Law Council
OF AUSTRALIA

Religious Freedom Bills

Attorney-General's Department

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the New South Wales Bar Association, the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of South Australia, the Law Society Northern Territory, the Not-for-Profit Legal Practice and Charities Committee of its Legal Practice Section, and its National Human Rights Committee, Equal Opportunity Committee and Indigenous Legal Issues Committee for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council recognises there are opportunities to consolidate and strengthen protections to prevent discrimination against people on the ground of their religion at the federal level, given existing protections are fragmented and inconsistent.

2. The Law Council considers that rights and freedoms should be protected in a coherent legal framework that promotes the understanding that human rights are universal, indivisible, interdependent and interrelated. As such, the Law Council continues to support a federal human rights act. It also supports the adoption of comprehensive, consolidated federal anti-discrimination legislation, provided this preserves and strengthens existing protections. However, the Law Council recognises that the Australian Government has adopted a different approach at this time.

3. Generally, the model proposed in the Religious Discrimination Bill 2019 (**the Bill**) for the protection of people from discrimination on the ground of religion is based upon other federal discrimination laws, particularly the *Sex Discrimination Act 1984* (Cth) (**SDA**), *Age Discrimination Act 2004* (Cth) (**ADA**) and the *Disability Discrimination Act 1992* (Cth) (**DDA**) (**the Established Model**).[1] The Bill uses the Established Model to protect persons from discrimination on the ground of religion. It protects persons against both direct and indirect discrimination in well-established areas of public life such as employment, education, goods and services, accommodation, access to premises, and clubs and associations.

4. However, there are some significant and concerning departures from the Established Model which introduce new and unorthodox protections for religious belief and expression. Some of these provisions are concerning because, contrary to well-established principles of international and domestic law, they prioritise the protection of freedom of religious expression over other well-recognised human rights, such as the right not to be discriminated against on the grounds of race, sex, sexual orientation, disability, or age, or the right to health, in a manner which disproportionately limits their enjoyment. Other provisions extend too far the discrimination protections based on the ground of religious activity or belief. The Law Council's principal concerns include the following.

5. **The definition of 'person' at subclause 5(1)** gives the Bill a broader scope than other Commonwealth anti-discrimination laws by extending its protections beyond natural persons to body corporates, incorporated associations, 'bodies' (however constituted) and bodies politic. Therefore, it is open for a body corporate under the Bill to allege that it has been discriminated against on the basis of its religious activity. This is inconsistent with relevant international human rights treaties, which protect the rights and dignity of individuals and in some cases groups of individuals, rather than corporates or governments. It may result in an uneven landscape of rights protection, in which the rights of natural persons based on certain attributes are considered alongside those of corporations. The Law Council recommends that the definition of 'person' in subclause 5(1) be removed, and consideration be given to clarifying that this definition is limited to a natural person. (see [60]-[73] below)

[1] The *Racial Discrimination Act 1975* (Cth) (**RDA**) uses a different model which more closely resembles the *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (**ICERD**), and has not been used in other federal discrimination statutes.

6. The Bill also includes provisions which restrict the concept of 'unreasonableness' in indirect discrimination in an unjustified manner. These include restricting a relevant employer from making an employer conduct rule at subclauses 8(3) and 8(4),[2] which restricts or prevents an employee from making a statement of religious belief at a time other than when the employee is performing work. These provisions do not exist in any other Australian jurisdiction. Whereas the usual 'reasonableness' test in the context of indirect discrimination would require the court to weigh all relevant matters in the balance, subclause 8(3) narrowly circumscribes what is reasonable. It significantly curtails consideration of the potential harm to others' rights and of the legitimate objective of maintaining tolerance and diversity in large Australian workplaces generally. Subclauses 8(3) and 8(4) also add significant complexity to this area of the law, noting that large employers may experience practical difficulties in interpreting them, and in establishing the high and ambiguous thresholds required the relevant exceptions. Their application to employers with over $50 million annual revenue also appears arbitrary in its effect, placing employees of large and small businesses in different situations. The Law Council considers that these provisions are unnecessary given the Bill's existing general reasonableness test for indirect discrimination, which enables the relevant issues to be dealt with in a comprehensive, balanced manner. The Law Council recommends that subclauses 8(3) and 8(4)[3] be removed. ([82]-[108])

7. Restrictions on the concept of reasonableness for indirect discrimination also include **deeming health practitioner conduct rules that limit conscientious objection unreasonable at subclauses 8(5) and 8(6)**. The Law Council considers that subclause 8(5) is unnecessary. Subclause 8(6) is broadly framed in terms of both the health services and the health practitioners covered. Subclause 8(6) may effectively override existing state government policy and lawmaking decisions (including decisions *not* to legislate for conscientious objections) which are designed to ensure patients' health care needs are not compromised, particularly patients in rural and regional areas where access to health care services may be severely limited. It may also undermine existing policy directives or codes of conduct, including their requirements to refer patients to alternative care. The Law Council is concerned that the exceptions to subclause 8(6) involve high thresholds which will be difficult to meet. It is particularly concerning that vulnerable groups of people may miss out on medical care and treatment as a consequence of these provisions. These provisions are also unnecessary as the conscientious objection rights of health practitioners can be appropriately accommodated, along with the rights of the patient and the health service's objectives, under the existing reasonableness test for indirect discrimination. The Law Council recommends that subclauses 8(5) and 8(6) be removed. ([109]-[157])

8. The **exception at clause 10, which proposes a broad-based exception for a religious body to a claim of religious discrimination** for conduct which may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted, is also of concern. The defence is broadly available to a religious educational institution, a religious charity or to any other religious body.[4] It is significantly broader than the usual forms of exception which apply in Commonwealth, state and territory anti-discrimination laws and proposes a lower test for exclusion. In particular, it changes the focus from requiring some form of *compulsion* on a religious body to act in a certain manner (eg to avoid injury to religious susceptibilities, or to conform with the

[2] See also paragraph 8(2)(d) concerning employer conduct rules more generally, which is also, in the Law Council's view, problematic, as discussed below.
[3] Along with paragraph 8(2)(d), as discussed below.
[4] Other than a charity or body which engages primarily or solely in commercial activities.

religious doctrine) to a more permissive basis for the exception. Under this broad exception, clause 10 may, for example, enable religious schools to exclude all teachers, contractors and students of different religious beliefs, regardless of the circumstances. The Law Council is concerned that this is not necessary or proportionate. It recommends that the religious bodies exception should be redrafted and brought into line with comparable Commonwealth provisions, particularly paragraph 37(1)(d) of the SDA, which also creates a general exception but in narrower terms, and only in relation to bodies established for religious purposes. ([158]-[205])

9. **Clause 41 also provides a broad-based exemption for statements of religious belief,** which will not constitute discrimination for the purposes of existing federal, state and territory anti-discrimination laws. That is, it would make lawful a statement of belief which would otherwise be unlawful discrimination by virtue of such a Commonwealth, state or territory law. The Law Council is concerned by this approach. It considers that reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination and promote substantive equality. The available exceptions are narrow, and discriminatory statements which do not fall within their scope may nevertheless serve to reinforce stigma for people who are already marginalised in the community. The Law Council is also concerned that clause 41 is unworkable as it will draw both the complainant and respondent into secondary litigation, causing further delay and cost to both parties. It should be removed from the Bill. ([231]-[294])

10. The Law Council makes a range of further recommendations regarding the Bill, including its **objects clauses** [39]-[44], **positive discrimination provisions** [206]-[218], **serious offence exemption** [221]-[225], **temporary exemptions provisions** [226]-[230], and proposed **Freedom of Religion Commissioner role** [295]-[302].

11. The Law Council also raises concerns with respect to the proposal in the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (**the HR Bill**) to amend section 11 of the *Charities Act 2013* (Cth) **(the *Charities Act*)**. This **amendment would clarify that the purpose of engaging in, or promoting, activities that support a traditional view of marriage** is not, of itself, a disqualifying purpose. The Law Council does not support the amendment for a range of reasons. These include that it is unnecessary, significantly broader than originally intended, may 'open the floodgates' and result in charities seeking legislative clarification on numerous other issues, and may raise confusion. Any concern in this area can be appropriately dealt with through regulatory guidance. The Law Council recommends that it be removed. ([347]-[333])

12. Finally, the Law Council notes that the release of exposure drafts of the Bill, the HR Bill and the (Consequential Amendments) Bill 2019 (**Consequential Amendments Bill**) (together, the **Religious Freedom Bills**) for public consultation has been welcome. However, the timeframe allocated for this consultation has been inadequate, having regard to the national significance of the subject matter. The Law Council is continuing to receive the views of the legal profession on these bills and urges the Australian Government to fully consider feedback received and consult further with all stakeholders in a measured manner, prior to the introduction of any legislation. The Law Council hopes that following receipt of the current submissions, the Australian Government will issue a further set of exposure draft Religious Freedom Bills for consultation. The matters sought to be addressed are too significant, complex and involve such deeply-held and divergent community views, to rush this process.

Introduction

13. The Australian Government has released for discussion three exposure drafts comprising a suite of bills on religious discrimination and belief:

    - the Bill;
    - Consequential Amendments Bill; and
    - the HR Bill.

14. The Law Council's submission focuses primarily on the Bill. It also makes specific comments with respect to the HR Bill's proposed amendments regarding the *Charities Act 2013* (Cth) (**the Charities Act**).

15. In the time available, the Law Council has not focused on the broader aspects of the HR Bill, nor considered the Consequential Amendments Bill. The Law Council may provide further views concerning the Religious Freedom Bills in due course, as it continues to receive the views of the legal profession, including on Constitutional law issues.

Need for a federal human rights act and consolidated anti-discrimination laws

16. The Law Council considers that rights and freedoms should be protected in a coherent legal framework. Any option for reform in this area should promote the understanding that human rights are 'universal, indivisible, interdependent and interrelated'.[5] The Law Council considers it is preferable to embed freedom of religion in a comprehensive and coherent framework of substantial rights protection, which recognises that limitations on rights[6] must be necessary, and proportionate to the specific need, in order to be justified and permissible. This is best achieved through a federal human rights act.[7] In the absence of such an act, legislation which places an undue emphasis on giving effect to a single freedom may risk unjustifiably limiting the rights of others.

17. The Law Council also notes that Australia has a highly complex system of anti-discrimination protections at the state, territory and federal level. Proposed religious freedom reforms may increase the complexity of Australia's anti-discrimination framework. As discussed below, the Bill will operate differently from existing federal anti-discrimination laws in several respects.[8]

18. As an overarching solution to this complexity, the Law Council's preferred approach is that federal anti-discrimination laws should be consolidated into a single, comprehensive enactment, to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds,

[5] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5].
[6] Other than rights which are absolute, as discussed below.
[7] See United Nations Human Rights Committee (**HRC**), *Concluding observations on the sixth periodic report of Australia*, 102nd sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) (**Concluding Observations**), [5]-[6].
[8] For example, as discussed below, with respect to its definition of 'employment', definition of 'person', temporary exemptions regime, standards of protection for statements of belief, and differences in how the *Fair Work Act 2009* and the Bill approach religion.

including religion.[9] However, the process of consolidation must preserve or enhance existing protections against discrimination and improve the regime's ability to promote substantive equality, as well as removing the regulatory burden on business.[10]

Recommendations:

- **That a federal human rights act be adopted.**
- **That comprehensive, consolidated federal anti-discrimination legislation be adopted which preserves and strengthens existing protections, improves the regime's ability to promote substantive equality and removes regulatory burdens on business.**

Religious Discrimination Bill

Background

The Bill

19. The Bill will make it unlawful to discriminate on the basis of religious belief or activity in specified areas of public life. It will not create a positive right to freedom of religion. Complaints under the Bill can be made to the Australian Human Rights Commission (**the AHRC**), which can conciliate complaints. Where conciliation is unsuccessful, an individual may apply to the Federal Court or Federal Circuit Court for a remedy, including compensation. The Bill also establishes the new role of a Religious Freedom Commissioner at the AHRC.

20. The Bill protects against discrimination on the grounds of 'religious belief or activity'.[11] Discrimination for the purposes of the Bill includes both direct discrimination and indirect discrimination.[12]

21. The Bill makes it unlawful to discriminate on the ground of religious belief and/or activity in relation to key areas including work, education, access to premises, providing goods and services, accommodation, land, sport, clubs and performing functions or exercising powers with respect to Commonwealth laws and programs.[13]

Response to Bill

Need for the Bill

22. The Law Council has previously recognised that there are opportunities to consolidate and strengthen the protections against discrimination on the basis of religion at the federal level, noting that the current federal protections for religious freedom are fragmented and inconsistent. In this context, the United Nations Human Rights Committee (**HRC**) has also noted its concerns regarding the 'lack of direct protection against discrimination on the basis of religion at the federal level'.[14] The enactment of a Commonwealth Religious Discrimination Act was a core recommendation made by

[9] As recognised by the HRC, Ibid, [18].
[10] Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws* (2011).
[11] The Bill, cl 5.
[12] Ibid, Pt 2.
[13] Ibid, Pt 3.
[14] HRC, Concluding Observations, [17].

the Expert Panel appointed to examine freedom of religion (**the Expert Panel**) in its recent final report.[15]

23. While the Law Council would prefer a more comprehensive federal charter, as well as a consolidated anti-discrimination law, it recognises that the Bill is designed to respond to the above recommendation. Except for some significant and concerning exceptions, the Bill is drafted to prohibit religious discrimination in a similar manner to the model found in other Commonwealth, state and territory laws that prohibit discrimination. That is, the Bill prohibits both direct and indirect discrimination against a person on the grounds of their religious belief or activity.[16] The Bill prohibits such discrimination only in certain well-understood areas of public life: employment and related relationships, education, access to premises, provision of goods, services and facilities, accommodation, land, sport, clubs and so forth.[17] These areas are largely consistent with the coverage that is provided by other components of the federal anti-discrimination law regime.

24. There are, however, some provisions inserted into the Bill which are not reflected in other discrimination laws and may be regarded as exceptional, including:

- the definition of 'person', which includes a body corporate, such as a religious body or other religious institution;
- the statutory definition of what constitutes reasonableness in a claim of indirect discrimination in subclauses 8(3) and (4) (employer conduct rules regarding statements of belief);
- subclauses 8(5) and (6) (the conscientious objection provisions);
- the clause 10 defence for acts of religious bodies in good faith and in accordance with doctrines, tenets, beliefs or teachings of the religion; and
- the clause 41 defence for statements of religious belief.

25. These are discussed in further detail below, along with other items of concern.

Need for a proportionate response to concern of lack of religious freedom

26. The Law Council considers that a measured and balanced approach should be adopted in implementing any Religious Discrimination Act. This is borne out by key Expert Panel findings. For example, the Expert Panel commented that it:

> *… did not accept the argument, put by some, that religious freedom is in imminent peril,* [however] *it did accept that the protection of difference with respect to belief or faith in a democratic, pluralistic country such as Australia requires constant vigilance.*[18]

As such, it 'acknowledged the timeliness of the obligations… to look again at the protection of religious freedom and its relationship with other rights, which are of equal weight and significance'.[19]

27. The Expert Panel found that there was a significant data gap on the prevalence of harm suffered by people of faith in Australia,[20] noting that 'by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in

[15] *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, 95 (Rec 15).
[16] The Bill, cls 7 and 8.
[17] The Bill, pt 3, divs 2 and 3.
[18] Ibid, 8.
[19] Ibid.
[20] Ibid, 100-101 (Rec 17).

Australian law'.[21] With respect to infringements, it noted that 'many submissions contained examples, most repeated several well-known, high profile cases of perceived infringement of religious freedom. Only a small minority of submissions provided personal examples'.[22]

28. The data sources reviewed by the Expert Panel also suggested that the experience of discrimination may not be evenly experienced across all religious groups, but possibly most acutely experienced amongst particular groups, such as Muslim and Jewish people.[23] For example, the Scanlon Foundation's 2017 national survey suggested that only five per cent of respondents held negative attitudes towards those belonging to Buddhist and Christian traditions. However, almost one in four respondents viewed Muslims negatively.[24] With regard to violence or the threat of violence, the Expert Panel cited reports from the Executive Council of Australian Jewry and the Islamophobia Register, which recorded 230 anti-Semitic incidents and 243 Islamophobic incidents during separate 12-month periods between 2014 and 2017.[25]

29. In the Law Council's view, these findings underline the importance of avoiding laws which are disproportionate and/or not well adapted towards scenarios of the greatest likely need. For example, recent research undertaken by RMIT Professor Anna Hickey-Moody regarding the experiences of faith groups has reportedly found that Muslim women in Australia endure disturbing levels of public violence, abuse and racism.[26] At the same time, the labour force participation rate of Muslim women is very low, partially due to discrimination.[27] This group may not stand to substantially benefit from measures designed to ensure that religious employees of large companies can make statements of belief freely outside the workplace.

Context - Australia's international law obligations

30. The **Appendix** provides a detailed overview of matters which are highly relevant to, and should inform any analysis of, the Bill. These include Australia's relevant international law obligations, as set out in the *International Covenant on Civil and Political Rights* (**ICCPR**)[28] *International Covenant on Economic, Social and Cultural Rights*[29] *(***ICESCR**) and other core international human rights treaties. They include:

- the right to equality and non-discrimination on the basis of religion as well as other grounds such as race, sex and 'other status' including sexual orientation;
- freedom of religion and belief (including to manifest one's religion or belief);
- freedoms of opinion and expression; and
- the right to the enjoyment of the highest attainable standard of health.

31. The Appendix refers briefly how religious freedom at international human rights law addresses or relates to different scenarios, including the propagation of religious beliefs, the right to conscientious objection and religious schools.

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[21] Ibid, 104.
[22] Ibid, 98.
[23] Ibid, 100.
[24] Ibid, citing Andrew Markus, *Mapping Social Cohesion: the Scanlon Foundation surveys 2017* (2017), 69.
[25] Ibid, 99-100.
[26] Sowaibah Hanifie, 'Muslim Australians found to suffer the 'most disturbing' experiences in public among all faiths', ABC (online), 7 May 2019, https://www.abc.net.au/news/2019-05-07/muslim-australians-found-to-suffer-most-disturbing-experiences/11058582.
[27] 'Fact check: Are more than half of Australia's working-age Muslims not in the workforce?', ABC (online), 6 September 2018, <https://www.abc.net.au/news/2018-06-04/fact-check-muslim-workforce/9800656>.
[28] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[29] Opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976).

32. As also outlined in the Appendix, it is a well-established principle of international law that human rights are interrelated, interdependent and indivisible. International human rights law also recognises that certain human rights are absolute, and no limitation upon them is permissible. For all other human rights, limitations may be imposed, provided certain standards are met.

33. For example, the right to freedom of thought, conscience and religion, and the right to hold opinions, are absolute. On the other hand, the right to manifest one's religion or to freedom of expression can be subject to limitations. For example, the freedom to manifest one's religion may be subject to limitation as indicated in article 18(3) of the ICCPR – that is, as prescribed in law and where necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Meanwhile, the freedom of expression carries with it 'special duties and responsibilities'. It may be subject to restrictions but only as are provided by law and as necessary to protect others' rights and reputations, national security, public order, public health or morals.

34. Where limitations on rights are permissible, consideration must be given to the principles on which such limitations are justifiable. The Law Council notes that while freedoms of religion and expression are fundamental human rights and should be protected by law, they should not be protected at the expense of other rights and freedoms. There is also a fundamental right of each individual to respect for their personhood and dignity on the basis of equality. Any limitation on that must be clearly shown to be necessary and proportionate.

35. Where tensions arise with respect to conflicting rights, the mechanism used to balance these tensions is that of proportionality, a well-established principle of international law embodied in the above limitation. In general, a State must only interfere with a person's rights if the interference is proportionate to the legitimate aim pursued.

36. It is expected that domestic legislation that aims to implement international human rights obligations will utilise the principle of proportionality as part of an assessment of the necessity of a measure in order to determine whether a limitation on a right is justifiable. In considering when limitations on human rights may be permissible, the Law Council endorses the analytical framework adopted by the Parliamentary Joint Committee on Human Rights (**PJCHR**). In general, where a provision appears to limit rights, the PJCHR considers whether and how:

    - the limitation is prescribed by law;
    - the limitation is aimed at achieving a legitimate objective;
    - there is a rational connection between the limitation and the objective; and
    - the limitation is proportionate to that objective.

37. The Appendix provides specific examples of the application of the proportionality principle in determining whether limitations on rights are justified in both international and domestic jurisprudence. These include several relevant examples of how limitations have been placed on freedom to manifest religion in different circumstances.

38. The Law Council has had regard to the above matters, as discussed in more detail in the Appendix**,** in analysing the Bill's provisions and commenting on them below.

Provisions: Part 1 - Preliminary

Objects

39. The objects of the Bill are set out in subclause 3(1):

> *(1) The objects of this Act are:*
>
> *(a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and*
>
> *(b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and*
>
> *(c) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.*

40. These objects are directed towards articles 2(1), 26, 18 and 19 of the ICCPR (see Appendix).

41. However, Law Council queries the inclusion of paragraph 3(1)(c) in the Bill's objects, which places undue weight on 'statements of belief'. This paragraph also undermines the intention of the Bill to be a 'Religious Discrimination' Act, rather than a Religious Freedom Act.

42. As noted in the Appendix, while the propagation of religious beliefs is recognised as part of the right to manifest religion, it is subject to specified limitations under article 18(2) of the ICCPR (and article 19(3)) and there is no special weight afforded to this aspect of the right above all others. Further, by failing to advert to the equally important rights that may limit the extent to which persons may manifest their religion belief – such as the right to respect for one's privacy or private life – this further contributes to the imbalance between protection of freedom of religion and a range of other rights. The Law Council notes that the Bill's broader provisions will be interpreted in light of paragraph 3(1)(c), not only those concerning statements of belief. These include the positive discrimination provisions at clause 11, which is specifically linked to the Bill's purposes.

43. Paragraph 3(1)(c) may also be problematic in that the Law Council is concerned that the Bill's provisions concerning statements of belief (subclauses 8(3), 8(4) and clause 41) may be inconsistent with the approach adopted towards limiting human rights at international law. These concerns are discussed further below.

44. The Law Council considers that paragraph 3(1)(c) should be removed. If this is not accepted, it proposes that the following amendments - if made in line with its recommendations concerning subclauses 8(3), 8(4) and clause 41 below - would better align this object with Australia's obligations.

Recommendations:

- **Paragraph 3(1)(c) be removed.**
- **Should this not be accepted, paragraph 3(1)(c) be amended to read as follows:**

  to ensure that people can, consistently with Australia's obligations with respect to freedom of religion (including the right to manifest their religion) and freedom of expression, and subject to specified limits as set out in articles 18 and 19 of the International Covenant on Civil and Political Rights, exercise these freedoms.

45. The Law Council also notes that subclause 3(2) states that in giving effect to the objects of this Act, regard is to be had to the indivisibility and universality of human rights, and the principle that every person is free and equal in dignity and rights. This responds to a specific recommendation made by the Expert Panel, that governments should consider the use of objects clauses in anti-discrimination laws to reflect the equal status in international law of all human rights, including freedom of religion.[30]

46. The Law Council supports subclause 3(2). However, it is concerned that subclause 3(2) sits at odds with several other provisions in the Bill, including those relating to employee conduct rules, statements of belief and health practitioners conduct rules, and the broad clause 10 exception. These seek to elevate the status of freedom of religious belief or activity above the status of other important rights and freedoms. They limit or remove the ability to consider how best to balance tensions between rights, undermining the likely effectiveness of subclause 3(2) as an interpretative tool. Should the Law Council's recommendations below be adopted, this would better implement the Expert Panel's recommendations.

47. It further suggests that consideration be given to including the principle that 'every person is free and equal in dignity and rights' in the Bill's objects, as well as in other anti-discrimination laws. This is a fundamental premise of international human rights law as reflected in article 1 of the *Universal Declaration of Human Rights*.[31]

Definitions

Employment

48. The definition of 'employment' in the Bill includes unpaid work,[32] while the definition under other anti-discrimination laws does not include volunteers.[33] As noted regarding clause 13 (prohibiting discrimination in the area of employment), the inclusion of unpaid work is intended to reflect modern work practices and ensures that workers who are particularly vulnerable to exploitation, such as unpaid interns, cannot be subject to discrimination on the ground of their religious belief or activity merely because they are working in an unpaid capacity.[34]

49. The Law Council suggests that to avoid confusion amongst employers, consideration be given to adopting a similar approach with respect to other anti-discrimination laws and employment.

[30] Expert Panel Report, 47 (Rec 3).
[31] GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).
[32] The Bill, cl 5(1).
[33] See eg SDA, s 4(1).
[34] Explanatory Notes, [2]-[4].

50. The Law Council also notes that the definition of 'employment' in the Bill is determined by the relationship employment (eg work under a contract of employment, or work that a person is otherwise appointed or engaged to perform[35]). This is not confined to a workplace or usual working hours. When read with clause 13(2), this means that an employee's out of hours or private religious activities could give rise to obligations for employers and rights to employees. While this aspect of the definition of employment does not differ substantively to other anti-discrimination laws, this may involve particular complexities in the religious discrimination context. For example, relevant employers will need seek to distinguish what is not 'a time when the employee is performing work on behalf of the employer' for the purposes of subclause 8(3) (conditions that are not reasonable relating to statements of belief). Therefore, they may owe obligations relating to out of hours activities but be restricted from making requests of employees.

51. The Law Council queries why Commonwealth employees are not included in the definition of employment, as in the SDA, DDA and ADA.[36]

Religious belief and religious activity

52. The Bill protects against discrimination on the grounds of 'religious belief or activity', which is defined as:

    - holding a religious belief; or
    - engaging in lawful religious activity; or
    - not holding a religious belief; or
    - not engaging in, or refusing to engage in, lawful religious activity.[37]

53. Neither 'religion', 'religious belief' nor 'religious activity' are defined terms. The Explanatory Notes indicate that, consistent with the approach taken in other Australian anti-discrimination laws, the Bill does not seek exhaustively to define the concept of 'religion' or to further define the concept of 'religious belief or activity'. Rather, the Notes state that the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (**the *Scientology Case***)[38] adopted a broad, principled approach to the concept of religion and accepted that faith traditions may emerge or develop over time. As such, the Bill avoids a prescriptive definition of religion or religious belief or activity that may be too rigid or easily outdated.[39]

Meaning of religion

54. As religion is not defined in the Bill, it is likely to bear its ordinary meaning in its legislative context taking into account previous judicial constructions of the term[40]. In the *Scientology Case*, Mason ACJ and Brennan J proposed that:

> *… the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against*

[35] The Bill, cl 5.
[36] SDA, s 4; ADA, s 5; DDA, s 4. The ADA and DDA also include (d) work as an employee of a State or an instrumentality of a State: ADA, s 5; DDA, s 4.
[37] The Bill, cl 5.
[38] (1983) 154 CLR 120 (***Scientology Case***).
[39] Explanatory Notes, [72].
[40] Although as the Bill is proposing to give effect to international obligations and depends in part for its constitutional validity on those obligations, it is also arguable that any interpretation would have regard to its meaning under international human rights law.

the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[41]

55. This definition includes in its purview both established religions and new religions whether large or small. It will, of course, not be limited to established Christian religions.

Meaning of religious belief or religious activity

56. State and territory anti-discrimination law does not specifically define what is 'religious belief or activity'[42], although most legislation states that the definition includes lack of belief or activity.[43]

57. Notwithstanding this, members of the Law Council's expert committees have raised concerns that the scope of 'religious belief' or 'religious activity' may be unclear under the Bill, as the Bill currently affords rights to bodies corporate and bodies politic, thereby expanding the likely meaning of 'religious activity'. Without clear definitions, the possibility exists that a wide range of persons and groups may attempt to prove that their beliefs or practices should be considered a religious belief or religious activity.

58. The New South Wales Law Society has also noted that the term 'religious belief or activity' is defined under the Bill, while 'religion' is not presently defined under the *Fair Work Act 2009* (Cth) (**FWA**), creating inconsistency across jurisdictions and the potential for 'forum-shopping' by litigants who allege they have suffered religious discrimination at work.

59. A further question arises whether Aboriginal and Torres Strait Islander Peoples' customs and beliefs are likely to come within the definitions of 'religious belief or activity' as set out the Bill. The Law Society of South Australia considers that traditional Aboriginal customs and beliefs are captured by the definition of religious belief or activity, thereby providing the same protections to Indigenous people as non-Indigenous people under the Bill.[44] The Law Society Northern Territory notes that the *Anti-Discrimination Act 1992* (NT) (**the NT Act**) expressly states that religious belief or activity is construed to include Aboriginal spiritual belief or activity.[45] Similarly the ACT defines 'religious conviction' to include 'the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people' and engaging in 'those practices, observances, beliefs'.[46]

Persons

60. Clause 5 states that the term 'person' has a meaning affected by the *Acts Interpretation Act 1901* (Cth)' (**the Acts Interpretation Act**). A note to this provision

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[41] *Scientology Case*, 136 (Mason ACJ and Brennan J).

[42] Although section 11 of the *Discrimination Act 1991* (ACT) (*the ACT Act*), for the purpose of prohibiting discrimination against an employee on the grounds of religious conviction by refusing permission to the employee to carry out a religious practice during working hours, defines 'religious practice' as a practice— (a) of a kind recognised as necessary or desirable by people of the same religious conviction as that of the employee; and (b) the performance of which during working hours is reasonable having regard to the circumstances of the employment; and (c) that does not subject the employer to unreasonable detriment.

[43] WA Act, s 4(3); Tasmanian Act, s 3; Qld Act, Schedule; Vic Act, s 4(1).

[44] Having regard eg to the findings of *ALRM v State of South Australia No 1* (1995) 64 SASR 551, 556 (Debelle J) and 553 (Doyle CJ), and the broad definition of religion provided by Mason ACJ and Brennan J in the *Scientology Case*, as discussed above.

[45] NT Act, s 4(4).

[46] ACT Act, Dictionary.

further states that under section 2C of the Acts Interpretation Act, an expression that is used to denote a person includes a body corporate, which may include a religious body or other religious institution. The Explanatory Notes to the Bill confirm that a person for the purposes of this Act includes natural persons, bodies corporate and bodies politic.[47] Further, they confirm that a body corporate may include not only 'religious bodies' (as defined in subclause 10(2), but 'other religious institutions' which engage solely or primarily in commercial activities.[48] Therefore it is open for a body corporate under the Bill to allege that it has been discriminated against on the basis of its religious activity.**[49]**

61. This express statement does not, to the Law Council's knowledge, exist elsewhere in Commonwealth anti-discrimination law. The Acts Interpretation Act's provisions apply *unless* the contrary intention appears.**[50]** The inclusion of the above statement in clause 5 appears to give the Bill a broader scope than other Commonwealth anti-discrimination laws by extending its protections to body corporates, incorporated associations, 'bodies' (however constituted) and bodies politic. It is also inconsistent with the ICCPR and other United Nations human rights treaties, which protect the rights and dignity of individuals and in some cases groups of individuals,[51] rather than corporates or governments. While the human right to manifest religious belief may be enjoyed either by individuals or in community with others,[52] the HRC has outlined that the beneficiaries of the rights recognised by the ICCPR are individuals,[53] and complaints under the ICCPR may only be brought by individuals.[54]

62. The language and objects of other Commonwealth anti-discrimination Acts are intended to benefit individuals, not corporations. With respect to the SDA, for example, its objects include giving effect to the *Convention on the Elimination of all forms of Discrimination Against Women*[55] and other international instruments.[56] It also seeks to eliminate discrimination against persons 'on the ground of sex, sexual orientation, gender identity' etc.[57] It is not generally possible for a body corporate to have a sex, sexual orientation or gender identity. In contrast, it is possible for a body corporate to engage in lawful religious activity.

63. With respect to the RDA, Gibbs CJ in *Koowarta v Bjelke-Petersen*[58] held that the core protections contained in subsection 9(1), which prohibits racial discrimination, were in respect of human beings.**[59]** He remarked that 'the context provided by section 9 and article 5 [of the *International Convention on the Elimination of All Forms of Racial*

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[47] Explanatory Notes, [74].
[48] Ibid, [75].
[49] As discussed in the Explanatory Notes, [74]-[78]. It may be unlikely that a body corporate would be considered to have a religious 'belief'.
[50] Acts Interpretation Act, s 2(2).
[51] Eg ICCPR, art 27.
[52] ICCPR, art 18(1).
[53] HRC, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [9]. The HRC has, however, recognised that these rights may have a communal element and has dealt with claims lodged by members of a religious order, for example, that protected their collective interest and are entitled to have their Order registered as a juridical entity: *Sister Immaculate Joseph v Sri Lanka*. See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UNGAOR, 36th sess, UN Doc A/36/684 (1981) (**the Religion Declaration**), art 6, as discussed in **the Appendix**.
[54] Under the Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature16 December 1966, UN Doc No 14668 (entered into force 23 March 1976), arts 1 and 2.
[55] Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).
[56] SDA, s 3(a).
[57] Ibid, s 3(b).
[58] (1982) 153 CLR 168 (***Koowarta***).
[59] Ibid, 184 [9], (Gibbs CJ).

Discrimination[60] (**ICERD**)] leads me to conclude that section 9 is not intended to apply to the rights of artificial persons such as corporations.'[61]

64. In contrast, both Gibbs CJ and Mason J in *Koowarta* found that a beneficial reading of section 12 of the RDA, concerning the disposal of estates or interests in land or accommodation, meant that it extended to discrimination against a corporation by the reason of the race, colour or national or ethnic origin of any associate of that corporation.[62]

65. Under section 46P of the AHRC Act, a complaint may be lodged with the AHRC alleging unlawful discrimination under the primary anti-discrimination acts[63] by a 'person aggrieved', on that person's own behalf, or on behalf of that person and one or more other aggrieved persons.[64] While undefined, Mason CJ in *Koowarta* recognised that a 'person aggrieved' for the purposes of bringing a complaint under the RDA may include a corporation.**[65]**

66. With respect to the DDA, in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,**[66]** Collier J followed Mason J in *Koowarta* and held that a body corporate, including entities incorporated pursuant to the *Associations Incorporation Act 1981* (Qld),**[67]** may be a 'person aggrieved' if, for example, the body corporate is treated less favourably based on the race, disability etc of its members, such as by being refused a lease of premises.**[68]** However, 'merely incorporating a body and providing it with relevant objects does not provide it with standing it otherwise would not have had'.**[69]**

67. The above suggests that it is clearly possible, but not automatic, for a body corporate to be considered to be a person aggrieved for the purposes of making a complaint of unlawful discrimination. However, this does not extend to affording a body corporate the full protections of non-discrimination law in its own right.

68. The decision to extend all protections under the Bill to religious body corporates, as opposed to religious persons, is unusual and its rationale unclear. It does not appear to have been recommended by the Expert Panel or to be supported by the ICCPR. It does not reflect the Bill's objects regarding the 'indivisibility and universality of human rights, and the principle that every person is free and equal in dignity and rights.'[70] It sits at odds with the approach adopted with respect to other anti-discrimination laws and may extend the scope of the Bill well beyond that of those laws. This could result in an uneven landscape of rights protection, in which the rights of natural persons based on certain attributes are weighed against those of potentially large corporations. For example, Catholic Healthcare reports that its 2017-2018 revenue and income was just over $290 million.[71]

69. The Law Council is concerned that unintended consequences may flow from this approach. For example, the Bill's prohibitions on discrimination include those

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[60] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[61] *Koowarta*, 184 [9] (Gibbs CJ).
[62] Ibid, 182 [7] (Gibbs CJ); 236 [38] (Mason J).
[63] 'Unlawful discrimination' means any acts, omissions or practices that are unlawful under Part 4 of the ADA, Part 2 of the DDA, Part II or IIA of the RDA, or Part II of the SDA: AHRC Act, s 3(1).
[64] As well as by two or more persons aggrieved, or by a person or trade union on behalf of one or more other persons aggrieved: see section 46P.
[65] *Koowarta*, 236 (Mason J).
[66] (2007) 162 FCR 313 (*Hervey)*.
[67] Ibid, 330 [49].
[68] Ibid, 329-330 [46], [54].
[69] Ibid, 330 [48].
[70] The Bill, cl 3.
[71] Catholic Healthcare, *Annual Review 2017-2018*, 19.

regarding Commonwealth laws and programs at clause 26. It may be reasonable in the circumstances, for example, for Commonwealth funding for a mental health program to be allocated to a secular counselling service, in preference to a religious affiliated applicant. The strictures of the particular religion and their application to counselling of clients drawn from the general population may make funding the service quite counterproductive to the mental health objectives being sought. Despite this, under the Bill, the government funding body may face questions of whether the Commonwealth has directly discriminated against the applicant.

70. Another example relates to clause 11 which, as discussed below, provides for positive discrimination. Under clause 11, a person does not discriminate against another person by engaging in conduct that is:

    - reasonable in the circumstances; and
    - consistent with the purposes of the Bill; and
    - either:
    - intended to meet a need arising out of a religious belief or activity of a person or group of persons; or
    - is intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person's or group's religious beliefs or activities.

71. The inclusion of religious body corporates in the definition of 'person' may therefore justify measures to address a 'disadvantage' experienced by the body corporate. This could lead to favourable treatment in Commonwealth grant allocation, or program funding.

72. Removing the definition of subclause 5(1) would bring the Bill into line with other Commonwealth anti-discrimination laws. To avoid uncertainty, the definition of 'person' could also be clarified to mean a natural person.

73. While not supporting such proposals, the Law Council also recommends that any proposals to significantly expand anti-discrimination laws' intended beneficiaries beyond natural persons to body corporates should be carefully considered, for example through a referral to the ALRC, in order to understand the likely consequences.

Recommendation:

- **The definition of 'person' in subclause 5(1) be removed. Instead, consideration could be given to a definition of 'person' which is specifically limited to a natural person.**

Part 2 - Concept of discrimination

74. The Law Council notes that clause 7 concerning direct discrimination, and clause 8 concerning indirect discrimination - at least as far as it extends to paragraph 8(2)(c) - generally accord with commonly accepted definitions in this area, such as in the SDA.[72]

[72] See, eg SDA, s 5.

75. In particular, paragraph 8(1)(c) notes that in order for indirect discrimination to be established, the relevant condition, requirement or practice must not be reasonable. The general reasonableness test set out in subclause 8(2) (up until and including paragraph 8(2)(c)) is important in this regard. It requires consideration of all the relevant circumstances of the case, including the following:

    - the nature and the extent of the disadvantage resulting from the imposition etc of the condition, requirement or practice;
    - the feasibility of overcoming or mitigating the disadvantage; and
    - whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

76. This list is not exhaustive and courts may take into account other matters they deem relevant in determining reasonableness. The reasonableness test provides an established balancing mechanism by which tensions which arise between different rights can be resolved to the least harmful effect in the circumstances.

Employer conduct rules

Employer conduct rule - paragraph 8(2)(d)

77. However, a fourth and unorthodox limb is added in the Bill to the general 'reasonableness' test states that:

    - *'if the condition, requirement or practice is an employer conduct rule – the extent to which the rule would limit the ability of an employee of the employer to have or engage in the employee's religious belief or activity'.*[73]

78. An 'employer conduct rule' is a condition, requirement or practice imposed by an employer that relates to employees' standards of dress, appearance or behaviour.[74]

79. The inclusion of this fourth limb appears unnecessary in that the first three limbs of the general reasonableness test above would already necessitate consideration of the disadvantage to an employee of an employer-imposed requirement to dress, appear or behave in a certain way, whether it can be overcome or mitigated and its proportionality to the employer's objectives, in all the circumstances.

80. The Law Council agrees that the right of an employee to manifest their religion through their dress, appearance or behaviour is important. While this is an important right, there may be instances in which the employer may need to curb certain types of behaviours – such as over-zealous attempts to convert junior employees[75] - in order to uphold a diverse and tolerant workplace, or ask employees to refrain from wearing certain religious dress, such as to maintain workplace safety. The standard reasonableness test enables such factors to be appropriately weighed.

81. There is a risk that paragraph 8(2)(d) affords undue emphasis to the rights of the employees to manifest their religion, at the expense of others' rights. Moreover, there is no obvious rationale as to why manifesting religion by employees outside work

[73] The Bill, cl 8(2)(d).
[74] Ibid, cl 5.
[75] The European Court of Human Rights has given some guidance concerning the distinction between permissible religious persuasion, on the one hand, and coercion on the other. In *Larissis v Greece* [(European Court of Human Rights, Application Nos. 140/1996/759/958960, 24 February 1998) the court decided that an officer of the Greek army had exploited his position of authority over his subordinates in trying to convert them.

should be prioritised over the right to manifest religion in other public contexts, such as when receiving health or aged care, while travelling, shopping, or playing sport.

Recommendation:

- **Paragraph 8(2)(d), relating to employer conduct rules for the purposes of the general reasonableness test for indirect discrimination, be removed.**

Relevant employers – statements of belief – subclauses 8(3) and 8(4)

82. Subclause 8(3) further states that an employer conduct rule that:

- is imposed, or proposed to be imposed, by a 'relevant employer'; and
- would have the effect of restricting or preventing an employee of the employer from making a 'statement of belief' at a time other than when the employee is performing work on behalf of the employer;

is not reasonable unless it is necessary to avoid unjustifiable financial hardship to the employer'.[76] Nor does a requirement to comply with the rule fall within the 'inherent requirements' exception.[77]

83. A 'relevant employer' is an employer with revenue of at least $50 million per year, and is not a Commonwealth, state or territory employer.[78] A 'statement of belief' includes a statement of a religious belief held by a person, made in good faith, which is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion'.[79]

84. Under subclause 8(4), subclause 8(3) does not apply to statements:

- that are malicious; or
- that would, or are likely to, harass, vilify, or incite hatred or violence against another person or groups of persons; or
- that a reasonable person would conclude would counsel, promote, encourage or urge conduct that would constitute a 'serious offence'.[80]

85. Clause 41 of the Bill also provides that statements of belief do not constitute discrimination, as discussed further below.

Unorthodox

86. The Law Council is concerned that the concept and use of 'statement of belief' in this context is unorthodox in anti-discrimination law. It does not appear to exist in another Australian jurisdiction. Firstly, it is unorthodox as 'reasonableness' in the context of indirect discrimination requires the court to weigh all relevant matters in the balance, whereas subclause 8(3) narrowly circumscribes what is reasonable. Second, it has clearly been drafted to apply to the circumstances of one case, which is best resolved through the application of subclause 8(2). That provision allows the employee's

[76] Ibid, cl 8(3).
[77] Ibid, cl 31.
[78] Ibid, cl 5.
[79] The Bill, cl 5. The definition also includes statements of belief about religion which are made in good faith by persons who do not hold a religious belief.
[80] Ibid, cl 8(4) and cl 27. A 'serious offence' means an offence involving harm (within the meaning of the *Criminal Code 1995* (Cth)) or financial detriment, that is punishable by imprisonment for two years or more under a Commonwealth, state or territory law: cl 27(2).

freedom of belief and expression to be considered and appropriately weighed against other rights and interests. Third, the provision only applies to companies with over $50 million annual revenue without policy justification.

87. On the basis of subclause 8(3), a code of conduct prohibiting employees from making offensive comments on social media outside of work could be unlawful discrimination**.** This was not canvassed or recommended by the Expert Panel.

Potential scope of statements of belief

88. As discussed in more detail below regarding clause 41, a 'statement of belief' is broadly defined. While recognising that a statement must be 'reasonably' regarded as being in accordance with the doctrines, tenets, beliefs or teachings of particular religions, it is possible that the following statements may be recognised as such, given their origin in religious texts:

- that people must not commit adultery (eg teenage unwed mothers);[81]
- that there are only two sexes, for 'male and female He created them';[82]
- that gay sex is an abomination;[83]
- that women who wear men's clothing and vice versa are detestable to God;[84]
- that women are 'deficient in intelligence and religion';[85]
- that women who menstruate are 'impure';[86] and
- that people with disability should not approach God.[87]

89. Further possible statements of belief, and concerns about the definition's broad drafting, are outlined in respect of clause 41.

Over-emphasis on certain rights at the expense of others

90. Subclause 8(3) is problematic as other than in the narrow circumstances discussed below (including under subclause 8(4)), it removes the requirement to consider the potential harm done to others' rights, and the need to maintain tolerance and diversity in large Australian workplaces generally. This may place individuals who are subject to potentially offensive and harmful statements based on religious beliefs, such as adherents of minority religions, people with disability or the LGBTI+ community, in a position of further vulnerability.

91. For example, as in the example of *Ross v Canada*[88] contained in the **Appendix**, a teacher may be well known for publishing a number of books and pamphlets containing controversial religious opinions including writings that Judaism fundamentally threatens the Christian faith outside the prominent private school where he teaches. Subclause 8(3) does not enable the balancing of tensions between rights – such as the best interests of the child, or the right to equality and non-discrimination of other religious minorities, compared with the teacher's right to freedom of expression and manifestation of religious belief – and no mechanism to assess whether the statement/s of belief were necessary, reasonable and

[81] Exodus 20:14.
[82] Genesis 1:27; 5:2.
[83] Leviticus 18:22
[84] Duteronomy 22:5.
[85] Sahih Bukhar 1:6:301.
[86] Leviticus 15: 19-20; Quran 2:222.
[87] Leviticus 21:17-23.
[88] HRC, *Views: Communication No 736/97,* 70th sess (26 October 2000) (***Ross v Canada***).

proportionate in the circumstances. Instead, the right to make statements of belief is privileged over other rights. This does not accord with a 'universal, indivisible, interdependent and interrelated'[89] approach to human rights.

92. In particular, there appears to be insufficient underlying recognition (including in subclause 8(4)) that under the ICCPR, the right to manifest religion may be subject to certain limitations, such as where it is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Similarly, the exercise of the right to freedom of expression 'carries with it special duties and responsibilities', and may also be limited where necessary to respect the rights or reputations of others, or for the protection of national security, public order, public health or morals.

Exception based on hardship to employer

93. The 'unjustifiable financial hardship' is a high threshold for the employer to establish, noting that the burden of proof rests on the employer.[90] The Law Council is concerned at its ambiguity and the practical difficulties involved in establishing this threshold, particularly given that 'unjustifiable financial hardship' will be assessed against the capacity of a business with revenue of at least $50 million. The provision also fails to take into account that an employer may wish to restrict an employee from making statements of religious belief out of work for reasons other than avoiding financial hardship, for instance to avoid workplace conflict and to ensure that employees of any or no religion can work harmoniously together.

94. An employer may also legitimately wish to restrict the statements of its employees because of the social messaging and reputation it is attempting to promote, such as through messages of diversity during the Olympic Games. It may be difficult to establish 'unjustifiable hardship' if an employee made public statements that undermined such a campaign. However, this does not mean that the employee should be given such a privileged position, particularly if the employer's activities are directed towards achieving social (as well as business) outcomes.

95. It also means that the extent of protections for persons against harm, and conversely the extent of employee freedoms, depends on commercially-driven circumstances. For example, advertisers may withdraw advertising from a major radio station if the host makes harmful religious-based remarks about gay people outside work hours. This would enable an employer conduct rule to be imposed. However, this result would essentially depend on whether sufficient people complained, rather than the necessity, reasonableness or proportionality of applying the rule in the circumstances.

96. The Law Council also queries whether this proposed provision, which places unjustifiable financial hardship at the centre of the legal test for reasonableness, is consistent with the Bill's stated objects. If the key policy objectives are to protect against discrimination on the grounds of religious belief or activity, it makes sense to apply a reasonableness test that takes into account such matters, including the nature and extent of the disadvantage experienced by the person being discriminated against, and the feasibility of overcoming that disadvantage.

97. The Law Council is unaware of an equivalent provision in any other piece of federal anti-discrimination legislation. While the DDA includes 'unjustifiable hardship' exceptions, this requires all relevant circumstances of the particular case to be taken

[89] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5].
[90] The Bill, cl 8(7).

into account, including the nature of the benefit or detriment likely to accrue, or to be suffered by, any person concerned.[91]

Arbitrary application

98. Subclause 8(3) is also arbitrary. Under these provisions, the imposition of employer conduct rules relating to statements of belief which were imposed on employees by small business or Government employers would not automatically be unreasonable. Therefore, employees of large businesses could more freely make statements of belief outside of working hours, compared to employees of small or Government employers.

99. The $50 million threshold for a 'relevant employer' may capture private universities and even some private schools. It has been reported, for example, that Wesley College in Melbourne has an annual income of $100.4 million while Haileybury College's annual income is $98.1 million.[92] Under the Bill, teachers in such schools may be permitted to make public statements of belief outside work regarding eg girls being inferior, or gay people going to hell, in circumstances that may be considered likely to harm students' wellbeing. To restrict these statements, the school would need to demonstrate that it is necessary to impose the requirement to avoid unjustifiable financial hardship to itself – that is, that a number of parents may withdraw their students from the school – instead of the likelihood that a student's or a group of students' wellbeing is harmed.

High and complex threshold for excluding statements

100. Additionally, subclause 8(4) appears to be a high threshold for statements to be excluded from the scope of subclause 8(3). It is noticeably higher than section 18C of the RDA which makes it unlawful for public acts which are reasonably likely in the circumstances to 'offend, insult, humiliate or intimidate' another person or group on the basis of their race, colour or national or ethnic origin.

101. The protections against race-based hate speech afforded by section 18C of the RDA would remain unaffected by the above clauses. However, the Bill appears to offer comparatively less protection from employee statements of belief which seek to harm other groups – such as women, people with disability, or LGBTI+ groups. Statements of belief made outside work which are not malicious and are not considered likely to harass, vilify or incite hatred or violence – but merely offend, humiliate or insult such groups – would be permissible under the Bill. That is, a claim of indirect religious discrimination arising from the making of a statement of belief which offended, humiliated or insulted members of a relevant group and contravened an employer conduct rule is likely to succeed under the Bill.

102. Determining what falls within the terminology of 'malicious', 'harass', 'vilify' or 'incite hatred or violence' may also be complex, posing difficulties for employers and employees alike. The Explanatory Notes simply state that:

[91] DDA, s 11.

[92] Inga Ting, Alex Palmer and Nathanael Scott, 'Rich school, poor school: Australia's great education divide', ABC (online), 13 August 2019, <https://www.abc.net.au/news/2019-08-13/rich-school-poor-school-australias-great-education-divide/11383384>.

These provisions acknowledge that employers may legitimately restrict their employees' religious expression where it may cause harm to a person, group of persons or the community at large.[93]

103. By way of example, according to the Cambridge Dictionary, the ordinary meaning of the word 'vilify' is:

to say or write unpleasant things about someone or something, in order to cause other people to have a bad opinion of them.[94]

104. However, this literal interpretation, which could exclude many statements of belief, may not accord with the Bill's purposes.[95] Its clause 3(1)(c) objects, together with clauses 8 and 41, suggest that the Bill's purposes include ensuring that statements of belief can be made with minimal interference. Therefore, it is likely that a more stringent interpretation of 'vilify' would apply.

105. The language utilised in certain state and territory anti-vilification legislation may be intended to inform the meaning of 'vilify'. For example, the NSW Act anti-vilification provisions prohibit a person to 'incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons' on certain grounds including race.[96] The states and the ACT follow a similar 'incitement' model, with variations as to the attributes protected.[97] However, if this meaning is intended to inform the meaning of 'vilify' in subclause 8(4), it becomes duplicative and confusing, as the subclause separately refers to 'inciting hatred'.

106. The word 'harass' may also raise questions of interpretation[98]. Sexual harassment has a particular legal meaning which is unhelpful in this context,[99] while the meaning of harass differs when applied to other attributes, such as under the DDA.[100]

107. The above suggests that the proposed provisions add significant legal complexity to the reasonableness test and give rise to practical challenges for large employers. They may also create challenges for compliance and enforcement bodies including the AHRC and the proposed new Freedom of Religion Commissioner.

108. For the above reasons, the Law Council does not support the inclusion of subclauses 8(3) and 8(4) of the Bill. The proposed provisions at subclauses 8(1) and 8(2), up to and including paragraph 8(2)(c), provide sufficient and appropriate protection on these matters.

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[93] Explanatory Notes, [132].
[94] Cambridge English Dictionary (online), <https://dictionary.cambridge.org/dictionary/english/vilify>.
[95] Acts Interpretation Act, s 15AA.
[96] Eg NSW Act, s 20C(1).
[97] See discussion in Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination & equal opportunity law* (Federation Press, 3rd ed, 2018), Ch 13.1. However, the Tasmanian Act also includes protections against offensive conduct at s 17(1).
[98] According to the Cambridge English Dictionary (online), the ordinary meaning of 'harass' is to continue to annoy or upset someone over a period of time, <https://dictionary.cambridge.org/dictionary/english/harass>.
[99] Eg 'unwelcome sexual advance, an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature' etc: SDA, s 28A.
[100] DDA, ss 35, 37, 39. See discussion of 'harass' with respect to the DDA in eg *Sluggett v Commonwealth* [2011] FMCA 609 at [135] (Brown FM) citing *McCormack v Commonwealth* [2007] FMCA 1245, [75], at which Mowbray FM adopted the ordinary dictionary definition of 'harass' which meant 'to trouble by repeated attacks; to harry, raid and disturb persistently, to torment'; and *Penhall-Jones v New South Wales (No 2)* [2008] FMCA 832 [40] (Raphael FM) observing that harassment is 'something which is repetitious or occurs on more than one occasion'.

Recommendation:

- **Subclauses 8(3) and 8(4), relating to the imposition of employer conduct rules concerning statements of belief by relevant employers, be removed.**

Conscientious objection provisions - subclauses 8(5) and 8(6)

109. The Bill provides that 'health practitioner conduct rules' are not reasonable unless certain exceptions apply. Subclauses 8(5) and (6) are intended to protect conscientious objection by a health practitioner to providing a health service.

110. By declaring the health practitioner conduct rules to be 'not reasonable' the statute has the effect of making a condition, requirement or practice unlawful once indirect discrimination is proven. The provision works in the same way as subclause 8(3).

111. A 'health practitioner conduct rule' is a condition, requirement or practice imposed on a health practitioner which relates to their provision of a health service, which would restrict or prevent the practitioner from conscientiously objecting to providing a health service due to their religious belief or activity. The religious belief or activity must be reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the health practitioner's religion.[101]

112. This may include a rule which requires doctors, nurses and other health practitioners to undertake procedures, or provide information, prescriptions or referrals, related to services such as abortion, euthanasia, contraception or sterilisation, regardless of their religious conscientious objections to those services.[102] Rules of that kind can be made by bodies such as the Medical Board of Australia, a State department of health or a government run hospital.

113. Under subclause 8(5), if a state or territory law allows a health practitioner to conscientiously object to providing a health service because of their religious belief or activity, a 'health practitioner conduct rule' that is inconsistent with that law is not reasonable.

114. In this context, the Bill's Explanatory Notes provide that some state and territory laws allow health practitioners to refuse to provide certain services, such as abortion and voluntary assisted dying.[103]

115. Under subclause 8(6), if subclause 8(5) does not apply, a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on:

- the ability of the person imposing, or proposing to impose, the rule to provide the health service; or
- the health of any person who would otherwise be provided with the health service by the health practitioner.

[101] The Bill, cl 5.
[102] Explanatory Notes, [137].
[103] Ibid, [140].

116. A ‘health practitioner’ is a person who is registered or licensed to provide a health service.[104] A ‘health service’ means ‘a service provided in the practice of any of the following health professions’. These include Aboriginal and Torres Strait Islander health practices, dental,[105] medical, medical radiation practice, midwifery, nursing, occupational therapy, optometry, pharmacy, physiotherapy, podiatry and psychiatry.[106]

117. With certain narrow exceptions, the effect of these provisions is that it will be unreasonable, and therefore unlawful discrimination, for an employer of a health practitioner to require that practitioner to provide a service to which they conscientiously object on religious grounds.

118. A requirement to comply with a health practitioner conduct rule that is not reasonable for the purposes of section 8 will not meet the inherent work requirements exception at section 31 of the Bill.[107]

119. Both subclauses 8(3) and 8(5) are unorthodox in the sense that other federal discrimination statutes do not restrict reasonableness in the way proposed.

120. The Law Council has concerns about subclauses 8(5) and (6).

Expert panel findings

121. The above provisions were not recommended by the Expert Panel and appear to undermine its findings. The Panel stated:

> *The Panel does not accept arguments that a right to discriminate in the provision of goods and services is required or proportionate to ensure the free and full enjoyment of Australians’ rights to freedom of religion under international law. Rather, the Panel is of the view that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights, and may cause significant harm to vulnerable groups in the community.*[108]

122. While it does not appear that its discussion addressed the provision of health services, the Panel noted that it had heard of the harm and distress the goods and services exceptions cause and that the targets of such exceptions are simply asking to be treated as any other citizen in the public sphere.’[109] In this context, it is worth reinforcing that many of the health services which are the subject of the above provisions are taxpayer-funded or subsidised. Introducing broad-brush legislation which places certain groups at risk of inadequate service provision undermines their general right to equality and non-discrimination. As subclauses 8(5) and (6) apply to the provision of health services, they are likely to have an adverse effect on equal and non-discriminatory provision of the right to health.

Necessity of subclause 8(5)

123. The Law Council queries the necessity for subclause 8(5). If a state or territory law provides for conscientious objections by a health practitioner, it is not open to a health service employing the practitioner to override this law through contractual

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[104] The Bill, cl 5.
[105] Excluding dental therapist, dental hygienist, dental prosthetist or oral health therapist: Ibid.
[106] The Bill, cl 5.
[107] Ibid, cl 31(7).
[108] Expert Panel Report, 49.
[109] Ibid, 48.

means. If it attempted to do so, this conduct would already appear to be both unlawful and unreasonable under the general reasonableness test at subclause 8(2).

124. The Law Council is not aware that health services are requiring health practitioners to provide services contrary to existing state and territory laws. It is, however, aware that health practitioners are encouraged to understand their legal rights and obligations. For instance, the Australian Medical Association's Conscientious Objection Policy (**the AMA Policy**)[110] refers all doctors to relevant legislation regarding their rights and obligations with respect to conscientious objection and encourages them to seek specific legal advice where necessary.[111]

125. On an orthodox construction of indirect discrimination, if a health practitioner conduct rule contravened 'a law of a state or territory' that would be a powerful argument in favour of determining whether the conduct rule is unreasonable. That effect is achieved by paragraphs 8(2)(a) – (c).

126. The Law Council further notes that subclause 8(5) raises the potential for confusion in that a state or territory law may not specify religion as a ground for conscientious objection. For example, the Reproductive Health Care Reform Bill 2019 (NSW)[112] simply enables conscientious objection without specifying the grounds.[113] Similarly, the conscientious objection provisions for health practitioners in the *Abortion Law Reform Act 2008* (Vic) do not require that a conscientious objection be on the basis of religious belief or activity.

The effect of a 'state or territory law allows a health practitioner to conscientiously object'

127. Subclause 8(5) is premised on the threshold requirement that 'if a law of a state or territory law **allows** a health practitioner to conscientiously object'. The application of the provision is straightforward where there is a statutory right to conscientiously object but it is more difficult if there is not.

128. For example, section 7 of the *Voluntary Assisted Dying Act 2017* (Vic) provides a right to conscientiously object, but section 8 of the *Abortion Law Reform Act 2008* (Vic) does not provide such a right, it only refers to such a right.

129. Where there is no such right in statute, conscientious objection may be 'allowed' in the context of contractual obligations or disciplinary laws. For example, a contract entered into between a doctor and a health service may require a medical practitioner to act in accordance with policies and procedures adopted by the health service which permit conscientious objection. Further, the Medical Board of Australia imposes on a health practitioner an obligation to treat a patient in a certain way subject only to a conscientious objection.[114] As long as the doctor acts in accordance with the contract or the disciplinary rule then he or she will be acting under a state or territory law which 'allows' for conscientious objection.

130. The problem with such an approach is that it relies on 'health practitioner conduct rules' to conscientiously object which are not passed by the relevant legislature. If this was not the intention of the drafter, then the words 'if a law of a state or territory law

[110] AMA, *AMA Position Statement: Conscientious Objection* (2019) (**AMA Policy)**.
[111] Ibid, [1.6].
[112] At the time of writing, this Bill had been passed by both houses and was awaiting assent. Upon its passage, the Bill will be entitled the *Abortion Law Reform Act*: cl 1.
[113] Reproductive Health Care Reform Bill 2019 (NSW), s 9.
[114] Medical Board of Australia, *Good medical practice: a code of conduct for doctors in Australia (*2015), <*https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx*> see cl 2.4 'Decisions about access to medical care'.

allows a health practitioner to conscientiously object' should be replaced with 'if a law of a state or territory provides a statutory right to conscientiously object'.

Subclause 8(6) - breadth

131. The Law Council is particularly concerned about the effects of subclause 8(6), which is broadly framed. It goes far beyond specific areas of health service or treatment in which religious-based conscientious objection may be reasonably expected, or has been reflected in state and territory legislation, such as abortion, contraception or voluntary assisted dying.[115]

132. For instance, with respect to 'health practitioners', it is not immediately apparent why a dentist, optometrist, podiatrist, or midwife would require the ability to conscientiously object to providing health services or treatments due to their religion. It may be that the underlying intention is to enable objection to a class of person as patients. If so, this would be a concerning move away from existing state and territory laws' focus on particular health services or treatments. It would also be contrary to Australia's obligations in international law to prohibit discrimination with respect to well-known classes of person protected from discrimination such as women, members of a particular race, persons with a disability, or persons of diverse sexuality.

133. The health services to which subclause 8(6) applies are also very broad. As well as abortion, fertility treatment and voluntary assisted dying, these may include the provision of contraception, medicines, health information, counselling and psychological support, nursing services, midwifery, blood transfusions, dental and cancer treatment. These are fundamental health services which underpin the health and wellbeing of diverse groups of Australians – including women and teenage girls, rural, regional and remote Australians, LGBTI+ groups and religious minorities.

134. While the Law Council acknowledges that the definition of a health practitioner conduct rule requires a link between a conscientious objection and a religious belief or activity which is 'reasonably regarded' as in accordance with religious doctrines, tenets, etc, it is concerned that subclause 8(6) casts the potential range of practitioners and services which may fall within its scope so widely.

Override of state and territory lawmaking and policy decisions

135. Subclause 8(6) applies if there is no applicable law of a state or territory which allows conscientious objection by health practitioners to providing a health service.

136. Currently, several states and territories have not legislated with respect to conscientious objections for health practitioners, or have only legislated in limited areas. State and territory governments may have deliberately elected not to enact such laws, having regard to competing objectives, including maximising access to health services.

137. Subclause 8(6) impinges on such decisions by providing that health practitioner conduct rules are not reasonable if the hurdle set out there is not met, and therefore

[115] For instance, the Law Council, while it has not conducted a thorough search is aware of: the *Abortion Law Reform Act 2008* (Vic); *Termination of Pregnancy Act 2018* (Qld), *Voluntary Assisted Dying Act 2017* (Vic); and the *Health Act 1993* (ACT). Relevant Bills at the time of writing included the Reproductive Health Care Reform Bill 2019 (NSW) (which had been passed by both houses and was awaiting assent) and the Voluntary Assisted Dying Bill 2019 (WA).

constitute unlawful discrimination. In this context, the LSSA has highlighted that the Bill may operate to override state lawmaking or policy decisions designed to ensure patients' health care needs are not compromised as a result of the religious views of health practitioners, particularly with respect to patients in rural and regional areas where access to health care services may be severely limited. It flags that this an issue currently being considered as part of the South Australian Law Reform Institute Reference into abortion laws.[116]

Undermining codes of conduct and lack of referral to other treatment

138. In situations and jurisdictions where laws do not apply, contracts between health services and health practitioners are particularly relevant, along with any Departmental health directives and professional codes of conduct.

139. In the latter context, the Medical Board of Australia's *Good medical practice: a code of conduct for doctors in Australia*[117] (**the Medical Board Code**) is a recognised 'Code' under sections 35 and 39 of the Health Practitioner Regulation National Law (NSW) No 86a. Such a Code is also, under section 41:

> *… admissible in proceedings under this Law or a law of a co-regulatory jurisdiction against a health practitioner registered in a health profession for which the Board is established as evidence of what constitutes appropriate professional conduct or practice for the health profession.*

140. The Code states that good patient care includes:

- referring a patient to another practitioner when this is in the patient's best interests;
- treating your patients with respect at all times;
- providing treatment options based on the best available information;
- ensuring that your personal views do not adversely affect the care of your patient;
- ensuring that decisions about patients' access to medical care are free from bias and discrimination;
- treating your patients with respect at all times;
- upholding your duty to your patient and not discriminating on medically irrelevant grounds, including race, religion, sex, disability or other grounds, as described in anti-discrimination legislation;
- being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues, of your objection, and not using your objection to impede access to treatments that are legal; and
- not allowing your moral or religious views to deny patients access to medical care, recognising that you are free to decline to personally provide or participate in that care.[118]

141. Subclause 8(6), in the Law Council's view, undermines the balanced and nuanced approach taken by the Medical Board Code towards situations in which a

[116] South Australian Law Reform Institute, *Reform of SA Abortion Laws* (online), <https://law.adelaide.edu.au/research/south-australian-law-reform-institute>.
[117] (2014), <https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>.
[118] Ibid.

practitioner's rights conflict with a patient's right to health, which seeks to minimise discrimination, harm and uphold human dignity.

142. It is particularly concerning that subclause 8(6) does not include any requirements to refer a patient to an alternative provider. In states and territories which have legislated in this area, a referral requirement to another health practitioner is a common feature.[119] The Law Council is concerned that the absence of a referral requirement may leave vulnerable patients without access to prompt alternative healthcare. It considers that the correct place for a referral requirement is in state law, including state policy or disciplinary obligation (such as under the Medical Board Code).

143. The NSW Bar Association has pointed out in this context that the primary state policy which currently guides abortion services is the *NSW Health Policy Directive: Pregnancy - Framework for Terminations in New South Wales Public Health Organisations* (the **NSW Directive**).[120] The NSW Directive would be a 'health practitioner conduct rule' under the Bill and, accordingly, would need to satisfy the new test set out in subclause 8(6). Clause 4.2 of the NSW Directive includes the following requirement on a medical practitioner where conscientious objection to an abortion service is raised:

> *Take every reasonable step to direct the woman to another health practitioner, in the same profession, who the practitioner reasonably believes does not have a conscientious objection to termination of pregnancy.*

144. There is a reasonable argument that this part of clause 2.4 of the NSW Directive would not satisfy subclause 8(6) because it does not constitute an 'unjustifiable adverse impact' on the consideration on paragraphs 8(6)(a) and (b). As a result, this provision of the NSW Health Directive would be unreasonable indirect discrimination and unlawful.

Narrow exceptions

145. For a health practitioner conduct rule to be reasonable, compliance with it must be necessary to avoid an 'unjustifiable adverse impact' on the ability of the person imposing the rule to provide a health service (subclause 8(6)(a)), or on the health of the person receiving the treatment (subclause 8(6)(b)). This is a high threshold.

146. The effect of the provision is that a health practitioner conduct rule which restricts conscientious objection can only do so where there is an unjustifiable adverse effect on either the provision of the health service or on the health of the patient. This has far-reaching effects for the provision of health services in the areas of abortion, (lawful) euthanasia, contraception and so forth.

147. In relation to whether the health practitioner conduct rule would have an unjustifiable adverse impact on the health of the person receiving the treatment, the Explanatory Notes provide relevant examples. These state that where non-compliance with a rule could result in the death or serious injury of a person seeking the health service, this would 'generally' amount to an unjustifiable adverse impact.[121] This would appear to suggest a very narrow test, in which even a possible death or serious injury would not always constitute an adverse unjustifiable impact. Further, even if a person is not at imminent risk of death or serious injury as a result of being

[119] Eg *Termination of Pregnancy Act 2018* (Qld), s 8(3).
[120] (2014), <https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_022.pdf>.
[121] Explanatory Notes, [147].

refused a health service, the resulting delay in accessing treatment, information, or medicines may nevertheless place that person at a serious risk of declining health in the longer term. Meanwhile, the experience of being refused treatment or medicines may also mean that some individuals simply stop seeking that treatment, expecting further refusals.

148. The provision is likely to exclude a health practitioner conduct rule which requires a conscientiously objecting doctor to refer the patient to a doctor who does perform the relevant service. This issue has arisen in debate over the Reproductive Health Care Reform Bill 2019 (NSW)[122]. As the requirement to refer is likely not to be an *unjustifiable* adverse impact on the health of the person seeking the abortion – because the patient can seek the procedure from another doctor – the requirement will be unreasonable under subclause 8(6).

149. The Explanatory Notes further highlight the example of the refusal by a sole medical practitioner in a small rural community to provide contraception as possibly amounting to unjustifiable adverse impact, as the women involved may be unable to access alternative health care without significant travel and cost.[123] However, the example used is problematic because it focuses on a woman seeking the Pill for non-contraceptive use, such as to treat serious conditions like endometriosis or polycystic ovary syndrome.[124] This excludes women in these communities who require contraception for contraceptive purposes. This may have serious deleterious consequences for rural girls and women seeking contraception.

150. The Law Council further notes that there are generally fewer health service providers available in remote communities. Remote patients are also generally more likely to be poorer, more vulnerable and in worse health than those in urban communities, and less able to access transport to other services. However, given the apparent narrowness of the exception for an 'unjustifiable adverse impact on the health of the person receiving the treatment', it would seem unlikely that health services are unlikely to fall within this exception only by the fact of their remoteness. It would rest on the service provider imposing the rule to explain the particular effect that a conscientious objection would have on a local remote population or patient. Some service providers may be better placed to do this than others. For example, a centrally based service administrator in an urban area, who oversees the work of many health practitioners nationally, may be unaware of a particular remote community's circumstances or the effect of any loss of service provision. The risk is that vulnerable patients in remote communities miss out as a result.

151. Similarly, the rule cannot be relied upon where there would be an 'unjustifiable adverse impact' on the ability of the person imposing, or proposing to impose, the rule to provide the health service.[125] This will mean that commercial imperatives of local service provision are likely to govern whether an individual is able to receive adequate health care. Again, the burden rests on the service provider to establish that these high thresholds are met.

[122] At the time of writing, this Bill had been passed by both houses and was awaiting assent.
[123] Explanatory Notes, [148].
[124] Ibid.
[125] The Bill, cl 8(6)(b).

Lack of balancing of rights

152. As flagged above and in the Appendix, the right to the highest attainable standard of physical and mental health is also a fundamental human right.[126] Australia has obligations to ensure that this right must be exercised without discrimination of any kind.[127] The ability to limit this right is narrow.[128] The right to manifest religion may also be limited in strict circumstances including to protect the right to health.

153. The Law Council is concerned that subclause 8(6) removes the ability, which would be provided under the subclause 8(2) general reasonableness test, to weigh these competing objectives in the circumstances. It represents a major departure from the way in which indirect discrimination is determined under both federal and state and territory discrimination states. It also does not encourage health services or providers to consider how to balance these rights appropriately or to reach a solution which minimises potential harm. The Law Council further considers that the general test would be sufficient to guard against most examples of policies or conduct rules that would otherwise force employees to provide services that are contrary to their religious belief.

Effect on vulnerable groups

154. The Law Council notes that particular groups may be at a greater risk where health practitioners conscientiously object to providing health services and treatments. These include women (particularly unmarried women and girls), diverse LGBTI+ groups, rural, remote and regional Australians, Indigenous Australians, and religious minorities. It is well understood that the health of several of these groups – several of whom are already frequently subject to discrimination and/or poor service provision - is disproportionately at risk.[129] The broad-brush approach proposed by subclause 8(6) may further undermine their health outcomes.

155. The provision has the potential to increase barriers to healthcare for people in regional areas or from low socio-economic backgrounds. For example, a teenager may be seeking a contraceptive pill in a regional town where there is only one pharmacy. The pharmacist may refuse to fill her prescription based on their religious beliefs.

156. Moreover, health practitioners engage with people at often vulnerable stages of their lives, particularly with the kinds of health services which likely to trigger religious sensitivities, such as abortion, blood transfusion, HIV/AIDS treatment, IVF and terminally ill people seeking euthanasia. The advice that health practitioners provide, or refuse to provide, may influence the treatment a person seeks. It is possible that the effect of subclause 8(6) is that it may see a person less likely to seek treatment. This could lead to the failure to screen, diagnose or treat important medical problems. It may also result in the abandonment of the patient by the practitioner at a critical

[126] Eg ICESCR, art 12(1).
[127] ICESCR, art 2(2).
[128] Under art 4(4) of the IECSCR, countries may subject economic, social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.
[129] Eg Australian Institute of Health and Welfare, 'Rural and remote health' (May 2017), https://www.aihw.gov.au/reports/rural-health/rural-remote-health/contents/rural-health; Women's Health Australia, Rural, remote and regional differences in women's health: Findings from the Australian Longitudinal Study on Women's Health: Final Report prepared for the Department of Health (2011); Department of Health, 'Lesbian, gay, bisexual, transgender and intersex people' (May 2013), <https://www1.health.gov.au/internet/publications/publishing.nsf/Content/mental-pubs-n-recovgde-toc~mental-pubs-n-recovgde-10~mental-pubs-n-recovgde-10-les>.

stage of their treatment, including without an obligation on the practitioner to refer to another practitioner.

157. The Law Council emphasises that under the general subclause 8(2) reasonableness test, *all* rights and needs could be appropriately weighed in the given circumstances – taking into account the vulnerability of a particular health recipient, as well as the religious-based rights of the health practitioner. This would include, for example:

- the rights of an unmarried woman with a history of mental illness and low socio-economic resources who is seeking contraception in a large, urban general practitioner service which has multiple doctors practising under the same roof. In this instance, the conscientious health objection of a particular doctor may be well understood across the service's staff, who follow established processes to easily and quickly refer and transfer the patient to an alternative practitioner within the building, in a manner that preserves her dignity and wellbeing and accommodates her need for treatment. In this case, the rights of the practitioner to refuse her treatment on conscientious objection grounds may be considered reasonable for the purposes of the general subclause 8(2) test; and
- the rights of a similar woman seeking the same service on the city fringes from a sole general practitioner. While a referral may be possible to another practitioner, it may be obvious from the woman's medical history given her mental health condition, a distrust of doctors, a history of disengaging from medical treatment, and a lack of funds for public transport she will be unlikely to seek help elsewhere. In this case, the rights of the practitioner to refuse her treatment may be less likely to be considered reasonable for the purposes of the general subclause 8(2) test, as the woman's needs to vital health care would need to take precedence in the particular circumstances.

158. For the above reasons, the Law Council does not support subclauses 8(5) and 8(6). If, however, the Australian Government is determined to include conscientious health service provisions in the indirect discrimination test of the Bill, the Law Council recommends that only subclause 8(5) be included.

Recommendation:

- **Subclauses 8(5) and 8(6), relating to the imposition of health practitioners conduct rules, be removed.**

Non-discrimination by religious bodies - Clause 10

159. Subclause 10(1) provides that a 'religious body' does not discriminate under the Bill by 'engaging, in good faith, in conduct that may be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.'

160. Under subclause 10(2), a 'religious body' includes:

- an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); or

- or any other body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities).[130]

161. Clause 10 applies despite anything else in the Bill.[131] The effect is that clause 10 operates as an overarching exception to the anti-discrimination provisions in Part 3 (or an exclusion from their operation).[132] It also limits the scope of the provisions concerning direct and indirect discrimination in clauses 7 and 8.

162. Clause 10 solely relates to the ability of religious bodies to discriminate against a person on the basis of that person's religious belief or activity.[133] It does not permit religious bodies to discriminate against people on the basis of other attributes such as sex, race or age.

163. The Law Council is concerned at the scope of this exclusion, and its lack of clarity, particularly given that 'religion' is not defined under the Bill. In addition, this provision is broader than similar exclusions in existing federal discrimination laws.

164. If clause 10 remains in its present form, it will operate to create a broader exception to the anti-discrimination regime relating to religious activity and belief, than the exceptions that apply to other areas protected from anti-discrimination by other Commonwealth and New South Wales (**NSW**) legislation.

165. This is undesirable. It is preferable that the exceptions to the various anti-discrimination regimes be consistent in their structures and terminology as far as practicable.

166. In the Law Council's opinion, clause 10 is too broad and does not appropriately reflect the balance of conflicting rights. There should not be a *carte blanche* right of religious bodies to discriminate against members of the general public on grounds of their religious beliefs and activities, solely on the basis that the conduct is in good faith and 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings' of the relevant religion.

Comparison between clause 10 and the exceptions in analogous anti-discrimination regimes under Commonwealth and NSW legislation

167. Clause 10 is considerably wider than the exceptions to anti-discrimination provisions in other legislation such as section 37 and 38 of the SDA, section 35 of the ADA, section 351 of the FWA, the definition of 'discrimination' in subsection 3(1) of the AHRC Act and section 56 of the NSW Act.

168. In general terms, there are two broad structures for legislative exceptions to anti-discrimination regime, as outlined below. Section 10 is substantially wider than either exception. No reason is given for this departure from the structure of analogous legislation. The primary difference is that current exceptions require that the person or body concerned must be required or compelled to act in the way that they have because of their religion whereas clause 10 makes the exception permissive.

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[130] The Bill, cl 10(2).
[131] Ibid, cl 10(3).
[132] Explanatory Notes at para [160] expressly state that it is not an exception, but as it operates in this way, and the distinction is immaterial for present purposes, it is called as such in this submission. See also Explanatory Notes, [162]; *Christian Youth Camps,* [163] - [166].
[133] The Bill, cls 7(1) and 8(1).

The First General Exception

169. Section 351 of the FWA, the definition of discrimination in subsection 3(1) of the AHRC Act and section 38 of the SDA, for example, limit the exception to the anti-discrimination provisions in those Acts to (inter alia) an action that is (**the First General Exception**):

- taken by an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed;
- in good faith; **and**
- in order to avoid injury to the religious [susceptibilities or sensitivities] of adherents of that religion or that creed**.**

The Second General Exception

170. In general terms those provisions provide that the relevant part of the Act does not affect an act or practice of a body [established for religious purposes[134] or established to propagate religion[135]] that (**the Second General Exception**):

- conforms to the [doctrines,[136]/ doctrines, tenets or beliefs,[137] / doctrines, tenets, or teachings[138]] of that religion **or**
- is necessary to avoid injury to the religious [susceptibilities[139] / sensitivities[140]] of adherents of that religion.

171. This exception exists in paragraph 37(1)(d) of the SDA and section 35 of the ADA. Both provisions – like clause 10 of the Bill, but unlike section 38 of the SDA - provide a general exemption or carve-out from the entirety of the relevant act's prohibitions on unlawful discrimination. In light of this very broad exemption, they also require that a body must be 'established for religious purposes'. This restricts the scope significantly of the bodies to which the exception may apply, compared to the language of 'a body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' which is included in clause 10 and the First General Exception.

Inconsistencies between overlapping legislation

172. A key inconsistency between clause 10 and both the general exceptions is the absence of injury or compulsion. In the First General Exception, the act for which an exception is sought must have been performed *in order to avoid injury to* the religious susceptibilities or sensitivities of adherents of that religion or that creed. In the Second General Exception the discriminatory act must be either so that the adherent conforms with the religion or be necessary to avoid the injury to the adherent's religious susceptibilities or sensitivities. Clause 10 requires only that the discriminatory act be '*reasonably regarded as being in accordance with* the doctrines, tenets, beliefs or teachings of the religion'.

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[134] SDA, s 37(d) and ADA, s 35. See also proposed new s.47C(1) of the *Marriage Act 1961*(Cth) which also refers to 'doctrines, tenets, beliefs or teachings' under the HR Bill, sch 1, item 7.
[135] NSW Act, s 56(d).
[136] Section 56(d) of the NSW Act only refers to 'doctrines', and not to 'tenets, beliefs or teachings'.
[137] Section 37 of the SDA and section 35 of the ADA refer to 'doctrines, tenets or beliefs'.
[138] The 'phrase doctrines, tenets, beliefs or teachings' is used in subsection 351(1) of the FWA, section 3 of the AHRC Act (see definition of 'discrimination'), proposed subsection 47C(1) to be inserted into the *Marriage Act* by the HR Bill (sch 1, item 7). This is also the phrase used in cl 10 of the Bill.
[139] SDA, s 37; AHRC Act, s 3 (definition of 'discrimination') and NSW Act, s 56.
[140] ADA, s 35; and Victorian Act, ss 82(2) and 83(2).

173. In relation to section 38 of the SDA, the Explanatory Notes state that:

> *[Clause 10] will capture the same religious educational institutions as are currently captured by section 38 of the Sex Discrimination Act. Accordingly, a religious educational institution which may discriminate in the provision of education under that Act may also discriminate on the basis of religious belief or activity under this Act.*[141]

174. This note is problematic if it is intended to draw an analogy between clause 10 and section 38 of the SDA because the exception in section 38 of the SDA is substantially narrower. The exception in paragraph 37(1)(d) is also, as discussed, noticeably tighter, particularly with respect to the bodies to which it applies.

175. It is undesirable for such differences to exist in analogous legislation when each act of a religious body may contemporaneously be governed by different anti-discrimination regimes. It is also not clear why substantially widening the exception is necessary.

Components of the exceptions to analogous anti-discrimination regimes

In accordance with doctrines, tenets, beliefs or teachings of the religion

176. Clause 10 eschews the strict requirement that the act 'conforms to' the doctrines of a religion, in favour of the less strict requirement that the act 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings' may result in unacceptable outcomes. The 'conforms to' requirement would seem to require a finding a fact as to whether this is correct or not. By contrast, an act 'may reasonably be regarded as being' in accordance with doctrines etc, even if this is ultimately proven to be untrue.

177. For example, a well-meaning minister, priest or rabbi may incorrectly construe a teaching of their religion and apply that incorrect construction to discriminate against a person on grounds of their religious beliefs. If a reasonable bystander of a religion would have made the same mistake, under the terms of clause 10 the discriminatory conduct is permissible even though it does not, in fact, conform to any teaching, belief, tenet or doctrine of the religious body.

178. In addition, inclusion of the words 'teachings' in clause 10 will allow it to apply more broadly compared to versions of the Second General Exception that have construed the words doctrines, tenets or beliefs narrowly.

179. In *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Ltd & Ors*[142] (***Christian Youth Camps***) the question arose as to whether the then exception in subsection 75(2) of the *Equal Opportunity Act* 1995 (Vic) permitted a body conducted by the Christian Brethren to refuse to let a youth group for same sex people use the camping facilities managed by the Christian Brethren, in circumstances where the Christian Brethren believed homosexuality was wrong. Subsection 75(2) provided:

> *Nothing in Part 3 applies to anything done by a body established for religious purposes that—*

[141] Explanatory Notes, [167].
[142] [2014] VSCA 75 (***Christian Youth Camps***).

(a) conforms with the doctrines of the religion; or

(b) is necessary to avoid injury to the religious sensitivities of people of the religion.

180. Maxwell P (with whom Neave JA substantially agreed) said:

> *As noted earlier, s 75(2) must be construed as a whole. The phrase 'anything done by a body established for religious purposes' must be taken, therefore, to mean any act or omission by the body in the course of its pursuit of the religious purposes for which it was established. Sub-paragraphs (a) and (b) reinforce that interpretation. Unless the conduct in question is connected with the religious purposes, no relevant question of conformity with doctrine could arise.*[143]

181. His Honour observed, by contrast, that:

> *…quite different questions arise if the body in question engages in an activity which is wholly secular. There may, of course, be a religious motivation for the activity but, if the activity does not have an intrinsically religious character, it is difficult to see how questions of doctrinal conformity or offence to religious sensitivities can meaningfully arise.*[144]

182. Maxwell P found that the activity of the Christian Brethren in conducting a secular accommodation business did not have an intrinsic religious character, and the conduct in refusing accommodation to the same sex youth group was outside the scope of subsection 75(2) of the Repealed Victorian Act.[145] Further, as subsection 75(2) refers to doctrines (but not beliefs), the act of excluding a youth group for same sex people from using camping facilities conducted by the Christian Brethren was found by Maxwell P to be outside the exception in subsection 75(2) of the repealed Victorian Act. In that case the belief that homosexuality was wrong, did not extend to a requirement that members of the Christian Brethren act, or refrain from acting, in a certain way when confronted with a request for their camp to be rented by the homosexual youth group.[146]

183. Maxwell P went on to say … 'the word 'necessary' expresses the clear legislative intention that, for conduct to be exempted, there must have been no alternative to engaging in the conduct if 'injury to religious sensitivities' was to be avoided'[147]. The question of necessity must be determined objectively.[148]

184. This case shows that even the Second General Exception is likely to be interpreted narrowly by reference to the requirement for doctrinal conformity.

185. The Law Council's concern is that clause 10 is cast more broadly than the Second General Exception. The Law Council cannot see any reason to extend the scope of the exceptions, or risk them being extended, beyond those which have formerly been applied in analogous legislation. In the absence of an explanation as to why the

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[143] Ibid, [263] (Maxwell P).
[144] Ibid, [265] (Maxwell P), see also [269]. Maxwell P footnoted the following: 'The European Court of Human Rights ('ECHR') has recently held that, in order for an act to constitute a 'manifestation' of religious belief for the purposes of art 9 of the European Convention on Human Rights, 'the act in question must be intimately linked to the religion or belief' and 'the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case': *Eweida & Ors v The United Kingdom* [2013] ECHR 37, [82]. See also *Ladele v London Borough of Islington* [2010] 1 WLR 955, [52].
[145] Ibid, [268]-[269] (Maxwell P).
[146] Ibid, [286] (Maxwell P).
[147] Ibid, [291] (Maxwell P).
[148] Ibid, [292]; see also per Neave JA at [424]-[427]).

exception should be broadened, the Law Council is opposed to a broader exception being introduced under clause 10 of the Bill.

The balancing of rights under clause 10

186. The exceptions in clause 10 must balance the right to be treated equally regardless of religious beliefs or practices against other fundamental rights and freedoms. It is important that the law only go as far as is necessary to achieve this balance.

187. In the Law Council's opinion, clause 10 does not achieve an appropriate balance. It does not eliminate discrimination against persons on the basis of their religious beliefs only as far as is necessary. In this respect it permits discrimination by people of one religious belief against those of different religious beliefs (or assumed religious beliefs) in circumstances where it is not necessary to do so to achieve an appropriate balance of human rights. It is in that sense that clause 10 is 'permissive'.

Employees of religious bodies – interaction between clauses 10 and 13

188. Clause 13 provides that it is unlawful for an employer to discriminate against an employee or prospective employee on the ground of religious belief or activity.

189. Clause 10, considered in the light of clause 13, is presumably intended to reflect the views expressed by the Expert Panel that religious schools be enabled 'to select staff and contractors that adhere to the religion and its practices in order to foster or protect the religious ethos of the school'.[149] Relevantly, it stated:

> *The Panel agreed that faith-based schools should have some discretion to discriminate in the hiring of teachers and other staff on the basis of religious belief, sexual orientation, gender identity, or marital or relationship status for the reasons outlined above. This enables schools positively to select staff and contractors that adhere to the religion and its practices in order to foster or protect the religious ethos of the school.*[150]

190. However, the Law Council considers this is an excessively broad articulation of any exception to the right to freedom from discrimination on the grounds of religious belief or activity, and thus a disproportionate and impermissible limitation on the enjoyment of other internationally recognised rights, including the right to freedom of religion, the right to work and right to respect for one's private life).

191. The Expert Panel noted that:

> *Protection from discrimination also forms part of Australia's obligations under the ICCPR, under article 26. Discrimination is recognised as having the potential to cause emotional distress to individuals and a loss of personal dignity and self-worth. The principles of equality and non-discrimination underpin the ICCPR. The issue of whether religious schools can discriminate against students or staff on the basis of protected attributes needs to be balanced against these international treaty obligations.* [151]

[149] Expert Panel Report, 62.
[150] Ibid.
[151] Ibid, 59 [1.229].

192. The Law Council agrees that clause 10 ought to balance these and other rights, and the rights of all Australians to live free from discrimination on the basis of their religious belief and activities. However, Australia's obligations under international laws[152] do not require that religious schools be entitled to exclude all teachers, contractors and students[153] of different religious beliefs in all circumstances. This is not necessary or proportionate. Yet this appears to be how clause 10 is intended to operate.

193. Examples given in the Explanatory Notes of forms of discrimination which are intended to be excluded by clause 10 include the following:

> *This provision will also ensure that religious bodies are able to maintain their religious ethos through staffing decisions. For example, it would not be unlawful for a Jewish school to require that all staff be Jewish and accordingly refuse to hire someone because they were not Jewish, if that conformed to the doctrines, tenets, beliefs or teachings of Judaism.*

194. In the Law Council's opinion, these examples do not reflect an appropriate balance between conflicting rights.

195. Australia's obligations under article 18(4) of the ICCPR to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions, do not require that permitting a religious school to insist that every employee and contractor adhere to the relevant religion.

196. The wording of the Victorian section 84 exception provides a reasonable alternative to clause 10:

> *Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation… if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.*

Students at religious schools - Interaction between clauses 10 and 18

197. Clause 18 of the Bill provides that it is unlawful for a religious institution to discriminate against a person on the ground of the person's religious belief or activity by, amongst other things, refusing to accept the person's application for admission as a student or expelling the student.

198. Clause 10 would permit a religious school to discriminate against a student on the ground of the student's religious belief or activity - where the conduct of the religious school is in good faith, and may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

199. As discussed above in connection with clause 13, the wording of clause 10 is very broad and the Law Council is concerned that it does not reflect an appropriate balance of the conflicting rights.

200. The Expert Panel went on to characterise the issue of conflicting rights as follows:

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[152] As set out in the Expert Panel Report, 58-59 [1.222]- [1.229].
[153] See the Bill, cl 18.

Parents … have a right to educate their children in accordance with the doctrines of their faith. However, the extent to which religious schools can discriminate against students in order to uphold these religious doctrines must be balanced against other international treaty obligations protecting individuals from discrimination and enshrining the fundamental rights of children.[154]

201. Ultimately the Expert Report did not recommend that discrimination by schools against students or potential students on the basis of their religious activities and beliefs of students be made unlawful.

202. Recommendation 7 was that the SDA should be amended to permit religious schools to select, or preference, students on the basis of sexual orientation, gender identity or relationship status, only on the basis of a written policy. [155] Recommendation 8 was that jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status. [156]

203. In the Law Council's opinion, this leaves clause 10 to operate in an unacceptable and disproportionate manner when the discrimination is otherwise prohibited by clause 18.

204. For example, clause 10 may be used to exclude a child from attending a Jewish school solely because the child is not Jewish in circumstances where the child's mother is Anglican and the father is Jewish and notwithstanding that the child has an appreciation of both religions. In these circumstances, the child has a fundamental right to be treated free from discrimination on the basis of his religious beliefs or lack thereof, and the father has a right to educate his child in accordance with his beliefs. The exclusion of such a child from a religious school may not reflect an acceptable or proportionate balance between competing rights.

205. The Law Council further notes that the Australian Government has referred the above Expert Panel recommendations concerning religious schools, and several of its related recommendations[157] concerning religious exemptions to the Australian Law Reform Commission (**ALRC**) for review.[158] Notwithstanding that the amended terms of reference for this review require the ALRC to confine its inquiry to issues not resolved by the Bill, and to confine any amendment recommendations to legislation other than the Bill,[159] the Law Council considers that proceeding with an expansive clause 10, particularly one which provides broad exemptions to religious educational institutions, would be pre-emptive while the ALRC's inquiry is occurring.

Conclusion

206. The Law Council considers that clause 10 should be significantly amended. The clause, which provides a general carve-out from the prohibitions on discrimination in the Bill, should align with paragraph 37(1)(d) of the SDA and section 35 of the ADA (and the Second General Exception above). This would bring it into line with comparable Commonwealth anti-discrimination exemptions which provide very broad

[154] Ibid, [1.260].
[155] Ibid, 69.
[156] Ibid.
[157] Expert Panel Report, Recs 1 and 5-8.
[158] The Hon Christian Porter MP, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* (10 April 2019) Attorney-General for Australia, media release.
[159] ALRC, 'Altered Terms of Reference 29 August 2019', updated 3 September 2019, <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>.

carve-outs from prohibitions on discrimination, and ensure that it has a much more limited scope in its application to acts or practices of bodies 'established for religious purposes'. It would also bring a higher threshold of 'injury or compulsion' into the test, in accordance with the usual practice for such exemptions.

Recommendation:

- **The scope of clause 10 should be significantly amended, in line with paragraph 37(1)(d) of the SDA and section 35 of the ADA, to apply to:**

  any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Conduct that is not discrimination – Clause 11

207. Although clause 11 is not phrased as being an exception to Part 3,[160] it operates as an overarching exception to those anti-discrimination provisions in the same way that clause 10 does.[161] Clause 11 solely relates to discrimination against a person on the basis of that person's religious belief or activity.[162]

208. More specifically, subclause 11(1) provides that a person does not discriminate against another person by engaging in conduct that:

- is reasonable in the circumstances; and
- is consistent with the purposes of this Act; and
- either:
- is intended to meet a need arising out of a religious belief or activity of a person or group of persons; or
- is intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person's or group's religious beliefs or activities.

209. Subclause 11(2) states that '[t]his section applies despite anything else in this Act', which is identical to subclause 10(3).

210. As noted, the Bill's objects are set out in clause 3. They include an object to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life and an object to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity.

Comparison between clause 11 and exceptions in other anti-discrimination regimes

211. Clause 11 differs in its wording to analogous exceptions in other anti-discrimination legislation.

[160] Explanatory Notes, [183].
[161] The Bill, cl 11(2) and Explanatory Notes, [183].
[162] Ibid, cls 7 and 8(1).

212. The Explanatory Notes state that clause 11 recognises the concept of legitimate differential treatment and is informed by the exception for positive discrimination in section 33 of the ADA.[163]

213. Clause 11 is analogous to section 33 of the ADA, but they differ in material respects:

- subsection 33(a) requires the act to provide 'a bona fide benefit' to persons of a particular age, whereas the wording of clause 11 does not require the conduct to provide a bona fide benefit; and
- section 33 does not have an equivalent to paragraph 11(1)(a) that the conduct engaged in be 'reasonable in the circumstances'.[164]

214. The Explanatory Notes also state that similar provisions exist in other Commonwealth legislation, for example, section 45 of the DDA or section 7D of the SDA.[165]

215. Section 45 of the DDA is cast differently again. In general terms, subsection 45(1) provides that the relevant Part does not render it unlawful to do an act 'reasonably intended' to ensure people with disabilities have equal opportunities, equal access to goods and facilities and affords persons who have a disability with grants, benefits or programs to meet their special needs. However, subsection 45(1) does not apply in relation if the relevant discrimination is not necessary for implementing the measure.[166]

216. There is no requirement that the positive discrimination be *necessary* to implement a measure under clause 11. Rather it must be 'intended to meet a need' or 'intended to reduce a disadvantage'. This is a lesser test, as one can intend to achieve something but not do so. By contrast the word 'necessary' would seem to import an objective analysis of the minimum required to achieve the goal. Consequently, the exception created by clause 11 will probably operate more broadly than it would had wording analogous to section 45 of the DDA been adopted in this respect.

217. Section 7D of the SDA is different still. In general terms, subsection 7D(2) provides that a person does not discriminate against another person under relevant provisions of that Act if they take special measures authorised by subsection 7D(1) 'for the purpose of achieving substantive equality' between men and women, people who have different sexual orientations etc. Section 7D(3) provides that a measure is to be treated as being taken for a purpose in subsection (1) if it is solely for that purpose, or for that purpose and for other purposes. Subsection 7D(4) provides that the section does not authorise the taking, or further taking, of special measures for a purpose that is achieved.

218. The Explanatory Notes do not explain why clause 11 is cast in different terms to analogous provisions in other Commonwealth anti-discrimination legislation.

219. The Law Council considers exceptions to anti-discrimination provisions should only be as broad as is necessary to achieve the appropriate balance between conflicting rights.

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[163] Explanatory Notes, [183].
[164] But note that s 15(1)(b) of the ADA includes this phrase in connection with the scope of indirect discrimination.
[165] Explanatory Notes, [183].
[166] DDA, s 45(2).

Recommendation:

- **Clause 11 be recast to permit positive discrimination to the extent necessary for implementing the relevant measures (by analogy to subsection 45(2) of the DDA).**

Part 3 – Unlawful discrimination

General

220. Subject to certain concerns below, the Law Council generally supports the provisions at Part 3 of the Bill, prohibiting discrimination on the basis of religion in work and in other areas of public life. These provisions give effect to Australia's obligations under the ICCPR to prohibit discrimination on the basis of religion.

221. The Law Council notes that this part of the Bill provides protections against discrimination in areas of public life in generally equivalent terms to other federal anti-discrimination laws including the ADA and RDA.

Serious offence exemption – Clause 27

222. Clause 27 provides that Divisions 2 and 3 do not make it unlawful to discriminate against a person on the ground of the person's religious belief or activity if:

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

223. A 'serious offence' means an offence involving harm (within the meaning of the *Criminal Code Act 1995* (Cth) or financial detriment, that is punishable by imprisonment for two years or more under a Commonwealth, state or territory law.[167]

224. This provision is intended to 'ensure that certain expressions of particular religious beliefs will not attract the protection of anti-discrimination law'.[168]

225. It is not clear that there is a sufficient nexus required between the relevant discrimination and the person's conduct in promoting etc a serious offence. This could be problematic if the response of the discriminator was clearly disproportionate and/or unconnected to the actions of the person in question. However, it could be overcome if there was a requirement that the relevant discrimination was necessary and reasonable in the circumstances.

226. The Law Council also queries why this provision is limited to offences that are punishable by two years or more, given that there is a range of less serious offences under state and federal laws, such as offences relating to distributing offensive indecent material or public nuisance offences, that could be directly relevant to the policy objectives underpinning this exemption. It suggests that the provision could be

[167] The Bill, s 27(2).
[168] Explanatory Notes, [284].

extended to covering any offence. However, if this suggestion were adopted, the addition of the 'necessary and reasonable' limb would be important to ensure that a balanced approach is adopted in response, having regard to the circumstances and seriousness of the offence and the response in question.

Recommendations:

- **New subclause 27(d) be added, requiring that the relevant discrimination was necessary and reasonable in the circumstances.**
- **Consideration be given to expanding the scope of clause 27 to any offence, provided that the above 'necessary and reasonableness' test is included.**

Temporary Exemptions

227. The Law Council notes that the temporary exemptions regime under the Bill diverges from the practice under other anti-discrimination laws.

228. Subclause 39(1) enables both the Minister and the AHRC to vary or revoke an exemption granted under clause 36. This is a broad and open-ended power which is not reflected in, for example, the SDA or the ADA.[169] The rationale for this divergence is unclear.

229. It is also unclear why the Minister, in addition to the AHRC, should have such a power concerning temporary exemptions, particularly noting that its exercise may override the AHRC's earlier decisions. It is common practice for temporary exemption powers to reside with the AHRC only.[170] It is appropriate that these should be exercised by the AHRC, which has established processes and guidelines for granting temporary exemptions under other anti-discrimination laws. This usually includes public consultation prior to making such determinations.[171]

230. The Law Council considers that clause 39 is unnecessary and should be removed. Should this occur, subclauses 40(b) and (c), concerning review by the Administrative Appeals Tribunal (**AAT**) of decisions made under clause 39, should also be removed.

231. Should this not be accepted, the Law Council recommends that only the AHRC should have temporary exemptions powers, rather than the Minister.

Recommendations:

- **Clause 39 and subclauses 40(b) and 40(c) be removed.**
- **Should this not be accepted:**
  - **the words 'or the Minister' be removed from subclause 39(1); and**
  - **subclause 40(c) be removed.**

Part 4 – Statements of belief do not constitute discrimination

232. Clause 41 makes up the entirety of Part 4. It is in the following terms:

[169] SDA, ss 44–47; ADA, ss 44-47.
[170] Ibid.
[171] AHRC, 'Exemptions' (undated), <https://www.humanrights.gov.au/our-work/legal/exemptions>.

41 Statements of belief do not constitute discrimination etc.

(1) A statement of belief does not:

(a) constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the Fair Work Act 2009); or

(b) contravene subsection 17(1) of the Anti-Discrimination Act 1998 of Tasmania; or

(c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.

(2) Subsection (1) does not apply to a statement:

(a) that is malicious; or

(b) that would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or

(c) that is covered by paragraph 27(1)(b).

233. While several of the provisions of concern discussed above affect claims of discrimination under the Bill, clause 41 sits outside of the Bill's principal provisions and has a far broader effect.

234. Paragraph 41(1)(a) states that a statement of belief is not discrimination for the purposes of 'any anti-discrimination law' within the meaning of the FWA.[172] That is, the proposed provision makes lawful a statement of belief which would otherwise be unlawful discrimination by virtue of such a Commonwealth, state or territory law. Consequential amendments will add the Bill to this list.[173]

235. The Law Council is concerned by this approach. Its view is that reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination and promote substantive equality.

236. Paragraph 41(1)(b) specifically targets the conduct prohibited by subsection 17(1) of the Tasmanian Act which is not described in the Tasmanian law as discrimination. Subsection 17(1) is as follows:

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) 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.

237. The attributes referred to in subsection 17(1) are, in order, gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations of sex

[172] Sections 12 and 351(3) of the *Fair Work Act 2009* define 'anti-discrimination law' as the: ADA, DDA, RDA; SDA; NSW Act; Victorian Act; Qld Act; WA Act; *Equal Opportunity Act 1984* (SA) (**the SA Act**); Tasmanian Act; ACT Act; and NT Act.
[173] Consequential Amendments Bill 2019, sch 1, item 19.

characteristics, disability, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities.

238. The Tasmanian Act may have been individually targeted because the conduct prohibited is that which 'offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute'. In other states, the conduct similarly prohibited is more serious.[174] For example, section 8 of the *Racial and Religious Tolerance Act 2001* (Vic) prohibits conduct which 'incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

239. Subclause 41(1)(c) allows for additional laws to be added to the list above by regulation.

General comments

240. The Law Council considers that Part 4 should be omitted. Its view is that reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination and promote substantive equality. By expressly overriding existing Commonwealth, state and territory discrimination laws, the Bill prioritises freedom of religion at the expense of existing anti-discrimination provisions. It extends a positive right to discriminate and denigrate based on religious beliefs, and prevents discrimination claims from being brought.

241. Clause 41 is highly unusual in that it seeks to override existing anti-discrimination laws at the Commonwealth, state and territory level. This does not appear in other Commonwealth anti-discrimination laws which are generally intended to operate concurrently with state and territory laws.[175] While subclause 60(1) indicates that this is intended with respect to the remainder of the Bill,[176] clause 41 stands alone in this respect.

242. There is no mechanism for balancing of conflicting rights – that is, the best interests of the child, or the rights to non-discrimination, versus freedom of expression – and no mechanism to assess whether the statement/s of belief are necessary, reasonable and proportionate in the circumstances. As with subclause 8(3), clause 41 does not appear to recognise that the rights to manifest religion or to freedom of expression are subject to limitation particularly with respect to the rights of others.[177] It also has the potential to impact social cohesion and reinforce stigma for those who are already marginalised in the community.

Scope

243. Clause 41 has such wide application that it represents a substantial reform to national discrimination law, not just in the area of religious discrimination. It protects religious expression over and above all other rights to be free of discrimination

[174] For example, ss 20C (race), 38S (transgender), 49ZT (homosexual) and 49ZXB (HIV/AIDS) of the *Anti-Discrimination Act 1977* (NSW), and ss 7 (race) and 8 (religion) of the *Racial and Religious Tolerance Act 2001* (Vic).
[175] Eg SDA, s 10.
[176] Subclause 60(1) of the Bill states that the Bill is not intended to exclude or limit the operation of a law of a state or territory to the extent that the law is capable of operating concurrently with the Bill. However, a note to clause 60 states that nothing in cl 60(1) detracts from the operation of Part 4 (which consists of cl 41).
[177] ICCPR, arts 18(3) and 19(3).

protected by both international law[178] or currently incorporated into Australian law.[179] This is confirmed by the Explanatory Notes:

> *This provision is intended to protect the rights to freedom of expression and freedom of religion by ensuring that a person may express their religious belief in good faith regardless of Commonwealth, state or territory anti-discrimination laws that might have otherwise made that statement unlawful.*[180]

244. Clause 41 is not a standalone right to freedom of religious expression but acts as a shield from claims that such statements constitute unlawful discrimination.

245. As noted above, the *Scientology Case* definition of religion may apply and it includes in its purview both established religions and new religions whether large or small. It will, of course, not be limited to established Christian religions.

246. The definition of 'statement of belief' is also broad because it includes a statement which is 'in accordance with … the doctrines, tenets, beliefs or teachings of the religion' concerned. That is, the statement need not come from the religion or its teachings, but must accord with them. The breadth of that definition has been addressed above with respect to clause 10 and is a broader exemption than exists in other anti-discrimination statutes.

247. Neither the definition of 'statement of belief' nor clause 41 identify who may make such a statement. As such, a statement of belief may be made by a person, a group of persons or by an organisation whether incorporated or not.

248. The definition of religion set out by the High Court in the *Scientology Case* above is such that there may be variation in belief even amongst adherents to the same religion: 'there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion'.[181] The effect of that part of the High Court's decision is that a statement of belief may be wide and varied and not necessarily follow closely the pronouncements of a senior member of any relevant church.

249. Importantly, the protection is not available for a statement of belief if the statement is malicious or would (or is likely to) harass, vilify or incite hatred or violence against another person or group of persons, or is a serious offence.[182]

250. The contrast between the relevant provisions in Tasmania and subclause 41(2) of the Bill provides an instructive comparison. It appears that what is generally proposed is that statements of belief which offend, humiliate, intimidate, insult or ridicule are to be protected so long as they do not comprise harassment, vilification, incitement to hatred or violence or are 'counselling, promoting, encouraging or urging conduct that would constitute a serious [criminal] offence'.[183]

251. The Explanatory Notes note that:

> *This provision applies solely to an action for discrimination under those Acts. This includes both direct and indirect discrimination, as well as racial discrimination under section 9 of the RDA. It does not apply to harassment*

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[178] ICCPR, arts 2 and 26.
[179] Namely all state, territory and federal discrimination statutes.
[180] Explanatory Notes, [401].
[181] Scientology Case, 137 (Mason ACJ and Brennan J).
[182] The Bill cl 41(2) with serious offence defined in cl 27(1)(b).
[183] The Bill, cl 27(1)(b).

(including sexual harassment), vilification or incitement under an anti-discrimination law (within the meaning of the Fair Work Act).

… Clause 41 does not affect actions for other unlawful conduct or offences under those Acts, such as harassment, vilification, or offences such as discriminatory advertisements or victimisation. For example, this provision does not affect the prohibition of offensive behaviour based on racial hatred in Part IIA of the RDA.

252. On this basis, statements which are reasonably likely to offend, insult, humiliate or intimidate another person or group on the basis of their race, colour or ethnic origin will remain prohibited under section 18C of the RDA. However, as noted above, religious statements which may offend, humiliate or ridicule on the basis of other attributes will not be protected unless they meet the stricter standard of harassment, vilification, incitement to hatred.

253. It should also be noted that subclause 41(1)(c) allows for additional laws to be added to the list above by regulation. This is of concern, as it may, for example, enable Part IIA of the RDA (containing section 18C) to be added via regulation in the future, with the effect that statements of belief also override these provisions (or any others added). The Law Council does not consider that it is appropriate to override primary legislation, particularly where it involves human rights, through regulation.

Operation of clause 41

254. To make sense of how clause 41 might operate in practice one needs to understand the operation of federal, state and territory discrimination laws which, in general, apply the same structure of approach to the prohibition of discrimination.

255. Each of the statutes prohibits discrimination on the basis of a relevant attribute. For example, under the Victorian Act, attributes may include: age, breastfeeding, employment activity, gender identity, disability, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation, expunged homosexual conviction or personal association with a person who has any such attribute.[184]

256. Each of the statutes also prohibits discrimination only in certain areas of public life (as mentioned above). Part 4 of the Victorian Act, for example, sets out those areas in which discrimination is prohibited and includes: employment, employment related areas such as firms and qualifying bodies, education, provision of goods and services, accommodation, clubs, sport and local government.

Workplace

257. It is well known that most discrimination claims arise in the workplace, followed by goods and services and the provision of education. It is worth considering how clause 41 might apply in those circumstances.

258. A statement of belief is not limited to oral statements and may include written statements. In a workplace that might be a sign on a notice board, an article or cartoon pinned up over someone's desk, a speech to employees but may also include a statement of policy by the organisation concerned. Such statements are often used as evidence in a discrimination case to substantiate that relevant discrimination has

[184] Victorian Act, s 6.

occurred. For example, displaying pornography in a workplace is likely to give rise to a complaint of sexual discrimination because it gives rise to what is sometimes called a 'hostile work environment'.

259. In the same way, homophobic statements made by a person of faith may contribute to a work atmosphere which is hostile to a person who is lawfully married to a person of the same sex. If such a statement is made in good faith and is in accordance with the 'doctrines, tenets, beliefs or teachings of [a] religion' then it would attract the protection provided by clause 41. If one puts religious-run organisations to the side for the moment, clause 41 removes a protection from such discrimination which occurs in an otherwise non-religious environment. This may undermine the employer's ability to promote a harmonious workplace.

260. While the focus of criticism of the Bill has legitimately been on the effect on people who are same sex attracted, its width is not so limited. Clause 41 permits statements of belief which would otherwise be discrimination on the grounds of disability, race, gender or political belief for example. Again, if such a statement is made in good faith and is 'reasonably to be regarded' as in accordance with the 'doctrines, tenets, beliefs or teachings of [a] religion' then it will attract the protection.

261. There is nothing in the definition of statement of belief that says that the statements must accord with the mainstream adherents of that religion. That is, an extreme belief may nonetheless constitute a belief which is reasonably in accordance with the specific religion. There is no requirement that the belief itself be reasonable.

262. As a result, it is worth exploring some of the statements that may, depending on their context and the way in which the statement is made, be unlawful discrimination, but which may be permitted by the operation of clause 41:

- a statement in an employment context that the Koran requires women cover their heads with a headscarf because they will otherwise be like 'uncovered meat';[185]
- a statement made by a teacher to a transgender school student that the bible says there are only two types of people, men and women, and there is no such thing as a transgender person;
- the posting in a retail shop of homophobic cartoons and quotations from the bible calling same-sex attracted persons sinful; and
- a statement at a school to a disabled student that disabled people are examples of the wrath of God.[186]

263. A real difficulty will arise in trying to divorce a lawful statement of belief from unlawful discriminatory acts. This is likely to arise, for example, in a workplace discrimination claim where it is alleged a person has been constructively dismissed by an employer who has made a substantial number of discriminatory statements which were nonetheless made in good faith and reasonably in accordance with a particular

[185] Such a statement was made by an Australian Muslim cleric to a religious gathering in 2006.

[186] There are numerous examples in both the Old and New Testaments that God brings disability as punishment for transgressions for sin or as an expression of God's wrath for people's disobedience: see Jewish Encyclopaedia, 1920; The Talmud of Jerusalem, 1956; and Encyclopaedia Judaica, 1972). See, for example, Zechariah 11:17, a curse is invoked upon the 'negligent shepherd.' God's judgment is severe; Jeroboam's arm shrivels up completely. Zechariah says: 'Woe to the worthless shepherd, who deserts the flock! May the sword strike his arm and his right eye! May his arm be completely withered, his right eye totally blinded.'; 2 Chron. 26:16-23: the story of King Uzziah who, because of his unfaithfulness to God, was struck by leprosy 'because the Lord had afflicted him' (Vs 20); and John 9:1-3: the disciples anticipated a connection between disability and sin with the question: 'Rabbi, who sinned, this man or his parents, that he was born blind?' Examples drawn from 'Biblical and Theological Perspectives on Disability: Implications on the Rights of Persons with Disability in Kenya' Pauline A. Otieno *Disability Studies Quarterly* Vol 29 No 4 (2009).

religion. One can imagine this occurring with an employer who draws racist or sexist conclusions from a religious text and repeats them repeatedly to an employee. Under the current State and Federal discrimination protections such statements could be the basis for a claim of constructive dismissal. If the statements stop short of harassment or incitement to hatred, then, if the Bill is made into law, they will attract the operation of the clause 41 defence.

Implications for the sporting sector

264. Another example is that the proposed legislation may have particular adverse effects in the sporting sectors. They note that sporting clubs and organisations generally strive to maintain a safe and inclusive sporting environment. This occurs at both grassroots and professional levels where sporting associations implement policies and codes of conduct to ensure such an environment.[187] These policies and procedures are designed to ensure that there is zero tolerance of any discrimination. The Law Council supports the notion that participants should have the right to feel that they are free from discrimination when participating in competitions. Sporting organisations enable those who may be disengaged or vulnerable to participate in sport, as it is often used to bridge gaps and encourage inclusiveness and cohesion within communities.[188]

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

266. Additionally, permitting discrimination between players may have further implications on spectators who may believe that it is appropriate to discriminate and create a negative atmosphere at competitions. This underlines the need for more balanced provisions in this area.

Procedural difficulties in litigating a clause 41 defence

267. Protection from discrimination is provided through a combination of federal, state and territory laws with different procedural requirements. In all jurisdictions complaints are made to a statutory body which conciliates the complaint between complainant and respondent. If the conciliation fails it is referred for determination to a court or tribunal. So, for example, a complaint of discrimination under the NSW Act may be made to the Anti-Discrimination Board which is required to conciliate the complaint. If the conciliation fails to resolve the matter, it is transferred to the NSW Civil and Administrative Tribunal (**NCAT**) for determination. A complaint under the SDA may be made to the AHRC where it is conciliated. If the conciliation fails to resolve the matter, proceedings may be commenced in the Federal Court or the Federal Circuit Court.

268. In each of the States and Territories discrimination complaints are heard and adjudicated by a locally established tribunal, such as NCAT or the Victorian Civil and

[187] Victoria University, 'Come out to Play: The Sports experiences of Lesbian, Gay, Bisexual and Transgender people in Victoria' (2010), 71.
[188] Richard Hinds, 'Sport bringing Australian and African communities together in challenging times', *ABC News* (5 January 2018), <https://www.abc.net.au/news/2018-01-05/australian-african-hoop-dreams-show-sports-power/9304450>.

Administrative Tribunal (**VCAT**). Appeals can be made to an appeal panel or to the relevant Supreme Court depending on the jurisdiction.

269. Discrimination complaints are overwhelmingly heard and determined in state and territory tribunals. During the 2017-18 year the following number of complaints of discrimination were referred to a state or territory tribunal for decision:[189]

(a) NSW – 89 cases;

(b) Victoria – 310 cases;[190]

(c) Queensland – 156 cases;[191]

(d) Western Australia – 68;

(e) Australian Capital Territory – 17;

(f) Tasmania – 41;[192]

(g) Northern Territory – 5.[193]

270. Only a fraction of discrimination claims are heard in the Federal Court or Federal Circuit Court. In 2017-18 there was a total of 60 cases commenced in the Federal Circuit Court and 35 in the Federal Court.[194] There are, no doubt, some discrimination claims brought in the Fair Work Commission. However, the Fair Work Commission does not appear to identify relevant actions commenced on the basis of a discriminatory ground. It should be noted that, in any event, the Fair Work Commission has been held not to be a Chapter III Court, so any defence sought to be raised in the Fair Work Commission would also need to be the subject of an application to a Chapter III Court.

271. By comparison with the federal courts, at least 686 complaints of discrimination were filed in state and territory tribunals.[195] Accordingly, if one excludes actions taken in the Fair Work Commission, less than 12 per cent of all discrimination claims nationally were heard by a federal court in 2017-18.

272. The primary reason for the disparity is likely to be that each of the state and territory tribunals currently operates on a 'no costs' basis in the area of discrimination law.[196] That is, the tribunal will not award the payment of an unsuccessful party's legal

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[189] The number refers to discrimination complaints which have been conciliated by the relevant state or territory body, eg the Anti-Discrimination Board in NSW. The number of complaints received by relevant agencies is far in excess of the number of complaints which are referred to the adjudicative body.
[190] The large number of cases considered by VCAT may reflect the ability of a complainant to bypass conciliation by the Victorian Equal Opportunity and Human Rights Commission and proceed directly to VCAT (Victorian Act, s 122).
[191] 52 matters were commenced in QCAT and 104 in the Queensland Industrial Relations Commission
[192] The 2017-18 Annual Report is not available as at the date of writing. According to the Annual Report for 2016-17, 41 complaints of discrimination were received by the Tribunal.
[193] Statistics from South Australia were not readily available. However, approximately 66 discrimination matters were referred to the South Australian Employment Tribunal by the Equal Opportunity Commission in 2017-18.
[194] Annual Report for 2017-18 of the Federal Court, Annual Report for 2017-18 of the Federal Circuit Court
[195] Not including South Australia.
[196] *Civil and Administrative Tribunal Act 2013 No 2* (NSW) s 60(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100; *State Administrative Tribunal Act 2004* (WA) s 87(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57(1); *Anti-Discrimination Act 1998* (Tas) s 95; *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 131.

costs save for in certain or exceptional circumstances. This is one of the mainstays of the discrimination regime allowing for low cost access to adjudication of complaints. Complaints made under the federal discrimination statutes must proceed in a costs jurisdiction such as the Federal Court or Federal Circuit Court.

273. In most States and Territories such a tribunal is not a Chapter III court and cannot exercise Federal jurisdiction or determine a question of federal law[197]. The NSW Court of Appeal has determined that NCAT is not a Chapter III court.[198] In *Commonwealth v Anti-Discrimination Tribunal (Tas)*[199] Kenny J determined, that the Anti-Discrimination Tribunal of Tasmania was similarly not a Chapter III Court and could not exercise federal jurisdiction.[200] However, in *Owen v Menzies*[201], the Queensland Court of Appeal determined that the Queensland Civil and Administrative Tribunal was a Chapter III Court.[202]

274. In *Sunol v Collier*[203] Leeming JA held that:

> ***A matter will involve the exercise of federal judicial power if, for example, one party has a defence which owes its existence to a law of the Commonwealth Parliament****. The resolution of any matter arising under the Constitution or involving its interpretation will constitute an exercise of federal judicial power. Once such a matter is identified, the whole of the jurisdiction being exercised by the court is federal jurisdiction. Accordingly, the applicable law must be that identified under Commonwealth law: it may be a State law picked up and applied by a Commonwealth law, such as sections 79 and 80 of the Judiciary Act 1903 (Cth). However, such provisions operate only in respect of federal jurisdiction being exercised by a court of a state or territory.*[204]

275. Clause 41 of the Bill provides a federal defence to a complaint of unlawful discrimination made under state or territory legislation. The determination of such a defence is plainly a 'question of federal law'.

276. The Tribunal tasked with adjudicating discrimination complaints in NSW and Tasmania, and no doubt other states and territories, will not be able to determine the federal defence. The defence will need to be determined by a Chapter III Court, usually a Supreme Court or the Federal Court.

277. This gives rise to real practical difficulties. First, the defence would need to be raised for determination by separate proceedings in the state or territory Supreme Court or the Federal Court. Second, while any defence might be resolved in such a Court the relevant Court would not be able to determine the substantive complaint because it will not have jurisdiction to do so.[205] Third, if the defence is rejected by the Court or is only successful for part of the claim, it will need to return to the relevant

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[197] *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 (***Gatsby***); *Burns v Corbett* [2018] HCA 15.
[198] *Gatsby* [281] (Leeming JA).
[199] (2008) 169 FCR 85 (***Commonwealth v Tasmanian Tribunal***).
[200] Ibid, [239].
[201] [2012] QCA 170; [2013] 2 Qld R 327 (***Owen v Menzies).***
[202] Ibid, [20], [61], [103].
[203] [2012] NSWCA 14 (***Sunol v Collier***).
[204] Ibid, [7] (Leeming JA), citing *LNC Industries Ltd v BMW (Australia) Ltd* [1983] HCA 31; 151 CLR 575 at 581; *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47; 217 CLR 30; *Felton v Mulligan* [1971] HCA 39; 124 CLR 367 at 373 (emphasis added).
[205] NSW Act ss 93A–93C; Victorian Act s 134; Qld Act ss 174A–174C; WA Act, s 107; SA Act s 95B, s 95D, s 96; Tasmanian Act ss 12, 13; *Human Rights Commission Act 1995* (ACT) s 53A; NT Act s 86.

tribunal for hearing and determination. Fourth, both parties will have to bear the additional costs and delay of such litigation, making such litigation unworkable and expensive.

278. In late 2018, NSW introduced amendments to the NSW *Civil and Administrative Tribunal Act 2013*[206] to mitigate the problem that NCAT cannot consider a federal issue. Following the amendments, where a federal issue arises in NCAT substituted proceedings may, with leave, be commenced in the Local Court or the District Court. In the context of clause 41, pursuit of the proposed defence will require the obtaining of leave and then commencement of substituted proceedings in either of those courts. The District Court is a jurisdiction where the usual costs rules apply.[207]

279. At present, anti-discrimination laws operate in a cooperative way between the States and Territories on the one hand and the Commonwealth on the other. The two systems have been designed to operate side-by-side and have done so for over 30 years. The proposed clause 41 undermines this cooperative system and makes a discrimination claim where the federal defence is raised unworkable for both the complainant and the respondent.

Relationship of clause 41 to existing religious exemptions

280. Many of the relevant statutes provide limited exemptions from the operation of the discrimination laws on religious grounds.[208] Section 84 of the Victorian Act, for example, provides this exemption:

> *Religious beliefs or principles*
>
> *Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's* ***religious belief or activity****, sex, sexual orientation, lawful sexual activity, marital status, parental status or* ***gender identity*** *if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.*

281. A further exemption is provided by section 82, subsection (2) of which has wide application:

> ***Religious bodies***
> *(1) Nothing in Part 4 applies to—*
> *(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or*
> *(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or*
> *(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.*
> *(2)* ***Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual***

[206] Part 3A.
[207] Paragraphs 34C(4)(d) and (g) with respect to the District Court. In the Local Court the costs rules that apply to NCAT continue.
[208] ADA s 35; SDA ss 23(3)(b), 37, 38, 40(2AA); NSW Act s 56; Victorian Act ss 38, 55, 56, 75, 76, 77; Qld Act ss 25, 41, 48, 80, 89, 90, 109; WA Act ss 21 (3)(b), 35AM(3)(b), 35Z, 63(3)(b), 66(1), 66ZG, 67I, 72, 73; SA Act ss 34(3), 35(2)(b), 50, 85ZB, 85ZM; Tasmanian Act ss 27(1)(a), 42, 51, 51A, 52; ACT Act ss 11, 26(b), 32, 44, 46; NT Act ss 30(2), 31(3), 37A, 40(2)-(3), 43, 51.

activity, marital status, parental status or gender identity by a religious body that—

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

282. A further exemption is provided by section 83 of the Victorian Act in relation to religious schools.

283. It is obvious that the proposed clause 41 of the Bill is far wider than, for example, the exemption provided by section 84 or subsection 82(2) of the Victorian Act because clause 41 applies to all attributes in all areas of discrimination, not just the limited attributes of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

284. Clause 41 of the Bill is also far wider than the exemption provided by subsection 56(1) of the NSW Act which restricts the exemptions to the 'act of a body established to propagate religion' and requires that the relevant act either 'conforms to the doctrines of that religion' or 'is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.

285. Sections 37 and 38 of the SDA provide exemptions in relation to discrimination on the prohibited grounds under that legislation. In particular there is a general exemption in paragraph 37(1)(d) from the provisions which prohibit sex discrimination for

… any … act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

286. Section 38 provides for certain limited exemptions in relation to employment and provision of education by educational institutions established for religious purposes. The exemptions are limited to discrimination on the grounds of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy where:

(a) The educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and

(b) The discriminator discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

287. By contrast, there are no exemptions for religious based discriminatory conduct under the RDA or the DDA. Nor would any of the exemptions under the Victorian Act be available with respect to prohibited discriminatory conduct on the basis of race or disability. Arguably the exemption under section 56 of the NSW Act applies to both race and disability.

288. Accordingly, whether clause 41 provides an additional level of defence to a person who makes a statement of belief will depend on the nature of the exemptions in the federal, state or territory legislation. Depending on the relevant statute the exemption will make no difference, little difference or a substantial difference. At its widest impact, clause 41 will provide an entirely new exemption to areas of race and disability discrimination where there is currently no religious exemption at all. There does not appear to be any evidential foundation, or plausible justification, for a religious exemption from prohibitions on racial or disability discrimination.

Reference to the Australian Law Reform Commission

289. As noted, in April 2019, the Federal Attorney-General referred the issue of religious exemptions in anti-discrimination statues to the ALRC. That reference was recently widened to include the legislation proposed in the Bill and cognate bills. It is not known why a provision as wide as clause 41 is proposed in the absence of the consideration and recommendations of the ALRC.

290. The Attorney-General referred to the ALRC consideration of what reforms to relevant anti-discrimination laws, the FWA and any other Australian law should be made in order to:[209]

- 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; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the RDA or otherwise.

291. While the amended terms of reference require the ALRC to confine its inquiry to issues not resolved by that Bill, and to confine any amendment recommendations to legislation other than the Bill,[210] the inclusion of a clause such as clause 41 (as well as other problematic clauses in the Bill, such as clause 10), nevertheless appear highly pre-emptive and limit the potential benefit of the inquiry itself.

No basis in Expert Panel Recommendations or Findings

292. Clause 41 was not recommended by the Expert Panel. Nor does it sit well with its approach to human rights, which as discussed, was generally balanced and proportionate.[211] The Expert Panel did note that:

> *There was considerable confusion in the community between vilification provisions and provisions directed at other restrictions on speech. For example, a large number of groups raised concerns about high-profile complaints, arguing that religious groups now feel threatened by uncertainty around what they can and cannot say in relation to their beliefs about marriage. These matters usually did not relate to vilification provisions in the sense of article 20 but rather laws regulating offensive, insulting, humiliating or intimidating speech directed at particular individuals or groups.*[212]

293. The Panel encouraged Commonwealth, state and territory Attorneys-General to cooperate to ensure greater consistency and national coverage with respect to anti-vilification laws regarding religion.[213] However, it made no other relevant

[209] The Hon Christian Porter MP, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* (10 April 2019) Attorney-General for Australia, media release.
[210] ALRC, 'Altered Terms of Reference 29 August 2019', updated 3 September 2019, <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>.
[211] Expert Panel Report, 29 [1.60]; 59 [1.229]; 66 [1.260].
[212] Ibid, 85 [1.346].
[213] Ibid, 86 [1.350]. In this context, it emphasised the difference between vilification under article 20 of the ICCPR (which was concerned with the advocacy of hatred that incites discrimination, hostility or violence), and the regulation of offensive, insulting, humiliating or intimidating speech directed at an individual with particular characteristics and did not include incitement: at 85 [1.344].

recommendations,[214] and in particular, it did not recommend that the Commonwealth override existing Commonwealth, state and territory laws in this area.

294. To the extent that, as recognised by the Expert Panel, uncertainty exists in religious communities regarding what may be said regarding beliefs about marriage, the Law Council suggests that a strong starting response would be to implement the Panel's Recommendation 18. This recommendation proposed an engagement and public education program about human rights and religion in Australia.[215] This should increase knowledge amongst all groups about how the rights to manifest religion and to freedom of speech may be likely intersect with other rights in practice. This would be a more proportionate response than overriding Commonwealth, state and territory anti-discrimination laws.

Conclusion

295. Clause 41 should not be enacted because:

(a) it is contrary to well-established principles of international law, in that it prioritises the protection of freedom of religious expression over well-recognised human rights such as the right not to be discriminated on the grounds of race, sex, sexual orientation, disability, or age in a manner which allows a disproportionate limitation on the enjoyment of those rights;[216]

(b) the provision reduces current protections against discrimination in federal, state and territory discrimination statutes; and

(c) the provision is unworkable as it will draw both the complainant and the respondent into secondary litigation, causing further delay and cost to both parties.

Recommendation:

- **Part 4 of the Bill, relating to statements of belief, should be removed**.

Part 6 – Freedom of Religion Commissioner

296. Part 6 establishes a Freedom of Religion Commissioner (**the Commissioner**) at the AHRC.

297. In this context the Expert Panel relevantly recommended that:

The AHRC 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.[217]

298. The Commissioner would join existing AHRC Commissioners, consisting of the:

[214] The Expert Panel made separate recommendations regarding the abolition of blasphemy laws: Ibid, 89 (Recs 13 and 14).
[215] Ibid, 102 (Rec 18).
[216] The rights protected by article 26 of the ICCPR are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[217] Expert Panel Report, 103 (Rec 19).

- President of the AHRC;
- Aboriginal and Torres Strait Islander Social Justice Commissioner;
- Age Discrimination Commissioner;
- Children's Commissioner;
- Disability Discrimination Commissioner;
- Human Rights Commissioner;
- Race Discrimination Commissioner; and
- Sex Discrimination Commissioner.

299. Rather than recommending a standalone Commissioner, the Expert Panel favoured extending the remit of an existing commissioner to include responsibility for issues relating to religious freedom. This could be done, for example, by the existing Human Rights Commissioner.[218]

300. The Law Council notes that the title of the Commissioner, which is focused on 'Religious Freedom', is not in keeping with these other titles, or the Bill's title, which focus on 'discrimination'. In the absence of a federal human rights act, it suggests that a preferable approach may be to establish a Religious Discrimination Commissioner.

301. An underlying concern in this regard may be resourcing, as a standalone Commissioner would require additional staff. It is unclear from the Explanatory Notes whether additional resources will be provided to ensure such staffing. In this context, the Law Council has previously raised its concerns that the AHRC has been subject to substantial funding cuts which undermine its capacity to perform its functions effectively, particularly during periods when it has been subject to public criticism.[219] Under the *Principles relating to the Status of National Institutions*, in order to be effective and granted an 'A status', national human rights institutions must be (inter alia) adequately funded.[220] In 2017, the HRC expressed concern about the AHRC's budget cuts, and called on Australia to restore these.[221] The Law Council considers that if a Commissioner is established, additional staffing resourcing must follow.

302. However, a broader concern relates to balance. As noted above, where religious rights intersect with other rights, there can be tensions arising, including with respect to LGBTI+ rights. The Law Council's Justice Project highlighted that, despite studies illustrating that LGBTI+ groups experience high rates of discrimination and harassment,[222] there is no dedicated commissioner for LGBTI+ issues at the federal level.[223] The Justice Project supported the establishment of such a dedicated role, provided that sufficient staffing and resources were also made available.[224]

303. The establishment of the Commissioner may further underline this gap. Accordingly, the Law Council considers that should a standalone position be pursued, consideration also be given to establishing a federal LBTI+ Discrimination Commissioner. However, to avoid significantly expanding the AHRC, and avoid a possible siloing effect regarding differing mandates, it may be better to have close

[218] Ibid, [1.416].
[219] Law Council of Australia, *Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Submission to the Australian Law Reform Commission, 9 October 2015.
[220] Principles relating to the Status of National Institutions (The Paris Principles), GA Res 48/134, (20 December 1993) [2].
[221] HRC, Concluding Observations, 13.
[222] Law Council of Australia, *Justice Project: Final Report* (August 2019), LGBTI+ Chapter, 8.
[223] Ibid, 39-41.
[224] Ibid, 4.

regard to the Expert Panel's recommendation that the Commissioner role should occur within the existing commissioner model.

Recommendations:

- **The Religious Freedom Commissioner position be retitled as a Religious Discrimination Commissioner.**
- **Consideration be given to establishing the Commissioner role within the existing AHRC Commissioner model, rather than establishing a new position.**
- **If the above recommendation is not accepted and a standalone Commissioner position is established, it should be:**
  - **supported with sufficient additional staffing and resources; and**
  - **accompanied by a dedicated LGBTI+ Discrimination Commissioner position, which is similarly resourced.**

Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

Background

304. The HR Bill is intended to respond to three recommendations made by the Expert Panel:

- **Recommendation 3** – that the Commonwealth, state and territory governments should consider the use of objects, purposes and other interpretative clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion;
- **Recommendation 4** – that the Commonwealth should amend section 11 of the Charities Act to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'; and
- **Recommendation 12** – that the Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that 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.

305. Due to resource and time constraints, the response below focuses on Recommendation 4 and the HR Bill's provisions concerning section 11 of the Charities Act. However, the Law Council may engage on the other aspects of the HR Bill in due course.

Proposed amendment to section 11 of the Charities Act

347. The exposure draft of the HR Bill includes in schedule 1 proposed amendments to the Charities Act. If the HR Bill were enacted, section 11 of the Charities Act would read as follows (with the proposed amendments underlined):

> *11. Disqualifying Purpose*
>
> *(1) In this Act:*
>
> *Disqualifying Purpose means:*
>
> *The purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or*
>
> *Example: Public policy incudes the rule of law, the constitutional system of Government of the Commonwealth, the safety of the general public and National security;*
>
> *Note: Activities are not contrary to public policy merely because they are contrary to Government policy.*
>
> ***The purpose of promoting or opposing a political party or a candidate for political office.***
>
> *Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).*
>
> *Note: The purpose of promoting or opposing a change to any matter established by Law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose (see paragraph (1) of the definition of Charitable Purpose in subsection 12(1)).*
>
> *(2) To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose.*

Summary of Law Council's position

306. The Law Council is very strongly of the view that this amendment should not be made for the following reasons:

- it does not reflect the recommendation;
- is not restricted or directly tied to religious freedoms and is significantly broader than it is intended to be;
- no amendment is necessary – it is stated 'to avoid doubt' but there is no legal doubt as to the issue raised and conversely the inclusion of the provision will have the effect of raising doubt where there was none;
- it is likely to 'open the floodgates' for lobbying for further amendments by advocacy bodies wishing for similar special treatment;
- it is a response to a moment in time based on a concern arising from an issue outside and not applicable in Australia, which does not make good legislation

for the short or long term. Such concern is appropriately dealt with through guidance by the regulator;

- as a result of the drafting, it does not achieve the clarification its insertion is intended to provide; and
- it will create confusion and have unintended consequences as the meaning of the provision is not clear.

The amendment does not reflect the recommendation

307. The Explanatory Notes for this proposed amendment refers (in paragraph 41) to the Expert Panel Report which noted concerns raised by faith-based charities as to possible ambiguity around whether advocacy of a traditional view of marriage could constitute a disqualifying purpose.

308. The recommendation to amend the Charities Act was to give certainty to faith-based charities by clarifying that supporting a view of traditional marriage as part of their activities in advancing religion would not, of itself, result in loss of charity registration.

309. However, the proposed amendment:

- is not limited to faith-based charities pursuing a charitable purpose of advancing religion and having as one of its purposes, or an incidental or ancillary purpose, promoting a view of traditional marriage as consistent with its religious doctrines;
- could apply to a charity with its only purpose being the support of a view of traditional marriage with no religious beliefs; and
- covers activities done in support of a view of traditional marriage which are unlawful or contrary to public policy (discussed below).

310. The Expert Panel Report makes it clear[225] that the recommendation arose from concerns of faith-based organisations. The faith-based organisations were concerned largely as a result of overseas examples. The Expert Panel stated that:

> *The Panel does not consider charities 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 experiences 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 legislation of the same sex marriage beyond doubt.* [226]

311. As can be seen, the Panel was clearly considering charities for advancing religion which advocated their religious views including a traditional view of marriage.

312. However, the proposed amendment goes well beyond addressing the concerns raised in the Expert Panel Report and the recommendation, when considered in the context of the statements in that report.

> *In particular, the Panel recommends an amendment 'similar to that suggested by the Acting Commissioner of the ACNC'.*

[225] Expert Panel Report, from [1.187] onwards.
[226] Ibid, [1.220].

The amendment suggested by Murray Baird, the then Acting Commissioner of the ACNC, in a letter dated 24 November 2017 was:

> *'However, one way to address the concerns that have been raised may be to provide in the amending legislation that nothing in the legislation adversely affects an entity's charitable status by reason only that the entity holds or expresses a position on marriage after the enactment of the legislation that, if held or expressed prior to the enactment of the legislation would have had such an effect.'*

313. This suggested amendment is targeted specifically to addressing the concern that the enactment of the Same Sex Marriage Act could result in advocating for traditional marriage somehow becoming unlawful or contrary to public policy and is significantly narrower than the proposed subsection 11(2) as it is limited to:

- the charitable status of charities that have currently recognised charitable purposes within the meaning of section 12 for the public benefit;
- holding or expressing a position on marriage; and
- activities which, before the change to the definition of 'marriage', did not amount to a disqualifying purpose, remaining activities which do not amount to a disqualifying purpose.

The amendment is unnecessary

314. The Expert Panel considered that under the existing legal framework, mere advocacy of a position contrary to government policy (such as a traditional view of marriage) did not meet the threshold of a disqualifying purpose.[227] The Government has accepted this view as noted in the Explanatory Notes.

315. The Law Council concurs that advocacy supporting a traditional view of marriage by faith-based charities will not be a disqualifying purpose unless the activities undertaken in support of the view are unlawful or contrary to public policy.

316. On this basis no amendment is required. The ACNC can assist any charities with concerns as to advocacy and has a number of resources on its website relating to advocacy and the meaning of disqualifying purpose. Further, if sufficient concern exists in relation to this particular issue, the ACNC could publish a Commissioner's Interpretation Statement to provide comfort and clarity to faith-based charities. It is more appropriate to respond to a moment in time concern in this manner, rather than through a legislative change which raises a number of interpretation issues discussed in this submission.

317. The recommendation made by the Expert Panel was not made on the basis that the amendment was *necessary*, but upon the basis that there 'was benefit to assist certainty' and that the Panel 'could see no particular harm' in the amendment. In our submission, certainty can be achieved through ACNC guidance, and there is in fact particular harm in the amendment (as explained in this submission), which the Expert

[227] The concerns raised by faith-based charities directly relate to the change of government policy in relation to the definition of marriage. Relevantly, the Note to section 11 states that 'Activities are not contrary to public policy merely because they are contrary to government policy'. Further, the Example to section 11 states that 'Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security'. These examples serve to illustrate that a very high threshold must be reached before an activity could be said to be contrary to public policy. That is, the activity must be something that undermines the very framework of Australia's democratic system or threatens public safety.

Panel may not have had the opportunity to receive feedback on, or consider in more detail.

Lack of clarity arising from difficulties in drafting

318. In addition to the drafting not reflecting the recommendation, the following difficulties arise from this drafting:

- it appears to allow any type of activity including unlawful or extreme activities done in support of a view of traditional marriage;
- it creates uncertainty as to pursuit of advocacy on other views; and
- it appears to create a new charitable purpose.

Has the unintended effect of allowing unlawful activities

319. Subsection 11 (2) applies to *all* activities done in support of a view of traditional marriage. This allows activities which are unlawful or contrary to public policy, eg incites violence against people or property, contrary to the reason for the inclusion of section 11 and the meaning of 'disqualifying purpose'. This is not an intended outcome.

320. The Explanatory Notes to the Bill state unlawful activities would constitute another purpose such to make them a disqualifying purpose, but this is not how paragraph (2) is drafted nor how purpose is determined. Whether activities form a separate purpose is determined on a case by case basis requiring assessment of a number of criteria. As such, if a charity had a purpose of engaging in illegal activities that support a view of traditional marriage, the drafting of paragraph (2) would mean that this purpose would no longer be a disqualifying purpose, and therefore be allowed.

321. As such, the statement in paragraph 43 of the Explanatory Notes that engaging in or promoting activities that support a traditional view of marriage, in conjunction with another disqualifying purpose, will constitute a disqualifying purpose, is not supported in the drafting of paragraph (2).

Creates uncertainty where there was none

322. The proposed amendment suggests that without the new provision, activities that support a view of traditional marriage are or could be activities that are unlawful or contrary to public policy. As set out above, there is no need for including this clarification in the Charities Act because the current legal position is that a faith-based charity would not have a disqualifying purpose by advocating for a traditional view of marriage (unless the activities it engages in or promotes are themselves unlawful or contrary to public policy). The words 'For the avoidance of doubt' suggest there could sensibly be doubt, where there is none.

323. The danger of including a discrete area for legislative 'clarification' is that it may be argued that without its inclusion, those activities would have constituted a disqualifying purpose. In other words, albeit that the provision is included 'to avoid doubt', the fact of its inclusion implies that doubt exists.

324. The consequence of this is that other similar views, which have not received legislative clarification in the Charities Act, may, as a result be argued to be disqualifying purposes. As such, there will now be a doubt as to whether activities undertaken by faith-based charities to advocate against lawful abortion, or euthanasia (for example) result in a disqualifying purpose.

Implies the existence of a new charitable purpose

325. The drafting can be read as implying an organisation with the sole purpose of engaging in or promoting activities (whatever those activities are) which support a view of traditional marriage, must already satisfy the requirement that the purposes are charitable purposes and are for the public benefit. This is not an intended outcome as the amendment is meant to apply to faith-based charities which as part of their religious purposes pursue activities supporting a view of traditional marriage.

326. Subsection 11(2) does not refer to the principle purpose of the charity being advancing religion and the purpose of supporting a view of traditional marriage being an ancillary or incidental purpose, which is the context the recommendation was made. There is no recommendation that entities without a religious basis or other charitable purpose in section 12 should be charities if they have a purpose of supporting a view of traditional marriage. The drafting of paragraph (2) creates uncertainty by giving rise to this possible interpretation.

327. All entities will need to be assessed as to their purposes, public benefit and whether the means of achieving the purpose is a disqualifying purpose.

Drafting not clear

328. The insertion of the words 'To avoid doubt' and 'of itself' may be intended to address or overcome some or all of the above drafting difficulties, but these words do not achieve this.

329. The New Zealand case of *Re Greenpeace of New Zealand Inc*[228] (***Greenpeace***) provides a good illustration of the interpretation issues that can arise in relation to a legislative provision that is included in order 'to avoid doubt'. The drafting of subsection 5(3) of the *Charities Act 2005* (NZ) was considered in this case, and instead of providing clarity, resulted in two differing interpretations.

330. In summary, the drafting of proposed subsection 11(2):

- does not clarify the issue as intended;
- has serious unintended consequences;

and should not be adopted for these reasons.

Other clarifications in the future

331. It is difficult to understand, if clarification is needed, why clarification is required only for this issue. This amendment has arisen from a moment in time where the Same Sex Marriage Bill was being debated at the same time a court case was decided in New Zealand which resulted in some unfounded concerns by faith-based charities in Australia. This 'knee jerk' reaction to insert a provision so specific to the issue, does not make good legislation for the short or long term.

332. It seems possible that charities advocating for changes in laws or policies on numerous issues, whether faith-based or otherwise, will be justified in also seeking 'clarification', for example those against abortion or euthanasia; environmental organisations against coal mines; organisations against wind farms; organisations against certain farming practices or the live export of livestock, to name but a few.

[228] [2014] NZSC 105.

333. As such, the inclusion of subsection 11(2) may 'open the floodgates' and result in charities seeking legislative clarification on numerous other issues.

334. For these reasons, the Law Council strongly recommends that the proposed amendment to section 11 of the Charities Act is not made.

Recommendation:

- **Items 3 and 4 of Schedule 1 of the HR Bill, proposing amendments to section 11 of the Charities Act, should be removed.**