



Australian  
Human Rights  
Commission

# Religious Freedom Bills second exposure draft

Submission to the Attorney-General's Department

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## 1 Introduction

1. On 27 September 2019, the Australian Human Rights Commission (the Commission) made a submission to the Attorney-General's Department in relation to the first exposure draft of a package of three draft Bills that the Department described collectively as the 'Religious Freedom Bills'.<sup>1</sup> The Religious Freedom Bills comprised drafts of the:
  - Religious Discrimination Bill 2019 (Cth) (the Bill)
  - Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) (the Consequential Amendments Bill)
  - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth) (the Freedom of Religion Bill).
2. On 10 December 2019, the Attorney-General's Department published a second exposure draft of the Religious Freedom Bills.
3. This submission focuses on the changes that have been made to the Religious Freedom Bills in the second exposure draft. It does not repeat all of the analysis and other information contained in the Commission's first submission. However, for clarity, those recommendations from the Commission's first submission, which have not already been implemented, are repeated here so that it is clear what changes the Commission considers still need to be made to the Bill from a human rights perspective.

## 2 Summary

4. The Commission strongly supports the introduction of enforceable protections against religious discrimination for all people in Australia. This has been the consistent position of the Commission for more than 20 years.<sup>2</sup>
5. While there are some protections against religious discrimination in Commonwealth, State and Territory law, these protections are incomplete. In some scenarios, such as complaints to the Commission of religious discrimination in employment, those existing legal protections do not provide for enforceable remedies where discrimination is established.
6. Just as Australians are provided with statutory protection against discrimination on the grounds of race, sex, disability and age, so too

should they be provided with equivalent protection against discrimination on the ground of religious belief or activity. This reinforces the idea, reflected in article 2 of the Universal Declaration of Human Rights and in the objects clause for the Bill, that human rights are indivisible and universal.

7. Prohibiting discrimination on the ground of religious belief or activity (including beliefs about religion held by people who are atheists or agnostics) is consistent with and supports the tolerant, pluralistic nature of Australian society.
8. Many provisions of the Bill are consistent with the objective of providing equivalent protection against discrimination on the ground of religious belief or activity—as compared with existing Commonwealth laws that prohibit discrimination on other grounds such as race, sex, disability and age. The Bill prohibits direct and indirect discrimination on the ground of religious belief or activity in areas of public life covered by those other Commonwealth discrimination laws. The Bill also provides for general and specific exemptions which are broadly consistent with other discrimination law.
9. The Commission endorses these elements of the Bill. They represent a conventional means of incorporating certain protections from international human rights law into Australia’s domestic law.
10. However, the Commission is concerned that, in other respects, the Bill would provide protection to religious belief or activity at the expense of other rights. The Commission considers that those provisions of the Bill need to be amended or removed, because they limit other human rights in a way that is unnecessary and disproportionate, or are otherwise inconsistent with international human rights law.
11. The Bill includes a number of unique provisions that have no counterpart in other anti-discrimination laws and appear to be designed to address high-profile individual cases. As a matter of principle, the Commission considers that legislating for single instances is not good legislative practice. As a matter of substance, it may lead to unintended and undesirable consequences.
12. Many of the amendments that have been made in the second exposure draft have the effect of enabling discrimination on the ground of religious belief or activity in a number of areas, if the body engaging in the discrimination is itself ‘religious’. This creates the

impression that this Bill is increasingly becoming a collection of exemptions for different kinds of religious organisations.

13. The Commission's view is that a Bill prohibiting religious discrimination should apply equally to the conduct of everyone in society, whether or not they are religious. In the context of a Bill that is seeking to eliminate religious discrimination, it is reasonable to expect as a starting point that everyone should have the same opportunity to apply for jobs, go to school and to buy goods and services, including where the employers, educators and providers of goods and services are religious bodies. Some exemptions for inherently religious practices are appropriate, but broad exemptions that allow religious bodies to engage in religious discrimination across a range of areas of public life undermines the rationale for the introduction of the Bill.
14. The Commission's main concerns regarding the Bill are as follows.
15. **First**, the scope of the Bill is overly broad in defining who may be a victim of religious discrimination, and too narrow in defining who may be found to have engaged in religious discrimination.
16. The Commission welcomes the clarification in the second exposure draft that only natural persons (and not corporations) may hold a religious belief and engage in religious activity. This change implements recommendation 2 in the Commission's first submission.
17. However, new clause 9, which prohibits discrimination against associates, is overly broad and again permits claims of religious discrimination to be made by corporations, as associates of a person with a religious belief. This is a significant departure from domestic and international human rights laws which protect only the rights of natural persons.
18. At the same time, the Bill provides that 'religious bodies'—including religious schools, religious charities and other religious bodies—are entirely exempt from engaging in religious discrimination if the discrimination is in good faith and is either in accordance with their religious doctrines, tenets, beliefs or teachings or is aimed at avoiding injury to the religious susceptibilities of adherents of the religion. This broad exemption permits religious discrimination in any area of public life covered by the Bill, including employment, education and the provision of goods, services and facilities.
19. The Commission considers that the scope of exemptions granted to religious schools should be considered by the Australian Law Reform

Commission as part of its current inquiry into religious exemptions including exemptions for religious schools under the *Sex Discrimination Act 1984* (Cth) (SDA).

20. The second exposure draft adds new exemptions allowing religious hospitals, aged care providers, camps and conference centres to engage in particular kinds of religious discrimination. In light of other more targeted exemptions available in the Bill which permit religious discrimination where this is intended to meet a need arising out of a religious belief or activity, or where this is necessary to fill an employment position where religious belief or activity is an inherent requirement of the role, the Commission considers that these new special exemptions for particular types of organisations are too broad and not necessary.
21. **Secondly**, the Bill provides that ‘statements of belief’ that would otherwise contravene Commonwealth, State or Territory anti-discrimination laws are exempt from the operation of those laws.
22. The Commission welcomes the clarification in the Explanatory Notes that the protection for discriminatory statements of belief does not extend to accompanying discriminatory conduct, and that the discriminatory statement may be relied on as evidence that related conduct was engaged in on a discriminatory ground. Clause 42 has been amended to add the words ‘in and of itself’ after ‘A statement of belief’. These changes respond to some, but not all, of the concerns expressed by the Commission at [84]–[90] of its first submission.
23. The Commission remains concerned that clause 42 will permit discriminatory statements of belief to be made, whether they amount to racial discrimination, sex discrimination or discrimination on any other ground prohibited by law. Section 5.5 of this submission describes a number of recent complaints to the Commission about discriminatory statements where the ‘statement of belief’ defence could operate. For example, the Commission received a complaint from a woman who had disclosed to her employer that she had recently become pregnant. She alleged that her employer said: ‘There is no room in [this] business for someone who is going to be a single mother’. If the Bill were passed with clause 42 in its proposed form, this statement may be protected from amounting to discrimination if it was a statement of belief (although related conduct, such as firing the woman if she ultimately had a child out of wedlock, could still amount to discrimination if the woman was able to show that the termination

of her employment was on the grounds of sex, pregnancy or marital status).

24. The Commission considers that this overriding of all other Australian discrimination laws is not warranted, sets a dangerous precedent, and is inconsistent with the stated objects of the Bill, which recognise the indivisibility and universality of human rights. By contrast, this provision seeks to favour one right over all others.
25. **Thirdly**, the Commission is concerned about deeming provisions that affect the assessment of whether codes of conduct imposed by large employers on their employees, and rules dealing with conscientious objections by medical practitioners, will be considered to be reasonable.
26. The deeming provisions related to conscientious objection increase the risk that patients may lose the ability to obtain ‘information, prescriptions, or referrals’ or to have procedures related to services such as abortion, euthanasia, contraception or sterilisation where, in all the circumstances, it would be reasonable to require health practitioners to provide those services or to make referrals to another health practitioner who is willing to do so.
27. The second exposure draft adds a further deeming provision which deems certain rules made by bodies that accredit professionals and tradespeople to be unreasonable.
28. Unlike all other Commonwealth discrimination laws, the Bill prejudices the assessment of reasonableness by deeming some specific kinds of conduct not to be reasonable. This means that, in those cases, not all of the potentially relevant circumstances will be taken into account.
29. **Fourthly**, those deeming provisions also have an impact on the ability of employers to decide who they employ. The Bill provides that employers may not decide that compliance with a code of conduct that extends to conduct outside work hours, or with rules dealing with conscientious objection, are an inherent requirement of employment, if they would be unreasonable under clause 8. This means, for example, that the narrow deeming provisions about what is reasonable for organisations with an annual revenue of more than \$50 million also have an impact on the decisions by those employers about the conditions they may set with respect to employment.

30. These four issues, and a range of others relating to all three Religious Freedom Bills, are dealt with in more detail both in the Commission's first submission and in this submission.
31. It would be a simple task to remove the few highly problematic provisions of the Bill, leaving a Bill that is consistent with other Commonwealth discrimination laws and provides strong protections against discrimination on the ground of religious belief or activity. The Commission's recommendations seek to achieve this outcome.

### **3 Recommendations**

32. The Commission makes a number of recommendations as set out below. Many of these recommendations were made in the Commission's first submission and have not yet been implemented. The list below consolidates recommendations from the Commission's first submission (other than recommendation 2, which has been implemented) and new recommendations in this submission. In some cases, the language of the previous recommendations and the references to clauses of the relevant Bills has been updated to reflect the amendments in the second exposure draft.
33. A number of new recommendations are made in this submission that were not made in the first submission. The new recommendations in this second submission are recommendations 2A, 3A, 3B, 3C, 3D, 3E, 5A and 14. The numbering has been adopted so that recommendations are grouped together thematically.
34. Under each recommendation are paragraph references to where information about the recommendation may be found in the Commission's first submission and in this second submission.

#### **Recommendation 1**

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

(Commission's first submission at [46]–[51])



### **Recommendation 2A**

The Commission recommends that the definition of ‘associate’ be amended to make clear that a complaint of discrimination may only be made by a natural person and not by a corporation.

(Commission’s second submission at [35]–[49])

### **Recommendation 3**

The Commission recommends that clause 11 of the Bill be amended to:

- (a) limit the definition of ‘religious body’ to ‘bodies established for religious purposes’
- (b) provide that the general exemption does not apply to conduct connected with commercial activities.

(Commission’s first submission at [63]–[77])

(Commission’s second submission at [75]–[99])

### **Recommendation 3A**

The Commission recommends that clauses 11(3), 32(10)(b) and 33(4)(b) be amended to limit the application of the relevant exemptions to conduct that is ‘necessary’ to avoid injury to the religious susceptibilities of adherents of the relevant religion.

(Commission’s second submission at [63]–[69])

### **Recommendation 3B**

The Commission recommends that clauses 11(2) and (4), 32(9) and (11), and 33(3) and (5) be amended to make clear that giving preference to persons of a particular religion will be permitted only where this also satisfies the relevant substantive test for non-discriminatory conduct.

(Commission’s second submission at [70]–[74])

### **Recommendation 3C**

The Commission recommends that clause 11(5) of the Bill be amended to remove the general exemption for educational institutions, and that this issue be referred to the Australian Law Reform Commission as part of its current review of religious exemptions in anti-discrimination law along with any amendment to the ALRC’s terms of reference as may be necessary for it to consider this issue.

(Commission’s second submission at [100]–[106])

### **Recommendation 3D**

The Commission recommends that clauses 32(8)–(11), dealing with exemptions from religious discrimination in employment and partnerships for religious hospitals, aged care facilities and accommodation providers, be removed from the Bill.

(Commission’s second submission at [107]–[117])

### **Recommendation 3E**

The Commission recommends that clauses 33(2)–(5), dealing with exemptions from religious discrimination relating to accommodation for religious camps and conference sites, be removed from the Bill.

(Commission’s second submission at [118]–[125])

### **Recommendation 4**

The Commission recommends that clause 42, dealing with discriminatory statements of belief, be removed from the Bill.

(Commission’s first submission at [78]–[97])

(Commission’s second submission at [126]–[158])

### **Recommendation 5**

The Commission recommends that clauses 8(3) and (5), dealing with the separate treatment of employer conduct rules imposed by private sector businesses with annual revenue of more than \$50 million be removed from the Bill.

(Commission’s first submission at [102]–[114])

(Commission’s second submission at [193]–[197])

### **Recommendation 5A**

The Commission recommends that clause 8(4), dealing with the separate treatment of qualifying body conduct rules imposed by qualifying bodies, be removed from the Bill.

(Commission’s second submission at [198]–[202])

### **Recommendation 6**

The Commission recommends that clauses 8(6)–(7), dealing with the separate treatment of rules about conscientious objections by health practitioners, be removed from the Bill.

(Commission’s first submission at [115]–[138])

(Commission’s second submission at [205]–[218])

### **Recommendation 7**

The Commission recommends that clauses 32(6)–(7), dealing with additional restrictions on what amounts to an inherent requirement of a job, be removed from the Bill.

(Commission’s first submission at [139]–[152])

### **Recommendation 8**

The Commission recommends that clause 40(1) of the Bill be amended to remove the provision granting the Attorney-General the ability to vary or revoke temporary exemptions granted by the Commission.

(Commission’s first submission at [153]–[157])

### **Recommendation 9**

The Commission recommends that further consideration be given to the breadth of operation of clause 28 of the Bill.

(Commission’s first submission at [158]–[164])

### **Recommendation 10**

The Commission recommends that further consideration be given to the breadth of operation of clause 30(2) of the Bill.

(Commission’s first submission at [165]–[171])

### **Recommendation 11**

The Commission recommends that if a new Freedom of Religion Commissioner is appointed, the Commission should be provided with sufficient additional budget to cover this position and appropriate staffing support and resources to undertake the role. Further, the introduction of the Religious Discrimination Act should also be accompanied by sufficient additional budget to provide the necessary information and conciliation services in relation to the new grounds of discrimination.

(Commission’s first submission at [172]–[180])

### **Recommendation 12**

The Commission recommends that the *Australian Human Rights Commission Act 1986* (Cth) be amended to clarify that an allegation of victimisation included in a complaint of unlawful discrimination may

form the basis of an application to the Federal Court or Federal Circuit Court once that complaint has been terminated by the Commission.

(Commission’s first submission at [181]–[189])

### **Recommendation 13**

The Commission recommends that Sch 1, clause 7 of the Freedom of Religion Bill, which would insert a new s 47C into the *Marriage Act 1961* (Cth), be removed from that Bill and that consideration of this proposed amendment await the report of the Australian Law Reform Commission of its review of religious exemptions in anti-discrimination law along with any amendment to the ALRC’s terms of reference as may be necessary for it to consider this issue.

(Commission’s first submission at [207]–[217])

### **Recommendation 14**

The Commission recommends that the words ‘(other than a local by-law)’ be removed from clause 30(3)(a) of the Bill.

(Commission’s second submission at [219]–[227])

## **4 Scope of the Bill**

### **4.1 Actions by corporations alleging religious discrimination**

35. It is axiomatic that only natural persons—that is to say, humans—have human rights. However, the first exposure draft of the Bill took the highly unusual step of enabling certain bodies corporate to claim that they have suffered discrimination on the grounds of the religious belief or activity of the body corporate itself. More specifically, it provided that bodies corporate could make complaints of religious discrimination against other corporations or against natural persons. It did this explicitly through:

- the definition of ‘person’ in clause 5 of the Bill, which said that ‘person’ has a meaning affected by the *Acts Interpretation Act 1901*
- the Note to the definition of ‘person’ which provided that ‘[u]nder s 2C of the *Acts Interpretation Act 1901*, 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, particularly at [77], which said that ‘it is open for a body corporate to make a complaint under this Act alleging that it has been discriminated against on the basis of its religious belief or activity’.
36. In its first submission, the Commission recommended that the definition of ‘person’ be removed from the Bill and that the Explanatory Notes be amended to make clear that a complaint of discrimination on the ground of religious belief or activity may only be made by or on behalf of a natural person.
37. This recommendation was accepted. The definition of ‘person’ was removed and the Explanatory Notes now make clear at [66] that:
- The Act is intended primarily to protect individuals from discrimination and does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities.
38. However, the effect of this amendment has been undermined by an expansive definition of ‘associate’ in a new clause 9 inserted into the second exposure draft. Clause 9 provides:
- This Act applies to a person who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.
39. The Explanatory Notes make clear that this clause:
- ... protects a person – including a natural person or body corporate – from discrimination on the basis of their association with a natural person who holds or engages in a religious belief or activity.
- ... For example, a corporation would be protected against discrimination in relation to their association with a natural person, such as their CEO.<sup>3</sup>
40. The Commission supports the inclusion of a clause that allows discrimination complaints to be made by individuals who are associates of a person with a religious belief or associates of a person who engages in religious activity. For example, an individual should be entitled to make a complaint if they have been discriminated against because of the religious belief of their spouse. However, the Commission does not support the extension of this principle to allow a *corporation* to make a claim of religious discrimination because of its association with an individual, whether that is the CEO, a director, shareholder, employee or customer.

41. International law and the domestic law of comparable jurisdictions makes clear that human rights law protects only humans. This principle has been adhered to in all of Australia's federal, state and territory human rights laws, including the existing federal discrimination laws. In the Commission's view, there is no justification for the Bill to depart from this settled and fundamental principle.
42. As previously observed, corporations cannot possess innately human qualities, such as dignity, which human rights law is designed to protect. More specifically, a corporation cannot have a religious belief that is somehow disconnected from the religious belief of an individual or group of individuals that are involved with the corporation. For this reason, the Bill should protect only the religious beliefs of individuals, including associates. The legitimate rights and interests of corporations can be, and are, legally protected in other ways—for example, in statutes dealing with competition law.
43. At the federal level there are two statutes that provide protection for 'associates' of a person with a protected characteristic.
44. The *Racial Discrimination Act 1975* (Cth) (RDA) provides protection for associates in ss 5 (immigrants), 11 (access to premises), 12 (land, housing, accommodation), 13 (goods and services) and 15 (employment). The RDA does not provide a definition of 'associate'.
45. The provisions of the *Disability Discrimination Act 1992* (Cth) (DDA) are generally extended to associates by virtue of s 7. 'Associate' is defined in s 4 in a non-exhaustive way, but in a way that suggests that it is intended only to apply to individuals:
  - associate**, in relation to a person, includes:
    - (a) a spouse of the person; and
    - (b) another person who is living with the person on a genuine domestic basis; and
    - (c) a relative of the person; and
    - (d) a carer of the person; and
    - (e) another person who is in a business, sporting or recreational relationship with the person.
46. More generally, in the four Commonwealth discrimination laws, the term 'person' is used when speaking about both someone engaging in discriminatory conduct and someone who is discriminated against. However, it is clear from the context of those other laws that the

person discriminated against can be only a natural person. In part, this is clear from the prohibited grounds of discrimination. A natural person can have a race, a sex, a sexual orientation, a gender identity, an intersex status, a marital or relationship status, or a disability. A natural person can be pregnant or breastfeeding. A corporation can have none of these characteristics.

47. The focus on individuals is clear from the constitutional basis for Commonwealth discrimination laws. The primary constitutional source is the external affairs power in s 51(xxix) of the Constitution, because the laws seek to enact into domestic law some of Australia's international obligations agreed through the ratification of human rights treaties.<sup>4</sup> The same is true of the present Bill.<sup>5</sup> Those human rights treaties, in turn, relate to the rights of natural persons within the territory or jurisdiction of Australia.<sup>6</sup>
48. Further, where the corporations power in s 51(xx) of the Constitution is relied on for validity in other Commonwealth discrimination laws, this is limited to ensuring that the relevant provisions apply to discrimination by a corporation, or by a person employed by a corporation.<sup>7</sup> The same is true of the present Bill, although it also extends the operation of the Bill so that its provisions are valid to the extent that they relate to discrimination against a person employed by a corporation.<sup>8</sup>
49. The clear policy intention in other Commonwealth discrimination laws is to rely on the corporations power only to permit claims to be made *against* corporations and not *by* them. The Commission considers that the same policy should govern complaints made by associates.

### **Recommendation 2A**

The Commission recommends that the definition of 'associate' be amended to make clear that a complaint of discrimination may only be made by a natural person and not by a corporation.

## **4.2 Exemptions for religious bodies to engage in religious discrimination**

50. The other aspect of the Bill that affects its overall scope is the general exemption granted to 'religious bodies' in clause 11. The second exposure draft expands the scope of this general exemption.

51. Religious bodies would be entirely exempt from the prohibition against religious discrimination provided that their conduct is in good faith and either:
- (a) a person of the same religion as the religious body could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of the particular religion; or
  - (b) the religious body engages in the conduct in order to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.
52. This is a new test when compared with the first exposure draft. The new test provides a broader definition of conduct that may be engaged in by religious bodies which will not amount to religious discrimination.
53. The definition of ‘religious bodies’ has also been expanded to include all religious public benevolent institutions, regardless of whether or not they engage in commercial activities.
54. The combined effect of these changes is that more bodies will be exempt from the operation of the Bill in relation to a greater range of conduct, giving them an increased ability to engage in religious discrimination when compared with the first exposure draft.
55. Further, additional specific exemptions have been inserted into clauses 32 and 33 of the second exposure draft to permit religious hospitals, aged care facilities and accommodation providers to engage in religious discrimination in employment and the formation of partnerships, and to permit religious camps and conference sites to engage in religious discrimination in the provision of accommodation.
56. This section of the submission deals with the following issues:
- the ways in which the new test for a religious body has been expanded
  - whether the broad exemption for religious bodies in the second exposure draft is consistent with the objects of the Bill
  - what an appropriate exemption for religious bodies might look like
  - whether special exemptions are required for religious educational institutions, hospitals, aged care facilities, accommodation providers, camps and conference sites.



(a) Scope of new test for ‘religious bodies’

57. The test for whether a religious body is entitled to an exemption has been broadened in three ways.
58. **First**, the test for whether the conduct of a body is religious has been broadened. The previous test was whether the body was engaging in conduct that may reasonably be regarded as being in accordance with teachings of the religion in question. This was a fairly standard objective test.
59. Now, the test is whether the body was engaging in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with teachings of the religion in question.
60. The Explanatory Notes make clear that this is still an ‘objective reasonableness test’.<sup>9</sup> Therefore, the test will not be satisfied by a particular person from the same religion giving evidence of whether they in fact consider that the conduct is in accordance with the teachings of the religion in question.
61. Rather, it will involve the court considering the question from the point of view of a hypothetical reasonable member of the religion in question.<sup>10</sup> The ultimate decision is still one made by the Court, albeit from the perspective of a member of the relevant religion. The Court will ask whether such a hypothetical reasonable person could reasonably consider the conduct to be in accordance with the teachings, etc of the religion.<sup>11</sup>
62. By requiring the Court to examine the question from the perspective of a hypothetical reasonable member of the religion in question, it appears that it is intended that a greater margin of appreciation will be given to the religious body claiming that the conduct is in accordance with its teachings.
63. **Secondly**, clause 11(3) provides a new, alternative way of qualifying for the exemption. A religious body will qualify for an exemption if it is engaging in good faith in conduct to avoid injury to the religious susceptibilities of adherents of its religion.
64. This picks up the language of ss 37 and 38 of the SDA and ss 153(2) and 195(2) of the *Fair Work Act 2009* (Cth) (Fair Work Act), and is similar to the language in s 35 of the *Age Discrimination Act 2004* (Cth) (ADA).

65. One difference is that under the Fair Work Act a respondent needs to show that it was acting in accordance with religious teachings and in order to avoid injury to religious susceptibilities, in order to qualify for an exemption. In s 37(1)(d) of the SDA, s 35 of the ADA and the second exposure draft of the Bill, these are alternatives.
66. However, unlike the exposure draft of the Bill, in s 37(1)(d) of the SDA and in s 35 of the ADA, which are the provisions that apply to the broadest range of conduct, the conduct must be necessary to avoid injury to the religious susceptibilities of adherents of the religion for the exemption to apply. Section 38 of the SDA and the Fair Work Act provisions do not include the requirement of necessity, but are confined to a much narrower range of conduct (eg discrimination by educational institutions, in a modern award or in an enterprise agreement) and, as noted above, in the case of the Fair Work Act there is an additional requirement that the conduct must be in accordance with religious teachings.
67. This means that the exemption proposed in clause 11(3) of the second exposure draft of the Bill is broader than any other existing religious exemption in federal discrimination law.
68. The exemption in clause 11(3), for conduct aimed at avoiding injury to religious susceptibilities, applies in relation to all conduct engaged in by religious bodies. In order to be consistent with the way in which this test has been used in other Commonwealth legislation, the Commission recommends that the exemption be limited to conduct that is 'necessary' to avoid injury to religious susceptibilities. An equivalent change should be made to this test in clauses 32(10)(b) and 33(4)(b) if, contrary to the Commission's recommendations below, these clauses are retained in the Bill.
69. For completeness, the Commission notes that including a requirement of 'necessity' would also be consistent with s 82(2) of the *Equal Opportunity Act 2010* (Vic), which was referred to by the Attorney-General in his speech to the National Press Club (shortly before the release of the second exposure draft of the Bill) as informing the Government's approach to the formulation of the exception for religious bodies.<sup>12</sup>

### **Recommendation 3A**

The Commission recommends that clauses 11(3), 32(10)(b) and 33(4)(b) be amended to limit the application of the relevant exemptions to

conduct that is ‘necessary’ to avoid injury to the religious susceptibilities of adherents of the relevant religion.

70. **Thirdly**, clauses 11(2) and (4) provide that the conduct exempted includes giving preference to people of the same religion as the religious body, whether the preference is in relation to employment, education, or the provision of goods, services or facilities.
71. These clauses are ambiguous and should be redrafted. For example, clause 11(2) states: ‘Without limiting subsection (1), conduct mentioned in that subsection includes giving preference to persons of the same religion as the religious body’. The conduct mentioned in subsection (1) is ‘conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion’. On one view, this could mean that giving preference to persons of the same religion will be *deemed* to be conduct that is in accordance with religious teachings.
72. It does not appear that this is the intended meaning. Rather, it appears that the intended meaning is that it will be permissible to give preference to persons of the same religion as the religious body, provided that this is conduct that a person of the same religion could reasonably consider to be in accordance with the teachings of that religion.<sup>13</sup>
73. No real clarification is given by the words ‘without limiting subsection (1)’ as the subsection is aimed at describing circumstances in which discrimination does not occur.
74. These sections should be redrafted to make clear that giving preference to persons of a particular religion will be permitted only where this also satisfies the test set out in clauses 11(1) and (3) respectively. Similar amendments should be made to clauses 32(9) and (11) and clauses 33(3) and (5) if, contrary to the Commission’s recommendations below, these clauses are retained in the Bill.

### **Recommendation 3B**

The Commission recommends that clauses 11(2) and (4), 32(9) and (11), and 33(3) and (5) be amended to make clear that giving preference to persons of a particular religion will be permitted only where this also satisfies the relevant substantive test for non-discriminatory conduct.

(b) Objects of the Bill – to eliminate religious discrimination so far as possible

75. The aim of the Bill is to introduce, for the first time, comprehensive protections against religious discrimination in core areas of public life. To the extent that religious bodies are participating in these areas of public life, they should generally be held to the same standard as everyone else.
76. This would be consistent with the primary object of the Bill, namely, ‘to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life’ (emphasis added).<sup>14</sup>
77. It is important to acknowledge that religious charities and other religious organisations have a significant role in public life in Australia. They run schools, hospitals, welfare organisations and employment agencies. They employ a very large number of people. Many receive a significant amount of public funding to support them in carrying out their activities. The extent to which such organisations are permitted to engage in conduct that would otherwise be unlawful discrimination has an impact on the lives of many Australians.
78. In the context of a Bill that is seeking to eliminate religious discrimination, it is reasonable to expect as a starting point that everyone should have the same opportunity to apply for jobs, go to school and to buy goods and services, including where the employers, educators and providers of goods and services are religious bodies.
79. The broad exemptions for religious bodies in the second exposure draft, which give them significant latitude to engage in religious discrimination, are inconsistent with the object of eliminating religious discrimination as far as possible. If exemptions are to be granted, they should be more targeted.

(c) Areas where religious discrimination is permissible

80. There are undoubtedly intrinsic aspects of religious practice that involve discrimination against people who are not adherents of the relevant faith. The Explanatory Notes give the examples of a church requiring anyone taking communion to be Christian, or of a place of worship permitting entrance only to people who are adherents of that faith.

81. It is reasonable for religious bodies to exclude those who are not of their faith when this is necessary for the practice of their religion.
82. However, it is less defensible to permit organisations participating in the general economy or in the provision of goods and services to exclude others based on their faith (or lack of faith).
83. This is particularly so where the organisations are recipients of public funding. Why should bodies that receive funds from all Australian taxpayers, from people of all faiths and no faith, be permitted to expend those funds on public activities in ways that are discriminatory?
84. The key question is to identify where it is appropriate to draw the line. Should all religious groups be permitted to discriminate on the basis of religion in all areas of public life, provided that an ordinary member of that faith could reasonably consider such discrimination to be in accordance with the teachings of that religion? This is what is anticipated by the second exposure draft. Or can more targeted exemptions be identified where discrimination is necessary for the conduct of religious practices, or for the carrying out of particular kinds of jobs?
85. Properly engaging with these questions would be more likely to result in a Bill that sought to eliminate religious discrimination so far as is possible while permitting the kinds of exclusionary conduct that are necessary for the practice of religion.
86. In its first submission, the Commission recommended that clause 10 (now clause 11) of the Bill be amended to:
  - (a) limit the definition of ‘religious body’ to ‘bodies established for religious purposes’
  - (b) provide that the general exemption does not apply to conduct connected with commercial activities.
87. This would mean that the general exemption would extend to bodies that are necessary for the practice of religion, in a way that was targeted to their religious activities but not their commercial activities.
88. Under the test proposed by the Commission, bodies with a religious ethos but established for other purposes, such as education, employment, health care, aged care, accommodation, or the relieving of poverty, sickness or disability, would not have the ability to discriminate in the provision of their services, but (under clause 32 of

the Bill) they would still have the ability to employ people of their faith if being of that faith was an inherent requirement of the relevant job.

89. These bodies would also maintain the ability under clause 12 of the Bill to provide services intended to meet a need arising out of a religious belief or activity. For example, it would not amount to discrimination for Jewish hospitals or aged care facilities to provide kosher food or prayer facilities to Jewish patients and clients or to observe Jewish holidays.
90. The Explanatory Notes also make clear that clause 12 is not limited only to *how* services are delivered by religious service providers. Subject to some limitations, clause 12 also would enable a religious service provider to *target* its services towards meeting a religious need or reducing a disadvantage by members of a particular religion. The Explanatory Notes give the following example:
- [I]t would be reasonable for a person to provide aged care services that were carefully targeted to meet the needs of Jewish Holocaust survivors, and for those purposes to offer residential placements and employment opportunities only to persons of the Jewish faith ...<sup>15</sup>
91. In other words, clause 12 appears to provide sufficient protection to religious service providers to meet the legitimate needs of members of their respective religious groups, without impinging unduly on the human rights of others. Nevertheless, clause 11 goes further by providing a general exemption from the whole of the Bill to a range of bodies.
92. Especially in light of clause 12, the Commission considers that clause 11 would limit human rights more than is necessary to achieve a legitimate purpose. The breadth of operation of clause 11 is highlighted by the inclusion in the second exposure draft of all religious ‘public benevolent institutions’ (PBIs) in the definition of ‘religious bodies’ regardless of whether or not they are engaging in commercial activities.
93. A PBI is a charity whose main purpose is the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness).<sup>16</sup> The Australian Charities and Not-for-profits Commissioner (ACNC) is responsible for registering entities as PBIs.<sup>17</sup> Guidance published by the ACNC provides that:

An entity’s motives are not directly relevant to determining its main purposes. For example, if an entity’s main purpose is advancing religion it

will not be eligible to be registered as a PBI. However, if the entity is motivated by religious faith and its main purpose is benevolent, it may still be eligible.<sup>18</sup>

94. If an entity is registered as a PBI, it is entitled to a range of tax concessions including deductible gift recipient (DGR) status.
95. The Bill provides that all PBIs that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion would be permitted to engage in discrimination on the ground of religious belief or activity in all areas of public life covered by the Bill. For example, they would be allowed to discriminate in the provision of their services to people suffering poverty or distress on the basis of the religious belief of those persons.
96. As noted by the ACNC, while a PBI may be motivated by religious faith, being religious is not an inherent requirement of being a PBI. Indeed, if the main purposes of an institution were advancing religion, it would not qualify for registration as a PBI. In these circumstances, the Commission considers that it is not appropriate for religious PBIs to be given a broad exemption from all of the prohibitions against religious discrimination contained in the Bill.
97. In making the case for granting a blanket exemption to PBIs, the Government identified the St Vincent de Paul Society as the kind of entity that would be entitled to the exemption.<sup>19</sup> It was suggested that the exemption would permit the St Vincent de Paul Society to make staffing decisions based on faith (although the exemption for PBIs in the Bill extends to discrimination in any area of public life and is not limited to discrimination in employment).
98. The St Vincent de Paul Society had made clear, both before<sup>20</sup> and after<sup>21</sup> the public release of the second exposure draft, that it had no intention of discriminating on the basis of religion when it came to engaging employees and volunteers in its shops or in its State and national secretariats. The Society did identify some roles ‘which have particular responsibility for overseeing our mission and Catholic ethos’ which were usually filled by Catholics. As noted above, if religious belief is an inherent requirement of a particular role, the Bill already separately provides in clause 32 that those roles may be filled by people of that faith.
99. The Commission considers that insufficient justification has been made for religious PBIs as a class to be granted a general exemption from the

Bill. The Commission reiterates recommendation 3 of its first submission, which is set out in paragraph [86] above.

(d) Special exemptions for other religious organisations

100. The second exposure draft goes further than broadening the exemption for religious bodies to engage in religious discrimination. It also provides special exemptions to a range of other organisations, namely, religious educational institutions, hospitals, aged care facilities, accommodation providers, camps and conference sites.

*Religious educational institutions*

101. Clause 11(5)(a) provides a broad exemption from the whole of the Bill for educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.
102. The definition of ‘educational institution’ is in the same terms as the exemption in s 38 of the SDA. Both cover schools, colleges, universities and other institutions in which education or training is provided. However, the scope of the exemption in clause 11 of the Bill is broader than s 38 of the SDA, because it is not limited to conduct aimed at ‘avoid[ing] injury to the religious susceptibilities of adherents of that religion’.
103. Section 38 of the SDA permits certain kinds of discrimination by educational institutions against staff, contract workers and students on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy. At the request of the Attorney-General, this section is currently being reviewed by the Australian Law Reform Commission (ALRC). The Attorney-General has asked the ALRC to consider whether these exemptions could be limited or removed altogether.
104. In the Commission’s view, and in light of the reference to the ALRC, it would not be appropriate to grant a broader exemption to educational institutions to discriminate on the ground of religious belief or activity than currently exists under the SDA in relation to the grounds covered by that Act. The Commission suggests that any exemptions that allow religious discrimination by educational institutions should be considered by the ALRC at the same time that it considers s 38 of the SDA.



105. The Commission notes that the terms of reference for the ALRC inquiry were amended on 29 August 2019, when the first exposure drafts of the Religious Freedom Bills were released.<sup>22</sup> Among other things, the amended terms of reference instructed the ALRC to ‘confine its inquiry to issues not resolved’ by the Religious Discrimination Bill and to ‘confine any amendment recommendations to legislation other than the Religious Discrimination Bill’. It may be that further amended terms of reference would be required in order to implement the Commission’s Recommendation 3C below (and possibly recommendation 13 from the Commission’s first submission).
106. In the meantime, educational institutions would still be able to rely on clause 32(2) of the Bill in relation to employment decisions. That is, employment decisions would be tested against an ‘inherent requirements’ standard. For example, at religious schools, it may well be an inherent requirement for teachers to be of the faith on which the school is founded, particularly if they are required to have pastoral care responsibilities. However, it may not be an inherent requirement for a cleaner or gardener employed by the school to be of the same faith.<sup>23</sup>

### **Recommendation 3C**

The Commission recommends that clause 11(5) of the Bill be amended to remove the general exemption for educational institutions, and that this issue be referred to the Australian Law Reform Commission as part of its current review of religious exemptions in anti-discrimination law along with any amendment to the ALRC’s terms of reference as may be necessary for it to consider this issue.

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

107. A new exemption has been included in clauses 32(8)–(11) of the second exposure draft Bill to allow religious hospitals, aged care facilities and accommodation providers (such as religious camps or retirement villages) to discriminate on the ground of religious belief or activity in relation to employment (and the formation of partnerships), regardless of whether being religious is an inherent requirement of the particular job.
108. Instead, the only requirements would be that the religious discrimination in employment is engaged in in good faith and, either:

- a person of the same religion could reasonably consider that the religious discrimination was in accordance with the doctrines, tenets, beliefs or teachings of that religion, or
  - the religious discrimination was done in order to avoid injury to the religious susceptibilities of adherents of that religion.
109. The ‘inherent requirements’ test for discrimination in employment is well established. For example, under the SDA, it is permissible to discriminate in employment on the basis of sex if it is a ‘genuine occupational qualification’ to be of a particular sex.<sup>24</sup> Examples include jobs involving the conduct of searches of the clothing or bodies of persons of a particular sex, and jobs involving the fitting of clothing for persons of a particular sex where it is necessary for the employee to be of a particular sex in order to preserve the person’s decency or privacy.<sup>25</sup>
110. Similarly, under the *Disability Discrimination Act 1992* (Cth), it is permissible to discriminate in employment on the basis of disability if a person with a disability is unable to carry out the inherent requirements of a particular job as a result of their disability, even if the employer were to make reasonable adjustments for them.<sup>26</sup>
111. Under the *Age Discrimination Act 2004* (Cth), it is permissible to discriminate in employment on the basis of age if the person is unable to carry out the inherent requirements of the particular employment because of their age.<sup>27</sup>
112. Consistently with other federal discrimination law, the Bill includes an inherent requirements test in clauses 32(2)–(5) for discrimination in employment. The Commission supports this test.
113. However, the new clauses 32(8)–(11) go beyond this and permit religious discrimination in employment by hospitals, aged care facilities and accommodation providers, where religious belief or activity is not an inherent requirement of the particular job. The Commission considers that insufficient justification has been provided to depart from the ordinary inherent requirements test.
114. The only rationale given in the Explanatory Notes to clauses 32(8)–(11) is that the broader exemption is necessary ‘to ensure that religious hospitals, aged care facilities and accommodation providers are able to maintain their religious ethos through staffing decisions’.<sup>28</sup> Two examples are given in the Explanatory Notes. The first is that these bodies should be able to ‘make certain employment decisions in

relation to positions which have an intrinsically religious character, such as requiring hospital chaplains to be of the same religion as the hospital'.<sup>29</sup> However, such a requirement would be adequately covered by the inherent requirements test. No more general exemption is necessary.

115. The second example is that, under the broader test, 'it would not be unlawful for a religious aged care facility to require that all staff abide by a code of conduct which required them to act consistently with key doctrines of faith whilst at work'.<sup>30</sup> The scope of this example is not clear as it does not spell out the kinds of conduct that may be required. However, regardless of the content of any particular code of conduct, the proposed exemption for aged care providers is much broader than this because it would allow an aged care provider to terminate the employment of a person on the basis of their religious belief, regardless of the role they were employed to perform. There is likely to be a range of jobs within an aged care facility where religious belief or activity is not an inherent requirement of the job.
116. Indeed, as the Explanatory Notes say when talking about the inherent requirements test, 'an employer cannot simply declare that it is an inherent requirement for an employee or partner to hold, or not hold, a religious belief or engage, or not engage, in a religious activity, unless this was, objectively in the circumstances, an essential element of the particular position'. There does not appear to be a principled reason to treat hospitals, aged care facilities or accommodation providers any differently.
117. In the Commission's view, an employer's imposition of blanket employment rules, which would otherwise be discriminatory on the basis of religious belief or activity, cannot be justified solely because those rules contribute to maintaining a 'religious ethos' in the workplace. More should be required to demonstrate the religious belief or activity set out in the employment rules is an essential part of the particular role.

### **Recommendation 3D**

The Commission recommends that clauses 32(8)–(11), dealing with exemptions from religious discrimination in employment and partnerships for religious hospitals, aged care facilities and accommodation providers, be removed from the Bill.

*Religious camps and conference sites*

118. A new exemption has been included in clauses 33(2)–(5) of the second exposure draft to allow religious camps and conference sites that provide accommodation to discriminate in the provision of that accommodation on the basis of the religious belief or activity of people seeking the accommodation.
119. In order to take advantage of this exception, the discrimination by the religious camp or conference site must be done in good faith, in accordance with a publicly available policy and either:
  - a person of the same religion could reasonably consider that the religious discrimination was in accordance with the doctrines, tenets, beliefs or teachings of that religion, or
  - the religious discrimination was done in order to avoid injury to the religious susceptibilities of adherents of that religion.
120. The proposed exemption is broad enough to cover camps and conference sites where accommodation is offered to the public at large and on a commercial basis. By contrast, under the current Bill, religious hospitals, aged care facilities and accommodation providers that offer their services to the public at large on a commercial basis are, for that reason, *not* granted an exemption that would allow them to discriminate against people who acquire their services.<sup>31</sup> It is unclear why religious camps and conference sites have been treated differently.
121. Further, the Explanatory Notes acknowledge that ‘religious camps and conference sites often do not require that all persons seeking accommodation be of their particular religious belief’.<sup>32</sup>
122. It appears that this proposed exemption is broader than necessary and that the need for the exemption has not been sufficiently justified.
123. In general, organisations that offer goods and services to the public at large on a commercial basis should do so on terms that are non-discriminatory. With the introduction of protections from discrimination on the basis of religious belief or activity, the commercial supply of goods and services should also be done in a way that does not discriminate on the basis of religious belief or activity. This includes the supply of accommodation services provided by camps and conference centres.

124. The Commission notes that there is a general exemption in clause 12 of the Bill which permits reasonable conduct, consistent with the purposes of the Act and which is intended to meet a need arising out of a religious belief or activity of a person or group of persons or is intended to reduce a disadvantage experienced by a person or group of people on the basis of the person or group's religious beliefs or activities. It appears that this clause would permit camps and conference sites to provide preference to people based on their religious belief or activity in the circumstances covered by that clause.
125. It is unclear why any further, more general exemption is required for religious camps and conference sites.

### **Recommendation 3E**

The Commission recommends that clauses 33(2)–(5), dealing with exemptions from religious discrimination relating to accommodation for religious camps and conference sites, be removed from the Bill.

## **5 Overriding Commonwealth, State and Territory discrimination law**

### **5.1 Discriminatory statements of belief**

126. Clause 42(1)(a) of the Bill provides that a 'statement of belief' does not constitute discrimination for the purpose of any anti-discrimination law. This means that no action alleging discrimination can be brought under the Religious Discrimination Act,<sup>33</sup> the RDA, the SDA, the DDA, the ADA or any State or Territory discrimination Act in relation to such a statement, providing it does not contravene clause 42(2).
127. The clause applies to:
- a 'statement of belief'
  - that would otherwise amount to discrimination
  - but is not malicious; or likely to harass, threaten, seriously intimidate or 'vilify'; or amount to the urging of a serious criminal offence.
128. As in the Commission's first submission, this submission will refer to such a statement as a 'discriminatory statement of belief'. The effect of

the clause is to render discriminatory statements of belief lawful and to override other Commonwealth, State and Territory laws to that extent.

129. The Commission reiterates recommendation 4 of its first submission, that clause 42 be removed from the Bill.
130. This submission does not reproduce what the Commission said in its first written submission about this clause.<sup>34</sup> Rather, it deals with three amendments to the clause.

## **5.2 Definition of ‘statement of belief’**

131. The second exposure draft amends the definition of a ‘statement of belief’ in clause 5 of the Bill.
132. The definition varies depending on whether the maker of the statement is religious. For a person who is religious, the range of statements of belief has been expanded. A statement of belief in the second exposure draft is:
  - of a religious belief actually held by that person
  - made in good faith by that person, by written or spoken words
  - of a belief that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.
133. As with the definition in the first exposure draft, the statement need not be about religion, it could be about any subject that is covered by a religious teaching. Further, the new test picks up the broader language in amended clause 11(1) which, as described in paragraphs [57]–[62] above, is designed to give a greater margin of appreciation to religious bodies in assessing whether conduct is sufficiently related to religion.
134. For a person who is not religious, a statement of belief is:
  - of a belief actually held by that person
  - made in good faith by that person, by written or spoken words
  - of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief.
135. The third aspect of this test has changed from requiring the belief to ‘arise directly from the fact that the person does not hold a religious belief’ to now ‘relate to the fact of not holding a religious belief’.

Arguably, the new test applies to a narrower range of statements by a person without a religious belief.

### 5.3 Definition of ‘vilify’

136. The second exposure draft also amends clause 42(2)(b) in a way that appears to provide greater scope for discriminatory statements of belief to be made.
137. The previous draft provided that discriminatory statements of belief would not be exempt from anti-discrimination law if they would be likely to ‘harass, vilify or incite hatred or violence’ against another person or group of persons. None of these terms was defined, so they all carried their ordinary meanings. As a result of amendments to clause 42(2)(b), statements will not be exempt from anti-discrimination law if they would be likely to ‘harass, threaten, seriously intimidate or vilify’ another person or group of persons.
138. Importantly, ‘vilify’ no longer takes its ordinary meaning, and has instead been defined to mean ‘incite hatred or violence’.
139. Reading in the new definition of ‘vilify’, the threshold now is that a statement will not be exempt from anti-discrimination law if it would be likely to ‘harass, threaten, seriously intimidate or incite hatred or violence’.
140. The implication of these changes is that discriminatory statements will now be permitted to ‘vilify’ people in the ordinary sense of that word.
141. The Shorter Oxford Dictionary defines ‘vilify’ as including:
  1. *trans.* To lower or lessen in worth or value; to reduce to a lower standing or level. ...
  2. To depreciate or disparage in discourse; to defame or traduce; to speak evil of ... .
  3. To regard as worthless or of little value; to condemn or despise.
142. These are the kinds of statements of belief that will now be permitted under the test in the second exposure draft.
143. It is unclear why the qualification ‘seriously’ has been added to the threshold of ‘intimidate’. It suggests that some forms of intimidation by way of discriminatory statements of belief will also be permissible.
144. The Shorter Oxford Dictionary defines ‘intimidate’ in the following way:

*trans.* To render timid, inspire with fear; to overawe, cow; now *esp.* to force to or deter from some action by threats or violence.

145. While the aspects of ‘intimidation’ dealing with threats of violence would be excluded, it appears that the intention is to permit some kinds of statements that render others timid, that inspire them with fear and that overawe or cow them, provided that this conduct does not rise to the level of ‘serious’ intimidation. It may be that ‘serious’ intimidation is intimidation that involves threats or violence.
146. In all cases, the section will only operate in relation to conduct that would otherwise be in breach of anti-discrimination law.

#### **5.4 Exemption only for discriminatory statements and not for related discriminatory conduct**

147. A significant amendment to clause 42(1) is the addition of the words ‘in and of itself’ after ‘A statement of belief’. This amendment responds to some of the submissions made by the Commission in relation to the first exposure draft.
148. As the Commission had pointed out, discriminatory statements may amount to ‘less favourable treatment’ in and of themselves. They may also provide evidence that other conduct, which is less favourable to a person, was undertaken for a prohibited reason.
149. The Commission identified three problems with clause 42:
  - it would allow discriminatory statements to be made that would otherwise be contrary to anti-discrimination law
  - it may also allow discriminatory conduct to be engaged in, if it was not possible to separate out discriminatory statements from discriminatory conduct
  - it may make it more difficult to demonstrate that discriminatory conduct was engaged in for a prohibited reason, by deeming discriminatory statements disclosing the motivation of the discriminator to not amount to discrimination.
150. The effect of the amendment is to confirm that people will be permitted to make discriminatory statements, but will not be protected if they act on those statements and engage in related discriminatory conduct that is consistent with the discriminatory statement. For example, the Explanatory Notes now make clear that business owners



(for example) will be permitted to make discriminatory statements about their employees or customers that would otherwise be contrary to anti-discrimination law, but would not be permitted to engage in 'any forms of behaviour that goes beyond the making of a statement such as employment decisions, decisions not to provide goods, services, or facilities or the destruction of religious symbols'.<sup>35</sup>

151. Further, the Explanatory Notes now make clear the Government's intention that a discriminatory statement of belief should be able to be 'brought forward as evidence in support of a discrimination complaint concerning separate conduct'.<sup>36</sup> For example, the discriminatory statement of belief could be evidence that related conduct was engaged in for a discriminatory reason.
152. In practice, however, it may be difficult to separate out discriminatory statements and related discriminatory conduct. An example given in the Commission's first submission related to the difficulty that people who are blind or have a vision impairment sometimes face in hailing a taxi when they are travelling with a guide dog. It is unlawful to treat a person less favourably because they have an assistance animal. If a taxi driver said to such a person that their religion considers dogs to be unclean animals, this may involve treating the person less favourably because of their assistance animal. Clause 42 may mean that such a statement would no longer be discriminatory in and of itself. If the person with the guide dog then does not get in the taxi, is the person merely making their own decision not to take the taxi in response to a (lawful) statement, or is the statement enough to also amount to an (unlawful) refusal by the taxi driver to provide a taxi service? Does the customer need to insist that the taxi driver take them in order to demonstrate that there has been an unlawful refusal of service?
153. Similarly, it appears that it would be permissible for a shop to have a sign in the window saying that gay people were not welcome if this was a statement of belief, although it would continue to be unlawful to refuse to serve a person because of their sexual orientation.
154. Examples of this nature can be multiplied where something discriminatory is said or written about a person without necessarily spelling out what the consequences will be for the person on the receiving end of the communication. Why should the statement be permitted where it would otherwise be unlawful, and where it would be unlawful to act on the statement?

155. Even if the narrowing of clause 42 is successful and it is possible to separate out discriminatory statements from any related conduct, this would still run into the same conceptual problems identified by the Commission in its first submission. In particular, it involves preferencing the manifestation of religion over the right to be protected from discrimination.
156. The proposed package of Religious Freedom Bills will amend the objects of each piece of federal discrimination law to reflect the ‘indivisibility and universality of human rights and their equal status in international law’.<sup>37</sup> However, clause 42 stands in direct conflict with these principles by favouring one human right at the expense of others.
157. This is also inconsistent with how Article 19 of the ICCPR generally anticipates that conflicts will be reconciled between the right to manifest religion and laws that are necessary for the protection of the community more generally. While the right to religious belief is absolute, the right to manifest religious belief may be subject to restrictions that are necessary in order to respect of the rights of others. Here, instead, longstanding existing rights that are necessary to protect the dignity of people in the community are being expressly overridden to expand the scope for the manifestation of religion.
158. The Commission maintains that clause 42 should be removed from the Bill.

## **5.5 Statements may amount to discrimination without accompanying conduct**

159. As the Commission noted in its first submission, statements may constitute discrimination if they amount to less favourable treatment on the ground of an attribute protected by discrimination law.
160. If a person wants to make a claim of discrimination under federal discrimination law (other than under the Fair Work Act), they must make a complaint to the Commission. The Commission’s role is to inquire into and attempt to conciliate such complaints.<sup>38</sup>
161. The Commission regularly receives complaints about oral or written statements which could amount to unlawful discrimination. For the purposes of this submission, the Commission reviewed summaries of complaints that it received in the three months from 1 August 2019 to

31 October 2019. Over this three-month period, it received 558 complaints of discrimination. For the purposes of this analysis, complaints of racial hatred and sexual harassment were excluded. At least 35 of these complaints (6.2%) included at least one claim of discrimination based on an allegedly discriminatory statement.

162. Complaints about discriminatory statements were received under each of the four federal discrimination Acts (RDA, SDA, DDA and ADA).
163. In a number of cases, the alleged statements were of a nature that could conceivably be covered by clause 42 of the Bill. That is, the alleged statement was of a kind that arguably could be consistent with a 'statement of belief'.
164. For example, a woman who had recently become pregnant told the Commission that when she advised her employer of her pregnancy her employer said: 'There is no room in [this] business for someone who is going to be a single mother'. Such a statement could amount to direct discrimination on the grounds of sex, marital status or pregnancy.<sup>39</sup> In some religions, having a child out of wedlock is considered to be sinful. If the Bill was passed with clause 42 in its proposed form, this statement may be protected from amounting to discrimination if it was a statement of belief (although any related conduct, such as firing the woman if she ultimately had a child out of wedlock would not be protected).
165. Other, more extreme, statements may not be protected by clause 42. For example, a second woman complained to the Commission about treatment by her boss after she disclosed her pregnancy. She claimed that her boss said to her: 'You fat old cow ... you are a worthless piece of s\*\*\* – all you'll ever be good at doing is getting f\*\*\*ed up'. This statement uses more derogatory language and, assuming it was made in those terms, the woman's boss may find it more difficult to characterise it as a statement of belief. Arguably, even if this was a statement of belief, it may be excluded from clause 42 on the ground that it was malicious. However, the comparison of these two cases highlights the scope for discriminatory statements that may currently be unlawful to be insulated by clause 42.
166. Another woman complained to the Commission that while she was at work her manager said to her: 'Women's best contribution to society is to have a baby. That being said, you're too old to have one'. She complained that this amounted to discrimination on the basis of her

sex and her age.<sup>40</sup> It is conceivable that the alleged statement by her manager may be based on a genuinely held religious belief. If the Bill was passed with clause 42 in its proposed form, this statement may be protected from amounting to discrimination. In those circumstances, the woman may lose the benefit of conciliation before the Commission in order to seek a resolution to her grievance.

167. A fourth woman complained to the Commission that while she was at work her boss told her to: 'Behave like a female and do as you're told'. She complained that this amounted to discrimination on the basis of her sex.<sup>41</sup> In parts of some religions, women are considered to have lower status than men and are expected to be subservient to men in a range of activities. If the Bill was passed with clause 42 in its proposed form, this statement may be protected from amounting to discrimination if it was a statement of belief.
168. Another situation involved a gay man, who made a complaint to the Commission that he was refused treatment by a doctor 'because I was a gay male spreading disease through the community'. Now that clause 42 of the Bill seeks to distinguish more clearly between discriminatory conduct and discriminatory statements, it seems likely that the alleged refusal of treatment could still amount to discrimination in the provision of a service on the ground of sexual orientation.<sup>42</sup> However, the alleged disparaging statement about homosexual men could be treated differently if clause 42 was passed in its proposed form. If a doctor made a statement to this effect in the course of a medical consultation, and it was a genuinely held religious belief of the doctor, the statement in and of itself may be protected from amounting to discrimination.
169. Finally, a woman who identifies as bisexual made a complaint to the Commission that while she was at work her director made disparaging comments about her 'LGBTI bulls\*\*\*', told her that 'bisexual people need to choose a lane and stay in it', called her a 'double dipper' and said 'why is it that women are so stupid?'. In a number of religions, same-sex attraction is considered sinful and can be condemned in strong terms. These alleged statements of animosity based on the woman's gender or sexual orientation could arguably be expressions of genuine religious belief. While they are strongly expressed, it is not clear that would be excluded from clause 42 on the grounds that they are malicious or that they are likely to harass, threaten, seriously intimidate, or incite hatred or violence. Clause 42 raises the real

prospect that conduct like this at work could be protected from amounting to discrimination.

170. These case studies are just a handful of complaints from a recent three-month period examined by the Commission. They are not unusual and they indicate the real impact that clause 42 is likely to have on the ability of people who claim that they have been discriminated against to obtain a remedy.

## 5.6 Sufficient protection for statements of belief

171. The Commission maintains that clause 42 should be removed from the Bill because its only operative effect is to weaken other protections against discrimination.
172. Importantly, removing clause 42 from the Bill is unlikely to have any substantial impact on the ability of religious people to profess their faith. This is so for three reasons.
173. **First**, and most importantly, the status quo will be maintained in that people will continue to be permitted to make statements of belief that do not contravene anti-discrimination laws. Most genuine statements of belief will fall into this category.
174. The previous section of this submission identified a number of statements that could fall within clause 42 as currently drafted, but these are not the kinds of statements that proponents of clause 42 have suggested are deserving of protection.
175. **Secondly**, the other provisions of the Bill will strengthen the ability of people to make statements of belief in a range of areas of public life by prohibiting discrimination on the basis of religious activity (including the professing of faith). So, for example, it will be unlawful for an employer to treat an employee less favourably because they made a religious statement, or to require employees to adhere to a code of conduct that unreasonably restricts the ability of employees to talk about their religious beliefs.
176. **Thirdly**, clause 42 does not address any identified systemic problem. Following a comprehensive inquiry involving more than 15,000 submissions and consultations in every State and Territory, the Religious Freedom Review concluded that there was ‘a lack of reliable information regarding the experience of religious freedom intersecting with other human rights’.<sup>43</sup> Despite many submissions ‘repeat[ing]

several well-known, high profile cases of perceived infringement of religious freedom<sup>44</sup> the Panel concluded that there was ‘insufficient evidence as to the frequency and impact of this type of discrimination within the community’.<sup>45</sup> The Panel recommended that the Commonwealth collect and analyse quantitative and qualitative information on the experience of freedom of religion at a community level, including in relation to any unreasonable restrictions on the ability of people to express their faith.<sup>46</sup>

177. In discussing the Bill at the launch of the first exposure draft at the Great Synagogue in Sydney<sup>47</sup> and later at the National Press Club in Canberra,<sup>48</sup> the Attorney-General identified two cases that he said formed the basis for the introduction of clause 42.
178. The first case involved a complaint made to Equal Opportunity Tasmania under s 17 of the *Anti-Discrimination Act 1998* (Tas) against the Catholic Archbishop of Hobart, Julian Porteous. The complaint related to a pamphlet published by the Australian Catholic Bishops Conference titled ‘Don’t mess with marriage’. The second case involved a complaint to the then Queensland Anti-Discrimination Commission about an email sent by the Chief Executive of the Baptist Union of Queensland’s Carinity care service during the Australian Marriage Law Postal Survey, in which he argued for a ‘no’ vote.
179. Both cases were ultimately withdrawn or discontinued.<sup>49</sup> There were no findings in either case that the conduct complained of was in fact contrary to any discrimination law. Moreover, the Attorney-General has said: ‘the view of the Government – and I think legally, the correct view – is that they were both unmeritorious, probably invalid complaints’.<sup>50</sup>
180. The Commission was not involved in either of these complaints and does not make any comment about their substance. However, assuming the Government’s view is correct, clearly it is not necessary to legislate to provide that certain conduct does not constitute discrimination when it would not constitute discrimination in any event.
181. Further, clause 42 is not restricted to legislation in Tasmania and Queensland where these two complaints were made. It also would limit the scope of the following pieces of legislation:
  - *Racial Discrimination Act 1975* (Cth)
  - *Sex Discrimination Act 1984* (Cth)

- *Disability Discrimination Act 1992* (Cth)
  - *Age Discrimination Act 2004* (Cth)
  - *Anti-Discrimination Act 1977* (NSW)
  - *Equal Opportunity Act 1984* (SA)
  - *Equal Opportunity Act 2010* (Vic)
  - *Equal Opportunity Act 1984* (WA)
  - *Discrimination Act 1991* (ACT)
  - *Anti-Discrimination Act* (NT)
  - and any other law prescribed by regulation.
182. There has been no suggestion that any complaints, let alone findings, have been made under any of these pieces of legislation about discriminatory statements of belief that warrant them being limited by new Commonwealth legislation.
183. It is particularly difficult to make the case for limiting Commonwealth discrimination laws in this way. This is because the substance of the Attorney-General's concerns about the two identified cases is not that the cases had substance and would have resulted in findings of discrimination, but rather that the process took too long before the complaints were withdrawn or discontinued. At the request of the Commission, the *Australian Human Rights Commission Act 1986* (Cth) was amended in 2017 to increase the threshold for the making of a valid complaint.<sup>51</sup> These changes have made it easier for the Australian Human Rights Commission to terminate unmeritorious complaints early in the complaint handling process.
184. The Attorney-General has observed:
- At the Commonwealth level great effort has been made to eliminate and discourage unmeritorious complaints, and if the relevant State based processes had been similarly and appropriately stringent it would be [un]likely that this provision of the Commonwealth Bill [clause 42] would have much, if any, work to do.<sup>52</sup>
185. It is an inherent aspect of any complaint handling process that from time to time unmeritorious complaints will be made. Clause 42 will do nothing to prevent unmeritorious complaints. The real concern raised by the Attorney-General is whether the relevant discrimination bodies have sufficient processes in place to promptly identify and terminate unmeritorious complaints.

186. Rather than introducing legislation that is unsuited to this concern, it would be more productive to engage with relevant States and Territories to discuss whether their discrimination bodies have the powers they need to deal appropriately with unmeritorious complaints.
187. In light of these issues, clause 42 should also be removed from the Bill because it is not necessary.

## **6 Indirect discrimination**

188. The Bill sets out prohibitions against direct discrimination in clause 7 and indirect discrimination in clause 8. The structure of clauses 7 and 8(1), (2) and (7) are consistent with other Commonwealth discrimination laws and are uncontroversial. Similarly, Part 3 of the Bill, dealing with the areas of public life in which discrimination on the ground of religious belief or activity would be prohibited, are uncontroversial.
189. However, when it comes to the test for indirect discrimination, the Bill introduces provisions that are unusual and unnecessary. In particular, two sets of deeming provisions in clauses 8(3)–(5) and clauses 8(6)–(7) narrow the test of whether conduct that might amount to indirect discrimination is reasonable in all of the circumstances. When those deeming provisions operate, not all of the relevant circumstances will be taken into account.
190. The Commission's first submission dealt in detail with the deeming provisions that relate to:
  - employer conduct rules and statements of belief; and
  - conscientious objections by health practitioners,and recommended that these clauses be removed from the Bill.
191. If these clauses were removed, assessments of indirect discrimination would be carried out in exactly the same way as the assessment of indirect discrimination in all other federal discrimination law. That is, there would be an assessment of whether the rule was likely to disadvantage people on the ground of religious belief or activity and an assessment, taking into account all of the relevant circumstances, of whether or not the restriction was reasonable. The Commission reiterates the comments it made in its first submission and its



recommendation that these additional deeming provisions be removed from the Bill.

192. The comments in the following sections are addressed to proposed amendments to these clauses in the second exposure draft.

## **6.1 Employer conduct rules and statements of belief**

193. Clause 8(3) of the Bill relates to codes of conduct that certain employers require their employees to adhere to. The provision is limited to private sector employers with revenue of more than \$50 million in either of the last two financial years.<sup>53</sup> It only applies to codes of conduct that regulate what employees of these companies can say when they are not at work.
194. The language of this clause has been amended in how it describes when an employee is not at work. Previously, the clause applied to codes of conduct that regulated statements of belief ‘at a time other than when the employee is performing work on behalf of the employer’. The clause now applies to codes of conduct that regulate statements of belief ‘other than in the course of the employee’s employment’.
195. The effect is that the deeming provision now applies in a narrower range of circumstances. An employee may be acting in the course of their employment in some situations while they are not performing work, for example at an office Christmas party. Codes of conduct dealing with office Christmas parties will be treated in the same way as codes of conduct governing employee behaviour while engaged in work. The deeming provision will not apply in those circumstances.
196. If the code of conduct restricts or prevents an employee of such a company from making a ‘statement of belief’ *other* than in the course of their employment (including a discriminatory statement of belief covered by clause 42), the code will be deemed to be unreasonable, regardless of the reasons the employer may have had for implementing it, unless the employer can prove<sup>54</sup> that the code is necessary to avoid ‘unjustifiable financial hardship’.
197. The Commission reiterates its previous submission that this clause be removed from the Bill.

## 6.2 Qualifying bodies

198. The second exposure draft of the Bill includes a new deeming provision in clause 8(4) relating to qualifying bodies. The deeming provision operates in the same way as clause 8(3) in relation to employers.
199. A qualifying body is an authority or body that is empowered to confer an authorisation or qualification that is needed for the practice of a profession, trade or occupation. The Explanatory Notes say that this provision is aimed at bodies such as those that certify lawyers, teachers, accountants and health practitioners, as well as training providers such as TAFEs and universities.<sup>55</sup>
200. The deeming provision in clause 8(3) applies to conduct rules imposed by qualifying bodies that regulate standards of behaviour *other than* when a person is carrying on a relevant trade or engaging in a relevant occupation. If a conduct rule by a qualifying body limits a person from making a ‘statement of belief’ while they are not carrying on the trade or engaging in the occupation, the rule will be deemed to be unreasonable unless the qualifying body can show that compliance with the rule is an essential requirement of the profession, trade or occupation.
201. No attempt is made in the Explanatory Notes to justify departing from the usual test of ‘reasonableness’ when assessing a qualifying body conduct rule. There does not appear to be any principled reason why special deeming provisions should apply to rules set by qualifying bodies. As with the deeming provision in relation to employer conduct rules, the effect would be that not all of the relevant circumstances would be taken into account when assessing whether the rule was reasonable.
202. For the same reasons as set out in the Commission’s first submission in relation to employer conduct rules, the Commission recommends that these provisions be removed from the Bill and that the standard test of reasonableness be applied to any indirect discrimination in these circumstances.

### **Recommendation 5A**

The Commission recommends that clause 8(4), dealing with the separate treatment of qualifying body conduct rules imposed by qualifying bodies, be removed from the Bill.

### 6.3 Threshold

203. The deeming provisions in relation to employer conduct rules and qualifying body conduct rules pick up the new definition of ‘statement of belief’: see paragraphs [131] to [135] above.
204. The threshold for statements to which the deeming provisions apply has also increased in the second exposure draft in the same way as the threshold for discriminatory statements of belief in clause 42: see paragraphs [136] to [146] above.

### 6.4 Conscientious objections by health practitioners

205. The last set of deeming provisions, in clauses 8(6)–(7) of the Bill, relates to conscientious objections by health practitioners.
206. The provisions relate to rules that restrict or prevent a health practitioner from conscientiously objecting to providing a health service on religious grounds. The provisions operate to deem such rules to be unreasonable in certain circumstances. As with the other deeming provisions, the effect is that not all of the relevant circumstances will be taken into account when assessing whether rules limiting conscientious objections are reasonable—for example, rules that require referrals to be made to other medical practitioners.
207. Three main changes have been made in the second exposure draft to the provisions dealing with conscientious objections.
208. **First**, the list of health services entitled to make a conscientious objection has narrowed. It no longer includes dentists, radiologists, occupational therapists, optometrists, physiotherapists, podiatrists and Aboriginal and Torres Strait Islander health practices. The Commission welcomes this change as it was difficult to understand what kinds of conscientious objections such medical practitioners could reasonably have had. However, the remaining list still contains a broad category of ‘medical’ services so the removal of explicit references to particular types of medical services may not actually result in much substantive change to the scope of the provision.<sup>56</sup>
209. **Secondly**, the provisions have been broadened to apply not only to providing a health service, but also to participating in the provision of a health service.

210. **Thirdly**, notes have been added in an attempt to clarify that, while the provisions are aimed at broadening the scope for health practitioners to conscientiously object to providing or participating in a health service, they are not aimed at allowing a health practitioner to refuse to provide a service to a particular person or groups of people.
211. The Government's summary is that an objection 'must be to a procedure, not to a person'.<sup>57</sup> However, sometimes the distinction between objecting to a procedure and objecting to a type of person is difficult to draw.
212. For example, certain types of hormone therapy are a medically necessary intervention for many trans people.<sup>58</sup> These medical interventions are provided only to trans people. If a doctor refused to prescribe hormone therapy required by a trans person, citing religious grounds, it would appear highly artificial to claim that the objection was only to the provision of the service and not to the kind of person who requires that service.
213. Similarly, people who do not have HIV but who are at high risk of contracting HIV, for example through sex or drug use, may seek a prescription for pre-exposure prophylaxis (PrEP).<sup>59</sup> PrEP is listed on the Pharmaceutical Benefits Scheme.<sup>60</sup> If a doctor refused to prescribe PrEP, citing religious grounds, it may again be artificial to claim that the objection is only to the provision of the medical service and not to the kind of person who, in the doctor's view, requires that service.
214. The Commission considers that the explanatory notes do not effectively delineate conscientious objections to procedures rather than to groups of people.
215. More generally, the inclusion of the notes has not cured the more fundamental problems with the deeming provisions in relation to conscientious objection that the Commission identified in its first submission.
216. Clause 8(6) serves little practical purpose. Where the clause operates, the relevant rule would be both contrary to State or Territory law *and* be deemed to amount to indirect religious discrimination under the Bill. A medical practitioner seeking to challenge the rule could do so directly on the basis that it was a breach of State or Territory law, without the need to go through the conciliation process involved in making a complaint to the Commission alleging that there has been indirect religious discrimination.

217. Clause 8(7) is problematic because it increases the risk that patients may lose the ability to obtain ‘information, prescriptions, or referrals’ or to have procedures related to services such as abortion, euthanasia, contraception or sterilisation where, in all the circumstances, it would be reasonable to require health practitioners to provide those services or to make referrals to another health practitioner who is willing to do so.
218. The Commission reiterates its previous submission that these clauses be removed from the Bill.

## 7 Local government by-laws

219. There was a general exception in the first exposure draft for conduct that was in direct compliance with State and Territory law.
220. Clause 30(3) provided that the prohibitions against discrimination in Divisions 2 and 3 of Part 3 did not apply to conduct in direct compliance with a law of a State or Territory.
221. The second exposure draft has reduced the scope of this exception by providing that the prohibitions against discrimination will still apply to conduct that is in direct compliance with a provision of a ‘local by-law’.<sup>61</sup> A ‘local by-law’ is defined as any law made by a body established for the purposes of local government by or under a law of a State or Territory.
222. The rationale given in the Explanatory Notes for overriding local government laws is that ‘this form of delegated legislation does not have the same levels of oversight and scrutiny as legislation made by the Commonwealth or a state or territory government’.<sup>62</sup>
223. The Explanatory Notes do not indicate the kinds of local government laws that it is envisaged would be in conflict with the Act and therefore overridden. However, it could be anticipated that they would include local government laws in relation to street preaching of the kind considered in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1. In that case, the High Court upheld as valid a by-law made by Adelaide City Council that prohibited persons from preaching, canvassing, haranguing or distributing printed material on any road (including a pedestrian thoroughfare or mall) without the permission of the Council. Under the amendment to clause 30(3) of the Bill, it may be possible to challenge such a by-law on the basis that it amounts to religious discrimination. If the challenge was framed as indirect

discrimination, it would be necessary to assess whether the by-law was reasonable in all of the circumstances.

224. It appears that clause 30(3) of the Bill is modelled on ss 39(4)–(5) of the ADA. The ADA does not include a carve out for local government laws, but (as with clause 30(3)(b) of the Bill) it does permit regulations to be made that prescribe particular State and Territory laws (including local government laws) that will not receive the benefit of an exception.
225. The exemptions in the ADA for conduct in compliance with law are broad (and broader than other federal discrimination law).<sup>63</sup> One virtue of the model in the ADA, in comparison with the second exposure draft of the Bill, is increased certainty. Conduct in compliance with State and Territory law will be lawful, except in the case of particular identified laws where compliance with the terms of the ADA would need to be assessed. Currently, there are no laws prescribed for the purposes of s 39(5) of the ADA.
226. If the carve out for local government laws was removed from clause 30(3)(a), it would still be possible to prescribe particular local government laws under clause 30(3)(b) that should be assessed for compliance with the religious discrimination provisions of the Bill. An advantage of such a structure is that those who are charged with enforcing compliance with valid local government laws, such as State and Territory police, would have greater certainty about which particular laws needed to be assessed against compliance with the Bill.
227. On balance, the Commission recommends that the amendment to clause 30(3)(a) in the second exposure draft of the Bill not be made.

#### **Recommendation 14**

The Commission recommends that the words '(other than a local by-law)' be removed from clause 30(3)(a) of the Bill.

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- <sup>1</sup> Australian Human Rights Commission, *Religious Freedom Bills, Submission to the Attorney-General's Department*, 27 September 2019. At <https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Australian%20Human%20Rights%20Commission.pdf>.
- <sup>2</sup> Australian Human Rights Commission, *Religious Freedom Review, Submission to the Expert Panel* (2018) at [11]-[14]. At <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>.
- <sup>3</sup> Explanatory Notes, second exposure draft, at [203]-[204].
- <sup>4</sup> In the case of the *Racial Discrimination Act 1975* (Cth), see proposed s 2A(1)(a) to be inserted into the RDA by the Freedom of Religion Bill, Sch 1, clause 8, in the case of the other Acts, see *Sex Discrimination Act 1984* (Cth), s 3(a), *Disability Discrimination Act 1992* (Cth), s 12(8), *Age Discrimination Act 2004* (Cth), s 10(7).
- <sup>5</sup> Bill, clause 58.
- <sup>6</sup> For example, see *International Covenant on Civil and Political Rights*, article 2(1).
- <sup>7</sup> *Sex Discrimination Act 1984* (Cth), s 9(11)-(14); *Disability Discrimination Act 1992* (Cth), s 12(9); *Age Discrimination Act 2004* (Cth), s 10(9).
- <sup>8</sup> Bill, clause 59(2).
- <sup>9</sup> Explanatory Notes, second exposure draft, at [237].
- <sup>10</sup> Explanatory Notes, second exposure draft, at [239]. See also The Hon Christian Porter MP, Attorney General, *Transcript of Press Conference*, 10 December 2019, at <https://www.attorneygeneral.gov.au/media/transcripts/press-conference-sydney-nsw-10-december-2019>: 'the test of reasonableness here is a test from the perspective of the average person of the same religion'.
- <sup>11</sup> By way of comparison, see how the impact of conduct on a group of people is considered for the purposes of s 18C of the *Racial Discrimination Act 1975* (Cth): *Eatock v Bolt* [2011] FCA 1103 at [251]-[252]; and how alleged misleading representations to the public at large were considered for the purposes of s 52 of the then *Trade Practices Act 1974* (Cth) (now s 18 of the Australian Consumer Law at Sch 2 of the *Competition and Consumer Act 2010* (Cth)): *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [102]-[103].
- <sup>12</sup> The Hon Christian Porter MP, Attorney-General, *Address to National Press Club Canberra*, 20 November 2019, at <https://www.attorneygeneral.gov.au/media/speeches/address-national-press-club-canberra-20-november-2019>.
- <sup>13</sup> Explanatory Notes to second exposure draft at [252].
- <sup>14</sup> Bill, clause 3(1)(a).
- <sup>15</sup> Explanatory Notes to second exposure draft at [260].
- <sup>16</sup> Australian Charities and Not-for-profits Commission, *Commissioner's Interpretation Statement: Public Benevolent Institutions*, CIS 2016/03 at 5.1.1 citing *Perpetual Trustee Co Ltd v Commissioner of Taxation* (1931) 45 CLR 224.
- <sup>17</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth), s 25-5(5), item 14.
- <sup>18</sup> Australian Charities and Not-for-profits Commission, *Commissioner's Interpretation Statement: Public Benevolent Institutions*, CIS 2016/03 at 5.5.3.

- <sup>19</sup> The Hon Christian Porter MP, Attorney-General, *Transcript of Press Conference in Sydney*, 10 December 2019, at <https://www.attorneygeneral.gov.au/media/transcripts/press-conference-sydney-nsw-10-december-2019>.
- <sup>20</sup> St Vincent de Paul Society, 'Religious Freedom Legislation', *Media Release*, 6 December 2019: 'In engaging staff and volunteers, the Society does not discriminate on the basis of religion, race, disability, gender or sexual orientation. It is not our intention to do so, even in the event of a change in legislation'. At [https://www.vinnies.org.au/icms\\_docs/313010\\_Religious\\_Freedom\\_Legislation.pdf](https://www.vinnies.org.au/icms_docs/313010_Religious_Freedom_Legislation.pdf).
- <sup>21</sup> St Vincent de Paul Society, 'Don't use Vinnies in the religious freedom debate', *Media Release*, 11 December 2019. At [https://www.vinnies.org.au/icms\\_docs/313130\\_Don\\_t\\_use\\_Vinnies\\_in\\_the\\_religious\\_freedom\\_debate.pdf](https://www.vinnies.org.au/icms_docs/313130_Don_t_use_Vinnies_in_the_religious_freedom_debate.pdf).
- <sup>22</sup> Australian Law Reform Commission, *Altered Terms of Reference*, 29 August 2019, at <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>.
- <sup>23</sup> See the discussion in Religious Freedom Review at [1.211]-[1.213].
- <sup>24</sup> *Sex Discrimination Act 1984* (Cth), s 30.
- <sup>25</sup> *Sex Discrimination Act 1984* (Cth), s 31.
- <sup>26</sup> *Disability Discrimination Act 1992* (Cth), s 21A.
- <sup>27</sup> Eg, *Age Discrimination Act 2004* (Cth), ss 18(4)-(5).
- <sup>28</sup> Explanatory Notes to second exposure draft at [452] and [454].
- <sup>29</sup> Explanatory Notes to second exposure draft at [463].
- <sup>30</sup> Explanatory Notes to second exposure draft at [464].
- <sup>31</sup> Explanatory Notes to second exposure draft at [232].
- <sup>32</sup> Explanatory Notes to second exposure draft at [492].
- <sup>33</sup> The Consequential Amendments Bill, Sch 1, clause 19 will amend the list of anti-discrimination laws in the *Fair Work Act 2009* (Cth) to include the new *Religious Discrimination Act 2019* (Cth).
- <sup>34</sup> Australian Human Rights Commission, *Religious Freedom Bills, Submission to the Attorney-General's Department*, 27 September 2019 at [78]-[97].
- <sup>35</sup> Explanatory Notes to second exposure draft at [548].
- <sup>36</sup> Explanatory Notes to second exposure draft at [551].
- <sup>37</sup> Bill, clause 3(2); Freedom of Religion Bill, Sch 1, items 2, 6, 8 and 10.
- <sup>38</sup> *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(aa).
- <sup>39</sup> *Sex Discrimination Act 1984* (Cth), ss 5, 6, 7 and 14.
- <sup>40</sup> *Sex Discrimination Act 1984* (Cth), ss 5 and 14; *Age Discrimination Act 2004* (Cth), ss 14 and 18.
- <sup>41</sup> *Sex Discrimination Act 1984* (Cth), ss 5 and 14.
- <sup>42</sup> *Sex Discrimination Act 1984* (Cth), ss 5A and 22.
- <sup>43</sup> Religious Freedom Review, *Report of the Expert Panel* (2018), at [1.408].
- <sup>44</sup> Religious Freedom Review at [1.400].
- <sup>45</sup> Religious Freedom Review at [1.408].
- <sup>46</sup> Religious Freedom Review, Recommendation 17.
- <sup>47</sup> The Hon Christian Porter MP, Attorney-General, *Religious Discrimination Bill 2019*, 29 August 2019, at <https://www.attorneygeneral.gov.au/media/speeches/religious-discrimination-bill-2019-29-august-2019>, at footnotes 7 and 8 and accompanying text.



- <sup>48</sup> The Hon Christian Porter MP, Attorney-General, *Q&A from the Address to the National Press Club Canberra*, 20 November 2019, at <https://www.attorneygeneral.gov.au/media/transcripts/qa-address-national-press-club-canberra-20-november-2019>.
- <sup>49</sup> The Hon Christian Porter MP, Attorney-General, *Religious Discrimination Bill 2019*, 29 August 2019, at <https://www.attorneygeneral.gov.au/media/speeches/religious-discrimination-bill-2019-29-august-2019>.
- <sup>50</sup> The Hon Christian Porter MP, Attorney-General, *Q&A from the Address to the National Press Club Canberra*, 20 November 2019, at <https://www.attorneygeneral.gov.au/media/transcripts/qa-address-national-press-club-canberra-20-november-2019>.
- <sup>51</sup> *Human Rights Legislation Amendment Act 2017* (Cth); Australian Human Rights Commission, *Inquiry into freedom of speech*, submission to the Parliamentary Joint Committee on Human Rights, 9 December 2016, at <https://www.aph.gov.au/DocumentStore.ashx?id=d42f430a-869c-4706-9414-bf0cba934162&subId=461226>, recommendations 1-3 and text at [180]-[214].
- <sup>52</sup> The Hon Christian Porter MP, Attorney-General, *Religious Discrimination Bill 2019*, 29 August 2019, at <https://www.attorneygeneral.gov.au/media/speeches/religious-discrimination-bill-2019-29-august-2019>, [text accompanying footnote 28](#).
- <sup>53</sup> Bill, clause 5, definition of ‘relevant employer’.
- <sup>54</sup> Bill, clause 8(7).
- <sup>55</sup> Explanatory Notes to second exposure draft at [126].
- <sup>56</sup> Bill, clause 5, definition of ‘health service’.
- <sup>57</sup> Attorney-General’s Department, *Religious freedoms legislation – Key changes from first exposure draft*, p 2, at <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>.
- <sup>58</sup> World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People*, (7<sup>th</sup> ed, 2012), pp 33-50, at [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf).
- <sup>59</sup> Australian Federation of AIDS Organisations, *HIV Prevention*, at <https://www.afao.org.au/about-hiv/hiv-prevention/prep/>.
- <sup>60</sup> Royal Australian College of General Practitioners, *Prescribing PrEP in general practice: What GPs need to know*, at <https://www1.racgp.org.au/news/gp/clinical/prescribing-prep-in-general-practice-what-gps-nee>.
- <sup>61</sup> Bill, clause 30(3)(a).
- <sup>62</sup> Explanatory Notes to second exposure draft at [411].
- <sup>63</sup> Cf *Sex Discrimination Act 1984* (Cth), s 40; *Disability Discrimination Act 1992* (Cth), s 47.