

## Chapter 4

### Conduct by religious bodies

4.1 This chapter outlines the key issues raised by submitters and witnesses in relation to clauses 7–10 (in Part 2) of the bill regarding certain conduct by religious bodies (other than religious educational institutions, which is dealt with in Chapter 5). A number of faith-based organisations were strongly supportive of ensuring that religious bodies should not be considered to be discriminating on the basis of religion if acting in accordance with their faith (although there were some concerns as to what test should apply). Conversely, there was strong opposition raised by a number of other groups about these provisions, as set out below. This chapter considers:

- clause 7, which makes it 'not discrimination' for religious bodies to act in accordance with their faith, including considering the definition of 'religious body'; the reasonableness test; and the test of avoiding injury to religious susceptibilities;
- the effect of Part 2 on employment by religious bodies (not including schools, which is set out in Chapter 5);
- the effect of Part 2 on access to services offered by religious bodies (such as services from faith-based charities), and the effect of clause 10, allowing reasonable conduct intended to meet a need or reduce a disadvantage; and
- amendments to the Charities Act regarding views taken by religious bodies in relation to marriage.

4.2 The chapter concludes with an assessment of the application of international human rights law to these provisions and provides the committee's view and recommendations.

#### Religious bodies acting in accordance with their faith

4.3 As set out in Chapter 2, Part 2 of the bill sets out conduct that will not constitute discrimination under the bill. Clause 7 (within Part 2) sets out the circumstances in which a religious body may generally act in accordance with their faith such that it will not be discrimination on the grounds of religion. Specifically, clause 7 provides that a religious body does not discriminate against a person on the ground of religious belief or activity by engaging, in good faith:

- (a) in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; and/or

(b) in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.<sup>1</sup>

4.4 Conduct in this context includes giving preference to persons of the same religion as the religious body. Clause 8 provides that subclauses 7(2) and (4) do not apply to certain conduct by religious hospitals, aged care facilities, accommodation providers and disability service providers. The explanatory memorandum states that this reflects the public benefit and important role of hospitals, aged care and disability facilities in the community.<sup>2</sup> The bill also notes that conduct that is not discrimination under this bill (as a result of Part 2 of the bill) 'may still constitute direct or indirect discrimination under other anti-discrimination laws of the Commonwealth'.<sup>3</sup>

4.5 The explanatory memorandum sets out that clause 7 is intended to apply to conduct that has an intrinsically religious character or is fundamental to the practice of religion.<sup>4</sup>

4.6 A number of submitters welcomed the inclusion of clause 7. For example, Associate Professor Mark Fowler noted that this declares the long-settled principle of international human rights law that the legitimate exercise of religious freedom is not discrimination.<sup>5</sup> The Australian Association of Christian Schools noted that clause 7:

positively protects the right of religious bodies and religious schools to choose to employ people whose religious beliefs will uphold the religious ethos of their organisation. This will allow religious bodies and schools to freely express who they are and allows for an alignment of values and 'mission fit' between the religious organisation and the individuals employed to represent the organisations in the public delivery of its services.<sup>6</sup>

4.7 The Institute of Civil Society argued:

This is a long overdue recognition that religious bodies when applying religious belief filters to membership and employment decisions are expressing their freedom of association – they can choose to prefer to have as members and employees those who agree with the beliefs of the religion and who live it out.<sup>7</sup>

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1 Religious Discrimination Bill 2021, subclauses 7(2) and (4).

2 Religious Discrimination Bill 2021, explanatory memorandum, p. 46.

3 Religious Discrimination Bill 2021, note 2 to subclauses 7(2) and (4). See also the Attorney-General's Department, Answers to written questions on notice, received 11 January 2022, question 5.

4 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

5 Associate Professor Mark Fowler, *Submission 20*, p. 10.

6 Australian Association of Christian Schools, *Submission 23*, p. 12.

7 Institute for Civil Society, *Submission 131*, p. 3.

4.8 However, a number of other submitters questioned the need for the clause, and its breadth. For example, Equality Australia stated that 'these sections place an ambiguous, uncertain and unwieldy hole in the legislation, allowing religious bodies to discriminate within their organisations against people who hold different religious beliefs (including those who are not religious)'.<sup>8</sup> The Law Council considered that clause 7 'is not concerned with prohibiting discrimination on religious grounds, it is aimed at *permitting* religious discrimination in the name of religion'.<sup>9</sup> It queried whether clause 7 is reasonable, proportionate and necessary:

The clause has the potential to enable a wide range of religious bodies to discriminate on religious grounds against people of other faiths, or with no faith. In turn, this is likely to undermine their rights including to equality and non-discrimination, work and education. This discrimination is likely to operate most strongly against already disadvantaged people who are least likely to be able to find alternative services or employment. This undermines the Bill's expressed intention to promote a tolerant, diverse and inclusive Australia, by providing that many religious bodies, including those who engage daily with, serve, teach or employ a broad cross-section of the public, are exempt from its prohibitions for a wide range of conduct which would otherwise constitute religious discrimination. In those States where religious discrimination is currently prohibited it will have the effect of making it easier to discriminate on the grounds of religion.<sup>10</sup>

4.9 Specific issues raised by submitters are considered in further detail below.

#### ***Definition of 'religious body'***

4.10 Clause 7 sets out that religious bodies may generally act in accordance with their faith. A 'religious body' is defined as meaning any of the following that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion:

- (a) an educational institution (which means a school, college, university or other institute at which education or training is provided);
- (b) a registered charity;
- (c) any other kind of body (other than a body that engages solely or primarily in commercial activities).<sup>11</sup>

4.11 A number of submitters raised concerns about this definition, with some arguing it was too restrictive and others arguing it was too broad.

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8 Equality Australia, *Submission 31*, p. 25.

9 Law Council of Australia, *Submission 28*, p. 23.

10 Law Council of Australia, *Submission 28*, p. 24. See also, Australian Discrimination Law Experts Group, *Submission 33*, p. 14.

11 Religious Discrimination Bill 2021, clause 5.

4.12 For example, Associate Professor Mark Fowler noted that not-for-profit charities that engage solely or primarily in commercial activities would not be captured by the definition of 'religious body'. He argued that many charities undertake fundraising, and this definition risks 'preventing a sizeable proportion of the not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake.'<sup>12</sup>

4.13 In contrast, a number of other submitters raised concerns about the breadth of the definition of 'religious body' (particularly as it applies in clause 7). For example, the Law Council of Australia noted that there is no requirement that a religious body be established for religious purposes, only that it is 'conducted in accordance with' the doctrines etc of a particular religion. The Law Council also noted that with respect to religious charities, there is no requirement that it have the sub-purpose of advancing religion and that this is broader than that set out in the second exposure draft which referred instead to 'registered public benevolent institutions'. The Law Council also noted that multiple bodies may fall within the 'any other kind of body' limb, and it may be difficult for bodies to determine if they are engaging solely or primarily in commercial activities. The Law Council concluded:

Clause 7 would extend the protection to discriminate on religious grounds to a large number of organisations which are not strictly engaged in providing religious services (such as mass, weddings, funerals, baptisms etc). It would include a broad number of organisations run by religions, such as clothes and second hand goods charities, health bodies which are not hospitals, advocacy organisations, organisations providing youth or crisis support (outside of accommodation), schools, universities, child care and early learning centres. Many of these organisations receive public funding and provide critical services to the community.<sup>13</sup>

4.14 A number of submitters raised similar concerns, particularly noting that this definition contrasts with exceptions in other anti-discrimination legislation, which apply the exceptions only to bodies 'established for religious purposes'.<sup>14</sup>

### ***Reasonableness test***

4.15 Subclause 7(2) states that a religious body does not discriminate by engaging, in good faith, in conduct 'that a person of the same religion as the religious body could 'reasonably consider' to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. The explanatory memorandum to the bill states that this

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12 Associate Professor Mark Fowler, *Submission 20*, p. 9.

13 Law Council of Australia, *Submission 28*, p. 19.

14 *Sex Discrimination Act 1984* (Cth), paragraph 37(1)(d) and *Age Discrimination Act 2004*, section 35. See, e.g., Australian Discrimination Law Experts Group, *Submission 33*, p. 15. See also Public Interest Advocacy Centre, *Submission 40*, p. 10; Australian Council of Trade Unions, *Submission 64*, p. 18; Australian Human Rights Commission, *Submission 97*, pp. 40–42.

imports an objective reasonableness test, and that the courts would then not need to determine whether particular conduct is in accordance with the doctrines etc of a particular religion, but whether members of the same religion would reasonably consider that to be so. The explanatory memorandum states that a court may still have regard to any foundational documents that a religious body considers supports the conduct, including the particular religion's doctrines, tenets, beliefs or teachings.<sup>15</sup> In relation to the 'good faith' limb, the Attorney General's Department noted that a court is likely to apply a broad interpretation, encompassing both subjective and objective considerations.<sup>16</sup>

4.16 A number of submitters raised concerns that the 'reasonableness test' of religious belief was inconsistent with the 'genuineness test' of religious belief that applies to statements of belief (see Chapter 6 for discussion of this alternate test). For example, the Australian Association of Christian Schools stated that the reasonableness test 'gives rise to the difficult scenario of judges having to interpret questions of theology or religious doctrines to determine if statements of belief by a corporate body conform to religious doctrine, and is inconsistent with common law precedents.<sup>17</sup> The Human Rights Law Alliance also stated:

There is no good reason for this inconsistency and protections for religious bodies should not be frustrated by the possibility of disputes within religious communities over doctrine and theology that a judge would need to adjudicate. Just as with an individual, the Courts should have regard to the evidence of genuine doctrinal standards that are asserted and practiced by a religious body.<sup>18</sup>

4.17 The Institute for Civil Society stated that when determining the religious beliefs of a religious body 'the test should not require a judge to identify and interpret the doctrines of the religion, thus breaking the well-established convention of excluding the judiciary from assessing questions of theology. Instead, the body should be able to adopt a statement of its religious beliefs and that should be sufficient evidence of what they are'.<sup>19</sup>

4.18 In contrast, a number of submitters raised concern as to the effectiveness of enabling the test to be met by ensuring just one other person of the same religion

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15 Religious Discrimination Bill 2019, explanatory memorandum, p. 44.

16 Attorney-General's Department, answer to written questions on notice, question 4 (received 11 January 2022). The Attorney-General's Department noted that this is an approach that was set out in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

17 Australian Association of Christian Schools, *Submission 23*, p. 12.

18 Human Rights Law Alliance, *Submission 30*, pp. 9–10.

19 Institute for Civil Society, *Submission 131*, pp. 7–8.

could reasonably consider the conduct to be in accordance with doctrines etc.<sup>20</sup> The Australian Discrimination Law Experts Group stated that the bar set by this test is so low as to be entirely ineffective:

The religious body would not be required to establish any recognised religious doctrinal basis for its act; even in relation to adducing evidence from a single individual adherent of the same faith, the religious body would not be required to establish that the individual agreed the act was in accordance with the beliefs of that religion. Rather, the religious body would only need to establish that an individual—any individual—might consider the act, reasonably, to be in accordance with the beliefs of that religion.<sup>21</sup>

4.19 The Public Affairs Commission of the Anglican Church of Australia acknowledges the difficulties of a court determining the doctrines of religion but considered this was common in legislation and that courts have usually given a great degree of deference to leaders of religion on what the doctrines are. It stated:

We believe the test requires more than just the views of any person of the same religion, no matter how uninformed or peculiar those views may be. We note that person has to “reasonably” consider the matters to be within the doctrines, tenets, beliefs or teachings of the religion. However, this RDB test is only what is reasonable from the perspective of a potentially uninformed individual, which does not assist in narrowing the exception to any great extent.<sup>22</sup>

4.20 The Law Council of Australia stated that they were not aware that this test appears elsewhere in Australian legislation, and it moves the relevant lens away from whether the conduct conforms to the doctrines etc, to an assessment by a person of the same religion as the religious body:

The Law Council considers that there may be multiple ‘reasonable’ interpretations amongst adherents of a religion as to what is in accordance with the doctrines, tenets, beliefs or teachings of a religion. Some religions have very large numbers of followers. This may undermine the certainty and clarity of the relevant provisions and broaden their scope. Further, there is no requirement that the relevant religious adherent be particularly well informed or senior within the religion, or that the reasonable interpretation

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20 See, e.g., Council of the Ageing, *Submission 29*, p. 3; Kingsford Legal Centre, *Submission 110*, pp. 3–4; Human Rights Law Centre, *Submission 190*, p. 12; ACT Government, *Submission 192*, paragraphs [46]–[48]; Equality Australia, *Submission 31*, p. 26; Public Interest Advocacy Centre, *Submission 40*, pp. 8–9; Amnesty International, *Submission 157*, p. 22; Anja Hilgemeijer, *Submission 5* (quoting Anja Hilgemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', 93, *Australian Law Journal* 2019, pp. 764–756; Liberty Victoria, *Submission 186*, pp. 4–5.

21 Australian Discrimination Law Experts Group, *Submission 33*, p. 13.

22 Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 8.

be correct. This goes to the balance and proportionality struck in this provision.<sup>23</sup>

4.21 A number of submitters recommended that the test used in other anti-discrimination legislation be used, namely to ensure it is not unlawful discrimination for religious bodies to do something 'that conforms to the doctrines, tenets or beliefs of that religion'.<sup>24</sup> The Public Affairs Commission of the Anglican Church of Australia agreed with this and also suggested that at least the test should be whether the conduct or belief is such that a substantial number of persons in senior positions or leadership roles or with authority to determine such matters in that same religion could reasonably consider it to be in accordance with the doctrines, tenets, beliefs or teachings of the religion. It also stated this 'would not require unanimity or even a majority view but to ensure that it is not just a bizarre misinterpretation of doctrine by a very small minority, possibly of two persons, within the religion'.<sup>25</sup>

### ***Avoid injury to religious susceptibilities***

4.22 Subclause 7(4) of the bill also provides that a person does not discriminate under this bill by engaging in good faith 'in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body'. A number of submitters noted that this differs from the exception in the *Sex Discrimination Act 1984*, which provides an exception for acts or practices of religious bodies that is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.<sup>26</sup> As such, a number of submitters recommended that subclause 7(4) (and associated clauses) be amended to include the word 'necessary'.<sup>27</sup>

### **Employment by religious bodies (clause 7, 9 and 10)**

4.23 In setting out when a religious body will not discriminate against a person under the bill, subclauses 7(3) and (5) explain that this includes giving preference to persons of the same religion as the religious body. This would apply to all religious bodies, as set out above, including educational institutions. Further, clause 9 provides that a religious hospital, aged care facility, accommodation provider or disability

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23 Law Council of Australia, *Submission 28*, p. 21.

24 See, *Sex Discrimination Act 1984*, paragraph 37(1)(d); *Age Discrimination Act 2004*, paragraph 35(a), and see for example, Law Council of Australia, *Submission 28*, p. 21 and 25; Equality Australia, *Submission 31*, p. 6; Children and Young People with disability Australia, *Submission 139*, pp. 4–5; Amnesty International, *Submission 157*, pp. 22–23; Planet Ally, *Submission 160*, p. 3; Uniting Church in Australia, answer to question on notice, 14 January 2022 (received 21 January 2022).

25 Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 8.

26 *Sex Discrimination Act 1984*, paragraph 37(1)(d).

27 See, for example, Public Interest Advocacy Centre, *Submission 40*, pp. 8; Australian Human Rights Commission, *Submission 97*, p. 43; Public Affairs Commission of the Anglican Church of Australia, *Submission 78*, p. 8; Equality Australia, *Submission 31*, p. 6; Law Council of Australia, *Submission 28*, p. 25.

service provider does not discriminate in relation to employment if it does so on the basis set out above (e.g. where a person of the same religion could reasonably consider it to be in accordance with doctrines etc, or to avoid injury to religious susceptibilities), as well as in accordance with a publicly available policy. The issue of educational institutions is considered in detail in Chapter 5, as are views in relation to requirements for a publicly available policy setting out the body's views in relation to employment.

4.24 A number of submitters expressed their support for enabling religious bodies to discriminate on the basis of religion in employment related decisions, noting the importance of this in ensuring the body was able to maintain its religious ethos. The Australian Christian Churches stated:

In any jurisdiction that has a prohibition on religious discrimination, it is necessary to have provisions that address the employment rights of faith-based organisations. A prohibition on religious discrimination can never be comprehensive... Freedom of religion necessitates that faith-based organisations have a right to select staff who are not only adherents of that faith but support the doctrines and practices of the religious faith to which the organisation is committed. This is no different from any other organisation that has a mission or purpose.<sup>28</sup>

4.25 Freedom for Faith argued:

Just as a political party can “prefer” to employ members of that party in head office, or an environmental lobby group can “prefer” to employ those who share its commitments, so religious bodies should generally be able to “prefer” to employ staff of the same faith, or support causes which match its faith commitments. Inclusion of “preference” is an important principle which recognises that occasionally a religious body may need specialist skills which are not easily available in its faith community, and so in some circumstances may choose to employ someone not in that community. Doing so should not undermine its general policy of preference.<sup>29</sup>

4.26 Pastor Michael Worker, General Secretary and Director of Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, explained that the Church has a worldwide statement of fundamental beliefs relating to health, lifestyle and biblical principles and they seek to have people on staff who will choose to align themselves with those beliefs and teachings of the church, and as such it would be contrary to their beliefs to, for example, employ someone in a same-sex marriage or relationship.<sup>30</sup>

4.27 Archbishop Peter Comensoli, Chair, Bishops Commission for Life, Family and Public Engagement, Australian Catholic Bishops Conference explained why it is

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

29 Freedom for Faith, *Submission 10*, p. 6.

30 Pastor Michael Worker, Seventh Day Adventist Church, *Hansard*, 13 January 2022, pp. 27–28.

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important to be able to employ people in accordance with the ethos of an organisation, from the Catholic point of view:

Whether it's within welfare services, health services, direct faith services or educational services, we approach that from the perspective of what our understanding of the human person is. That's informed by our beliefs, our teachings, our culture and our practices. In a sense, it's a proposal. We propose; we're not imposing. We propose and people can be a part of that, if they wish to, or not. So that sort of sense in which to develop an ethos that is something that people can understand and accept or not then becomes something that is available for them. An area which I just mentioned is some services that we provide which would be provided differently by other organisations in a similar sort of area. If people know that this is where we're coming from and this is our perspective and we carry with it a certain sense of the positivity of the human person, there's an openness to them understanding what they're involved in.<sup>31</sup>

4.28 The Right Reverend Doctor Michael Stead, Bishop of South Sydney, Anglican Church Diocese of Sydney stated:

We believe that the people who work in these organisations actually shape the ethos. It's not good enough just to have a statement of belief plastered on the wall; we actually have it embodied. We believe that Anglicare does what it tries to do, which is to love people in the name of Jesus. It does that by having people who believe in Jesus doing their work. It's very hard to do that with people who don't have a faith commitment as Christians. Now, lots of people who are not Christians and who are of very different religions work for Anglicare, but they understand that they're working for an organisation with a strong Christian ethos and they embrace that.<sup>32</sup>

4.29 In contrast the Uniting Church in Australia Assembly told the committee:

In our community service activity across the country, which is quite significant in size and scope, we are still able to keep the integrity of the organisation as a Christian faith based organisation without having to have that opportunity to employ people from a particular faith, because, in fact, as a Christian and Uniting Church community service activity, the diversity of our workforce is central to the work that we do in providing person centred care and providing for the needs of individuals. In fact, it's almost counterintuitive to that, in that we want the opportunity to be able to provide, as we've said, not only the best person for the job but a diversity of people and a workforce that reflects the community in which the service is being delivered ... We can still maintain the integrity of the organisation

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31 Archbishop Peter Andrew Comensoli, Australian Catholic Bishops Conference, *Committee Hansard*, 13 January 2022, pp. 18–19.

32 The Right Reverend Doctor Michael Stead, Anglican Church Diocese of Sydney, *Committee Hansard*, 13 January 2022, p. 48.

as a faith based organisation without having to have that in our back pocket; we don't need that in order to do that.<sup>33</sup>

4.30 A number of other submitters raised concerns as to the effect of these provisions on the rights of workers. For example, the Australian Council of Trade Unions argued that '[t]hese provisions will mean that workers in religious organisations with differing religious beliefs to their employer will have little protection at work'. They submitted that the bill extends the 'right to discriminate... not just to giving priority to applicants of a certain faith in recruitment practices, but to any kind of discrimination in employment on religious grounds, including refusing an existing staff member a promotion or a pay-rise, or terminating their employment'. The Australian Council of Trade Unions were concerned that the bill gives 'significant power to religious employers to dictate via a policy document what a particular religious ethos or teaching must mean to individual workers'.<sup>34</sup>

4.31 In answers to questions taken on notice, the Australian Council of Trade Unions added that the 'exemptions are too broad and the protections and safeguards in the Bill are not sufficient to ensure that these exemptions will not be used to victimise workers who stand up for better rights at work'.<sup>35</sup>

4.32 Similarly, the Australian Medical Association raised concerns that 'these provisions may limit the education, training and career development opportunities for many doctors should they be discriminated against by religious hospitals and aged care facilities for not adhering to a particular faith'.<sup>36</sup>

4.33 Ms Lori-Anne Sharp, Acting Federal Secretary, Australian Nursing and Midwifery Federation, argued that this 'could potentially have a negative impact on recruiting and retaining a future carer workforce and nursing workforce'.<sup>37</sup>

4.34 The Centre for Women's Safety and Wellbeing stated that these provisions will overwhelmingly impact women, as health care and social assistance and education and training are female dominated industries, and will compound the current employment experiences of women.<sup>38</sup>

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33 Ms Sharon Hollis, Uniting Church in Australia Assembly, *Committee Hansard*, 14 January 2022, pp. 57–58.

34 Australian Council of Trade Unions, *Submission 64*, pp. 18–19.

35 Australian Council for Trade Unions, answer to question on notice, question 1 from Senator Rice, 14 January 2022 (received 21 January 2022). See also Australian Services Union, *Submission 101*, p. 6; Rainbodhi LGBTQIA+ Buddhist Community, *Submission 8*, p. 5.

36 Australian Medical Association, *Submission 96*, p. 3. See also ACON, *Submission 34*, p. 10; National Association of People with HIV Australia, *Submission 132*, p. 5.

37 Ms Lori-Anne Sharp, Australian Nursing and Midwifery Federation, *Committee Hansard*, 14 January 2022, p. 3.

38 Centre for Women's Safety and Wellbeing, *Submission 179*, p. 4. See also Australian Women's Health Network, *Submission 83*, p. 3.

4.35 The Buddhist Council of NSW raised concerns that these provisions would disadvantage people of Buddhist and other minority religious faiths, stating:

Our community members may be locked out of employment opportunities in education, hospitals, aged care, disability services and charities run by religious bodies, even when these are government contracts or publicly funded and even when there is no inherent religious aspect to this work.<sup>39</sup>

4.36 Other submitters raised particular concerns for those located in remote and rural communities where employment opportunities may be limited. For example, Rainbow Territory stated:

In remote communities in the NT, where there may only be one or two employers in a particular industry, and all are religiously affiliated, the Bill will significantly limit employment opportunities for LGBTIQI community members, who may face unfair treatment in the workplace on the grounds of the employers' religious beliefs.<sup>40</sup>

4.37 The Law Council of Australia recognised the need for religious institutions to preserve their ethos, including by ensuring certain staff, such as chaplains, were of the same faith. However, they noted that clause 9 applies to all employments, including junior roles, and it 'may enable discrimination against hospital orderlies or occupational therapists, whose religious views are irrelevant to their effective performance in their role'.<sup>41</sup>

4.38 Further, the Australian Discrimination Law Experts Group argued that requiring doctors, aged care workers and employees at accommodation and disability service to be of the same faith as the religious organisation 'is an unwarranted limitation on freedom of speech, opinion and belief' and employment decisions should be based on merit'. They noted that as religious organisations receive government funding and are primarily conducted for commercial or service provision purposes, they should not enjoy special exceptions.<sup>42</sup>

4.39 The Australian Human Rights Commission argued that the existing exception in clause 39 of the bill (to allow for discrimination on the basis of religion if a person would otherwise not be able to meet the inherent requirements of the position) is sufficient, and there does not appear to be a principled reason to treat hospitals, aged care facilities or accommodation providers any differently to other employers.<sup>43</sup> Mr Graeme Edgerton, the Deputy General Counsel for the Australian Human Rights Commission stated that the bill provides religious bodies with the 'right to preference'

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39 Buddhist Council of NSW, *Submission 51*, pp. 2–3. See also Australian Sangha Association, *Submission 84*, p. 2.

40 Rainbow Territory, *Submission 193*, p. 1.

41 Law Council of Australia, *Submission 28*, p. 28.

42 Australian Discrimination Law Experts Group, *Submission 33*, p. 18.

43 Australian Human Rights Commission, *Submission 97*, p. 59.

as well as the 'right to discriminate once people are already employed', including in relation to the terms and conditions that can be imposed on an employee and termination of employment. He noted that the prohibition on religious discrimination 'should apply equally to religious organisations and to secular organisations once people are employed'.<sup>44</sup>

### **Access to services from religious bodies**

4.40 As clause 7 provides it will not be discrimination on the grounds of religion for religious bodies to act according to their faith, this would also apply to charities that provide services such as welfare, second-hand clothes, food, and child-care to the public. As such, these charities could legitimately differentiate between people on the grounds of their religion in the provision of their services. For further discussion about the bodies this provision applies to, see the discussion about the definition of 'religious bodies' above. It is noted that this would not apply to hospitals, aged care facilities, accommodation providers (such as those providing homelessness services) and disability service providers (see clause 8). Equality Australia queried the extent to which faith-based organisations providing mixed services can discriminate, given they may provide a mixture of accommodation, disability and other services. It also noted that the meaning of a 'hospital' is not clear, given the explanatory memorandum used the example of a medical centre, and not a hospital, to illustrate the exemption applicable to hospitals.<sup>45</sup>

4.41 The Australian Council of Social Service was particularly concerned about faith-based organisations being allowed to discriminate against people who may fairly and reasonably access certain services or seek employment:

People who access community services include those experiencing low income, poverty, disadvantage, marginalisation and other forms of hardship. The proposed exemptions for faith-based organisations may leave people stranded without adequate assistance, especially in regional, rural and remote communities where there are fewer providers in operation.<sup>46</sup>

4.42 A number of charitable service providers also raised concerns about the impact of the bill on people in accessing essential services. Sacred Heart Mission considered the bill 'will cause harm and distress to people who are already vulnerable within our society' and noted:

Faith-aligned institutions, such as ours have demonstrated that it is possible to uphold the religious faith on which our work is founded, providing

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44 Mr Graeme Edgerton, Australian Human Rights Commission, *Committee Hansard*, 14 January 2022, p. 28.

45 Equality Australia, *Submission 31*, pp. 26–27.

46 Australian Council of Social Service, *Submission 62*, p. 2.

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services to anyone who needs them, while at the same time respecting the diverse faith of our workforce, volunteers, clients and residents.<sup>47</sup>

4.43 The Uniting Church in Australia gave evidence that as a provider of education and community services across Australia 'we are concerned certain provisions within this Bill may act as a barrier to vulnerable people accessing essential services'.<sup>48</sup> Ms Claerwen Little, National Director, UnitingCare Australia, further elaborated as to their concern about the impact of the bill:

Most of our services are provided to people who are in the most vulnerable of circumstances and, if they believe that, because they're coming to a faith based organisation—and sometimes they have no choice about that, because that's the organisation in the community that they need to come to—then they may be fearful that they will be discriminated against when they get there, and that is really not okay, because that is not what happens in our services at the moment. So I think this opens up the sense that, if you're faith based, you are going to be discriminating, and I think that's a really deeply difficult and dangerous place to be.<sup>49</sup>

4.44 Women with Disabilities Australia noted that women and girls with disability already face a multitude of barriers to accessing services, and noted that there are few domestic and family violence services that are equipped to support individuals with disability, and in many cases the only support available may be from religious charities.

If charities providing essential services like these are able to deny support to individuals based on religious belief, this would only further limit the already sparse supports available to women with disability; a situation which is even worse for women with disability who are First Nations, LGBTIQ+, from CaLD backgrounds and from rural, regional and remote communities.<sup>50</sup>

4.45 The Youth Affairs Council of Western Australia raised concerns as to the impact of this on LGBTIQ+ people:

For LGBTIQ+ young people of faith, there is a risk that as a result of this Bill that they will be unable to access services or other institutions that are in accordance with their faith if those services are openly hostile towards LGBTIQ+ people. Many LGBTIQ+ community members are also people of faith, with one study estimating this to be almost 30% of all young LGBTIQ+ people.<sup>51</sup>

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47 Sacred Heart Mission, *Submission 58*, p. 1.

48 Uniting Church in Australia, Opening Statement, *Committee Hansard*, 14 January 2022, p. 52.

49 Ms Claerwen Little, UnitingCare Australia, *Committee Hansard*, 14 January 2022, p. 55.

50 Women with Disabilities Australia, *Submission 100*, p. 5.

51 Youth Affairs Council of Western Australia, *Submission 155*, p. 13. See also LGBTIQ+ Health Australia, *Submission 155*.

4.46 The ACT Government also noted its concern that:

communities, particularly LGBTQIA+ and HIV positive communities who may need to disclose their identities in order to receive appropriate services, will self-select out of seeking services from religious bodies which appear to have greater and more ambiguous powers to discriminate.<sup>52</sup>

4.47 The Australian Human Rights Commission noted that while it is reasonable for religious bodies to exclude those who are not of their faith when this is necessary for the practice of their religion:

it is less defensible to permit organisations participating in the general economy or in the provision of goods and services to the public at large to exclude others based on their faith (or lack of faith). This is particularly so where the organisations are recipients of public funding. The Religious Freedom Review did not accept arguments that a right to discriminate in the provision of goods and services is required or proportionate to ensure the free and full enjoyment of Australian's rights to freedom of religion under international law.<sup>53</sup>

4.48 However, Mr Peter Wertheim, Co-Chief Executive Officer, the Executive Council of Australian Jewry, explained that while most organisations that provide services, like soup kitchens, open them to everybody, there may be small organisations that have a particular need and want to look after their own members. Mr Wertheim stated:

It's not directed specifically against your community or any other community; it's something that we have set up to look after our community. There's a difference between that negative discrimination which is directed specifically at Jews because they're Jews or at Muslims because they're Muslims and something that says, 'Look, we've set up a youth camp for Anglican kids, and it's only for Anglican kids because we want them to have that religious experience.' It's not directed against anyone in particular. I think there's a big difference there.<sup>54</sup>

4.49 Mrs Wendy Francis, National Director, Politics, Australian Christian Lobby, also agreed that giving preference to persons of the same religion as the religious body was an important part of this legislation, and it would be acceptable to have a soup kitchen of one faith turning away members of another faith, as 'the law needs to be a broad enough law to be able to say that you are able to have people of your own ethos come in'.<sup>55</sup>

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52 ACT Government, *Submission 192*, paragraph [45].

53 Australian Human Rights Commission, *Submission 97*, p. 37.

54 Mr Peter Wertheim, Executive Council of Australian Jewry, *Committee Hansard*, 21 December 2021, p. 56.

55 Mrs Wendy Francis, Australian Christian Lobby, *Committee Hansard*, 21 December 2021, p. 25.

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**Reasonable conduct intended to meet a need or reduce a disadvantage**

4.50 Clause 10 of the bill also provides that it is not discrimination for anyone to engage in conduct that is reasonable in the circumstances and intended to meet a need arising out of a religious belief or activity or to reduce a disadvantage experienced because of a person's religious beliefs or activities. The explanatory memorandum states that this recognises the concept of legitimate differential treatment.<sup>56</sup>

4.51 The Australian Human Rights Commission agreed with this, noting:

This provision is based on an understanding of the need for substantive, rather than merely formal, equality. It recognises that there is not currently a level playing field for everyone in society. Some people face individual disadvantage as a result of attributes that are personal and intrinsic to them, and some groups face structural barriers to equal participation in public life. Discrimination legislation needs to address both the prevention of negative conduct that causes disadvantage, and the facilitation of positive conduct that is directed towards achieving equality.<sup>57</sup>

4.52 The Commission noted that this provision would allow religious service providers to meet the legitimate needs of members of respective religious groups, and that this important targeted provision that is focused on the needs of individuals should be carefully considered when assessing whether the breadth of clause 7 is necessary.<sup>58</sup>

4.53 Mr Wertheim, Executive Council of Australian Jewry, noted the importance of clause 10, saying:

In the Jewish community, such bodies have been operating with a high reputation for decades, in one case for more than a century, meeting religious and cultural needs within our community which would otherwise not be met, including the supply of kosher food, participation in Jewish community events and observance of Jewish festivals. One should not underestimate the importance of catering to religious and cultural needs in meeting the overall care needs of members of our community who use the services of these bodies.<sup>59</sup>

4.54 However, the Law Council of Australia noted that clause 10 does not seek to ensure that persons with religious belief or who engage in religious activities have equality of opportunity with other persons, and so departs from the usual approach

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56 Religious Discrimination Bill 2021, explanatory memorandum p. 50.

57 Australian Human Rights Commission, *Submission 97*, p. 39.

58 Australian Human Rights Commission, *Submission 97*, p. 39.

59 Mr Peter Wertheim, Executive Council of Australian Jewry, *Committee Hansard*, 21 December 2021, p. 52.

taken in anti-discrimination legislation.<sup>60</sup> It stated that clause 10 is objectionable because it has the effect of requiring that the conduct be reasonable to meet the need or reduce the disadvantage, but does not require that the conduct be reasonable to achieve equality.<sup>61</sup> The Kingsford Legal Centre similarly stated that clause 10 is not proportionate and overly broad: 'and risks providing cover for those who argue that they have a "need" to discriminate against others and are "disadvantaged" by an inability to do this'.<sup>62</sup>

4.55 The Attorney-General's Department, however, were of the view that the reasonableness requirement in clause 10 would act as a 'safeguard to ensure this provision is not used to, for example, justify measures that would unreasonably disadvantage other persons'.<sup>63</sup> They stated that:

The requirement that conduct be reasonable in the circumstances is necessary because the nature of the protected attribute, religious belief or activity, cannot be precisely described (noting that it is not defined in the Bill) which means that the protected attribute is one which can affect areas of a person's life in ways that are likely to vary depending on the particular religious beliefs of the person. For example, strict dietary requirements may be necessary under one religion, but not under another.<sup>64</sup>

4.56 The Attorney-General's Department considered that 'determining reasonableness may include examining whether there was any disadvantage to other persons resulting from the conduct'.<sup>65</sup>

### **Amendments to Charities Act regarding views on marriage**

4.57 The Human Rights Legislation Amendment Bill 2021 seeks to amend the *Charities Act 2013* (Charities Act) to clarify that an entity that encourages or promotes the view of marriage as a union of a man and woman to the exclusion of all others, is presumed to be undertaking those activities for the public benefit and not contrary to public policy.<sup>66</sup> The statement of compatibility states that individuals and organisations should generally be able to present and promote their beliefs, including religious charities being able to manifest their faith publicly, lawfully and without

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60 See *Disability Discrimination Act 1992*, section 45 and *Sex Discrimination Act 1984*, section 7D.

61 Law Council of Australia, *Submission 28*, p. 29.

62 Kingsford Legal Centre, *Submission 110*, p. 8. See also Liberty Victoria, *Submission 186*, p. 7.

63 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

64 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

65 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

66 Human Rights Legislation Amendment Bill 2021, Schedule 1, item 3.

threat to their charitable status.<sup>67</sup> The explanatory memorandum states that this is not intended to do anything other than codify the policy position under the Charities Act and seek to avoid any doubt that such activities, done so lawfully, is not a disqualifying purpose.<sup>68</sup>

4.58 A number of submitters explicitly supported this amendment.<sup>69</sup> For example, Freedom for Faith submitted:

It seems a very good idea for Parliament to recognise that this traditional belief is one that can be held by sincere believers who also engage in active charitable activity.<sup>70</sup>

4.59 The Australian Association of Christian Schools considered the gaps within the Charities Act that the amendment would fill:

It is important to note that the proposed amendment is not limited to charities registered with a purpose of 'advancing religion' but extends to entities with other charitable purposes, including schools with the purpose of 'advancing education'. It will thus protect religious schools from the loss of their charitable status and is welcomed by AACS for that reason.<sup>71</sup>

4.60 However, other submitters raised concerns about this amendment,<sup>72</sup> including that the amendment is unnecessary. The Australian Human Rights Commission noted previous advice from the Commissioner of Taxation and the Acting Commissioner of the Australian Charities and Not-for-Profit Commission that the amendments were not necessary to protect the status of religious charities. It also noted that it has been four years since same-sex marriage became lawful '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'.<sup>73</sup>

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67 Human Rights Legislation Amendment Bill 2021, statement of compatibility, p. 8.

68 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 16.

69 Freedom for Faith, *Submission 10*, p. 13; Australian Association of Christian Schools, *Submission 23*, p. 23; Christian Schools Australia and Adventist Schools Australia, *Submission 24*, p. 13; Australian Christian Churches, *Submission 63*, p. 8; Associated Christian Schools, *Submission 74*, p. 3.

70 Freedom for Faith, *Submission 10*, p. 13.

71 Australian Association of Christian Schools, *Submission 23*, p. 23.

72 See e.g., Equality Australia, *Submission 31*, p. 7; Equal Voices, *Submission 32*, p. 9; Australian Discrimination Law Experts Group, *Submission 33*, p. 20; ACON, *Submission 34*, p. 11; Tasmanian Council of Social Services, *Submission 36*, p. 2; Public Interest Advocacy Centre, *Submission 40*, p. 27; Professor Tiffany Jones, *Submission 44*, p. 9; Family Planning NSW, *Submission 88*, p. 7; Dr Sean Mulcahy, *Submission 126*, p. 2; Children and Young People with Disability Australia, *Submission 139*, p. 7; Amnesty International, *Submission 157*, p. 7; NSW Council for Civil Liberties, *Submission 181*, p. 13; Rainbow Families, *Submission 182*, p. 6; Human Rights Law Centre, *Submission 190*, p. 20; Legal Aid Queensland, *Submission 92*, p. 9.

73 Australian Human Rights Commission, *Submission 97*, p. 73.

However, the Seventh-day Adventist Church in Australia noted that while (unsuccessful) challenges to public benefit and similar issues have been made to faith-based organisations in New Zealand, 'it seems a very good idea for Parliament to recognise that this traditional belief is one that can be held by sincere believers who also engage in active charitable activity'.<sup>74</sup>

4.61 Other criticisms related to the language of the proposed amendment. The Public Interest Advocacy Centre submitted:

It is inappropriate to single out one particular perspective about one particular social issue. No equivalent protection of pro-marriage equality charities was considered before 2017. Nor does the Bill propose equivalent protections for contrary views.<sup>75</sup>

4.62 Rainbow Families submitted:

Rainbow Families also queries how this definition of 'traditional marriage' was reached. We see two people having a ceremony to express their love and enter into a legal union, forsaking all others, as a traditional display. Which religious texts were consulted to conclude that traditional marriage is a voluntary union between a man and a woman, considering the history of gender imbalance in marriage, dowries and intent behind marriage?<sup>76</sup>

## **International human rights law**

### ***Rights to freedom of religion or belief, freedom of expression, equality and non-discrimination, work, private and family life***

4.63 Insofar as Part 2 of the bill characterises certain conduct by religious bodies as not constituting discrimination, it would have the effect of affording greater protection to religious bodies to act in accordance with their faith. This would allow, for example, religious hospitals, aged care facilities, accommodation providers and disability service providers to preference persons of the same religion as the religious body in employment decisions.

4.64 As noted in Chapter 2 of this report, by affording greater protection to religious bodies to manifest their religion, this measure would promote the rights to freedom of religion and freedom of expression. The right to freedom of religion includes the freedom to manifest one's religion or belief in worship, observance, practice and teaching.<sup>77</sup> The terms 'observance' and 'practice' do not contain 'any spatial or institutional specificities and must be broadly applied', including in the

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74 Seventh-day Adventist Church in Australia, *Submission 82*, p. 6.

75 Public Interest Advocacy Centre, *Submission 40*, p. 27.

76 Rainbow Families, *Submission 182*, p. 6.

77 International Covenant on Civil and Political Rights, article 18(1).

workplace.<sup>78</sup> International human rights law recognises the importance of protecting religious groups for the realisation of the individual right to freedom of religion.<sup>79</sup>

4.65 The UN General Assembly has observed that the right to freedom to manifest religion 'includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life'.<sup>80</sup> The right to freedom to manifest religion, including in the workplace, intersects with, and has a mutually reinforcing relationship with, the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds.<sup>81</sup>

4.66 However, by allowing religious bodies to treat persons differentially on the basis of their religious belief or activity (including by preferencing persons in employment decisions and restricting access to charitable services on the basis of religion), this measure also necessarily engages and limits the rights to freedom of religion or belief, freedom of expression, equality and non-discrimination, work and private and family life for others. As observed by the UN Special Rapporteur:

Religious discrimination does not only take place when an individual's right to manifest their religion or belief freely is restricted or interfered with by the State or non-State actors. It can also take place when an individual's enjoyment of other fundamental rights — for example the right to health, education, expression — is restricted or interfered with by State or non-

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78 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) [31].

79 See, e.g., *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'.

80 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].

81 International Covenant on Civil and Political Rights, article 19. See also UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

State actors in the name of religion, or on the basis of a person's religion or belief.<sup>82</sup>

4.67 Discrimination involves any distinction, exclusion, restriction or preference which is based on a protected attribute (such as religion or belief) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms (such as the right to work). The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>83</sup>

4.68 This measure not only permits differential treatment on the basis of religion or belief, but it may also have the effect of allowing indirect discrimination against persons on the basis of other protected attributes, such as gender and sexuality. Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>84</sup> In the context of this measure, indirect discrimination may occur, for example, if a religious body were to refuse to hire a woman who was divorced or dismisses a female employee who gets divorced while employed on the ground that engaging in such conduct is in accordance with the body's religion and/or to avoid injury to the religious susceptibilities of adherents of the same religion as the body (assuming that such conduct is also in accordance with any other legislative requirements).

4.69 While it is acknowledged that the bill itself does not explicitly permit differential treatment on the basis of protected attributes other than religion and the bill conceptually characterises such conduct as 'not discrimination', as a matter of international human rights law, such conduct would likely constitute direct discrimination on the basis of religion or belief and possibly indirect discrimination on the basis of other protected attributes such as gender and marital status.<sup>85</sup> However,

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

83 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

84 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

85 Under the Convention on the Elimination of All Forms of Discrimination Against Women, article 11(2) provides that: 'In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'.

international human rights law also recognises that differential treatment on the basis of a protected attribute, such as religion, gender or sexuality, will not constitute *unlawful* discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>86</sup>

4.70 The statement of compatibility acknowledges that conduct permitted under Part 2 of the bill could limit a person's right to equality and non-discrimination by preventing a person accessing the services and education or employment opportunities from a religious body on the basis of their religious belief or activity.<sup>87</sup> Regarding clause 10 (see paragraph [4.50]), the statement of compatibility states that it could limit a person's right to equality and non-discrimination by permitting the beneficial treatment of persons of certain religious belief, while not providing such treatment to persons of other religious belief.<sup>88</sup> While noting that the bill does not permit discrimination on the basis of a protected attribute such as sexuality, the Attorney-General's Department did acknowledge that issues of sexuality may still be relevant to religion, submitting that a religious body would be allowed to consider a person's religious beliefs about issues such as sexuality (irrespective of the person's own sexuality) where they could show that this was part of the doctrines, tenets, beliefs or teachings of their religion.<sup>89</sup>

4.71 In practice, this would likely have a disproportionate impact on LGBTIQ+ persons, noting that international human rights law jurisprudence has emphasised the 'need for particularly convincing and weighty reasons to justify a difference in

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86 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].

87 Religious Discrimination Bill 2021, statement of compatibility, pp. 10–12.

88 Religious Discrimination Bill 2021, statement of compatibility, pp. 14–15.

89 Attorney-General's Department, *Submission 191*, p. 8.

treatment' on the grounds of sex and sexual orientation.<sup>90</sup> It is noted that the bill itself states that conduct that is not discrimination under this bill may still constitute direct or indirect discrimination under other anti-discrimination laws.<sup>91</sup> However, as noted in Chapter 2 (at paragraph [2.50]) in assessing the permissibility under international human rights law of possible indirect discrimination under this bill, it is not relevant whether such differential treatment may be lawful or unlawful under other federal anti-discrimination laws.

4.72 In addition, the rights to work, privacy and family life may be limited by the measure to the extent that it would deprive persons of certain religious belief of employment opportunities and permit arbitrary interference with a person's private and family life. The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work.<sup>92</sup> Relevantly, the right must be made available in a non-discriminatory manner. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home life, regardless of whether such interferences emanate from State authorities or from natural or legal persons.<sup>93</sup> A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

#### *Limitation criteria*

4.73 The above rights 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.

4.74 This general test is further qualified by specific requirements that apply to the rights to freedom of religion and freedom of expression. The freedom to manifest one's religion or beliefs may be limited so long as such limitations are prescribed by

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90 *EB v France*, European Court of Human Rights, Grand Chamber, Application No 43536/02 (2008) [91]. See also *Staatkundig Gereformeerde Partji v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35]; [Bull & Anor v Hall & Anor](#) [2013] UKSC 73 (27 November 2013) [52]–[53]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [39]–[40].

91 See, e.g., Religious Discrimination Bill 2021, subclause 7(2), note 2.

92 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

93 International Covenant on Civil and Political Rights, articles 17 and 23; and the International Covenant on Economic, Social and Cultural Rights, article 10; UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]–[4]. See also Anja Hilkemeijer, *Submission 5*, p. 2; and Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

law and are necessary to protect public safety,<sup>94</sup> order, health or morals,<sup>95</sup> or the fundamental rights and freedoms of others. The right to freedom of expression may also be subject to limitations that are necessary to protect the rights or reputations of others,<sup>96</sup> national security, public order, or public health or morals.<sup>97</sup> Additionally, limitations on the rights to freedom of religion and expression must be rationally connected to the stated objective, and proportionate and non-discriminatory. The necessity of the measure is also relevant in assessing the permissibility of a restriction on the rights to freedom of religion and freedom of expression.<sup>98</sup> The limitation clause in relation to the rights to freedom of religion and freedom of expression is to be strictly interpreted. The UN Human Rights Committee has stated that:

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- 94 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.7].
- 95 The UN Human Rights Committee has stated 'that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. See *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8].
- 96 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].
- 97 In considering the scope of permissible restrictions on the right to freedom of expression in the context of the right to freedom of religion, the UN Human Rights Committee has observed that it would be impermissible for 'laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers'. It would also be impermissible for laws to prohibit displays of lack of respect for a religion or other belief system, including blasphemy laws, and for such 'prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith'. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [48].
- 98 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5] where the Committee stated that it needed to "assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory". 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]. See also Associate Professor Mark Fowler, *Submission 20*.

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.<sup>99</sup>

4.75 Further, where the manifestation of religion or the expression of a religious opinion or belief limits the rights or freedoms of others, each right must be balanced against each other.<sup>100</sup> This is because manifestations of religion or belief 'must comply with the duty to respect the fundamental rights and freedoms of others and may be subject to limitations on those grounds'.<sup>101</sup> The UN Special Rapporteur has noted that:

there is no hierarchy of human rights and where freedom of religion clashes with the right to non-discrimination and equality, or laws of general effect, the focus should be on ensuring that all human rights are protected, including through reasonable accommodation.<sup>102</sup>

4.76 In the context of this measure, the competing rights in question are the rights of religious bodies (and their adherents) to manifest their religion and the rights of others, including the right to manifest religion or express a belief contrary to that of the religious body; the right to work and access employment opportunities in a non-discriminatory manner; the right to equality and non-discrimination; and the rights to a private and family life. In resolving conflicts between competing limitable human rights, the United Kingdom courts and the European Court of Human Rights have undertaken a balancing exercise – often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.<sup>103</sup>

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99 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].

100 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].

101 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].

102 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [81].

103 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. In addressing the conflict between the rights to freedom of religion and equality and non-discrimination, 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'. See also Anja Hilgemeijer, *Submission 5*, p. 2 and Anja Hilgemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

4.77 The specific circumstances of the case, the competing rights in question and the vulnerability of the persons involved are relevant considerations in undertaking this balancing exercise.<sup>104</sup> Regarding the latter, the UN Special Rapporteur has emphasised that where vulnerable groups are involved, 'religious liberty' can never be used to justify violations of their rights.<sup>105</sup> They noted that:

the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke "religious liberty" to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.<sup>106</sup>

4.78 While international human rights law recognises that religious institutions 'constitute a special category, as their *raison d'être* is, from the outset, a religious one', the circumstances of the specific case are still relevant in assessing whether the conduct of religious institutions constitutes a permissible limitation on the rights of others.<sup>107</sup> The UN Special Rapporteur has stated:

The autonomy of religious institutions...undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a broader margin of discretion when imposing religious norms of

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104 See, e.g., [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *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]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, Asma Jahangir, E/CN.4/2006/5 (2006) [51]–[52].

105 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [42].

106 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke "religious liberty" concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'.

107 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].

behaviour at the workplace, much depends on the details of each specific case.<sup>108</sup>

### *Prescribed by law*

4.79 Human rights standards require that interferences with rights must have a clear basis in law (that is, they must be prescribed by law). This principle includes the requirement that laws must satisfy the 'quality of law' test, which means that any measures which interfere with human rights must be sufficiently certain and accessible, such that people understand the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.<sup>109</sup> In the context of limitations on the right to freedom of religion, the European Court of Human Rights has stated that:

The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, referring to the quality of the law in question, it requires that it be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law...The phrase thus implies, inter alia, that the terms of domestic law must be sufficiently clear to enable individuals to foresee the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting their rights under the Convention.<sup>110</sup>

4.80 While the measure clearly has basis in domestic law, namely the religious discrimination legislative package, there may be questions as to whether the quality of law test is met. As currently drafted, the rights of others may be limited in the following circumstances:

- a religious body engages, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (the 'reasonableness test');
- a religious body engages, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body (the 'religious susceptibilities' test); and

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108 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].

109 *Pinkney v Canada*, United Nations (UN) Human Rights Communication No.27/1977 (1981) [34].

110 *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [78]. See also *Gorzelik and others v Poland*, European Court of Human Rights (Grand Chamber), Application No. 44158/98 (2004) [64], where the Court stated that to meet the quality of law test, the law must be 'accessible to the persons concerned and formulated with sufficient precision to enable them...to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct'.

- a person engages in conduct that is reasonable in the circumstances; and is consistent with the purposes of the bill; and either is intended to meet a need arising out of a religious belief or activity of a person or group of persons, or is intended to reduce a disadvantage experienced by a person or group of persons on the basis of their religious beliefs or activities (the 'need or disadvantage' test).<sup>111</sup>

4.81 In relation to conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability service providers, the conduct must also be in accordance with a publicly available policy; and comply with any requirements determined by the minister.<sup>112</sup>

4.82 In assessing whether the measure meets the quality of law test, it is necessary to consider the scope and clarity of the threshold tests contained in the relevant provisions – the reasonableness test, the religious susceptibilities test and the need or disadvantage test. The explanatory memorandum states that the reasonableness test (in subclauses 7(2), 9(3) and 40(2)) is an objective test that asks whether persons of the same religion or relevant religious denomination as the religious body would reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of the particular religion.<sup>113</sup> The test is framed so as to avoid courts determining whether the conduct is in accordance with the religion, although courts may have regard to any foundational documents that a religious body considers supports the conduct under consideration.<sup>114</sup> The explanatory memorandum notes that it is intended that conduct be of an intrinsically religious character or be fundamental to the practice of religion, as well as including other conduct engaged in by a religious body in good faith in accordance with the doctrines, tenets, beliefs or teachings of that religion.<sup>115</sup> A number of submitters have raised concern with the breadth of this test, see discussion above at paragraphs [4.18] to [4.21].

4.83 The explanatory memorandum does not provide any information on the meaning of 'religious susceptibilities' or the kind of conduct that would meet the test of avoiding injury to the religious susceptibilities of adherents. It is also not clear what level of injury would need to occur in order for conduct to meet this test. Jurisprudence from the European Court of Human Rights may be helpful in this regard. In considering the competing rights of freedom of religion (of a religious institution) and freedom of association (of individual members of the religious institution), the European Court of Human Rights observed that, in order to justify interference with individual rights,

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111 Religious Discrimination Bill 2021, clause 10.

112 Religious Discrimination Bill 2021, subclauses 9(3) and (5).

113 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

114 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

115 Religious Discrimination Bill 2021, explanatory memorandum, pp. 44–45.

there must be a real and substantial risk that the rights of others may threaten the autonomy of the religious institution. It stated:

a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.<sup>116</sup>

4.84 The religious susceptibilities test does not import any requirement that there be a real and substantial risk to the autonomy of the religious body in order to justify the body interfering with, and limiting, the rights of others. Rather, the test is formulated at a much lower threshold, only requiring conduct to be engaged in good faith to avoid injury to religious susceptibilities of adherents. Given that there may be vast diversity in the views and susceptibilities of adherents, it may be difficult for individuals to foresee under what circumstances the religious susceptibilities of any adherent may be injured or likely to be injured. In their analysis of a similarly worded test in the *Sex Discrimination Act 1984*, Anja Hilkemeijer and Amy Maguire stated that the test of avoiding injury to religious susceptibilities is an 'imprecise test' and likely 'falls short of the "legality" requirement of international human rights law'.<sup>117</sup> As noted above at paragraph [4.22], a number of groups also noted that unlike the test in the *Sex Discrimination Act 1984*, the test under this bill omits that conduct be 'necessary' to avoid injury to religious susceptibilities of adherents.

4.85 The need or disadvantage test under clause 10 also imports a reasonableness requirement. The explanatory memorandum states that whether conduct is reasonable requires consideration of whether it is necessary to meet the identified need. It explains that this reasonableness requirement is intended to act as a safeguard to ensure the provision is not abused to justify otherwise discriminatory conduct where it is not reasonable, or where there is no relevant need.<sup>118</sup> The conduct must also be consistent with the objects of the bill, set out in clause 3, including the indivisibility and universality of human rights, their equal status in international law,

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116 *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013) [159].

117 Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, p. 757. See generally Ms Anja Hilkemeijer, *Submission* 5.

118 Religious Discrimination Bill 2021, explanatory memorandum, pp. 50–51.

and the principle that every person is free and equal in dignity and rights.<sup>119</sup> Regarding the test in clause 10, the Attorney-General's Department stated that:

The requirement that conduct be reasonable in the circumstances is necessary because the nature of the protected attribute, religious belief or activity, cannot be precisely described (noting that it is not defined in the Bill) which means that the protected attribute is one which can affect areas of a person's life in ways that are likely to vary depending on the particular religious beliefs of the person. For example, strict dietary requirements may be necessary under one religion, but not under another. A reasonableness requirement also acts as a safeguard to ensure this provision is not used to, for example, justify measures that would unreasonably disadvantage other persons.<sup>120</sup>

4.86 Noting that clause 10 does not contain any guidance as to the matters to be considered in assessing reasonableness, the Attorney-General's Department stated that 'a number of considerations would be relevant', including 'whether there was any disadvantage to other persons resulting from the conduct'.<sup>121</sup> Some submitters have, again, raised concerns regarding the breadth of this test, as set out above at paragraph [4.54].

4.87 Noting that the circumstances in which an individual's rights may be limited by the measure are drafted in broad and imprecise terms, there are questions as to whether the measure meets the quality of law test. It is not clear that the measure is drafted in such a way as to be sufficiently clear to enable individuals to foresee the circumstances in which a religious body may limit their rights. While the requirement for conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers to be in accordance with a publicly available policy may assist in clarifying the circumstances in which the rights of individuals may be limited, without knowing the content of such policies, it is difficult to assess the extent to which this requirement may assist in narrowing the scope of the measure. The breadth of the measure is also relevant to questions of proportionality (as discussed below).

*Legitimate objective and rational connection*

4.88 The statement of compatibility states that the overall objective pursued by the bill is to promote the rights to freedom of religion and equality and non-discrimination (on the ground of religion) by prohibiting discrimination on the

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119 Religious Discrimination Bill 2021, explanatory memorandum, pp. 51–52.

120 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

121 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

basis of religious belief or activity in specified areas of public life, including work, education and in the provision of goods, services and facilities.<sup>122</sup>

4.89 Regarding the objective pursued by Part 2 of the bill, the statement of compatibility states that the measure seeks to enable religious bodies to conduct themselves in accordance with their religion, which also promotes an individual's rights to manifest religion in community with others and freedom of association.<sup>123</sup>

4.90 Regarding clause 10, the statement of compatibility states that the objective of this provision is to allow affirmative and beneficial measures to be taken to meet the genuine needs of individuals and groups based on their religious beliefs and activities, and in doing so, remove barriers to equality and conditions that may perpetuate discrimination based on those beliefs or activities.<sup>124</sup>

4.91 The statement of compatibility states that the provisions in Part 2 appropriately balance the right to freedom of religion with other rights and seek to protect certain conduct engaged in for legitimate and inherently religious purposes, which would otherwise be adversely impacted by the prohibition of discrimination.<sup>125</sup> The statement of compatibility notes that without these provisions, the bill could restrict or interfere with the observance or practice of particular religions or the ability for religious bodies to conduct their affairs in accordance with their religious beliefs.<sup>126</sup>

4.92 International human rights law has recognised protection of religious institutional autonomy – an aspect of the right to freedom of religion – as a legitimate objective.<sup>127</sup> Thus, insofar as the provisions in Part 2 of the bill seek to protect the right of religious bodies to act in accordance with their faith, the measure appears to pursue a legitimate objective.

4.93 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection to the objective sought to be achieved.

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122 Religious Discrimination Bill 2021, statement of compatibility, p. 8.

123 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

124 Religious Discrimination Bill 2021, statement of compatibility, p. 15.

125 Religious Discrimination Bill 2021, statement of compatibility, pp. 8 and 14. See also Attorney-General's Department, *Submission 191*, p. 8.

126 Religious Discrimination Bill 2021, statement of compatibility, p. 10.

127 See, eg, *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [86]; *Siebenhaar v Germany*, European Court of Human Rights, Grand Chamber, Application No 18136/02 (2011) [41]; *Obst v Germany*, European Court of Human Rights, Application No 425/03 (2010) [44]; *Hasan and Chaush v Bulgaria*, European Court of Human Rights, Grand Chamber, Application No 30985/96 (2000) [62]. See also Anja Hilkemeijer, *Submission 5*, quoting Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, p. 756; Associate Professor Mark Fowler, *Submission 20*, p. 34–36.

The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. In this regard, the statement of compatibility states:

The provisions have been carefully balanced to ensure they only exempt conduct engaged in in good faith by inherently religious bodies, which relates to the fundamental tenets underpinning the religious body and is necessary for that body to continue to act in accordance with their religious beliefs and to maintain their religious ethos. This ensures that there is a rational connection between the limitation and the objective, and that the measure will be effective at targeting and achieving the objective.<sup>128</sup>

4.94 In general terms, affording greater protection to religious bodies to act in accordance with their faith would likely be effective to achieve the stated objective of protecting the institutional autonomy of religious organisations and their right to manifest religion.<sup>129</sup>

#### *Proportionality*

4.95 In assessing proportionality, some matters that are necessary to consider include:

- whether the proposed limitation is sufficiently circumscribed;
- whether the measure is flexible enough to treat different cases differently;
- whether any less rights restrictive alternatives could achieve the same stated objective;
- the degree to which an appropriate balance has been struck between competing limitable rights; and
- whether the measure is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review.

4.96 As discussed above (at paragraphs [4.79]–[4.87]), there are some concerns that the measure is drafted in broad terms and the threshold tests to determine whether conduct by a religious body is not discrimination may not be sufficiently clear as to enable individuals to foresee the circumstances in which their rights may be limited by conduct engaged in by religious bodies. The breadth of the measure raises questions as to whether the proposed limitation is sufficiently circumscribed.

4.97 A related consideration is the flexibility of the measure. As currently drafted, the measure imposes a blanket approach, specifying conduct that is not discrimination, without regard to the merits of individual cases. Importantly, the measure does not allow for an assessment, on a case-by-case basis, of whether the

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128 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

129 Although, some submitters have raised concerns that the measure may not be rationally connected to the objects of the bill itself, namely, to prohibit religious discrimination, because Part 2 of the bill permits discrimination in the name of religion, see Australian Discrimination Law Experts Group, *Submission 33*, p. 14; Law Council of Australia, *Submission 28*, pp. 23–26.

differential treatment of individuals based on their religion or other belief is based on reasonable and objective criteria or, where other rights are limited, whether the proposed limitation is reasonable, necessary and proportionate, having regard to the specific circumstances of the case.<sup>130</sup>

4.98 Without flexibility to treat different cases differently, it is difficult in practice to assess whether the limitation of rights in each individual case would satisfy the limitation test under international human rights law. There may be circumstances, for instance, where a religious body acts in accordance with their faith and, for the purposes of this bill, the conduct is *not* discrimination, however under international human rights law, that same conduct may constitute unlawful discrimination. This lack of flexibility also makes it difficult to ensure that the least rights restrictive approach is taken to achieve the stated objective of protecting religious institutional authority, noting that where a religious body interferes with the rights of others, such interference should be based on a 'real and substantial' risk to institutional autonomy and should 'not go beyond what is necessary to eliminate that risk'.<sup>131</sup> On this point, the Australian Human Rights Commission submitted that it considers 'clause 7 as currently drafted would limit human rights more than is necessary to achieve a legitimate purpose'.<sup>132</sup>

4.99 Further, the flexibility to have regard to the individual circumstances of the case is particularly important in circumstances where competing rights must be balanced, as it is necessary in the context of this measure. Noting that affording greater protection to the right to freedom of religion may have the effect of limiting other human rights and vice versa, the degree to which an appropriate balance has been struck between competing limitable rights is a key factor in assessing proportionality.

4.100 As noted, the specific circumstances of the case, the competing rights in question and the vulnerability of the persons involved, are relevant considerations in

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130 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].

131 *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013) [159]. See also *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.8] regarding the need to take the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.

132 Australian Human Rights Commission, *Submission 97*, p. 40.

undertaking this balancing exercise.<sup>133</sup> For example, in cases involving the competing rights of a religious institution and the rights of individual members or employees of that institution, relevant circumstances that have been considered by the European Court of Human Rights in balancing these rights include the nature of the employment, including the 'degree of loyalty' owed by the individual employee to the religious employer; the incompatibility of the religious beliefs of the employee and religious employer; the risk or threat to the institutional autonomy of the religious organisation; the degree of harm caused to the individual; and the possibility of finding other work (where the individual was dismissed).<sup>134</sup> Regarding the latter, Anja Hilkmeyer and Amy Maguire summarised the case law as follows:

even in relation to those employees with a heightened duty of loyalty to the religious organisation (eg teachers of religion) who may be dismissed because of a breach of the religious organisation's moral precepts, the ECtHR, in considering the reasonableness of the dismissal, takes into account, among other factors, the likelihood of that complainant finding alternative employment. This particularised approach to the possibility of finding alternative employment was evident in the case of *Schüth* where difficulties for a church organist in finding suitable employment outside of the church were key to the Court's finding that his dismissal by the church on the ground of adultery was unjustifiable. In contrast, in the case of *Travas*, the fact that a teacher of Catholicism could find other work because

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133 See, e.g., [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35], [37]; *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]; UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]; UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, Asma Jahangir, E/CN.4/2006/5 (2006) [51]–[52]. Regarding the wider margin of appreciation afforded to religious institutions, see 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].

134 See, e.g., *Sindicatul "Păstorul cel Bun" v. Romania*, European Court of Human Rights, Grand Chamber, Application No. 2330/09 (2013); *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014); *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017); *Schüth v Germany*, European Court of Human Rights, Application No 1620/03 (2010). Regarding international human rights jurisprudence on this issue see, e.g., Associate Professor Mark Fowler, *Submission 20*, pp. 34–36; Anja Hilkmeyer, *Submission 5*, quoting Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

he was also qualified to teach the secular subject of ethics contributed to the Court's finding that his dismissal was reasonable.<sup>135</sup>

4.101 The jurisprudence of the European Court of Human Rights indicates that the permissibility of any limitation of rights turns on the specific circumstances of the case. The UN Special Rapporteur has also reiterated the necessity of 'careful case-by-case analysis...to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.<sup>136</sup> Notwithstanding the importance of this balancing exercise under international human rights law, the measure, as currently drafted, does not provide for a form of balancing exercise to be undertaken where the right of a religious body to manifest religion competes with the rights of others. While the objects clause in the bill refers to the indivisibility and universality of human rights, and their equal status in international law, it is not clear the extent to which this clause will facilitate the balancing of rights in practice, noting that the measure itself does not require such an exercise to be undertaken.<sup>137</sup> On this issue, the Attorney-General's Department drew attention to section 15AA of the *Acts Interpretation Act 1901*, which provides that:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.<sup>138</sup>

4.102 The Attorney-General's Department stated that in drafting the bill 'the Government has been careful to strike an appropriate balance, including by ensuring that these provisions are limited in their application and subject to a variety of safeguards set out in the terms of each provision'.<sup>139</sup> The statement of compatibility states that Part 2 'appropriately balances the right to freedom of religion with other rights' by limiting the circumstances in which conduct is not covered by the prohibition of discrimination to 'instances where there is a clear rationale for allowing the differential treatment of individuals on the basis of their religious belief or activity'.<sup>140</sup> However, no information was provided as to how this balance is appropriately struck in each individual case.

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135 Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 761–762.

136 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [47].

137 Religious Discrimination Bill 2021, clause 3.

138 *Acts Interpretation Act 1901*, section 15AA.

139 Attorney-General's Department, answer to written question on notice, question 2 (received 11 January 2022).

140 Religious Discrimination Bill 2021, statement of compatibility, p. 8.

4.103 While it may be the intention of the bill to ensure the right to freedom of religion is appropriately balanced with the rights of others, as a matter of legislative interpretation, there is no clear mechanism by which this balancing exercise can occur under the bill. A number of submitters raised concerns about the inability to effectively balance rights in relation to this measure. For example, Dr Cristy Clark, member of the Australian Discrimination Law Experts Group, stated:

it's an unequal protection of people's rights to manifest their religion or beliefs because only some people get that protection. In some cases it might be that institutions get that protection over and above individuals with religious beliefs, for example, in the school or employment contexts. But it also means that those rights are elevated above the rights to non-discrimination and equality of other people, and that's fundamentally inconsistent with international human rights law and the way that it's supposed to be implemented...Things have to be done: a single article obviously needs to be implemented in its entirety but also the indivisibility of human rights is why they're recognised and so you can't elevate one and ignore the other in the context of implementing international human rights. The whole idea is that they're supposed to balance carefully against each other.<sup>141</sup>

4.104 In the absence of the ability to consider the individual circumstances of the case and balance competing human rights, there appears to be a risk that the measure may not be proportionate in all circumstances.

4.105 Finally, another factor in assessing proportionality is whether the measure is accompanied by sufficient safeguards, including the possibility of oversight and the availability of review. The Attorney-General's Department noted that safeguards are set out in the terms of each provision.<sup>142</sup> In relation to clause 7, the statement of compatibility indicates that the requirement that conduct be engaged 'in good faith' and relate to the doctrines, tenets, beliefs or teachings of the religion underpinning the religious body would operate as a safeguard.<sup>143</sup> In relation to clause 9, the statement of compatibility states that the provision is limited to employment decisions and the requirement that the conduct be in accordance with a publicly available policy would operate as a safeguard.<sup>144</sup> In relation to clause 10, the statement of compatibility states that by requiring conduct to be reasonable and consistent with the purposes of the bill, the clause is appropriately limited to only capture conduct consistent with the broader beneficial purposes for which the bill was established.<sup>145</sup> The explanatory memorandum notes that reasonableness in this context includes

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141 Dr Cristy Clark, Australian Discrimination Law Expert Group, *Committee Hansard*, 21 December 2021, pp. 15–16. See also Liberty Victoria, *Submission 186*, pp. 4–5.

142 Attorney-General's Department, answer to written question on notice, question 2 (received 11 January 2022).

143 Religious Discrimination Bill 2021, statement of compatibility, p. 11.

144 Religious Discrimination Bill 2021, statement of compatibility, p. 12.

145 Religious Discrimination Bill 2021, statement of compatibility, p. 15.

whether the conduct is necessary to meet the identified need.<sup>146</sup> The Attorney-General's Department stated that this requirement would act as a safeguard.<sup>147</sup>

4.106 The requirement that conduct be engaged in good faith may have some safeguard value, although the strength of this safeguard will depend on how it is interpreted and applied in practice. On this issue, the Attorney-General's Department stated:

The department's view is that a court is likely to apply a broad interpretation of the good faith requirement, encompassing both subjective considerations (the person making a statement of belief considers they are behaving honestly and with a legitimate purpose) as well as objective considerations (the person has taken a conscientious approach to honouring the values asserted by the Bill, which may include considering the effect of their speech given the overall purpose of the Bill). This is an approach that was set out in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.<sup>148</sup>

4.107 The explanatory memorandum further states that 'good faith' is intended to take its ordinary legal meaning and not reflect a religious concept of faith.<sup>149</sup> Some submitters and witnesses noted the importance of the good faith requirement but raised concerns with its breadth in the context of this measure.<sup>150</sup> For instance, Robin Banks, a member of the Australian Discrimination Law Experts Group, noted that '[i]t is very hard to establish something not being made in good faith'.<sup>151</sup>

4.108 The requirement that conduct be in accordance with a publicly available policy issued by the religious body may also assist with proportionality. The explanatory memorandum states that this requirement would ensure that clause 9 only permits conduct in circumstances where a religious body has a publicly articulated policy.<sup>152</sup> It notes that this is intended to provide a safeguard for the general community noting the broader impact this provision could have on people employed by, or seeking to be employed by, these religious bodies. For example, a religious hospital may have a policy that states certain positions will only be filled by adherents of the same religion

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146 Religious Discrimination Bill 2021, explanatory memorandum, p. 50–51.

147 Attorney-General's Department, answer to written question on notice, question 6 (received 11 January 2022).

148 Attorney-General's Department, answer to written question on notice, question 4 (received 11 January 2022).

149 Religious Discrimination Bill 2021, explanatory memorandum, p. 44.

150 See, e.g., Law Council of Australia, *Submission 28*, p. 20;

151 Ms Robin Banks, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 13.

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

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as the hospital, thus providing certainty and transparency to the public and potential employees.<sup>153</sup>

4.109 It is also noted that the minister has the power to determine additional requirements for the purposes of a publicly available policy. The explanatory memorandum states that this would provide further clarity for religious bodies around the nature and scope of this requirement if needed.<sup>154</sup>

4.110 While there is currently no guidance as to how this power would likely be exercised, the explanatory memorandum anticipates that guidance would be passed on the kinds of matters set out in the Religious Freedom Review Report. In particular, a publicly available policy should outline the precepts of the religion that relate to preferencing employees; outline the position of the religious body; explain how the body's policy will be enforced; and that this policy should be publicly available, so that prospective employees can make choices about making an application.<sup>155</sup> The explanatory memorandum states that guidance would be limited to the form, presentation and availability of policies.<sup>156</sup>

4.111 Subject to any additional requirements set out by the minister, the public policy requirement would likely enhance transparency and may help to ensure the measure is sufficiently circumscribed, which could assist with proportionality. However, without knowing the substance of the policy, it is difficult to assess the extent to which it would serve as an adequate safeguard to protect the rights of others.

4.112 In this regard, some submitters have raised concerns that a publicly available policy may in practice facilitate discrimination rather than act as a safeguard. The Australian Discrimination Law Experts Group, for example, submitted:

Having a publicly available policy that advocates for preferencing or expressly states an intention to discriminate on the grounds of religion does not ameliorate any of the disadvantages that those people who are excluded from employment in religious institutions will suffer. Maintaining a publicly available policy accepting and advocating for discrimination on any basis has the capacity to further exacerbate stigma of individuals based on attributes they hold by indicating that discrimination on that basis is legitimate and justifiable...Explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harms that individuals will face as a consequence

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

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

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

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

of a religious organisation's refusal to employ persons on the basis of an attribute but instead has the capacity to exacerbate such stigmas.<sup>157</sup>

4.113 Further, as to the availability of oversight and access to review, while complaints made under this bill or other federal anti-discrimination laws would be dealt with by the Australian Human Rights Commission, there are questions as to how the complaints process would operate in practice in circumstances where conduct may not be discrimination under this bill but may constitute discrimination under another anti-discrimination law. On this point, the Attorney-General's Department stated:

There may be circumstances where the nature of the conduct a person wishes to complain about may provide the basis for claims under a number of different anti-discrimination laws. As is the case at present, a person making a complaint would need to identify what they consider are the relevant grounds for the complaint. Depending on the circumstances of the complaint and the terms of the relevant anti-discrimination laws, conduct may amount to unlawful discrimination under one law but not under another law. The AHRC's existing process of assessing claims of unlawful discrimination would be extended to the Bill once it is enacted.<sup>158</sup>

4.114 The potential complexity of this process was of concern to some submitters and witnesses. For instance, the Australian Discrimination Law Experts Group stated that 'given the complex interaction between this Bill and existing federal discrimination laws, parties are likely to become mired in complex litigation about the various ways in which these laws interact with each other'.<sup>159</sup> It submitted that the note to clause 7(2) 'renders the question more murky and makes it more likely that clause 7 can be used as an alternative route to discriminate on the basis of race, age, sex, LGBTQ+ status and disability'.<sup>160</sup> While some form of review appears to be available, there are questions as to whether the potential complexity of this process undermines its safeguard value in practice.

4.115 In conclusion, while the measure pursues the legitimate objective of seeking to protect religious institutional autonomy, there are some questions as to whether the measure would meet the quality of law test and would be proportionate in all circumstances, noting the inability to have regard to the individual circumstances of each case and appropriately balance competing limitable rights. Under international human rights law, the ability to consider the individual circumstances of the case is critical to ensuring that rights are appropriately balanced and any limitation on individual rights is reasonable, necessary and proportionate in each case.

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157 Australian Discrimination Law Experts Group, *Submission 33*, p. 18. See also discussion in Chapter 5.

158 Attorney-General's Department, answer to written question on notice, question 5 (received 11 January 2022).

159 Australian Discrimination Law Experts Group, *Submission 33*, p. 14.

160 Australian Discrimination Law Experts Group, *Submission 33*, p. 14.

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**Committee view**

4.116 The committee considers it an essential aspect of the right to freedom of religion that religious bodies are able to act in accordance with their faith. It is important that religious bodies be able to continue to run and administer their churches, mosques, temples, schools, hospitals, charities and missions according to their faith. The committee considers it is appropriate to have an expansive definition of what constitutes a religious body to ensure most bodies that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion are able to act, in good faith, in accordance with their faith.

4.117 In order to properly fulfil this right it may be necessary for religious employers to impose religious rules of conduct on the workplace, which may lead to conflicts with the right to freedom of religion or belief, and the right to equality and non-discrimination, of employees. The committee acknowledges there is a difficult balancing act to be undertaken. However, for many religious groups, being able to organise and maintain important aspects of their religious community life includes being able to run their faith-based organisations according to their religion. The committee considers that the right to freedom of religion requires that faith-based organisations have a right to select staff, who are not only adherents of that faith, but who also support the organisation's religious doctrines and practices.

4.118 The committee notes, in practice, most religious organisations are not likely to make their employment decisions based on faith. As currently occurs, hospitals, aged care facilities and charities consider, first and foremost, a person's qualifications for the role. However, in order to adequately protect the right to freedom of religion it may be occasionally necessary for such bodies, acting in good faith, to operate in accordance with their faith, and this should not constitute discrimination on the basis of religion. It is noted that conduct that is not considered to be discrimination under the Religious Discrimination Bill 2021 may still constitute discrimination under other anti-discrimination laws, which the committee considers appropriate.

4.119 The committee also notes that where hospitals, aged care facilities, accommodation providers and disability service providers act in accordance with their faith in relation to employment, they must do so in accordance with a publicly available policy (this issue is discussed in more detail in Chapter 5). The committee considers this provides the necessary transparency and clarity around such conduct.

4.120 As such, the committee considers that the provisions in clauses 7–10 of the Religious Discrimination Bill 2021 have been carefully balanced to ensure they only exempt conduct engaged in, in good faith, by bodies that are inherently religious, and where it is necessary for the body to properly maintain its religious ethos. In doing so the committee considers it promotes and upholds the fundamental right to freedom of religion and belief and strikes the right balance.

**Recommendation 7**

**4.121** The committee recommends that the explanatory memorandum to the Religious Discrimination Bill 2021 be amended to provide clarification as to the applicability of the bill to in-home care services, particularly in relation to aged care and disability services.