

Chapter 3

Unlawful discrimination

3.1 This Chapter outlines the key issues raised by submitters and witnesses in relation to Parts 3 and 4 of the bill.¹ Submitters and witnesses were strongly in favour of there being protection against discrimination on the ground of religion, although there were some differences of opinion in how this should be achieved, as set out below. This Chapter also sets out specific concerns raised in relation to the concept of discrimination, including:

- the definition of religious belief or activity;
- the application of local by-laws;
- the burden of proof in determining if a condition imposed is reasonable;
- the test for indirect discrimination; and
- bodies corporate able to claim discrimination.

3.2 This Chapter also looks at issues raised by submitters and witnesses in relation to the exceptions and exemptions in Division 4 of Part 4 of the bill, and the role of the Religious Discrimination Commissioner. It concludes with an assessment of the application of international human rights law to these provisions, and provides the committee's view and recommendations.

Prohibiting discrimination on basis of religion

3.3 Submitters and witnesses overwhelmingly supported the idea of a federal law protecting individuals against discrimination on the ground of religious belief or activity.² While there is protection against discrimination on the grounds of religion in every state and territory apart from New South Wales and South Australia, there is limited protection at the federal level. The Attorney-General's Department stated that:

the primary purpose of this Bill is to protect ordinary people of faith from discrimination as they go about their daily lives. The Bill also protects those who experience discrimination because they do not adhere to any faith or

1 Although it does not deal with clause 15 in Part 3, which is dealt with in Chapter 6.

2 See for example, Freedom for Faith, *Submission 10*, p. 4; Australian Christian Lobby, *Submission 16*, p. 4 and Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 19; Dr Denis Dragovic, *Submission 18*, pp. 5–6; Executive Council of Australian Jewry Inc, *Submission 19*, pp. 2–3; Associate Professor Mark Fowler, *Submission 20*, p. 7; Australian Christian Higher Education Alliance, *Submission 25*, p. 5; Council of the Ageing, *Submission 29*, p. 1–2; Australian National Imams Council, *Submission 27*, p. 3; Human Rights Law Alliance, *Submission 30*, p. 3; Mr Keysar Trad, Australian Federation of Islamic Councils, *Committee Hansard*, 21 December 2021, p. 28.

religious belief. Sadly, as the Religious Freedom Review chaired by Philip Ruddock heard, many Australians, particularly those from minority faiths, experience discrimination all too often on the basis of their religious beliefs or activities. At present, there are only limited protections for these people under the Commonwealth's anti-discrimination regime.³

3.4 The Australian Discrimination Law Experts Group noted that 'protections at a federal level against discrimination on the basis of religion and related characteristics is well overdue'.⁴ Associate Professor Neil Foster, Board Member of Freedom for Faith, also noted that the overall framework of protection of religious freedom is patchy and there are gaps in protection:

There is no protection against religious discrimination in New South Wales at all at the moment under the discrimination laws. There's no protection in South Australia, except for a very minor one in relation to religious dress. There's limited protection under the Fair Work Act. So we think this is a gap and we think it ought to be filled.⁵

3.5 Ms Anna Brown, Chief Executive Officer, Equality Australia, noted that the organisation is 'very supportive of protections for people of faith', and of protections against discrimination for everyone.⁶ A number of submitters and witnesses also gave examples of why the right to freedom of religion needs to be protected. The Presbyterian Church of Australia noted:

Freedom of Religion is widely accepted as a natural right. As Christians, this means we see that it is a freedom granted by God. Each person, made in God's image, has an instinct to respond to God, and a responsibility to do that. That response cannot, ultimately, be determined by other people (though it is mediated socially) nor should it be imposed by the state. The state should recognise this freedom and it should be extended to people of all religions and those who hold no religious convictions.

Religious convictions and practices are an important part of culture for millions of Australian citizens and residents. Allowing individuals and communities the freedom to express their religious convictions as fully as possible is an important way of treating them with dignity.⁷

3 Mr Andrew Walter, Acting Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 14 January 2022, p. 61.

4 Ms Robin Banks, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 10.

5 Associate Professor Neil Foster, Freedom for Faith, *Committee Hansard*, 14 January 2022, pp. 13–14. See also Professor Nicholas Aroney, *Committee Hansard*, 21 December 2022, p. 8; Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2022, p. 19.

6 Ms Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 73.

7 The Presbyterian Church of Australia, *Submission 94*, p. 3.

3.6 The Catholic Women’s League of Australia, explained why they considered it was necessary for religious freedoms to be recognised in law:

Across the world and in our own country, many Christians have been unjustly taken to courts, and in onerous and expensive proceedings, have seen their freedom to follow religious conviction attacked, experienced the loss of livelihoods, and the loss of the freedom to share religious convictions and beliefs within the wider society – all because complainants were offended by their beliefs and have utilized anti-discrimination law to silence the Christian voice. It is the responsibility of a democratically elected government to ensure the freedom to practice religion, to enshrine in law the human right to practice one’s faith and encourage the willingness of the citizens to tolerate the beliefs of each other without the creation of a legal framework which can be used to suppress and punish the religious convictions of her citizens.⁸

3.7 The Executive Council of Australian Jewry Inc. set out statistics as to the incidence of antisemitism in Australia, stating that 'discrimination against Jews, is becoming more serious, and there have been worrying signs that it is creeping into mainstream institutions and society'. As such it stated:

It is therefore anomalous in our view that at present there is a Federal law dedicated to prohibiting discrimination on the ground of race, and Federal laws dedicated to prohibiting discrimination on the ground of certain other attributes, namely sex, age and disability, but not on the ground of religion.⁹

3.8 Similarly, the Australian National Imams Council set out examples of discrimination experienced by Australian Muslims, stating that the 'concept of the Bill offers a critical opportunity to address an urgent and pressing concern held by Australian Muslims and persons of other faith', and it 'sends a message that their faith is valued and they should not need to hide their religious identity or practices, be it wearing a hijab or attending congregational prayers on a Friday'.¹⁰ The Muslim Women's Network also stated:

The issue of religious discrimination, and vilification even more so even though it is outside the scope of this legislation, is one of the most challenging issues facing Muslim women in this country. Muslim women, because of a range of factors not the least of which is how they dress, have become the most visible targets for bigots, racists and extremists. Muslim women have increasingly become the target for physical as well as verbal abuse, intimidation and even assault...Yet religion remains as the one

8 Catholic Women’s League of Australia, *Submission 175*, pp. 1–2.

9 Executive Council of Australian Jewry Inc, *Submission 19*, pp. 2-3. See also Mr Peter Wertheim, Executive Council of Australian Jewry Inc, *Committee Hansard*, p. 52-53.

10 Australian National Imams Council, *Submission 27*, pp. 3 and 6. See also Mr Bilal Rauf, *Committee Hansard*, 21 December 2021, p. 27. See also Mr Keysar Trad, Australian Federation of Islamic Councils, *Committee Hansard*, 21 December 2021, p. 27.

glaring omissions from the Commonwealth legislative framework and is ad hoc and piece meal at a state level...

How can we say that all rights are equal when so many rights are protected but the right to practice one's faith without discrimination isn't? How can we say that religious freedom shouldn't take precedence over other rights when in fact it is the right that has no protection in law at a national level and arguably at a State level? How can we balance the competing interests of people's rights when some are given legal protection and others aren't? Yes, all rights are equal. So, the simple question then is, why isn't religion protected against discrimination like other rights if they are all equal? ¹¹

3.9 The Anglican Church Diocese of Sydney also stated:

People of faith are facing increasing hostility in Australia... Recent polling from McCrindle Research reveals that 29% of Australians have experienced discrimination for their religion or religious views. As the report notes, 'this equates to about half of those who identify with a religion which is six in ten Australians'.¹²

3.10 While there was broad support for religious discrimination to be prohibited by law, there were many differences of opinion as to how this should be achieved. A number of submitters raised concerns about legislating to protect against religious discrimination in a context where there is no overarching protection of rights, such as a Human Rights Act or Charter of Rights.¹³ The Law Council submitted that it was 'preferable to embed freedom of religion in a comprehensive and coherent framework of substantial rights protection, which recognises that limitations on rights must be necessary, and proportionate to the specific need, in order to be justified and permissible'. They argued that this 'is best achieved through a federal human rights act'.¹⁴ The Human Rights Law Centre also stated that human rights are indivisible and cannot be positioned in a hierarchical order, and that instead of 'unbalanced and

11 Mrs Maha Krayem Abdo, Muslim Women Australia, *Committee Hansard*, 21 December 2021, p. 27.

12 The Anglican Church Diocese of Sydney, *Submission 158*, p. 3.

13 See, e.g., Emeritus Professor Rosalind Croucher, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, pp. 26-27; The Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 2; Australian Council for Trade Unions, answer to question of notice, question 1 from Senator Rice, 14 January 2022 (received 21 January 2022).

14 The Law Council, *Submission 28*, p. 8.

piecemeal pieces of legislation', all human rights should be protected through an Australian Charter of Rights.¹⁵

3.11 A number of submitters also raised concerns that the bill elevated the rights to freedom of religion over the right to equality and non-discrimination of other people.¹⁶ Specific concerns in relation to this are set out in Chapters 4, 5 and 6.

3.12 A number of submitters considered that protection against discrimination on the grounds of religion should follow the model set out in other anti-discrimination legislation. For example, Ms Lisa Annese, the Chief Executive Officer of the Diversity Council Australia said:

We really are in favour of an act that protects people's right to their religion in the workplace. It should look similar to the other Commonwealth antidiscrimination laws so that it protects the right to religion and inherent in that there are limits on the expression of that religion in a workplace context, because that could impinge on the rights of others to be authentically safe.¹⁷

3.13 There were also some submitters who considered there was a need to consolidate all federal anti-discrimination law into one statute to better allow for a balancing of rights. The Public Affairs Commission of the Anglican Church of Australia stated:

Given the piecemeal nature of anti-discrimination laws, it is essential that such laws protecting against religious discrimination are designed in a way that is consistent with the operation of other anti-discrimination statutes and do not derogate in any way from those protections. It is essential to protect all human rights of vulnerable people.¹⁸

15 Human Rights Law Centre, *Submission 190*, p. 8. See also The Law Council, *Submission 28*, p. 8; St Vincent de Paul Society Australia, *Submission 55*, p. 2; Just Equal Australia, *Submission 69*, p. 7; Legal Aid Queensland, *Submission 92*, p. 2–3; Children by Choice, *Submission 150*, p. 4; Uniting Network Australia, *Submission 153*, p. 4; Amnesty International, *Submission 157*, p. 6; Australian Lawyers for Human Rights, *Submission 171*, p. 4; Women's Health Victoria, *Submission 173*, p. 6; Centre for Women's Safety and Wellbeing, *Submission 179*, p. 6; NSW Council for Civil Liberties, *Submission 181*, p. 4; Australian Nursing and Midwifery Federation, *Submission 118*, p. 15; Human Rights Law Centre, *Submission 190*, p. 3; Parents for Transgender Youth Equity, *Submission 73*, p. 3; Kingsford Legal Centre, *Submission 110*, p. 1.

16 See, for example, Dr Cristy Clark, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 16; Equality Australia, *Submission 31*; Public Interest Advocacy Centre, *Submission 40*, p. 3; Australian Council of Trade Unions, *Submission 64*, p. 3; Kingsford Legal Centre, *Submission 110*, p. 2; Australian Council of Human Rights Authorities, *Submission 125*, p. 1; Australian Lawyers for Human Rights, *Submission 171*, p. 3; Human Rights Law Centre, *Submission 190*, p. 2; [Form letter type 1](#).

17 Ms Lisa Annese, Diversity Council, *Committee Hansard*, 13 January 2022, p. 35.

18 The Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 2.

3.14 Equality Rights Alliance also supported the consolidation of federal anti-discrimination law, noting that a combined statute could include a mechanism to balance competing rights, including in 'cases where the rights to express religious beliefs conflicts with a right to non-discrimination'.¹⁹

3.15 The Australian Women's Health Network stated that while all people have the right to freedom, religion, and belief, they did 'not see any need for a separate and specific piece of legislation to protect people from religious discrimination on the grounds of their religious belief or activity'.²⁰

3.16 Other submitters raised concern as to the amount of anti-discrimination legislation and the possibility for inconsistent legislation across Commonwealth and state and territory laws, arguing that review of existing laws may be better than introducing a new bill.²¹ For example, the Australian Industry Group noted that all states and territories, except New South Wales and South Australia, already protect against discrimination on religious grounds, and their preference would be for the gaps in state and territory legislation to be filled, rather than putting another piece of Commonwealth legislation on top.²²

3.17 However, other submitters raised concerns that pursuing a charter of rights or consolidated anti-discrimination legislation is likely to be a complex exercise which would result in further delays to protect the right to freedom of religion. Right Reverend Doctor Michael Stead, Bishop of South Sydney, Chair of the Religious Freedom Reference Group, Anglican Church Diocese of Sydney stated:

We've been talking about a religious discrimination bill since 2018, since the Ruddock inquiry, and it's taken this long to get where we've got to. My concern is that any attempt to pursue a charter or an integrated antidiscrimination act is going to so delay the protection of religious discrimination that it's, if I can be blunt, kicking it off into the long grass rather than dealing with the issue as it presents.²³

3.18 Further, the Institute of Public Affairs considered that the anti-discrimination framework was not the appropriate way to best protect religious liberty:

19 Equality Rights Alliance, *Submission 166*, p. 9.

20 The Australian Women's Health Network, *Submission 83*, p. 2. See also Ms Emma Iwinska, The Australian Women's Health Network, *Committee Hansard*, 13 January 2022, p. 55; Equality Australia, *Submission 31*, p. 28; Marie Stopes Australia, *Submission 177*, p. 4; Human Rights Law Centre, *Submission 190*, p. 8; The Law Council, *Submission 28*, p. 8; Equality Rights Alliance, *Submission 166*, p. 4.

21 Ms Christine Cooper, Independent Education Union, *Committee Hansard*, 13 January 2022, p. 5.

22 Mr Stephen Smith, Australian Industry Group, *Committee Hansard*, 13 January 2022, p. 30.

23 Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 52.

While it is commendable that the Federal Government is giving attention to the serious and important question of how to protect the rights of Australians of faith, IPA research finds safeguarding these rights by expanding the anti-discrimination framework may be a counterproductive method to safeguard freedom of religion. Specifically, the research finds: the anti-discrimination legal framework is incompatible with religious liberty; the exemptions for statements of belief will fail to protect freedom of expression, and that exemptions for religious bodies are a narrow and unreliable mechanism to protect religious liberties.²⁴

Concept of discrimination

3.19 The bill sets out that discrimination includes the concept of direct discrimination: treating someone less favourably because of a person's religious belief or activity.²⁵ It also includes the concept of indirect discrimination: imposing a condition, requirement or practice, which is not reasonable, and which has the effect of disadvantaging persons with a particular religious belief or activity.

Defining religious belief or activity

3.20 The bill defines 'religious belief or activity' as meaning:

- (a) holding, or not holding, a religious belief; or
- (b) engaging, or not engaging, in a religious activity, unless that activity is unlawful (however, an activity is not unlawful merely because a local by-law prohibits it).²⁶

3.21 Some submitters raised concerns that this definition is largely undefined, and absent more detailed definition as to what constitutes a religious belief or activity, this may be defined narrowly by the courts to be restricted to private personal observance of religious worship,²⁷ and may not capture the communication of religious beliefs.²⁸ Some submitters also expressed concern that what constitutes a 'religion' is not defined in the bill. The Australian Christian Lobby stated:

For determining what is a "religious belief", the Court then becomes an arbiter of theology and religious adherents will need to adduce significant expert evidence to establish that a particular belief is part of their religion. These deficiencies in defining the nature of a "religious" belief or activity significantly weaken the protections afforded to those who seek to live and

24 Institute of Public Affairs, *Submission 134*, p. 2.

25 Clause 13 of the Religious Discrimination Bill 2021.

26 See clause 5, definition of 'religious belief or activity' and subclauses 5(2) and (3).

27 See for example, Human Rights Law Alliance, *Submission 30*, p. 9.

28 See for example, Russell Blackford, *Submission 7*, pp. 2–3.

act in a way consistent with their religious beliefs, a right reflected in Article 18(1) of the ICCPR.²⁹

3.22 The explanatory memorandum states that the term is defined broadly, and it is consistent with the approach taken in other anti-discrimination laws, and that the bill does not seek to comprehensively define the concept of 'religion' or 'religious belief or activity'. Instead, the bill relies on the approach taken by the High Court in determining what constitutes a religion, noting that faith traditions may emerge or develop over time.³⁰ A number of submitters supported this approach, noting that attempting to define it beyond the High Court's approach would potentially create the unwelcome issue of secular judges needing to determine and assess the content of religious doctrine.³¹

Local by-laws

3.23 Some submitters also raised concern that while the bill will not apply to engaging in a religious activity that is unlawful, what is unlawful does not include activities that are only unlawful because a local by-law prohibits that activity.³² The explanatory memorandum states that this will ensure persons are still protected under the bill even if their religious activity contravenes council by-laws, such as street preaching. It states that this recognises that a complaint under this bill should not be limited by delegated legislation, as this does not have the same levels of oversight and scrutiny as legislation made by the Commonwealth, or a state or territory government.³³ However, some submitters expressed concern that this will prevent local councils from introducing by-laws to protect public order, such as from street evangelists who harangue citizens in public places,³⁴ and that this may mean by-laws would not apply equally to all groups.³⁵

29 Australian Christian Lobby, *Submission 16*, p. 6. See also [Form letter type 1](#).

30 Religious Discrimination Bill 2021, explanatory memorandum, p. 35.

31 Australian Christian Higher Education Alliance, *Submission 25*, pp. 5–6. See also Law Council of Australia, *Submission 28*, p. 16.

32 Religious Discrimination Bill 2021, clause 5(1) definition of 'religious belief or activity' and subclauses 5(2) and (3).

33 Religious Discrimination Bill 2021, explanatory memorandum, p. 37.

34 Don't Divide Us, *Submission 108*, p. 3.

35 Kingsford Legal Centre, *Submission 110*, p. 4. See also TransGender Victoria, *Submission 112*, p. 2; Dr Sean Mulcahy, Associate Professor Kate Seear, Andrea Waling, *Submission 126*, p. 13; Uniting Network, *Submission 153*, p. 18; Australian Lawyers for Human Rights, *Submission 171*, p. 15; NSW Council for Civil Liberties, *Submission 181*, p. 14; Liberty Victoria, *Submission 186*, p. 4; Human Rights Law Centre, *Submission 190*, p. 20; Equality Australia, *Submission 31*, pp. 34–35; Public Interest Advocacy Centre, *Submission 40*, p. 24; Banyule City Council, *Submission 76*, p. 2; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 3.

Indirect discrimination if condition or practice is not reasonable

3.24 Clause 14 provides that a person discriminates against another if they impose a condition, requirement or practice which is not reasonable and which disadvantages people who hold or engage in particular religious beliefs or activities. Subclause 14(2) provides whether a condition, requirement or practice is reasonable would depend on all the relevant circumstances of the case, including the nature and extent of the disadvantage imposed; the feasibility of overcoming or mitigating the disadvantage; and whether the disadvantage is proportionate to the result sought. The explanatory memorandum explains that this test is broadly consistent with the tests of indirect discrimination in other anti-discrimination legislation.³⁶

3.25 Some submitters argued that clause 14 should be amended to provide that a person will discriminate if they impose a condition, requirement or practice which is not 'necessary', rather than which is not 'reasonable'.³⁷ Their argument was that this would be consistent with the international law standard, as article 18(3) of the International Covenant on Civil and Political Rights provides that limitations may only be placed on the right to freedom of religion 'as are prescribed by law and are *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. For example, the Australian Association of Christian Schools stated that, as currently drafted, clause 14:

requires a judge to determine whether an indirectly discriminatory act against a person is 'reasonable'. Although this customary test is appropriate in anti-discrimination law, in the unique context of religious discrimination its substantive operation should be aligned with the requirements of international law.³⁸

3.26 Mr John Steenhof, Principal Lawyer, Human Rights Law Alliance, further argued:

The bill provides that you have protection from indirect discrimination where someone imposes a condition. But if, say, it's an employer and they can show that the condition is reasonable—and there's a very low bar test for reasonableness—then your religious discrimination claim will fail. That's really inconsistent with article 18 of the ICCPR, which says that rights can only be infringed where it is absolutely 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. So the bar for a discriminator to jump over to be able to suppress religious freedom is lower in this bill than it is in the international covenants. That is

36 Religious Discrimination Bill 2021, explanatory memorandum, p. 61.

37 The Australian Association of Christian Schools, *Submission 23*, pp. 17–18. See also Anglican Church Diocese of Sydney, *Submission 158*, p. 18; Australian Christian Lobby, *Submission 16*, p. 8; Executive Council of Australian Jewry Inc, *Submission 19*, p. 9; Associate Professor Mark Fowler, *Submission 20*, pp. 25–26; Human Rights Law Alliance, *Submission 30*, p. 10.

38 The Australian Association of Christian Schools, *Submission 23*, pp. 17–18.

one of its major failings where it does not reflect the ICCPR and, further, does not reflect the Siracusa principles, which are the internationally respected principles that set out when rights can be derogated from or overridden, which was part of the recommendations of the Ruddock review. The expert panel report into religious freedom said that, if you're going to pass laws about religious freedom, they should have regard of the Siracusa principles, and they are completely absent from this bill.³⁹

3.27 A discussion as to the application of international human rights law to these provisions is set out below (beginning at paragraph [3.61]).

3.28 Further, a number of submitters also argued that the bill did not go far enough and that the bill should include a 'reasonable adjustments' clause. This would place a positive requirement on employers to accommodate religious belief or activity, where this could be done without imposing an 'unjustifiable hardship' (similar to that taken in the *Disability Discrimination Act 1992*.⁴⁰ The Human Rights Law Alliance said:

Such accommodations have not been included in the case of religion in the Bill despite clear applications directly relating to religious beliefs (e.g. Sabbatarian Christians who don't wish to work on the Sabbath; Muslims who require accommodation for their daily prayers; religious dietary requirements of various kinds etc.) A reasonable adjustments clause would give a balanced and reasonable protection to religious Australians in cases where, for example, employers could easily make adjustments at little cost or hassle to accommodate religious beliefs but which would not place an undue burden where the adjustment would be costly or cause hardship.⁴¹

3.29 The Institute for Civil Society submitted:

The Bill should contain a 'reasonable adjustments' clause, equivalent to the Disability Discrimination Act provisions. Organisations would then be obliged to make reasonable adjustments to accommodate a person's genuine religious beliefs unless to do so would cause the organisation substantial hardship. E.g. If there are 12 staff and machinery running on Friday requires 8 to handle the machinery, it may be a reasonable adjustment to let 2 Muslim staff take time off for afternoon prayers and then work the extra time, rather than rostering them on during their prayer time. If an exceptional customer order or breakdown of other machinery requires all staff to work at that time the employer would not need to make

39 Mr John Steenhof, Human Rights Law Alliance, *Committee Hansard* 21 December 2021, p. 87.

40 Freedom for Faith, *Submission 10*, p. 15; Australian Christian Lobby, *Submission 16*, p. 7; Associate Professor Mark Fowler, *Submission 20*, p. 27; Australian National Imams Council, *Submission 27*, p. 11; Human Rights Law Alliance, *Submission 30*, p. 6; Seventh-day Adventist Church in Australia, *Submission 82*, p. 7; Institute for Civil Society, *Submission 131*, p. 7; Presbyterian Church of Victoria, *Submission 133*, p. 4; Anglican Church Diocese of Sydney, *Submission 158*, p. 15; Australian Catholic Bishops Conference, *Submission 185*, p. 10.

41 Human Rights Law Alliance, *Submission 30*, p. 6.

the adjustment to rosters that day because it would not be a reasonable one and/or would cause the employer substantial hardship.⁴²

Burden of proof

3.30 In the exposure draft versions of the bill, the bill provided that in determining if a condition, requirement or practice resulted in indirect discrimination, the person who imposes, or proposes to impose the condition, requirement or practice has the burden of proving that it was reasonable.⁴³ This aligns with the approach taken in other anti-discrimination legislation.⁴⁴ The explanatory notes to the exposure draft explained the reason for this:

Placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the complainant is unlikely to have access to the information required to prove that an action is unreasonable.⁴⁵

3.31 However, the current bill does not include such a provision, meaning the normal rules of evidence would apply, such that the complainant would need to prove the conduct was unreasonable. A number of submitters raised concern about this, stating the approach taken in the exposure draft should be reinstated.⁴⁶ For example, the Institute for Civil Society stated:

If a person is discriminated against because a (facially equal) general condition, requirement or practice is more disadvantageous to them because of their religious belief or activity (e.g., a general rule that all employees have to work on the 4th Saturday of a month disadvantages employees whose religious Sabbath falls on Saturday), there is a defence if the discriminator can prove the rule is reasonable. But in the Religious Discrimination Bill alone that burden of proof rule is absent meaning the burden of proof is on the person discriminated against to prove that the rule is unreasonable. This needs to be changed so that the Bill uses the standard

42 Institute for Civil Society, *Submission 131*, p. 7.

43 Second exposure draft, Religious Discrimination Bill 2019, subclause 8(8).

44 See *Sex Discrimination Act 1984*, section 7C; *Disability Discrimination Act 1992*, subsection 6(4); *Age Discrimination Act 2004*, subsection 15(2).

45 Religious Discrimination Bill 2019, explanatory notes, second exposure draft, p. 24.

46 See for example: Freedom for Faith, *Submission 10*, p.15; Associate Professor Mark Fowler, *Submission 20*, p. 26; Australian Christian Higher Educational Alliance, *Submission 25*, p. 18; Seventh-day Adventist Church in Australia, *Submission 82*, p. 7; Institute for Civil Society, *Submission 131*, p. 6.

burden of proof provision in relation to the reasonableness of indirect discrimination.⁴⁷

Bodies corporate able to claim discrimination

3.32 Clause 16 of the bill makes it unlawful under the proposed Act to discriminate against a person on the basis of the person's association with someone else. It sets out that an association with another individual includes a near relative, someone they live with, have an ongoing business or recreational relationship or where they are members of the same unincorporated association. A 'person' is not defined in the bill, and as such the usual interpretation is that this includes a body politic or corporate as well as an individual.⁴⁸ Subclause 16(3) also provides that a person that is a body corporate will be considered to have an association with an individual if a reasonable person would closely associate the body corporate with that individual. The explanatory memorandum explains that this means a body corporate would be able to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely associated with. It states this is important 'to protect the religious freedoms of individuals who may be associated with bodies corporate'.⁴⁹

3.33 Some submitters considered it was important to protect corporate bodies from discrimination. Associate Professor Mark Fowler stated:

There are sound policy reasons why religious corporations should be clearly protected under the Bill: religious belief is most often expressed in associational form. To allow that a sole trader could take the benefit of religious discrimination protections, but not where they subsequently incorporated the business would be arbitrary.⁵⁰

3.34 The Association of Christian Schools also stated:

The inclusion of clause 16 pertaining to "associates" is a welcome addition as it provides that protection from religious discrimination is extended to persons on the basis that they have an association with an individual who holds or engages in a religious belief or activity, for example members of the same unincorporated association or a business relationship. This "associates" clause could allow Christian schools to benefit from the protection of religious discrimination in the areas listed under the Act, for example accessing premises, goods, services, facilities and accommodation.⁵¹

47 Institute for Civil Society, *Submission 131*, p. 6.

48 *Acts Interpretation Act 1901*, section 2C.

49 Religious Discrimination Bill 2021, explanatory memorandum, p. 66.

50 Associate Professor Mark Fowler, *Submission 20*, pp. 27–28. See also Institute of Civil Society, *Submission 131*, p. 3.

51 Australian Association of Christian Schools, *Submission 23*, p. 19.

3.35 Dr Alex Deagon, a Senior Lecturer in the School of Law at the Queensland University of Technology, also stated there is no impediment to empowering religious corporations as litigants in a law protecting against religious discrimination, and 'indeed such is required as a means to give adequate effect to the protections afforded to individuals and groups against religious discrimination in international law'.⁵²

3.36 However, a number of other submitters raised concerns that extending discrimination protection to bodies corporate is inconsistent with the human rights treaties which protect the rights and dignity of individuals, and in some cases groups of individuals, rather than bodies corporate or governments. For example, Ms Anna Brown, Chief Executive Officer of Equality Australia, said 'traditionally discrimination law protects the individual against unfair treatment on the basis of a protected attribute. So we're quite alarmed by the inclusion of these sorts of provisions that protect entities as well as individuals'.⁵³ The Australian Human Rights Commission noted that it 'is axiomatic that only humans have human rights'. The Commission stated that it supports the inclusion of a clause allowing discrimination complaints to be made by individuals who are associates of a person with a religious belief or those who engage in religious activity, but does not support the extension of this to allow a corporation to make a claim of religious discrimination because of its association with an individual:

International law and the domestic law of comparable jurisdictions makes clear that human rights law protects only humans. This principle has been adhered to in all of Australia's federal, state and territory human rights laws, including the existing federal discrimination laws. In the Commission's view, there is no justification for the Bill to depart from this settled and fundamental principle.

Corporations cannot possess innately human qualities, such as dignity, which human rights law is designed to protect. More specifically, corporations have 'neither soul nor body' and cannot have a religious belief that is somehow disconnected from the religious belief of an individual or group of individuals that are involved with the corporation. The legitimate rights and interests of corporations can be, and are, legally protected in other ways—for example, in statutes dealing with competition law.⁵⁴

3.37 Similarly the Law Council of Australia said:

the Bill should protect natural persons, not bodies corporate. Human rights protect characteristics which are innately human, such as sex, race and religion. The intention that the protections in the Bill should be extended to bodies corporate, does not appear to have been recommended by the Expert Panel or supported by the ICCPR, or accord well with the Bill's objects

52 Dr Alex Deagon, *Submission 3*, p. 6.

53 Ms Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 69.

54 Australian Human Rights Commission, *Submission 97*, p. 33.

regarding the 'indivisibility and universality of human rights'. It could result in an uneven landscape of rights protection in which the rights of natural persons based on certain attributes are weighed against those of potentially large corporations.⁵⁵

3.38 Associate Professor Luke Beck also raised concerns that, given the ability of bodies corporate to make complaints of discrimination, the bill may mean governments would be unable to require their contractors providing welfare services to refrain from some forms of discrimination.⁵⁶ The Australian Council of Trade Unions also noted its concern that this provision could affect the ability of people to take action protesting against the actions of a commercial body.⁵⁷ Equality Australia also raised concerns as to the potential for large damages to be sought by companies who experience a secondary boycott based on their association with certain individuals.⁵⁸

Exceptions and exemptions

3.39 Division 4 of Part 4 of the bill also sets out a number of exceptions and exemptions, which specify that certain conduct will not be unlawful under the legislation (see Chapter 2 for further detail). This is separate to conduct by religious bodies that is stated to be 'not discrimination' under Part 2 of the bill (and is considered in Chapters 4 and 5 of this report).

3.40 Most submitters did not raise concerns regarding this Division of the bill, noting that it is the orthodox approach to anti-discrimination legislation to set out specific, limited exceptions to what constitutes unlawful discrimination. Issues that were raised by some submitters are set out below.

Clause 35 – counselling, promoting a serious offence

3.41 The Australian Human Rights Commission raised concerns about the breadth of operation of clause 35 of the bill. This clause provides that it is not unlawful to discriminate against a person on the ground of their religious belief or activity if the person has expressed a particular religious belief and a reasonable person, having regard to all the circumstances would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence (being an offence punishable by two or more years imprisonment).

55 Law Council of Australia, *Submission 28*, p. 44. See also: Associate Professor Luke Beck, *Submission 38*, p. 17; Fair Agenda, *Submission 122*, pp. 11–12; LGBTI Legal Service Inc, *Submission 161*, pp. 5–6; Australian Lawyers for Human Rights, *Submission 171*, pp. 11–12; NSW Council for Civil Liberties, *Submission 181*, pp. 16–17; Human Rights Law Centre, *Submission 190*, p. 20; ACT Government, *Submission 192*, paragraphs 8-12, recommendation 1.

56 Associate Professor Luke Beck, *Submission 38*, p. 18.

57 Australian Council of Trade Unions, *Submission 64*, p. 22. See also Equality Australia, *Submission 31*, p. 36.

58 Mr Kassisieh, Equality Australia, *Committee Hansard*, 21 December 2021, p. 71.

The Australian Human Rights Commission raised concerns that if these criteria are met, it would not be unlawful to discriminate against a person on the basis of any of their religious belief or activities – not just on the basis of their religious beliefs or activities generally.⁵⁹

Clause 37 – conduct by law enforcement, national security and intelligence bodies

3.42 Some submitters raised concerns regarding the exception in subclause 37(2). That subsection provides that it will not be unlawful under the bill for persons exercising law enforcement, national security or intelligence powers to discriminate on the grounds of a person's religious belief or activity where the discrimination is reasonably necessary to the exercise of those powers. The explanatory memorandum provides that this is intended to provide clarity that Australian law enforcement, security and intelligence bodies can continue to lawfully perform their powers and functions in circumstances where a person's religious beliefs or activities may have a connection to law enforcement, national security or intelligence.⁶⁰

3.43 The Islamic Council of Victoria raised concerns about this exception, noting that there 'is no correlation between any religious belief or activity and conduct which may be unlawful'. They were of the view that Muslims had 'been subjected to racial profiling and targeting under the guise of national security' and that clause 37 will continue that.⁶¹ The Australian National Imams Council also raised concerns about the breadth of the exception, noting that it 'risks alienating Muslims and creating a sense of mistrust given the experiences of coercive and investigative powers being misused'. They submitted that 'there ought to be a review or capacity to seek redress through the Commissioner'.⁶²

Clause 39 – exceptions in relation to inherent requirements for employment

3.44 The bill sets out that it is unlawful for an employer to discriminate against another person on the ground of the person's religious belief or activity when hiring or dismissing employees or in their terms and conditions of employment.⁶³ However, the bill also provides that it is not unlawful if, because of the person's religious belief or activity, they are unable to carry out the inherent requirements of the employment or partnership.⁶⁴ This reflects existing exemptions in other anti-discrimination

59 Australian Human Rights Commission, *Submission 97*, pp. 63–64.

60 Religious Discrimination Bill 2021, explanatory memorandum, p. 84.

61 Islamic Council of Victoria, *Submission 111*, pp. 4–5.

62 Australian National Imams Council, *Submission 27*, p. 11. See also Australian Muslim Advocacy Network, *Submission 93*, p. 9.

63 Religious Discrimination Bill 2021, clause 19.

64 Religious Discrimination Bill 2021, subclause 39(2).

legislation.⁶⁵ The explanatory memorandum states that in order for a requirement to constitute an inherent requirement it must meet the high threshold set by the High Court, namely that the requirements are 'something essential' to or an 'essential element' of the particular position.⁶⁶

3.45 Some employer groups raised concerns as to the complexity of the proposed exception for employers. The Australian Chamber of Commerce and Industry (ACCI) supported the exception but raised concerns as to the drafting of the provision. For example, it noted there were small differences in the drafting of this exception and that contained in the *Fair Work Act 1996* and other anti-discrimination legislation. It noted that other legislation, and international law, refers to the 'inherent requirements of the *particular job/employment*', whereas subclause 39(2) refers to the 'inherent requirements of the employment or partnership'. The ACCI suggested that the more general term 'employment' should be replaced with the more specific term 'particular position'.⁶⁷

3.46 The Australian Industry Group stated that the inherent requirements exception is appropriate to address circumstances where an employee may not be able to perform the job because of a religious belief or activity, but it is not adequate to address unreasonable religious activity in the workplace:

For example, the exception would not be relevant where an employee complains to the employer about a co-worker who leaves religious pamphlets on the employee's desk every day, despite the employee communicating to the co-worker that this is unwanted, or a co-worker who makes constant unwelcome attempts to convince the employee to follow their religion.⁶⁸

3.47 The Australian Industry Group therefore recommended that the bill be amended to enable employers to take reasonable management action to deal with unreasonable religious activity in the workplace.⁶⁹

3.48 However, the Attorney-General's Department said this was unnecessary as this type of conduct is likely to come up only as potential indirect discrimination and it is already a requirement in clause 14 that, if it's reasonable, it does not constitute discrimination. In response to questions on notice, the Department further noted that the bill will not override work health and safety laws, and:

65 See *Age Discrimination Act 2004*, subsection 18(4); *Disability Discrimination Act 1992*, section 21A; and *Sex Discrimination Act 1984*, section 30.

66 Religious Discrimination Bill 2021, explanatory memorandum, p. 88. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.

67 Australian Chamber of Commerce and Industry, *Submission 199*, pp. 5–7.

68 Australian Industry Group, *Submission 142*, p. 4.

69 Australian Industry Group, *Submission 142*, p. 5.

employers would continue to have a duty to ensure, so far as is reasonably practicable, the health and safety of workers and others in the workplace under the model laws. This includes managing risks to psychological health, such as harassment. It is intended that action taken by employers that is necessary to comply with their duties under work health and safety law would not be unlawful under the Religious Discrimination Bill, in accordance with subclauses 37(1) and (3) of the Bill [which provide that it is not unlawful if the conduct constituting discrimination is in direct compliance with a law of the Commonwealth or a State or Territory].⁷⁰

3.49 Some submitters also expressed concern as to how broad the exception relating to the inherent requirements of the employment may be. Harmony Alliance stated:

the term 'inherent requirements' is not defined and provides scope for employers to define tasks that are contrary to an individual's religious or cultural beliefs as 'inherent requirements' even if they do not pertain to the core business of the employing institution. This clause will disproportionately disadvantage migrant and refugee women by allowing employers to use religious or cultural beliefs as a barrier to employment.⁷¹

Clause 40 – Exceptions relating to camps and conference sites

3.50 The bill provides that it is unlawful for a person to discriminate on the grounds of religious or activity in making facilities available and in relation to accommodation.⁷² However, subclause 40(2) provides that it will not be discrimination if the conduct constituting the discrimination is in the course of establishing, directing, controlling or administering a camp or conference site that:

- (a) provides accommodation and is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and
- (b) the conduct is done in good faith and a person of the same religion as the alleged discriminator could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or it is done to avoid injury to the religious susceptibilities of adherents of the same religion of the alleged discriminator; and
- (c) the conduct is in accordance with a publicly available policy.

3.51 A number of submitters raised concerns as to the breadth of this exception and what this would mean for those wishing to hire out camps and conference sites. Particular concerns were raised that this may disproportionately impact those in rural

70 Attorney-General's Department, answer to question on notice 22003, 14 January 2022 (received 21 January 2022).

71 Harmony Alliance, *Submission 106*, p. 3.

72 Clauses 26 and 27 of the Religious Discrimination Bill 2021.

and remote areas of Australia where alternative venues may be more limited.⁷³ Some submitters raised concerns that this would allow religious camp and conference sites to refuse to provide accommodation or services to certain groups:

This would mean, for instance, that a religious camp could refuse to provide accommodation to a youth group that supports queer youth, unmarried or sole parents, people who have left marriages due to family violence, and others.⁷⁴

3.52 A number of submitters raised concerns that the hiring out of conference and camping sites is a commercial activity, and it is not clear why the bill, which otherwise prohibits discrimination in a commercial context, allows discrimination on the grounds of religion in this instance. For example, the ACT Government noted that this is inconsistent with existing ACT law and raised concerns that this would allow discrimination on the basis of religion for individuals and groups seeking to book accommodation or facilities at religious camps and conference sites in the ACT.⁷⁵ The Australian Human Rights Commission stated:

The proposed exemption is broad enough to cover camps and conference sites where accommodation is offered to the public at large and on a commercial basis. By contrast, under the Bill, religious hospitals, aged care facilities and disability service providers that offer their services to the public at large on a commercial basis are, for that reason, not granted an exemption that would allow them to discriminate against people who acquire their services. There does not appear to be a principled reason why religious camps and conference sites have been treated differently...

In general, organisations that offer goods and services to the public at large on a commercial basis should do so on terms that are non-discriminatory.⁷⁶

3.53 Some submitters also questioned the application of the provision to conduct done in good faith that accords with the doctrines of a religion, or to avoid injury to the susceptibilities of adherents of the religion – rather than to conduct that is necessary to maintain the religious ethos of the camp or conference.⁷⁷ This wording is the same as that used in clauses 7 and 9 and the concerns raised in relation to this wording is considered in more detail in Chapter 4.

73 See for example, Kingsford Legal Centre, *Submission 110*, p. 10; Uniting Network, *Submission 153*, p. 19.

74 See for example, Sean Mulcahy, Associate Professor Kate Seear, Andrea Watling, *Submission 126*, pp. 8–9.

75 ACT Government, *Submission 192*, p. 23.

76 Australian Human Rights Commission, *Submission 97*, p. 60.

77 Sean Mulcahy, Associate Professor Kate Seear, Andrea Watling, *Submission 126*, pp. 8–9; Amnesty International, *Submission 157*, p. 22.

Exemptions granted by the Australian Human Rights Commission

3.54 Clause 44 of the bill provides that the Australian Human Rights Commission may grant to a person or body an exemption from the requirements not to discriminate under Division 2 or 3 of Part 4 of the bill. Such exemptions could not exceed five years. Clause 47 provides that such exemptions may be varied or revoked by the Commission or the minister. Clause 69 also provides that the Commission may delegate all or any of its functions under the bill (including the power to grant exemptions) to any person or body of persons.

3.55 The Senate Standing Committee for the Scrutiny of Bills raised concerns that these powers give the Commission and the minister a broad power to grant, vary or revoke an exemption.⁷⁸ It also expressed concerns as to the breadth of power that may be delegated to 'any person' under clause 69.⁷⁹ The Law Council of Australia stated that it considered it appropriate that the Commission should be able to make exemptions, however, considers there should be a requirement on the Commission to publish in the Gazette notices and reasons with respect to the variation or revocation of exemptions granted.⁸⁰ The Australian Human Rights Commission also noted that other anti-discrimination legislation enables temporary exemptions to be made by the Commission, but that no other legislation gives the Attorney-General the power to vary or revoke an exemption granted by the Commission. In the absence of any explanation for this change, the Commission recommended that the power of the Attorney-General be removed so that the decision remain with the body that has conducted the inquiry into whether the exemption should be granted.⁸¹

3.56 Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Group, Attorney-General's Department, explained the reason for giving the Attorney-General this power:

I think the concern there was really that religion is a slightly different ground to some of those other grounds that are protected by the four existing discrimination laws. It has more of a quality which goes to aspects such as freedom of expression and manifestation of the terms of article 18 of the ICCPR as well. This provision allows that flexibility, essentially from a political aspect, and perhaps the commission may not have taken into account the broad range of equities that are in play when we're talking about exemptions in this type of field. I think it's just a different ground for protection and different to those for existing laws which go much more to

78 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2021* (1 December 2021), p. 29; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 60–64.

79 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18 of 2021* (1 December 2021), pp. 30–31; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 64–66.

80 Law Council of Australia, *Submission 28*, p. 46.

81 Australian Human Rights Commission, *Submission 97*, p. 65.

the kind of personal characteristics and attributes of an individual which are immutable.⁸²

Role of Religious Discrimination Commissioner

3.57 Part 6 of the bill seeks to introduce a Religious Discrimination Commissioner (Commissioner) who would have responsibilities under the bill, including to promote an 'understanding and acceptance of' and compliance with this legislation.⁸³

3.58 The introduction of a Religious Discrimination Commissioner was endorsed in some submissions.⁸⁴ For example, the Australian Christian Churches stated that this 'will be a positive step towards promoting protection against religious discrimination and freedom of speech on religious matters'.⁸⁵ The Association of Heads of Independent Schools of Australia submitted that introducing the new Commissioner 'would signal to the community that Australia values religious freedom and diversity and is prepared to act against religious discrimination. It would also establish a point of contact for those experiencing religious discrimination as well as provide leadership of research on religious activity in Australia and of promotion of religious tolerance'.⁸⁶ Conversely, others submitted that introducing a Commissioner was inappropriate given the lack of other Commissioners, particularly in relation to LGBTQI+ rights.⁸⁷

3.59 Additionally, other submitters queried whether the establishment of a Commissioner was an efficient use of government funding, particularly in light of Religious Freedom Review findings that an additional Commissioner was not

82 Mr Andrew Walter, Attorney-General's Department, *Committee Hansard*, 14 January 2022, pp. 64–65.

83 Religious Discrimination Bill 2021, Part 6-7.

84 Association of Heads of Independent Schools of Australia, *Submission 71*, p. 3; Australian Sangha Association, *Submission 84*, attachment 1; Presbyterian Church of Australia, *Submission 94*, p. 9; Relationships Australia, *Submission 99*, p.13; Queensland Advocacy Incorporated, *Submission 115*, p. 4; Uniting Church in Australia Assembly, *Submission 152*, p. 8.

85 Australian Christian Churches, *Submission 63*, p. 4.

86 Association of Heads of Independent Schools of Australia, *Submission 71*, p. 8.

87 Equality Australia, *Submission 31*, p. 41; Pride in Law, *Submission 37*, p. 6; Public Interest Advocacy Centre, *Submission 40*, p. 25; Just Equal, *Submission 69*, p. 5; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 4; Kingsford Legal Centre, *Submission 110*, p. 10; Transgender Victoria, *Submission 112*, p. 2; Children and Young People with Disability Australia, *Submission 139*, p. 5; Activate Church, *Submission 145*, p. 6; Planet Ally, *Submission 160*, p. 3; LGBTI Legal Service Inc, *Submission 161*, p. 2; Australian Lawyers for Human Rights, *Submission 171*, p. 3; NSW Council for Civil Liberties, *Submission 181*, p. 13; Human Rights Law Centre, *Submission 190*, p. 20.

necessary, as the Australian Human Rights Commission already has the capacity to perform the functions of protecting freedom of religion.⁸⁸

3.60 Some submitters also expressed concerns as to the impact a Commissioner would have on free speech and the relationship between state and religious institutions.⁸⁹ For example, the Presbyterian Church of Victoria submitted:

The PCV has reservations about the creation of this role. Our concerns revolve around the possible interference by the State in adjudicating and judging religious theology.⁹⁰

International human rights law

Rights to freedom of religion, freedom of expression and equality and non-discrimination

Prohibiting religious discrimination

3.61 By making it unlawful to discriminate against a person on the ground of their religious belief or activity in various areas of public life the bill promotes the right to freedom of religion, particularly the right to manifest one's religion, and the rights to freedom of expression and equality and non-discrimination (on the grounds of religious belief) (see Chapter 2 for further details on the content of these rights). This is an important step in realising Australia's international human rights obligations in the areas of freedom of religion and anti-discrimination. In this regard, the UN Human Rights Committee has previously recommended that Australia:

take measures, including by considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and inter-sectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.⁹¹

3.62 Further, international human rights law requires States parties to relevant international treaties to guarantee human rights to all persons without discrimination

88 Expert Panel, *Religious Freedom Review: Report of the Expert Panel*, May 2018, pp. 102-103, recommendation 19; Equality Australia, *Submission 31*, p. 41; Just Equal, *Submission 69*, p. 5; Australian GLBTIQ Multicultural Council, *Submission 80*, p. 4; Pride in Protest & National Union of Students, *Submission 85*, p. 1; AIVL, *Submission 141*, p. 7; Uniting Network Australia, *Submission 153*, p. 6; Rainbow Families, *Submission 182*, p. 5; Liberty Victoria, *Submission 186*, pp. 12–13.

89 Presbyterian Church of Victoria, *Submission 133*, p. 2; see also, Institute of Public Affairs, *Submission 134*, p. 3.

90 Presbyterian Church of Victoria, *Submission 133*, p. 2.

91 UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6 (2017)[17]–[20].

of any kind, including on the grounds of sex, religion and political or other opinion.⁹² Thus, insofar as the bill prohibits discrimination on the ground of religious belief or activity in various areas of public life, including work and education,⁹³ it would not only promote the right to equality and non-discrimination, including Australia's obligation to guarantee rights in a non-discriminatory way, but it would also promote the substantive rights in question, such as the rights to work and education (see Chapter 2 for further details on the contents of these rights).

3.63 To ensure compliance with Australia's international obligations, it is important that the concept of discrimination, as defined under the bill, aligns with international human rights law. In this regard, as discussed above (at paragraphs [3.24] to [3.26]), some submitters raised concerns that the concept of indirect discrimination in clause 14 does not align with the limitation clause set out in article 18(3) of the International Covenant on Civil and Political Rights.

3.64 Noting that the rights to freedom of religion or belief and equality and non-discrimination are 'inextricably linked',⁹⁴ in practice, were a person indirectly discriminated against on the basis of their religion, their right to freedom to manifest religion would also be limited. Under international human rights law, in assessing a claim of indirect religious discrimination and a limitation of an individual's right to manifest religion, regard would be had to the limitation clause in article 18(3) as well as whether the differential treatment was based on reasonable and objective criteria

92 See, e.g., International Covenant on Economic, Social and Cultural Rights, article 2; International Covenant on Civil and Political Rights, article 2; Convention on the Rights of the Child, article 2.

93 See, e.g., Religious Discrimination Bill 2021, clauses 19 and 24.

94 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33].

such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.⁹⁵

3.65 As outlined in Chapter 2, article 18(3) provides that the freedom to manifest one's religion or beliefs may be limited so long as such limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁹⁶ This limitation clause is to be strictly interpreted and limitations 'may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated'.⁹⁷

3.66 Further, where the manifestation of religion or the expression of a religious opinion or belief has an adverse effect on the rights or freedoms of others, each right must be balanced against each other.⁹⁸ For example, if a claim of indirect discrimination involved a clash between the rights of the complainant and the rights of others, including the rights of religious groups to institutional autonomy, these competing rights would need to be balanced. As outlined in Chapter 2, this balancing

95 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

96 International Covenant on Civil and Political Rights, article 18(3).

97 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [31], [44], [45].

98 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8]; United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8]; UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [16].

exercise is often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.⁹⁹

3.67 In the context of this bill, clause 14 provides that a person discriminates against another if they impose a condition, requirement or practice which is not reasonable and which disadvantages people who hold or engage in particular religious beliefs or activities. Assessing whether a condition, requirement or practice is reasonable would be a relevant consideration in determining whether any limitation on the rights to freedom of religion and equality and non-discrimination was proportionate. However, the necessity of the measure is also a relevant consideration. This is most often considered as part of a broader analysis of whether the limitation serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. In the case of *Yaker v France*, for instance, the UN Human Rights Committee assessed whether the restriction was 'prescribed by law, pursue[ed] a legitimate objective, [was] necessary for achieving that objective, and [was] proportionate and non-discriminatory'.¹⁰⁰ Therefore, under international human rights law, both the concepts of reasonableness and necessity are important considerations in assessing any limitation on the rights to freedom of religion and equality and non-discrimination. Were clause 14 to incorporate both the concept of reasonableness and necessity it would likely be brought into closer alignment with international human rights law.

99 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. The authors state that '[r]eligious freedom may be limited in favour of non-discrimination rules and vice versa, unless either result threatens the foundational values of the Convention or the *forum internum* of religious belief'. In addressing the conflict between these rights, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'. For European Court of Human Rights jurisprudence see *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014) [123], [125]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113].

100 *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5]. See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36]. Likewise, the Special rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [17].

Exceptions and exemptions

3.68 The exceptions and exemptions in the bill may also promote the right to freedom of religion to the extent that they afford greater protection to individuals and religious bodies to manifest their religion. However, as outlined in Chapter 2, the rights to freedom of religion and expression usually intersect with other human rights, and manifestations of religion and expressions of beliefs or opinions have the potential to adversely impact on the rights and freedoms of others.

3.69 In this way, the exceptions and exemptions in the bill may have the effect of simultaneously promoting and weakening the above protections of the rights to freedom of religion, freedom of expression and equality and non-discrimination as they would make lawful otherwise discriminatory conduct and allow people to be discriminated against on the basis of their religion or belief. As discussed in Chapter 2, permitting differential treatment on the basis of religion would not only constitute discrimination on the basis of religion but may also have the effect of indirectly discriminating on the basis of other protected attributes. Further, noting the broad discretion conferred on the Australian Human Rights Commission to grant exemptions, the potential scope of any future exemptions and its impact on human rights is not clear.

3.70 As previously noted, the rights to freedom of religion, freedom of expression and equality and non-discrimination may be subject to permissible limitations where the limitation is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. Noting that limitations on the right to freedom to manifest religion must be strictly interpreted, it is necessary to consider whether the exceptions and exemptions contained in the bill, which would have the effect of restricting the right to manifest religion, are based on grounds specified in article 18(3) – namely, necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

3.71 While most exceptions set out in Part 4 of the bill appear to broadly align with the grounds specified in article 18(3), there are some questions regarding clauses 37 and 40. As outlined above, subclause 37(2) provides that it will not be unlawful under the bill for persons exercising law enforcement, national security or intelligence powers to discriminate on the grounds of a person's religious belief or activity where the discrimination is reasonably necessary to the exercise of those powers. The ground of 'national security' is not a specified ground under article 18(3). The UN Human Rights Committee has made clear that:

paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be

imposed for discriminatory purposes or applied in a discriminatory manner.¹⁰¹

3.72 The UN Special Rapporteur has similarly stated that "national security" may not be invoked as a ground for limiting the freedom to manifest one's religion or belief under international human rights law'.¹⁰² They noted:

Increasingly, security-related arguments are deployed to suppress religion or belief. New religious groups are often declared "dangerous" to "national security", even though article 18 (3) of the Covenant does not include national security as a legitimate limitation ground for restricting the manifestation of religion or belief. Arrests for religious activities are carried out and religious officials or members may suffer from continued detention or harassment.¹⁰³

3.73 As noted above (at paragraphs [3.42] to [3.43]), some submitters raised concerns that this exception will be used in a discriminatory manner to target minority religious and racial groups. Noting the clear position under international human rights law that the right to freedom of religion may not be limited on the ground of national security, it appears that subclause 37(2) would not be a permissible exception to the prohibition on religious discrimination. The more general exception relating to compliance with a provision under Commonwealth, state or territory laws would only be permissible if the provision in question related to a ground specified in article 18(3).

3.74 Regarding the exceptions relating to accommodation and facilities, conduct relating to making available religious camps and conference sites would not be discrimination if it meets the test set out in subclause 40(2). As set out above, this test is similarly worded to the tests set out in Part 2 of the bill relating to conduct engaged in by religious bodies that is not discrimination. As discussed in Chapter 4 and 5, there are questions as to whether the threshold tests (including the reasonableness test (in paragraph 40(2)(c)) and the religious susceptibilities test (in paragraph 40(5)(b)) as well as the requirement that conduct be in accordance with a publicly available policy and comply with any requirements determined by the minister (in subclauses 40(2) and (5)), meet the quality of law test and are sufficiently circumscribed such that any limitation on rights is proportionate.

101 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [31], [44], [45].

102 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [45]. The Special Rapporteur further noted 'with concern the prevalence of countries that have adopted a complex set of regulations that unlawfully restrict various manifestations of freedom of religion or belief on the basis of vague and broad concepts such as "national identity", "national unity" or "culture"'.

103 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [72].

Bodies corporate able to claim discrimination

3.75 As outlined above, clause 16 would have the effect of allowing a body corporate to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely associated with.

3.76 Under international human rights law, States Parties have a general obligation to respect rights and ensure them to all *individuals* in their territory and subject to their jurisdiction.¹⁰⁴ The UN Human Rights Committee has made clear that the beneficiaries of human rights are individuals, while noting that certain rights, such as the right to freedom to manifest religion or belief, may be enjoyed in community with others.¹⁰⁵

3.77 In this regard, as discussed in Chapter 2, international human rights law has recognised the importance of protecting religious groups and their institutional autonomy in realising the individual right to freedom of religion.¹⁰⁶ While there is a communal element to the right to freedom of religion, individuals remain the beneficiaries of human rights and therefore may not be consistent with international human rights law that anti-discrimination law be extended to protect bodies corporate.

104 See, e.g., International Covenant on Civil and Political Rights, article 2. See also UN Human Rights Committee, *General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004).

105 UN Human Rights Committee, *General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004) [9]. The Committee further noted: 'The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights'.

106 See, e.g., UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41]. See also *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014). At [127] the Court stated: '[w]here the organisation of the religious community is in issue, Article 9 [freedom of thought, conscience and religion] of the [European Convention on Human Rights] must be interpreted in the light of Article 11 [freedom of assembly and association], which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'.

Committee view

3.78 The committee notes that almost all submitters and witnesses to this inquiry recognised the importance of protecting the right to be free from discrimination on the grounds of religious belief and activity. This also accords with the committee's survey results, where 95 per cent of respondents considered there should be legislation to protect people from religious discrimination in certain areas of public life on the grounds of their religious belief or activity.¹⁰⁷

3.79 The committee considers the right to freedom of religion is a fundamental human right and welcomes enhancements to the statutory protection of the right to freedom of religion in Australia. The committee considers this brings legislative protections for religious belief and activity to the same standard as that already afforded under federal law on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status. The committee is also pleased to see the recognition of the importance of Australia enshrining the right to freedom of religion as contained in the International Covenant on Civil and Political Rights, noting for the past decade this committee has considered the rights in this treaty, and others, when assessing the human rights compatibility of Commonwealth legislation before the Parliament.¹⁰⁸

3.80 The committee therefore considers that Part 4, in setting out that discrimination on the ground of a person's religious belief or activity in certain areas of public life is unlawful, is an important and necessary step in protecting the right to freedom of religion. The committee considers that Part 4, in general, is consistent with other protections in Australian anti-discrimination law. The committee considers Part 4 promotes the rights to freedom of religion, freedom of expression and equality and non-discrimination (on the grounds of religion).

3.81 The committee considers it appropriate that the bill defines the term 'religious belief or activity' broadly. Adopting a broad, principled approach to the concept of religion, as informed by the approach developed by the High Court, is more appropriate than seeking to definitely set this out in legislation, noting that faith traditions may emerge or develop over time.

3.82 The committee considers that the bill appropriately defines the concept of direct and indirect discrimination. In particular, the committee is of the view that it is appropriate to define indirect discrimination as imposing a condition, requirement or practice which is not reasonable and which disadvantages people who hold or engage in particular religious beliefs or activities. However, the committee is concerned that the burden of proving if a condition, requirement or practice is reasonable would rest

107 See Appendix 4.

108 See the *Human Rights (Parliamentary Scrutiny) Act 2011*.

on the person bringing the discrimination complaint, not on the person imposing it, and considers this should be amended to bring it in line with other anti-discrimination legislation.

3.83 The committee further notes that the bill seeks to introduce exceptions and exemptions to the prohibition of discrimination on the ground of religion. The committee considers these are reasonable and appropriate and allow for limited bases on which would justify allowing otherwise discriminatory conduct (for example, to reflect the distinction between public and private life). In relation to exceptions relating to work, the committee considers it appropriate that the bill sets out that it is not unlawful for a person to discriminate where, because of the person's religious belief or activity, they are unable to carry out the inherent requirements of the job. The committee notes that in order for a requirement to constitute an 'inherent requirement' it must meet the high threshold set by the High Court, namely that the requirements are 'something essential' to or an 'essential element' of the particular position. The committee considers this is appropriate. However, the committee considers that, for the sake of clarity and consistency across other legislation, the reference to the 'inherent requirements of the employment' should be replaced with the more specific 'inherent requirements of the particular position'.

3.84 While the committee considers it essential that employees be guaranteed the right to freedom of religion in the workplace, it is also important that unnecessary burdens are not placed on employers, and that this legislation not create confusion as to what reasonable management action employers can take. The committee agrees with submitters, such as the Australian Industry Group, that employers should be able to take reasonable management action in a reasonable manner, and that this should not constitute discrimination. The committee appreciates that the bill is unlikely, as a matter of law, to classify reasonable management action as discrimination (for example, it may be necessary to take management action against employees who continually leave religious pamphlets on their colleagues' desks as this would remain part of an employer's duty to ensure workers and others are not harassed). However, the committee considers it would be preferable, for the avoidance of any doubt, that the bill and explanatory memorandum be amended to clarify that the bill will not make it unlawful for reasonable management action to be undertaken by employers.

3.85 Further, the committee considers it appropriate that the Australian Human Rights Commission be able to grant temporary exemptions, in the same way as it does under existing anti-discrimination law. However, in the interests of transparency, the committee considers that the bill should require that, in making such exemptions, the Commission should publish the evidence on which its findings were made and its reasons for making the exemption. The committee notes that this would be consistent with requirements set out in other anti-discrimination legislation.¹⁰⁹ In addition, given

109 See *Sex Discrimination Act 1984*, section 46; *Disability Discrimination Act 1992*, section 57; and *Age Discrimination Act 2004*, section 46.

the importance of the power to grant exemptions – which would mean that conduct which would otherwise be unlawful discrimination should be permitted on a temporary basis – this should not be a power that the Commission should be able to delegate to any level staff member, or indeed, 'any person'. The committee considers only a Commissioner, or the very senior executive members of staff of the Commission, should be able to make such exemptions.

3.86 The committee also notes the concerns raised by the Australian Human Rights Commission as to why the Attorney-General should be able to vary or revoke an exemption made by the Commission. The committee appreciates the importance of protecting the independence of the Commission and considers it would generally be best placed, having granted the initial exemption, to consider any need for a variation or revocation of the exemption. However, the committee notes that any exemption would make it lawful for those granted an exemption to discriminate on the grounds of religion. Noting the importance of protecting the right to freedom of religion, the committee considers there may be circumstances where the Attorney-General is best placed to consider the broader equities around the making of such an exemption, and considers it important that the Attorney-General retain the flexibility to vary or revoke an exemption. However, the committee recognises the importance of parliamentary oversight of any decision to vary or revoke an exemption by the Attorney-General. On that basis, the committee considers it would be appropriate that should the Attorney-General vary or revoke an exemption, this be done by way of a legislative instrument (rather than a notifiable instrument), so that Parliament has some oversight of this decision via the disallowance process.¹¹⁰

3.87 The committee acknowledges that there are a wide range of views regarding some of the other issues raised in this Chapter. However, the committee considers that in relation to these issues, the bills generally strike the appropriate balance between upholding the important right to be free from discrimination on the basis of religion and respecting the rights of others.

Recommendation 1

3.88 The committee recommends that, consistent with other anti-discrimination legislation, clause 14 of the Religious Discrimination Bill 2021 be amended to require that in determining if a condition, requirement or practice imposed on a person resulted in indirect discrimination, the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving it was reasonable.

110 See *Legislation Act 2003*, section 42. Note also that if primary legislation declares an instrument to be a legislative instrument, it becomes a legislative instrument (even if it is not legislative in character), see *Legislation Act 2003*, subsection 8(2).

Recommendation 2

3.89 The committee recommends that paragraph 39(2)(b) of the Religious Discrimination Bill 2021 be amended to refer to the inherent requirements of the 'particular position', rather than the inherent requirements of the 'employment'.

Recommendation 3

3.90 The committee recommends that the government consider including a legislative note in the Religious Discrimination Bill 2021 that states that reasonable management action conducted within a reasonable manner will not constitute unlawful discrimination, and provide examples in the explanatory memorandum of the type of action that would likely constitute reasonable management action.

Recommendation 4

3.91 The committee recommends, consistent with other anti-discrimination legislation, that Division 4 of Part 4 of the Religious Discrimination Bill 2021 be amended to include a provision that the Australian Human Rights Commission and Attorney-General, in exercising powers under clauses 44 and 47, must include with the explanatory materials accompanying the instrument the following information:

- the Commission or Attorney-General's findings on material questions of facts in relation to the decision;
- the evidence on which those findings were based;
- the reasons for the decision; and
- the fact that an application may be made to the Administrative Appeal Tribunal for a review of the decision.

Recommendation 5

3.92 The committee recommends that subclause 69(1) of the Religious Discrimination Bill 2021 be amended to provide that the Australian Human Rights Commission can only delegate the power to make an exemption to a Commissioner or an SES member of staff of the Commission.

Recommendation 6

3.93 The committee recommends that clause 47 of the Religious Discrimination Bill 2021 be amended to provide that the Australian Human Rights Commission may vary or revoke an exemption by notifiable instrument, but the Attorney-General may only vary or revoke an exemption by disallowable legislative instrument (ensuring there is parliamentary oversight of any political decision to vary or revoke an exemption made by the Commission).

