and related bills: Sumbission 115

Australian Discrimination Law Experts Group


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to the

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# Religious Discrimination Bill 2021 and related bills

22 December 2021

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# Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group ('ADLEG'), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

This submission responds to the Senate Legal and Constitutional Affairs Committee inquiry into the Religious Discrimination Bill 2019 ('the Bill') and the Religious Discrimination (Consequential Amendments) Bill 2021 and the Human Rights Legislation Amendment Bill 2021 (together 'the Bills') ('the inquiry').

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by contacting robin.banks@utas.edu.au.

This submission may be published.

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# Summary

This submission is made in response to the Senate Legal and Constitutional Affairs Committee inquiry into the Religious Discrimination Bill 2019 ('the Bill') and the Religious Discrimination (Consequential Amendments) Bill 2021 and the Human Rights Legislation Amendment Bill 2021 (together 'the Bills') ('the inquiry').

As set out in further detail below, ADLEG's recommendations are as follows:

**Recommendation 1:** Clause 12 and the definition of statement of belief in clause 5 be removed from the Bill.

**Recommendation 2:** Clause 11 be removed from the Bill.

**Recommendation 3:** Clauses 7 to 9 and clause 34 be removed from the Bill, and replaced with a more targeted and proportionate exception for religious bodies in Part 4, Division 4.

**Recommendation 4:** Section 38 of the *Sex Discrimination Act 1984* (Cth) be removed and the Bill be amended to confirm that it does not undermine any protections or prohibitions under the *Sex Discrimination Act 1984* (Cth) or other discrimination laws.

**Recommendation 5:** Clause 15 and associated definitions be removed from the Bill.

**Recommendation 6:** That consideration of the Bills be delayed until such time as the Australian Government has fulfilled its obligations to ensure accessibility of the process and materials, and effective opportunities for engagement by members of affected communities.

**Recommendation 7:** That other matters of concern regarding the Bills be rectified.

# The Religious Discrimination Bill 2021

## Inconsistency with Australia's human rights obligations

The right to non-discrimination is a fundamental human right at international law. It is also a 'basic and general principle relating to the protection of human rights'.[1] Australian governments have repeatedly acknowledged the right to non-discrimination and have taken measures to ensure that it is realised and respected in Australia. The right to non-discrimination is guaranteed by international human rights treaties to which Australia is a party.[2]

To the extent that the Religious Discrimination Bill 2021 (Cth) ('the Bill') protects a person from discrimination on the basis of religious belief and activity, the Bill is grounded in principles expounded in international law and the fundamental human rights to equality and non-discrimination. In particular, Parts 3, 4 and 5 of the Bill are largely consistent with a right to non-discrimination as these Parts focus on the prohibition of discrimination on the basis of religious belief and activity. If the Bill proceeds these Parts should be retained.

However, Part 2 of the Bill is not concerned with the right to non-discrimination but is best understood as relating to an arbitrary form of 'freedom of thought, conscience and religion', as provided for under article 18 of the *International Covenant on Civil and Political Rights* ('ICCPR').[3] In its focus only on religious thought and belief, it is inconsistent with the broader terms of article 18 of the ICCPR as the Bill privileges religious belief over other forms of conscience and thought. Relevant to the Bill's focus on religion, article 18 is in the following terms:

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1 Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev 9 (Vol I) (10 November 1989).

2 *Discrimination (Employment and Occupation) Convention*, opened for signature 25 June 1958, 362 UNTS 31, Australian Treaty Series 1974 No 12 (entered into force 15 June 1960, entered into force for Australia 15 June 1974) ('ILO No 111') (entered into force for Australia 15 June 1974) arts 1 and 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1, Australian Treaty Series 1975 No 40 (entered into force 4 January 1969, entered into force for Australia 30 October 1975 except Article 14 which entered into force for Australia 28 January 1993) ('CERD') arts 2 and 5; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 993 UNTS 3, Australian Treaty Series 1976 No 5, UN Doc A/6316 (1966) (entered into force 3 January 1976, entered into force for Australia 10 March 1976) ('ICESCR') arts 2, 3 and 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 999 UNTS 171; Australian Treaty Series 1980 No 23, UN Doc A6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except article 41 which entered into force on 28 January 1993) ('ICCPR') arts 2, 3 and 26; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1, Australian Treaty Series 1983 No 9 (entered into force 3 September 1981, entered into force for Australia 27 August 1983) ('CEDAW') arts 2 and 7–16; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, Australian Treaty Series 1991 No 4 (entered into force 2 September 1990, entered into force for Australia 16 January 1991) ('CRC') art 2; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, Australian Treaty Series 2008 No 4 (entered into force 3 May 2008, entered into force for Australia 16 August 2008) ('CRPD') arts 3(b) & (e), 4(1) and 5 in particular.

3 ICCPR (n 2) art 18.

- shall include 'freedom to have or to adopt a religion or belief of [their] choice';
- 'freedom … in public or private to manifest [...] religion or belief in worship, observance, practice and teaching.'

Unlike the freedom to have or adopt a religion which is absolute,[4] the right to manifest religion and belief can be limited at international law where such limitations are 'necessary to protect … the fundamental rights and freedoms of others'.[5] This is highlighted in article 18(3) of the ICCPR. The UN Human Rights Committee explains and expands on this approach:

> Article 18.3 permits restrictions on the freedom to manifest religion or belief only if the limitations are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others… In interpreting the scope of permissible limitations clauses, State parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26.[6]

Part 2 of the Bill currently allows for the infringement of the fundamental rights and freedoms of others, particularly those found in articles 2, 3 and 26, on the basis of a person's religious belief or activity.

The Bill relies, in clause 64, on the external affairs power for its constitutional validity. In doing so, it relies on international human rights law. This submission considers the extent to which the Bill complies with international human rights law, and raises a number of significant points of inconsistency and non-compliance.

## Overriding existing discrimination law protections (clauses 11 and 12)

This Bill is the first instance that provisions in a federal discrimination law in Australia have been drafted to explicitly override and weaken other federal, state and territory discrimination laws. It has never previously occurred in over forty years of discrimination laws in Australia, yet in this Bill there are two examples of such overrides. Australia's legislative framework is designed to create two concurrent systems of discrimination law—federal, and state/territory—that can operate alongside each other. This is reflected in provisions made in every federal discrimination law explicitly stating that they do not exclude or limit the operation of state or territory laws that are capable of operating concurrently.[7]

There has long been bipartisan consensus to maintain these complementary and concurrent discrimination law systems, which allow claimants to pursue appropriate causes of action, and allow states and territories to pass laws that reflect their own values and principles.

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4 ICCPR (n 2) art 18(2).

5 ICCPR (n 2) art 18(3).

6 Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion (Art 18)* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

7 *Racial Discrimination Act 1975* (Cth) s 6A(1); *Sex Discrimination Act 1984* (Cth) s 10(3); *Disability Discrimination Act 1992* (Cth) s 13(3); *Age Discrimination Act 2004* (Cth) s 12(3).

There are three particular aspects of the Bill that raise concerns about the impacts of this Bill on existing protections against discrimination:

1. The operation of the 'statements of belief' override provision in clause 12 and the definition in clause 5.
2. The express override of state and territory discrimination law exceptions found in clause 11.
3. The practical impact of clauses 11 and 12 in limiting access to justice.

### *Statements of belief*

First, clause 12(1)(a) of the Bill protects 'statements of belief' as defined in clause 5 from any discrimination claim under any Australian discrimination laws, whether at federal, state or territory level. Clause 12(1)(b) also protects 'statements of belief' from a claim under section 17(1) of the *Anti-Discrimination Act 1998* (Tas).

The balance between federal discrimination laws, on the one hand, and state and territory discrimination laws, on the other hand, would be thrown into disarray by clause 12. Indeed, the Bill legalises and therefore has the potential to legitimise discrimination on all grounds that are presently proscribed, including race.

Clause 12 would have wide-ranging consequences in limiting liability for discrimination, vilification and otherwise harmful comments against others which target protected attributes. For instance, it is currently unlawful for a person in Tasmania to use a racial epithet or slur to offend, ridicule, insult, intimidate or humiliate another person on the basis of their race. Under clause 12, this behaviour would become lawful – but only for those who do so on the basis of a religious belief.

Under clause 12, the following scenarios that are currently unlawful acts of discrimination under various state and territory laws would likely become lawful if based on a religious belief:

- an employer telling a transgender employee that their identity is against the laws of God;
- a childcare provider stating to a single mother that they are evil for depriving their child of a father;
- a student with disability being told by a teacher that their disability is a trial imposed by God;
- a waiter in a café saying repeatedly they will 'pray for your sins' to a gay couple.

This will create a particularly unworkable situation for businesses in regard to employment. Work health and safety laws impose a positive duty on employers to prevent bullying,[8] and discrimination laws require businesses to provide their services free from discrimination,[9] yet

[8] See generally Safe Work Australia, *Guide for preventing and responding to workplace bullying* (May 2016) <https://www.safeworkaustralia.gov.au/system/files/documents/1702/guide-preventing-responding-workplace bullying.pdf>.

[9] See, eg, *Sex Discrimination Act 1984* (Cth) s 22.

clause 12 would authorise bullying and discrimination by people of religion. The Bill would have the effect of providing employers, employees and workplace participants with a *carte blanche* right to make such statements, and limit the ability of employers to take any action. It also reduces the already low likelihood of marginalised persons lodging legitimate discrimination complaints by introducing many levels of complexity into the process.

There is an exception contained in clause 12(2) for statements that are malicious[10] or that constitute incitement (called 'vilification' in this Bill).

The way vilification is defined in clause 5 is, however, far narrower than in most other vilification laws. Notably, as explained by Arthur Moses SC, past President of the Law Council of Australia, the clause 12(2) test is far narrower than the federal test for racial vilification.[11]

The term 'malicious' seems to most commonly be used in respect of prosecutions, for example, 'malicious prosecution' which is a tortious claim.[12] There is also some discussion of 'malicious publication' or having a malicious state of mind in the context of defamation.[13] It appears that this term is interpreted to mean conduct that is engaged in with an intention to cause harm,[14] and that the statement is unfounded. It is very hard to imagine a circumstance in which a statement that met the definition of 'statement of belief' could be proved to the requisite standard to have been made with an intention to cause harm. Given it relates to a religious belief, which involves faith in unprovable concepts, proving it was unfounded would seem an impossible task.

Further, clause 12(1)(c) is highly irregular in permitting any other federal, state and territory law to be overridden (including any future law affected by way of regulation). Such a measure would purport to endow the proposed religious discrimination law with entrenched status. This is a power that is normally reserved for the *Commonwealth Constitution*.

The Bill does not provide any clarity in terms of who will be required to prove that the statement was or was not malicious, or was vilifying, etc.

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10 Religious Discrimination Bill 2021 (Cth) cl 12(2)(a).

11 See Paul Karp, 'Religious discrimination bill could legalise hate speech, Law Council warns', *The Guardian* (online, 4 September 2019) <https://www.theguardian.com/law/2019/sep/04/religious-discrimination-bill-could legalise-race-hate-speech-law-council-warns>; *Racial Discrimination Act 1975* (Cth) s 18C. As also noted in Simeon Beckett, 'Key protection in religious discrimination bill is fatally flawed', *The Sydney Morning Herald* (online, 18 September 2019) <https://www.smh.com.au/national/key protection-in-religious-discrimination-bill-is-fatally-flawed-20190917-p52s3n.html>.

12 For discussion, see, for example, Dyson Hore-Lacy, 'Malicious prosecution to sue or not to sue' (2015) 130 *Precedent* 10. There appears to be an element that the allegation giving rise to the prosecution must be unfounded.

13 For example, see, New South Wales Law Reform Commission, *Defamation*, Discussion Paper No 32 (1993) [9.71], [10.29]–[10.33].

14 See, eg, *Criminal Code 1899* (Qld) s 317: 'Acts intended to cause grievous bodily harm and other malicious acts'.

The current (third iteration) Bill has changed how 'statement of belief' is defined. In the 2019 Exposure Draft of the Bill, the term 'statement of belief' was defined as:[15]

> ***statement of belief***: a statement is a statement of belief if:
>
> (a) the statement:
>
> (i) is of a religious belief held by a person (the first person); and
>
> (ii) is made, in good faith, by written or spoken words by the first person; and
>
> (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
>
> (b) the statement:
>
> (i) is of a belief held by a person who does not hold a religious belief; and
>
> (ii) is made, in good faith, by written or spoken words by the person; and
>
> (iii) is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief.

That definition was the subject of concern because it was sufficient for another person of the same religion to 'reasonably consider [the belief expressed] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. To satisfy this test, it would have been sufficient for one other person of the same religion to agree that it was within the religion's 'doctrines, tenets, beliefs or teachings'. This is a highly subjective test, without even a requirement of it being a 'reasonable member' of that religion, or a recognised religious leader.

It is notable and of concern that the current Bill's definition of 'statement of belief' removes even that modest level of objectivity provided by the 'one other person' of the same religion, test. Under the current definition, it is enough for the person who makes the statement to *themselves* consider that it is in accordance with the doctrines, tenets, beliefs or teachings of their religion. This is now an entirely subjective test. It is difficult to contemplate how this test would ever result in a statement being found to not fit within the definition.

In contrast, the prohibitions found in discrimination laws rely on objective tests of conduct. For example, section 17(1) of the *Anti-Discrimination Act 1998* (Tas)—which some critics have described as subjective—requires the conduct to be such that 'a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.' Sexual harassment provisions across the country are similarly framed.

The current definition in clause 5 also extends the types of statements that are protected to include 'or other communication (other than physical contact)'. This extends the protected

[15] Exposure Draft Religious Discrimination Bill 2019 (Cth) cl 5 (definition of 'statement of belief')

statements to include derogatory or demeaning images of people or groups of people with protected attributes under discrimination laws.

As well as this significant concern about the absence of objectivity and clarity about how the limits on statements of belief will be dealt with, clause 12 and the definition of statement of belief in clause 5 are inconsistent with Australia's international human rights law obligations. Clause 12 sits within Part 2 ('Conduct etc. that is not discrimination').[16] The Explanatory Memorandum to the Bill states that the approach in this part 'ensures that nothing in this Bill affects the ability for inherently religious organisations to manifest their religious belief and operate in accordance with their religious ethos in good faith'. This appears to be an assertion that it is consistent with the right to freedom of belief, thought and religion found in article 18 of the ICCPR.[17] It is important to note, however, that the exercise of freedom of belief, thought and religion in article 18(1) and (2) is 'subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[18] Relevant fundamental rights and freedoms that this substantive clause expressly overrides are the right to equality:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex ...[19]

And the right to non-discrimination:

> **Article 26**
>
> All people are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[20]

It is clear that by expressly overriding those laws that currently provide protection for the rights to equality and non-discrimination, clause 12 has failed to take a proportionate approach to balancing the protection and realisation of the rights protected under articles 2, 18 and 26 of the ICCPR. By exclusively prioritising the exercise of freedom of religion to the detriment of well-established protections for the rights to equality and non-discrimination, clause 12 is not consistent with Australia's international human rights obligations.

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16 It is noted that this is outside the Part dealing with exceptions and therefore there is a question of whether reliance on clause 7 or 9 requires proof in the way exceptions do.

17 ICCPR (n 2).

18 ICCPR (n 2) art 18(3).

19 ICCPR (n 2) art 2(1).

20 ICCPR (n 2) art 26 (emphasis added).

### *Exceptions under state and territory discrimination laws*

Secondly, clause 11 of the Bill provides a further mechanism to override state and territory laws. Specifically, religious exceptions to state and territory discrimination laws in the area of employment can be overridden where those exceptions are not as permissive of discrimination as the Bill.

The Bills provide a clear example of how this will operate, by explicitly targeting recent Victorian reforms.[21] These reforms have placed limits on the employment-related exceptions provided to religious organisations and educational institutions in Victoria: namely, discrimination in employment will only be permitted where it is reasonable and proportionate, and where religious belief or activity is an inherent requirement of the job.[22] This effectively means that religious schools, for instance, can discriminate on the basis of key faith-based roles (such as religious education teachers) but not other roles (such as gardeners). Clause 11 would override these protections for employees of religious organisations and educational institutions, and open up employees of religious organisations and educational institutions to a far wider array of discriminatory conduct.

This means that religious schools, for example, would be able to hire and fire on the basis of *any* religious views, even where such views are irrelevant to the position in question.[23] The school only needs to share publicly their policy on this. This clause therefore overrides the will of state and territory parliaments that have determined the protections for discrimination that are necessary in their jurisdiction.

Article 6 of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') recognises the right to work, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept, and obliges State parties to take appropriate steps to safeguard this right. The right to work further requires that States Party to the ICESCR provide a system of protection guaranteeing access to employment. Relevantly, this right must be made available in a non-discriminatory manner.

Australia also has an obligation to progressively realise economic, social and cultural rights, and a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of these rights. By removing protections against workplace discrimination provided for under existing state and territory laws, clause 11 of the Bill would constitute a retrogressive measure in relation to the right to work, in addition to the rights to equality and non-discrimination.

While retrogressive measures may be permissible under international human rights law, the United Nations Committee on Economic, Social and Cultural Rights has noted that there is a

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21 Religious Discrimination (Consequential Amendments) Bill 2021 (Cth) sch 2, cl 2(a).

22 Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic).

23 See further Liam Elphick and Alice Taylor, 'Religious schools can still expel LGBTQ+ kids. The Religious Discrimination Bill only makes it worse', *The Conversation* (online, 25 November 2021) <https://theconversation.com/schools-can-still-expel-lgbtq-kids-the-religious-discrimination-bill-only-makes-it-worse-172494?utm_medium=Social&utm_source=Twitter#Echobox=1638241606>.

strong presumption against the permissibility of such measures and 'the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant'.[24] Existing laws already seek to provide a balance between freedom of religion and the rights to work, equality and non-discrimination, while clause 11 appears to provide exclusive protection of freedom of religion to the detriment of other existing rights. This is inconsistent with Australia's obligations under international human rights law.

### *Limiting access to justice by overriding State and Territory laws*

Thirdly, the override of state and territory discrimination laws will significantly limit access to justice for victims of discrimination in Australia.

The overwhelming majority of discrimination claims are made through state and territory systems, rather than the federal system, largely owing to state and territory statutory authorities having a local presence and state and territory tribunals operating on a presumptive 'no costs' basis in the area of discrimination law. As such, a state and territory tribunal will not award the payment of an unsuccessful party's legal costs, other than in exceptional circumstances.

However, state and territory tribunals are not Chapter III courts under the *Commonwealth Constitution* and cannot exercise federal jurisdiction or determine a federal question of law. A matter will involve the exercise of federal judicial power if a party has a defence that owes its existence to a law of the federal Parliament. The High Court of Australia ruled in *Burns v Corbett* that a state tribunal cannot validly exercise federal judicial power, for example by determining a complaint of discrimination involving residents of different states.[25]

Clauses 11 and 12 of the Bill provide a federal defence to a complaint of unlawful discrimination made under state and territory discrimination laws, in overriding those laws. These defences are undoubtedly 'federal questions of law'. As such, state and territory tribunals will be unable to hear any questions or issues pertaining to these defences. Were a respondent to a state- and territory-based claim of unlawful discrimination to raise either of these defences at any stage of the complaint process, only a Chapter III court could hear and adjudicate it. This means that one of two outcomes would result:

- The complaint of discrimination would be determined to be beyond jurisdiction and would be dismissed with no option for the complainant to lodge in the federal jurisdiction because of the bar on this in federal discrimination law.[26]

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24 Committee on Economic, Social and Cultural Rights, *General Comment 13: the Right to education* (1999) 21st session, UN Doc E/C.12/1999/10 (8 December 1999) [45].

25 *Burns v Corbett; Burns v Gaynor; Attorney General for New South Wales v Burns; Attorney General for New South Wales v Burns; New South Wales v Burns* [2018] HCA 15 (18 April 2018).

26 Also relevant to this concern is the 6-month time limit for lodgement of federal discrimination complaints. This is at odds with the 12-month limit found in state and territory discrimination laws and is likely to operate as a further bar to lodgement after a federal defence is identified in a state or territory claim.

- Alternatively, the federal defence would need to be raised in separate proceedings in the relevant state and territory Supreme Court or the Federal Court of Australia (if legally possible) for adjudication. While that process was taking place, the state and territory tribunal that originally heard the discrimination claim would not be able to determine the substantive complaint of discrimination.

This delay and complexity is at odds with the approach adopted in all discrimination laws to enable complaints to proceed more quickly, informally and inexpensively to the parties than other claims. This will significantly increase the costs and delay of discrimination litigation, undermining the international human rights law right to an effective remedy for a discrimination complaint. Numerous, if not the majority of, discrimination complaints would be forced to cease their complaint for reasons of cost and time.

Article 2(3) of the ICCPR requires State parties to ensure access to an effective remedy for violations of human rights, including violations of the rights to equality and non-discrimination.[27] State parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Effective remedies should also be appropriately adapted to take account of the special vulnerability of certain categories of persons.[28] While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), the fundamental obligation to provide an effective remedy is absolute.[29]

In summary, clauses 11 and 12 significantly undermine the operation of state and territory discrimination laws and are inconsistent with the Australian Government's obligation to ensure people who experience breaches of their equality and non-discrimination rights 'have an effective remedy'. These clauses will undermine the purpose and capacity of discrimination laws to a greater degree than any other reform seen in over forty years of discrimination laws in Australia, and significantly limit access to justice for discrimination victims.

**Recommendation 1: Clause 12 and the definition of statement of belief in clause 5 be removed from the Bill.**

**Recommendation 2: Clause 11 be removed from the Bill.**

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27 ICCPR (n 2) art 2(3).

28 In this regard, it is relevant to note that many of the discrimination grounds listed in federal, state or territory laws are those of groups experiencing significant barriers to access to justice by the Law Council of Australia in its *Final Report: The Justice Project* (2018) <https://www.lawcouncil.asn.au/justice-project/final-report>.

29 See Human Rights Committee, *General Comment 29: States of Emergency (Article 4)*, 72nd sess, UN Doc CCPR/21/C/21/Rev 1/Add 11 (2001) (31 August 2001) [14].

## Permitting discrimination by religious bodies (clauses 7 and 9)

### *The test for religious conduct*

Part 2 of the Bill currently allows for the infringement of the fundamental rights and freedoms of others on the basis of a person's religious belief.

Clause 7 of the Bill provides that a religious body does not discriminate under *any provision of the Bill* if they engage either:

- 'in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion' (clause 7(2)); *or*
- 'in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body' (clause 7(4)).

Clauses 7(3) and 7(5) emphasise that the conduct mentioned in clauses 7(2) and (4) includes giving preference to persons of the same religion as the religious body.

Conduct only needs to conform to either clause 7(2) or clause 7(4) to be considered non-discriminatory for the purposes of the Bill. Clause 7 is unorthodox, extremely wide in scope, and far easier to satisfy than *any* religious body exception test found in *any* other federal, state or territory discrimination law in Australia. Indeed, it is so far removed from other comparable religious body tests in Australian discrimination law, and indeed any discrimination law in comparable jurisdictions around the world, so as to be entirely unrecognisable.

Clauses 7(2) and (4) will, in effect, allow a religious body to escape liability for an otherwise unlawful act of religious discrimination where they can establish that *a single person* of the same religion as the body *could reasonably consider* the act to be in accordance with the beliefs of that religion. The religious body would not be required to establish any recognised religious doctrinal basis for its act; even in relation to adducing evidence from a single individual adherent of the same faith, the religious body would not be required to establish that the individual agreed the act was in accordance with the beliefs of that religion. Rather, the religious body would only need to establish that an individual—*any* individual—*might* consider the act, reasonably, to be in accordance with the beliefs of that religion. The bar set by this test is so low as to be entirely ineffective. It is difficult, if not impossible, to imagine an act by a religious body which would *not* fall within the scope of clause 7(2), and therefore be excluded from the operation of the Bill. It would be near equivalent to construct clause 7(2) to read: 'A religious body does not discriminate under any provision of this Act in engaging in any act or conduct'.

Clause 7(4) is somewhat based upon an existing test found in the *Sex Discrimination Act 1984* (Cth) ('SDA'). While section 37(1)(d) of the SDA provides an exception where conduct 'is necessary to avoid injury to the religious susceptibilities of adherents of that religion', clause 11(3) omits that the conduct be 'necessary'. Rather, the conduct must only, in fact, be 'to avoid injury to the religious susceptibilities of adherents'. This, again, lowers the bar of this

test significantly; it is misleading to suggest this test 'aligns' with existing SDA provisions. The SDA also does not lower the bar of the test to require only one individual to consider that the act might be in accordance with religious beliefs, it must *actually* be in accordance with religious beliefs.

The notes associated with clause 7 indicate that conduct pursuant to clauses 7(2) and 7(4) *may* still be discrimination under another federal discrimination law. This does not clearly rectify concerns that clause 7 could be used to protect conduct that is discriminatory on the basis of race, age, sex, LGBTQ+ status and disability. Given the complex interaction between this Bill and existing federal discrimination laws, parties are likely to become mired in complex litigation about the various ways in which these laws interact with each other. Further, the current, third version of the Bill weakened this legislative note (now Note 2 to clause 7(2)) to make this result less clear. In the Second Exposure Draft of the Bill, the equivalent clause noted that:

> This subsection *does not* permit conduct that is otherwise unlawful under any other law of the Commonwealth, including the *Sex Discrimination Act 1984*.[30]

By contrast, note 2 to clause 7(2) of this Bill provides that:

> Conduct that is not discrimination under this Act *may still* constitute direct or indirect discrimination under other anti-discrimination laws of the Commonwealth including, for example, the *Sex Discrimination Act 1984.* (*emphasis* added)

This change only renders the question more murky and makes it more likely that clause 7 can be used as an alternative route to discriminate on the basis of race, age, sex, LGBTQ+ status and disability.

As religious discrimination is not currently prohibited by federal law, it may be suggested that the effect of clauses 7(2) and (4) is simply to continue the status quo for religious bodies, such that conduct they currently engage in lawfully will remain lawful if this Bill becomes law. However, were clauses 7(2) and (4) in their current form to become law, there could be a potential argument under section 109 of the *Commonwealth Constitution* that state and territory laws which do not provide as wide an exception for religious bodies would be rendered invalid to the extent to which they are inconsistent with clauses 7(2) and (4). This would have the effect of rendering lawful a far wider range of conduct by religious bodies that is currently deemed unlawful under state and territory laws. As most discrimination claims proceed to state and territory tribunals, as noted above, this could significantly weaken existing protection for individuals against religious discrimination. Further, even if this were not the case, to exclude such a significant array of conduct from the operation of this Bill would undermine and frustrate the very purpose of the Bill: *to prohibit religious discrimination*. The Bill, in its current form, likely permits more discrimination than it prohibits.

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30 Religious Discrimination Bill 2019 (Cth) cl 11(1), (3) (emphasis added).

Equivalent religious body exceptions at the federal, state and territory level require that conduct 'conforms to' religious doctrine or 'is necessary to avoid injury to' religious susceptibilities.[31] There is no principled basis on which a far lower standard should be set for religious bodies in this Bill, nor for weakening the standard set by other Australian discrimination laws, which still allow some religious activities to be defensible in discrimination claims, in recognition of a religious body's right to exercise religious freedom in relation to core activities and doctrine.

### *Definition of 'religious body'*

The definition of 'religious body' in clause 5 includes educational institutions, registered charities and 'any other kind of body (other than a body that engages solely in or primarily in commercial activities)'.[32]

Australian charities that provide a vast array of public services and benefits would be covered by this definition. Clause 7 would allow them to discriminate widely, in ways that non-religious charities cannot. This would exacerbate what is already an uneven playing field in the various industries and markets in which the not-for-profit sector compete. This is further exacerbated by the inclusion of registered public benevolent bodies, as this now includes an even wider array of important organisations that receive government funding to provide various public goods and services.

Take an example of a soup kitchen affiliated to one particular religion. This provision would allow the soup kitchen to require that *any* volunteer helping serve bowls of soup is of the same religion. It would also allow the soup kitchen to refuse to serve soup to any persons who are of a different religious faith, or of no religious faith, or to require recipients to participate in religious activities in order to receive food. Similarly, a homeless shelter could refuse to provide shelter to a person who did not have the same beliefs or does not participate in such activities.

While there may be a basis for this exception for those charities that are expressly established for a religious purpose, there appears to be no basis to extending this exception to charities or public benevolent institutions with a mere religious affiliation or connection, where their main purpose is to provide public (and publicly funded) goods, services or facilities such as food or shelter or counselling. Equivalent religious body exceptions in other federal discrimination laws apply only to 'bodies established for religious purposes'.[33] This would still capture core religious institutions and charities and public benevolent institutions established primarily for religious purposes in their core religious conduct, while excluding charities and public benevolent institutions with only a religious affiliation or connection. Organisations that

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31 *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35. No such religious exceptions exist in the *Racial Discrimination Act 1975* (Cth) or the *Disability Discrimination Act 1992* (Cth). On state laws, see, eg, *Anti-Discrimination Act 1977* (NSW) s 56(d); *Anti-Discrimination Act 1998* (Tas) s 52(d).

32 Religious Discrimination Bill 2021 (Cth) cl 5 (definition of 'religious body').

33 *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35.

engage solely or primarily in commercial activities should not be granted a *carte blanche* exception from this Bill owing only to a loose connection with a particular religion.

It is notable that the permission to discriminate in employment on the basis of religion will affect a significant number of jobs in Australia. For example, in 2017 the Catholic Church reported that it employed over 220,000 people across 3,000 organisations.[34] Of these, 77% were women.[35] The Bishop of Bunbury, in his foreword to the report, stated that:

> These people serve, care for or educate millions of Australians every day. Their number makes us one of the largest single group of employers in Australia – bigger than Woolworths and bigger than the four biggest banks in Australia combined.[36]

In 2020, over 79,900 people were also employed in independent (non-Catholic) schools in Australia, of whom 67.6% were women.[37]

As such, the provisions in Part 2 that allow religious organisations to discriminate will disproportionately affect women and will impact on a significant proportion of the Australian workforce.

### *Religious schools*

Clauses 7(2) and (4) apply to religious educational institutions and apply to all conduct except for conduct with respect to employment that is covered by clauses 7(6) and 11. Clauses 7(2) and (4) allow for a broad array of conduct from religious educational institutions with respect to students and other members of the school community. The kinds of actions that can be taken by religious educational institutions could limit a child and young person's rights to belief and to manifest their belief.

For instance, a student may join a religious school in Year 1 and at the time be of the same religious faith. Halfway through Year 12, that student may continue to hold their religious faith but may want to manifest that belief differently to the school's interpretation of what the faith requires. Clause 7(2) would allow the school to expel that student or treat that student differently than other students on the basis that they do not share the same religious beliefs as required by the school. In doing so, rather than protecting a child's right to religious belief in accordance with article 14 of the UN *Convention on the Rights of the Child*, the Bill *limits* their rights by privileging the conduct of religious educational institutions over the human rights of children. Article 14 of the UN *Convention on the Rights of the Child* stipulates that States Parties to the Convention should respect the right of the child to freedom of thought, conscience

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34 Robert Dixon, Jane McMahon, Stephen Reid, George Keryk, Annemarie Atapattu (2017) *Our work matters: Catholic Church employers and employees in Australia*, Australian Catholic Bishops Conference, xii <https://ncpr.catholic.org.au/wp-content/uploads/2018/03/Our-Work-Matters.pdf>.

35 Ibid.

36 Ibid v.

37 ACARA: Australian Curriculum, Assessment and Reporting Authority, *Staff numbers* (2020) <https://www.acara.edu.au/reporting/national-report-on-schooling-in-australia/national-report-on-schooling-in-australia-data-portal/staff-numbers>.

and belief.[38] While parents do have rights and duties to provide direction to the child in the exercise of these rights, this needs to be consistent with the evolving capacities of the child and allow for a degree of exploration of thought and belief, particularly for older secondary school students.

Such actions may also constitute a potential violation of the right to education, which is guaranteed by article 13 of the ICESCR. Under this article, States Parties to the Convention recognise the right of everyone to education and agree that education shall be directed to the full development of the human personality and sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms. The right to education includes a guarantee of non-discrimination, which means that no student should be excluded from education on the basis of any protected personal attribute (such as religious belief).

In contrast to clauses 7(2) and (4), equivalent provisions in the Australian Capital Territory, Northern Territory, Queensland, and Tasmanian laws allow schools to discriminate on the ground of religion at the time of admission to the school, but not in respect of a student's continuing enrolment.[39] The approach adopted in these state and territory legislative schemes provides a more balanced protection of the right of religious educational institutions to operate in accordance with their faith, but also respects a child's individual right to explore their own faith and beliefs.

The exceptions with respect to staff in clauses 7 and 11 at religious educational institutions also have the capacity to limit employees' and potential employees' rights to employment and freedom of thought, conscience and belief. Clause 11 allows religious educational institutions to preference persons on the basis of their religion where there is a publicly available policy that outlines the educational institutions policy in doing so. Clause 11 applies not only to determinations or preferences as to who should be employed but also determinations once someone is employed or in the determination to remove staff. This is because clause 11 applies to conduct that would otherwise be unlawful in both clause 19(1) in relation to hiring *and* in clause 19(2) in relation to terms and conditions in employment and preferencing in employment. Clause 11 allows religious educational institutions an extremely wide exception with respect to both hiring staff as well as making determinations about their conditions of ongoing employment after they have commenced work. The preferencing made available in religious educational institutions could allow religion to be used as an alternative route to discriminate on the basis of other protected attributes:

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38 CRC (n 2) art 14.

39 *Discrimination Act 1991* (ACT) s 46(1); *Anti-Discrimination Act 1992* (NT) s 30(2); *Anti-Discrimination Act 1991* (Qld) s 41(a); *Anti-Discrimination Act 1998* (Tas) ss 51A. The exceptions in the NT and Tasmanian law apply to schools **conducted in accordance with 'doctrine' or 'tenets, beliefs, teachings, principles or practices' 'of a particular religion'**, while the Queensland exception applies to educational institutions **'wholly or mainly** for students of a particular … religion', and the ACT exception applies to educational institutions 'conducted **solely** for students having a religious conviction' (**emphasis** added).

- In promotion rounds, a religious school could choose a particular staff member on the basis that they best adhere to the religious beliefs of the school, for instance, because they oppose marriage equality.
- In a redundancy process, a religious university could preference particular staff on the basis of religion to determine which staff are to be made redundant, even where religion is otherwise irrelevant to their role, for instance, keeping a staff member who is anti-abortion while making redundant a staff member who is pro-choice.
- In a hiring process at a religious school, an applicant who explicitly advises that they will refuse to use students' identified pronouns could be hired over a more qualified applicant who wishes to use students' identified pronouns.

### *Religious hospitals, aged care facilities, accommodation providers and disability service providers*

Separate exceptions have been added to the Bill in clause 9, allowing religious hospitals, aged care facilities, accommodation providers and disability service providers to discriminate on the basis of religious belief or activity in employment. The tests provided in clause 9 require a very low standard of proof. This could allow, for instance, a religious hospital to sack a doctor who expresses pro-choice views. It could also allow a religious aged care facility to refuse to hire an atheist care worker.

There is no rational basis for requiring doctors, aged care workers, and employees at accommodation and disability service providers to express the exact same religious beliefs and practices as the religion with which their employer is associated. The requirement is an unwarranted limitation on freedom of speech, opinion and belief. These are organisations receiving government funding and primarily conducted for commercial purposes or for service provision purposes. They should not have the benefit of special exceptions. Healthcare, accommodation, and other services should be provided by those individuals who are best equipped—most skilled and capable—to provide them, on the basis of merit.

### *Publicly available policies*

The only limitation apparent in clauses 7, 9 and 11 is the requirement to have a publicly available policy. Even then, it is only required for employment discrimination for religious educational institutions, hospitals, aged care facilities, accommodation providers and disability service providers. It is not a requirement for any other religious bodies, or for discrimination in any other area (such as goods and services).

Having a publicly available policy that advocates for preferencing or expressly states an intention to discriminate on the grounds of religion does not ameliorate any of the disadvantages that those people who are excluded from employment in religious institutions will suffer. Maintaining a publicly available policy accepting and advocating for discrimination on any basis has the capacity to further exacerbate stigma of individuals based on attributes they hold by indicating that discrimination on that basis is legitimate and justifiable. One of the primary aims of discrimination law is to lessen the stigma of persons on the basis of their

attributes. Explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harms that individuals will face as a consequence of a religious organisation's refusal to employ persons on the basis of an attribute but instead has the capacity to exacerbate such stigmas.

### *A path forward*

Religious body and religious educational institution exceptions in discrimination laws can undermine the right to equality. They should only be permitted where they can be justified when balanced with the fundamental rights and freedoms of others. International human rights law requires that discriminatory conduct not be permitted unless there is a legitimate purpose for the discriminatory conduct, and the means by which that purpose is achieved is proportionate.

Recently proposed reforms in Victoria adopt the preferred international human rights law approach, and are a best practice approach in Australia.[40] These reforms limit or remove existing general religious body exceptions, and instead provide for the following exceptions:

- Allow religious schools to discriminate on the ground of the religion of the prospective student in the admission of students, but not at any later stage.
- Allow religious bodies to discriminate on the ground of religion in employment, but only where religious practice or observance is an inherent requirement of the role (for instance a religious education teacher, but not a maths teacher or gardener) (again, on the ground of the religion of the employee or staff member).
- Allow the government-funded provision of goods and/or services by religious bodies to discriminate on the ground of religion (of the person seeking goods or services).
- Allow the non-government-funded provision of goods and/or services by religious bodies to discriminate on multiple grounds, including sexual orientation and gender identity (of the person seeking goods or services).
- Require that all conduct permitted by these exceptions be reasonable and proportionate.

The reasonable and proportionate test provides an objective basis to assess whether the action proposed to be taken is just or unjust and includes consideration of the consequences to the person who is being discriminated against and the rights of the religious body. This in turn allows discrimination law to strike an appropriate balance between the right to equality and the right to religious belief.

Tasmanian provisions also provide an example of best practice. They permit discrimination in employment only on the basis of religion where it is a genuine occupational requirement of the role,[41] while students at religious schools can only be discriminated against on the basis of

40 Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic).

41 *Anti-Discrimination Act 1998* (Tas) s 51.

religion at the time of admission, that is at the first point of entry to the school, and not in relation to ongoing enrolment.[42] The former limitation focuses on the religious educational institution's continued right to hire staff of the same religious faith where the role requires religious observance. The latter limitation focuses on the religious educational institution's continued right to build a community of faith through the admission of its students. Tasmania's lack of distinction as to government funding for goods and services is preferable to the Victorian approach. There is no justified reason why, for instance, LGBTIQA+ people should be discriminated against in the provision of certain goods and services but not others. The principled position should be that discrimination is not permitted regardless of whether the provision of those goods and service is government-funded or not.

The Bill should combine the most effective and principled parts of the respective Victorian and Tasmanian approaches and thereby become the new best practice jurisdiction on religious body defences to unlawful conduct allegations. This would appropriately reflect international human rights law, and adopt targeted defences allowing religious organisations to discriminate on the basis of religion (but no other grounds) where religion is inherent to the conduct in question and the conduct is both reasonable and proportionate. In doing so, this provision should also be moved to the 'Exceptions' part of the Bill (Part 4, Division 4), meaning that clause 34 should consequentially be removed.

Specifically, the religious body exceptions in the Bill should:

- require that conduct be reasonable and proportionate in order to be permitted under religious body and religious educational authority exceptions;
- require that discrimination only be permitted on the ground of religious belief or activity of the employee or service user under religious body and religious educational authority exceptions, and not on the basis of any other grounds;
- require that employment discrimination only be permitted under religious body and religious educational authority defences where conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the role and the person cannot meet those inherent requirements because of the person's religious belief or activity; and
- only permit religious educational authorities to discriminate against students on the basis of the student's religion at the point of admission, and not at any later stage.

**Recommendation 3: Clauses 7 to 9 and clause 34 be removed from the Bill, and replaced with a more targeted and proportionate exception for religious bodies in Part 4, Division 4.**

[42] *Anti-Discrimination Act 1998* (Tas) s 51A.

# Other matters of concern

## Protecting students and teachers at religious schools

The *Sex Discrimination Act 1984* (Cth) ('SDA') retains exceptions in section 38 that permit religious schools to discriminate against students, teachers and staff on a range of different protected attributes, including sexual orientation, gender identity, pregnancy and marital status.[43] These should be removed.

However, even if those SDA exceptions are removed, this Bill could provide an alternative route for religious schools to discriminate, especially against LGBTQ+ teachers and students.[44] As noted above, religious schools need only prove that an individual of the same religion as the school 'could reasonably consider' the school's actions to accord with their religious beliefs. It is not a test seen in any other Australian discrimination laws. It is such a low bar that religious schools could likely rely on it for almost all conduct.

For instance, a non-supportive religious school may teach that marriage is between a man and a woman and same-sex couples should not be permitted to marry or have children. That school could then discriminate against any staff and students who do not adhere to this belief – such as a teacher or gardener who marries their same-sex partner.

As noted above, the second exposure draft of the Bill previously contained a clarification that the Bill 'does not' permit conduct that is unlawful under the SDA. However, the current version of the Bill has watered this down. It now simply says, in legislative note 2 to clause 7(2), that conduct covered by the Bill 'may' still be discriminatory under the SDA. The subtle change from 'does not' to 'may' makes a significant difference.

Even if the SDA exceptions are removed, this Bill contains an alternative route in clauses 7 and 11 that would permit discrimination against those who are protected under the SDA and other discrimination laws. This must be clarified and rectified.

Further, under international human rights law, parents have the right to send their children to schools of their choice, including religious schools that educate 'in conformity with their own convictions'. This right is found in article 13(3) of the ICESCR and article 18(4) of the ICCPR. Both the exceptions found in section 38 of the SDA and clause 7 of this Bill allow religious schools to exclude particular students, thus denying parents their choice of religious education for their child. As such, this Bill effectively prioritises the conduct of religious schools over the religious freedom of parents, despite international law prioritising the latter.

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43 *Sex Discrimination Act 1984* (Cth) s 38.

44 See further Liam Elphick and Alice Taylor, 'Religious schools can still expel LGBTQ+ kids. The Religious Discrimination Bill only makes it worse', *The Conversation* (online, 25 November 2021) <https://theconversation.com/schools-can-still-expel-lgbtq-kids-the-religious-discrimination-bill-only-makes-it-worse-172494?utm_medium=Social&utm_source=Twitter#Echobox=1638241606>.

**Recommendation 4: Section 38 of the *Sex Discrimination Act 1984* (Cth) be removed and the Bill be amended to confirm that it does not undermine any protections or prohibitions under the *Sex Discrimination Act 1984* (Cth) or other discrimination laws.**

## Qualifying body conduct rules

Clause 14(1) prohibits indirect discrimination on the basis of religious belief or activity, reflecting the structure of other federal discrimination laws by defining indirect discrimination as the imposition of a condition, requirement or practice which has, or is likely to have, the effect of disadvantaging persons who possess the protected attribute (in this case, a particular religious belief or activity). Clause 14(1)(c) also reflects the structure of other federal discrimination laws by providing a 'reasonableness' defence to indirect discrimination. As in other federal discrimination laws,[45] 'reasonableness' is assessed in clause 14(2) by reference to a set of balancing factors that weigh the different and competing interests of the relevant parties: the nature and extent of any disadvantage resulting from the condition, requirement or practice; the feasibility of overcoming or mitigating this disadvantage; and the proportionality of this disadvantage to the result sought by the person who imposed the condition, requirement or practice. This is similar to proportionality exercises undertaken to balance and resolve competing human rights under international law.

Under these provisions, and these provisions alone, indirect discrimination under this Bill would work in the same way as it does under other discrimination laws in Australia. Consider the example of a law firm that imposes a requirement that all employees must work between 9am and 1pm on Sundays. This might *prima facie* disadvantage those of a religious faith that requires or expects observance of that faith and/or attendance at religious ceremonies and events on Sundays. This may not be a disadvantage that can be overcome or mitigated, and it may be unclear why a law firm would require work to be completed in those hours when courts are not open on Sundays and clients are less likely to be working at that time. As such, it may be that this requirement is found to be unreasonable, and therefore unlawful indirect discrimination on the ground of religious belief or activity. The situation may be different for employers with stronger justifications for requiring work to be conducted on weekends, such as real estate agencies. The advantage of the general 'reasonableness' test and associated balancing factors is that individual circumstances of the relevant parties can be taken into account and weighed against each other in coming to a decision on whether the condition, requirement or practice in question amounts to indirect discrimination.

However, clauses 15 of the Bill effectively circumvents and overrides this general 'reasonableness' defence and the associated balancing factors used to assess 'reasonableness'. This clause provides that a 'qualifying body conduct rule' that would restrict or prevent the expression of religious beliefs by members of a qualifying body outside the course of their employment will be presumed 'unreasonable'. This has the effect of creating a legal presumption that conduct rules that apply to professionals, tradespeople and other workers are

[45] See, eg, *Sex Discrimination Act 1984* (Cth) s 7B(2).

unlawful indirect discrimination, rather than assessing this through the balancing factors used to assess 'reasonableness' under all other indirect discrimination claims under Australian discrimination laws.

'Qualifying bodies' include legal admission boards, medical boards, universities and TAFEs, and teacher's registration boards, among other bodies. The role of qualifying bodies is to regulate the conduct of its members, who fill important societal roles that carry the risk of harm to people in the community. For example, law societies usually require that lawyers are 'fit and proper persons' to carry on legal practice, while various medical regulatory bodies certify the suitability of its practitioners to provide medical services to the public. These members provide services to a diverse array of community members, many of whom have complex needs and experience exclusion, discrimination and stigma. It is a significant step to circumvent the role of qualifying bodies as regulators.

The type of provision found in clause 15 (either a specific one on 'qualifying body conduct rules' or one providing a general presumption of unreasonableness) is not found in *any* other Australian discrimination law, which adequately address the issue through ordinary indirect discrimination provisions (including the 'reasonableness' defence and associated balancing factors). While these provisions clearly target an Israel Folau-type situation, this situation can already be, and is more appropriately, captured by the ordinary indirect discrimination provisions in clauses 14(1) and (2) without requiring additional special provisions. Instead, the current situation under the Bill is that where a qualifying body imposes a rule that restricts the expression of religious beliefs, this would be unlawful indirect discrimination unless the body can prove one of two exceptions (which are difficult to establish, and discussed above under 'Statements of belief').

Under clause 15, statements on the basis of religious belief would have greater protection from qualifying body intervention than a statement made for any other reason. For qualifying bodies, it would mean that measures to protect their reputation, practice and regulatory functions through codes of conduct would need to be applied differently in respect of members making statements on the basis of religious belief and members making statements on some other basis, such as a social, cultural, political, scientific, or considered belief.

For example, a qualifying body might impose a rule that bans members from engaging publicly in controversial political debates. If a gay member is restricted by this rule from publicly supporting marriage equality as a result, they could argue an indirect discrimination case under the *Sex Discrimination Act 1984* (Cth), but the rule will be lawful if the qualifying body can establish that the rule was 'reasonable' based on the balancing factors. Differently, a religious member in the same situation (for instance, a member restricted from publicly opposing marriage equality on the basis of their religious beliefs) could argue an indirect discrimination case under the proposed Religious Discrimination Act, and the rule would be *presumed* unlawful unless the qualifying body can prove one of the narrow exceptions in clause 15(3). As noted above, the difficult evidentiary issues with proving the exceptions in clause 15(3) are discussed earlier, in the section on 'Statements of belief'.

As a matter of equality, there should not be one rule for indirect discrimination on the basis of race, sex, disability and age, and another rule for indirect discrimination on the basis of religion. Qualifying body conduct rules should be considered under the same 'reasonableness' test in all federal discrimination laws.

**Recommendation 5: Clause 15 and associated definitions be removed from the Bill.**

## Consultation and accessibility

There has been very limited time available to consult on such significant changes to the discrimination law framework in Australia and the failure of the Australian Government to fulfil its obligations, for example, under the *Convention on the Rights of Persons with Disabilities* ('CRPD'):

- article 21: to 'providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost';[46]
- article 29: to 'ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others'.[47]

In relation to these obligations, Australia made the following statement in its most recent report to the Committee on the Rights of Persons with Disabilities:

> 257.The Australian Government provides information about laws, policies, systems and obligations in accessible formats, including in Easy Read and Easy English where possible. Under the DDA, all Australian Government agencies are required to ensure that information and services are provided in a non-discriminatory and accessible manner.[48]
>
> 326.The Australian Government is committed to ensuring the meaningful participation of persons with disabilities in decision making processes at all levels, including their ability to vote and exercise choice.[49]

The time available for submissions to this parliamentary inquiry has been very short and there have been no accessible format materials made available by the Australian Government to ensure that people with disabilities that affect their communication needs can fully engage with this legislative process.

Despite this, the current (and previous exposure draft processes) have not provided sufficient time for effective engagement by people with disability or ensured that information, etc, was

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46 CRPD (n 2) art 21: Freedom of expression and opinion, and access to information.

47 CRPD (n 2) art 29: Participation in political and public life.

48 Australia, *Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018*, UN Doc CRPD/C/AUS/2–3 (received 7 September 2018, distributed 5 February 2019) [257].

49 Ibid [326].

provided in accessible formats. This has prevented many people with disability from exercising their article 29 rights to participation in political and public life.

**Recommendation 6: That consideration of the Bills be delayed until such time as the Australian Government has fulfilled its obligations to ensure accessibility of the process and materials and effective opportunities for engagement by members of affected communities.**

## Further issues with the Bills

There are a number of other aspects of the Bills that have been drafted to provide special protections or privileges for religion, including:

- permitting religious *bodies*, not just *individuals*, to bring claims of discrimination under the Bill, despite the well-established position that human rights should only be afforded to *humans*: clause 16(3)
- challenging local government limits on activities in local government areas that may affect the actions of street preachers: clause 5(2) and (3) of the Bill;[50]
- permitting discrimination in the commercial hiring of camps or conference facilities: clause 40(2) of the Bill;[51]
- deeming the actions of charities (irrespective of whether they are religious charities or not) in promoting 'a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life' to be, without more, 'conclusively … for the public benefit and not contrary to public policy': Schedule 1, clause 3, *Human Rights Legislation Amendment Bill 2021*; and
- extending discrimination permitted by schools in terms of refusing to hire facilities for marriage-related purposes despite these matters being heavily debated when changes were made to the *Marriage Act 1961* in 2017: Schedule 1, clause 6, *Human Rights Legislation Amendment Bill 2021*.

These issues must be considered in light of their impact on human rights, and should be corrected – in most instances, through the deletion of the relevant clause.

**Recommendation 7: That other matters of concern regarding the Bills be rectified.**

[50] See for example, the decision of the High Court of Australia involving a challenge to the prosecution by the City of Adelaide of Caleb and Samuel Corneloup for breaching Council by-laws: *Attorney-General for South Australia v Corporation of the City of Adelaide and Ors* [2013] HCA 3 (27 February 2013).

[51] Countering the Victorian Supreme Court decision in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014).