



Australian
Human Rights
Commission

Religious Freedom Bills

Submission to the Attorney-General's Department

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Attorney-General's Department in relation to the Department's consultation on a package of three draft Bills that the Department describes collectively as the 'Religious Freedom Bills'. The Religious Freedom Bills comprise 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. The Commission is pleased to make a submission as part of this public consultation process.

2 Summary

3. The Commission strongly supports the introduction of enforceable protections against religious discrimination for all people in Australia. This has been the consistent position of the Commission for more than 20 years.¹
4. While there are some protections against religious discrimination at the Commonwealth, State and Territory level, these protections are incomplete. In some scenarios, such as complaints to the Commission of religious discrimination in employment, they do not provide for enforceable remedies where discrimination is established.
5. Just as Australians are provided with statutory protection against discrimination on the grounds of race, sex, disability and age, so too should they be provided with equivalent protection against discrimination on the ground of religious belief or activity. This reinforces the idea, reflected in article 2 of the Universal Declaration of Human Rights and in the objects clause for the Bill, that human rights are indivisible and universal.
6. Prohibiting discrimination on the ground of religious belief or activity (including beliefs about religion held by people who are atheists or agnostics) is consistent with the tolerant, pluralistic nature of Australian society.

7. In many respects, the Bill is 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.
8. The Commission endorses these elements of the Bill. They represent a standard means of incorporating certain protections from international human rights law into Australia’s domestic law. The Commission also identifies, in the body of this submission, certain provisions of the Religious Freedom Bills which represent good practice in the drafting of discrimination law.
9. However, the Commission is concerned that, in other respects, the Bill would provide protection to religious belief or activity at the expense of other rights. The Bill also 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 this is not good legislative practice. As a matter of substance, the Commission considers that this may lead to unintended and undesirable consequences.
10. The Commission’s main concerns regarding the Bill are as follows.
11. **First**, the scope of the Bill is overly broad in defining who may be a victim of religious discrimination and, arguably, too narrow in defining who may be found to have engaged in religious discrimination.
12. Unlike all other Commonwealth discrimination laws, which focus on the rights of natural persons (that is, humans) to be free from discrimination, the Bill provides that claims of religious discrimination may be made by corporations including religious institutions, religious schools, religious charities and religious businesses. This is a significant departure from domestic and international human rights laws which protect only the rights of natural persons.
13. 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 in accordance with their religious

doctrines, tenets, beliefs or teachings. This is a wide exemption that undercuts protections against religious discrimination, particularly in the areas of employment and the provision of goods and services, and requires further close examination.

14. **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. Discriminatory statements of belief, of the kind described in clause 41 of the Bill, whether they amount to racial discrimination, sex discrimination or discrimination on any other ground prohibited by law, will no longer be unlawful. The Commission considers that this overriding of all other Australian discrimination laws is not warranted, sets a concerning precedent, and is inconsistent with the stated objects of the Bill, which recognise the indivisibility and universality of human rights. Instead, this provision seeks to favour one right over all others.
15. **Thirdly**, the Commission is concerned about two 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. 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.
16. **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 has an impact on the decisions by those employers about the conditions they may set with respect to employment.
17. These four issues, and a range of others relating to all three Religious Freedom Bills, are dealt with in more detail in the body of the Commission's submission.

18. 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

19. The Commission makes the following recommendations.

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).

Recommendation 2

The Commission recommends 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.

Recommendation 3

The Commission recommends that clause 10 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.

Recommendation 4

The Commission recommends that clause 41, dealing with discriminatory statements of belief, be removed from the Bill.

Recommendation 5

The Commission recommends that clauses 8(3)–(4), dealing with the separate treatment of employer conduct rules by private sector

businesses with annual revenue of more than \$50 million, be removed from the Bill.

Recommendation 6

The Commission recommends that clauses 8(5)–(6), dealing with the separate treatment of rules about conscientious objections by health practitioners, be removed from the Bill.

Recommendation 7

The Commission recommends that clauses 31(6)–(7), dealing with additional restrictions on what amounts to an inherent requirement of a job, be removed from the Bill.

Recommendation 8

The Commission recommends that clause 39(1) of the Bill be amended to remove the provision granting the Attorney-General the ability to vary or revoke temporary exemptions granted by the Commission.

Recommendation 9

The Commission recommends that further consideration be given to the breadth of operation of clause 27 of the Bill.

Recommendation 10

The Commission recommends that further consideration be given to the breadth of operation of clause 29(2) of the Bill.

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.

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.

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.

4 Existing protection against religious discrimination

20. There are a number of protections for freedom of religion in Australian law; however, these protections are limited.
21. At the federal level, a person may make a complaint to the Australian Human Rights Commission or to the Fair Work Commission about discrimination on the basis of religion that occurs in the context of employment.
22. The Australian Human Rights Commission can also inquire into complaints about acts done or practices engaged in by or on behalf of the Commonwealth that are contrary to freedom of religion or belief, and may examine Commonwealth laws to determine whether they are consistent with freedom of religion or belief.
23. However, unlike other Commonwealth discrimination laws, complaints of religious discrimination that are made to the Australian Human Rights Commission do not give individuals a pathway to court if their complaint cannot be resolved at the Commission. As a result, this existing complaint pathway cannot result in a determination from an adjudicative body that provides a legally-enforceable outcome. In the Commission's view, the primary goal of the present Bill should be to provide enforceable remedies for discrimination on the basis of religious belief or activity that are equivalent to rights under other Commonwealth discrimination laws.
24. At the State and Territory level, there are protections against discrimination on the basis of religion in all jurisdictions other than New South Wales (NSW) and South Australia. Complaints may be made to relevant discrimination bodies in each jurisdiction. Queensland, Victoria and the Australian Capital Territory (ACT) also

have protections for freedom of religion in their respective human rights Acts.

25. Religious bodies and educational institutions also have protections for freedom of religion provided by way of the exemptions to other Commonwealth discrimination laws. The *Sex Discrimination Act 1984* (Cth) (SDA) and the *Age Discrimination Act 2004* (Cth) (ADA) allow religious bodies to discriminate against people in certain circumstances on grounds including their sex and age if the discriminatory conduct conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents to that religion.² The SDA also allows religious educational institutions to discriminate against both staff and students on grounds including sexual orientation, gender identity, marital or relationship status or pregnancy in employment and the provision of education. These exemptions permit certain kinds of discrimination against children.
26. The Attorney-General has asked the Australian Law Reform Commission (ALRC) to consider reforms to anti-discrimination law to limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way that is consistent with their religious ethos.³
27. In addition, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires bills and other draft legislation to be accompanied by a 'statement of compatibility', when introduced into the Australian Parliament. That statement considers how the draft law engages human rights, which is defined broadly and includes the *International Covenant on Civil and Political Rights* (ICCPR).⁴ Under this 2011 Act, the Parliamentary Joint Committee on Human Rights scrutinises draft laws, including by reference to statements of compatibility. It advises Parliament on whether those draft laws are consistent with international human rights law, including freedom of religion.

4.1 Discrimination in employment: Australian Human Rights Commission

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

29. This function is given to the Commission in pursuance of Australia's international obligations under *International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation*, done at Geneva on 25 June 1958. This convention prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin as well as other grounds specified by ratifying States.
30. The Commission has received a total of 58 complaints of discrimination in employment on the basis of religion in the five years to 30 June 2019. The kinds of complaints received by the Commission include complaints about workplace harassment on the basis of religion, discrimination because of religious dress, and discrimination based on the complainant not having a religious belief.
31. If a matter cannot be successfully conciliated, the Commission will inquire into whether or not the alleged conduct amounted to discrimination in employment. For the conduct to amount to discrimination, it must be a distinction, exclusion or preference made on the basis of religion. However, conduct will not amount to discrimination if:
 - it is based on the inherent requirements of the job, or
 - the job is at an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the distinction, exclusion or preference was made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
32. If the Commission finds that there was discrimination in employment on the basis of religion, the Commission can issue a notice to the parties setting out the action that it recommends be taken to remedy the act of discrimination. These recommendations are not binding on the parties, but may form part of a public report to the Attorney-General.

Case study: wearing religious articles or clothing at work

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

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

4.2 Commonwealth acts or practices contrary to freedom of religion

33. The Commission can also inquire into a complaint about acts or practices of the Commonwealth that are inconsistent with or contrary to:
 - the right to freedom of thought, conscience and religion in article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 14 of the *Convention on the Rights of the Child* (CRC)
 - the right to non-discrimination, including on the basis of religion, in article 26 of the ICCPR and article 2 of the CRC
 - the *Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, proclaimed by General Assembly of the United Nations on 25 November 1981.
34. These instruments provide for an absolute right to have or adopt a religion and to hold religious beliefs.
35. Under international law, while the right to hold religious beliefs is absolute and not subject to any limitations, the right to manifest one's religion may be subject to limitations in some circumstances. Any limitations must be prescribed by law and must be necessary to protect one or more other important goals. The ICCPR identifies these other public goals as the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others. When the

achievement of one of these other goals interferes with the right to manifest one's religion, it is necessary to conduct a proportionality analysis to determine whether the right to manifest one's religion has been impermissibly infringed.

36. The manifestation of religion may be individual or in community with others and in public or private. It includes the following freedoms:
- to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes
 - to establish and maintain appropriate charitable or humanitarian institutions
 - to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief
 - to write, issue and disseminate relevant publications in the area of religion or belief
 - to teach a religion or belief in places suitable for these purposes
 - to solicit and receive voluntary financial and other contributions from individuals and institutions
 - to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief
 - to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief
 - to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.
37. Again, when a complaint is made to the Commission, the Commission's role is to inquire into and attempt to reach a settlement of such complaints through conciliation. The Commission has received a total of 11 complaints about acts or practices of the Commonwealth that are contrary to freedom of religion or belief in the five years to 30 June 2019.

38. If a matter cannot be successfully conciliated, the Commission will inquire into whether or not the act or practice was contrary to human rights.
39. If the Commission finds an act or practice of the Commonwealth was contrary to the human rights protected by these instruments, the Commission can issue a notice to the parties setting out the action that it recommends be taken to remedy the breach of human rights. These recommendations are not binding on the parties, but may form part of a public report to the Attorney-General.

4.3 Fair Work Commission jurisdiction

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

4.4 State and Territory bodies

42. The anti-discrimination laws of each State and Territory, with the exception of NSW and South Australia, contain a prohibition against discrimination on the ground of religious belief. In NSW, it is prohibited to discriminate against a person on the basis of their 'ethno-religious origin'. In South Australia, there are protections from discrimination in employment and education on the grounds of religious dress.
43. Where those laws prohibit discrimination or vilification on the basis of a person's religion, an individual complainant may make a complaint to a specialist anti-discrimination or human rights body.
44. Queensland, Victoria and the ACT have also enacted statutory charters of human rights (or human rights Acts), which each include freedom of

religion. Like the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) referred to above, each of these State and Territory laws requires that for every proposed draft law (such as a Bill), the executive branch of government must produce a statement that assesses the compatibility of the draft law with human rights. The laws also allow the Supreme Court of the relevant jurisdiction to make a declaration where an existing law cannot be interpreted consistently with a human right. In those circumstances, the declaration is provided to the responsible Minister for them to consider whether to amend the draft law.

45. From 1 January 2020, the Queensland Human Rights Commission will be able to take complaints under the *Human Rights Act 2019* (Qld) about conduct by public entities after that date that is not compatible with human rights, including freedom of thought, conscience, religion and belief.

5 Scope of the Bill

5.1 Definition of employment

46. The Bill includes a definition of employment that includes volunteer workers and unpaid interns.⁵ The Commission commends the Government for this initiative.
47. The Commission has identified this as a gap in protection across existing Commonwealth discrimination laws.⁶
48. The decision to provide protection to unpaid workers is significant in the context of this Bill, given that there are many volunteers who work for religious organisations.
49. The Commission is of the view that the protection for volunteers and unpaid interns in the Bill should be extended to the other grounds of discrimination covered by Commonwealth discrimination laws. There are many people who participate in public life as volunteers and they should have the benefit of protection from discrimination. Similarly, internships are now a common part of higher education courses and can be critically important for young people seeking to enter the workforce.
50. Making this protection uniform would also address potential inconsistencies that may arise in intersectional complaints. For example, a Buddhist woman who was volunteering for a particular

organisation and claimed to be discriminated against on the grounds of her religious belief, and either her race or her sex, would only be able to bring a claim for discrimination on the grounds of her religious belief.

51. Uniform protection could be provided by inserting an equivalent definition of 'employment' into the other four Commonwealth discrimination Acts. This could be done, for example, through inserting appropriate amendments into the Consequential Amendments Bill or the Freedom of Religion Bill.

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).

5.2 Actions by corporations alleging religious discrimination

52. Human rights are the inherent rights of people that arise by reason of our shared humanity. From this mutual and reciprocal recognition of equality comes our standards of freedom and justice. As the preamble to the Universal Declaration of Human Rights proclaims:

recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

53. The Bill takes the unusual step of extending the scope of protection against discrimination on the grounds of religious belief or activity to bodies corporate. More specifically, it provides that bodies corporate may make complaints of religious discrimination against other corporations or against people. It does this explicitly through:

- the definition of 'person' in clause 5 of the Bill, which says that 'person' has a meaning affected by the *Acts Interpretation Act 1901*
- the Note to the definition of 'person' which provides 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 says 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’.

54. It is difficult to understand how a corporation could have a religious or any other belief. Corporations have ‘neither soul nor body’ and can only act through the agency of individuals.⁷ A key rationale for adopting a corporate structure, particularly that of a limited liability company, is to separate the legal personality and responsibility of the company from that of its shareholders or members.
55. In the Commission’s view, protection against discrimination on the basis of ‘religious activity’ should be confined to activity engaged in by natural persons on the basis of their religious belief (or lack thereof). Human rights are designed to protect innately human characteristics, especially dignity. It is therefore an axiomatic principle of international law that human rights extend only to humans. This principle is reflected in existing Commonwealth discrimination laws. This principle is applied also in Australian law dealing with other human rights, such as privacy.
56. An important aspect of religion is that it is practised both individually and communally. In this context, it is possible that the Bill’s expansive definition of ‘person’ is intended to provide a simple means for a group of individuals, who have suffered discrimination on the basis of their religion, to make a single complaint. However, the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) already provides for this in a manner that would not cause the problems adverted to above. For example, a complaint of discrimination may be made to the Commission on behalf of a ‘person aggrieved’ by particular conduct, being a person who alleges that they have been discriminated against.⁸ An individual, a union or a corporate entity may also make a complaint to the Commission on behalf of one or more other people who are ‘persons aggrieved’.⁹ If conciliation by the Commission is not successful, an application may be made to the Court by an ‘affected person’, being a person on whose behalf the complaint was lodged.¹⁰ Such complaints may also be brought as representative proceedings.¹¹

57. For instance, these provisions were used to allow Mr Jeremy Jones, the Executive Vice President of the Executive Council of Australian Jewry, to make a complaint on behalf of Jewish people in Launceston alleging racial hatred. Mr Jones was also a 'person aggrieved', including because of his representative role.¹² By contrast, in a different matter, a volunteer incorporated association established to advocate for equitable access to premises and facilities did not have standing itself as a 'person aggrieved' to complain that council bus stops failed to comply with the relevant standard under the *Disability Discrimination Act 1992* (Cth) (DDA).¹³
58. These cases highlight the difference between corporations seeking to bring discrimination claims in their own right, and representative proceedings dealing with discrimination against individuals. The Commission considers that a religious body, such as a church, should be able to make a complaint on behalf of its members who have been subjected to discrimination on the basis of their religious beliefs or activities. If it were necessary for such a complaint to go to court, this could be done by way of a representative proceeding. However, it would be a significant departure from existing discrimination law, and from human rights law as protecting only humans, to allow corporations to bring actions for religious discrimination in their own right.
59. In other 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. While a corporation could be said to have an age, it would be incongruous to suggest that the *Age Discrimination Act 2004* (Cth) extends to the protection of discrimination against corporations, whether young or old.
60. The focus of the protection of natural persons is also clear from the provisions of other Commonwealth discrimination laws that set out the constitutional basis for their operation. In all cases, 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.¹⁴ The same is true of the present Bill.¹⁵ Those human rights treaties, in turn, relate to the rights of natural persons within the territory or jurisdiction of Australia.¹⁶

61. 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.¹⁷ 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.¹⁸
62. 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.

Recommendation 2

The Commission recommends 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.

5.3 General exemption for religious bodies

63. The other aspect of the Bill which affects its overall scope is the general exemption granted to 'religious bodies' in clause 10.
64. Religious bodies would be entirely exempt from the prohibition of religious discrimination provided that their conduct is in good faith and 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings' of the particular religion.
65. The Commission's primary concern with this exemption is the scope of the definition of 'religious body'. Related to this, is a concern about the scope of activities of these bodies that would qualify for an exemption.
66. 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 that anyone taking communion be Christian, or of a place of

worship permitting entrance only to people who are adherents of that faith.

67. However, the general exemption in clause 10 applies not only to 'bodies established for religious purposes',¹⁹ but also to a much broader group, including bodies that engage in commercial activities.
68. The term 'religious body' is defined as including:
 - an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion
 - a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities)
 - any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities).
69. 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 10 of the Bill is broader than s 38 of the SDA, because it is not limited to conduct that is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.
70. 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 ALRC. The Attorney-General has asked the ALRC to consider whether these exemptions could be limited or removed altogether.
71. 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.
72. The Explanatory Notes suggest that clause 10 would permit a Jewish school to require that all staff be Jewish.²⁰ In the Commission's view,

employment decisions, including by schools, are best evaluated according to the 'inherent requirements' test set out in clause 31(2) of the Bill. 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.²¹

73. Charities and 'other bodies' are also included within the broad definition of 'religious bodies'. They are only excluded if their activities are 'solely or primarily' commercial. This leaves open the potential for certain religious bodies to be exempt from claims of religious discrimination in a range of commercial activities, provided the body also engages in other activities as well. It is not clear to the Commission that, as suggested in the Explanatory Notes, religious hospitals and aged care providers would necessarily fall outside the definition of 'religious bodies' because 'they provide services to the public on a commercial basis'.²² This should be made clear in the Bill, by providing that the exemption does not apply to conduct connected with commercial activities.
74. It is important to acknowledge that 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.
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. In the Commission's view, the range of bodies that are able to access the general exemption in clause 10 of the Bill is too broad. It should be limited, as with other Commonwealth discrimination laws, to 'bodies established for religious purposes'.

77. Further, the Bill should explicitly provide that the general exemption in clause 10 does not apply to conduct connected with commercial activities.

Recommendation 3

The Commission recommends that clause 10 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.

6 Overriding Commonwealth, State and Territory discrimination law

6.1 Discriminatory statements of belief

78. Clause 41(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,²³ the *Racial Discrimination Act 1975* (Cth) (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 41(2).
79. The clause applies to:
- a 'statement of belief'
 - that would otherwise amount to discrimination
 - but is not malicious; or likely to harass, vilify or incite hatred or violence; or amount to the urging of a serious criminal offence.
80. 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. As the Commission said in its submission to the Religious Freedom Review, it is highly unlikely that the Commission could support proposed reforms that would permit forms of discrimination that are currently unlawful.²⁴

81. A 'statement of belief' is defined in clause 5 of the Bill. The definition varies depending on whether the maker of the statement is religious. For a person who is religious, a statement of belief:

- is of a religious belief actually held by that person
- where the belief is one that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion, and
- is made in good faith.

The statement need not be about religion, it could be about any subject that is covered by a religious teaching.

82. For a person who is not religious, a statement of belief:

- must be about religion
- must be limited to a belief that is held by the person that arises directly from the fact that the person does not hold a religious belief, and
- is made in good faith.

83. Many, if not most, 'statements of belief' will not contravene other discrimination laws. There is clearly no need to provide legislative protection from the operation of discrimination laws in relation to statements that are not discriminatory. The sphere of operation of clause 41 is limited to discriminatory statements of belief.

84. 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. Often establishing the reason that unfavourable conduct was undertaken is one of the greatest obstacles to an individual, who has in fact been discriminated against, being able to prove it to the requisite legal standard.

85. For example, an employer may make a statement that 'women should not be in leadership positions'. That is a statement that may reasonably be regarded as being in accordance with the doctrines of some religions. The employer may genuinely believe the statement and make it in good faith. However, it may have a significant adverse effect on women in that workplace. Further, if there was subsequent conduct by the employer of not promoting women, it may provide evidence that the conduct was engaged in for a prohibited reason.

Section 5(1) of the SDA prohibits direct sex discrimination. This involves less favourable treatment on the ground of sex. As a result of clause 41 of the Bill, the statement would not constitute discrimination. Arguably, a court may also find that, if the statement is not discriminatory, it cannot be relied on to support an allegation that other related conduct was engaged in 'on the ground of the sex of the aggrieved person'.

86. To take another example, some people who are blind or have a vision impairment have difficulty in successfully hailing a taxi when they are travelling with a guide dog. Sections 5(1) and 8 of the DDA provide that 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 and should not be permitted in a vehicle, this may involve treating the person less favourably because of their assistance animal. As a result of clause 41 of the Bill, the statement would not constitute disability discrimination.
87. Historically, there have been instances where people with disabilities have faced discrimination on the basis of a view that disability is a divine punishment for sin or the result of negative karma. It is not difficult to image situations in which statements of these views would be likely to entrench discrimination against people with disabilities, particularly where these statements are combined with other less favourable treatment.
88. The Commission is not aware of any faith-based group that is currently advocating that it, or its members, should be permitted to engage in conduct that is currently prohibited under the RDA. Nevertheless, clause 41 would render lawful any discriminatory statement of belief that would otherwise amount to racial discrimination under s 9(1) of the RDA. It is extremely difficult to establish racial discrimination in the absence of direct evidence.²⁵ In many cases, courts have been reluctant to draw inferences of racial discrimination in the absence of express statements that demonstrate that race was a factor in decision-making.²⁶ Clause 41 would be likely to compound this difficulty by insulating racially discriminatory statements from review by the courts.
89. The Religious Freedom Review received submissions setting out personal accounts of discrimination faced by lesbian, gay, bisexual, transgender and intersex (LGBTI) people in a range of areas of public life, including 'as students in religious schools, patients in faith-based

hospitals, employees in religious institutions and members of religious congregations'.²⁷ Instances of discrimination in these areas may well be accompanied by discriminatory statements of belief. Since 2013, the SDA has prohibited discrimination in a range of areas of public life on the grounds of sexual orientation, gender identity or intersex status.²⁸ By rendering discriminatory statements of belief lawful, clause 41 is likely to make it more difficult for LGBTI people to establish that they have been discriminated against for a prohibited reason.

90. The Explanatory Notes make clear that clause 41 does not apply to actions for harassment, offensive behaviour based on racial hatred, vilification or incitement.²⁹ However, sexual harassment can also be a form of sex discrimination.³⁰ Further, conduct that falls short of sexual harassment may still amount to sex discrimination if it amounts to less favourable treatment by reason of sex.³¹ In each case, clause 41 would prevent actions for discrimination based on this kind of conduct as a result of a discriminatory statement of belief.
91. Recommendation 3 of the Religious Freedom Review was that Australian governments should consider the use of objects clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights. This recommendation was accepted by the Government and is endorsed by the Commission. In response to this recommendation, clause 3(2) of the Bill provides that, in giving effect to the objects of the Bill, regard is to be had to 'the indivisibility and universality of human rights'. Similar provisions would be added to the RDA, SDA, DDA and ADA by the Freedom of Religion Bill.
92. Clause 41 is inconsistent with these objects clauses. Instead of reflecting the equal status of human rights and their indivisibility, it seeks to favour one human right at the expense of others. The Commission has serious concerns about how this would affect the enjoyment of other human rights in practice.
93. Further, clause 41 is inconsistent with the protections against discrimination provided for in articles 2 and 26 of the ICCPR. Article 26 requires Australia to legislate 'equal and effective protection' against discrimination on a range of grounds including race, sex, religion or other status. Among other things, article 2 requires Australia to ensure that people whose rights have been violated have an effective remedy. In overriding other anti-discrimination laws, clause 41 does not provide equal protection against discrimination and compromises the ability of

people who have been discriminated against to obtain an effective remedy in the circumstances in which the clause operates.

Recommendation 4

The Commission recommends that clause 41, dealing with discriminatory statements of belief, be removed from the Bill.

6.2 Increased cost and complexity in State matters

94. There is a further reason why the broad overriding of Australian discrimination laws for discriminatory statements of belief is problematic. It is likely to lead to increased cost and complexity where this Commonwealth provision is sought to be relied on in matters brought in State and Territory tribunals.
95. Most first instance discrimination proceedings are brought in State and Territory tribunals, such as the Victorian Civil and Administrative Tribunal, the NSW Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal. Many complainants prefer to use these tribunals, as opposed to federal courts, because each side is responsible for their own legal costs. An unsuccessful party is not liable to pay the legal costs of the other side.
96. However, these State and Territory tribunals are not Chapter III Courts, within the meaning of the Australian Constitution, and are not vested with Commonwealth jurisdiction. If an employee brings a discrimination claim under State law in one of these tribunals, and the employer relies on a Commonwealth defence in clause 41 to defeat the claim, on the basis that the conduct was a statement of belief, the likely result is that the case would need to be transferred to a federal court or a State court vested with Commonwealth jurisdiction.
97. This would involve not only the additional time and cost of multiple proceedings, but would also expose the complainant to paying the costs of the respondent in the court proceedings if they are unsuccessful. This would deprive a complainant of one of the advantages of pursuing a State claim and would have the tendency to reduce access to justice.

7 Indirect discrimination

98. 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.
99. The Commission considers some of the standard parts of the Bill to be best practice, such as the broader definition of 'employment', discussed in section 5.1 above.
100. 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)–(4) and clauses 8(5)–(6) 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.
101. These deeming provisions are considered in more detail in the following sections.

7.1 Employer conduct rules and statements of belief

102. The first set of deeming provisions, in clauses 8(3)–(4) of the Bill, relates to codes of conduct that certain employers require their employees to adhere to. The provisions are limited to private sector employers with revenue of more than \$50 million in either of the last two financial years.³² They only apply to codes of conduct that regulate what employees of these companies can say while they are not at work.
103. If the code of conduct restricts or prevents an employee of such a company from making a 'statement of belief' when they are not at work (including a discriminatory statement of belief covered by clause 41), the code will be deemed to be unreasonable, regardless of the reasons the employer may have had for implementing it, unless the employer can prove³³ that the code is necessary to avoid 'unjustifiable financial hardship'.

104. The implicit assumption behind this provision seems to be that the only legitimate reason that a large employer could have to seek to regulate the behaviour of its employees while they are not at work is a financial one. Unless 'unjustifiable financial hardship' can be demonstrated, no other circumstances can be taken into account in assessing whether the employer's conduct was reasonable. For example, it would not be open to an employer to claim that it considered that a code of conduct was necessary to promote the values or ethos of the company or to prevent discrimination.
105. The Bill does not define 'unjustifiable financial hardship' or provide any means of assessing its magnitude. This phrase does not have a foundation in international law dealing with religious discrimination, nor is the Commission aware of a jurisdiction similar to Australia where the law on religious discrimination applies a phrase such as this. It is also unclear what relationship 'unjustifiable financial hardship' has to the concept of 'unjustifiable hardship' in the DDA. In the DDA, a person can be found to have discriminated against a second person with a disability if the first person fails to make reasonable adjustments for the second person and this has the effect that the second person is treated less favourably than a person without a disability would have been treated in the same circumstances.³⁴ An adjustment will be reasonable, unless it would cause 'unjustifiable hardship' to the first person.³⁵ Sections 21B and 29A of the DDA also provide a defence of unjustifiable hardship in particular circumstances. A list of factors relevant to assessing unjustifiable hardship is set out in s 11 of the DDA.
106. The concept of 'unjustifiable hardship' in the DDA recognises that it is often necessary to make adjustments so that people with disability can participate in public life to the same extent as people without disability. It also recognises that some adjustments can impose significant costs on the person making the adjustments and that it is necessary for a process of assessment to be undertaken to determine whether that burden is reasonable in all the circumstances. The assessment process seeks to balance factors including:
- the nature of the benefit or detriment likely to result to any person from making the adjustments
 - the effect of the disability on the person with the disability

- the financial circumstances of the person making the adjustments, and the estimated cost of those adjustments.
107. The concept of ‘unjustifiable financial hardship’ in the Bill does not have the same characteristics or logic as ‘unjustifiable hardship’ in the DDA. It is not part of a holistic evaluation of relevant circumstances. Instead, it creates a hurdle that must be cleared prior to any other relevant circumstances being taken into account.
108. It appears that the inclusion of the deeming provision in clauses 8(3)–(4) was prompted, in whole or in part, by the decision of Rugby Australia and NSW Rugby Union to terminate the contract of Mr Israel Folau. The Bill does not purport to apply retrospectively, and there has been no suggestion that these provisions would have any effect on that dispute. The Commission does not make any comment on how that dispute should be resolved. Nevertheless, some information regarding that dispute is relevant in understanding the rationale for these provisions of the Bill. On 7 May 2019, an independent panel determined that Mr Folau had breached the Professional Players’ Code of Conduct in relation to social media posts on 10 April 2019.³⁶ In a post on 10 April 2019, Mr Folau included an image with the following text: ‘WARNING Drunks Homosexuals Adulterers Liars Fornicators Thieves Atheists Idolaters HELL AWAITS YOU, REPENT! ONLY JESUS SAVES’. In the text accompanying the image, the post quoted a passage from Galatians 5:19–21 in the King James Version of the Bible and included the additional text, ‘Those that are living in Sin will end up in Hell unless you repent. Jesus Christ loves you and is giving you time to turn away from your sin and come to him’.³⁷
109. The Explanatory Notes to the Bill provide that a ‘statement of belief’ may include ‘a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell’.³⁸
110. The Attorney-General’s Department has identified a number of causes of legal complexity in legislation. One of these is: ‘an aversion to principles-based legislation, leading to a tendency to have rules that accommodate very small variations in circumstances’.³⁹ There are good policy reasons to avoid trying to legislate for individual cases. Such a practice limits the application of general principle and can produce arbitrary outcomes.
111. Here, it is not clear why the Bill seeks to restrict the factors that can be taken into account when assessing whether codes of conduct are

reasonable. In particular, it is not clear why the predominant factor to be weighed up is a financial one.

112. Article 18(3) of the ICCPR provides that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, in the case of the deeming provision in clauses 8(3)–(4), the impact of the manifestation of religion on the rights and freedoms of others may not be taken into account, unless 'unjustifiable financial hardship' can first be demonstrated.
113. Again, this is inconsistent with the acceptance by the Government that discrimination law should reflect the equal status in international law of all human rights.
114. No satisfactory explanation has been put forward for treating private sector businesses with an annual revenue of more than \$50 million differently from other employers, or for reducing their ability to make decisions about the conduct of their business that are reasonable in all of the circumstances.

Recommendation 5

The Commission recommends that clauses 8(3)–(4), dealing with the separate treatment of employer conduct rules by private sector businesses with annual revenue of more than \$50 million, be removed from the Bill.

7.2 Conscientious objections by health practitioners

115. The second set of deeming provisions, in clauses 8(5)–(6) of the Bill, relates to conscientious objections by health practitioners.
116. 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.
117. The definition of a 'health service', that a health practitioner may object to providing on religious grounds, is broad. It involves a service provided in the practice of any of the following health professions:
 - Aboriginal and Torres Strait Islander health practice

- dental (not including the professions of dental therapist, dental hygienist, dental prosthetist or oral health therapist)
- medical
- medical radiation practice
- midwifery
- nursing
- occupational therapy
- optometry
- pharmacy
- physiotherapy
- podiatry
- psychology.⁴⁰

118. The relevance of all of these categories is not immediately clear. For example, there has been no attempt to explain the circumstances in which a doctor may want to conscientiously object to providing a service in an Aboriginal and Torres Strait Islander health practice, or in relation to dentistry, optometry or podiatry.

119. The Explanatory Notes provide more specific examples of where health practitioners may want to object to providing a health service. This includes circumstances where ‘doctors, nurses and other health professionals’ are required to ‘undertake procedures, or provide information, prescriptions, or referrals, related to services such as abortion, euthanasia, contraception or sterilisation’.⁴¹

120. The deeming provisions in clauses 8(5)–(6) operate differently, depending on whether relevant State or Territory law allows health practitioners to conscientiously object to providing a health service.

(a) *Where State and Territory laws provide for conscientious objection*

121. Where a State or Territory law allows conscientious objection, clause 8(5) provides that a rule that restricts or prevents conscientious objection and is inconsistent with the State or Territory law is unreasonable.

122. An example given in the Explanatory Notes is section 7 of the *Voluntary Assisted Dying Act 2017* (Vic) which provides:

A registered health practitioner who has a conscientious objection to voluntary assisted dying has the right to refuse to do any of the following-

- (a) to provide information about voluntary assisted dying;
- (b) to participate in the request and assessment process;
- (c) to apply for a voluntary assisted dying permit;
- (d) to supply, prescribe or administer a voluntary assisted dying substance;
- (e) to be present at the time of administration of a voluntary assisted dying substance;
- (f) to dispense a prescription for a voluntary assisted dying substance.

123. A rule which restricted the operation of a provision of this kind would be held to be unreasonable and amount to indirect religious discrimination.
124. The Explanatory Notes say that clause 8(5) will not affect the imposition of a State or Territory rule that *limited* the ability of a health practitioner to conscientiously object to providing a particular service where the rule was consistent with State or Territory law.⁴² It gives the example of a rule that is consistent with ss 8(3) or (4) of the *Abortion Law Reform Act 2008* (Vic) which provide:
- (3) Despite any conscientious objection to abortion, a registered medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.
 - (4) Despite any conscientious objection to abortion, a registered nurse is under a duty to assist a registered medical practitioner in performing an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.
125. In this respect, the Bill relies on State and Territory law to achieve the balance between conscientious objection and the necessity for treatment. The Explanatory Notes say that clause 8(5) of the Bill 'recognises that statutory conscientious objection provisions are primarily a matter for the states and territories'.
126. Where clause 8(5) operates, the relevant rule would be both contrary to State or Territory law and also indirect discrimination under the Bill. It is therefore not clear why clause 8(5) is necessary, given that those

seeking to challenge the rule could do so directly on the basis that it is 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.

(b) *Where State and Territory laws do not provide for conscientious objection*

127. In general terms, clause 8(6) operates where a State or Territory law does not allow a health practitioner to conscientiously object to providing a health service on religious grounds.
128. However, the particular circumstances in which clause 8(6) operates are not clear. It is expressed to operate 'if subsection (5) does not apply'. This could potentially be where State and Territory law is silent about conscientious objection, or where State and Territory law prohibits conscientious objection (for example, in relation to objections to vaccination). If the provision operates in the latter case, it appears that it would override State and Territory law.
129. Where clause 8(6) operates, it deems rules that restrict conscientious objection to be unreasonable, unless the rule is necessary to avoid an 'unjustifiable adverse impact' on:
 - the provision of the relevant health service; or
 - the health of a person who is seeking that health service.
130. Again, this deeming provision operates to limit the factors that can be taken into account when assessing reasonableness. A rule will be deemed to be unreasonable, and therefore discriminatory, unless the limited criteria in clause 8(6) apply.
131. The Bill does not attempt to distinguish between which adverse impacts are justifiable and which are unjustifiable. The Explanatory Notes say that a result of death or serious injury 'would generally amount to an unjustifiable adverse impact' (emphasis added).⁴³ The only conclusions that can be drawn from this are that not all adverse impacts on patients will justify rules that limit conscientious objections, and sometimes even the death of a patient may be insufficient.
132. The Commission is concerned that this appears to countenance a wide range of possible adverse health impacts in the name of protecting the freedom of religion of health practitioners.

133. The risk involved in this approach is 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.
134. This is particularly the case where there is an absence of State or Territory law requiring such services or referrals to be provided. For example, in Victoria, s 8(1) of the *Abortion Law Reform Act 2008* (Vic) provides:
- (1) If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must—
 - (a) inform the woman that the practitioner has a conscientious objection to abortion; and
 - (b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.
135. In other States, the imposition of similar rules in professional codes of conduct or departmental policy directives which are not specifically provided for in statute would be at risk of being deemed to amount to religious discrimination, without all of the relevant circumstances being taken into account. This may occur because a court finds that the person imposing the rule was not able to establish that the rule had an ‘unjustifiable adverse impact’ on either:
- the ability of the person imposing the rule to provide the health service, or
 - the health of the woman requesting the advice or the service.
136. For example, the Reproductive Health Care Reform Bill 2019 (NSW) is currently being debated in the NSW Parliament. That Bill would repeal offences in the *Crimes Act 1900* (NSW) dealing with abortion and enable terminations of pregnancy to be performed by medical practitioners in certain circumstances. It would require a registered health practitioner who has a conscientious objection to performing a termination on a person to disclose the objection and refer the person to another practitioner who does not have a conscientious objection.

137. The Commission understands that conscientious objections to terminations in NSW are currently governed by a Policy Directive issued by NSW Health.⁴⁴ If the NSW Bill is passed, the provisions relating to conscientious objection (including the referral requirement) would be protected by clause 8(5) of the Religious Discrimination Bill. However, until that time any non-statutory rules or directions dealing with the same subject would need to satisfy the hurdles in clause 8(6) and would be overridden to the extent that they were inconsistent with clause 8(6) even if they were reasonable in all of the circumstances.
138. The Commission considers that the case for inclusion of the deeming provisions in clauses 8(5)–(6) has not been established. If these clauses were removed, assessments of indirect discrimination in relation to rules dealing with conscientious objection would be carried out in exactly the same way as any other assessment of indirect discrimination. 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.

Recommendation 6

The Commission recommends that clauses 8(5)–(6), dealing with the separate treatment of rules about conscientious objections by health practitioners, be removed from the Bill.

8 Inherent requirements

139. As noted in section 4.1 above, a person who considers that they have been discriminated against in employment on the basis of religion can currently make a complaint to the Commission under s 32(1)(b) of the AHRC Act. The Commission is required to conduct an inquiry and, if appropriate, attempt to resolve the matter by conciliation.⁴⁵ If the matter cannot be conciliated, the Commission may make findings about whether or not there was discrimination. If the Commission finds that there was discrimination, it may report its findings to the Attorney-General.⁴⁶
140. At present, the findings and recommendations of the Commission are not binding. The Bill would provide for enforceable remedies for discrimination on the basis of religion or belief, including in the context of employment.

141. The AHRC Act provides that ‘discrimination’ in employment does not include any distinction, exclusion or preference in respect of a particular job that was based on the inherent requirements of the job.⁴⁷
142. The Bill replicates these provisions by prohibiting discrimination on the grounds of religious belief or activity in relation to employment (clause 13), partnerships (clause 14), qualifying bodies (clause 15) and employment agencies (clause 16). In clauses 31(2)–(5), exceptions are set out that permit discrimination if the person is unable to carry out the inherent requirements of the job because of the person’s religious belief or activity.
143. The Explanatory Notes give the following example: ‘it would not be unlawful for a store only open on Saturdays to not hire a Jewish person because they observed the Sabbath and therefore could not work on Saturdays’.
144. There are a number of limits on the use of the ‘inherent requirements’ test to refuse employment to a person. For example, case law provides that:
 - an inherent requirement is something that is ‘essential’ to the position rather than incidental, peripheral or accidental⁴⁸
 - the burden is on the employer to identify the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked⁴⁹
 - the inherent requirements should be determined by reference to the specific job that the employee is being asked to do and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted⁵⁰
 - the inherent requirements exception will be interpreted strictly so as not to defeat the purpose of the anti-discrimination provisions.⁵¹
145. The Bill proposes to include two additional limits on the inherent requirements test.
146. First, clause 31(6) provides that certain ‘employer conduct rules’ cannot be inherent requirements of a job. An ‘employer conduct rule’ is a condition, requirement or practice that:

- is imposed by an employer on employees; and
 - relates to standards of dress, appearance or behaviour.
147. Such a rule would not be an inherent requirement of the job if:
- it would have the effect of restricting or preventing an employee from making a ‘statement of belief’ outside of work hours; and
 - it is not reasonable for the purpose of clause 8.
148. This picks up the restricted meaning of ‘reasonableness’ in relation to businesses with an annual revenue of \$50 million or more. In the case of those businesses, a rule that restricts ‘statements of belief’ outside of work will not be considered to be an ‘inherent requirement’ of the job, unless the rule was necessary to avoid ‘unjustifiable financial hardship’ to the employer.
149. Secondly, clause 31(7) provides that certain ‘health practitioner conduct rules’ cannot be inherent requirements of a job.
150. A ‘health practitioner conduct rule’ involves a condition, requirement or practice that would have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing a health service because of their religious belief or activity.
151. Such a rule would not be an inherent requirement of the job if it was not reasonable for the purpose of clause 8. This picks up the restricted meaning of ‘reasonableness’ in clause 8. It means that rules which do not have statutory backing at a State or Territory level and which require doctors, nurses and other health practitioners to undertake procedures, or provide information, prescriptions, or referrals, related to services such as abortion, euthanasia, contraception or sterilisation may be deemed not to be inherent requirements of the job. In those cases, they could not be the basis for discrimination in employment.
152. Earlier in this submission, the Commission recommended that the restrictions on the application of the reasonableness test, when considering indirect discrimination, be removed from the Bill. As a result, the Commission also recommends that clauses 31(6)–(7) be removed from the Bill. In the Commission’s view, the ordinary limitations on the inherent requirements test, as set out in [144] above, are sufficient.

Recommendation 7

The Commission recommends that clauses 31(6)–(7), dealing with additional restrictions on what amounts to an inherent requirement of a job, be removed from the Bill.

9 Temporary exemptions

9.1 Variation or revocation by the Attorney-General

153. The Bill makes provision for the Commission to grant temporary exemptions from the operation of the prohibitions against discrimination on the basis of religious belief or activity. A temporary exemption may be granted for a period of up to five years and may be granted subject to particular terms and conditions.
154. Each of the SDA, DDA and ADA makes provision for temporary exemptions to be granted by the Commission.⁵² Temporary exemptions may be granted to allow a person time to make changes in order to comply with anti-discrimination laws. The Commission has published guidelines on how it exercises its power to grant temporary exemptions.⁵³ A decision by the Commission to grant a temporary exemption is reviewable in the Administrative Appeals Tribunal.
155. The Bill differs from other Commonwealth discrimination laws in that it gives the Attorney-General the power to vary or revoke an exemption granted by the Commission.⁵⁴ There is no equivalent provision to this effect in the SDA, DDA or ADA.
156. The Explanatory Notes do not provide any explanation for why the Attorney-General is given the power to vary or revoke temporary exemptions in relation to religious discrimination, in circumstances where the Attorney has no equivalent power in relation to any other kind of temporary exemption.
157. In the absence of any explanation for this change, the Commission considers that it is more appropriate to leave the initial decision on varying or revoking temporary exemptions with the body that has conducted the inquiry into whether the exemption should be granted, and to leave any merits review of those decisions to an independent Tribunal with expertise in reviewing administrative decisions.

Recommendation 8

The Commission recommends that clause 39(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.

10 General exceptions

10.1 Counselling or promoting a serious offence

158. There is a general exception in clause 27 of the Bill that permits discrimination against a person if they have expressed a religious belief that amounts to counselling, promoting, encouraging or urging the commission of a serious offence.
159. The Commission is generally supportive of this exception; however, it appears that the exception may operate more broadly than intended.
160. The exception operates if three criteria are satisfied:
 - a person has expressed a particular belief
 - it is reasonable to conclude that, by expressing that belief, the person is counselling, promoting, encouraging or urging the commission of a serious offence, and
 - at the time the discrimination occurs, it is reasonable to assume that the person holds the particular belief.
161. It appears that, if these criteria are met, it is not unlawful to discriminate against that person on the basis of any of their religious beliefs or activities. That is, the exception does not merely apply to discrimination on the ground of the particular expression that encouraged the commission of an offence, but extends to discrimination on the basis of the person's religious beliefs or activities more generally.
162. If this interpretation is correct, then the qualifying conditions in (a) to (c) operate to open the gate to religious discrimination against the person, regardless of the basis for the religious discrimination.
163. On the basis of the Explanatory Notes, it appears that this broad operation may have been unintended. For example, at [287], the Notes say that the exception 'does not apply to discrimination on the grounds of beliefs which are imputed to a person'. This suggests that

there should be a link between the qualifying conditions for the operation of the section and the particular discrimination.

164. The Commission recommends that further consideration be given to the breadth of operation of this provision and, in particular, whether it should be limited to discrimination on the ground of the particular belief that triggers the operation of the section.

Recommendation 9

The Commission recommends that further consideration be given to the breadth of operation of clause 27 of the Bill.

10.2 Law enforcement, national security and intelligence functions

165. Clause 29(2) provides a general exception in relation to law enforcement, national security or intelligence. It provides that it is not unlawful to discriminate on the basis of religious belief or activity if:
- a person is performing functions or exercising powers relating to law enforcement, national security or intelligence under a law or program of the Commonwealth, and
 - the conduct constituting the discrimination is reasonably necessary in performing the function or exercising the power.
166. There do not appear to be any equivalent exemptions in other Commonwealth anti-discrimination laws.
167. The Explanatory Notes suggest that this is a 'catch all' exception designed to ensure that 'nothing in this Act will disrupt the lawful performance or exercise of functions and powers related to law enforcement, national security and intelligence'.⁵⁵ The Notes say that the functions and powers the exception is aimed at include 'policing, investigations, intelligence gathering (including defence intelligence) and security vetting'.⁵⁶ They also say that a person's religious beliefs may be relevant to investigations into offences of terrorism, forced marriage or slavery.⁵⁷ Presumably, it is intended that the exception will permit 'religious profiling' of suspected offenders.
168. However, it is not immediately clear how the exception relates to the kinds of discrimination that are prohibited by the Bill. The Bill applies only to discrimination in particular areas of public life. For example, clause 13 of the Bill prohibits discrimination in employment and, on its

face, the exception appears to cover employment decisions. Does this mean, for example, that it would be lawful for the Australian Federal Police to refuse to employ a person of a particular faith (assuming that this was permissible under s 116 of the Constitution)? Or is it suggested that the employment of AFP officers is not a function or power related to law enforcement? Assuming the exception applies, how would an assessment be made about whether discrimination in employment on the basis of religious belief or activity was 'reasonably necessary' in performing that function or exercising that power?

169. The areas of public life covered by the Bill are: employment (in various forms); education; access to premises; provision of goods, services and facilities; accommodation; land; sport; clubs; requests for information; and Commonwealth laws and programs.
170. It is not immediately clear the scope of overlap between the kinds of conduct that take place in these areas of public life and the kinds of conduct that take place in the course of policing, investigations, intelligence gathering and security vetting.
171. If it is not intended that this exception applies to all areas of public life covered by the Bill, it would improve the clarity of operation of the Bill to identify the areas of public life where it is intended that the exception is to apply. Similarly, it would be useful to include in the Explanatory Notes examples of discrimination that would otherwise be caught by the Bill.

Recommendation 10

The Commission recommends that further consideration be given to the breadth of operation of clause 29(2) of the Bill.

11 Freedom of Religion Commissioner

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

The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

174. The text of the report was more explicit, saying that ‘the Panel is of the view that the appointment of an additional commissioner is not necessary,’ including because the Human Rights Commissioner already has the capacity to perform many of the functions suggested for a Religious Freedom Commissioner.⁵⁸ The panel suggested instead that there was value in ‘extending the remit of an existing commissioner to include responsibility for issues relating to religious freedom’.⁵⁹
175. The Commission does not object to the creation of a new statutory office but notes that there is force in the view expressed by the Expert Panel that the functions given to the Freedom of Religion Commissioner could be performed by another existing Commissioner or Commissioners.
176. If there is to be a new Commissioner appointed, this should be accompanied by new funding for the role and necessary support staff, so that the ability of the Commission to fulfil its other statutory requirements is not compromised.
177. The Commission notes that when there has been an increase in the total number of Commissioners appointed, this has not always been accompanied by the provision of appropriate funding, which has limited the resources available to the incoming Commissioner as well as placing strain on other sections of the Commission, particularly those dealing with the conciliation of complaints. For example:
 - In the 2014–15 Budget, there was a funding cut for the Commission of \$1.650 million over four years. The reason given for this reduction in funding was that the number of Commissioners was being reduced from seven to six when the statutory term of the Disability Discrimination Commissioner ended and a new Disability Discrimination Commissioner was not appointed.⁶⁰
 - This funding was not restored when a new Human Rights Commissioner was appointed in February 2014 bringing the total number of Commissioners back up to seven.

- In July 2016 a new Disability Discrimination Commissioner was appointed bringing the total number of Commissioners up to eight. However, no additional budget was provided to the Commission for the costs associated with this new position.⁶¹
 - The impact on the Commission of taking on significant additional expenses with the appointment of new Commissioners, without additional budget (and in fact with a reduced budget), was a reduction in staffing levels and an increased burden on remaining staff. For example, despite increased operational efficiencies within the Commission, complaint handling staff saw an increase in caseloads which were on average 30% higher than standard caseloads.⁶²
178. If there is to be a new Commissioner appointed to the Commission, this should be accompanied by sufficient additional budget for the Commissioner and a necessary support team of staff. The Commission's standard staffing for Commissioner support is an executive assistant; Director level manager and chief adviser; Senior Policy Officer; Policy Officer and Researcher.
179. More generally, and regardless of whether a new Commissioner is appointed, the introduction of a new Commonwealth discrimination Act could reasonably be expected to lead to an increase in discrimination inquiries and complaints and a corresponding increased workload for the Commission's national information service and its investigation and conciliation service. The last time such a significant change was made to Commonwealth discrimination law was the introduction of the ADA in 2004. Additional staff to handle complaints and field inquiries relating to the new law will be required.
180. There will be a need for new guidance material to be prepared both for the public and for complaint handling staff in relation to religious discrimination.

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.

12 Victimization

181. The Bill would make it an offence to engage in victimisation.⁶³ Victimization involves subjecting a person to a detriment, or threatening to do so, because the person has taken certain action related to the enforcement of their rights or the rights of someone else under Commonwealth discrimination law.
182. Similar victimisation offences are found in the other Commonwealth discrimination Acts.⁶⁴
183. A person may make a complaint to the Commission alleging unlawful discrimination.⁶⁵ The definition of 'unlawful discrimination' includes both:
 - acts, omissions or practices that constitute discrimination under the four Commonwealth discrimination Acts; and
 - any conduct that is an offence under specified provisions of those Acts.⁶⁶
184. The Consequential Amendments Bill provides that the offences in Part 5 of the Bill, including victimisation, will also fall within the definition of 'unlawful discrimination' in s 3(1) of the AHRC Act.⁶⁷ As the Explanatory Notes make clear, this means that a person can make a complaint to the Commission alleging that they have been the subject of victimisation and the Commission may inquire into and attempt to conciliate such a complaint.⁶⁸
185. If a complaint that has been made to the Commission is 'terminated', for example because the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation, the complainant may make an application to the Federal Court or Federal Circuit Court alleging unlawful discrimination by one or more of the respondents to the terminated complaint.⁶⁹
186. An application alleging unlawful discrimination is a civil proceeding. There is conflicting authority about whether such an application may include an allegation that a respondent engaged in victimisation.⁷⁰ The Commission considers that the better view is that a person who alleges that they have been victimised has the right to bring a civil action

alleging victimisation once a complaint of unlawful discrimination is terminated by the Commission. The Commission says that this result flows from a consideration of the statutory scheme, including its text, context and purpose.

187. In September 2018, the Commission made detailed submissions on this issue to the Federal Court of Australia in a proceeding in which victimisation had been alleged. Some of the key points made by the Commission were:
- Part IIB of the AHRC Act deals with redress for unlawful discrimination. This includes Division 1, relating to conciliation of complaints of unlawful discrimination by the President and Division 2, relating to proceedings alleging unlawful discrimination in the Federal Court and the Federal Circuit Court. The structure of the Act suggests that the scope of conduct being considered at each stage is intended to be the same.
 - Allegations of victimisation are intimately connected with allegations of discrimination because victimisation typically involves either retaliatory action because a person made a complaint of discrimination to the Commission, or the causing of a detriment to a person because they participated in conciliation processes of the Commission. As such, it is appropriate that, along with the deterrence value that comes from victimisation being an offence, any civil action alleging discrimination be permitted to include allegations of victimisation.
 - The AHRC Act provides that the unlawful discrimination alleged in the application must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint.⁷¹
 - The remedies that are available if the court is satisfied that there has been unlawful discrimination include a declaration that the respondent has committed unlawful discrimination and an order that the respondent not repeat or continue such unlawful discrimination.⁷² Again, the structure of the Act suggests that 'unlawful discrimination' has a consistent meaning, whether used in relation to the Commission's conciliation processes or proceedings before a court.
 - Allowing civil remedies for victimisation is consistent with the way in which victimisation matters under the SDA were dealt

with immediately prior to the introduction of s 46PO of the AHRC Act, when determinations by the Commission that victimisation had occurred could be the subject of civil enforcement proceedings in the Federal Court.⁷³

188. Ultimately, the hearing of the matter in which the Commission made those submissions was abandoned. The Commission continues to monitor cases in which victimisation is raised so that the same submissions can be made to the Court. However, in the meantime, the legal position on this issue remains uncertain as a result of conflicting authority of the Full Court of the Federal Court.
189. The Commission considers that the Consequential Amendments Bill is an appropriate vehicle to clarify the jurisdiction of the Federal Court and Federal Circuit Court to hear civil allegations of victimisation. One way that this could be done would be by inserting another note to s 46PO(1) confirming that an application made under that section may include any conduct that amounts to 'unlawful discrimination' including allegations of conduct that would be an offence under the provisions described in paragraphs (ca), (d), (e), (ea) and (f) of the definition of 'unlawful discrimination'. The Explanatory Notes could then be updated to confirm the intention that a person making a complaint of victimisation to the Commission may also bring a civil action in court alleging victimisation if that complaint is terminated by the Commission.

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.

13 Freedom of Religion Bill

190. The Freedom of Religion Bill deals with three of the other recommendations from the Religious Freedom Review.

13.1 Objects clauses

191. Recommendation 3 of the Religious Freedom Review was that:
- Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.
192. In response to this recommendation, the Freedom of Religion Bill would add clauses to the RDA, SDA, DDA and ADA to confirm that:
- In giving effect to the objects of this Act, regard is to be had to:
- (a) the indivisibility and universality of human rights; and
 - (b) the principle that every person is free and equal in dignity and human rights.
193. An equivalent clause is included in the Bill at clause 3(2).
194. In the case of the RDA, the Freedom of Religion Bill would also insert an objects clause as new s 2A.
195. The Commission supports these changes. The changes are more than merely preambles to the respective pieces of legislation. They reflect the way in which human rights law operates in practice and recognise that when there are competing human rights claims, there is a need to reconcile those claims in a way that best accommodates their different requirements.
196. When the Commission made its submission to the Religious Freedom Review, it observed that any reform designed to further protect religious freedom should be done in such a way that promotes human rights in their universality and indivisibility.⁷⁴
197. For reasons discussed earlier, the Commission considers that the present Bill does not achieve this balance, particularly in the overriding of Commonwealth, State and Territory law in clause 41 of the Bill and the deeming provisions in clauses 8(3)–(6) of the Bill which limit a full consideration of relevant factors when assessing whether there has been indirect discrimination. Those clauses seek to advance one right at the expense of others.

13.2 Amendment to Charities Act

198. The Religious Freedom Bill would introduce a new s 11(2) into the *Charities Act 2013* (Cth) (Charities Act) in the following form:

To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and a woman to the exclusions of all others, voluntarily entered into for life, is not, of itself, a ***disqualifying purpose***.

199. Similar amendments were proposed but not passed during the parliamentary debate on the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth).⁷⁵ At the time those amendments were proposed, advice was tabled from the Commissioner of Taxation and the Acting Commissioner of Australian Charities and Not-for-profits Commission (ACNC) to the effect that the amendments were not necessary in order to protect the status of religious charities.⁷⁶
200. The Religious Freedom Review considered submissions in relation to this issue and recommended a change to the Charities Act, not because this would have the effect of changing existing legal rights, but rather to provide charities with some comfort, given the concerns that some had expressed in relation to what they suggested were comparable cases in other countries:

The Panel does not consider charities, established for a religious purpose, which continue to advocate their religious views, including a 'traditional' view of marriage, to be at risk of losing their charitable status under Australian law. The Panel was reluctant to draw too many inferences from overseas experience which turned on different legislation and specific facts in those cases. However, the Panel can see a benefit to assist certainty, and could see no particular harm, in an amendment similar to that suggested by the Acting Commissioner of the ACNC to put the immediate issue raised by the legalisation of same-sex marriage beyond doubt.⁷⁷

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

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

202. Although the subject of a recommendation, the case for making this change was not strongly put by the Panel. In assessing whether the

amendment proposed by the Religious Freedom Bill should now be made, it would be necessary to weigh up the following issues.

203. First, based on the assessment of the Panel, there does not appear to be any legal need to make the amendment.
204. Secondly, given the passage of time since the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) was enacted, the concerns expressed by charities to the Religious Freedom Review may no longer be as pressing. The legislation was assented to on 8 December 2017. The terms of reference for the Panel were released the following week and submissions were called for by 31 January 2018 (later extended to 14 February 2018). The Panel conducted its review expeditiously and reported its findings to the Prime Minister on 18 May 2018. It has now been almost two years since the legislation was passed and the Commission is not aware of any suggestion that a charity has been at risk of losing its charitable status as a result of advocating for a 'traditional' view of marriage.
205. Thirdly, in assessing whether any harm would be caused by the amendment, the views of people who supported the marriage equality legislation should also be taken into account. Many people who expressed their support for marriage equality, including through the 2017 postal survey, did so because they considered that the previous definition was discriminatory and did not provide equal status to LGBTI people. It would be reasonable to consider that some LGBTI people, and perhaps the majority of Australians who voted to change the definition of marriage, may be concerned to see the wording of the previous definition reintroduced in other Commonwealth legislation, albeit as a 'view of marriage' rather than a definition, particularly where there is not a legal need to do so.
206. The Commission expects that the Department will receive submissions on these issues during the course of this public consultation process.

13.3 Amendment to Marriage Act

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

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

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body; or
 - (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
- 208. Subsection 47B(4) provides that ‘a body established for religious purposes’ has the same meaning as in s 37 of the SDA.
- 209. Recommendation 12 of the Religious Freedom Review was that this exemption be extended to religious schools. The Freedom of Religion Bill responds to this recommendation by proposing to insert a new s 47C into the Marriage Act.
- 210. The new exemption would permit, for example, a Catholic school that hires out its chapel to former students for use in weddings to refuse to hire the chapel to particular students if those students intended to use it for the solemnisation of a same-sex wedding or a wedding where one of the partners was a divorcee.⁷⁸ In those circumstances, the refusal would not be contrary to the SDA because it would be done in direct compliance with the Marriage Act.⁷⁹
- 211. The Panel noted that a religious school may not fall within the meaning of a ‘body established for religious purposes’ under s 37 of the SDA because educational institutions established for religious purposes are subject to a separate exemption in s 38 of the SDA.
- 212. Each of ss 37 and 38 of the SDA is the subject of the current review by the ALRC into religious exemptions in anti-discrimination law, referred to earlier in this submission. The Attorney-General has asked the ALRC to consider whether those exemptions should be limited or removed altogether (if practicable) while also guaranteeing the right of religious institutions to conduct their affairs in a way that is consistent with their religious ethos.
- 213. Arguably, the terms of reference for the ALRC review also include consideration of s 47B of the Marriage Act. This is because the Attorney-General has asked the ALRC to consider reforms to ‘relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law’ in order to limit or remove religious exemptions to prohibitions on discrimination.⁸⁰ In substance, and read with s 40(2A) of the SDA, s 47B amounts to a religious exemption from anti-discrimination law.

214. In any event, the meaning of s 47B may well be affected by the ALRC review because it relies on the meaning of the religious exemptions in ss 37 and 38 of the SDA.
215. The proposed new s 47C is of the same character.
216. In the circumstances, the Commission recommends that a new exemption to anti-discrimination law not be made while the ALRC is conducting a review that is aimed at limiting or removing existing exemptions to anti-discrimination law. The Commission recommends that s 47C be removed from the Religious Freedom Bill and that full consideration of this exemption await the report of the ALRC.
217. This would treat recommendation 12 of the Religious Freedom Review in the same way as recommendations 1, 5, 6, 7 and 8.

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.

¹ Australian Human Rights Commission, *Religious Freedom Review, Australian Human Rights Commission submission to the Expert Panel* (2018) at [11]-[14]. At <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>.

² SDA, s 37; ADA, s 35.

³ The Hon Christian Porter MP, Attorney-General and Minister for Industrial Relations, 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation' *Media release*, 10 April 2019, containing the terms of reference for the ALRC inquiry. At <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>.

⁴ See: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 3(1), 8-9.

⁵ Bill, clause 5, definition of 'employment'.

- ⁶ Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform*, October 2019, pp 9-10. At <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>.
- ⁷ *Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1964) 110 CLR 9 at 14 (Kitto, Taylor and Owen JJ).
- ⁸ *Australian Human Rights Commission Act 1986* (Cth), ss 46P(2)(a) and (b).
- ⁹ *Australian Human Rights Commission Act 1986* (Cth), ss 46P(2)(c) and 46PB.
- ¹⁰ *Australian Human Rights Commission Act 1986* (Cth), ss 3 (definition of 'affected person') and 46PO(1).
- ¹¹ *Federal Court of Australia Act 1976* (Cth), Part IVA.
- ¹² *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537 at 547-549.
- ¹³ *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313.
- ¹⁴ 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).
- ¹⁵ Bill, clause 57.
- ¹⁶ For example, see *International Covenant on Civil and Political Rights*, article 2(1).
- ¹⁷ SDA, s 9(11)-(14); DDA, s 12(9); ADA, s 10(9).
- ¹⁸ Bill, clause 58(2).
- ¹⁹ SDA, s 37(1)(d); ADA, s 35.
- ²⁰ Explanatory Notes at [180].
- ²¹ See the discussion in Religious Freedom Review at [1.211]-[1.213].
- ²² Explanatory Notes at [174].
- ²³ 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).
- ²⁴ Australian Human Rights Commission, *Religious Freedom Review, Australian Human Rights Commission submission to the Expert Panel* (2018) at [10]. At <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>.
- ²⁵ J Hunyor, 'Skin-deep: Proof and Inferences in Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537.
- ²⁶ For example, see *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243; *Chau v Oreanda Pty Ltd* [2001] FMCA 114; *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767; *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 and the cases referred to in Australian Human Rights Commission, *Federal Discrimination Law* (2016), pp 49-51, at <https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>.
- ²⁷ Religious Freedom Review, at [1.400].
- ²⁸ SDA, ss 5A, 5B and 5C.
- ²⁹ Explanatory Notes at [418]-[420].
- ³⁰ *Aldridge v Booth* (1988) 80 ALR 1 at 16-17 (Spender J); *Hall v Sheiban* (1989) 20 FCR 217 at 277 (French J); *Elliott v Nanda* (2001) 111 FCR 240 at 281 [127] (Moore J).
- ³¹ *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91.
- ³² Bill, clause 5, definition of 'relevant employer'.
- ³³ Bill, clause 8(7).
- ³⁴ DDA, ss 5(2), 6(2).
- ³⁵ DDA, s 4, definition of 'reasonable adjustment'.

- ³⁶ NSW Rugby Union, *Updates: Israel Folau Statements*, <http://www.nswwaratahs.com.au/news/news-article/articleid/18377/rugby-australia-and-nsw-rugby-union-statement-regarding-israel-folau>.
- ³⁷ Australian Broadcasting Corporation, 'Israel Folau committed high-level breach of players' code of conduct' 7 May 2019. At <https://www.abc.net.au/news/2019-05-07/israel-folau-breached-code-of-conduct-hearing-finds/11089234>.
- ³⁸ Explanatory Notes at [407].
- ³⁹ Attorney-General's Department, 'Causes of complex legislation and strategies to address these'. At <https://www.ag.gov.au/LegalSystem/ReducingTheComplexityOfLegislation/Documents/causes-of-complex-legislation-and-strategies-to-address-these.pdf>.
- ⁴⁰ Bill, clause 5, definition of 'health service'.
- ⁴¹ Explanatory Notes at [137].
- ⁴² Explanatory Notes at [143].
- ⁴³ Explanatory Notes at [147].
- ⁴⁴ New South Wales Government, Ministry of Health, *Pregnancy – Framework for Terminations in New South Wales Public Health Organisations*, 2 July 2014, p 7. At https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_022.pdf.
- ⁴⁵ AHRC Act, s 31(b).
- ⁴⁶ AHRC Act, s 32A.
- ⁴⁷ AHRC Act, s 3, definition of 'discrimination'.
- ⁴⁸ *X v Commonwealth* (1999) 200 CLR 177 at 177 [43] (McHugh J), 208 [102] (Gummow and Hayne JJ), *Qantas Airways v Christie* (1998) 193 CLR 280 at 294 [34] (Gaudron J).
- ⁴⁹ *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76 at 87-88 (Cooper J); *Power v Aboriginal Hostels Ltd* (2003) 133 FCR 254 at [19] (Selway J), both dealing with the 'inherent requirements' test under the DDA.
- ⁵⁰ *X v Commonwealth* (1999) 200 CLR 177, *Qantas Airways v Christie* (1998) 193 CLR 280.
- ⁵¹ *X v Commonwealth* (1999) 200 CLR 177 at 222-223 [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 333 [152] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28 at 32-33 [19], [24], [26] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739 at 757 [89] (Wilcox J).
- ⁵² SDA, s 44; DDA, s 55; ADA s 44.
- ⁵³ Australian Human Rights Commission, *Exemptions*, at <https://www.humanrights.gov.au/our-work/legal/exemptions>.
- ⁵⁴ Bill, clause 39.
- ⁵⁵ Explanatory Notes at [320].
- ⁵⁶ Explanatory Notes at [318].
- ⁵⁷ Explanatory Notes at [323]-[324].
- ⁵⁸ Religious Freedom Review at [1.415].
- ⁵⁹ Religious Freedom Review at [1.416].
- ⁶⁰ Australian Government, *Portfolio Budget Statements 2014-15, Budget Related Paper No. 1.2, Attorney-General's Portfolio*, pp 194-195. At <https://webarchive.nla.gov.au/awa/20160105001255/https://www.ag.gov.au/Publications/Budgets/Budget2014-15/Pages/PortfolioBudgetStatements2014-15.aspx>.

- ⁶¹ Instead, the budget for the Commission in 2016/17 decreased. See Australian Government, *Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.2, Attorney-General's Portfolio*, pp 128-129. At <https://webarchive.nla.gov.au/awa/20170408040550/https://www.ag.gov.au/Publications/Budgets/Budget2016-17/Pages/Portfolio-Budget-Statements-2016-17.aspx>.
- ⁶² Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights in its Inquiry into freedom of speech*, 9 December 2016 at [289]-[293]. At <https://www.aph.gov.au/DocumentStore.ashx?id=d42f430a-869c-4706-9414-bf0cba934162&subId=461226>.
- ⁶³ Bill, clause 43.
- ⁶⁴ RDA, s 27(2), SDA, s 94; DDA, s 42; ADA, s 51.
- ⁶⁵ AHRC Act, s 46P(1).
- ⁶⁶ AHRC Act, s 3(1) definition of 'unlawful discrimination'.
- ⁶⁷ Consequential Amendments Bill, Sch 1, clause 3.
- ⁶⁸ Explanatory Notes to the Consequential Amendments Bill at [19].
- ⁶⁹ AHRC Act, s 46PO(1). A court application may be made by an 'affected person', defined as a person on whose behalf the complaint was lodged.
- ⁷⁰ *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118; *Chen v Monash University* (2016) 244 FCR 424.
- ⁷¹ AHRC Act, s 46PO(3).
- ⁷² AHRC Act, s 46PO(4).
- ⁷³ SDA, ss 47A and 83A as in force on 16 November 1999.
- ⁷⁴ Australian Human Rights Commission, *Religious Freedom Review, Australian Human Rights Commission submission to the Expert Panel* (2018) at [10]. At <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>.
- ⁷⁵ See the clause (3) of the amendments proposed by the Hon Scott Morrison MP and clauses (2), (7), (8) and (9) of the amendments proposed by Mr Andrew Broad MP; Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, pp 13,064-13,072; 13,107-13,114 and 13,123-13,129.
- ⁷⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, pp 13,068-13,069 (Mr Warren Entsch MP).
- ⁷⁷ Religious Freedom Review at [1.200].
- ⁷⁸ See Explanatory Notes to Freedom of Religion Bill at [58].
- ⁷⁹ SDA, s 40(2A).
- ⁸⁰ The Hon Christian Porter MP, Attorney-General and Minister for Industrial Relations, 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation' *Media release*, 10 April 2019, containing the terms of reference for the ALRC inquiry. At <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>.