The Senate

Legal and Constitutional Affairs Legislation Committee

Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions]

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Abbreviations

AACS	Australian Association of Christian Schools
ACCI	Australian Chamber of Commerce and Industry
ACBC	Australian Catholic Bishops Conference
ACC	Australian Christian Churches
ACL	Australian Christian Lobby
ACTU	Australian Council of Trade Unions
ADLEG	Australian Discrimination Law Experts Group
AGD	Attorney-General's Department
Age Discrimination Act	*Age Discrimination Act 2004*
AHISA	Association of Heads of Independent Schools of Australia
AHRC	Australian Human Rights Commission
AHRC Act	*Australian Human Rights Commission Act 1986*
Ai Group	Australian Industry Group
AIJAC	Australia/Israel & Jewish Affairs Council
ALA	Australian Lawyers Alliance
ALRC	Australian Law Reform Commission
AMAN	Australian Muslim Advocacy Network
ANIC	Australian National Imams Council
bills	Religious Discrimination Bill 2021; Religious Discrimination (Consequential Amendments) Bill 2021, and the Human Rights Legislation Amendment Bill 2021
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
Civil Aviation Act	*Civil Aviation Act 1988*
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
Charities Act	*Charities Act 2013*
committee	Legal and Constitutional Affairs Legislation Committee
Consequential amendments bill	Religious Discrimination (Consequential Amendments) Bill 2021

CSA & ASA	Christian Schools Australia and Adventist Schools Australia
Disability Discrimination Act	*Disability Discrimination Act 1992*
ECAJ	Executive Council of Australian Jewry
EM	Explanatory memorandum
Fair Work Act	*Fair Work Act 2009*
HRLA	Human Rights Law Alliance
Human rights legislation bill	Human Rights Legislation Amendment Bill 2021
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGIS Act	*Inspector-General of Intelligence and Security Act 1986*
LCA	Law Council of Australia
Marriage Act	*Marriage Act 1961*
NCEC	National Catholic Education Commission
PCA	Presbyterian Church of Australia
PCV	Presbyterian Church of Victoria
PIAC	Public Interest Advocacy Centre
PJCHR	Parliamentary Joint Committee on Human Rights
RDC	Religious Discrimination Commissioner
Racial Discrimination Act	*Racial Discrimination Act 1975*
Religious discrimination bill	Religious Discrimination Bill 2021
Sea Installations Act	*Sea Installations Act 1987*
Sex Discrimination Act	*Sex Discrimination Act 1984*
Tasmanian Anti-Discrimination Act	*Anti-Discrimination Act 1998* (Tas)
Victorian Equal Opportunity Act	*Equal Opportunity Act 2010* (Vic)

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List of Recommendations

Recommendation 1

5.12 The committee recommends that the Commonwealth government considers the issues raised in relation to clauses 11 and 12 of the Religious Discrimination Bill 2021, with particular regard to the:

concerns of Professor Anne Twomey; and
drafting amendments proposed by Professor Nicholas Aroney.

Recommendation 2

5.13 Subject to Recommendation 1, the committee recommends that the Senate passes the bills.

Chapter 1
Introduction

1.1 On 2 December 2021, the Senate referred the provisions of the Religious Discrimination Bill 2021 (the religious discrimination bill), the Religious Discrimination (Consequential Amendments) Bill 2021 (the consequential amendments bill) and the Human Rights Legislation Amendment Bill 2021 (the human rights legislation bill) (referred to collectively as 'the bills') to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 4 February 2022.

Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to organisations inviting submissions by 7 January 2022. The committee received 221 submissions, listed at Appendix 1.

1.3 The committee also received five form letters. An example of each of these letters is available on the committee's webpage. A list of these letters and the total number received of each is also available at Appendix 1.

1.4 The committee held two public hearings in Canberra on 20 and 21 January 2022. A list of the witnesses who appeared is at Appendix 2.

Acknowledgement

1.5 The committee recognises that people of religious faith and people of no religious faith often have deeply held, sometimes complex, personal views about religious belief and activity that are inherent in many, if not all, aspects of their lives and which can be particularly enlivened during processes such as a Senate committee inquiry. The committee extends its thanks to those who engaged with the inquiry process in a respectful and constructive manner. The committee appreciates the variety of views put to it, and the willingness of inquiry participants to discuss their experiences.

Structure of this report

1.6 The committee appreciates that, together, the bills form a multi-faceted package that engages a variety of issues. In this report, the committee has focused its attention on the areas that appeared to garner the most support from or raise the most concern amongst stakeholders during the course of the inquiry.

1.7 This report comprises five chapters, as follows:

- Chapter 1 outlines the administrative details of the inquiry, background to the inquiry and the key provisions of the bills.

- Chapter 2 considers a mechanism to protect against religious discrimination, in principle and in relation to specific legislative reform.
- Chapter 3 discusses issues pertaining to human rights and discrimination.
- Chapter 4 explores a number of other issues, such as the constitutionality of the bills, jurisdictional implications and the definitions of some key terms. And,
- Chapter 5 outlines the committee's view and recommendations.

Overview of the bills

The legislative package

1.8 Together, the three bills seek to implement the recommendations of the Expert Panel on Religious Freedom in the Religious Freedom Review[1] and implement greater protections from religious discrimination in federal legislation.

The religious discrimination bill

1.9 The religious discrimination bill would create new primary legislation implementing a range of measures to prohibit discrimination on the basis of a person's religious belief or activity.

1.10 Upon introducing the bill in the House of Representatives on 25 November 2021, the Prime Minister stated that the religious discrimination bill would 'fix an important weakness in our discrimination laws'. He noted that while:

> the Commonwealth has a Sex Discrimination Act, a Racial Discrimination Act, a Disability Discrimination Act and an Age Discrimination Act…there is no standalone legislation to protect people of religious, or faith against discrimination. Or indeed for those who choose not to have a faith or religion.[2]

1.11 The explanatory memorandum (EM) states that protections against discrimination on the grounds of religion under existing Commonwealth, state and territory laws 'are piecemeal, have limited application and are inconsistent across jurisdictions'.[3]

1.12 The Prime Minister explained that 'the introduction of this bill, the Religious Discrimination Bill 2021, will fix this'.[4] He stated that 'this bill seeks to protect people of faith from discrimination on the basis of their religion in daily life,

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1 Department of Prime Minister and Cabinet, *Religious Freedom Review*, https://www.pmc.gov.au/domestic-policy/taskforces-past-domestic-policy-initiatives/religious-freedom-review (accessed 26 January 2022).

2 The Hon. Scott Morrison MP, Prime Minister, *House of Representatives Hansard*, 25 November 2021, p. 10811.

3 Explanatory memorandum to the religious discrimination bill, p. 2.

4 The Hon. Scott Morrison MP, Prime Minister, *House of Representatives Hansard*, 25 November 2021, p. 10811.

including work, education, buying goods and services and accessing accommodation'.[5]

1.13 The EM describes the 'wide range of areas of public life' where the religious discrimination bill would prohibit discrimination on the basis of a person's religious belief or activity, such as 'employment, education, access to premises, the provision of goods, services and facilities, and accommodation'. The effect of this would be to 'ensure that all people are able to hold and manifest their faith, or lack thereof, in public without interference or intimidation'.[6]

1.14 The EM states another objective of the religious discrimination bill is:

> to promote attitudinal change, to ensure that people are judged on their capacity and ability, rather than on generally unfounded negative stereotypes that some may have about people who hold certain religious beliefs or undertake certain religious activities.[7]

1.15 According to the EM, the religious discrimination bill seeks 'as far as possible' to be consistent with existing prohibitions on discrimination in the *Age Discrimination Act 2004* (Age Discrimination Act), *Disability Discrimination Act 1992* (Disability Discrimination Act) and the *Sex Discrimination Act 1984* (Sex Discrimination Act). However, the EM notes that some alterations have been made 'to reflect the distinct nature of religious belief or activity as a protected attribute'.[8]

1.16 According to the Attorney-General's Department (AGD), subject to a number of exceptions within the bill, it 'does not override or interfere with state or territory legislation'. The AGD said that clause 68 would clarify that the bill 'is not intended to exclude or limit the operation of a state or territory law, to the extent that the law is capable of operating concurrently with the bill'.[9]

Religious Discrimination Commissioner

1.17 The religious discrimination bill would create the office of the Religious Discrimination Commissioner at the Australian Human Rights Commission (AHRC). The new Religious Discrimination Commissioner would have responsibility for freedom of religion, including discrimination on the grounds of religious belief or activity, at the AHRC. The EM states that the Commissioner would also promote understanding of and compliance with the

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5 Explanatory memorandum to the religious discrimination bill, p. 2.

6 Explanatory memorandum to the religious discrimination bill, p. 3.

7 Explanatory memorandum to the religious discrimination bill, p. 3.

8 Explanatory memorandum to the religious discrimination bill, pp. 4-5. See also Attorney-General's Department (AGD), *Submission 175*, p. 5.

9 AGD, *Submission 175*, p. 5.

religious discrimination bill as well as advocate, inquire into and report on issues pertaining to freedom of religion in Australia.[10]

1.18 If enacted, the religious discrimination bill would facilitate the submission of complaints to the Commission, 'about unlawful discrimination on the ground of religious belief or activity'. Complaints could be about either:

- direct discrimination – when a person (or group of people) is treated less favourably than others because of their background or certain personal characteristics (clause 13); or
- indirect discrimination – when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute (clause 14).[11]

1.19 The Commission would not be 'a court and does not have the power to decide if a complaint amounts to unlawful discrimination'. Rather, its role would be to hear from all parties and help resolve complaints, and:

> If the President of the Commission is satisfied that a complaint cannot be resolved, the complaint will be terminated. In some cases, such as where a complaint cannot be resolved by conciliation, a complainant may be able to take the complaint to court. The court is then able to decide whether the subject of the complaint amounts to unlawful discrimination.[12]

1.20 The bill would require the new Religious Discrimination Commissioner to conduct a review of the Act within two years of commencement, to ensure the government understands the impacts of the bill and identifies any necessary improvements. The AGD advised that the review would also:

> …ensure that any necessary modifications following the Australian Law Reform Commission (ALRC) review of religious exceptions can be identified and made. It will also provide an opportunity for stakeholders to identify any concerns about the operation of the Bill.[13]

Consequential amendments bill

1.21 The consequential amendments bill would amend the *Australian Human Rights Commission Act 1986* (AHRC Act), the *Civil Aviation Act 1988* (Civil Aviation Act), *Fair Work Act 2009* (Fair Work Act), *Inspector-General of Intelligence and Security Act 1986* (IGIS Act), and the *Sea Installations Act 1987* (Sea Installations Act).

1.22 In his second reading speech, the Hon Alan Tudge MP stated that the amendments to these Acts would 'ensure that discrimination on the basis of religious belief or activity is treated in the same manner as discrimination

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[10] Explanatory memorandum to the religious discrimination bill, p. 3.

[11] AGD, *Submission 175*, p. 6.

[12] AGD, *Submission 175*, p. 6.

[13] AGD, *Submission 175*, p. 15. The ALRC review is briefly considered later in this report.

under existing antidiscrimination law'.[14] The EM describes these amendments as being 'necessary to support the implementation' of the religious discrimination bill.[15]

1.23 The consequential amendments bill would enable the AHRC to extend its inquiry and conciliation functions to unlawful discrimination under the Religious Discrimination Act (if enacted).[16] It would also confer on the Religious Discrimination Commissioner the same functions, powers, duties and privileges of the existing Commissioners.[17]

1.24 The consequential amendments bill also contains a number of amendments to the religious discrimination bill contingent upon the passage of the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic), which passed the Victorian Parliament on 3 December 2021.[18]

Human rights legislation bill

1.25 The human rights legislation bill would amend the Age Discrimination Act, *Charities Act 2013* (Charities Act), Disability Discrimination Act, *Marriage Act 1961* (Marriage Act), *Racial Discrimination Act 1975* (Racial Discrimination Act) and the Sex Discrimination Act to enhance protection of the right to freedom of religion within existing Commonwealth legislation.

1.26 In his second reading speech, the minister stated that the human rights legislation bill would amend objects clauses within existing anti-discrimination Acts 'to reflect the equal status of all human rights'.[19] The amendments, he explained, would:

> ensure that each federal antidiscrimination act has an objects clause which recognises the indivisibility and universality of all human rights, the equal status of all human rights in international law and the principle that every person is free and equal in dignity and rights.
>
> These amendments will ensure that appropriate regard is given to all human rights in antidiscrimination law, including the right to freedom of religion. This reflects a key principle in international law—that all human

[14] The Hon Alan Tudge MP, Minister for Education and Youth, *House of Representatives Hansard*, 25 August 2021, p. 10815.

[15] Explanatory memorandum to the consequential amendments bill, p. 1.

[16] Explanatory memorandum to the consequential amendments bill, p. 1.

[17] Explanatory memorandum to the consequential amendments bill, p. 1.

[18] Explanatory memorandum to the consequential amendments bill, p. 2.

[19] The Hon Alan Tudge MP, Minister for Education and Youth, *House of Representatives Hansard*, 25 August 2021, p. 10817.

> rights must be treated with equal importance, and no rights should be prioritised at the expense of any other.[20]

1.27 The EM to the human rights legislation bill identifies that the bill's second purpose lies in its proposed amendments to the Charities Act and Marriage Act:

> the freedom to manifest religion or belief is a fundamental aspect of the right to freedom of religion. This includes manifestation through establishing and maintaining places of worship and appropriate charitable institutions. It is imperative that Australian laws do not unduly burden this freedom.
>
> Accordingly, this Bill makes amendments to the Charities Act and the Marriage Act to clarify the application of aspects of those Acts. These amendments go directly to the ability of individuals and faith-based organisations to manifest their religious beliefs. 8. Faith-based charities play a vital role in Australian civil society. The amendments in this Bill recognise that the law must protect the reasonable ability for such faith-based charities to manifest their faith and express their religious beliefs, without threat to their charitable status.
>
> The solemnisation of marriage has particular significance for people of faith and can be an important way in which faith is manifested. The amendments in this Bill recognise that religious educational institutions should not be compelled to provide goods, services or facilities in support of marriages which are not in accordance with their religious beliefs.[21]

Background

Religious Freedom Review

1.28 On 22 November 2017, the then Prime Minister, the Hon Malcolm Turnbull MP, announced a review into religious freedom in Australia. The review was conducted by an Expert Panel, chaired by the Hon Philip Ruddock, and comprising of Emeritus Professor Rosalind Croucher AM, the Hon Dr Annabelle Bennett AC SC, Father Frank Brennan SJ AO and Professor Nicholas Aroney.

1.29 The review was announced in response to proposals for legislative reform to protect freedom of religion during the debate on marriage equality, recognising that any legislative reforms to protect freedom of religion should be undertaken carefully to avoid the risk of unintended consequences. The terms of reference for the review required the Expert Panel to examine and report on whether Australian law (Commonwealth, state and territory) adequately protects the human right to freedom of religion. In doing so, the

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[20] The Hon Alan Tudge MP, Minister for Education and Youth, *House of Representatives Hansard*, 25 August 2021, pp. 10817-10818.

[21] Explanatory memorandum to the human rights legislation bill, pp. 1-2.

Expert Panel was required to consider the intersections between the enjoyment of the right to freedom of religion and other human rights.

1.30 The Expert Panel received some 15,620 submissions and conducted around 90 consultation meetings with 180 individuals and groups.[22] In its final report, which was provided to the then Prime Minister on 18 May 2018, the Expert Panel made 20 recommendations to enhance the protection of freedom of religion in Australia, both through legislative amendments to Commonwealth, state and territory laws, and through non-legislative measures.[23]

1.31 The religious discrimination bill seeks to implement recommendations 3, 15 and 19 of the Religious Freedom Review, while the human rights legislation bill would implement recommendations 3, 4 and 12.

Exposure draft consultation

1.32 The bills currently before the Parliament are the third publicly released iteration of the legislation, following on from two exposure draft consultation processes when past iterations of the bills were released for public consultation. The first exposure draft consultation commenced on 29 August 2019; over 6,000 submissions were received, 270 of which were published.

1.33 On 10 December 2019, a second exposure draft consultation process commenced on a second iteration of the bills. Submissions to the second process closed on 31 January 2020. Approximately 7,000 submissions were received to this inquiry, and 290 submissions were published.

1.34 The current package of bills was also informed by consultation, including roundtable discussions and meetings with interested stakeholders such as religious, legal, community and lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) groups.[24]

1.35 The AGD advised that the government sought legal advice on the current legislative package, where appropriate, and 'considers that the Bills are appropriately supported by the Commonwealth's Constitutional powers'.[25]

Key provisions

Religious discrimination bill

1.36 The religious discrimination bill contains nine parts:

- Part 1—Preliminary;

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[22] Expert Panel on Religious Freedom, *Religious Freedom Review*, 2018, p. 16.

[23] Expert Panel on Religious Freedom, *Religious Freedom Review*, 2018, pp. 1-7.

[24] AGD, *Submission 175*, p. 3.

[25] AGD, *Submission 175*, p. 5.

- Part 2—Conduct etc. that is not discrimination;
- Part 3—Concept of discrimination on the ground of religious belief or activity;
- Part 4—Unlawful discrimination;
- Part 5—Offences;
- Part 6—Religious Discrimination Commissioner;
- Part 7—Functions of the Australian Human Rights Commission;
- Part 8—Application and constitutional provisions; and
- Part 9—Other matters.

Part 1

1.37 Proposed clause 3 would give effect to Recommendation 3 of the Religious Freedom Review by recognising 'the indivisibility and universality of human rights, and their equal status in international law'.[26]

1.38 Proposed subclause 5(1) contains several definitions, such as:

- 'qualifying body' – an authority or body that is empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation.
- 'religious belief or activity' – holding or not holding a religious belief, and engaging in, not engaging in or refusing to engage in religious activity'.[27]
- 'religious body' – an educational institution,[28] registered charity or any other kind of body (other than a body that engages solely or primarily in commercial activities) that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.[29]
- 'statement of belief' – a statement:
  - of a religious belief held by a person, made in good faith, by written or spoken words or other communication (other than physical contact), by the person, and a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
  - of a belief held by a person who does not hold a religious belief, made in good faith, by written or spoken words or other communication (other

[26] Religious Discrimination Bill 2021, clause 3.

[27] Religious Discrimination Bill 2021, subclause 5(1).

[28] The bill provides a note that 'educational institution' includes 'child care centres and early learning centres at which education or training is provided'; some submitters suggested further clarification regarding this definition, noting there is 'serious doubt as to the extent to which such entities provide "education", as understood at law'; see Associate Professor Mark Fowler, *Submission 146*, p. 5; Seventh-day Adventist Church in Australia, *Submission 123*, p. 7.

[29] Religious Discrimination Bill 2021, clause 5.

than physical contact), by the person, and a belief that the person genuinely considers to relate to the fact of not holding a religious belief.[30]

1.39 Subclause 5(2) would clarify that religious activity does not include an activity that is unlawful.[31]

1.40 Clause 6 would extend the meaning of 'ground' by articulating discrimination on the grounds of religious belief or activity:

(a) on the ground of a characteristic that people who hold or engage in the religious belief or activity generally have; and
(b) on the ground of a characteristic that people who hold or engage in the religious belief or activity are generally presumed to have; and
(c) on the ground of the religious belief or activity that a person holds or engages in; and
(d) on the ground of the religious belief or activity that a person has held or engaged in in the past, whether or not the person still holds or engages in the religious belief or activity; and
(e) on the ground of the religious belief or activity that a person is thought to hold or engage in, whether or not the person holds or engages in the religious belief or activity; and
(f) on the ground of the religious belief or activity that a person is thought to have held or engaged in in the past, whether or not the person has held or engaged in the religious belief or activity in the past.[32]

Part 2

1.41 Part 2 of the religious discrimination bill would provide that certain conduct is not discrimination, for example certain conduct by religious bodies, conduct to meet a need or disadvantage, and statements of belief.

1.42 Clause 7 of the bill would specify that the following activities by a religious body would not be discrimination:

- 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;[33] or
- by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.[34]

1.43 Subclause 7(6) would require that where the conduct is engaged in by an education institution (that falls within the definition of a religious body):

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30 Religious Discrimination Bill 2021, subclause 5(1).

31 Religious Discrimination Bill 2021, subclause 5(2).

32 Religious Discrimination Bill 2021, clause 6.

33 Religious Discrimination Bill 2021, clause 7(2).

34 Religious Discrimination Bill 2021, clause 7(4).

(g) the conduct must be in accordance with a publicly available policy; and
(h) if the Minister determines requirements [by legislative instrument under subclause (7)]…the policy, including in relation to its availability, must comply with the requirements.[35]

1.44 Clause 8 sets out certain conduct by religious hospitals, aged care facilities, accommodation providers and disability service providers not covered by clause 7, including:

(a) establishing, directing, controlling or administering a hospital or aged care facility; or
(b) if the religious body solely or primarily provides accommodation—the provision of accommodation; or
(c) establishing, directing, controlling or administering a camp or conference site that provides accommodation; or
(d) if the religious body solely or primarily provides services to people with disability—the provision of the services.[36]

1.45 Clause 9 would provide that conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability services providers would not be discrimination in relation to employment or partnerships if the body has:

- engaged in good faith; and
- engaged in accordance with a publicly available policy; and
- if the Minister determines requirements (by legislative instrument under subclause (7)), complied with the requirements.[37]

1.46 In addition, under clause 9, these bodies would not discriminate against a person in relation to employment or partnerships if:

- a person of the same religion as the body could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion;[38] or
- the body engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.[39]

1.47 Clause 10 would provide that a person does not discriminate by engaging in reasonable conduct intended to meet a need arising out of a person or group's

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35 Religious Discrimination Bill 2021, clause 7(6).

36 Religious Discrimination Bill 2021, clause 8.

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

38 Religious Discrimination Bill 2021, subclause 9(3)(c).

39 Religious Discrimination Bill 2021, subclause 9(5)(c).

religious belief or activity, or to reduce a disadvantage experienced by a person or group based on their religious beliefs or activities.

1.48 The AGD explained that the conduct protected by clause 10 would be legitimate differential treatment, which 'must be reasonable in the circumstances and consistent with the purposes of the bill'. The provision is to:

> …ensure that programs, policies and other conduct aimed at ensuring the equality of, and full participation by, people of faith in public life are supported and not otherwise affected by the provisions of this Bill.[40]

1.49 Clause 11 would permit educational institutions to preferentially employ people who hold or engage in a particular religious belief or activity. The preference may be given to people of any, or no, religion, as long as the preference is given in good faith and in accordance with a publicly available policy, regardless of relevant state or territory law.[41]

1.50 The AGD submitted that a policy may be made public through 'any appropriate means', for example at the time of making an employment application, part of a package of material associated with an advertised role, or a by providing a printed copy to anyone who requests it.[42]

1.51 Clause 12 would provide that statements of belief that satisfy the definition of that term in clause 5(1) would not constitute discrimination under existing Commonwealth, state or territory anti-discrimination law, nor would they contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) (Tasmanian Anti-Discrimination Act) or a specified provision of a law prescribed in a disallowable instrument for the purposes of this clause.[43]

1.52 The EM states that clause 12 would provide 'a defence to a complaint of discrimination made in relation to the statement in and of itself'.[44] This provision 'is not intended to impact the meaning or interpretation of other anti-discrimination law, or the tests of direct or indirect discrimination.[45] The operation of the provision would be such that 'although the statement of

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[40] AGD, *Submission 175*, pp. 9-10.

[41] Religious Discrimination Bill 2021, clause 11; see also, explanatory memorandum to the religious discrimination bill, p. 52.

[42] AGD, *Submission 175*, p. 11.

[43] Religious discrimination bill, Clause 12. Subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations of sex characteristics, disability, marital status, relationship status, breastfeeding, parental status or family responsibilities.

[44] Explanatory memorandum to the religious discrimination bill, p. 53.

[45] Explanatory memorandum to the religious discrimination bill, p. 53.

belief is not, in and of itself, discriminatory, this clause will not affect the determination of whether associated conduct constitutes discrimination'.[46]

1.53 The AGD clarified that the protection afforded by clause 12 applies only to statements (whether written, spoken, or through other forms of communication), and does not extend to conduct which may be discriminatory.[47]

1.54 Subclause 12(2) would excise statements that are malicious or that 'a reasonable person would consider would threaten, intimidate, harass or vilify a person or group' or that advocate for the commission of a serious criminal offence from the protection outlined in subclause 12(1). While 'vilify' is defined in subclause 5(1) to mean 'incite hatred or violence towards [a] person or group', 'threaten', 'intimidate' and 'harass' are undefined by the bill. The EM states that these words are intended to be interpreted in accordance with their ordinary meaning.

1.55 The AGD explained the judicial process which may take place in considering clause 12:

> As clause 12 is a federal defence, state and territory tribunals may be unable to consider matters where a defence under this clause is raised in relation to a claim of discrimination under a state or territory anti-discrimination law. However, states and territories each have competent courts. If their legislation provides a barrier to complainants accessing these – in lieu of a tribunal – it is open to states and territories to make amendments to their legislation.[48]

Part 3

1.56 Part 3 of the religious discrimination bill describes discrimination on the grounds of religious belief or activity. It would prohibit both direct discrimination and indirect discrimination on the ground of religious belief or activity, ensuring that treating a person less favourably because of their religious belief or activity (clause 13), or imposing unreasonable conditions, requirements or practices which have the effect of disadvantaging people of a particular religious belief or activity (clause 14) are unlawful in the areas of public life covered by the bill.[49]

1.57 The EM notes that Part 3 clarifies that certain conduct is not covered by the prohibition of discrimination under the religious discrimination bill. It states that under Part 2, conduct engaged in by religious bodies in accordance with

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[46] Explanatory memorandum to the religious discrimination bill, p. 53. See also AGD, *Submission 175*, p. 12.

[47] AGD, *Submission 175*, p. 12.

[48] AGD, *Submission 175*, p. 13

[49] Explanatory memorandum to the religious discrimination bill, p. 6.

their faith and reasonable conduct intended to meet a need or reduce a disadvantage arising out of a person or group's religious belief or activity would not constitute discrimination on the grounds of religious belief or activity.[50]

1.58 Clause 15 would prohibit discrimination by a qualifying body (as defined in subclause 5(1)) in the imposition of qualifying body rules. The EM illustrates examples of entities that might fall within this definition, as follows:

> Examples of qualifying bodies include bodies which certify or register professionals such as lawyers, teachers, accountants or health practitioners. In addition, universities and vocational education and training providers, such as TAFEs, would constitute qualifying bodies to the extent that they are empowered to grant authorisations or qualifications that are needed for, or which facilitate, the practice of a profession, trade or occupation. For example, a university which confers medical degrees which are required for the practice of medicine would be a qualifying body in relation to the conferral of those qualifications.
>
> Examples of qualifying body conduct rules may include professional or registration standards or policies which require persons to engage, or not engage, in certain behaviour in order to receive or maintain their qualification or authorisation.[51]

1.59 The protection against discrimination in clause 15(1) would protect against the imposition of conditions, requirements or practices (qualifying body conduct rules) that would limit the ability of professionals or members of a trade or occupation to make statements of belief in their personal capacity.[52] The provision is limited by three circumstances, namely:

- the protection extends only to making a statement of belief outside of a person practising their profession, trade or occupation and does not otherwise affect the ability of qualifying bodies to regulate religious expression;[53]
- if compliance with the qualifying body conduct rule is an essential requirement of the profession, trade or occupation;[54] or
- if the statement of belief would be considered by a reasonable person to threaten, intimidate, harass or vilify a person or group, or would encourage the commission of a serious offence.[55]

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50 Explanatory memorandum to the religious discrimination bill, p. 59.

51 Explanatory memorandum to the religious discrimination bill, pp. 62-63.

52 Religious Discrimination Bill 2021, subclause 15(1); see also, explanatory memorandum to the religious discrimination bill, p. 63.

53 Explanatory memorandum to the religious discrimination bill, p. 63.

54 Subclause 15(2)

55 Subclause 15(3)

1.60 Clause 16 would extend the application of the religious discrimination bill (except Part 2 and clause 15) to people who have an association with an individual who holds religious beliefs or engages in religious activities. Subclause 16(3) would allow a body corporate to make a claim of religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person with whom it is closely associated.[56]

1.61 Clause 17 would clarify that where the discriminator has two or more reasons for a discriminatory act, the discriminatory reason need only be one of the reasons for the act, whether or not it is the dominant or a substantial reason for the doing of the act.[57]

Part 4

1.62 Part 4 of the religious discrimination bill sets out when discrimination on the ground of a person's religious belief or activity is unlawful (Divisions 2 and 3) and the associated exceptions (and exemptions) in certain circumstances (Division 4).

1.63 Divisions 2 and 3 of Part 4 would provide that it is unlawful to discriminate on the ground of religious belief or activity in relation to:

- work, including employment (clause 19), partnerships (clause 20), the activities of qualifying bodies (clause 21), registered organisations (clause 22) and employment agencies (clause 23);
- education (clause 24);
- access to premises (clause 25);
- the provision of goods, services and facilities (clause 26);
- accommodation (clause 27);
- the disposal of an estate or interest in land (clause 28);
- sport (clause 29);
- membership of clubs (clause 30);
- requesting or requiring certain information (clause 31); and
- the administration of Commonwealth laws and programs (clause 32).

1.64 Clause 33 would enable a person to seek civil remedy against another if the other person has engaged in 'victimisation'. Victimisation occurs when a person subjects, or threatens to subject, another person to detriment because they believe the other person has taken, or proposes to take, some form of action under this bill.[58] This civil remedy would operate separately from the criminal provision for victimisation in clause 50.

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[56] Subclause 16(3); see also, explanatory memorandum to the religious discrimination bill, p. 66.

[57] Clause 17; see also, explanatory memorandum to the religious discrimination bill, p. 67.

[58] Clause 33; see also, explanatory memorandum to the religious discrimination bill, p. 78.

1.65 Division 4 of Part 4 outlines exceptions and exemptions, including:

- where a reasonable person would conclude that the first person has expressed a particular belief that is counselling, promoting, encouraging or urging conduct that would constitute a serious criminal offence (clause 35);
- in relation to charitable organisations' rules governing the conferral of charitable benefits (clause 36);
- conduct in direct compliance with certain Commonwealth, state and territory legislation including provisions relating to law enforcement, national security or intelligence (clause 37);
- conduct in direct compliance with orders of court or tribunals, determinations or industrial instruments (clause 38); and
- in relation to work, specifically in employment relating to domestic duties or in an employment or partnership setting where a person's religious belief or activity renders them unable to carry out the inherent requirements of that employment or partnership (clause 39); and
- other aspects of private life, such as exceptions for share houses, religious camps or conference sites and the disposal of land by gift or through wills, clubs where membership is restricted to persons who hold or engage in a particular religious belief or activity and voluntary bodies (clauses 40-43).

1.66 Part 4 would allow the AHRC to grant a person or body a temporary exemption from the operation of a provision of Division 2 or 3 by notifiable instrument (clause 44). Clause 47 would provide that temporary exemptions may be revoked by the AHRC or the minister, also by notifiable instrument, while clause 48 would provide applications to the Administrative Appeals Tribunal for review of decisions under clauses 44 and 47.

1.67 The AGD explained that protections in Part 4 do not extend to activities that are unlawful, to ensure that the bills do not protect religious activities which are inconsistent with Australian law, including those which may constitute criminal conduct.[59]

1.68 Part 5 would establish two offences, for victimisation (clause 50) and discriminatory advertisements (clause 51).

1.69 Part 6 of the religious discrimination bill would establish the statutory office of the Religious Discrimination Commissioner at the AHRC. The EM states that Part 6 of the bill is based on equivalent provisions governing the offices of the Age Discrimination Commissioner, Disability Discrimination Commissioner, Race Discrimination Commissioner and the Sex Discrimination Commissioner.[60]

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[59] AGD, *Submission 175*, p. 14.

[60] Explanatory memorandum to the religious discrimination bill, p. 100.

1.70 Part 7 would confer functions on the AHRC in relation to discrimination on the ground of religious belief or activity.[61] The EM notes that the provisions of Part 7 reflect analogous provisions in existing anti-discrimination law, including the Age Discrimination Act, Disability Discrimination Act, Racial Discrimination Act and the Sex Discrimination Act.[62]

1.71 Complaints of discrimination could be received and acted upon by the AHRC, under the consequential amendments bill (see paragraphs 1.76).

Part 8

1.72 Part 8 outlines the application and constitutional provisions of the religious discrimination bill.

1.73 Clause 64 explains the constitutional basis for the bill, namely that it would give effect to Australia's obligations under the:

- International Convention on Civil and Political Rights;
- International covenant on Economic, Social and Cultural Rights;
- Convention on the Rights of the Child;
- International Convention on the Elimination of All Forms of Racial Discrimination ;
- ILO Convention concerning Discrimination in respect of Employment and Occupation (No.111); and
- ILO Convention concerning Termination of Employment at the Initiative of the Employer (No. 158).

1.74 The EM states that 'this provision clarifies that the external affairs power is the main constitutional basis' for the bill.[63]

Consequential amendments bill

1.75 The consequential amendments bill contains two schedules:

- Schedule 1—Amendments consequential on the enactments of the Religious Discrimination Act 2021; and
- Schedule 2—Contingent amendments.

Schedule 1

1.76 Schedule 1 of the consequential amendments bill would amend the AHRC Act to add the Religious Discrimination Commissioner as a member of the AHRC. These amendments would allow the AHRC to perform functions in relation to the Religious Discrimination Act, including the function of inquiring into, and attempting to conciliate, complaints of unlawful discrimination under that Act.

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61 Explanatory memorandum to the religious discrimination bill, p. 67.

62 Explanatory memorandum to the religious discrimination bill, p. 100.

63 Explanatory memorandum to the religious discrimination bill, p. 105.

1.77 Amendments to the IGIS Act and further amendments to the AHRC Act under Schedule 1 would ensure that complaints of discrimination on the basis of religious belief or activity in relation to the conduct of intelligence agencies are dealt with by the Inspector-General of Intelligence and Security (IGIS).

1.78 Item 13 of Schedule 1 would amend the AHRC Act to require the AHRC to refer complaints relating to discriminatory industrial instruments to the Fair Work Commission. Items 16 to 18 would amend the Fair Work Act to provide that the Religious Discrimination Commissioner may make submissions to the Fair Work Commission in relation to such instruments. Schedule 1 would also amend subsection 351(1) of the Fair Work Act to extend the definition of 'anti-discrimination law' to include the Religious Discrimination Act. In effect, this would mean that provision for lawful acts and exceptions under the bills would apply to claims of adverse action because of an employee's religion.[64]

1.79 Further proposed amendments under Schedule 1 include:

- amending the Civil Aviation Act to provide that civil aviation regulations may be inconsistent with the Religious Discrimination Act if necessary for the safety of air navigation;
- amending the Schedule to the Sea Installations Act to ensure that the Religious Discrimination Act would apply to sea installations in adjacent areas.

Schedule 2

1.80 The amendments in Schedule 2 were contingent upon the passage of the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) through the Victorian Parliament. This bill was passed on 3 December 2021 and received Royal Assent on 14 December 2021.

1.81 Schedule 2 would amend subsection 11(2) of the Religious Discrimination Act to include the *Equal Opportunity Act 2010* (Vic) within the definition of 'a prescribed State or Territory law'.[65]

Human rights legislation bill

1.82 The human rights legislation bill contains one schedule, which contains amendments to the:

- Age Discrimination Act;
- Disability Discrimination Act;
- Racial Discrimination Act;
- Sex Discrimination Act;
- Charities Act; and

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[64] For further discussion on the interaction of the religious discrimination bill with the *Fair Work Act 2009* see AGD, *Submission 175*, pp. 15-16.

[65] Consequential amendments bill, Schedule 1, Item 1.

- Marriage Act.

1.83 The proposed amendments to the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act would incorporate an objects clause to provide that in giving effect to the objects of each Act, regard is to be had to the indivisibility and universality of human rights, and their equal status in international law, and the principle that every person is free and equal in dignity and rights.[66] Similarly, the proposed amendment to the Racial Discrimination Act would introduce an objects clause to that Act which includes, among other things, these principles.[67]

1.84 Schedule 1's proposed amendments to the Charities Act would clarify that advocacy of a view of marriage as the union of a man and a woman would not, of itself, amount to a 'disqualifying purpose'.[68]

1.85 In addition, the proposed changes to the Marriage Act would clarify that religious schools are not required to make available their facilities, or to provide goods and services, for any marriage, provided that the refusal:

- conforms to the doctrines, tenets or beliefs of the religion of the body, or
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[69]

Financial impact

1.86 According to their respective explanatory memoranda, both the religious discrimination and consequential amendments bills would have cost implications for the AHRC. The creation of the statutory office of the Religious Discrimination Commissioner would require additional expenditure for the salary and expenses of the Commissioner, as well as the necessary support staff. In addition, further expenditure would be required for additional complaints handling staff at the AHRC to inquire into, and attempt to conciliate, complaints of discrimination on the ground of religious belief or activity under the bill.[70]

1.87 The human rights legislation bill would have nil or an insignificant financial impact on Commonwealth government departments, agencies and the AHRC.[71]

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66 Human rights legislation bill, Items 1, 2, 4, 5, 8 and 9

67 Human rights legislation bill, Item 7

68 Human rights legislation bill, Item 3

69 Human rights legislation bill, Item 6

70 Explanatory memorandum to the religious discrimination bill, p. 3 and explanatory memorandum to the consequential amendments bill, p. 3.

71 Explanatory memorandum to the human rights legislation bill, p. 3.

Consideration by other parliamentary committees

Parliamentary Joint Committee on Human Rights (PJCHR)

1.88 On 26 November 2021, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General referred the bills to the PJCHR for inquiry and report by 4 February 2022.

1.89 Given the PJCHR's inquiry occurred concurrently with this committee's inquiry, and shared the same reporting date, that committee's considerations and conclusions are not reflected in this report.

Senate Standing Committee for the Scrutiny of Bills

1.90 The Senate Standing Committee for the Scrutiny of Bills (the scrutiny committee) raised issues regarding significant matters that the religious discrimination bill would defer to delegated legislation and sought the Attorney-General's advice regarding:

- in relation to subclauses 7(7), 9(7), 40(3) and (6):
- why the requirements for certain policies relevant to the application of discrimination law, including how the policies are to be made publicly available, have been left to delegated legislation;
- whether the bill could be amended to include at least high-level guidance in relation to this matter on the face of the primary legislation;[72]
- in relation to the power to prescribe certain state and territory laws under clause 11:
- why this power is left to delegated legislation; and
- which state or territory laws, if any, are currently intended to be prescribed within regulations made under subclause 11(3);[73]
- in relation to the power to exclude certain Commonwealth, state and territory laws from being exempt from the provisions of the bill under subclauses 37(1) and (3):
- why this power is left to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.[74]

1.91 The scrutiny committee further questioned and sought the Attorney-General's advice as to the broad discretionary powers the bill would provide to the AHRC and the minister with regard to temporary exemptions under clause 44 of the religious discrimination bill, specifically:

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[72] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, pp. 26-27.

[73] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, p. 27.

[74] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, pp. 28-29.

- why it is considered necessary and appropriate to provide the AHRC with a broad power to grant, vary or revoke exemptions to Divisions 2 or 3 of the bill under clauses 44 and 47;
- why it is considered necessary and appropriate to provide the minister with a broad power to vary or revoke exemptions to Divisions 2 or 3 of the bill under clause 47; and
- whether the bill can be amended to include guidance on the exercise of the power on the face of the primary legislation, noting the potential for a broad, unconstrained exemption power to undermine the religious discrimination framework.[75]

1.92 The scrutiny committee sought advice from the Attorney-General as to:

> why it is considered necessary and appropriate to provide the Commission, the Commissioner, or another member of the Commission with civil immunity under clause 72 of the Religious Discrimination Bill 2021 and the Commissioner, or a person acting on their behalf, with civil immunity under section 48 of the *Australian Human Rights Commission Act 1986* so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.[76]

1.93 The scrutiny committee requested the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.[77]

1.94 The scrutiny committee articulated additional concerns with respect to the broad delegation of administrative powers that could arise as a result of the operation of clause 69 of the religious discrimination bill in conjunction with the existing section 19 of the AHRC Act. On this matter it concluded:

> The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the powers and functions of the Commission or the Commissioner to be delegated to any staff member of the Commission or to any other person or body of persons.[78]

1.95 At the time of writing, the Attorney-General's response, along with the scrutiny committee's conclusions, were yet to be published.

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[75] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, pp. 29-30.

[76] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, p. 32.

[77] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, p. 33.

[78] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 18/21*, 1 December 2021, p. 31.

Chapter 2
A mechanism to protect against religious discrimination

2.1 Throughout the course of the inquiry numerous stakeholders expressed their support for protection from discrimination on the basis of religious belief and activity.

2.2 A range of submitters and witnesses supported the bills, with evidence to the committee detailing the anticipated positive impact of the bills on the lived experience of those holding religious belief, while also identifying specific provisions of the bills which, if enacted, would provide effective protection from religious discrimination. Other submitters and witnesses supported the principle of protecting religious belief and practice from discrimination but voiced concerns about the bills as a mechanism to achieve that protection.

2.3 This chapter outlines evidence received in support of the bills, both in general terms and with reference to specific provisions of the bills.

Commonwealth anti-discrimination law

2.4 The Attorney-General's Department (AGD) detailed existing Commonwealth anti-discrimination law, under which it is unlawful to discriminate on the basis on several protected attributes including age, disability, sex, race, intersex status, gender identity and sexual orientation 'in certain areas of public life, including education and employment'. Current anti-discrimination laws include the:

- *Age Discrimination Act 2004;*
- *Disability Discrimination Act 1992;*
- *Racial Discrimination Act 1975;* and
- *Sex Discrimination Act 1984.*

State and territory anti-discrimination law

2.5 Anti-discrimination law exists in all Australian jurisdictions in order to implement rights to non-discrimination and equality, and to prohibit adverse action being taken against individuals on the basis of particular attributes. The AGD explained that the list of protected attributes varies between jurisdictions, but in New South Wales and South Australia discrimination on the grounds of religious belief or activity is not currently unlawful. The AGD noted that:

> …the Religious Discrimination Bill will provide individuals with an avenue for recourse for discrimination based on religious belief or activity that is not otherwise available in those jurisdictions.[1]

Support for protection from religious discrimination

2.6 The legislative package considered by the committee would allow persons and religious bodies to generally act in accordance with their faith, and for this conduct not to amount to discrimination—provided the conduct has been engaged in in good faith and a person of the same religion could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

2.7 The following sections discuss support for this principle, in the context of the case for legislative reform and the need for the bills in particular.

The case for reform

2.8 It was put to the committee that legislative reform is required due to a marked increase in religious discrimination in Australia.

2.9 For example, the Australian Catholic Bishops Conference (ACBC) drew attention to studies and reports commissioned in the last decade, 'that reveal that religious discrimination is a problem in Australia, especially for minority faiths'. The ACBC said:

> These studies reveal that up to one in four Australian children have been on the receiving end of discrimination on the basis of their religion.[2]

2.10 Christian Schools Australia and Adventist Schools Australia (CSA & ASA) pointed to 2021 research, which indicated that 29 per cent of Australians have experienced religious discrimination, equating to half of the 60 per cent of Australians who identify as people of faith.[3]

2.11 The Executive Council of Australian Jewry (ECAJ) also observed that members of the Australian Jewish community were facing unofficial antisemitism, which was becoming increasingly serious and with 'worrying signs that it is creeping into mainstream institutions and society'. By way of example, ECAJ explained that:

> There were 447 recorded antisemitic incidents in Australia during the year ending 30 September 2021, according to the annual Report on Antisemitism in Australia, a report which has been published by our organisation each year for more than 30 years. The incidents were logged by the ECAJ, Jewish community roof bodies in each State, and other Jewish community groups and included physical assaults, abuse and harassment, vandalism, graffiti, hate and threats communicated directly by email,

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1 Attorney-General's Department (AGD), *Submission 175*, p. 5.

2 Australian Catholic Bishops Conference, *Submission 95*, p. 2.

3 Christian Schools Australia and Adventist Schools Australia, *Submission 89*, p. 12.

> letters, telephone calls, posters, stickers and leaflets. In the previous 12-month period, these same bodies logged a total of 331 incidents. Accordingly, there was **an increase of 35%** in the overall number of reported antisemitic incidents compared to the previous year.[4]

2.12 The Presbyterian Church of Victoria (PCV) explained that the need to strengthen religious freedom laws has arisen due to an increase in discriminatory amendments in state laws, which 'remove these ordinary rights from religious people and groups'.[5]

2.13 Similarly, the Institute for Civil Society argued that:

> Discrimination against people of faith is real and growing in Australia but there are no legal protections against it in federal, NSW or South Australian anti-discrimination law. This is a gap in antidiscrimination law we would not accept for any other minority.
>
> …
>
> Sex, sexual orientation, gender identity, age, race, and disability all have their own discrimination acts in Commonwealth Law. Religion does not.[6]

2.14 The Australian Muslim Advocacy Network (AMAN) requested that the bills provide a 'shield against vilification for people who are targeted because of their religious beliefs or activity'. The AMAN provided examples of serious anti-Muslim sentiment being publicly expressed, and drew attention to the Australian Human Rights Commission (AHRC) findings of 2021, in its 'Sharing the stories of Australian Muslims' report, that:

> 79% of Australian Muslims surveyed were afraid for their community following the Christchurch attack; almost 80% has experienced unfavourable treatment on the basis of religion, race and ethnicity; and 23% felt unable to speak up when they or someone they knew experienced unfavourable treatment.[7]

2.15 Professor Nicholas Aroney, Professor of Constitutional Law at the University of Queensland and member of the Expert Panel on Religious Freedom that conducted the Religious Freedom Review, submitted that:

> my engagement with issues of religious freedom and religious discrimination as a member of the Expert Panel has convinced me that enactment of the Religious Discrimination Bill 2021 is a pressing necessity.[8]

2.16 Professor Aroney pointed to the research of Professor Jonathan Fox of Bar-Ilan University in Tel Aviv, which he argued:

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4 Executive Council of Australian Jewry, *Submission 94*, p. 2. Emphasis in original.

5 Presbyterian Church of Victoria, *Submission 140*, p. 2.

6 Institute for Civil Society, *Submission 128*, pp. 2, 4.

7 Australian Muslim Advocacy Network, *Submission 122*, pp. 3-4.

8 Professor Nicholas Aroney, *Submission 145*, p. 5.

> demonstrates that secularised Western democracies such as France, Germany, and Switzerland engage in more government-based religious discrimination than many countries of Asia, Africa, and Latin America. Professor Fox singles out Australia as a clear example of the recent rise of socially-based discrimination, especially against Jews and Muslims. Jews, in particular, have been the victims of literally hundreds of instances of vandalism, harassment and threats of violence reported each year.[9]

The need for the bills

2.17 It was observed by many in support of the legislative package that while there is discrimination legislation in place to protect other personal attributes, such as gender, race, sexuality and disability, no such law exists for the legitimate expression of religion and associated beliefs and practices. Many also pointed to the recommendations of the Religious Freedom Review of 2018, as making the case for legislative change.

2.18 The committee received strong support for the bills from religious bodies of various denominations, from people of faith, and other stakeholders, including support for the bills as an overall package, and for specific clauses (which are discussed later in this chapter).[10]

Freedom of religious expression

2.19 The PM Glynn Institute at the Australian Catholic University spoke to the need for the freedom of expression of religion, and the role of religious belief in people's everyday lives, saying:

> …religious belief is a considered and deeply-held conviction which powerfully informs the way religious believers live, the actions they take, and the shape of communities. It is not just another form of subjective or personal opinion significant only for the individual who holds it. Religious freedom arises from the universal human search for the truth about our nature, the world we live in, and how we should live.[11]

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[9] Professor Nicholas Aroney, *Submission 145*, p. 5.

[10] Clause 7, Religious Discrimination Bill 2021. See, for example, Dr Renae Barker, *Submission 2*, pp. 2, 13; Albany Free Reformed Church Education Association, *Submission 17*, pp. 1-2; Catholic Education Tasmania, *Submission 35*, p. 4; Freedom for Faith, *Submission 96*, p. 1; Presbyterian Church of Australia, *Submission 105*, p. 2; Seventh-day Adventist Church in Australia, *Submission 123*; Institute for Civil Society, *Submission 128*, p. 2; Anglican Church Diocese of Sydney, *Submission 136*, p. 7; Associate Professor Mark Fowler, *Submission 146;* Human Rights Law Alliance, *Submission 150*, pp. 2-3; Rev Kamal Weerakoon, *Submission 155*, pp. 1-2; Mrs Karina Okotel, *Submission 156*, [p. 1]; Dr Denis Dragovic, *Submission 162*, p. 1; Benjamin Cronshaw, *Submission 166*; Mrs Margaret Airoldi, *Submission 167*; Rosemary Albert, *Submission 177*; Malcolm Eglinton, *Submission 181*; Stefan Slucki, *Submission 183*, p. 2; Steven Scott, *Submission 191;* Arnold and Margaret Schiebaan, *Submission 192.*

[11] PM Glynn Institute, Australian Catholic University, *Submission 132*, p. 1.

2.20 Similarly, the Australian Association of Christian Schools (AACS) asserted that the protection and promotion of religious freedom is 'essential in an open and free society which values human rights'. The AACS continued:

> Respect for religious freedom is fundamental to a democratic and pluralistic society and is intrinsically linked to several other fundamental liberties including freedom of speech, association, and conscience, making the freedom of religious expression a barometer for the health of the wider civil society.[12]

2.21 The PCV submitted that the Christian faith—as practiced in prayers, thoughts, words and deeds—is practiced both in public and in private, and argued that for 'Australia to succeed and prosper as a truly multicultural society, freedom to hold and practice religion must be protected in law'.[13]

2.22 Similarly, Australian Christian Churches (ACC) argued that while the focus of the bills is on discrimination, the proposed legislation would also in a 'very modest and limited way' protect freedoms to make statements of belief and would reduce the harassment and intimidation of people of religious faith 'who express, in a moderate and reasonable way, statements of belief long held by all the world's great religions'.[14]

2.23 The Presbyterian Church of Australia (PCA) spoke to the role of the bills in supporting individual expressions of spirituality in the public sphere:

> Religion cannot be constrained to private expressions of belief; all religious conviction leads to some form of public expression…Christianity is not simply a private matter that can be left at the door of the home, or of the church, but a view of the world that shapes public life. Every Christian — whether a cobbler, baker, or politician—should see their life and work informed by their faith. The ability to exercise religious convictions in the broad scope of public life is, then, necessary for religious freedom.[15]

2.24 The National Catholic Education Commission (NCEC) said that the legislative package 'must be enacted with bipartisan support to ensure freedom of religion is supported universally and equally in this nation'. The NCEC observed:

> The right to freedom of association has been an enshrined part of Australian industrial relations and fair work policy and practice over many decades. It protects the rights of all people to voluntarily associate on common values and goals – it's these protections that underpin trade unionism. Religious rights need the same protections.[16]

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[12] Australian Association of Christian Schools, *Submission 33*, pp. 4-5.

[13] Presbyterian Church of Victoria, *Submission 140*, p. 2.

[14] Australian Christian Churches, *Submission 5*, pp. 2-3.

[15] Presbyterian Church of Australia, *Submission 105*, p. 3.

[16] National Catholic Education Commission, *Submission 88*, pp. 3, 6.

Options for legal recourse

2.25 The Australian Christian Lobby (ACL) considered the bills necessary, as they address a 'longstanding gap in Federal Discrimination law and provide much-needed protections to all Australians of all or no religious beliefs within public life'.[17]

2.26 The Australian National Imams Council (ANIC) expressed support for the bills, and reflected that currently, if Australian Muslims are discriminated against because of their religious identity, there was 'little to no legal recourse'. ANIC considered this a 'fundamental deficiency in the federal discrimination legislative regime'. ANIC argued, therefore, that the new legislation would offer a 'critical opportunity to address an urgent and pressing concern held by Australian Muslims and persons of other faiths' and supported the bills' provisions which allow for civil (rather than criminal) remedies for religious communities at risk of discrimination.[18]

2.27 The Australia/Israel Jewish Affairs Council (AIJAC) stated that while the Australian Jewish community is small in comparison to a number of other faith communities, it has specific needs in terms of education, aged health and disability care, as well religious and cultural needs. AIJAC explained that the community's specific needs were, on the whole, currently met by community-based institutions and these tasks could not be easily substituted by services offered by secular (or other faith-based) bodies.[19]

2.28 Dr Alex Deagon also supported the bills, given that religious belief and activity is the 'only attribute that does not attract comprehensive, separate protection under Commonwealth discrimination legislation'. Further, Dr Deagon noted that the protections offered by the bills is 'necessary to address increasing hostility to religion' and to fulfil Australia's international obligations.[20]

2.29 Dr Denis Dragovic took issue with the broad arguments being made against the bills and suggested that the debate about the legislation had been 'poorly served by specious statements, hypothetical examples not grounded in reality, and a misunderstanding of religion'.[21] Dr Dragovic argued that legislated discrimination in favour of say, race or sex, was in an effort to help such groups thrive, but to:

> …selectively exclude religious believers despite international human rights law explicitly providing for it, is itself an explicitly discriminatory act against believers.

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17 Australian Christian Lobby, *Submission 1*, p. 4.

18 Australian National Imams Council, *Submission 144*, pp. 3, 5, 8.

19 Australia/Israel Jewish Affairs Council, *Submission 147*, p. 3.

20 Dr Alex Deagon, *Submission 3*, p. 4.

21 Dr Denis Dragovic, *Submission 162*, p. 1.

> Most sections of this Bill seek to prevent discrimination bar a few that support a religious body to establish a religious community so that they can thrive. This should not be controversial and should be treated no differently to the purposes of similar sections in other antidiscrimination legislation.
>
> …
>
> The fear of many who have voiced concern over this bill, that somehow this Bill will unleash a torrent of disrespectful conversations is not only plainly wrong, as it hasn't to date, but is counter to what history has taught us about how to best manage tolerance in a liberal democracy.[22]

2.30 A similar point was raised by the Institute for Civil Society, which said it was important to have a clear understanding of what the bills do, because:

> …a few activists, whose views have been given considerable attention in parts of the mainstream media, have created a misleading impression that the legislation has much greater impact than it does. It is, in reality, a Bill which, if enacted, will lead only to modest advances in terms of prohibition of discrimination. These improvements are nonetheless welcome.[23]

Religious education

2.31 There was considerable focus during the inquiry on the provisions of the Religious Discrimination Bill 2021 (religious discrimination bill) allowing religious educational institutions to preference, in good faith, the employment of persons who hold or engage in a particular religious belief or activity. Religious education institutions and other stakeholders offered strong support for these provisions.[24]

2.32 The AGD explained that the bills seek to ensure that religious schools can continue to make employment choices that 'maintain the religious ethos of the school', enabling parents of faith to 'confidently make choices for the education of their children'.[25]

2.33 The AACS argued that the freedom for Christian schools to employ Christian staff, and people in step with a school community's religious beliefs and values, 'goes to the very heart of why our schools exist'. The AACS continued that:

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[22] Dr Denis Dragovic, *Submission 162*, pp. 1-2; 4.

[23] Institute for Civil Society, *Submission 96*, pp. 1-2.

[24] Clause 11 of the Religious Discrimination Bill 2021. See for example, Albany Free Reformed Church Education Association, *Submission 17*, p. 2; Lutheran Education Australia, *Submission 91*, p. 2; Presbyterian Church of Australia, *Submission 105*, pp. 5-6; Hillside Christian College, *Submission 108;* Catholic Women's League Australia – New South Wales Inc., *Submission 110*, p. 2; Association for Reformed Political Action, *Submission 112*, pp. 2-3; PM Glynn Institute, Australian Catholic University, *Submission 132*, p. 6; Dr Denis Dragovic, *Submission 162*, pp. 6-8.

[25] AGD, *Submission 175*, p. 10.

> It is essential to the school's operation that it can make a deliberate determination that all staff members are willing to adhere to the beliefs and values of the Christian faith, both as a matter of personal belief and as evidenced by their conduct.[26]

2.34 CSA & ASA also spoke to the role of personal faith for teachers and other staff in Christian schools, and opined that faith communities, including Christian schools, 'must be able to take action that separates individuals from that community where their actions undermine the school, or reflect a repudiation of what the school believes in and stands for'.[27] Mr Mark Spencer, Director of Public Policy at the CSA, explained that the need for staff of the same religious beliefs extended beyond just the teaching of religious subjects. He stated:

> There's the old adage about it takes a whole village to raise a child. We believe it takes a whole school to educate a child, and that includes all staff. It's not just the transmission of academic knowledge and subject content. As any teacher or educator will tell you, it's about the relationships. It's about the informal content of the classroom—so dynamics within the classroom—the culture of the school and the ethos of the school. They all go to transmitting and forming that holistic young person…[28]

2.35 Hillside Christian College also rebutted the argument that non-Christians could teach those subjects and be involved in a school community without being of faith themselves. The College instead observed that:

> Christian schools require a cohesive team that is able to deliver the strategic objectives of the organisation. However, in meeting religious objects and goals, it is not just a matter of Christian subjects being taught, it is the cultural environment that is vital to the learning environment. Learning also does not just consist of the classroom or lie solely with the teachers…For a Christian school, with cultural focus on a Christian environment and associated support system, the vital importance of every employee being aligned with the educational and religious objects and values of the organisation is paramount. The Christian life is not compartmentalised rather it is holistic.[29]

2.36 The ACBC explained that 'Catholic schools do not expel students or sack staff simply on the grounds of sexual orientation, gender identity or any other protected status'. The ACBC took issue with such assertions, saying that they:

> …have gravely misrepresented and undermined the good work of Catholic schools and unnecessarily caused anxiety in the community. Where there is a discipline issue or a disagreement, principals or other senior members of staff will work to try to resolve the issue pastorally.[30]

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[26] Australian Association of Christian Schools, *Submission 33*, p. 14.

[27] Christian Schools Australia and Adventist Schools Australia, *Submission 89*, p. 6.

[28] Mr Mark Spencer, Christian Schools Australia, *Proof Committee Hansard*, 20 January 2022, p. 27.

[29] Hillside Christian College, *Submission 105*, pp. 3-4.

[30] Australian Catholic Bishops Conference, *Submission 95*, p. 2.

2.37 The NCEC argued that 'parents and families of students and staff, who share the same religious beliefs, should have the right to gather and associate for the purposes of education, formation and worship in a sympathetic and supportive environment'. The NCEC concluded that, for Catholic schools, it is important to retain a 'critical mass' of Catholic students and staff in its schools—'even as we welcome those from other religious backgrounds or none'—and this meant 'preferencing the enrolment or employment of students or staff who are Catholic, or who are willing to support and share in the ethos and mission of the school'.[31]

2.38 The NCEC offered several reasons as to why it supported the bills, stating that Catholic schools were not seeking to discriminate on the basis of an individual's personal attributes, such as race or gender identity, and that the bills were not seeking to do this. The NCEC further remarked that the bills would not:

> …give schools the right to discriminate against people based on their personal attributes, and Catholic schools are not seeking to do this.
>
> The proposed legislation simply enables Catholic schools to preference the employment or enrolment of people of the Catholic faith, and those willing to support the ethos and mission of their schools. This is reasonable and fair in a free, pluralist society.
>
> At all times, Catholic schools seek to engage on any issue that might arise regarding staff or the enrolment of students pastorally, with respect and care in recognising the dignity of each individual as a fundamental principle.
>
> There is no solid evidence to show that the proposed legislation will lead to direct or indirect discrimination of people based on their personal attributes (e.g. sexual orientation).[32]

2.39 Catholic Education Tasmania posited that the bills defend 'the right of Catholic schools to reject all and any ideologies that oppose Catholic belief and practice'. Catholic Education Tasmania advised that it asserts the right:

> …to refuse to teach non-Catholic ideological, political, social, or sexual beliefs or practices, or to implement them in any way (or to allow or support conduct that expresses such ideologies) in the school's day-to-day dealings with all staff, parents, and students.
>
> This right is intrinsic to the mission, function and purpose of Catholic education in Tasmania.[33]

2.40 Dr Deagon suggested that allowing religious schools to 'preference staff with belief and behaviour consistent with the ethos of the school' was a

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[31] National Catholic Education Commission, *Submission 88*, pp. 3, 7.

[32] National Catholic Education Commission, *Submission 88*, p. 5. See also: Australian Catholic Bishops Conference, *Submission 95*, p. 9.

[33] Catholic Education Tasmania, *Submission 35*, p. 4.

'fundamental human right'.[34] Similarly, Dr Renae Barker argued that religious schools must be able to make decisions about their operations 'in ways that sets them apart from secular schools', in order to 'maintain their unique character'.[35]

2.41 Dr Barker highlighted that the religious discrimination bill would specifically override state and territory law to:

> …permit religious bodies that are an educational institution to 'gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity.' I welcome to use of positive language and the concept of giving preference to co-religionists rather than discriminating against those of other faiths.[36]

2.42 The Australian Christian Higher Education Alliance (ACHEA) commented on the role of religion in higher education. Mr Nick Jensen, Political Liaison with the ACHEA, said with regard to higher education:

> …there are four fundamental requirements that we need in order to exist as faith based higher education providers: the freedom to teach our faith and doctrine; the freedom to employ all staff according to our religious culture and ethos; the freedom to require staff and students to uphold that culture and ethos; and the freedom to resolve ethical issues with reference to our doctrines and belief. Religious discrimination impacts our institutions directly. This legislation goes a long way to providing the necessary protections. ACHEA supports the bill…[37]

Consequential amendments bill

2.43 Those in support of the religious discrimination bill were also in favour of the consequential amendments bill.

2.44 In particular, there was support for Schedule 2 of the consequential amendments bill, which, in relation to clause 11 of the religious discrimination bill and the new prohibition on discrimination on the basis of religious belief or activity, would define a prescribed state or territory law as including Victoria's *Equal Opportunity Act 2010* (Victorian Equal Opportunity Act). In other words, the bills, if passed, would 'override' the provisions of the Victorian Equal Opportunity Act, which was recently amended with regard to the application of religious exemptions in that state.[38]

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[34] Dr Alex Deagon, *Submission 3*, p. 4.

[35] Dr Renae Barker, *Submission 2*, p. 11.

[36] Dr Renae Barker, *Submission 2*, p. 11.

[37] Mr Nick Jensen, Australian Christian Higher Education Alliance, *Proof Committee Hansard*, 20 January 2022, p 26. See also: Australian Christian Higher Education Alliance, *Submission 103*, p. 21.

[38] See for example: Institute for Civil Society, *Submission 96,* pp. 5-6; Anglican Church Diocese of Sydney, *Submission 136*, pp. 9-10; Presbyterian Church of Victoria, *Submission 140*, p. 3.

2.45 The NCEC spoke directly to the issue of the Victorian Equal Opportunity Act, which in its view were a 'serious over-reach by the Victorian Government into the rightful freedoms of faith-based organisations in that state'. The NCEC said that this approach could result in:

> …a 'tiered' system of religious rights across Australia narrowing the freedoms for faith-based schools in some jurisdictions.
>
> The lack of harmonisation also opens the door to unnecessary lawfare against faith-based schools resulting in costly and lengthy litigation requiring Courts and Commissions to adjudicate increasing numbers of complaints.[39]

2.46 The NCEC concluded that there is a push for Australia to 'adopt a monoculture of thought under the banner of diversity' which resulted in the Victorian Government's 'over-reach'. NCEC expressed concern that the Victoria legislation could set a precedent for other jurisdictions, and in this context 'strongly welcomes and supports' the provision of the bills which address these concerns.[40]

2.47 A similar point was made by the ACBC, which also voiced concerns about the 'inherent requirement' provisions of the Victorian laws. The ACBC argued that:

> Across all sectors in Catholic organisational contexts, the introduction of an "inherent requirement" test is a serious intrusion into the expression of faith and an unnecessary instrument of power. It may lead to vexatious claims being adjudicated by a commissioner or the courts, neither of which have the competency to define religious matters for believers … The Victorian Government has been unable to identify a single problem in Catholic schools with which this legislation is meant to address.[41]

2.48 Lutheran Education Australia argued that that Victorian legislation does not:

> …fully consider the totality of the role of a teacher and student learning outcomes beyond content knowledge, the importance of holistic education of the individual child supported by all staff, and the role of the entire school community in establishing and upholding an ethos. This governmental and legislative overreach in Victoria places at risk the ability

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Victoria's *Equal Opportunity Act 2010* was recently amended so that religious bodies and schools can only discriminate on religious grounds, where the religious belief is an inherent requirement of the job, and if a religious body receives Victorian Government funding, the body can only discriminate on the basis of a person's religious beliefs, not other personal characteristics; see Premier the Hon Daniel Andrews, 'Laws Pass to Stop Discrimination Against Victorians', *Media Release*, 3 December 2021 (accessed 19 January 2022).

39 National Catholic Education Commission, *Submission 88*, p. 6.

40 National Catholic Education Commission, *Submission 88*, p. 10. See also: Australian Catholic Bishops Conference, *Submission 95*, pp. 7-8.

41 Australian Catholic Bishops Conference, *Submission 95*, p. 8.

> of Lutheran schools to function as authentically Lutheran schools consistently living out their ethos.[42]

2.49 The AACS welcomed the Schedule 2 provisions, on the basis they would provide assurances to schools that they could:

> …continue to employ staff who share the beliefs of the school across all positions, not just certain positions where religious belief or activity is judged to be an 'inherent requirement' of the job through a narrow set of criteria.[43]

Specific provisions

2.50 Specific provisions of the bills were highlighted as being necessary for ensuring protection from religious discrimination. Some of the key provisions discussed in evidence are detailed below.

2.51 Some submitters explained why the provisions of the bill need to be different to the provisions of existing anti-discrimination law. For example, the Anglican Church Diocese of Sydney said that a 'plain vanilla' bills package which replicated the provisions of existing Commonwealth law would 'not allow religious institutions the freedom to maintain their religious ethos'.[44] Right Reverend Dr Michael Stead, Bishop of South Sydney continued:

> The bill addresses a longstanding gap in federal antidiscrimination law. This bill in particular does what a plain, vanilla bill does not do, which is to strike the right balance between the twin stated aims of the bill: on the one hand, to render it unlawful to discriminate on the basis of religious belief or activity whilst, on the other hand, at the same time, affording sufficient legislative protection for religious institutions to allow them the freedom to maintain their religious ethos.[45]

2.52 Dr Deagon further explained why a specific religious discrimination legislative package was needed, saying that the 'reason is that religion is unique':

> It's unique, firstly, because it entails external expression. Part of having a religion for many people is being able to externally express it through worship, prayer and publicly interacting with people in a public context and not hiding who you are as a religious person. It's also unique in the sense that being religious or having a religion or practising a religion entails practising or manifesting in community with others, and our international law recognises this through, for example, article 18 of the ICCPR. So part of being a religious organisation with a religious ethos

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[42] Lutheran Education Australia, *Submission 91*, p. 4. See also: Seventh-day Adventist Church in Australia, *Submission 123*, pp. 4-5.

[43] Australian Association of Christian Schools, *Submission 33*, p. 24. See also: Christian Schools Australia and Adventist Schools Australia, *Submission 89*, p. 15; Presbyterian Church of Australia, *Submission 105*, p. 6.

[44] Anglican Church Diocese of Sydney, *Submission 136*, p. 4.

[45] Right Reverend Dr Michael Stead, Bishop of South Sydney; Chair, Religious Freedom Reference Group, Anglican Church Diocese of Sydney, *Proof Committee Hansard*, 20 January 2022, p. 66.

> means that some organisations may wish to develop that ethos through having staff who consistently adhere to the beliefs and the conduct standards of that organisation. Religious organisations with a particular religious ethos are obviously going to have a different view about what that ethos means compared to different religions or to secular organisations.[46]

2.53 The Institute for Civil Society argued that the bills do 'not give any new rights to religious bodies at all' (excluding some rights in relation to religious educational institutions). The Institute continued that the proposed legislation:

> … simply gives individual people rights to complain about discrimination. It doesn't even give religious organisations a right to complain about discrimination (although there is a mechanism by which an individual might be able to complain on behalf of an affected group of people). What it does provide to religious bodies, necessarily, is a defence to unwarranted discrimination claims made under the legislation. Any law on religious discrimination has to define the scope and limits of the right to complain about being discriminated against. There have to be limits on that right, as with any other discrimination law.[47]

Statements of belief

2.54 A 'statement of belief' is defined by the religious discrimination bill as a statement of a belief that a person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (including atheist and agnostic beliefs).

2.55 Clause 12 of the religious discrimination bill would provide that a statement of belief does not constitute discrimination, if it is not malicious, and if a reasonable person would not consider the statement to threaten, intimidate, harass or vilify a person or group.

2.56 The majority of faith communities and individuals of faith offered strong support for the statement of belief provisions.

2.57 Associate Professor Mark Fowler was supportive of 'religious beliefs' being considered in relation to a person's genuine religious convictions, 'thus avoiding judges having to act as theologians to interpret religious doctrines to determine if a belief "conforms" to an identified religious doctrine'. Associate Professor Fowler continued:

> This is consistent with the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes…[48]

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[46] Dr Alex Deagon, *Proof Committee Hansard*, 20 January 2022, pp. 10-11.

[47] Institute for Civil Society, *Submission 96*, p. 3.

[48] Associate Professor Mark Fowler, *Submission 146*, p. 3. In light of this view, Associate Professor Fowler suggested that clauses 7, 9 and 40 of the religious discrimination bill be amended to include a genuine beliefs test, rather than the 'reasonable other person' test; see p. 5.

2.58 The AIJAC argued that clause 12 would offer an appropriate balance between protecting the rights of individuals to express their faith freely or organisations to operate in accordance with the views of their membership, and the right of all individuals to live free from vilification and harassment. The AIJAC emphasised that this clause would also place responsibilities on people of faith and faith communities, saying:

> …the other side of the coin is a responsibility for people of faith to avoid making statements that may disparage or disrespect those who don't share those views. This is a moral obligation which should not require further legislation. Instead, strong leadership is required from community and political leaders alike to call out any public statements that do not show respect to other Australians.[49]

2.59 The ECAJ was also supportive of clause 12 as currently drafted and considered it likely that the provision would only apply to a very narrow range of statements. ECAJ posited that clause 12 would:

> …have an extremely limited application in terms of permitting statements that are at present prohibited by other laws. Perhaps its main effect will be to discourage the making of complaints about statements of religious belief which would in any event have only remote prospects of succeeding under the current law.
>
> …
>
> The express exclusion from protection of any statement that is malicious, or which a reasonable person would consider would threaten, intimidate, harass or vilify a person or group should, one hopes, negative any suggestion that the government is encouraging or sanctioning statements that disparage or are disrespectful of people on the basis of their faith, sexual orientation or identity, or any other personal attribute, even if the statements are allowed under the Bill and the current law.[50]

2.60 Similarly, the PCA argued that 'very few good faith statements of religious faith could be fairly construed as discriminatory'.[51]

2.61 The AACS endorsed the definition of 'statement of belief', suggesting that it was a significant improvement on previous iterations of the bills, and would help to avoid 'judges having to interpret questions of theology or religious doctrines to determine if statements of belief conform to religious doctrine, as consistent with common law precedents'.[52]

2.62 Dr Deagon considered that the statement of belief provisions are suitably supported by the other provisions of the bills, and therefore unlikely to lead to 'hurtful personal attacks on the basis of religion'. Dr Deagon continued:

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[49] Australia/Israel Jewish Affairs Council, *Submission 147*, p. 5.

[50] Executive Council of Australian Jewry, *Submission 94*, pp. 14-15.

[51] Presbyterian Church of Australia, *Submission 105*, p. 7.

[52] Australian Association of Christian Schools, *Submission 33*, p. 13.

> …statements of belief must overcome significant hurdles to attract protection from the Bill: they must be made in good faith, and not be malicious, and not be reasonably considered to threaten, harass, intimidate or vilify, and must not urge the commission of a criminal offence. This combination of limitations means the kinds of hypotheticals posed by the detractors, if they exist, would not meet the standard to be protected. The protection of statements of belief is appropriately designed to promote the robust discourse which is the hallmark of a democratic and pluralist society.[53]

2.63 The PCV supported the statement of belief provisions but was concerned about 'vexatious litigation'. It suggested that it was not the place of the courts to determine the content of religious belief; rather, this could only be determined by a person who genuinely holds those beliefs, and decisions 'about whether a statement of belief represents a religion must always be the responsibility of religious institutions, not government bodies'.[54]

2.64 The AGD clarified that these provisions re intended to ensure that a person should not be subjected to a discrimination complaint under any Commonwealth, state or territory anti-discrimination law, 'simply for expressing their genuine religious beliefs in good faith'.[55] The AGD stated that discrimination law 'generally requires some form of actual or proposed conduct to occur', and was of the view that:

> …a statement, in and of itself, is unlikely to constitute the basis for a claim of discrimination without some other behaviour that would be either less favourable treatment (for direct discrimination) or a requirement to comply with a condition, requirement or practice that would disadvantage the person and was not reasonable (for indirect discrimination).[56]

2.65 The AGD considered that a court is likely to apply a 'broad interpretation of the good faith requirement encompassing both subjective considerations…as well as objective considerations'. The department suggested that a court would need to do more than 'merely accept a person's claim that their statement satisfies the requirements of the definition', and the courts would need to inquire into whether a person's beliefs are sincerely held.[57]

State and territory anti-discrimination law

2.66 Some submitters expressed support for the element of clause 12 which provides that a statement of belief does not constitute discrimination for the purposes of other state and federal anti-discrimination legislation.

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53 Dr Alex Deagon, *Submission 3*, p. 5.

54 Presbyterian Church of Victoria, *Submission 140*, p. 4.

55 AGD, *Submission 175*, p. 11.

56 AGD, *Submission 175*, p. 12.

57 AGD, *Submission 175*, p. 12.

2.67 For example, the PCV said that across Australia there are now laws in place which:

> …punish people for communicating their religious beliefs in public (Tasmania), for forming associations and organisations to serve religious ends (Victoria), and even for teaching and praying for our own children, in our own churches and homes (Victoria). These laws are both immoral and unjust.[58]

Tasmanian anti-discrimination law

2.68 In particular, clause 12 of the religious discrimination bill was keenly endorsed by those in support of the bill, as it would provide that a statement of belief does not constitute discrimination for the purposes of section 17(1) of Tasmania's *Anti-Discrimination Act 1998* (Tasmanian Anti-Discrimination Act), which takes into consideration 'offensive' conduct against religious belief or activity, among other things.[59]

2.69 Dr Deagon argued that the proposed overriding of the Tasmanian Anti-Discrimination Act is a positive move as that Act is an 'outlier in Australian anti-discrimination law and stifles freedom of speech and the expression of religion in public life'.[60]

2.70 Similarly, Professor Nicholas Aroney remarked that the Tasmanian Anti-Discrimination Act is 'the broadest provision of its kinds in Australia', that goes 'considerably further in constraining freedom of expression' than contemplated by the ICCPR. Professor Aroney therefore considered it appropriate for the Commonwealth to intervene to ensure there are no unjustified, legislated restrictions on the freedom of expression.[61]

2.71 The Anglican Church Diocese of Sydney echoed these views, arguing that subsection 17(1) of the Tasmanian Anti-Discrimination Act:

> …is an inappropriate restriction on the right protected by Article 18 of the ICCPR to manifest one's religion in public, and the right to freedom of expression protected by Article 19. The Commonwealth override of this law is necessary to ensure that Australia upholds its obligations as a signatory to the ICCPR.[62]

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58 Presbyterian Church of Victoria, *Submission 140*, p. 2.

59 Sections 16 and 17(1) of the Tasmanian *AntiDiscrimination Act 1998*- provides that a person must not engage in conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of, among other things, sexual orientation, marital or relationship status, religious belief or affiliation, or religious activity.

60 Dr Alex Deagon, *Submission 3*, p. 5.

61 Professor Nicholas Aroney, *Submission 145*, pp. 2-3. See also: Institute for Civil Society, *Submission 128*, pp. 7-8.

62 Anglican Church Diocese of Sydney, *Submission 136*, p. 13.

2.72 The Wilberforce Foundation suggested, given moderate statements of belief do not contravene section 17 of the Tasmanian Anti-Discrimination Act, the bills before the committee ameliorate 'some of the burden that the Tasmanian Act imposes on religious expression'.[63]

2.73 The AGD explained that Tasmania is the only jurisdiction where a provision exists to capture conduct in relation to protected attributes that a person may find 'offensive'. The AGD continued that where a claim of discrimination or a claim for breach of subsection 17(1) of the Tasmanian Anti-Discrimination Act is made, a respondent could raise clause 12 of the religious discrimination bill as a defence (where the conditions for clause 12 are met).[64]

Employment protections

2.74 Clause 11 of the religious discrimination bill stipulates that a religious educational institution does not contravene a state or territory law, if in employment matters it gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity—if doing so is in accordance with a publicly available written policy that outlines the religious body's position in relation to particular religious beliefs or activities.

2.75 The AGD explained that the purpose of clause 11 is to preserve existing state and territory exemptions. The Commonwealth government considered it would only be necessary to prescribe a state or territory law if:

> …a jurisdiction enacted a law that removed or limited an existing religious exception that permits religious educational institutions to preference in employment. The criteria by which the power to prescribe a state or territory law would be exercised is clearly laid out in clause 11(3) of the Bill.[65]

2.76 The department outlined the benefits of requiring a publicly available statement of beliefs:

> The requirement to have a written, publicly available policy increases certainty and transparency and ensures that prospective or existing employees as well as the general public would be able to ascertain and understand the position of a religious body in relation to the particular matter dealt with in the relevant provision of the Bill (ie employment, partnerships, or accommodation facilities).
>
> Any guidance issued by regulations would be intended to assist religious bodies to achieve this goal. Future guidance could also respond to particular issues identified by religious bodies in developing their publicly available policies. Noting that clause 11 operates to override certain State

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63 The Wilberforce Foundation, *Submission 13*, p. 1.

64 AGD, *Submission 175*, p. 13.

65 AGD, *Submission 175*, p. 10.

> and Territory laws, the Government considered it important to have the requirements for publicly available policies set out on the face of the Bill.[66]

2.77 Those in support of the bills were particularly reassured by these provisions.[67]

2.78 The AACS, for example, said it was 'very pleased' to see clause 11 included, believing there 'is no greater threat to an educational institution's religious freedom right than the removal or narrowing of exceptions in state or territory based anti-discrimination laws in relation to the employment of staff'; doing so is a 'direct assault on their freedom of religious belief, expression and association'.[68] Mr Dylan Turner of the AACS reiterated this position:

> Clause 11 is important because it overrides certain laws at the state and territory level that hinder the ability of our schools to operate under this proven and popular Christian school model.[69]

2.79 The ACC suggested that in any jurisdiction with a prohibition on religious discrimination, there is a need for 'provisions that address the employment rights of faith-based organisations'. The ACC continued that faith-based organisations should have the 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. For example, an environmental group can choose not to select as a member of staff someone who does not share the objectives or priorities of the organisation or who might actively seek to undermine it.[70]

2.80 The Anglican Church Diocese of Sydney suggested that the override of state and territory legislation necessary when considered against the obligations under the ICCPR. The Church said that 'under the ICCPR, the Commonwealth is held to account for the actions of its States and Territories for failing to protect human rights'. This then:

> …provides a rationale for the limited override of inconsistent State or Territory legislation in clause 11, where that legislation undermines the rights protected in Article 18 [of the ICCPR]. By enacting clause 11, the Commonwealth Government is exercising its duty as a signatory to the ICCPR to establish a national minimum standard in relation to the freedom

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[66] AGD, *Submission 175*, p. 11.

[67] See for example, National Catholic Education Commission, *Submission 88*, p. 8; Stefan Slucki, *Submission 183*, p. 2.

[68] Australian Association of Christian Schools, *Submission 33*, pp. 17, 19. See also, Catholic Education Tasmania, *Submission 35*, p. 5.

[69] Mr Dylan Turner, Australian Association of Christian Schools, *Proof Committee Hansard*, 20 January 2022, p. 26.

[70] Australian Christian Churches, *Submission 5*, p. 4.

> of religious educational institutions to maintain their religious ethos through employment.[71]

2.81 The PM Glynn Institute at the Australian Catholic University spoke more broadly to the protection the bills would provide for religious bodies to act in accordance with their faith, and noted that:

> …it is helpful that these provisions clarify that acting in accordance with religious beliefs is not in and of itself a form of discrimination. The assumption that religion is inherently discriminatory (and therefore unjust) undermines a proper respect and appreciation for the importance of religious freedom as a fundamental human right.[72]

2.82 The Institute for Civil Society argued that the override provisions should go further, and be amended to ensure that:

> …all religious bodies, not just educational institutions, are free to choose to preference in employment people with the same religious beliefs as the body. Further, the override in clause 11 should not depend on the making of regulations naming specific State and Territory anti-discrimination laws. Such regulations can be made and unmade and changed by different Ministers and governments. If the Parliament considers that, as a matter of principle, religious bodies (including churches, mosques, synagogues and temples) and schools should be free to choose to preference in employment people with the same religious beliefs as the religious body (just as political parties and MPs are free to preference people with the same political views in employment), then the Parliament should enact a simple statutory right for religious bodies to do so which will override inconsistent State and Territory laws to the extent of the inconsistency, without having arguments about whether there should be a regulation for each new State and Territory law.[73]

The status of associations and institutions

2.83 Varying views were proffered about the provisions of the religious discrimination bill which provide for associations, institutions and corporations to be litigants in discrimination matters—a break from the approach in other discrimination law where proceedings can only be commenced by a natural person. However, those in support of the bill saw merit in this approach.

2.84 Dr Deagon, for instance, suggested that the provisions are reasonable and would give effect to legislation that better adheres Australia to its international human rights obligations. Dr Deagon stated:

> …as a constitutional matter, there is no impediment to empowering religious corporations as litigants in a law protecting against religious discrimination, and indeed such is required as a means to give adequate

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71 Anglican Church Diocese of Sydney, *Submission 136*, p. 12.

72 PM Glynn Institute, Australian Catholic University, *Submission 132*, p. 4.

73 Institute for Civil Society, *Submission 128*, p. 12.

> effect to the protections afforded to individuals and groups against religious discrimination in international law.[74]

2.85 Bishop Mark Edwards, representing the ACBC, considered the extension of rights to religious institutions to be a reasonable reflection of the rights to freedom of association. Bishop Edwards was of the view that:

> In that sense an institution isn't something separate but it's a gathering of a whole lot of individuals. I get there's a balance to be achieved between competing rights, but it's also rights of individuals to get together, to form a group where the ethos, the belief, the curriculum, if you like, of who we are is able to be presented and passed on. It's so hard for our young people to experience that it's possible to be somebody who lives a relationship with God, who believes that God is present and active in our lives as a personal being. To be in a group of people who believe that is the gift that we want to offer our young people in our schools and in our workplaces.[75]

2.86 The AACS argued that incorporated and unincorporated entities should have the ability to initiate discrimination complaints in their own right, and 'not merely as an associate of an individual'. The AACS encouraged the inclusion of stronger provisions in the religious discrimination bill in this respect, to protect religious institutions from discrimination and therefore protect the rights of individuals associated with those institutions.[76]

Religious Discrimination Commissioner

2.87 Previous iterations of the bills created the position of a Religious Freedom Commissioner, which—in the current version of the bills—is renamed as a Religious Discrimination Commissioner (RDC), within the AHRC. There was general support for the creation of the RDC role, as provided for in Part 6 of the religious discrimination bill.[77]

2.88 The ACC said that the appointment of the RDC would be a positive step 'towards promoting protection against religious discrimination and freedom of speech on religious matters'.[78] Similarly, Professor Aroney suggested that in addition to addressing the problems of religious discrimination, the Commissioner's role should include the promotion of religious freedom.[79]

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74 Dr Alex Deagon, *Submission 3*, pp. 5-6.

75 Bishop Mark Edwards OMI, Bishop of Wagga Wagga; Member, Bishops Commission for Catholic Education; Member, National Catholic Education Commission; Member, Australian Catholic Bishops Conference, *Proof Committee Hansard,* 20 January 2022, p. 39.

76 Australian Association of Christian Schools, *Submission 33*, p. 9.

77 However, some submitters argued that the name should revert to 'Religious Freedom Commissioner' as initially proposed; see, for example: Australian Christian Churches, *Submission 5*, pp. 3-4.

78 Australian Christian Churches, *Submission 5*, p. 4.

79 Professor Nicholas Aroney, *Submission 145*, p. 4.

2.89 The PCV did observe, however, that while the power to make decisions about religious should rest with religious bodies, it hoped that the appointment of a Religious Discrimination Commissioner would 'guide the AHRC toward developing deeper insight into the harms of religious discrimination'. Further, the Commissioner should 'have significant understanding of religious communities, their idiosyncrasies, differences, similarities and also genuinely seek to champion religious rights'.[80]

2.90 In a somewhat differing view, the Association of Heads of Independent Schools of Australia (AHISA) supported the creation of the RDC, but called for this office and the role of the Commissioner to be established as a matter of priority, and to this end, for its establishment be uncoupled from and independent of the religious discrimination bill.[81] AHISA explained that it saw a broader role for the office of the Commissioner:

> The office and role of the Religious Discrimination Commissioner have symbolic and practical significance regarding religious discrimination and religious freedom beyond any specific oversight of a religious discrimination act. Expanding the Commissioner's role to promote understanding of and compliance with a future religious discrimination act could be executed through such an act and consequential amendments to the *Australian Human Rights Commission Act*.[82]

2.91 The Institute for Civil Society made similar points. The Institute considered the appointment of the Commissioner a positive step, but urged that the person appointed to the role must be:

> …a person of sufficient calibre, conviction and standing within faith communities is appointed. In a diverse, multicultural society, it is as important to promote acceptance of different religious beliefs as it is to promote racial harmony, for many ethnic minorities are also religious minorities. The Commissioner can also be a significant voice within the Australian Human Rights Commission, which has, in the recent past, had a very mixed record on supporting the internationally protected human rights of freedom of religion and conscience, and the related freedoms of speech and association for people of faith.[83]

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80 Presbyterian Church of Victoria, *Submission 140*, p. 4. See also Mr Joel Delaney, *Submission 189*.

81 Association of Heads of Independent Schools of Australia, *Submission 80*, p. 3.

82 Association of Heads of Independent Schools of Australia, *Submission 80*, p. 8.

83 Institute for Civil Society, *Submission 96*, p. 10.

Chapter 3
Issues in relation to human rights and discrimination

3.1 This chapter considers issues raised in evidence about the potential discrimination and human rights implications of the bills. The specific issues examined include:

- the international human rights framework;
- overriding other human rights;
- statements of belief;
- discrimination by religious educational institutions;
- human rights for groups and corporations; and
- provisions under the *Sex Discrimination Act 1984* (Sex Discrimination Act).

3.2 In considering these issues, the committee recognises that the Parliamentary Joint Committee on Human Rights (PJCHR) was also referred the package of bills and brings specific expertise to the consideration of the human rights implications. This chapter should therefore be considered in conjunction with the report of the PJCHR.

International human rights framework

3.3 Australia is a party to the seven core international human rights treaties:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child (CRC); and
- the Convention on the Rights of Persons with Disabilities (CRPD)[1]

3.4 The religious discrimination bills directly engage the ICCPR, and, to some extent, the CERD and the CRPD.

[1] Attorney-General's Department (AGD), 'International human rights system', https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system (accessed 24 January 2022).

Human rights and the religious discrimination bills

3.5 The Attorney-General's Department (AGD) advised that the Commonwealth's anti-discrimination laws are based on the implementation of these international treaty obligations but noted that these treaties are not self-executing, and require domestic legislative implementation to have effect under Australian law.[2]

3.6 The primary constitutional basis for implementing these treaties domestically is the power of the Parliament to make laws with respect to external affairs,[3] which extends to the implementation of Australia's treaty obligations under international law; all of Australia's discrimination laws were enacted under the external affairs power.[4] The bills would also be implemented under this power.

3.7 In addition, in giving effect to the objects of the bills, the AGD pointed to subclause 3(2) of the Religious Discrimination Bill 2021 (religious discrimination bill) which would require that regard be given to the indivisibility and universality of human rights, and their equal status in international law.[5]

3.8 Many submitters pointed to ICCPR, which, at Article 18, provides that 'everyone shall have the right to freedom of thought, conscience and religion' and continues that:

> This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> …
>
> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[6]

3.9 The Australian Muslim Advocacy Network (AMAN) also drew attention to Article 5 of the CERD. The AMAN quoted Article 5:

> State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic group, to equality before the law,

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2 AGD, *Submission 175*, p. 3. See also Attachment C, AGD, *Submission 175* for further discussion of specific human rights and anti-discrimination legal frameworks.

3 Section 51(xxix) of the Constitution.

4 Professor Nicholas Aroney, *Submission 145*, p. 5.

5 AGD, *Submission 175*, p. 7.

6 United Nations Human Rights, *International Covenant on Civil and Political Rights*, Article 18, paragraphs 1, 3.

> notably in the enjoyment of…(vii) the right to freedom of thought, conscience, and religion.[7]

Support for the ICCPR principles and the bills

3.10 In the context of international human rights, the bills were considered a positive step forward in meeting Australia's international human rights obligations,[8] and submitters saw the bills as being integral to the promotion of the ICCPR principles.[9]

3.11 The Australian Association of Christian Schools (AACS), for example, argued there is currently a 'glaring omission' in the Commonwealth legislative framework, as it does not explicitly protect religious freedom in a manner consistent with the ICCPR. The AACS was of the view that enactment of the bills would 'fill the gap in discrimination law and improve the human rights protections for all Australians', while creating better consistency and certainly in the protection of rights across the different states and territories.[10]

3.12 The Human Rights Law Alliance (HRLA) said that of the five main equality rights recognised by international law—being race, age, sex, disability and religion—only religion had not been given protection in Commonwealth law and rectifying this was made more important because 'religious freedom has many unique aspects and protected iterations that other attributes don't'.[11] The HRLA called for the legislative package to include the proper protection of the following unique religious qualities, as provided for by the ICCPR:

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7 Australian Muslim Advocacy Network, *Submission 122*, p. 2.

8 The opposite view was also put forward, with the Law Council of Australia submitting that the statement of belief provided for by clause 12 'provides that, contrary to international human rights law, manifestation of religious belief must be privileged over other human rights such as freedom from discrimination on the grounds of sex, sexual orientation, disability, race and age'; see Law Council of Australia, *Submission 8*, p. 5. It was also noted that there is a distinction between religious discrimination and freedom of religion; see Dr Renae Barker, *Submission 2*, pp. 2-3.

9 See for example: The Wilberforce Foundation, *Submission 13*, pp. 1-2; Mr Timothy Tunbridge, *Submission 37*; National Catholic Education Commission, *Submission 88*, pp. 3, 6; Christian Schools Australia and Adventist Schools Australia, *Submission 89*, pp. 7-8, 12; Executive Council of Australian Jewry, *Submission 94*, pp. 3-4, 8; Australian Catholic Bishops Conference, *Submission 95*, pp. 4-5; Australian Muslim Advocacy Network, *Submission 122* pp. 2-3; Professor Nicholas Aroney, *Submission 145*, pp. 1-2; Associate Professor Mark Fowler, *Submission 146*, p. 3; Mrs Karina Okotel, *Submission 156*, [pp. 2-3].

Conversely, the Australian Catholic Bishops Conference suggested the bills did not go far enough to 'ensure that, within the limits of federal legislative power, this fundamental human right [to religious freedom] is protected' *Submission 95*, p. 2.

10 Australian Association of Christian Schools, *Submission 33*, p. 5.

11 Human Rights Law Alliance, *Submission 150*, p. 3. Notwithstanding these views, the HRLA put forward a number of suggestions for amendment to the bills in order to better protect religious freedom rights.

- freedom of religious belief and activity is both an individual and collective right;
- freedom of religious belief and activity is both a private and a public right;
- freedom of religion should only by limited in exceptional circumstances; and
- freedom of religious belief and activity includes the right of parents to educate their children in conformity with their own convictions.[12]

3.13 In relation to this final point, the AGD also drew attention to Article 18(4) of the ICCPR, which provides that respect be given to the 'liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.[13]

3.14 Christian Schools Australia and Adventist Schools Australia (CSA & ASA) similarly drew attention to this Article and recommended the objects of the religious discrimination bill be amended to include Article 18(4), in recognition of the 'strong bi-partisan support for parental choice in education, for many decades'.[14]

3.15 Karina Okotel, a law lecturer, supported the bills and submitted that, to give effect to the obligations in Article 18(4), it is necessary to 'allow religious schools to positively discriminate when engaging staff and volunteers who do not share their beliefs'.[15]

Overriding other human rights

3.16 While noting that the religious discrimination bill seeks to implement Article 18 of the ICCPR, several submitters and witnesses argued that the bill, specifically Part 2 (which contains the 'statement of belief' provisions), would privilege the right to freedom of religion over other human rights and protected attributes.[16]

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[12] Human Rights Law Alliance, *Submission 150*, p. 11.

[13] AGD, *Submission 175*, p. 10. See also: Hillside Christian College, *Submission 108*, pp. 2-3.

[14] Christian Schools Australia and Adventist Schools Australia, *Submission 89*, p. 13.

[15] Mrs Karina Okotel, *Submission 156*, [p. 3].

[16] See, for example: Ms Catherine Brown, Director, Communications and Advocacy, Diversity Council Australia, *Proof Committee Hansard*, 21 January 2022, p. 33; Professor George Williams, *Submission 4*, p. 2; Law Council of Australia, *Submission 8*, p. 35; Australian Education Union, *Submission 12*, p. 3; Australian Lawyers Association, *Submission 16*, p. 8; Buddhist Council of NSW, *Submission 18*, p. 3; Australian Council of Trade Unions (ACTU), *Submission 26*, p. 3; Equality Australia, *Submission 29*, p. 12; Australian Youth Affairs Coalition, *Submission 36*, pp. 1-2; A coalition of disability advocacy organisations, *Submission 42*, p. 1; Amnesty International Australia, *Submission 46*, p. 13; Australian Nursing and Midwifery Federation, *Submission 50*, p. 15; Josephite Justice Office, *Submission 79*, p. 2; National Secular League, *Submission 134*, p. 3.

3.17 The Australian Human Rights Commission (AHRC) endorsed those elements of the religious discrimination bill which would provide protection against discrimination on the ground of religious belief or activity, in an equivalent way to the protection against discrimination on other grounds such as race, sex, disability and age in existing Commonwealth laws. However, the AHRC expressed concerns that the bills, as drafted, go further than required and would elevate one form of speech above others. The AHRC said the bills would:

> …provide protection to religious belief or activity at the expense of other rights. The Commission considers that those provisions of the Bill need to be amended or removed, because they limit other human rights in a way that is unnecessary and disproportionate, or are otherwise inconsistent with international human rights law.
>
> …
>
> The Commission is concerned that clause 12 will permit discriminatory statements of belief to be made, whether they amount to racial discrimination, sex discrimination, discrimination on the ground of disability or on any other ground prohibited by law.[17]

3.18 The Australian Discrimination Law Experts Group (ADLEG) held a similar view. Dr Cristy Clark, Member of ADLEG, spoke to the complexity of international human rights law and how the current package of legislation could better be structured within this framework to ensure one right was not elevated over others:

> …we have an opportunity to turn to international human rights law in terms of resolving this tricky issue. It is very difficult for the courts to get involved in assessing the genuineness or the validity of peoples' structures of belief, particularly in terms of religious doctrine…But this has been looked at intently in relation to international human rights law under article 18. The resolution there is to place it within a system of human rights protection which gives equal protection to everybody's right so that there's not a special override granted to one set of beliefs over everybody else's beliefs, and also rights to equality, non-discrimination, employment and education. Once you sit it within that system of balancing then it's not such a concern that people do have a degree of latitude in determining their own views and beliefs.[18]

Interaction with and overriding of existing discrimination protections

3.19 The explanatory memorandum (EM) to the religious discrimination bill explains that the bill:

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[17] Australian Human Rights Commission (AHRC), *Submission 32*, p. 5.

[18] Dr Cristy Clark, Member, Australian Discrimination Law Experts Group (ADLEG), *Proof Committee Hansard,* 21 January 2022, p. 5.

> …does not affect the operation of other Commonwealth anti-discrimination legislation or permit any discrimination on the grounds of an attribute protected by these laws.[19]

3.20 This position was, however, disputed by several stakeholders.

3.21 The AHRC expressed significant concern that the bills *would* override existing Commonwealth discrimination legislation, and said that such an approach was 'not warranted, sets an alarming precedent, and is inconsistent with the stated objects of the Bill, which recognise the indivisibility and universality of human rights'. The AHRC argued that instead, 'this provision seeks to favour one right over all others'.[20]

3.22 ADLEG submitted that 'the Bill legalises and therefore has the potential to legitimise discrimination on all grounds that are presently proscribed, including race'.[21] The Public Interest Advocacy Centre (PIAC) echoed this view, stating that the bill:

> effectively…says that if anyone claims that their view is a religious belief then they really get a free pass and they don't need to comply with discrimination laws that we've had operating for decades in Australia.[22]

3.23 Another issue of concern raised in evidence was the manner in which the bills would impact existing protections against other forms of discrimination, at the state and territory level.

3.24 Professor Anne Twomey explained that where the Commonwealth has the power to enact a valid Commonwealth law, section 109 of the Constitution provides that the Commonwealth law will prevail over any inconsistent state law, to the extent of the inconsistency, and the inconsistency in the state law considered inoperative. However, section 109 only operates:

> …in relation to an inconsistency between valid Commonwealth and State laws. It does not confer upon the Commonwealth Parliament a power to repeal State laws or alter State laws or affect the interpretation of State laws or prohibit the State from enacting certain laws.[23]

3.25 The Hon Selena Uibo, Attorney-General and Minister for Justice in the Northern Territory Legislative Assembly, spoke to the adverse consequences which could arise from 'fragmented' discrimination laws across Commonwealth and state and territory jurisdictions:

> The fragmented nature of the discrimination law across the country is something that we feel needs to be more harmonised. The differences

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19 Religious Discrimination Bill 2021, *Explanatory Memorandum,* p. 2.

20 AHRC, *Submission 32*, p. 6.

21 ADLEG, Submission 115, p. 7.

22 Mr Hunyor, PIAC, *Proof Committee Hansard,* 21 January 2022, p. 5.

23 Professor Anne Twomey, *Submission 31*, p. 4

> between Commonwealth laws and state and territory laws makes it all the more complex for people to access understanding, support, advice [about] their protections and the complaint mechanisms in order to protect them as Australians. This presents a huge barrier when we're talking about the conversation of justice. I believe that this bill will raise the barrier to access to that justice even higher and more out of reach of the everyday Territorian.[24]

3.26 Dr Carolyn Tan, Chairperson, Public Affairs Commission of the Anglican Church of Australia, expressed concern about the statement of belief provisions overriding existing discrimination legislation. Dr Tan explained a statement of belief:

> …might not specifically override a clause of this particular legislation, but certainly it could override state and territory religious discrimination components. So that would be a concern. There's nothing that stops people from making statements of belief if you remove section 12. The issue is whether people need to learn to make statements of belief in ways that are not unlawful under other legislation.[25]

3.27 Equality Australia spoke to the potential impact of overriding state and territory laws. Mr Ghassan Kassisieh, Legal Director of Equality Australia, explained that:

> We think it is accurate that the bill does wind back protections for LGBTI people, for people with disability, for women, for other groups, including people of faith because they are currently protected in a range of ways under state and territory laws—noting the exceptions in New South Wales and South Australia. That's why our position has always been that our laws should protect all of us equally, whether you are a person of faith or not.[26]

3.28 The Australian Lawyers Alliance (ALA) shared this view, summarising:

> …the RD Bill will weaken existing protections for people who rely on other discrimination laws to protect them from offensive, insulting, humiliating or intimidating conduct, including women, people with disabilities, people from culturally and linguistically diverse backgrounds, and Gay, Lesbian, Bisexual, Transgender, Intersex and Queer (GLBTIQ+) people.[27]

3.29 Particular concerns were raised about the impact of clause 11 on the *Equal Opportunity Act 2010* (Vic)[28] (Victorian Equal Opportunity Act) and

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[24] The Hon Selena Uibo, Attorney-General and Minister for Justice, Northern Territory Legislative Assembly, *Proof Committee Hansard,* 21 January 2022, p. 62.

[25] Dr Carolyn Tan, Chairperson, Public Affairs Commission, Anglican Church of Australia, *Proof Committee Hansard,* 20 January 2022, p. 66.

[26] Mr Ghassan Kassisieh, Legal Director, Equality Australia, *Proof Committee Hansard*, 21 January 2022, p. 11.

[27] Australian Lawyers Alliance, *Submission 16*, p. 5.

[28] As amended by clause 11 of the Religious Discrimination (Consequential Amendments) Bill 2021.

clause 12 on section 17(1) of the *Anti-Discrimination Act 1998* (Tas) (Tasmanian Anti-Discrimination Act).

3.30 Clause 11 seeks to override prescribed state and territory laws to allow religious schools to discriminate on the basis of religious belief or activity, in accordance with a written policy. The provision (as amended by clause 11 of the Religious Discrimination (Consequential Amendments) Bill 2021 [consequential amendments bill]) would override the Victorian Equal Opportunity Act following the passage of the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic). In its submission, the Victorian Government explained that the recent amendments to the Equal Opportunity Act (which clause 11 seeks to override):

> …removes the ability for religious bodies and schools to discriminate in employment, running a school and the provision of government-funded goods and services because of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status, or gender identity. By narrowing key aspects of the religious exceptions – while maintaining the ability to discriminate on the grounds of religious belief is certain circumstances – , the EO Amendment Act strikes a fair balance between the right to freedom of religion and the right to equality and non-discrimination.
>
> Religious organisations and schools will be able to discriminate in employment based on a person's religious belief or activity where conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the role, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate in all the circumstances. This new test ensures that staff cannot be discriminated against because of their religious beliefs for reasons that have nothing to do with their work duties.[29]

3.31 The Victorian Government asserted that clause 11 'would directly undermine recent reforms in Victoria'.[30] It described the measure as 'an inappropriate and unwarranted intervention by the Commonwealth' in circumstances where legislative change reflected 'a clear mandate from the Victorian people, received strong support in the Victorian Parliament and was developed in close consultation with key stakeholders in Victoria'.[31]

3.32 PIAC noted that clause 11 would have an impact across multiple jurisdictions, explaining:

> Much of the debate up to now has focused on the fact that that is in response, allegedly, to the recently passed Victorian laws. Indeed it would probably make discrimination against teachers easier. It also has

[29] Victorian Government, *Submission 78*, p. 3.

[30] Victorian Government, *Submission 78*, p. 4.

[31] Victorian Government, *Submission 78*, p. 4.

> implications for Queensland, which has provisions that have existed for almost a decade…It needs to be appropriate in the circumstances, as well as potentially applying in Tasmania and the ACT.[32]

3.33 Similar concerns were raised about the impact of clause 12 on section 17(1) of the Tasmanian Anti-Discrimination Act. At present, section 17(1) prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on fourteen grounds including race, age, disability, sexual orientation, gender identity and relationship status. Equality Tasmania emphasised that that Act 'has fostered a more inclusive Tasmania' and described the legislation as a 'gold standard'.[33] It argued that clause 12 would undermine the protections in section 17(1) and could make Tasmania 'a crueller and less kind place to live'.[34]

3.34 Mr Graeme Edgerton of the AHRC sought to clarify some misunderstanding about the operation of—in particular—Tasmanian anti-discrimination law. Mr Edgerton observed that:

> There are two points to understand about the Tasmanian law. One is that I think there's a misapprehension about the threshold; it's been portrayed as a very low threshold for a complaint to be successfully made. Case law in Tasmania about section 17 says it should be interpreted in the same way as section 18C of the Racial Discrimination Act. In that sense it should apply only to conduct that has profound and serious effects, not be likened to mere slights. So the threshold for section 17 is higher than I think people expect.
>
> The second thing to note about Tasmania is that there's already a free-speech defence available, in section 55 of the Tasmanian act. That defence allows people to engage in public acts that are done in good faith for any purpose in the public interest. That defence was not tested in the Porteous case. It's a defence that's currently on the Tasmanian books and it's another good reason why clause 12 is not necessary, because the good-faith requirement is already in Tasmanian law.[35]

3.35 The AGD submitted that the explicit inclusion of subsection 17(1) under clause 12 is due to the 'broad scope and demonstrated ability of subsection 17(1) to affect freedom of religious expression'.[36]

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[32] Mr Lawrie, PIAC, *Proof Committee Hansard,* 21 January 2022, p. 7.

[33] Mr Rodney Croome AM, President, Equality Tasmania, *Proof Committee Hansard,* 21 January 2022, p. 15.

[34] Equality Tasmania, *Submission 197*, p. 19.

[35] Mr Graeme Edgerton, Deputy General Counsel, AHRC, *Proof Committee Hansard,* 21 January 2022, p. 59.

[36] AGD, *Submission 175*, p. 12.

Statements of belief

3.36 The operation and impact of the statement of belief provisions, at clause 12 of the religious discrimination bill, were the subject of much debate during the course of the inquiry (see also chapters 2 and 4).

3.37 The committee heard repeated concerns that clause 12 would provide legal protection for the making of statements that are offensive, humiliating and otherwise discriminatory.[37] As PIAC articulated:

> Part of the concern we've got with the way this is drafted is that it explicitly seeks to permit things that are otherwise discriminatory. That's its purpose. Otherwise there is no need to have it there. But also our concern is that it is deliberately drafted in a way to capture fringe or radical views. It's entirely subjective in its approach. It can capture views that may be disavowed by other members of that religion or even leaders of that religion, because it's seeking to really capture the most extreme views that no-one else would agree with, as long as the particular individual genuinely considers them to form part of their faith. To have crafted something so broad, it seems really only intended to capture views that are otherwise radical. Then, in terms of whether or not it takes away other rights, that's why it's there; it deliberately seeks to do it.[38]

3.38 The committee heard many personal accounts and hypothetical scenarios from LGBTIQA+ advocacy groups,[39] women's groups,[40] organisations advocating on behalf of people with disability,[41] and youth organisations[42] which sought to

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[37] See, for example: Mr Jonathan Hunyor, Chief Executive Officer, PIAC, *Proof Committee Hansard*, 21 January 2022, pp. 3-4; Human Rights Law Centre, *Submission 76*, p. 15–18; Mr Brian Greig OAM, Western Australian Spokesperson, Just.Equal Australia, *Proof Committee Hansard*, 21 January 2022, p. 8; Just.Equal, *Submission 28*, p. 3; Equality Australia, *Submission 29,* Attachment 1, pp. 3-9; LGBTIQ+ Health Australia, *Submission 43*, pp. 6-8; Rainbow Families Queensland, Submission 74, p. 3; A Gender Agenda, *Submission 85*, p. 4.

[38] Mr Hunyor, PIAC, *Proof Committee Hansard*, 21 January 2022, pp. 3-4.

[39] See, for example: Mr Heath Paynter, Deputy Chief Executive Officer, Australian Federation of AIDS Organisations (AFAO), *Proof Committee Hansard*, 21 January 2022, p. 23; Mx Giancarlo de Vera, President, Australian GLBTIQ Multicultural Council (AGMC), *Proof Committee Hansard*, 21 January 2022, p. 24; Mr Gopalkrishnan, AGMC, *Proof Committee Hansard*, 21 January 2022, p. 24; ACON, *Submission 10*, p. 7; Commissioner for Children and Young People Western Australia, *Submission 23*, pp. 1-2.

[40] See, for example: Ms Jo Flanagan, Chief Executive Officer, Women's Health Tasmania, *Proof Committee Hansard*, 21 January 2022, pp. 20-21; Equality Rights Alliance, *Submission 48*, p. 7; Harmony Alliance, *Submission 84*, p. 2; Women's Health Victoria, *Submission 107*, p. 4.

[41] See, for example: Ms Fiona Strahan, Disability Voices Tasmania, *Proof Committee Hansard*, 21 January 2022, p. 17; A coalition of disability advocacy organisations, *Submission 42*, p. 1; Queensland Advocacy Inco, *Submission 51*, pp. 4-5; A Gender Agenda, *Submission 85*, p. 4.

[42] See, for example: Ms Charlotte Glance, Youth Pride Network (YPN), *Proof Committee Hansard*, 21 January 2022, p. 26; Commissioner for Children and Young People Western Australia, *Submission 23*, pp. 1-2; Australian Youth Affairs Coalition, *Submission 36*, p. 2; ReachOut, Submission 39, pp. 1-2.

illustrate the harm that could arise as a result of statements protected by this clause. For instance, Equality Australia provided the following list of statements it regarded could attract protection under clause 12:

- a colleague telling another colleague that women must learn to stay silent;
- a boss writing in an employee's book that her lesbianism is sinful;
- a teacher telling a student that children born out of wedlock are the product of sin;
- a dentist telling his patient that her schizophrenia is caused by evil spirits and that spiritual healing can cure her;
- a taxi driver telling a person with a guide or assistance dog that their dog is unclean;
- a bus driver telling a passenger that she is oppressed by her faith;
- a shop assistant telling a customer that his prophets are not to be revered;
- a psychologist telling her client that gay people are broken;
- a psychiatrist telling his patient diagnosed with depression that 'she should be looking forward to the Kingdom of heaven';
- a doctor telling a trans patient that God made men and women and attempts to affirm their gender are wrong;
- a medical, support or aged care worker telling a person who is HIV positive that AIDS is a punishment from God;
- a lecturer refusing to use a student's pronouns because he believes her 'gender to be false'.[43]

3.39 Equality Australia submitted that 'statements of this kind undermine the dignity of everyday Australians going about their lives' and continued that:

> They make workplaces, schools and places where services are provided less welcoming and more hostile places for women, LGBTIQ+ people, people with disability, people of faith and others, increasing barriers to their equal participation in society.[44]

3.40 While acknowledging that there would be limitations on the substance of statements that would attract protection under clause 12, Equality Australia suggested that the provision as drafted would likely protect statements that 'offend, insult or humiliate particular groups of people'.[45]

3.41 Submitters highlighted that clause 12 could also increase discrimination against people of faith, particularly those of minority faith traditions. PIAC submitted that, under the religious discrimination bill, it could be permissible for a Jewish person to be told 'that they are responsible for killing Jesus'.[46] Likewise Venerable Akaliko, Board Member, Buddhist Council of

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[43] Equality Australia, *Submission 29*, pp. 12-13.

[44] Equality Australia, *Submission 29*, p. 13.

[45] Equality Australia, *Submission 29*, p. 15.

[46] PIAC, *Submission 6*, p. 5.

New South Wales, drew from his own experience to explain that 'moderately expressed views can still cause a lot of harm'. He shared that:

> it is quite common for Christians to come up to me on the street and to tell me that I am going to Hell and that I'm following the wrong religion. These things are often yelled at me. I've been told in the past that I'm a sinner and that I will rot in Hell. These would be regarded as moderately expressed views according to this legislation. It doesn't go far enough to protect people from views which are offensive or humiliating.[47]

3.42 Venerable Akaliko cautioned that statements of belief should not be a reason to 'embolden…horrible comments being made under the guise of religious views'. Venerable Akaliko continued that the provisions should be 'strengthened so that it also includes offensive and insulting comments that are discriminatory':

> I think there's a lot of opportunity for bad-faith actors and people who don't hold a genuine religious view to make comments to people from minority groups or other religions under the guise of a religious view, which could actually cause a lot of harm.[48]

3.43 Venerable Mettaji of the Australian Sangha Association likewise drew attention to concerns about the statement of belief provisions, given that under a dictionary definition, a 'statement of belief is an opinion' and therefore 'may not be challenged with rigorous evidence'. Venerable Mettaji questioned how a statement of belief could be considered by the courts, when:

> …one religion is saying, 'My peer here said that was reasonable for me to say it'? That's the test that's being applied to this bill. That's part of the reason we say we can't support the bill in its current form.[49]

3.44 The AHRC also strongly opposed the statement of belief provisions. Emeritus Professor Rosalind Croucher, President of the ARHC, told the committee that the AHRC considers the clause 'not legally necessary', as 'other provisions of the bill will provide confidence to people that they can speak freely about their faith without infringing the rights of others'.[50]

3.45 Mr Edgerton of the AHRC further explained:

> Those who are proponents of clause 12 have not identified any Australian case where a moderately expressed statement of belief has been found to be contrary to Australian discrimination law, either in a tribunal or in a court. So we say the conclusion from that is that clause 12 doesn't address a

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[47] Venerable Akaliko, Board Member, Buddhist Council of New South Wales, *Proof Committee Hansard*, 21 January 2022, pp. 62, 63.

[48] Venerable Akaliko, Buddhist Council of New South Wales, *Proof Committee Hansard*, 21 January 2022, pp. 62, 63.

[49] Venerable Mettaji, Australian Sangha Association, *Proof Committee Hansard*, 20 January 2022, p. 62.

[50] Emeritus Professor Rosalind Croucher, President, AHRC, *Proof Committee Hansard*, 21 January 2022, p. 55.

> pressing legal issue. It's not necessary to protect moderate statements of religious belief. But that's not the legal effect of clause 12. The legal effect of clause 12 is broader than that, and that's why we have concerns about it. It not only protects moderate statements; at the margins, because it overrides existing antidiscrimination law protections, it will also have real impacts on people who rely on those protections, particularly in relation to demeaning or degrading statements.[51]

3.46 The AHRC advised it was unaware of any case where genuine statements of belief 'have been held to be contrary to Australian anti-discrimination law' and argued that the 'only thing that clause 12 of the Bill does is to affect the operation of anti-discrimination legislation (both Commonwealth laws and State and Territory laws) to permit conduct that would otherwise amount to discrimination'. The AHRC called for clause 12 to be removed from the bill in its entirety.[52]

3.47 AGD explained that the purpose of clause 12:

> …is to ensure that people can express their genuine religious beliefs or nonreligious beliefs about religion in good faith and without malice, so long as such statements do not harass, threaten, intimidate or vilify a person or group, or would otherwise counsel, promote, encourage or urge conduct that would constitute a serious offence.[53]

3.48 The AGD responded to some of the concerns raised about clause 12 and explained how the clause is intended to operate. Mr Andrew Walter, Acting Deputy Secretary stated:

> Clause 12 is very circumscribed and it is on a number of levels. The starting point is it has to be a statement and it doesn't extend to conduct which could be a course of conduct. So it's a mere statement of belief in and of itself. That's a critical narrowing to begin with. Then if we go to the definition of what a statement of belief is—and just for ease, so we don't take hours over this, I will stick to religious beliefs because it also works for a non-religious belief—it has to be a religious belief held by the person. That's really important. You don't get to take advantage of this by saying, 'Muslims think X, Y and Z' if you're not a Muslim. It has to be a religious belief that you actually hold. It must be made in good faith.[54]
>
> …
>
> The third element is that you have to genuinely believe that that is part of the doctrines, tenets and beliefs of your faith. So you don't get to just make up things and say, 'I'm a Christian and I think X, Y and Z.'

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51 Mr Edgerton, AHRC, *Proof Committee Hansard,* 21 January 2022, p. 57.

52 AHRC, *Submission 32*, pp. 7, 18.

53 AGD, *Submission 175*, p. 11.

54 Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Branch, AGD, *Proof Committee Hansard,* 21 January 2022, p. 73.

3.49 Mr Walter noted that the test for establishing whether this element is satisfied is one of whether the individual believes it or not. He explained:

> There are a couple of elements here. It needs to be a religious belief in the first place. So if it doesn't meet the threshold that the High Court has set down in terms of what constitutes a religious belief or not it's not in. Secondly, you subjectively have to genuinely believe that it is part the doctrines, tenets and beliefs of your faith. That's necessary because there are, of course, established religions—perhaps I'm displaying my Protestant background, but for Protestantism and many other religions it's about your personal relationship with God or with the Bible, for example, which means that others may not share that common interpretation. But it has to be genuinely held. There needs to be some demonstration that you do hold that belief and have held it over time.[55]

3.50 Mr Walter remarked that clause 12 'doesn't apply an objective test' in that it does not require a comparison of the statement to the codicils of the particular religion. Instead, the test is:

> 'Do you genuinely believe that this is part of the doctrines, tenets and beliefs of your faith?' If the answer is yes, the third element is good faith. I think that's the real nub of the issue, when it comes to those things like, 'You're in a wheelchair because you're godless,' or homosexual or whatever it is.
>
> …
>
> Good faith, in that context, means: (a) are you saying something that—there's a fidelity element. Are you saying something is consistent with your religion? But that's picked up in other elements. The critical bit here, drawing on the decision in Bropho, which is a Federal Court decision of Justice French, is about exercising that right to free speech, in this instance, conscientiously having regard to the aims of the legislation that is impacted. In this case, it's, say, the Religious Discrimination Bill or the disability discrimination bill—an act, my apologies—which is another example. If, for example, you're talking about a care worker, of some sort, saying that type of abhorrent statement, it's simply not protected, because you would not be able to get over the good faith element. So it brings equal rounds, the statement, in the factual circumstances in which it's made.[56]

3.51 Crucially, the clause is intended to be clarificatory, rather than create new rights; this is a 'core principle behind the drafting of the provision':

> …there will only be the most limited of circumstances where mere statements of religious belief are likely to amount to discrimination in and of their own right, without any associated conduct. I think this committee has heard evidence to that effect in some of the submissions, and we would agree with that as a general proposition.
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> What was heard during the Religious Freedom Review and what was heard from some religious stakeholders during our consultation was that,

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[55] Mr Walter, AGD, *Proof Committee Hansard,* 21 January 2022, p. 73.

[56] Mr Walter, AGD, *Proof Committee Hansard,* 21 January 2022, pp. 73-74.

> nonetheless, the threat of action being taken against them is having an impact on how they feel they can manifest their religion in the public [sphere]. The intention behind clause 12 is very much meant to give people confidence that a claim of discrimination, if it were to be made against them, could be resolved very quickly, because you could point to clause 12 and say, 'No, I am merely stating a religious belief.'
>
> …
>
> People have been saying to us that this issue comes up where they do not feel confident that they are in a position where they can express those views. This gives them that confidence. I don't think that's a placebo; I think it is making the law clearer and more certain on its face.[57]

3.52 Mr Walter outlined how clause 12 could contribute to better efficiencies in dealing with discrimination complaints. While the provision would not stop someone making an unmeritorious complaint, it would allow a complaint to be considered in the initial stages, and—if constituting a statement of belief—to be dismissed before going through a 'detailed process of analysing the situation and attempting to conciliate' In other words, it would provide 'upfront clarity'.[58]

3.53 Mr Walter confirmed that the department was unaware of any examples at the Commonwealth level where genuine statements of belief have been held to be contrary to discrimination law. However, Mr Walter placed an important caveat on this, saying:

> …religion really isn't a question under many of our existing discrimination laws. It does come up in the Sex Discrimination Act and, to some extent, under the Racial Discrimination Act in relation to ethno-religious groups. So there are unlikely to be a huge number of examples where religion is going [to] be in play.[59]

Impact in workplaces

3.54 Employer groups and unions expressed concerns about the potential impact of clause 12 in workplaces. Unions Tasmania stated:

> We'd like to note that discrimination is deeply traumatic when it occurs anywhere, but we hold specific concerns that overriding our laws and introducing statements of belief that may be made in workplaces could deeply traumatise workers, could lead to additional sick leave, additional workers compensation claims for mental illness and injury and would create discord in workplaces that we desperately don't need.[60]

3.55 The Australian Industry Group (Ai Group) and the Australian Chamber of Commerce and Industry (ACCI) shared concerns about the potential

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57 Mr Walter, AGD, *Proof Committee Hansard,* 21 January 2022, p. 67.

58 Mr Walter, AGD, *Proof Committee Hansard,* 21 January 2022, pp. 68, 69.

59 Mr Walter, AGD, *Proof Committee Hansard,* 21 January 2022, p. 5.

60 Mrs Jessica Munday, Secretary, Unions Tasmania, *Proof Committee Hansard,* 21 January 2022, p. 17.

limitations on employers taking action against individuals who make statements of belief protected by clause 12.[61] While the Ai Group supported the removal of clause 12 altogether, both it and the ACCI argued that if the statement of belief protection was to be enacted, it should be accompanied by an exemption to allow employers to take reasonable management action without that constituting discrimination.[62] Ai Group explained the rationale for this as follows:

> We have a very significant focus within Ai Group with our members on helping them to achieve diverse and inclusive workplaces. I don't think anyone could argue that that isn't beneficial all around. We're keen to make sure this bill doesn't disturb that.[63]

3.56 While the Australian Council of Trade Unions (ACTU) shared the employer groups' concerns about clause 12, it argued that the reasonable management action proposal would not sufficiently address the issues raised by clause 12. It stated, '[m]erely dealing with any constraint that an employer might have is only one part of the problem of creating a safe workplace free from discrimination'. [64] The ACTU elaborated:

> Should s 12 remain in the Bill, doubt will still be cast on the effectiveness of employer policies, enterprise agreement clauses and codes of conduct that use existing discrimination laws as their foundation. The express override of laws intended to protect vulnerable groups from discrimination at work and other areas of public life is completely unwarranted and unacceptable. The way in which this 'override' will work in practice is extremely unclear. It will undoubtably increase unfairness, conflict and confusion in Australian workplaces. The proposed amendment to s 39 will not address these serious matters.
>
> Further, an amendment to s 39 would not assist at all where an employer did not take reasonable management action to prevent harmful conduct; either because the hostile and discriminatory comments were made by members of management themselves; or because policies and processes at the organisations were inadequate or non-existent. A worker in such a workplace would be left without any recourse to a discrimination complaint, if the hostile or discriminatory statements could be justified based on an individual's religious views.[65]

3.57 On that basis, the ACTU argued that clause 12 should be removed.[66]

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61 *Proof Committee Hansard*, 21 January 2022, pp. 39-40.

62 *Proof Committee Hansard*, 21 January 2022, pp. 39-40.

63 Mr Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group, *Proof Committee Hansard*, 21 January 2022, pp. 39-40.

64 Mr Liam O'Brien, Assistant Secretary, ACTU, *Proof Committee Hansard*, 21 January 2022, p. 48.

65 ACTU, answers to questions on notice, 21 January 2022 (received 28 January 2022), p. 2.

66 Mr O'Brien, ACTU, *Proof Committee Hansard*, 21 January 2022, p. 48

3.58 The AGD advised that reasonable management action of the kind referred to by employer groups 'seems unlikely to be unlawful under the bill as it is currently constructed'. The department:

> In relation to direct discrimination, if the employer put in place a policy that is not discriminatory to any particular group but did impose rules around respectful workplaces—the kind of materials, in general terms, that could be placed on people's desks, and so forth—it would be quite unlikely to offend the direct discrimination prohibition because, if you apply comparator test, if you treat materials that relate to political opinion in the same way you treat materials about religious belief, it simply wouldn't be discriminatory to impose that condition.
>
> Of course, in relation to indirect discrimination, if you impose a facially neutral condition, requirement or practice, that will always be okay, provided you can establish that it's reasonable. One of the key elements of that proposal around reasonable management action is reasonableness. In a sense, the reasonableness defence to indirect discrimination and the reasonable management action proposal are doing much the same work in relation to facially neutral policies.
>
> I suppose another initial observation I would make is that in relation to an employer's very legitimate interest in providing a safe workplace, which may be related to this, the bill doesn't affect either employers' or indeed employees' obligations under work health and safety law to provide a safe workplace. Anything that employers do that they consider to be necessary to comply with their duties under the work health and safety law would be not unlawful under this bill.[67]

Discrimination in religious education institutions

3.59 The impact of the measures in the bill on religious education institutions was discussed throughout the inquiry. In particular, the power to require that staff and students practice the religion of the institution, and to hire preferentially on this basis were considered at some length. Submitters of all persuasions generally agreed that such preferential treatment is necessary for certain positions within religious bodies such as schools (discussed in chapter 2). However, questions were raised as to whether that should extend to all positions of employment in those settings.[68]

3.60 The question for PIAC was 'one of reasonableness and balancing the different rights and the different values that we have in society'. It suggested that one

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[67] Mr Stephen Still, Assistant Secretary, Employment Standards Branch, AGD, *Proof Committee Hansard,* 21 January 2022, p. 72.

[68] See, for example, Law Council of Australia, *Submission 8*, p. 22; Australian Discrimination Law Experts Group, *Submission 115*, pp. 17-20; ACTU, answers to questions on notice, 21 January 2022 (received 28 January 2022), p. 4.

such value is non-discrimination and suggested that schools can maintain an ethos without having to discriminate.[69]

3.61 Equality Australia expressed a similar sentiment, highlighting that such exemptions 'must employ a better balancing mechanism to accommodate the rights of individuals with different and no religious beliefs who are employed, enrolled or rely on services delivered by faith-based organisations'.[70] Such exemptions, Equality Australia asserted:

> …must also prevent the selective application of religious beliefs to target and single out LGBTQ+ people and the people who support them for less favourable treatment, as we have seen in a number of recent cases.[71]

3.62 Equality Australia continued, adding:

> Religious exemptions in Commonwealth law should not allow discrimination based on sexual orientation or gender identity by faith-based organisations (as they currently do), but should allow for discrimination based on a person's religion if religious adherence is actually relevant to the particular role, program or service in question, and it is reasonable and proportionate for the religious body's religious practice or requirement to dominate an individual's own religious practice.[72]

3.63 PIAC suggested that these provisions would allow 'religious schools to discriminate against children and young people on the basis of their religious belief beyond the point of enrolment'. [73] It explained:

> We think that's an appropriate balancing of the rights of faith communities to form schools to educate their children as well as the protection of religious freedom of children and young people so that they can question, develop and explore their faith without fear of punishment on the basis of who they are. That's a core principle which is not respected by this bill.
>
> We would also note that there is potentially a flow-on impact for LGBT students because of the ability of schools to discriminate on the basis of religious views about sexual orientation and gender identity rather than those things per se. We saw those implications highlighted by a number of the witnesses during yesterday's hearings, that they would discriminate against some gay students because of their approach to homosexuality and call it discrimination on the basis of religious belief. The longer term implication is that, even if the Sex Discrimination Act were to finally be amended to remove that exclusive ability to discriminate against LGBT students, there is also a fear that a religious discrimination bill passed in its

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69 Mr Jonathan Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Proof Committee Hansard*, 21 January 2022, p. 5.

70 Equality Australia, *Submission 29*, p. 28.

71 Equality Australia, *Submission 29*, p. 28.

72 Equality Australia, *Submission 29*, pp. 28-29.

73 Mr Alastair Lawrie, Policy Manager, Public Interest Advocacy Centre (PIAC), *Proof Committee Hansard*, 21 January 2022, p. 6.

> current form could be used to discriminate against LGBT students via an alternative means.[74]

3.64 AGD explained the rationale for the proposed provisions regarding employment in religious education institutions as follows:

> The Government considers that ensuring religious schools can continue to make employment choices that maintain the religious ethos of the school enables parents of faith to confidently make choices for the education of their children. Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the liberty of parents to choose schools for their children in conformity with their own religious and moral convictions. Article 18(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that States Parties undertake to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. As noted in paragraphs 73 and 74 of the Statement of Compatibility of Human Rights for this Bill, the Government has considered these Articles in drafting clause 11.[75]

3.65 AGD clarified that clause 11 would permit the override of state and territory provisions relating to employment decisions by religious education institutions only in circumstances where that state or territory provision is prescribed under the clause *and* where inconsistency arises between the Commonwealth and state or territory provisions.[76]

Human rights for groups and corporations

3.66 As discussed in paragraph 1.60, clause 16 would allow a body corporate to make a claim for religious discrimination.

3.67 The AHRC was concerned that the bill would allow a corporation to:

> …make a complaint of religious discrimination against an individual or another organisation. This is a significant departure from domestic and international human rights laws which protect only the rights of individuals, that is, humans.[77]

3.68 Professor Croucher explained that existing discrimination law already provides the ability for more than one person to bring a complaint under those laws, as a group (or a 'collective'), and there was:

> …a possibility for a number of individuals to group together and bring a complaint. That's quite a different concept from imbuing in a corporation the right to be a complainant under antidiscrimination law, which is completely at odds with the ethos of human rights law, which is about the

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[74] Mr Lawrie, PIAC, *Proof Committee Hansard,* 21 January 2022, p. 6.

[75] AGD, *Submission 175*, p. 10.

[76] AGD, *Submission 175*, p. 10.

[77] AHRC, *Submission 32*, p. 6.

> human rights of individuals. It's the corporate element that is unnecessary and I think throws a confusing and an unnecessary element into the mix.[78]

3.69 The AHRC recommended that clause 16, dealing with 'associates' and which would allow a corporation to make a complaint of religious discrimination, be 'amended to make clear that a complaint of discrimination may only be made by a natural person and not by a corporation'.[79]

3.70 Mr Ghassan Kassisieh, Legal Director of Equality Australia, argued that empowering groups and corporations to make claims of discrimination was not the norm in Australia. He explained that the international human rights framework protects human rights, and 'calls on states to protect humans from discrimination'. In considering the rights of groups and corporations, Mr Kassisieh said:

> There are some international examples and domestic examples where corporations have been able to, for example, under charters of rights, human rights acts and constitutional protections, bring individual claims, but we have rejected that approach in Australia.[80]

3.71 In contrast, Dr Alex Deagon argued that there are two constitutional supports for 'protecting the ability of religious corporations to be litigants'. Dr Deagon argued that firstly, 'the Constitution supports the power to legislate to protect incorporated and unincorporated religious bodies against religious discrimination through the external affairs power',[81] and the ICCPR protects 'individuals manifesting their beliefs in community with others (including through incorporated and unincorporated communities), and protect such communal entities against discrimination'. Dr Deagon claimed that because of this, 'international law jurisprudence clearly accepts religious associated as distinct persons at law which can sue and be sued in their own right'. To his second point, Dr Deagon stated:

> …the Commonwealth has the power to legislate with respect to constitutional corporations through the corporations power. Where a religious corporation is a constitutional corporation, and such a corporation is the object of statutory command or has rights and obligations conferred upon it, the Commonwealth has the ability to designate a religious corporation as a litigant. Therefore, as a constitutional matter, there is no impediment to empowering religious corporations as litigants in a law protecting against religious discrimination, and indeed such is required as a means to give adequate effect to the protections

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78 Emeritus Professor Rosalind Croucher, President, AHRC, *Proof Committee Hansard*, 21 January 2022, p. 57.

79 AHRC, *Submission 32*, p. 8.

80 Mr Ghassan Kassisieh, Legal Director, Equality Australia, *Proof Committee Hansard*, 21 January 2022, p. 13.

81 Constitutional provisions and the external affairs power are discussed elsewhere in this report.

> afforded to individuals and groups against religious discrimination in international law.[82]

3.72 Associate Professor Mark Fowler also supported the inclusion of body corporates and similar bodies as having protection from religious discrimination. Associate Professor Fowler argued that religion is unique in its 'propensity…to cause people to congregate' and suggested it is:

> …quite correct when the Human Rights Commission says that international human rights law is to protect individuals, but what it also recognises is that, if you don't protect individuals when they congregate, you undermine the protection that is given to individuals themselves… In the Australian context, Justice Redlich, in the Cobaw decision, recognised that, if we didn't enable corporations of religious believers to also take protection, we would undermine the substantive protection to the individuals associated with those corporations. So it's very important that we be very clear about what we're saying here. The international law does protect individuals, but, if you don't also protect corporations, you undermine the protections to individuals.[83]

3.73 Professor Nicholas Aroney explained that the 'associational, collective and institutional aspects' of freedom of religion are affirmed in international instruments and official international commentary'.[84] He further asserted that under domestic law, freedom of religion is 'exercised through an array of legal institutional forms, including charitable trusts, unincorporated associations, incorporated associations, companies limited by guarantee and corporate bodies formed under special legislation or by letters patent'.[85] He argued:

> It would be entirely inconsistent with long-standing Australian legal practice to deny that religious freedom is appropriately manifested in a variety of associational and corporate forms and that religious organisations have legal rights.[86]

Sex Discrimination Act

3.74 Exemptions currently exist under the Sex Discrimination Act which provide that it is not unlawful to discriminate against another person on the grounds of sexual orientation, gender identity, marital or relationship status, in the provision of education or training in an education institution, if it is 'in

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82 Dr Alex Deagon, *Submission 3*, pp. 5-6.

83 Mr Mark Fowler, *Proof Committee Hansard*, 20 January 2022, p. 12.

84 Professor Nicholas Aroney, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 25 January 2022), p. 3.

85 Professor Nicholas Aroney, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 25 January 2022), p. 4.

86 Professor Nicholas Aroney, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 25 January 2022), p. 4.

accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.[87]

3.75 The AGD confirmed that the bills do not affect the operation of the current religious exemptions in the Sex Discrimination Act. Rather, in responding to the Religious Freedom Review, the government tasked the Australian Law Reform Commission (ALRC) with examining religious exemptions in all Australian laws. The AGD pointed out that:

> The Government's position was made very clear at the time and in the terms of reference for the inquiry that it does not support discrimination. The Government is concerned to get the balance right between ensuring religious schools can maintain their religious ethos and ensuring people are free from discrimination.[88]

3.76 While the bills before the committee do not make amendments to the Sex Discrimination Act, there was discussion about the exemptions under that Act during the inquiry. Broadly, those in support of the bills were opposed to changes to the Sex Discrimination Act which would remove the current exemptions—at least until such time as the independent review, currently underway by the ALRC, is completed.[89]

3.77 For example, Dr Deagon argued that any changes to the Sex Discrimination Act in the context of the bills would be 'misconceived', noting that:

> Previous parliamentary committees considered such a move and rejected it, recommending the issue be considered in depth by the Australian Law Reform Commission. This is still the best approach as religious discrimination and religious exemptions to sex discrimination are conceptually and legally separate.[90]

3.78 Similarly, the AACS opined that the religious discrimination bills should in no way be linked to amendments to the current exemptions under the

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87 *Sex Discrimination Act 1984*, s. 38(3).

88 AGD, *Submission 175*, p. 5.

The Australian Law Reform Commission's 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation' is examining whether exemptions for religious institutions in federal, state and territory laws could be limited or removed altogether, while still allowing religious institutions to conduct their affairs in accordance with their religious ethos. The ALRC is due to report 12 months from the date the Religious Discrimination Bill 2021 is passed by Parliament.

89 See, for example: Australian Christian Lobby, *Submission* 1, p. 7; Australian Christian Churches, *Submission 5*, p. 6; Catholic Education Tasmania, *Submission 35*, p. 3; Institute for Civil Society, *Submission 96*, p. 18; Presbyterian Church of Australia, *Submission 105*, p. 9; Association for Reformed Political Action, *Submission 112*, p. 5; Presbyterian Church of Victoria, *Submission 140*, pp. 4-5; Human Rights Law Alliance, *Submission* 150, pp. 16-17; Malcolm Eglinton, *Submission 181*, [p. 7].

90 Dr Alex Deagon, *Submission 3*, p. 4.

Sex Discrimination Act, 'without careful consideration of the impact on Christian schools' teaching program and behavioural policies'. The AACS further stated:

> The ability of our schools to operate in accordance with their religious beliefs is fundamental to maintaining a distinctive Christian character in their schools and these [Sex Discrimination Act] exemptions should not be altered without extensive consultation with affected stakeholders.[91]

3.79 The Anglican Church Diocese of Sydney considered the religious discrimination legislative package is 'rightly a precursor to the ALRC review', because the bills, once enacted would:

> …establish, in positive terms, what religious bodies require in order 'to reasonably conduct their affairs in a way consistent with their religious ethos'. Religious bodies do not want carte blanche to discriminate on the basis of sex, age, disability or race, but merely want to be able to operate in accordance with the doctrines, tenets, beliefs or teachings of their religion.[92]

3.80 Submitters who opposed the bills shared the view that the exemptions under the Sex Discrimination Act 'continue to licence discrimination against LGBTQ+ people, including students'. Equality Australia explained:

> The real issue that needs to be addressed are broad exemptions in the *Sex Discrimination Act 1984* (Cth) which continue to licence discrimination against LGBTQ+ people, including students. In the lead up to the Wentworth byelection, the Government made a commitment to repeal exemptions for religious schools allowing them to expel students based on their sexual orientation. That promise remains unfulfilled. Moves to entrench exemptions for religious schools in connection with marriage, while the broader issue of religious school exemptions remain, highlights a lack of balance in the approach to exemptions generally and a prioritisation of religious privilege over and above the interests of LGBTIQ+ people.
>
> In light of the Prime Minister's remarks that he does not support the expulsion of gay students or the sacking of gay teachers it is not clear why this religious exemption is being legislated now while LGBTQ+ people have to wait for a further 12 months for an Australian Law Reform Commission inquiry to tell us what we already know: that LGBTQ+ staff, teachers and students at religious schools are not adequately protected from discrimination based on their sexual orientation or gender identity.[93]

3.81 The AGD informed the committee that no further amendments to the legislation, including in relation to the Sex Discrimination Act, have been approved at this time.[94]

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91 Australian Association of Christian Schools, *Submission 33*, p. 6.

92 Anglican Church Diocese of Sydney, *Submission 136*, pp. 5-6.

93 Equality Australia, *Submission 29*, p. 44.

94 *Proof Committee Hansard*, 21 January 2022, pp. 75-76.

Chapter 4
Other issues

4.1 This chapter considers criticisms raised about the bills and their operation during the course of the inquiry. Concerns included:

- the constitutionality of the bills and whether they are established under a suitable head of power;
- jurisdictional issues with access to justice and the impact of the bills on state and territory tribunals;
- the impact of the bills on the provision of services in rural and remote areas; and
- the need for more specificity in the definition of some key terms (including 'religious belief or activity' and 'religious body').

Constitutional impacts

4.2 As discussed in chapter 1, clauses 64 and 65 of the Religious Discrimination Bill 2021 (religious discrimination bill) state that the bill relies upon the external affairs power in section 51(xxix) as its constitutional head of power. That is because there is no head of power directly related to human rights.

4.3 Where the Commonwealth has the power to enact a valid Commonwealth law, section 109 of the Australian Constitution provides that the Commonwealth law will prevail over any inconsistent state law, to the extent of the inconsistency, and the inconsistency in the state law considered inoperative.

4.4 Submitters and witnesses considered the provisions of the bills, and particularly the religious discrimination bill, in relation to section 109 of the Constitution.

Constitutional questions

4.5 Several submitters and witnesses voiced concerns about the constitutional basis for the bills. Others suggested that claims the bills give full effect to Australia's obligations under the ICCPR failed to consider Article 18 in its totality.

4.6 Professor Anne Twomey, Professor of Constitutional Law at the University of Sydney, highlighted that freedom of religion is limited to some degree by Article 18(3) of the ICCPR, which states:

> Freedom to manifest one's religion or beliefs may be subject ***only*** to such limitations as are prescribed by law and are ***necessary*** to protect public

> safety, order, health, or morals or the fundamental rights and freedoms of others.[1]

4.7 Professor Twomey suggested that the controversy around the manner in which protections under the religious discrimination bill may impact the rights and freedoms of others 'raises a question about the reliance on s 51 (xxix) as a head of power to support this Bill'.[2] Professor Twomey observed that s 51 (xxix);

> …is regarded as a 'purposive' power…[and] does not give the Commonwealth Parliament a power to make *any* law with respect to freedom of religion. It only confers a power to make a law that is capable of being reasonably considered to be appropriate and adapted to giving effect to the terms of the treaty.[3]

4.8 Professor Twomey continued that section 51(xxix) does not support the bill, 'if the provisions of the bill were substantially inconsistent with the ICCPR as a whole', because:

> …article 18 of the ICCPR states that the right to freedom of religion may ***only*** be limited where it is ***necessary*** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> Such an assessment would therefore be a difficult one for a court to make, if the validity of the law were challenged on the ground of a lack of power. The court would have to assess: (a) what limitations on freedom of religion are 'necessary' to protect the rights and freedoms of others; and (b) whether a failure to incorporate such necessary limitations in the relevant law, when combined with any deleterious impact of the law upon other rights and freedoms declared by the ICCPR, would mean that the law was so deficient in its implementation of the ICCPR that it was 'substantially inconsistent' with it and was not 'capable of being reasonably considered to be appropriate and adapted to giving effect to the treaty'.[4]

4.9 The Australian Lawyers Alliance (ALA) argued that:

> Key provisions of [the] RD Bill have the effect of interfering with other rights protected by the ICCPR. These provisions may therefore not be valid under the constitutional external affairs power as they do not give effect to Australia's obligations under the ICCPR.[5]

4.10 The Law Council of Australia (LCA) likewise argued that there are 'important questions as to whether, given significant departures from key treaties, clause 64 may be relied upon as the main constitutional basis of the bill'.[6]

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1 Professor Anne Twomey, *Submission 31*, p. 2. Emphasis in original, as added by the submitter.

2 Professor Anne Twomey, *Submission 31*, p. 2.

3 Professor Anne Twomey, *Submission 31*, p. 2. Emphasis in original.

4 Professor Anne Twomey, *Submission 31*, p. 3. Emphasis in original.

5 Australian Lawyers Alliance, *Submission 16*, p. 11.

6 Law Council of Australia, *Submission 8*, p. 49.

4.11 Ms Katherine Eastman SC of the LCA questioned whether the external affairs power provides the Commonwealth with the authority to pass the religious discrimination bill. The LCA queried whether the 'relevant Australian law is appropriate and adapted to give effect to the international law obligations'. Ms Eastman considered these matters in relation to Article 18:

> While article 18 of the International Covenant on Civil and Political Rights recognises the freedom of religion, that freedom comes with certain exceptions, and the exceptions are part of the way in which one looks at the character of the right and the extent to which Australian law reflects that relevant international law. The second point is that article 18 of the ICCPR cannot be read and considered in isolation in the context of the human rights law, and, to the extent that this bill gives precedence to article 18 rights and freedom of religion, to the … important rights in the ICCPR, particularly equality and non-discrimination on a range of grounds, then, in that respect, the question of whether the bill would be [inaudible] by the international law is a live issue, and we agree with Professor Twomey's submissions in this respect.[7]

4.12 However, Professor Nicholas Aroney, Professor of Constitutional Law, University of Queensland, pointed to several instances where the High Court has upheld the power of the Commonwealth to enact legislation, 'selectively addressing particular international obligations under particular international treaties'. Professor Aroney contended that 'all of the Commonwealth's discrimination laws enacted under the external affairs power are of this character'.[8]

4.13 Professor Aroney expanded on this point further when appearing before the committee, making several observations about the bills and their constitutionality. He argued that, 'inevitably, whenever new legislation is enacted by the Commonwealth relying on the external affairs power, questions about its constitutionality arise'. Professor Aroney highlighted several examples, saying:

> …when the Racial Discrimination Act was enacted, there were questions about whether it was constitutional. However, that did not stop the government from proceeding with enacting the law, even though the law was itself under constitutional doubt for several years until its constitutionality was resolved in the Koowarta case by a very close majority of the High Court. The same can be said about the other federal discrimination laws, including the Sex Discrimination Act, and, indeed, when the Commonwealth decided to intervene in the construction of a dam in Tasmania, known as the Tasmanian dam case. Whenever the Commonwealth intervenes in these areas it does have the potential to produce a degree of litigation to resolve these constitutional questions. That is what normally happens in Australia. It's not something unusual.

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7 Ms Katherine Eastman SC, Chair, Law Council of Australia Equal Opportunity Committee, Law Council of Australia, *Proof Committee Hansard*, 20 January 2022, p. 4.

8 Professor Nicholas Aroney, *Submission 145*, p. 5.

> So I don't see that there is really a need to be overly concerned in principle that the introduction of this bill could produce some litigation because all of the progressive steps that have been taken in Australian law to protect human rights have involved those sorts of problems.[9]

4.14 Professor Aroney further clarified that the religious discrimination bill 'does not seek to protect all of the rights recognised by the ICCPR but rather focusses on protecting the right not to be discriminated against on the basis of religion'. Professor Aroney explained that the focus on religious discrimination:

> …does not mean that the Bill cannot be characterised as a law implementing the ICCPR. The High Court has pointed out that a law implementing a treaty need not give effect to all obligations under that treaty, so long as its "partial" implementation does not mean that the law cannot fairly be characterised as a law which implements the treaty and so long as the law does not contain "significant provisions" which render the law "substantially inconsistent" with the terms of the treaty.[10]

4.15 The Attorney-General's Department (AGD) stated that the religious discrimination legislation is on a 'sound constitutional footing'. Mr Andrew Walter, Acting Deputy Secretary, AGD advised that the department had received legal advice on a number of provisions in the bills and:

> …we have shaped the legislation in accordance with that legal advice. There is nothing that we've heard or seen in the submissions or of what we've heard so far that has caused us to rethink our view…we think the bill is on sound constitutional footing.[11]

Suggested amendments to clauses 11 and 12

4.16 As explained elsewhere in this report, where the Commonwealth has the power to enact a valid Commonwealth law, section 109 of the Constitution provides that the Commonwealth law will prevail over any inconsistent state law, to the extent of the inconsistency, and the inconsistency in the state law considered inoperative.

4.17 As referenced in Chapter 3, Professor Twomey explained to the committee that clause 11 of the religious discrimination bill purports to alter the effect of the application of a state law, but 'it is not within the Commonwealth Parliament's power to legislate to control the legal operation of a state law'; it can only give rise to an inconsistency which renders the state law inoperative to the extent of

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[9] Professor Nicholas Aroney, *Proof Committee Hansard*, 20 January 2022, p. 13.

[10] Professor Nicholas Aroney, answer to questions on notice, 20 January 2022, pp. 5-6 (responses received 25 January 2022).

[11] Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Proof Committee Hansard*, 21 January 2022, p. 78.

that inconsistency. Professor Twomey argued that 'if the state law is inoperative, there can be no contravention of it'.[12]

4.18 Professor Twomey concluded that:

> Overall, s 11 is conceptually confused and probably invalid to the extent that it seeks to control the operation of a state law rather than establish a direct inconsistency with it or exclude it from operating within a field that has been exhaustively and exclusively covered by a Commonwealth law.[13]

4.19 Professor Twomey also expressed concerns about the drafting of clause 12, stating:

> It provides that a statement of belief 'does not constitute discrimination for the purposes of' a number of Acts, including State Acts. How can a Commonwealth law dictate the interpretation of what amounts to discrimination under a State law? It cannot do so. It cannot amend or alter a State law or instruct a court as to how to interpret the State law. All it can do is enact its own law that gives rise to an inconsistency (eg by granting a right or conferring a power to do something, which a State law prohibits, limits or qualifies), rendering the State law inoperative to the extent of that inconsistency.[14]

4.20 Professor Twomey concluded that – particularly with regard to clauses 11 and 12 of the religious discrimination bill – it was 'confounding to contemplate why these provisions of a highly contentious Bill would be drafted in such a provocative manner' and suggested they be amended.[15]

4.21 Professor Aroney echoed Professor Twomey's concerns around constitutionality, explaining:

> If clauses 11 and 12 are construed by the Court as evincing an intention to cover the field and thus displace the prescribed State laws that enter that field, then the clauses may be effective under section 109. However, if they are construed as an attempt by the Commonwealth to alter the meaning and effect of the State laws, then they may not be effective to displace the State laws.[16]

4.22 In order to address this issue, and 'put the matter beyond doubt', Professor Aroney suggested 'a simple drafting alteration', which could clarify that clauses 11 and 12 'ensure that the described conduct is not unlawful

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[12] Professor Anne Twomey, *Submission 31*, pp. 4-5.

[13] Professor Anne Twomey, *Submission 31*, p. 5.

[14] Professor Anne Twomey, *Submission 31*, p. 5.

[15] Professor Anne Twomey, *Submission 31*, p. 5.

[16] Professor Nicholas Aroney, *Submission 145*, p. 3. See also: *Proof Committee Hansard*, 20 January 2022, p. 9.

notwithstanding anything contained in any of the prescribed State or Territory laws'.[17]

4.23 Professor Aroney said such amendments were 'advisable because, as currently drafted, clauses 11 and 12 purport to determine the meaning and effect of the prescribed State laws, and decisions of the High Court have raised doubts about whether this would be constitutionally effective'.[18] Under Professor Aroney's revised wording:

> … the Commonwealth law establishes or affirms the existence of a right or liberty to engage in the described conduct. An inconsistency under section 109 will arise in respect of any State or Territory law that would prohibit the described conduct.[19]

Clause 11

4.24 Professor Aroney proposed the following wording for clause 11 (suggested amendments emphasised):

> (1) **Notwithstanding any prescribed State or Territory law, it is lawful for a religious body that is an educational institution when engaging in conduct described in section 19 (about employment), to give preference, in good faith, to persons who hold or engage in a particular religious activity if the conduct is in accordance with a written policy that:**
>
> (a) outlines the religious body's position in relation to particular religious beliefs or activities; and
> (b) explains how the position in subparagraph (a) is or will be enforced by the religious body; and
> (c) is publicly available, including at the time employment opportunities with the religious body become available.

4.25 Professor Aroney argued that the effect of such a clause would be supported by the current wording in subclause 11(4) of the religious discrimination bill, and would:

> …make it lawful to engage in the defined conduct. Any state or territory law that made the same conduct unlawful would be inconsistent with it and would therefore be invalid to the extent of the inconsistency under section 109 [of the Constitution].[20]

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17 Professor Nicholas Aroney, *Submission 145*, p. 3.

18 Professor Nicholas Aroney, response to questions on notice, 20 January 2022, p. 9 (responses received 25 January 2022).

19 Professor Nicholas Aroney, response to questions on notice, 20 January 2022, pp. 11-12 (responses received 25 January 2022).

20 Professor Nicholas Aroney, *Submission 145*, p. 7.

Clause 12

4.26 Professor Aroney explained that clause 12 seeks to ensure that a statement of belief would not constitute discrimination under named state and territory laws, 'while allowing that a statement of belief, might, in the circumstances of a case, in conjunction with conduct, contribute to a conclusion that unlawful discrimination has occurred'.[21]

4.27 Professor Aroney made suggestions for changes to clause 12 which would maintain the objectives of the provision, 'while addressing any doubts about the effectiveness of clause 12 under section 109 of the Constitution' (amendments emphasised):

> (1) A statement of belief, in and of itself, does not **constitute discrimination for the purposes of this Act.**
>
> (2) **Notwithstanding any of the following State or Territory laws, it is not unlawful to make a statement of belief, in and of itself:**
>
> (a) the *Age Discrimination Act 2004*;
> (b) the *Disability Discrimination Act 1992*;
> (c) the *Racial Discrimination Act 1975*;
> (d) the *Sex Discrimination Act 1984*;
> (e) the *Anti-Discrimination Act 1977* (NSW);
> (f) the *Equal Opportunity Act 2010* (Vic.);
> (g) the *Anti-Discrimination Act 1991* (Qld);
> (h) the *Equal Opportunity Act 1984* (WA);
> (i) the *Equal Opportunity Act 1984* (SA);
> (j) the *Anti-Discrimination Act 1998* (Tas.);
> (k) the *Anti-Discrimination Act 1991* (ACT);
> (l) the *Anti-Discrimination Act* (NT);
> (m) any State or Territory law prescribed by the regulations for the purposes of this subsection.
>
> (3) Subsection (2) does not apply to a statement of belief:
>
> (a) that is malicious; or
> (b) that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or
> (c) that is covered by paragraph (35(1)(b).
>
> (4) **Subsection (2) is intended to apply to the exclusion of a law of a State or Territory so far as it would otherwise make a statement of belief, in and of itself, unlawful.**
>
> (5) **Subsection (2) is not intended to apply to the exclusion of a law of a State or Territory so far as certain conduct would constitute discrimination under that law where the conduct included, but was not limited to, a statement of belief.**

[21] Professor Nicholas Aroney, *Submission 145*, p. 7.

Views on proposed amendments

4.28 The committee sought the views of stakeholders on Professor Aroney's proposed amendments.

4.29 In response, the Institute for Civil Society told the committee it supported Professor Aroney's drafting, because it would provide a simply stated right and 'would resolve the doubts which Professor Twomey has'.[22]

4.30 Likewise, Professor Patrick Parkinson, Director of Freedom for Faith, considered the current drafting of clauses 11 and 12 to be 'very complicated and unnecessarily awkward', and urged the enactment of a nationally consistent law. Professor Parkinson argued that a simpler approach would be to do as Professor Aroney has suggested—to create a right that 'it is lawful for religious bodies to employ or prefer people of their faith—with which, if a state law is inconsistent, it's invalid to the extent of that inconsistency'. Professor Parkinson argued that this would 'not be difficult and would make for much a clearer law for the parliament to pass.'[23]

4.31 Dr Colin Rubenstein of the Australia/Israel and Jewish Affairs Council (AIJAC) similarly considered Professor Aroney's suggestions 'eminently reasonable and worthy of serious consideration'. Dr Rubenstein reflected that while these matters are likely to be considered by the courts, this could be a 'tardy process'. Dr Rubenstein confirmed that AIJAC's 'initial reaction is that this is quite a sensible and reasonable qualification from Professor Aroney'.[24]

4.32 Upon reflecting on Professor Aroney's suggestions further, Dr Rubenstein advised that while the redrafts might address the constitutional issues raised by Professor Twomey, they might also 'confer an unintended consequence by expanding the remit for a person to seek protection for statements of belief'.[25]

4.33 The Executive Council of Australian Jewry (ECAJ) advised that while it supported Professor Aroney's proposals for clause 11, it could not support his proposed amendments to clause 12. Instead, ECAJ offered suggested redrafts of its own and explained:

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[22] Mr Mark Sneddon, Institute for Civil Society, *Proof Committee Hansard,* 20 January 2022, p. 18.

[23] Professor Patrick Parkinson, Freedom for Faith, *Proof Committee Hansard*, 20 January 2022, pp. 18, 19. See also: Pastor Michael Worker, General Secretary, and Director, Public Affairs and Religious Liberty, Seventh-day Adventist Church in Australia, *Proof Committee Hansard*, 20 January 2022, p. 87.

[24] Dr Colin Rubenstein, Australia/Israel & Jewish Affairs Council, *Proof Committee Hansard*, 20 January 2022, p. 47. See also: Right Reverend Dr Michael Stead, Bishop of South Sydney; Chair, Religious Freedom Reference Group, Anglican Church Diocese of Sydney, *Proof Committee Hansard*, 20 January 2022, pp. 66, 67; Pastor Mark Llewellyn Edwards, Australian Christian Churches, *Proof Committee Hansard,* 20 January 2022, p. 90.

[25] Australia/Israel Jewish Affairs Council, answer to question on notice, 20 January 2022 (response received 27 January 2022).

> In our view this proposed redraft, if enacted, would enlarge the scope of the protection to be given to statements of belief well beyond that which is contemplated by the express words of the current clause 12, and would sweep aside many of the critical limitations to the operation of clause 12 which are explained in paragraphs 151 to 194 of the Explanatory Memorandum to the primary Bill.
>
> …Professor Aroney's proposed redraft would provide that a statement of belief "is not unlawful" under those laws. This would have the effect of excepting statements of belief from *any* contravention of those laws, and not merely from a contravention of their *anti-discrimination* provisions. The difficulty is that Commonwealth, state and territory anti-discrimination laws prohibit not only forms of conduct that constitute discrimination, but other forms of conduct as well.[26]

4.34 The AHRC did not support the suggested amendments. The AHRC contended that Professor Aroney's approach would not address its 'substantive concerns with either clause 11 or clause 12' and it should not form part of the religious discrimination bill.[27] With regard to the proposed clause 11, the AHRC asserted that:

> …the effect of the clause would be to substitute a policy position of the Commonwealth Government for a policy position of the State of Victoria in an area where Victoria has primary responsibility. This would be a highly unusual step. Education is primarily a responsibility of the States.[28]

4.35 Turning to clause 12, the AHRC said Professor Aroney's suggestion would not address concerns that it would 'result in a diminishing of protections against discrimination with adverse consequences that are unintended and unnecessary'. The AHRC continued:

> Significantly, the proposed redraft of clause 12 would be *more* problematic than the existing clause 12 because it would override anti-discrimination law to a greater extent.
>
> …Existing clause 12 is limited to providing that statements of belief do not amount to *discrimination* under Commonwealth, State and Territory anti-discrimination laws. However, under the proposed new drafting, clause 12(2) would provide a general right to make a statement of belief, notwithstanding *any* anti-discrimination law. This is not limited to discrimination provisions in those laws and would also extend to harassment and vilification provisions in those laws, subject to the limitations in clause 12(3).
>
> This means that a statement of belief could provide a defence to s 18C of the *Racial Discrimination Act 1975* (Cth) (RDA). This was a result that was

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[26] Executive Council of Australian Jewry Inc., answers to questions on notice, 20 January 2022, pp. 1-2, (responses received 24 January 2022). See pp. 4-5 for suggested redrafts to clause 12.

[27] Australian Human Rights Commission (AHRC), answers to questions taken on notice, 21 January 2022, p. 5 (responses received 27 January 2022).

[28] AHRC, answers to questions taken on notice, 21 January 2022, p. 6 (responses received 27 January 2022).

> explicitly disavowed by the Government in the Explanatory Memorandum at [178].[29]

4.36 When the AGD was asked to respond to Professor Aroney's proposed amendments, the department indicated comfort with the clauses as currently drafted. Mr Walter of the AGD advised:

> In relation to Professor Aroney's suggestion: again, we don't see anything there that causes us at this point to think that we need to rethink how we've done it. I think the committee has also heard evidence that [the amendments] may have other consequences as well, and so, if we were to head down that path, we would want to go and get our own independent legal advice on how his approach to the legislation works. Of course, we have not done that at this point.[30]

Questions of jurisdiction – tribunals and courts

4.37 There was some confusion expressed during the inquiry about the interaction of the bills with state and territory tribunals, where discrimination matters are normally heard, and how matters would interact with the federal courts.

4.38 There was also discussion about the role of the federal courts in determining state discrimination cases, which could arise following the enactment of these bills. Those in favour of the bills argued that future developments in case law would clarify the provisions. However, a number of witnesses took issue with this suggestion, drawing attention to section 109 of the Constitution, which provides that when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

4.39 As was well clarified by the Right Reverend Dr Michael Stead, Bishop of South Sydney, the issue in terms of section 109 is 'not so much the constitutionality of the amendment but whether they would be constitutionally effective—that is, whether section 109 be invoked to override the inconsistent state legislation'.[31]

Concerns about jurisdiction

4.40 Mr Liam Elphick of the Australian Discrimination Law Experts Group (ADLEG) suggested, for example, that the beneficial role of the courts had been over-simplified in relation to clauses 11 and 12 because they:

> …are not simple provisions. They are complex provisions. They are not provisions that can be worked out with a little bit of tinkering here and there by this federal court and that supreme court. They would drastically undermine and throw into chaos our discrimination law system and the

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[29] AHRC, answers to questions taken on notice, 21 January 2022, p. 6 (responses received 27 January 2022).

[30] Mr Walter, Attorney-General's Department, *Proof Committee Hansard*, 21 January 2022, p. 78.

[31] Right Reverend Dr Michael Stead, Bishop of South Sydney; Chair, Religious Freedom Reference Group, Anglican Church Diocese of Sydney, *Proof Committee Hansard*, 20 January 2022, p. 67.

> way in which victims of discrimination pursue justice through our courts and our tribunals, particularly at the state and territory level. I've discussed this with my colleagues at ADLEG, utilising our many, many years of expertise in discrimination law, and I cannot see a situation in which this naturally or automatically resolves through the court process. The provision should not proceed at all.[32]

4.41 The ALA raised similar concerns, observing that some state or territory anti-discrimination complaints 'will not be able to be considered by state/territory tribunals, where the respondent claims a "statement of belief" exemption'. The ALA explained:

> As state/territory tribunals cannot consider federal laws, these matters will now have to be heard by a state/territory court or a federal court if this provision becomes law. This will significantly increase the cost for complainants in other discrimination matters, making the complaint process less accessible.
>
> The effect of this clause will be that complaints under state/territory jurisdiction in respect of discrimination on the basis of sex, relationship status, pregnancy, parental status, breastfeeding, race, age, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, will not be able to be considered by state/territory tribunals if the respondent alleges that the alleged discriminatory conduct was a "statement of belief". Whether the conduct amounted to a statement of belief would need to be considered by the state/territory court or a federal court.[33]

4.42 These concerns were echoed by the LCA, which noted that 'protection from discrimination is provided through a combination of federal, State and Territory laws', with discrimination complaints 'overwhelmingly heard and determined in State and Territory tribunals, rather than through the federal court system'. However, the LCA considered that clause 12 complaints would be a matter for consideration under federal law. The LCA pointed to possible issues, saying:

> The tribunal tasked with adjudicating discrimination complaints in the States and Territories (save for Queensland), will not be able to determine the federal defence. The defence will need to be determined by a Chapter III Court, and necessitate further litigation.[34]

4.43 The LCA also expressed concern around conflicts with section 109 of the Constitution and, in relation to clause 12, with the timing of complaints, the complexity of matters and increased risks of costs. The LCA noted that most of the state anti-discrimination tribunals are no cost jurisdictions, or 'costs are

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[32] Mr Liam Elphick, Member, Australian Discrimination Law Experts Group, *Proof Committee Hansard*, 21 January 2022, p. 6.

[33] Australian Lawyers Alliance, *Submission 16*, p. 9.

[34] Law Council of Australia, *Submission 8*, p. 39.

only awarded in exceptional or special circumstances'.[35] Ms Katherine Eastman of the LCA elaborated:

> The types of people who may use these laws are not academics following the development of laws over time; they're ordinary people who may be very unaware of the law and unaware, for example, as to what the best forum to prosecute their case is. Those making statements of belief may also be unaware of the law, the extent to which they may even have a defence, and also the consequences of raising a defence based on clause 12. … In terms of resolving those issues, they are very complex issues involving questions of jurisdiction and the operation of chapter III of the Constitution and they can't be dealt with in a very simple way in one piece of legislation.[36]

4.44 The LCA argued that clause 12 should not be enacted, considering it 'unworkable', with the potential to 'draw both the complainant and the respondent into secondary litigation, causing further delay and cost to both parties'.[37]

4.45 When asked whether it considered clause 12 'unworkable', Ms Rita Jabri Markwell, Legal Adviser to the Australian Muslim Advocacy Network (AMAN), remarked that the provision certainly 'adds complexity to litigating for claimants'. Ms Jabri Markwell continued that without sufficient data, it is hard to discern 'the precise solution for the precise problem', stating:

> If the problem is that there are too many discrimination complaints that are putting people of faith under stress, it would be good to see the data on that and then to try to resolve that problem as precisely as possible. But we don't have enough information, and that's why we didn't make a recommendation [to that effect].[38]

Response to concerns

4.46 In response to the concerns raised by the LCA, Professor Aroney suggested that established features of the 'Australian federal system will not render clauses 11 and 12 unworkable'. Professor Aroney argued that 'the jurisdictional limits of State tribunals has arisen in many legal contexts and is an ongoing issue requiring broader legal reforms'. He concluded:

> …clauses 11 and 12 will operate like the many other Commonwealth laws that intersect with State laws which are routinely administered by State tribunals. As in all such situations, decisions of State courts competent to

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[35] Ms Katherine Eastman SC, Law Council of Australia, *Proof Committee Hansard*, 20 January 2022, p. 2.

[36] Ms Katherine Eastman SC, Law Council of Australia, *Proof Committee Hansard*, 20 January 2022, p. 3.

[37] Law Council of Australia, *Submission 8*, p. 40.

[38] Ms Rita Jabri Markwell, Legal Adviser, Australian Muslim Advocacy Network, *Proof Committee Hansard*, 20 January 2022, pp. 58-59.

> exercise federal jurisdiction may be required to determine any dispute concerning the meaning and effect of clause 11 and 12, but once such determinations are made, they will operate as a precedent for all similar cases.[39]

4.47 Professor Aroney emphasised that many cases have been before tribunals and courts where the limited jurisdiction of tribunals has been an issue, including:

> …under a lot of areas of Australian law that are well established and people don't question, such as laws relating to discrimination at a state level or laws relating to vilification at a state level and also laws relating to retail leases and military discipline proceedings. No-one is saying that the Commonwealth should get out of the area of law in order to resolve the problem. It's a wider problem that needs to be addressed and I don't think it's a specific problem relevant to this bill.[40]

4.48 On notice, Professor Aroney observed that most discrimination matters are resolved by conciliation, without engagement of a tribunal:

> The problem arising from the limited jurisdiction of State tribunals will only occur in the limited proportion of cases that are referred to a tribunal, in which a clause 11 or clause 12 defence is raised, and in which there is no court decision that provides relevant guidance.[41]

4.49 Associate Professor Mark Fowler suggested that it was the 'bespoke protections' of the religious discrimination bill which were eliciting concerns from some stakeholders, and that clause 12 would 'require some clarification from the courts'. However, Associate Professor Fowler highlighted that state courts are vested with chapter III jurisdiction and can therefore determine constitutional matters which would be binding on a state tribunal. He contended that:

> Each of the relevant jurisdictions allow for a transfer from the tribunal to a state court to determine matters that arise in such conflict. Also, a Federal Court may be sought to determine such a conflict as well. In the instance that a Federal Court makes a determination then the question is: is that binding on a state tribunal? The Federal Court's finding will be highly authoritative in respect of the particular conflict for a tribunal…it is a very orthodox, long-running understanding of the Australian court system that a higher court will be binding on a lower tribunal.[42]

4.50 The AGD conceded, however, that the interaction between state, territory and federal tribunals and courts was a 'genuine problem'. Mr Walter provided the

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[39] Professor Nicholas Aroney, *Submission 145*, p. 4.

[40] Professor Nicholas Aroney, *Proof Committee Hansard,* 20 January 2022, p. 13.

[41] Professor Nicholas Aroney, response to questions on notice, 20 January 2022, pp. 4-5 (responses received 25 January 2022).

[42] Associate Professor Mark Fowler, *Proof Committee Hansard,* 20 January 2022, pp. 8, 9, 10. See also: Associate Professor Mark Fowler, answers to questions on notice, 20 January 2022 (response received 24 January 2022).

following explanation as to why the problem could not properly be addressed in the bills:

> In the relationship between the legislation and particularly state and territory tribunals—as in complaints bodies that are not courts— there is a challenge there, and it's a challenge that's caused by chapter III of the Constitution. There are a number of mechanisms by which the challenges thrown up by chapter III can be overcome, and they're more or less efficient depending on which jurisdiction we're talking about. However, that is a genuine problem. There is no way of drafting our way around that part of the Constitution, unfortunately. I mentioned in the Parliamentary Joint Committee on Human Rights that there is currently a case before the High Court which may resolve some of these difficulties.[43]

Impact on services in rural and regional areas

4.51 The committee heard evidence about the potential impact of the religious discrimination bill on regional and remote communities, particularly in areas where there is only one or a limited number of service providers, connected to a religious organisation.

4.52 It was suggested that if the law allows a religious organisation to engage employees on the basis of religious belief or practice, this could not only exclude people from appropriate employment, but also deny the public access to essential services.[44]

4.53 The Hon Selena Uibo, Attorney-General and Minister for Justice in the Northern Territory, voiced concerns about how, for example, the statement of belief provision could detrimentally impact the Northern Territory. Ms Uibo advised that:

> My concern here in the Territory—it's a small jurisdiction—would be some very regional and remote parts of the country not having the option of other places either to have employment or to attend education institutions based on any inhibitors or barriers because of statements of belief. That would be a huge concern for the Territory… [45]

4.54 Minister Uibo explained that in terms of non-government organisations providing services in the Northern Territory, there are many which have a religious founding. Minister Uibo continued:

> Often they're the only service provider providing either programs or services in some of the regional and remote parts of the Territory. Most of them are key service providers for Territorians who are vulnerable, disadvantaged, and in our remote areas a high proportion are Aboriginal Territorians. Some of the organisations, many of you would know and be

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[43] Mr Walter, AGD, *Proof Committee Hansard,* 21 January 2022, p. 69.

[44] Mr David Syme, *Submission 196*.

[45] The Hon Selena Uibo, Attorney-General and Minister for Justice, Northern Territory Legislative Assembly, *Proof Committee Hansard,* 21 January 2022, p. 63.

> familiar with—Anglicare, Catholic Care and some of the volunteer groups, like the Salvation Army and the Australian Red Cross. They are key partners for delivering services and programs in the Northern Territory.
>
> The impact of some of the proposals or restrictions of the bill would definitely trickle through the community…[46]

Suggested amendments

4.55 While supportive of the bills, some submitters and witnesses pointed to several areas where they considered the bills could be amended (in addition to those amendments proposed by Professor Aroney and discussed earlier in this chapter), to strengthen protections from religious discrimination.

4.56 For example, Dr Renae Barker explained that while the bills are 'essential to protect the most vulnerable in our community', as drafted they have some 'flaws'. Dr Barker argued that 'these flaws need to be addressed if we are to achieve the core aim of anti-discrimination law: less discrimination'.[47]

4.57 Some of the suggested amendments raised during the course of the inquiry are considered in the following sections.

Definition of 'religious belief and activity' and 'religious body'

4.58 Both those in support of and in opposition to the bills took issue with a lack of clarity around the definition of 'religious belief', how to determine a 'genuinely held' belief, and other terms in the bills such as 'religious body'.

4.59 Dr Barker submitted that 'while any definitions of religion used when applying the provisions of the Religious Discrimination Bill must be a legal one', this would not necessarily be 'what ordinary people will have in mind when they think about the application of the Bill'. Dr Barker continued:

> As the debate on the Bill has already demonstrated when people think about religion they think about the things people do and say in the name of their religion. In other words they focus on the manifestation of religion or the practice of religion rather than the belief.
>
> …
>
> This is not to say the Bill is unlimited. The actions covered by the Bill must be a religious activity. However this will be much more than going to mosque, temple, church or synagogue on the relevant holy day. Religion touches upon almost all aspects of a person's life.[48]

4.60 In her appearance at a public hearing, Dr Barker reiterated:

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[46] The Hon Selena Uibo, Attorney-General and Minister for Justice, Northern Territory Legislative Assembly, *Proof Committee Hansard,* 21 January 2022, pp. 64-65.

[47] Dr Renae Barker, *Submission 2*, p. 14.

[48] Dr Renae Barker, *Submission 2*, p. 5.

> …the definition of 'religion' is very broad. The High Court [has] recognised the Church of Scientology,[49] but hasn't since had an opportunity to consider the definition. Internationally it has moved on to be even broader…religion is a very broad concept and covers an awful lot of different beliefs and practices, many of which most people in Australia would be unfamiliar with and feel uncomfortable with.[50]

4.61 The Equality Rights Alliance also argued for a definition of 'religion', in order to support the definition of 'religious belief or activity'. The Alliance argued that currently, it is not clear where the 'boundary between matters which constitute religious beliefs and non-religious thoughts or matters of conscience' lies. The Alliance suggested that, as an alternative, the bills could be extended to 'protect thought and conscience as well as religion'.[51]

4.62 Ms Hellen Dalley-Fisher of the Equality Rights Alliance explained the Alliance's concerns about the definitions as drafted. Ms Dalley-Fisher told the committee:

> …when you look at the definition as it stands currently in the Act, what you need is: he needs to believe in good faith that his beliefs are his beliefs, and he needs to genuinely believe that his beliefs conform with the tenets of his faith, of his religion. We don't have a definition of religion, so it's very difficult to start unpicking that. It's going to end up being a long and complicated process in the courts, which doesn't benefit anyone.
>
> The flipside to that is that there will be people whose beliefs are extreme and problematic, from a safety, health or discrimination rights perspective, for other people, which will nevertheless be happily covered. So we need a balancing mechanism in the act which allows us to say, if we have two people's rights on the line—the right to non-discrimination on the basis of religion and somebody else's right—there needs to be a provision for balancing that, preferably on the basis of comparative damage.[52]

4.63 The Australian Chamber of Commerce and Industry (ACCI) expressed considerable concern about the definitions, observing that while fundamental to the bills, the definitions have a 'circular nature' and lack clarity for business owners who would seek to take 'precautions to avoid conduct deemed discriminatory'. ACCI argued that the definitions:

> …do little to inform and assist employers with determining whether certain characteristics or behaviour constitute a religious belief or activity.
>
> …Legislation that imposes obligations on employers needs to be written with clarity and precision, avoiding or minimising such ambiguity…However, ACCI does acknowledge the difficulty in

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[49] *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120

[50] Dr Renae Barker, *Proof Committee Hansard*, 20 January 2022, p. 3.

[51] Equality Rights Alliance, answers to questions taken on notice, 21 January 2022, p. 1 (responses received 26 January 2022).

[52] Ms Hellen Dalley-Fisher, Equality Rights Alliance, *Proof Committee Hansard,* 21 January 2022, p. 33.

> exhaustively capturing the meaning of 'religion' in a statutory definition due to the variety of forms, practices, and theological beliefs…Nevertheless, greater clarity is crucial for a definition which is an operative component of the major parts of the Bill, given its wide application, especially on small business owners, most of whom are unlikely to have any legal expertise (nor many doctorates in divinity).
>
> …
>
> ACCI is deliberately not making an argument about which faiths or beliefs deserve legal protection but rather highlights to the Committee the complexity and unpredictability of reverting to such a circular definition, instead of effectively defining the phrase in statute…the vague definition in the Bill leaves open the door to potential controversy and conflict in workplaces due to the burden placed on employers to discern whether purported beliefs or activities are legitimately religious in nature.
>
> To minimise workplace conflict, which harms productivity, job security and both employers and employees, employers should not be forced into theological debates over the legitimacy of religious beliefs or activities but instead [be] supported by having an ability to clarify whether or not a particular belief, conduct, request or expectation falls under a statutory definition.[53]

4.64 The Australian Christian Lobby (ACL) observed that the bills provide no substantive definition of what constitutes a 'religious belief' or 'religious activity'. It was concerned that the courts could become 'an arbiter of theology', and suggested the bills include 'an expansive and inclusive definition of religious activity', and a sincerity or genuineness test for determining religious belief—similar to the bills' approach to determining a 'statement of belief'.[54]

4.65 The Australian Association of Christian Schools (AACS) thought the religious discrimination bill could be strengthened by amending the definition of 'religious belief or activity' so as to protect a person from discrimination 'because of their refusal to engage in conduct contrary to their religious belief'. This would help to protect an individual from unwanted pressure to act contrary to their religious convictions.[55]

4.66 The Human Rights Law Alliance (HRLA) also considered that without a more complex definition of 'religious belief and activity', it was likely to be 'defined narrowly by the courts to be restricted to private personal observances of religious worship'. The HRLA called for the definition to be amended to:

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[53] Australian Chamber of Commerce and Industry, *Submission 133*, pp. 15-16.

[54] Australian Christian Lobby, *Submission 1*, p. 5. See also Catholic Education Tasmania, *Submission 35*, p. 2; Malcolm Eglinton, *Submission 181*, [pp. 3-4].

[55] Australian Association of Christian Schools, *Submission 33*, pp. 11-12.

> …capture every dimension of religious belief and activity; worship, practice and teaching of religion in public and private, individually and communally as set out in Article 18 of the ICCPR…[56]

4.67 The Queensland Council for Civil Liberties also said that the definition was too broad, and suggested amendments to clarify that a 'religious body' was any 'established for religious purposes'—because principles of freedom of association 'apply to bodies having a religious objective, not that are simply conducted in accordance with religious principles'.[57]

4.68 These concerns were addressed by the AGD, which observed that 'religious belief or activity' is broadly defined in the religious discrimination bill and explained that no Australian jurisdiction defines 'religion', 'religious belief' or 'religious activity', consistent with the approach of common law and acknowledging that 'faith traditions may emerge or develop over time'.[58]

4.69 The AGD highlighted issues that might arise from a narrower definition:

> Any attempt to define the terms 'religion', 'religious belief' and 'religious activity' is likely to have significant unintended consequences as a prescriptive definition may be too rigid or become easily outdated (and may unintentionally exclude small and emerging religions from the scope of the Bill).[59]

Statements of belief

4.70 While the broad operation of clause 12 and the statement of belief provisions have been discussed elsewhere in this report, evidence to the committee also raised concerns about the wording of the clause and how it would apply if enacted.

4.71 Equality Australia, for instance, argued that the statement of belief provisions would 'lower-the-bar for acceptable conduct in the workplace and in education settings'. Equality Australia suggested that clause 12 'fails to extend an equal protection for statements made by non-believers':

> Non-believers are only protected when making statements related only to the fact of not holding a religion. As the Explanatory Memorandum says, it is not intended that this definition would capture philosophical beliefs which do not relate to a lack of religious belief. This means that section 12 fails to conform with the requirements of article 18 of the ICCPR, given it does not protect the expressions of believers and non-believers equally.[60]

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56 Human Rights Law Alliance, *Submission* 150, pp. 11-12.

57 Queensland Council of Civil Liberties, *Submission 77*, p. 5.

58 Attorney-General's Department, *Submission 175*, p. 7.

59 Attorney-General's Department, *Submission 175*, p. 7.

60 Equality Australia, *Submission 29*, pp. 13-14. See also: Diversity Council Australia, *Submission 7*, pp. 11-13.

4.72 Equality Australia concluded that clause 12 was a 'provision which is beyond repair and must be removed'. In relation to subclause 12(2)(b), Equality Australia argued:

> In partnering the word 'harass' with 'threaten', 'intimidate' and 'vilify' in subsection 12(2)(b), and omitting words such as 'offend', 'insult' and 'humiliate', it now becomes relatively clear that a great degree of latitude is being given to statements which could offend, insult and humiliate others. Moreover, although the word 'harass' could have had a broader meaning on its own, given its context, it is likely to be interpreted much more narrowly to conform with the words chosen as its partners, namely, 'threaten', 'intimidate' and 'vilify'.
>
> Coupled with an objective 'reasonable person' test that ignores how a particular group would be affected by certain statements, and a statutory note that states 'a moderately expressed religious view that does not incite hatred or violence would not constitute vilification', it becomes likely that statements which offend, insult or humiliate particular groups of people are being authorised by subsection 12(2)(b).[61]

4.73 The Uniting Church in Australia argued that clause 12 as drafted is 'too broad', has 'too narrow a bar', and its interaction with existing legislated rights is unclear. Ms Sharon Hollis, President of the Uniting Church of Australia explained:

> Even though it does, at one level, rule out the highest level of offending people, there's a lower level of offence or hurt that can be given to people if you claim you're making a statement of belief. We further think there is a dilemma in a person simply holding that to be their own held position of religious faith, because there is no way to test whether that statement of belief is, in fact, held by the wider religious community to which they belong. That makes it dangerous and therefore hard to tell whether what they are making is a statement of belief or simply a statement of dislike of people that is harmful.[62]

4.74 While supportive of the bill in general, Dr Barker argued that the 'statement of belief' is the 'most controversial and arguably the most problematic' clause in the package of bills. While acknowledging that the clause supports the role of religion in the public sphere, as well as freedom of religion, Dr Barker suggested the clause is too broad and that removing the clause from the religious discrimination bill would not prevent religious people from holding certain beliefs, nor require them to reveal their religious beliefs.[63]

4.75 Conversely, Mr Lyle Shelton argued that clause 12 was not extensive enough, because it would not override 'vilification' provisions in state and territory

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[61] Equality Australia, *Submission 29*, pp. 15, 19.

[62] Ms Sharon Hollis, President, Uniting Church in Australia, *Proof Committee Hansard*, 20 January 2022, p. 82.

[63] Dr Renae Barker, *Submission 2*, p. 9.

legislation and therefore the clause does not 'fully and properly protect statements of religious belief'.[64]

4.76 The HRLA similarly opined that the provisions as drafted do not 'deal with the true threat to statements of religious belief—vilification claims under state and territory laws' and the 'misuse of vilification laws by activists'.[65]

4.77 The ECAJ, while supportive of clause 12, raised concerns in relation to 'genuinely held beliefs' and consensus views, stating:

> Conflicts in matters as subjective and irreducible as fundamental faith and belief are simply not amenable to resolution by the application of any objective test, including reliance on the evidence of religious experts or reference to the beliefs of other members of the same faith community, or a segment of it.[66]

'Reasonable' or 'necessary'?

4.78 The bills would provide that potentially discriminatory activity be considered against a 'reasonableness' test[67]—that is, an imposition of a condition would not constitute unlawful discrimination, if determined that a condition was reasonable in the circumstances.[68]

4.79 Some submitters took the view that these provisions as currently worded do not meet the high threshold established by international law, specifically Article 18 of the ICCPR, where limitations on freedoms are prescribed by law and are 'necessary' (as opposed to 'reasonable') for protection from discrimination.[69]

4.80 The AACS drew attention to the explanatory memorandum for the religious discrimination bill, which argues that the bill 'only limits the right to freedom of religion and other rights in circumstances where it is necessary to do so'.[70] The AACS suggested that 'due to the non-alignment between the "reasonable" and "necessary" standards', the statement in the explanatory memorandum is incorrect. The AACS recommended that clause 14 be amended to 'clarify that

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64 Mr Lyle Shelton, *Submission 198*, p. 3.

65 Human Rights Law Alliance, *Submission 150*, p. 14.

66 Executive Council of Australian Jewry, *Submission 94*, p. 6.

67 For example, see Part 3, clause 14(2) of the Religious Discrimination Bill 2021.

68 Explanatory memorandum to the religious discrimination bill, pp. 60-61.

69 See, for example: Australian Christian Lobby, *Submission 1*, p. 6; Executive Council of Australian Jewry, *Submission 94*, pp. 15-16; Institute for Civil Society, *Submission 96*, p. 15; Seventh-day Adventist Church in Australia, *Submission 123*, pp. 6-7; Anglican Church Diocese of Sydney, *Submission 136*, pp. 20-21; Associate Professor Mark Fowler, *Submission 146*, p. 6.

The ICCPR and the international human rights framework is discussed elsewhere in this report.

70 Explanatory memorandum to the religious discrimination bill, pp. 32-33.

the reasonableness test cannot operate to impose a limitation that would not be permitted under Article 18(3) of the ICCPR', and that any limitation on expression of religious activity or belief be amended from 'reasonable' to 'necessary'.[71]

4.81 The sentiments expressed by the AACS were echoed by the HRLA, which said the reasonableness threshold was 'far too low a bar for allowing discrimination', was inconsistent with the ICCPR and therefore would 'not effectively protect religious Australians from indirect discrimination'.[72]

Burden of proof

4.82 In existing anti-discrimination laws, the burden of proof is placed on the respondent to prove that a discriminatory law or action it has imposed is reasonable, because a 'claimant is at a disadvantage if required to prove the reasonableness of an imposed condition compared to the respondent'.[73]

4.83 However, it was submitted to the committee that the religious discrimination bill does not have a provision requiring a respondent to prove that a discriminatory provision is reasonable, despite previous iterations of the bills taking this approach.

4.84 The HRLA argued under the bills 'an aggrieved person in a religious discrimination claim must prove that the condition is not reasonable'. The HRLA encouraged amendments to the bill to clarify that the person imposing a condition, requirement or practice must make the argument that it is reasonable.[74]

4.85 Similarly, the Australian National Imams Council (ANIC) pointed to this apparent drafting oversight and argued for the alignment of the religious discrimination bill with other federal discrimination laws through the inclusion of a provision making clear the onus of the burden of proof.[75]

4.86 Associate Professor Fowler likewise called for the reinstatement of burden of proof provisions, on those imposing the conditions, for consistency with other Commonwealth discrimination laws.[76]

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71 Australian Association of Christian Schools, *Submission 33*, pp. 20-21.

72 Human Rights Law Alliance, *Submission* 150, p. 13.

73 Human Rights Law Alliance, *Submission 150*, p. 4.

74 Human Rights Law Alliance, *Submission 150*, p. 4.

75 Australian National Imams Council, *Submission 144*, p. 10. See also: National Catholic Education Commission, *Submission 88*, p. 11; Australian Catholic Bishops Conference, *Submission 95*, p. 10; Australian Christian Higher Education Alliance, *Submission 103*, p. 19; Seventh-day Adventist Church in Australia, *Submission 123*, p. 7; Institute for Civil Society, *Submission 128*, p. 11; Anglican Church Diocese of Sydney, *Submission 136*, p. 15.

76 Associate Professor Mark Fowler, *Submission 146*, p. 26.

4.87 The AGD confirmed that the burden of proof provisions had been omitted in error from the current version of the bills. The AGD confirmed that there is work underway to rectify this, and that the burden of proof provisions will be made 'consistent with all other indirect discrimination provisions' in other Commonwealth discrimination legislation.[77]

Reasonable adjustments

4.88 Those in support of the bills made repeated calls for them to be amended to include a 'reasonable adjustments' requirement. Such a clause would echo the provisions found in disability discrimination law, and would require the reasonable adjustment of conditions, most particularly in the workplace, to accommodate the religious beliefs or activities of an individual.

4.89 Mr John Steenhof, Principal Lawyer with the HRLA, said that the inclusion of a reasonable adjustments clause would provide a way of 'moderating and allowing for the conflict that is going to arise between an employer and a religious employee to provide that if reasonable adjustments can be made, they should'. Mr Steenhof continued:

> That is in the Disability Discrimination Act. It is not in here. It is something that has been recommended internationally as a necessary part of any religious discrimination law, and it should be there.[78]

4.90 Associate Professor Fowler argued that the inclusion of a reasonable adjustments clause in the bills would be in line with the approach taken in the *Disability Discrimination Act 1992* (for which the courts have considered the 'reasonable adjustments' issue). It would also accord with the international human rights framework:

> The Report of the Former United Nations Special Rapporteur of Freedom of Religion or Belief titled *Elimination of all forms of religious intolerance* provided to the sixty-ninth session of the General Assembly recommended the use of 'reasonable accommodation' provisions as a means to combat religious discrimination. The Report would support the inclusion of a reasonable adjustments requirement within the Bill.[79]

4.91 The HRLA argued that reasonable adjustment provisions have not been included in the religious discrimination bill, 'despite clear applications directly

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[77] Mr Walter, Attorney-General's Department, *Proof Committee Hansard*, 21 January 2022, p. 71. At the time of the hearing on 21 January 2022, the AGD advised that there were no other approved amendments to the legislative package; see Mr Walter, p. 74.

[78] Mr John Steenhof, Human Rights Law Alliance, *Proof Committee Hansard*, 20 January 2022, pp. 23-24.

[79] Associate Professor Mark Fowler, *Submission 146*, p. 27. For suggested drafting amendments to incorporate reasonable adjustments into the bills, see Associate Professor Mark Fowler, answers to questions on notice, 20 January 2022, pp. 4-5 (response received 24 January 2022).

relating to religious beliefs'. The HRLA elaborated that reasonable adjustment clauses would:

> …give a balanced and reasonable protection to religious Australians in cases where for example, employers could easily make adjustments at little cost or hassle to accommodate religious beliefs but which would not place an undue burden where the adjustment would be costly or cause hardship.[80]

4.92 The ACL echoed these views, suggesting the application and utility of such clauses to 'religious belief is readily apparent, particularly in the workplace'. The ACL provided examples, saying:

> Muslim employees who require time for their daily prayers, Christian employees who have a conscientious objection to working on Sundays and Jewish employees who are required to abide by certain kosher dietary requirements would all benefit from such a provision, which would impose a reasonable balance between the needs of an employer and the rights of religious Australians not to be discriminated against.[81]

4.93 The ANIC similarly called for a reasonable adjustments clause for employers, and provided the following example of how such provisions could operate:

> …where there are sufficient staff to allow flexible rostering that would accommodate a Muslim to attend for compulsory Friday congregational prayer, it would be discrimination if the employer refuses to make the reasonable adjustments. Conversely, if it was not reasonable – for example, there were insufficient staff or the continuous operations would be impacted – then an employer would not be required to adjust rosters to accommodate the religious obligations of some employees.[82]

4.94 The Anglican Church Diocese of Sydney also supported the inclusion of reasonable adjustment clauses, because the same principles ought to apply to religious belief and activity, as they do in other laws. The Church argued that such provisions should:

> …require an employer to make reasonable adjustments for an employee's genuine religious beliefs unless to do so would cause the organisation substantial hardship. … Conversely, if it was not reasonable – for example, if an emergency requires all staff to work a full weekend – then an employer would not be required to adjust rosters to accommodate the religious obligations of some employees.[83]

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[80] Human Rights Law Alliance, *Submission 150*, p. 6.

[81] Australian Christian Lobby, *Submission 1*, p. 6. See also Catholic Education Tasmania, *Submission 35*, pp. 2-3; Association for Reformed Political Action, *Submission 112*, p. 4; Institute for Civil Society, *Submission 128*, pp. 12-13; Malcolm Eglinton, *Submission 181*, [p. 4].

[82] Australian National Imams Council, *Submission 144*, p. 11.

[83] Anglican Church Diocese of Sydney, *Submission 136*, p. 19.

4.95 Some witnesses opposed the inclusion of reasonable adjustment provisions. For example, Equality Australia suggested that such provisions are already implied in indirect discrimination provisions, therefore:

> …providing that defence across the whole lot [of discrimination], including indirect discrimination claims, means that effectively you need to give a free pass or more latitude to a person who engages in misconduct based on a religious belief than you would to a person without that religious belief. Again, it goes back to the principle that our law should protect us all equally.[84]

4.96 The Australian Industry Group (Ai Group) likewise posited that reasonable adjustment provisions are unnecessary. While acknowledging the reasonable adjustment provisions in disability law, Ai Group said 'in terms of religious belief and religious activity, the legislation outlaws direct and indirect discrimination. We don't think it needs another very significant concept in there around reasonable adjustments'.[85]

Ministerial discretion

4.97 The religious discrimination bill would provide that religious educational institutions, hospitals, aged care facilities, accommodation, disability service providers, and religious camps and conference sites do not engage in discrimination, if the conduct is in accordance with a publicly available policy, and conducted in good faith.

4.98 The bill further states that the minister may, by legislative instrument, determine requirements about a policy—including in relation to its availability.

4.99 Evidence to the committee urged for the ministerial powers in this regard to be amended, and for the minister's power to be clearly limited to matters of form and procedure, rather than the substance of a policy.[86]

4.100 While welcoming the transparency and certainty arising from the requirement for a publicly available policy, the AACS was concerned about the 'expansive power' which could be afforded to the minister, without sufficient parliamentary scrutiny. The AACS noted that no other equivalent delegated power exists in other Commonwealth discrimination law, which could 'so

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84 Mr Ghassan Kassisieh, Equality Australia, *Proof Committee Hansard*, 21 January 2022, p. 14.

85 Mr Stephen Smith, Australian Industry Group, *Proof Committee Hansard,* 21 January 2022, p. 41.

86 See for example: Australian Christian Lobby, *Submission 1*, p. 7; Executive Council of Australian Jewry, *Submission 94*, p. 9; Institute for Civil Society, *Submission 96*, p. 13; Presbyterian Church of Australia, *Submission 105*, p. 7; Anglican Church Diocese of Sydney, *Submission 136*, pp. 16-17; Malcolm Eglinton, *Submission 181*, [p. 5].

substantively affect the operation of an exception or exemption applying to religious institutions or schools'.[87]

4.101 Christian Schools Australia and Adventist Schools Australia (CSA & ASA) were also of the view that such ministerial discretion is 'clearly unacceptable and inconsistent with the requirements of international law'. The CSA & ASA further argued that 'educational institutions should be able to rely upon the provisions in the Bill itself and not be concerned about the possibility of future limitations that are not subject to rigorous Parliamentary scrutiny'.[88]

4.102 Similar concerns were raised by Associate Professor Fowler, who noted there was 'no limit' on matters which the minister could address in regulation, and therefore the minister could 'potentially encroach upon or frustrate the operation of the exclusion as applied to a religious institution'. Noting that there is no equivalent power granted to any minister in any Australian jurisdiction and that it would provide considerable ministerial discretion in the future, Associate Professor Fowler recommended that these provisions be removed.[89]

4.103 The National Catholic Education Commission (NCEC) also expressed some reservations about ministerial discretion, suggesting that the religious discrimination bill and its explanatory materials are not clear 'regarding the breadth of the Minister's power', nor do they provide examples of how this power will operate in practice. The NCEC echoed the view of other submitters, stating:

> …while it may be reasonable for the Minister to have the power to determine the manner in which the policy is made publicly available, it would not be legitimate for the Minister to determine the content of the policy. Catholic Education recommends that the Bill should be amended to ensure that the powers of the Minister in this regard are limited. At the very least, examples of how the Minister could exercise this power should be provided for greater clarity, transparency and certainty.[90]

4.104 With regard to the ministerial powers, the AGD commented that the purpose of the regulation-making power was to:

> …ensure that guidance can be provided if necessary to address specific concerns or issues identified by stakeholders or the community when

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87 Australian Association of Christian Schools, *Submission 33*, p. 16.

88 Christian Schools Australia and Adventist Schools Australia, *Submission 89*, p. 14.

89 Associate Professor Mark Fowler, *Submission 146*, p. 21.

90 National Catholic Education Commission, *Submission 88*, pp. 7-8. See also: Australian Catholic Bishops Conference, *Submission 95*, p. 9; Australian Christian Higher Education Alliance, *Submission 103*, p. 10.

> either developing policies or accessing or using policies prepared by a religious body.[91]

The 'Folau clause'

4.105 Earlier drafts of the bills contained provisions which would have provided protections to employees for expressions of faith outside the workplace. Restrictions imposed by employers on such employees for that action would have been deemed unlawful discrimination, unless proven necessary to achieving reasonable results for the employer's business or activities.

4.106 The bills before the committee do not contain these provisions. Some submitters in support of the bills expressed the view that the clause, known colloquially as the 'Folau clause', should be reinstated in the bills.[92]

4.107 For example, the Catholic Women's League Australia-New South Wales Inc. argued that 'protection from discrimination against applicants and employees on the basis of religious belief or activity—inside or outside of the workplace—to be essential for the protection of religious believers'. The League advised that its members had:

> …expressed concerns about their own employment, or the employment of their children or grandchildren who seek to express their religious beliefs publicly, including on social media. While the Israel Folau sacking made headlines, there are other occurrences of this that do not receive the same amount of attention or support.[93]

4.108 The ACL noted that the Folau clause in previous drafts of the legislation was intended to ensure that a moderate expression of faith by an employee, in their own time, was their own business. The ACL therefore considered employee protections 'necessary, reasonable and proportionate and should be included' in the bills.[94]

4.109 The Presbyterian Church of Australia (PCA) supported the Folau clause, stating such a clause is necessary so it is 'explicit that an employer must prove that a prohibition on employees from making statements of belief or unbelief is necessary for the employer's activities and has the least restrictive effect in achieving that goal'.[95]

4.110 The HRLA likewise argued for the re-inclusion of the Folau clause:

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91 AGD, *Submission 175*, pp. 10-11.

92 See for example: Australian Family Coalition, *Submission 109*, p. 3; Association for Reformed Political Action, *Submission 112*, p. 4; Ps Daniel Roberts, *Submission 170*; Rosemary Albert, *Submission 177;* Malcolm Eglinton, *Submission 181*, [p. 6]; Stefan Slucki, *Submission 183*, p. 3; Joel Delaney, *Submission 189*.

93 Catholic Women's League Australia-New South Wales Inc., *Submission 110*, p. 3.

94 Australian Christian Lobby, *Submission 1*, p. 5.

95 Presbyterian Church of Australia, *Submission 105*, p. 8.

> Removing this protection is a serious flaw of the Bill and is a clear signal that religious freedom rights have been placed secondary to commercial interests and are not worthy of protection from discrimination. No one would tolerate an employer seeking to control the full expression of rights connected with other protected attributes outside of work.
>
> This decision also shows that the drafters have not considered the unique nature of the freedom of religious belief and activity. Making personal expressions of faith is of fundamental importance to freedom of religious expression and belief, which is an extremely strong and non-derogable right under Article 18 of the ICCPR. A moderate expression of faith by an employee outside of work in their own time should be of no concern to their employer.[96]

4.111 Other submitters similarly held strong views about the re-insertion of the Folau clause in the package of bills. The Australian Catholic Bishops Conference (ACBC) argued that the absence of employment protections 'contributes to a fear among ordinary people of faith of adverse action from employers', resulting in forms of self-censorship. The ACBC concluded that this would have a 'chilling effect on freedom of religion' in the workplace, and would be in addition to reported incidents of religious discrimination already occurring in the workplace and other areas. The ACBC said that the bills:

> …should protect the right of an employee to make moderate statements of belief without being penalised by their employer provided the statements meet the RDB's test of not harassing, threatening, intimidating or vilifying a person or group.[97]

4.112 The Institute for Civil Society thought that employment protections should be included in the bills, because:

> …the principle of protecting employees who make moderate non-vilifying statements of belief or unbelief from employer code of conduct overreach is a sound one. The Bill should provide a flexible proportionality standard which still allows employers to make employer conduct rules about employee speech for legitimate objectives such as avoiding inflammatory language and fights in the workplace. However, if challenged, the application of the rule would be unlawful discrimination under the Bill if the employer cannot show that the rule is necessary to achieve a legitimate goal of the employer in managing the workplace and that, in achieving that goal, the rule has the least restrictive effect on employee freedom to make moderate, non-vilifying statements of belief and unbelief. This will require employers to draft their codes of conduct to be reasonable and justified and avoid overreach.[98]

4.113 The Wilberforce Foundation, a coalition of practicing lawyers and legal academics, also recommended that the bills pass, subject only to amendments

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[96] Human Rights Law Alliance, *Submission 150*, p. 15.

[97] Australian Catholic Bishops Conference, *Submission 95*, p. 11.

[98] Institute for Civil Society, *Submission 128*, p. 13.

which would allow 'employees to exercise their inherent rights to speak freely on matters of their faith outside of work hours without facing sanctions by their employers'.[99]

[99] The Wilberforce Foundation, *Submission 13*, pp. 1, 2.

Chapter 5
Committee view

5.1 As stated in chapter 1, the committee is grateful to stakeholders who engaged in this inquiry in a respectful and constructive way. The inquiry was enriched by the personal insights shared, and the considered views expressed about the ways in which the proposed package of legislation may impact on the lives of those of religious faith and of no religious faith.

5.2 Across the diverse views voiced during the course of this inquiry, there was broad support for measures to protect people from discrimination on the grounds of religious belief and activity. The lack of such protections is a significant gap in Australia's anti-discrimination regime and its obligations under international law.

5.3 The absence of a comprehensive set of protections against religious discrimination in Australia is remarkable, particularly given the fundamental way in which spirituality and religion have informed and continue to contribute to the diverse and pluralistic fabric of Australian society.

5.4 These bills are, therefore, a necessary addition to Australia's anti-discrimination laws, seeking to fill that gap and afford people both of religious faith and of no religious faith protections to practice their beliefs without interference or recrimination.

5.5 There is some apprehension about certain aspects of these bills. It was put to the committee that the measures in the legislative package extend beyond 'standard' or 'orthodox' anti-discrimination provisions, like those which exist to protect other personal attributes. However, the committee is persuaded that the unique nature of religious belief and activity, including that they are expressive and support and encourage activity in communal settings, warrants specific protections.

5.6 Clause 12 of the Religious Discrimination Bill 2021 (religious discrimination bill) – the 'statement of belief' clause – was the subject of much discussion amongst stakeholders. The committee agrees that there is a balance to be struck between the competing values that inform Australian society, but it is not convinced that affording protection to people of religious faith (or of no religious faith) to express moderately held religious beliefs made in good faith would disturb that balance or skew it in favour of one particular attribute.

5.7 A healthy pluralist society must allow for people of religious faith to act and express in accordance with their beliefs—and likewise for those not of religious faith. The religious discrimination bill seeks to protect this key value, while acknowledging that such a right is not absolute. In particular, the clear

limitations placed on clause 12 (and other provisions of the bill) provide the space necessary for people of religious faith to practice their faith while also protecting social cohesion and the fundamental rights of others.

5.8 The committee acknowledges stakeholders' concerns about section 38 of the *Sex Discrimination Act 1984* (Sex Discrimination Act) and discussion about possible amendments to that Act. The operation of exemptions under the Sex Discrimination Act, particularly in the context of education institutions and the implications for teachers and students, is a serious issue.

5.9 Media reports over recent days have suggested that the government may seek to amend the Sex Discrimination Act. While this report broadly reflects on key positions on this issue (see chapter 3), the committee was advised by the Attorney-General's Department that such an amendment to the Sex Discrimination Act had not been approved. Therefore, at the time of tabling, no such amendment was available to the committee for further consideration or comment.

5.10 The prospective operation of the bills, and the religious discrimination bill in particular, was contested by eminent representatives of Australia's legal community. This points to the legal complexity of these bills, and the committee agrees that they will likely attract judicial consideration. As Professor Nicholas Aroney of the University of Queensland told the committee, it is not without precedent that progressive legislation has passed into law and subsequently been clarified by the judiciary.[1]

5.11 That said, the committee considers that the Commonwealth government should ensure that constitutional questions are addressed to the extent possible prior to enactment of the bills. In particular, the committee urges the government to give careful consideration to the issues raised by Professors Anne Twomey and Nicholas Aroney, including Professor Aroney's proposed amendments.

1 Professor Nicholas Aroney, *Proof Committee Hansard*, 20 January 2022, p. 13.

Recommendation 1

5.12 The committee recommends that the Commonwealth government considers the issues raised in relation to clauses 11 and 12 of the Religious Discrimination Bill 2021, with particular regard to the:

- **concerns of Professor Anne Twomey; and**
- **drafting amendments proposed by Professor Nicholas Aroney.**

Recommendation 2

5.13 Subject to Recommendation 1, the committee recommends that the Senate passes the bills.

Senator the Hon Sarah Henderson
Chair

Additional comments from Australian Labor Party senators

Introduction

1.1 Freedom of thought, conscience and religion or belief are fundamental human rights.

1.2 Labor has already expressed its support for the extension of the Commonwealth's anti-discrimination framework to ensure Australians are not discriminated against because of their religious beliefs or activities– just as Commonwealth law currently prohibits discrimination on the basis of age, disability, race, sex, gender identity, sex characteristics and sexual orientation. Labor senators of the committee reiterate their support for that position.

1.3 So, the question before the committee is therefore not whether Labor or Liberal senators support the religious discrimination bills in principle– the question is whether the bills the government has introduced achieve their objective of protecting people of faith from discrimination while, at the same time, not diminishing the rights and freedoms of others.

1.4 Our consideration of these bills has been guided by the three principles set out by the Australian Labor Party following their introduction to the Parliament:

(i) As the International Covenant on Civil and Political Rights makes clear, religious organisations and people of faith have the right to act in accordance with the doctrines, beliefs or teachings of their traditions and faith.

(ii) Support for the extension of the Commonwealth's anti-discrimination framework to ensure Australians are not discriminated against because of their religious beliefs or activities.

(iii) Consistent with the international covenant, ensuring that any extension of the Commonwealth's anti-discrimination framework does not remove protections that already exist in the law to protect Australians from other forms of discrimination.

1.5 During this inquiry, submitters have expressed overwhelming support for extending the Commonwealth's anti-discrimination framework to protect people of faith. This is an important point and we must not allow it to be obscured by the significant controversy over a handful of contentious provisions in the government's religious discrimination bills.

1.6 At the same time, the fact that aspects of the government's proposed reforms are highly contentious cannot be ignored and it must be recognised that this contention has come about largely as a function of the way in which the government has approached the task of developing this legislation.

1.7 Given the limited time available to prepare these additional comments, Labor senators have elected to focus their attention primarily on the contentious aspects of the religious discrimination bills—noting that each of us will have further opportunities to discuss other aspects of the bills in the Parliament or elsewhere.

Election commitments and broken promises

1.8 On 13 December 2018, the Prime Minister announced that his government would enact a Religious Discrimination Act and appoint a 'Religious Freedom Commissioner' before the 2019 election. That did not happen and thus it then became one of the government's election commitments.

1.9 The promise to enact a Religious Discrimination Act was not an isolated commitment. It was accompanied by a series of other election commitments about how the government would go about the task of developing legislation and addressing the other recommendations in the Religious Freedom Review. The Prime Minister promised the Australian people that (among other things):

- The government would 'work with the Opposition, crossbench and key stakeholders in a spirit of bipartisanship' to introduce a religious discrimination bill into the Parliament that already enjoyed cross-party support. This did not happen.
- The government would establish a Council of Attorneys-General Working Group with states and territories, which would consider– and work through– recommendations of the Religious Freedom Review that related to state and territory anti-discrimination laws, including their interaction with Commonwealth laws. This did not happen.
- The government would, within a fortnight (back in 2018), legislate to ensure children are protected from discrimination at school. This did not happen.
- The government would, following consultation with states and territories, commission the Australian Law Reform Commission (ALRC) to conduct an inquiry 'with a view to settling upon a legislative mechanism that would, on a nationally consistent basis, achieve the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to prohibitions on discrimination based on a person's identity, while also protecting the right of religious institutions to reasonably conduct themselves in a way consistent with their religious ethos'. More than three years later, no such inquiry has been conducted.
- The government would task the ALRC, following consultation with states and territories, with considering 'how best to amend current Commonwealth anti-discrimination legislation to prohibit the commencement of any legal or administrative action, pursuant to State-based anti-discrimination legislation analogous to section 18C of the *Racial Discrimination Act 1975*' (i.e. section 17(1) of the Tasmanian *Anti-*

Discrimination Act 1998). More than three years later, no such inquiry has been conducted.

1.10 Having broken each of these promises, the Prime Minister then waited until the last minute before an election to introduce one of the most complex pieces of proposed legislation this committee has been tasked with reviewing during this term of the Parliament. The government then demanded that this committee conduct its review over the Christmas holiday period in the middle of a pandemic giving potential submitters very little time to thoughtfully respond to the committee's call for evidence.

The committee's inquiry and report

1.11 The committee received hundreds of submissions and had very little time to consider each of them carefully.

1.12 This would be incredibly challenging at the best of times. But in the middle of what the Prime Minister has rightly described as a 'very difficult summer' for all Australians, it has proved to be challenging for senators to give the committee's report— and, indeed, the subject matter of the report— the level of close attention it deserves.

1.13 That said, Labor senators wholeheartedly endorse the many laudable sentiments in the committee's report, particularly about the need to protect people of faith from discrimination.

1.14 We would also like to record our support for Recommendation 1 of the committee's report, which calls on the government to consider the issues raised by submitters in relation to clauses 11 and 12 of the Religious Discrimination Bill 2021 in particular. However, we note that while the committee has singled out the constitutional concerns identified by Professors Twomey and Aroney, the concerns expressed by submitters in relation to clauses 11 and 12 clearly extend beyond those issues.

1.15 Labor senators acknowledge that clauses 11 and 12 are intended to address real and legitimate concerns of religious organisations and people of faith.

1.16 Certainly it is the case that we support the right of a religious school to give preference in employment with a view to ensuring that the school is able to reasonably conduct itself consistently with its religious ethos. Preserving that right is the concern underlying clause 11.

1.17 We also agree that the mere expression of a non-malicious and 'moderately expressed religious view', in good faith, should not contravene any Australian law– and the government and Parliament have a role to play in reassuring people of faith of this. We understand that providing that reassurance is the primary purpose of clause 12.

1.18 In its effort to address those underlying concerns however, the government has produced two complex, divisive and novel provisions – and it has done so without consulting with the Opposition, or any state or territory government.

1.19 It is clear from the evidence received by the committee that clauses 11 and 12 are the most contentious and complex provisions in the Religious Discrimination Bill 2021.

1.20 Numerous submitters have argued that clause 12, in particular, would undermine protections that already exist in the law to protect Australians from other forms of discrimination, and that neither clause 11 nor clause 12 would achieve their objectives. Many submitters have also argued that– by overriding state and territory anti-discrimination law unilaterally– legitimate complaints relating, in whole or in part, to a 'statement of belief' under state and territory anti-discrimination laws would face a much more complicated and expensive process. In some cases, legitimate complaints may not be able to proceed at all.

1.21 Conversely, other submitters rejected this view, arguing that these concerns are overstated. For their part, such submitters contended that clauses 11 and 12– though imperfect –are essential to provide certainty to Australians that the law will protect the ability of religious schools to maintain their ethos and the right of people of faith to give expression to their religious beliefs.

1.22 Labor senators note that, in its appearance at the committee's hearing on 21 January, the Attorney-General's Department was unable to address many of the concerns that have been raised about clauses 11 and 12.

1.23 We also understand the frustration expressed by advocates for the bills that the extension of the Commonwealth's anti-discrimination framework to protect people of faith has been delayed as a result of the length of time the government has taken to act on its promise in 2018 to bring forth these bills to the Parliament.

1.24 Against that background, we support the committee's recommendation that the government considers the many concerns raised by submitters in relation to clauses 11 and 12. We would add that the government should work with the Opposition, crossbench and key stakeholders to address those concerns.

1.25 Further, Labor senators urge the government to engage directly with minority religious groups to address concerns that aspects of the bills may have the potential to negatively impact these groups through a reduced access to services.

Other concerns with the Religious Discrimination Bill

1.26 In the short time available to prepare these additional comments, Labor senators have not had the opportunity to address the concerns that have been raised by submitters about other provisions of the bill (though many of those concerns are set out in the committee's report). Needless to say, the

government should consider those concerns carefully and work with the Opposition, crossbench and key stakeholders to address them– whether by way of amendment(s) to the bills or, where appropriate, by other means.

1.27 Separately, Labor senators note that there is no anti-vilification provision in the government's Religious Discrimination Bill. In light of well publicised incidents of religiously motivated violence, it is time for – at the very least – a mature national conversation about the call for greater legislative protection against vilification and incitement to hatred or violence based on a person's religion or religious belief.

Conclusion

1.28 Labor senators of the committee wish to extend their thanks to those who have participated in the committee's inquiry into these bills. We acknowledge that the question of religious discrimination in Australia, and how the Parliament should address it, is one that can evoke passionate responses among members of our community and appreciate the respectful manner in which participants conducted themselves throughout the course of the committee's hearings.

1.29 The matter which the committee has been asked to consider is one that is both complex and difficult and we reiterate our disappointment that the committee has been provided with such little time to consider the bills and their provisions in greater detail.

1.30 Australia is a nation that is built on religious pluralism and freedom. Labor has and will continue to support the rights of Australians to manifest their religious beliefs in accordance with our obligations under Article 18 of the International Covenant on Civil and Political Rights.

1.31 Labor supports the notion that the Commonwealth's anti-discrimination framework should be expanded to ensure that Australians are not discriminated against on the basis of their religious beliefs or practices. In doing so, Labor has made clear that it is important that such an extension does not remove existing protections Australians already enjoy against other forms of discrimination.

1.32 Throughout the course of the committee's inquiry, it became clear that whilst most of the measures contained in the bills were welcome and worthy of implementation in law, certain provisions are highly contentious.

1.33 We accept the calls of certain key stakeholders for action, however it is important that the bills which do pass the Parliament are as well constructed as they can be. Thus, we implore the government to work with the Opposition, crossbench and key stakeholders to address the concerns of submitters to this inquiry with a view to ensuring that the religious discrimination bills are fit for purpose.

Senator Raff Ciccone
Deputy Chair
Senator for Victoria

Senator Louise Pratt
Senator for Western Australia

Senator Deborah O'Neill
Senator for New South Wales

Dissenting report from the Australian Greens

Recommendations:

Recommendation 1

That further consideration of the bills be delayed until an appropriate consultation process has been undertaken, and until the *Sex Discrimination Act 1984* has been amended to provide protection for LGBTIQA+ students.

Recommendation 2

That clause 12 be removed in its entirety.

Recommendation 3

The Australian Government should work towards full implementation of the United Nations Declaration on the Rights of Indigenous Peoples into Australian domestic law.

Recommendation 4

That the current bills not proceed.

Recommendation 5

That the Australian Government develop a Charter of Rights, to protect religious belief amongst other protected attributes.

Recommendation 6

That any new Religious Discrimination bill adopt a similar approach to other anti-discrimination legislation, operating as a shield not a sword.

The importance of protecting human rights

1.1 The Australian Greens want greater international respect for and protection of human rights, and for Australia to ratify and adhere to, both locally and abroad, all human rights conventions. That should include an Australian bill of rights that incorporates Australia's international human rights obligations into domestic law.

1.2 In line with that commitment to human rights, the Australian Greens support legislation that protects the rights of people to hold and practice their religious beliefs.

1.3 There are, however, significant shortcomings in the process that has led to the development of the Religious Discrimination Bill 2021 ('the Bill') and

associated bills ('the package of Bills'), which are reflected in the significant flaws in the bill as introduced.

The flawed process to date

Limited time for Parliamentary scrutiny

1.4 A significant number of submissions noted that despite releasing exposure drafts two years ago, in 2020, the inquiry process for the package of Bills introduced into the Parliament has been extremely short. This has made consultation for many organisations difficult, particularly amidst the ongoing challenges of the pandemic.

1.5 As the Law Council of Australia noted:

> The Law Council regrets the short inquiry timeframes for these bills, particularly noting that they fall over the summer holiday period. It recognises that these timeframes are largely outside the control of parliamentary committees. Its constituent bodies are concerned that the timeframes for responding to such complex legislation are not reasonable, and that their volunteer members have not had the capacity to consider all of the issues or provide a comprehensive response.[1]

1.6 Representatives of People with Disability Australia (PWDA) noted that due to the short period for the inquiries, they had not been able to undertake adequate consultation with their members.[2] Similarly, the Australian Discrimination Law Experts Group noted that:

> The time available for submissions to this parliamentary inquiry has been very short and there have been no accessible format materials made available by the Australian Government to ensure that people with disabilities that affect their communication needs can fully engage with this legislative process.[3]

1.7 Despite this, the current (and previous exposure draft processes) have not provided sufficient time for effective engagement by people with disability or ensured that information, etc, was provided in accessible formats. This has prevented many people with disability from exercising their article 29 rights to participation in political and public life.

1.8 The rushed process for this current bill contrasts especially poorly with the longer consideration given to other bills, which received a longer, more appropriate period of parliamentary consideration and scrutiny; in the most recent instance, the bill to establish the *Age Discrimination Act 2004* was

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1 Law Council of Australia, *Submission 8*, p. 8.

2 Mx Giancarlo de Vera, Senior Policy Manager, People with Disability Australia, *Proof Committee Hansard*, 21 January 2022, p. 36.

3 Australian Discrimination Law Experts Group, *Submission 115*, p. 25.

introduced on 26 June 2003, and following a Parliamentary inquiry, passed almost a year later, on 15 June 2004.

1.9 While exposure drafts were released two years before the introduction of the bill, the Government showed little effort at genuine consultation, as reflected in the bills as introduced. Large numbers of submissions which raised significant concerns, including from State and Territory governments, were ignored or disregarded. There was no public consultation process, or transparency about how consultation forums were organised.

Comparison with other policy commitments

1.10 As outlined earlier in this dissenting report, the Government's approach to this Bill has been rushed and lacked adequate consultation. Despite the push to ensure this Bill is considered quickly, without adequate consultation, the Government has failed to deliver on other long-held commitments, including the much-delayed promises to amend the *Sex Discrimination Act 1984*.

1.11 In October 2018, the Prime Minister was asked what he would say to gay teens who faced the threat of expulsion from schools because of their sexuality. The Prime Minister said that he 'understands and is going to take action to fix it'.[4] More than three years later, no action has been taken and no amendments introduced. The proposed review by the Australian Law Reform Commission is set to report a year after the passage of any Religious Discrimination Bill, meaning that in the intervening period between the Prime Minister's promise and the reporting date, an entire cohort of students will have entered high school and graduated.

Recommendation 1

1.12 That further consideration of the bills be delayed until an appropriate consultation process has been undertaken, and until the *Sex Discrimination Act 1984* has been amended to provide protection for LGBTIQA+ students.

Flaws in the government's proposed bill

Implementation of international agreements

1.13 A number of submissions have noted that the approach of the Bill to implementing recommendations from the International Covenant on Civil and Political Rights raise significant concerns.

1.14 As Associate Professor Beck outlined:

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[4] The Hon Scott Morrison MP, Prime Minister of Australia, 'Doorstop with Senator the Hon Anne Ruston, Minister for International Development and the Pacific and Mr Tony Pasin MP, Member for Barker', *Transcript of Press Conference*, 13 October 2018.

> It is not consistent with international human rights law to give greater protection to religious beliefs than to non-religious beliefs … Because the definition of statement of belief (i) very clearly discriminates between religious and non-religious people and between religious and non-religious beliefs and (ii) does not ensure the enjoyment of rights freedoms on an equal footing, there is a sufficient basis for a conclusion that the provisions of the Bill dealing with statements of belief are inconsistent with international human rights law.[5]

1.15 Similarly, Professor George Williams stated in his submission that:

> I also have concerns about the Bill on free speech grounds. In his second reading speech to the Bill, the Prime Minister highlighted the need to protect four fundamental freedoms:
>
> > The freedom to worship is not merely the freedom to believe.
> >
> > It's the freedom to think.
> >
> > It is the freedom to exercise our conscience.
> >
> > It is the freedom to doubt.
> >
> > Indeed, it's the freedom not to believe.
>
> These freedoms are inseparable, but the Bill fails to reflect this. Statements of belief in the Bill only encompass statements relating to a religious belief or a belief relating to the fact of not holding a religious belief. In other words, it only protects statements connected to religious belief. No protection is provided other beliefs, such as matters of conscience.
>
> This is inconsistent with article 18 of the International Covenant on Civil and Political Rights. It does not separate out religious speech for protection, but instead provides that:
>
> > Everyone shall have the right to freedom of thought, conscience and religion.
>
> By contrast, the Bill provides an elevated status to religious speech but fails to protect speech on matters of thought or conscience.
>
> The consequence of this is that a person may make a statement, perhaps about another group or expressing a belief such as pacifism, but the statement will only receive protection if it has a religious basis. A person making exactly the same statement as a matter of conscience without a religious basis will receive no protection.
>
> This Bill prioritises religious speech over other forms of speech in Australia. This is deeply problematic in a secular nation. It also finds no basis in the international human rights conventions that the Bill purports to implement.[6]

1.16 Ms Eastman, of the Law Council of Australia, stated:

> While article 18 of the International Covenant on Civil and Political Rights recognises the freedom of religion, that freedom comes with certain

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[5] Associate Professor Luke Beck, *Submission 160*, pp. 5-6.

[6] Professor George Williams, *Submission 4*, pp. 1-2.

> exceptions, and the exceptions are part of the way in which one looks at the character of the right and the extent to which Australian law reflects that relevant international law. The second point is that article 18 of the ICCPR cannot be read and considered in isolation in the context of the human rights law, and, to the extent that this bill gives precedence to article 18 rights and freedom of religion, to the [inaudible] important rights in the ICCPR, particularly equality and nondiscrimination on a range of grounds, then, in that respect, the question of whether the bill would be [inaudible] by the international law is a live issue, and we agree with Professor Twomey's submissions in this respect.[7]

1.17 In turn, the failures in implementing international law have implications for the constitutionality of the bill. As Constitutional law expert Professor Anne Twomey submitted:

> From a constitutional point of view, therefore, s 51(xxix) would not support the Bill if the provisions of the Bill were substantially inconsistent with the ICCPR as a whole, including the other rights and freedoms the ICCPR declares, taking into account that article 18 of the ICCPR states that the right to freedom of religion may only be limited where it is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[8]

1.18 Similarly, Associate Professor Luke Beck concluded:

> As noted at 1.2 above, it appears that key provisions in the Bill are inconsistent with international law.
>
> Accordingly, to the extent that the statements of belief 'sword' provisions or particular applications of those provisions rely for their validity only on the external affairs power there must be significant constitutional doubt that those provisions or those applications are constitutionally valid.[9]

Constitutional issues associated with the override of state and territory legislation

1.19 Unfortunately, the constitutional issues associated with the implementation of international agreements are not the only constitutional flaws in the bill's drafting. As Professor Anne Twomey noted:

> Where the Commonwealth has the power to enact a valid Commonwealth law, s 109 of the Constitution provides that the Commonwealth law will prevail over any inconsistent State law, to extent of the inconsistency. The State law is rendered inoperative to the extent that it is inconsistent with the Commonwealth's law. If the inconsistency later disappears because the Commonwealth has repealed or amended its law, the previously inconsistent part of the State law again becomes operative.

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[7] Ms Katherine Eastman SC, Chair, Law Council of Australia Equal Opportunity Committee, Law Council of Australia, *Proof Committee Hansard*, 20 January 2022, p. 4.

[8] Professor Anne Twomey, *Submission 31*, p. 3.

[9] Associate Professor Luke Beck, *Submission 31*, p. 4.

> Section 109 only operates in relation to an inconsistency between valid Commonwealth and State laws. It does not confer upon the Commonwealth Parliament a power to repeal State laws or alter State laws or affect the interpretation of State laws or prohibit the State from enacting certain laws. The Commonwealth Parliament has no legislative power to interfere in State laws in this way…
>
> The Commonwealth Parliament could, however, enact a law that empowers a person to do X notwithstanding the operation of any State law, or the operation of specified State laws. This would create a direct inconsistency between the laws (i.e. the Commonwealth law empowers a person to do X and the State law prohibits it or limits the power to do X). Section 109 would then operate so that the Commonwealth law prevailed and the State law was inoperative to the extent of the inconsistency.
>
> …
>
> The problem with ss 11 and 12 of the Religious Discrimination Bill is that they do not follow this path of creating an inconsistency by stating that a person is authorised to do X despite a State law. Instead, s 11 purports to alter the effect of the application of a State law by stating that 'A religious body that is an educational institution does not contravene a prescribed State or Territory law if' the body does X in a particular manner. But it is not within the Commonwealth Parliament's power to legislate to control the legal operation of a State law, including what conduct contravenes a State law. All it can do is enact its own law which gives rise to an inconsistency (eg by authorising the religious body to do X in a particular manner despite the operation of a State law), rendering the State law inoperative to the extent of the inconsistency. If the State law is inoperative, there can be no contravention of it. But this outcome arises because of the inconsistency, not because the Commonwealth Parliament can legislate to determine which actions contravene a State law and which do not.[10]

1.20 Similarly, Associate Professor Luke Beck concluded that:

> While federal laws can override State laws in some circumstances, federal laws cannot alter or amend State laws…Section 12(1)(a) purports to control the content of State laws rather than simply overriding the operation of State laws. This is bad legislative drafting and the result is that section 12(1)(a) is most likely unconstitutional.[11]

Overriding state and territory law will limit access to justice

1.21 Even beyond the issues of constitutionality, the override of state and territory law in clause 12 and other parts of the bill is unprecedented and profoundly concerning. As the Australian Discrimination Law Experts Group noted:

> This Bill is the first instance that provisions in a federal discrimination law in Australia have been drafted to explicitly override and weaken other federal, state and territory discrimination laws. It has never previously

[10] Professor Anne Twomey, *Submission 160*, pp. 4-5.

[11] Associate Professor Luke Beck, *Submission 31*, pp. 11-12.

> occurred in over forty years of discrimination laws in Australia, yet in this Bill there are two examples of such overrides. Australia's legislative framework is designed to create two concurrent systems of discrimination law—federal, and state/territory—that can operate alongside each other. This is reflected in provisions made in every federal discrimination law explicitly stating that they do not exclude or limit the operation of state or territory laws that are capable of operating concurrently.
>
> There has long been bipartisan consensus to maintain these complementary and concurrent discrimination law systems, which allow claimants to pursue appropriate causes of action, and allow states and territories to pass laws that reflect their own values and principles.[12]

1.22 Multiple submissions noted profound concerns at this approach to stripping away existing protections in antidiscrimination law at multiple levels around the country. The Australian Human Rights Commission stated that:

> The Commission considers that the explicit overriding of all other Australian discrimination laws is not warranted, sets an alarming precedent, and is inconsistent with the stated objects of the Bill, which recognise the indivisibility and universality of human rights. By contrast, this provision seeks to favour one right over all others, and to additionally elevate one form of speech above others.[13]

1.23 The ACT Government stated in their submission:

> The ACT and other stakeholders condemned these unprecedented override clauses in our previous submission, and are concerned that this has been retained in the current Bill…There is no reasonable justification to elevate the right to freedom from religious discrimination and freedom of religious expression above other Federal freedoms from discrimination on the basis of sex, age, disability and race…Further, this approach is contrary to the cooperative framework of discrimination law generally. It sets a dangerous precedent that the Federal government may seek to continue eroding robust, local discrimination protections in States and Territories, that reflect the will of residents of those jurisdictions. It is particularly concerning that the federal government may seek to do this through regulations rather than further legislation, reducing the amount of scrutiny on future parliamentary action seeking to extend religious freedom.[14]

1.24 Similarly, the Tasmanian government's submission stated:

> …while I can confirm the Tasmanian Government's support for prohibiting discrimination on the grounds of religious belief, I do wish to reiterate our concerns raised with the previous Commonwealth Attorney-General in relation to the provisions of the principal which appear to effectively invalidate the operation of the Tasmanian Anti-Discrimination Act, and specifically section 17(1) of that Act, to the extent that the conduct complained of amounts to a statement of belief…I would like to reiterate

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[12] Australian Discrimination Law Experts Group, *Submission 115*, pp. 6-7.

[13] Australian Human Rights Commission, *Submission 32*, p. 5.

[14] ACT Government, *Submission 100*, pp. 9-10.

> that the Tasmanian Government's view is that the Religious Discrimination legislative package as drafted would diminish the ability of the Tasmanian Anti-Discrimination Tribunal to deal with certain complaints and that, as a Government, we continue to strongly advocate for no weakening of our Anti-Discrimination laws.[15]

1.25 These concerns were shared by the Australian Council of Human Rights Authorities, comprising key anti-discrimination officials in each jurisdiction, stating that the bill:

> …undermines the coherence of Australia's anti-discrimination framework by overriding state and territory anti-discrimination legislation (cl 11 and 12).[16]

The impacts of clause 12

1.26 While the Bill has profound and extensive flaws, a key issue highlighted consistently in multiple submissions were the problems associated with clause 12.

1.27 As the Australian Discrimination Law Experts Group explained:

> Clause 12 would have wide-ranging consequences in limiting liability for discrimination, vilification and otherwise harmful comments against others which target protected attributes. For instance, it is currently unlawful for a person in Tasmania to use a racial epithet or slur to offend, ridicule, insult, intimidate or humiliate another person on the basis of their race. Under clause 12, this behaviour would become lawful – but only for those who do so on the basis of a religious belief…[17]

1.28 The Public Interest Advocacy Centre submitted that:

> Religiously-motivated demeaning and derogatory comments will be protected in all areas of public life: in workplaces, in schools, colleges and universities, in hospitals and aged care facilities, on buses and trains, and in cafes, restaurants and shops.[18]

1.29 In particular, the impacts of clause 12, in interaction with Australia's legal system, will profoundly reduce people's access to justice. As the Australian Discrimination Law Experts Group explained:

> … the override of state and territory discrimination laws will significantly limit access to justice for victims of discrimination in Australia.
>
> The overwhelming majority of discrimination claims are made through state and territory systems, rather than the federal system, largely owing to state and territory statutory authorities having a local presence and state and territory tribunals operating on a presumptive 'no costs' basis in the area of discrimination law. As such, a state and territory tribunal will not

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15 Tasmanian Government, *Submission 71*, pp. 1-2.

16 Australian Council of Human Rights Authorities, *Submission 165*, p. 1.

17 Australian Discrimination Law Experts Group, *Submission 115*, p. 6.

18 Public Interest Advocacy Centre, *Submission 6*, p. 4.

> award the payment of an unsuccessful party's legal costs, other than in exceptional circumstances.
>
> However, state and territory tribunals are not Chapter III courts under the Commonwealth Constitution and cannot exercise federal jurisdiction or determine a federal question of law. A matter will involve the exercise of federal judicial power if a party has a defence that owes its existence to a law of the federal Parliament.[19]

1.30 Similarly, the Public Interest Advocacy Centre noted that this flaw remained in the Bill as introduced, despite being raised repeatedly in submissions on the exposure drafts:

> It is therefore extremely disappointing this significant flaw remains in the final version of the Bill.
>
> It undermines one of the primary advantages of the existing anti-discrimination framework – that State tribunals offer a no-cost/low-cost, accessible option for people affected by discrimination to have their complaints resolved (and indeed a no-cost/low-cost method for respondents to have matters resolved too).
>
> By requiring that matters involving statements of belief defence be resolved only by courts, all parties will see their costs increase, as well as other impacts in terms of resources and timeliness. This will put the ability to make a discrimination complaint out of reach for many people.
>
> The statement of belief provision will therefore deny access to justice to the groups who are most likely to experience discrimination, including women, people with disability, LGBTI people and people of minority faiths.[20]

1.31 The Australian Human Rights Commission shared this concern, stating:

> There is a further reason why the introduction of a new federal defence to all Australian discrimination laws is problematic. It is likely to lead to increased time, cost and complexity where this Commonwealth defence is relied on in matters brought in State and Territory tribunals.[21]

1.32 The main committee report, in recommending amendments to clauses 11 and 12, acknowledges that problems exist in relation to those clauses. Sadly, the main committee report does not substantively engage with those problems, or recommend an appropriate solution.

1.33 As the Public Interest Advocacy Centre noted in evidence to the committee:

> One thing that came up in yesterday's hearings was the submission from Professor Aroney and questions about his proposed amendments to clauses 11 and 12. PIAC expresses its opposition to those drafted amendments for a number of reasons. We don't support them in principle because we don't support the Commonwealth override of state and

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[19] Australian Discrimination Law Experts Group, *Submission 115*, p. 12.

[20] Public Interest Advocacy Centre, *Submission 6*, p. 7.

[21] Australian Human Rights Commission, *Submission 32*, p. 30.

> territory legislation in this way. We don't support them in substance because we don't support taking away existing rights from teachers and other employees of educational institutions or overriding via the statement-of-belief provision to allow derogatory and demeaning comments against people. We particularly don't support the amendments as drafted. We note that his proposed amendments to section 12 in fact override section 18C of the Racial Discrimination Act as well as antivilification provisions in state and territory laws, because it's not limited to discrimination under those laws but applies to anything that is unlawful under any of those acts. Finally, we think it would be much clearer and fairer to remove both those provisions, so that religious belief is protected on an equivalent basis to other protected attributes.[22]

1.34 Similarly, Equality Australia noted that the proposed amendments, which have not undergone any meaningful consultation, would in fact worsen the situation:

> I would endorse what I heard Mr Lawrie say: that they don't actually resolve the substantive issues that the two clauses have in overriding existing protections, and, in fact, they try and bake them in. But, in so doing, they also have a couple of further problems. One is that, for example, on the overriding of laws that protect people with different religious beliefs in religious institutions, they water down the written policy proposal so that it's even easier for a religious institution to set and change rules, including for existing employees, as they wish, in a way that they can then enforce against those employees. As to the statement of belief clause provisions, I don't think that they resolve, for example, the Law Council of Australia's broader constitutional concerns about whether the external affairs power would give adequate support for those clauses, and I think there has been an analysis around article 18 of the International Covenant on Civil and Political Rights, but I don't think that's the only article that's relevant. I think it might have been Mark Sneddon yesterday who also mentioned other articles, and I would agree with him to this extent: that there is a requirement under the ICCPR for states to provide an effective remedy against discrimination, and that is on a range of grounds, including religious beliefs. So, to the extent that that provision preferences one ground over another, I would agree with the Law Council that that's actually not a faithful implementation of the human rights framework that it's seeking to rely on for its own power.[23]

1.35 In a response to a question on notice, the Australian Human Rights Commission noted that the amendments proposed by Professor Aroney address only one of two concerns noted by Professor Anne Twomey. The Commission stated:

> The drafting by Professor Aroney would not address the Commission's substantive concerns with either clause 11 or clause 12. The Commission

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[22] Mr Alastair Lawrie, Policy Manager, Public Interest Advocacy Centre, *Proof Committee Hansard*, 21 January 2022, p. 2.

[23] Mr Ghassan Kassisieh, Legal Director, Equality Australia, *Proof Committee Hansard*, 21 January 2022, p. 11.

> maintains the position that, even if the provisions were drafted in the form proposed by Professor Aroney, they should not form part of the Bill.
>
> …
>
> Significantly, the proposed redraft of clause 12 would be more problematic than the existing clause 12 because it would override anti-discrimination law to a greater extent.
>
> …
>
> The Commission's view is that it would be highly undesirable for clause 12 to be amended in a way that permits a greater degree of discrimination and harassment than is currently proposed. There should certainly not be a reduction in protections against racial vilification or sexual harassment without a full opportunity for public debate.[24]

1.36 Given these concerns, and the late stage at which Professor Aroney has provided these amendments, it is clear that they do not address the significant shortfalls in this bill, and that they may raise additional concerns.

Recommendation 2

1.37 That clause 12 be removed in its entirety.

The extension of human rights law to corporations

1.38 Another unprecedented component of the bill is the expansion of protections provided by human rights law from humans, to corporations. As the Australian Human Rights Commission noted:

> It is axiomatic that only humans have human rights. However, the Bill takes the highly unusual step of enabling corporations to make claims of religious discrimination. This would permit corporations to bring proceedings against people (or other organisations) and allege that they have been discriminated against.
>
> …
>
> International law and the domestic law of comparable jurisdictions makes clear that human rights law protects only humans. This principle has been adhered to in all of Australia's federal, state and territory human rights laws, including the existing federal discrimination laws. In the Commission's view, there is no justification for the Bill to depart from this settled and fundamental principle.
>
> Corporations cannot possess innately human qualities, such as dignity, which human rights law is designed to protect. More specifically, corporations have 'neither soul nor body' and cannot have a religious belief that is somehow disconnected from the religious belief of an individual or group of individuals that are involved with the corporation. The legitimate rights and interests of corporations can be, and are, legally

[24] Australian Human Rights Commission, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 27 January 2022), pp. 5-7.

> protected in other ways—for example, in statutes dealing with competition law.[25]

1.39 Similarly, the Australian Council of Human Rights Authorities noted their concern that the Bill:

> … departments from anti-discrimination law by enabling body corporates and religious bodies or institutions protections against discrimination, ordinarily provided only to individuals (cl 16). For example, if an employee of a company with a religious belief makes a statement of belief that is offensive, and a supplier terminates their supply arrangement with the company because the supplier found the remarks offensive, the employing company could possibly make a complaint of discrimination against the supplier, on the grounds that the company is an associate of the employee with the religious belief.[26]

Exceptions for religious bodies are too broad

1.40 A further failure of the drafting is that rather than adopting a standard anti-discrimination approach, the Bill provides extremely broad exemptions for religious organisations, enabling them to engage in religious discrimination. As the Australian Human Rights Commission noted:

> the Bill provides very broad exemptions that allow 'religious bodies' to engage in religious discrimination.
>
> …
>
> [B]road exemptions that allow religious bodies to engage in religious discrimination across a range of areas of public life undermines the rationale for the introduction of the Bill.
>
> …
>
> The breadth of exemptions available is particularly concerning when it comes to schools, and other religious educational institutions.[27]

1.41 The Australian Council of Human Rights Authorities concurred that the Bill:

> … provides religious bodies with broader freedom to discriminate against people of different or no faith (cl. 9). For example, contrary to some state and territory anti-discrimination law, it will not be discrimination for religious bodies such as educational institutions, hospitals, aged care facilities, certain accommodation providers, religious camps and conference sites to seek to preserve a 'religious ethos' among staff by making faith-based decisions in relation to employment.[28]

1.42 The Law Council of Australia shared those concerns, stating:

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[25] Australian Human Rights Commission, *Submission 32*, pp. 32-33.

[26] Australian Council of Human Rights Authorities, *Submission 165*, p. 2.

[27] Australian Human Rights Commission, *Submission 32*, pp. 6-7.

[28] Australian Council of Human Rights Authorities, *Submission 165*, p. 2.

> The Bill is also unorthodox as it begins, under Part 2, by permitting a wide range of conduct that will not constitute discrimination on the grounds of religious belief or activity, and will not engage its prohibitions on discrimination in key areas of public life. Several of its provisions are overly broad in scope. The Law Council is concerned that Part 2, as drafted, will undermine the Bill's core objects of eliminating discrimination against persons on the ground of religious belief or activity in a range of areas of public life, and ensuring equality before the law, regardless of religious belief or activity. It considers that Part 2 should be removed.[29]

This bill will have a devastating impact on people's lives

LGBTIQA+ communities

1.43 The Religious Discrimination Bill in its current form has devastating impacts on several socially marginalised communities that we have heard from, across the hearings. The Bill has the ability to act to the detriment of hard-fought protected rights of women, people with disabilities, LGBTQIA+ people, the elderly, and other communities to be treated with respect, dignity and equality.

1.44 As highlighted by Equality Australia, the Bill seeks to:

> allow people to discriminate against others by protecting offensive, derogatory and demeaning statements based in or about religion in the places we work, study and access goods and services…[and] protect religious beliefs and activities of people and organisations in ways that do not adequately protect the rights of others.[30]

1.45 The right to practice one's religion should not come at the cost of harm to socially marginalised groups or overriding hard-fought discrimination protections. As it stands, the Bill has the potential of causing harm to the health and safety of LGBTQIA+ people. According to LGBTIQ+ Health Australia:

> Australian research ..demonstrate(s) that exposure to religious anti-gay prejudice (the disapproval of homosexuality on religious grounds) predicted higher levels of anxiety, depression, stress, and shame; more harmful alcohol use; and more instances of both physical and verbal victimisation.[31]

1.46 LGBTIQ+ Health Australia (LHA) also noted that this Bill:

> provides the possibility that older LGBTI people will be forced to use aged care services provided by faith-based organisations where discrimination against them will be lawful.[32]

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[29] Law Council of Australia, *Submission 8*, p. 5.

[30] Equality Australia, *Submission 29*, p. 5.

[31] LGBTIQ+ Health Australia, *Submission 43*, p. 6.

[32] LGBTIQ+ Health Australia, *Submission 43*, p. 7.

1.47 This fear reflects LHA's consultations to report on the Royal Commission into Aged care Quality and Safety, where:

> many people reported experience of discrimination and exclusion where workers express and act on faith-based convictions that being LGBTI is sinful. Participants reported being actively told to suppress their identity and experienced loss of connection with their LGBTI community.[33]

1.48 The Bill also essentially offers a freedom from consequence to spewing hateful comments against members of the LGBTIQA+ community. Equality Australia, endorsed by other peak LGBTIQ+ bodies, explained that:

> Section 15 of the Religious Discrimination Bill will allow people who wish to express prejudiced, harmful or dangerous views based in or about religion to do so without facing consequences for their conduct even when it impacts on other employees, clients or customers or diminishes public trust in a profession. These provisions undercut the ability of professional bodies to promote inclusive and respectful workplace cultures by putting them in complex legal straitjackets with a test that is one-sided, and almost impossible to apply or understand, let alone meet.[34]

1.49 The LGBTQIA+ community has fought for their rights for a long time, and there is a long journey still remaining to ensure full equality before the law. This Bill is a huge step backward, undermining the rights and freedoms of LGBTQIA+ community to exist and express their identity.

1.50 Mental Health Australia also notes that:

> …statistics show a clear need to reduce stigma, prejudice and discrimination, the Religious Discrimination Bill has the potential to further increase the stigma and discrimination experienced by LGBTIQ+ people resulting directly in further deterioration of their mental health … Increase in stigma is also likely to have a direct impact on the willingness of LGBTIQ+ people experiencing mental health difficulties to seek help. Without appropriate treatment, mental health conditions are likely to deteriorate.[35]

Women

1.51 The Australian Women's Health Network similarly noted significant concerns about the impact of the bill on women's rights, and the potential to erode and undermine key protections. As noted in their submission to the Parliamentary Joint Committee on Human Rights (PJCHR):

> The Bill will most certainly reduce access to sexual and reproductive health services for women and men which is already an area of health that is highly stigmatised and has a higher level of conscientious objectors.

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33 LGBTIQ+ Health Australia, *Submission 43*, p. 6.

34 Equality Australia, *Submission 29*, p. 20.

35 Mental Health Australia, *Submission 20*, p. 2.

> The Bill will affect access to sexually transmitted infection screening and prevention, contraception and abortion, genomic screening to prevent chronic illness, fertility treatments and maternal healthcare, all of which are vital public health services. There will also be broader impacts for gender equity and measures that prevent abuse and violence such as relationships and sexuality education, respectful relationships education and responses to abuse, including institutional child sexual abuse and exploitation.[36]

1.52 In the workplace, where women experience high rates of sexual assault and harassment, the impact of this Bill will be particularly devastating. Victorian Trades Hall Council noted in their submission to the PJCHR:

> Every day we see new examples of the harms of sexual harassment and gendered violence. Yet this Bill would protect a range of Statements of Belief that would widely be considered examples of sexual harassment or gendered violence. VTHC believes that every person deserves to feel safe at work, yet this Bill would seek to deny women workers protection from gender-based hostility at work.[37]

1.53 Faith-based community service organisations are amongst the largest providers of support services for women and children, including crisis accommodation, counselling and financial support for those fleeing abusive relationships. A number of submitters (e.g. Women's Health Network, WWDA), raised concern that allowing staff and volunteers within those faith-based organisations to make statements of belief regarding, for example, the sanctity of marriage or the right for a husband to control his partner, could discourage women from leaving dangerous situations. As Women With Disability Australia noted in their submission, such views:

> instead of supporting women experiencing violence to access safety or leaving the relationship, could encourage reconciliation, which may further place them at physical and psychological harm, and serious injury or death.[38]

1.54 The Centre for Women's Safety and Wellbeing also expressed concern in their submission to the PJCHR that the Bill will:

> allow workplaces, educational institutions, community and healthcare services and other parts of our community to foster cultures that are unsafe, unsupportive, non-inclusive, and working against efforts to achieve gender equality.[39]

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[36] Australian Women's Health Network, *Submission 83,* Parliamentary Joint Committee on Human Rights inquiry into the Religious Discrimination Bill 2021 and related bills, p. 3.

[37] Victorian Trades Hall Council, *Submission 11,* Parliamentary Joint Committee on Human Rights inquiry into the Religious Discrimination Bill 2021 and related bills, pp. 1-2.

[38] Women with Disabilities Australia, *Submission 47*, p. 4.

[39] Centre for Women's Safety and Wellbeing, *Submission 179,* Parliamentary Joint Committee on Human Rights Inquiry into the Religious Discrimination Bill 2021 and related bills, p. 4.

1.55 In evidence to the PJCHR, the Australian Women's Health Network shared the concern:

> The concern with having the bill is that, while we have fought for years and years for gender equality and for women to have sexual and reproductive health rights and bodily autonomy as a human right, the new Religious Discrimination Bill, where statements of belief—and it just has to be a statement of belief by a person—become protected, reinforces and pushes that trajectory and that advancement backwards, not forwards.[40]

Disabled people

1.56 For people with disabilities living in Australia, this Bill poses threats to the *Disability Discrimination Act 1992*, and according to PWDA:

> will override existing federal, state and territory anti-discrimination laws by making so-called statements of belief immune from legal consequences under said Commonwealth laws.[41]

1.57 The Bill, if enacted, will replace the 'social model of disability' upon which all pieces of disability policy and legislation current in Australia are based on through Australia's ratification of the United Nations Convention on the Rights of Persons with Disability (UN CRPD), with the 'religious model of disability', where disability is often viewed as a 'sin'. PWDA has reported:

> This means that service providers will be able to refuse to accommodate people with certain disabilities within the providers' settings based entirely upon a subjective notion of good faith.[42]

1.58 In their submission to the PJCHR, Children and Young People with Disabilities Australia (CYDA) uses anecdotal evidence from LivedX, a focus group they conducted for young LGBTQIA+ people with disabilities:

> I think this bill could kill people. If you grew up in a religious household who constantly told you, you were going to hell for your sexuality, and then suddenly a medical professional is legally able to? That feels like it could cause some significant mental health risks.[43]

Multicultural communities

1.59 For multicultural communities across Australia, a key concern is that the rushed nature of this Bill has not allowed for appropriate community

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[40] Ms Dianne Hill, Board Member, Australian Women's Health Network; and Chief Executive Officer, Women's Health Victoria, *Proof Committee Hansard*, Parliamentary Joint Committee on Human Rights inquiry into the Religious Discrimination Bill 2021 and related bills, 13 January 2022, p. 58.

[41] People with Disability Australia, *Submission 66*, p. 2.

[42] People with Disability Australia, *Submission 66*, p. 4.

[43] Children and Young People with Disability Australia, *Submission 139*, Parliamentary Joint Committee on Human Rights Inquiry into the Religious Discrimination Bill 2021 and related bills, p. 3.

consultation. For example, the Federation of Ethnic Community Councils of Australia said:

> The Bill review process has involved inadequate timeframe and inappropriate processes for public submission …
>
> Given the complicated nature of the proposed legislation, the timeframe given for this inquiry is inadequate and the process inappropriate.
>
> The timeframe given to respond to this Bill has been exceedingly short for organisations and members of the public. Given this Bill has the potential to override existing anti-discrimination laws across the country, ample time should be available to ensure the public understand the implications.[44]

1.60 FECCA also noted particular concerns about the online survey run by the PJCHR, stating:

> FECCA is concerned with the nature of the online survey allowing members of the public to express their views on the religious discrimination legislative package. The survey design appears to lead respondents to a predetermined outcome and how this reason we reject the validity of the results.[45]

1.61 FECCA also expressed profound concerns about the Bill, urging that it not be passed:

> The Religious Discrimination Bill 2021 poses a risk that people in Australia will lose discrimination protections at work, school and when accessing goods and services like healthcare to accommodate people who make discriminatory statements based on 'religious beliefs'. FECCA is concerned the Religious Discrimination Bill will open doors for discrimination by taking away existing anti-discrimination protections, including on the grounds of race, religion, sex, marital status, disability, sexual orientation, gender identity or intersex status.
>
> As the peak, national body representing people in Australia from culturally and linguistically diverse backgrounds, FECCA rejects all forms of discrimination.
>
> We urge the Committee to ensure any Religious Discrimination Bill does not remove existing discrimination protections. It must ensure all workers, students, customers and clients are equally protected from discrimination, no matter who they are, whom they love or what they believe. It must not privilege the rights and beliefs of one group over another.[46]

1.62 The Diversity Council Australia has expressed similar concerns, noting:

> … this proposed legislation, as drafted, could stop Australian employers fostering inclusive cultures, eroding any business benefit derived from inclusion, ..[and] goes beyond protecting people from discrimination on

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[44] FECCA, *Submission 82,* pp. 2-3.

[45] FECCA, *Submission 82,* p. 3.

[46] FECCA, *Submission 82,* p. 2.

> the basis of religion and undermines protections afforded under other anti-discrimination legislation.[47]

First Nations people

1.63 The rushed nature of the inquiries considering this bill also mean that there was inadequate time to fully scrutinise a number of issues raised in submissions on earlier drafts of the Bill. In particular, inquiries into this Bill have not had adequate time to scrutinise the protection provided to First Nations beliefs by the Bill, or ensure that they are adequate. For example, Democracy in Colour wrote in a submission on an earlier exposure draft:

> It is particularly concerning that the Bill doesn't mention whether the cultural and spiritual practices of First Nations' people would be protected.[48]

1.64 Similarly, the North Australian Aboriginal Justice Agency wrote in a submission on an earlier exposure draft:

> NAAJA is further concerned that the Bill may not sufficiently or specially protect Aboriginal communities' belief and spirituality, particularly given the comments on Aboriginal spirituality made by the Religious Freedom Review Panel in its report dated May 2018. NAAJA notes the Panel's comment that further and specific consultation on the special protection of Aboriginal spiritual beliefs is necessary but has not yet taken place.[49]

1.65 Given the importance of providing culturally appropriate protections for First Nations' belief, it is important that for any Bill to proceed it should be very clear that it is based on the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples and provides strong, culturally appropriate protections for First Nations belief systems in their full diversity across the continent.

Recommendation 3

1.66 The Australian Government should work towards full implementation of the United Nations Declaration on the Rights of Indigenous Peoples into Australian domestic law.

People of faith

1.67 While a number of religious communities have argued in support of the Bill, a number of others have opposed it on the basis of significant concerns. In particular, while many supported the broad attempt to protect people of

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47 Diversity Council Australia, *Submission 7*, p. 6.

48 Democracy in Colour, *Submission to the Religious Discrimination Bills – first exposure drafts consultation*, p. 2.

49 North Australian Aboriginal Justice Agency, *Submission to the Religious Discrimination Bills – first exposure drafts consultation*, p. 3.

faith, they noted that the approach adopted in this bill (including the flaws outlined above) will create significant problems.

1.68 For example, the Uniting Church in Australia Assembly outlined clear concerns, leading to an opposition to the Bill overall:

> We commend the Australian Government for proposing to make religious belief and activity, as well as the absence of religious belief and activity, a protected attribute in discrimination law at the federal level. However, based on our commitment to human dignity and the common good, the Uniting Church in Australia does not support provisions that would permit statements and actions that demean and unjustly diminish the rights of others on religious grounds. People should be able to enjoy their right to freedom of thought, conscience, religion and belief – however, the manifestation or expression of their religion and beliefs should not harm or demean others, nor should it be privileged over other rights.
>
> We believe there are certain provisions in this Bill that actually increase the likelihood of discrimination against people of minority faiths and also people from more vulnerable groups within society. We believe it does this by privileging powerful religious voices at the expense of minority and vulnerable voices in society, which seems to be the exact opposite of its purpose, and by providing what we see as extraordinary and excessive religious exceptions. We are concerned such provisions could have the effect in the wider community of emboldening discrimination by providing an authorising environment for demeaning statements or actions. Rather than building harmony and tolerance it would have a corrosive effect on society …
>
> Ultimately, the Uniting Church believes the right to freedom of religion is vital to a diverse society but must always be balanced and bound together with the "due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."
>
> We do not believe the Bill, in its current form, achieves this balance and therefore would not support this Bill's progress into law.[50]

1.69 Similarly, the Public Affairs Commission of the Anglican Church of Australia submitted:

> We believe the RDB still gives too much unnecessary scope and encouragement for harmful discriminatory behaviour in the name of religion in a manner that unfairly overrides other equally important human rights to be free from discrimination.
>
> …
>
> We therefore urge that the RDB be amended as outlined below as we cannot support it in its current form.[51]

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[50] Uniting Church in Australia Assembly, *Submission 44*, p. 2.

[51] Public Affairs Commission, Anglican Church of Australia, *Submission 62*, p. 2.

1.70 The Hindu Council of Australia also noted significant concerns, and sought amendments to the Bill:

> We are concerned that some provisions of the bill which exempt religion inspired organisations will restrict religious freedom rather than protecting it. If the bill is passed as proposed, it will curtail religious freedom and its expression by the vulnerable older people, students and the unemployed. We are concerned that provision of employment and services by religion inspired organisations will force vulnerable people to change their religion (against their own will) so that they can qualify to receive school admission, hospital admission, accommodation in aged care facilities and employment. This discrimination based on religion sanctioned by law will lead to exploitation of minority religions by powerful organisations being run by other religions.[52]

1.71 The Buddhist Council of NSW similarly said:

> We do not support this bill as it currently stands. Whilst we welcome limited protections for religious freedom, it is our view that the bill does not strike the right balance between religious freedom and the right to equal treatment and to be free from discrimination.[53]

1.72 The Australian Sangha Association, representing Buddhist monks and nuns, echoed the importance of preventing religious discrimination, but outlined a broad range of concerns with the Government's approach in the current bill, concluding:

> … the ASA believes that the Government has not adequately made the case for a Religious Discrimination Bill of this nature and the ASA wishes to put on record that it cannot support the present bill.[54]

Workers in religious schools and institutions

1.73 The Bills also pose significant risks to people of faith who are employed as workers in religious schools and institutions. As the Independent Education Union (IEU) noted in their submission:

> The proposed provisions of ss 7 and 19 would operate as an effective exemption from the provisions of the Bill for religious educational institutions in employment. In doing so they would variously deny freedom of religion and religious expression to the employees of those institutions whose religious views differed from those of their employer, whether or not they were members of the same faith as that employer. This is both unnecessary and a direct negation of the human rights to freedom of religion and freedom of expression that the Bill purports to protect.[55]

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[52] Hindu Council of Australia, *Submission 104*, p. 1.

[53] Buddhist Council of NSW, *Submission 18*, p. 2.

[54] Australian Sangha Association, *Submission 56*, p. 3.

[55] Independent Education Union, *Submission 98*, p. 3.

1.74 The IEU outlined in powerful terms the risks that their members are already facing, simply in relation to public debate on the bill, before it extends the ability of institutions to discriminate against employees:

> This Bill will do nothing however to prevent a small minority of employers in faith-based schools from continuing to discriminate against their employees. This capacity to discriminate will simply be extended, where it does not already exist, to include the capacity to discriminate on the basis of religious belief or not holding a religious belief.
>
> We are particularly concerned that in the past three years some employers have utilised their immunity from prosecution to take adverse action against members in the context of the federal parliament considering legislation.
>
> Following the referendum and subsequently the passage of the Marriage Amendment (Definition and Religious Freedoms) Act 2017 members, in many schools and in more than one state, were required to sign declarations presented to them that amended school charters and statements of faith to include terms stating that homosexuality and state sanctioned same sex unions were morally wrong. They were frequently disciplined and dismissed if they refused to do so.
>
> In our submission to the Attorney General's Department in respect of the 2019 Bills we noted that it was of particular concern to the IEU that there had been requests from members for assistance following criticism of the draft Religious Freedoms Bills in IEU publications. Members were aggrieved that: they were directed by their employer to contact the union to ask that this content be removed; informed by their employer in various terms that they owed a primary duty to their employer to do so and threatened with disciplinary action by their employer if they did not. Identical grievances have been referred to us by members following the publication of the Religious Discrimination Bill 2021.
>
> IEU members are still receiving warnings, losing salary and/or positions of leadership, being suspended from their employment and being dismissed solely for reasons directly associated with and attributable to their sex, sexual orientation, gender identity, marital or relationship status and/or pregnancy.[56]

Intersectionality

1.75 As the Diversity Council Australia notes:

> Intersectionality refers to the ways in which different aspects of a person's identity can expose them to overlapping forms of discrimination and marginalisation.
>
> It is therefore critical when drafting and implementing anti-discrimination legislation that legislators, policymakers and those implementing such policies, understand intersectionality, and take an intersectional approach to implementing such policies.[57]

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[56] Independent Education Union, *Submission 98*, p. 6.

[57] Diversity Council Australia, *Submission 7*, p. 5.

1.76 This Bill, which prioritises religious rights over other rights to equality and anti-discrimination, ignores the multiple facets of one's identity, such as LGBTQIA+ people from multicultural and multifaith communities. Similarly, the Australian GLBTIQ Multicultural Council noted:

> ...we [must] strike the right balance between protecting LGBTIQ+ people from multicultural and multifaith backgrounds, so we can coexist as LGBTIQ+ people of faith. We also support other diversities within the multicultural and multifaith communities so that they may also coexist.[58]

1.77 The approach taken in drafting these Bills disregards the importance of intersectionality, creating a profound policy and legislative failure, and risking severe damage to multiple communities, as outlined throughout this submission.

Workplace impacts, including social cohesion

1.78 Everyone deserves to be safe in the workplace. Unfortunately, this Bill, as it currently stands, makes it difficult to protect everyone at work from discrimination. The Australian Council of Trade Unions (ACTU), while affirming 'work is absolutely central to human dignity and our ability to live a decent life',[59] raised concerns about this Bill making workers susceptible to discrimination in their means of livelihood. They explained that:

> The RDB departs from the usual framework of anti-discrimination laws and introduces a series of untested concepts into discrimination law which are of uncertain effect. This will create a risk of increased confusion, conflict and harm in Australian workplaces. The RDB will increase, not decrease, the prospect of discrimination against workers on the grounds of their religious beliefs; it will increase job insecurity in religious organisations, and undermine workers' health and safety at work. We are extremely concerned that the RDB will impact negatively on employers' ability to meet existing duties to create safe, healthy, respectful and inclusive workplaces for all workers.[60]

1.79 This Bill's placing of religious rights over other rights to equality and non-discrimination is also particularly concerning to workers, reports the ACTU:

> It is contrary to the basic principles of human rights law to privilege one category of rights over another: in this case, the right to make religious 'statements of belief' over the right to equality and non-discrimination, particularly for women, LGBTIQ+ people, people with disability, single mothers, and other groups susceptible to condemnation or discrimination on religious grounds. The RDB allows religious employers to discriminate against individual workers who have differing (or no) religious beliefs to

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58 Australian GLBTIQ Multicultural Council Inc., *Submission 67*, p. 2.

59 Australian Council of Trade Unions (ACTU), *Submission 26*, p. 1.

60 ACTU, *Submission 26*, p. 2.

> their employer – even where religion is not relevant to the role – privileging the rights of religious employers over their workers.[61]

1.80 Victorian Trades Hall Council echoed this concern and recorded in their submission to the PJCHR:

> The carve-out in the Bill to protect Statements of Belief, including those that are hostile, offensive, inappropriate and harmful, gives a green light to discriminatory language and actions. The low bar of what constitutes a Statement of Belief leaves significant scope for hostile and harmful statements made at work to become exempt from being identified as discriminatory. These provisions give workers limited access to external antidiscrimination bodies if they have been subject to hostile statements. This is especially harmful in situations where the employer is the alleged perpetrator of discrimination, where the use of internal processes would be prejudiced.[62]

1.81 The National Tertiary Education Union also expressed a similar concern about discrimination against workers:

> The RDB (clause 7) also allows religious employers to discriminate against individual workers who have differing (or no) religious beliefs to their employer – even where religion is not relevant to their role – privileging the rights of religious employers over their workers. The rights to discriminate provided by the RDB extend 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.[63]

The false dichotomy between people of faith and LGBTIQA+ communities

1.82 This Bill also places a false dichotomy between people of faith and LGBTQIA+ people. In reality, LGBTQIA+ communities of faith, who were engaged in little to no consultation in this rushed Bill, experience these conflicts in their lives and expressions of gender, sexuality, and faith, much to their detriment.

1.83 Statistically, according to Equal Voices, a national organisation of LGBTIQA+ people and allies from Christian faith backgrounds, LGBTIQA+ people with faith affiliations in Australia number over one million, and this population is most at risk from adverse outcomes if the Bill as framed, becomes law.

1.84 Equal Voices noted in their submission to the PJCHR:

> We are concerned that this Bill would further embolden those who currently wield so much institutional power, to wield this power to the detriment of ordinary Christians in churches and schools who find

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[61] ACTU, *Submission 26*, p. 3.

[62] Victorian Trades Hall Council, *Submission 11*, Parliamentary Joint Committee on Human Rights inquiry into the Religious Discrimination Bill 2021 and related bills, p. 1.

[63] National Tertiary Education Union, *Submission 11*, p. 3.

> themselves the target of harassment and bullying for their sex, marital status, sexual orientation or gender identity - ordinary Christians who are there in every congregation and school, and who ask only to be accepted and supported in their faith journeys as they grow into the people they are called by God to be.[64]

1.85 The Australian GLBTIQ Multicultural Council echoes this concern for LGBTQIA+ people from multicultural and multifaith backgrounds:

> The legislative package fundamentally frames the right of LGBTIQ+ people to practice religion in diametric opposition to our LGBTIQA+ identities and intersecting identities, such as gender, race, culture and disability. We have a right to feel safe in all the communities we are a member of, and this legislative package threatens this.[65]

Broad community opposition

1.86 The fundamental flaws in the Government's approach to this Bill are reflected in the broad, consistent concerns and opposition raised across an extremely diverse range of communities and organisations, in their evidence to inquiries on the bills.

1.87 As outlined throughout this dissenting report, an entire cross section of society opposes the provisions in these bills that would undermine human rights and provide a 'sword' for attacks on others. Concerns and oppositions have been expressed by unions, corporations, non-profit organisations, health organisations, legal experts, human rights advocates, as well as groups representing women, disabled people, LGBTIQA+ communities, multicultural communities, and large communities of people of faith.

1.88 The ACTU noted in their submission:

> …the ACTU remains deeply concerned about a number of provisions of the RDB, as well as the government's approach to these important matters. We are concerned that despite the changes made, the RDB will still hamper the ability of employers to create safe and healthy workplaces, as well as enabling and encouraging further unreasonable discrimination against workers by religious employers.[66]

1.89 In their evidence to the Legal and Constitutional Affairs Committee, the Australian Industry Group confirmed that:

> We don't support the bill in its current form. But we recognise that this has been a longstanding policy position of the government, so we're not

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[64] Equal Voices, *Submission 32*, Parliamentary Joint Committee on Human Rights inquiry into the Religious Discrimination Bill 2021 and related bills, p. 4.

[65] Australian GLBTIQ Multicultural Council Inc., *Submission 67*, p. 2.

[66] ACTU, *Submission 26*, p. 2.

> opposing a bill in this space, but we do think the bill needs to be amended to make it workable for workplaces.[67]

1.90 As a national peak body for the community services sector, ACOSS noted significant concerns, and recommended that the Bill not proceed:

> We remain deeply concerned that this Bill, even with revisions made to the previous iteration, continues to privilege religious interests and beliefs over the rights, interests and beliefs of all other people in a way that creates a detrimental impact on the community overall.
>
> …
>
> Even with revisions, the Bill retains fundamental problems in its proposed approach to discriminations.[68]

1.91 The Australian Medical Association (AMA) noted that while the current Bill is an improvement on exposure drafts, there were still significant concerns, and that the Bill should only proceed if amended:

> While the AMA welcomes the removal of provisions in relation to one of our major concerns being conscientious objection, other concerns have not been addressed in the Religious Discrimination Bill 2021, meaning the legislation maintains the potential to impact adversely on the medical profession and patient care.
>
> …
>
> The AMA strongly advocates that should the Bill proceed, it be further amended to reflect the AMA's recommendations.[69]

1.92 The Public Health Association of Australia concurred, noting:

> PHAA RECOMMENDS THAT THE BILLS NOT BE SUPPORTED, because of the potential to perpetuate a range of harm, vilification and discrimination in our society. The Bills may widen the gap in health status and access to health services for marginalised groups in society.[70]

1.93 The Australian Federation of Aids Organisations agreed, arguing that:

> … we are deeply concerned by the Bill because its provisions prioritise the religious beliefs of healthcare workers to the detriment of marginalised individuals and communities living with or at increased risk of HIV and who require sensitive and specialist health services free from stigma and discrimination.[71]

1.94 Human rights organisations such as the Human Rights Law Centre opposed the Bills, noting:

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[67] Mr Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group, *Proof Committee Hansard*, 21 January 2022, p. 44.

[68] ACOSS, *Submission 21*, p. 1.

[69] Australian Medical Association, *Submission 54*, pp. 1, 7.

[70] Public Health Association of Australia, *Submission 151*, p. 4.

[71] Australian Federation of Aids Organisations, *Submission 73*, p. 1.

> …the Government's Religious Discrimination Bill 2021 (the Bill) repeats the patterns of the first and second exposure drafts of the Bill and fails to strike the right balance between the freedom to manifest religion and the right of everyone to equal treatment and non-discrimination.
>
> The removal of a provision from the second exposure draft that would have allowed doctors with a religious objection to certain health services to abandon their ethical duties to their patients is welcome, as well as the removal of the so-called 'Folau clause'. However, there remain a number of provisions that are unprecedented, unjustified and inconsistent with international human rights laws…
>
> The effect is to give a greater licence to discriminate on religious grounds than already exists in law, to the detriment of people of minority faiths, women, LGBTIQ+ people, people with disability, First Nations people, people of colour and many others. For people who face multiple and intersecting forms of discrimination, such as ableism, racism and sexism, this Bill is an even greater threat.
>
> The Bill is inconsistent with Australia's international human rights obligations and should be opposed by the Committee. It is also inconsistent with the commitment made by former Attorney General Christian Porter to draft a bill that does not provide a licence to discriminate.[72]

1.95 Amnesty International Australia (AIA) shared those concerns, stating:

> AIA has serious concerns that this Religious Discrimination Bill (the Bill) in its current form will condone behaviour, statements and environments that create unsafe or potentially harmful environments for some people and communities who are attempting to access essential services such as health, mental health, education, accommodation, crisis support services, aged care and [employment]. This Bill will particularly impact on LGBTQIA+ people, people with a disability and/or lived experience of mental illness, Aboriginal and Torres Strait Islander people, rural and remote communities, single parents, divorcees, people of minority faiths and beliefs, people with limited support or resources, women, children and young people.[73]

1.96 Education sector unions also expressed profound concerns, with the National Tertiary Education Union noting:

> The NTEU opposes this Bill. It will increase, rather than decrease, discrimination. It is not in-line with existing anti-discrimination measures in other areas but raises rights of religious expression above all other rights. It creates additional powers for organisations to discriminate against employees (and students) in cases when it is not necessary for performance of a job. Instead of imposing this complex, confusing and inconsistent system over the top of state laws, a new federal protection against discrimination for workers and other individuals on the grounds of

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[72] Human Rights Law Centre, *Submission 76*, pp. 2-3,

[73] Amnesty International, *Submission 46*, pp. 4-5.

> religion could be achieved by a simple amendment to an existing discrimination act.[74]

1.97 The Council of the Ageing, advocating for older Australians, also noted its concerns in its submission to the PJCHR, stating that:

> …there are some elements of the religious discrimination legislative package that do not appear to meet this core test of equal rights amongst its peer attributes. Accordingly, we recommend the bill only be supported with amendments.[75]

Fundamental flaws in the government's approach

1.98 As outlined by numerous witnesses, the approach adopted by the Government goes significantly beyond a standard anti-discrimination Act. That approach would have had widespread support across the community, been significantly less controversial and damaging to social cohesion, and would have involved a much more straightforward drafting approach, reducing the risks of constitutional questions and other flaws.

1.99 As the Australian Human Rights Commission noted in its submission:

> Many provisions of the Bill are consistent with the objective of providing protection against discrimination on the ground of religious belief or activity that is equivalent to the protection against discrimination on other grounds such as race, sex, disability and age in existing Commonwealth laws. The Bill prohibits direct and indirect discrimination on the ground of religious belief or activity in areas of public life covered by those other Commonwealth discrimination laws. The Bill also provides for general and specific exemptions, most of which are broadly consistent with other discrimination law.
>
> The Commission endorses these elements of the Bill. They represent a conventional means of incorporating certain protections from international human rights law into Australia's domestic law.
>
> However, the Commission is concerned that, in other respects, the Bill would provide protection to religious belief or activity at the expense of other rights. The Commission considers that those provisions of the Bill need to be amended or removed, because they limit other human rights in a way that is unnecessary and disproportionate, or are otherwise inconsistent with international human rights law.[76]

1.100 Similarly, the Public Interest Advocacy Centre noted that:

> There is a clear role for a Commonwealth Religious Discrimination Act to provide effective protection against discrimination on the grounds of religious belief in public life, consistent with the protection afforded other grounds such as sex, race, disability, age and sexual orientation. Such an

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[74] National Tertiary Education Union, *Submission 11*, p. 5.

[75] Council of the Ageing, *Submission 29*, Parliamentary Joint Committee on Human Rights inquiry into the Religious Discrimination Bill 2021 and related bills, p. 1.

[76] Australian Human Rights Commission, *Submission 32*, p. 5.

> Act would play an important role in supporting a tolerant, diverse and fair community and help prevent discrimination against religious minorities in Australia.
>
> This Bill is not that Act.
>
> Unfortunately, the Religious Discrimination Bill is a radical departure from existing antidiscrimination law principles and norms. If passed, it would undermine the rights of women, LGBTI people, people with disability and people of minority faiths to live their lives free from discrimination. It is excessively complicated and contains a range of novel provisions that seek to privilege religious views over other rights in ways that will corrode, rather than build, tolerance and harmony.[77]

Recommendation 4

1.101 That the current bills not proceed.

Recommendation 5

1.102 That the Australian Government develop a Charter of Rights, to protect religious belief amongst other protected attributes.

Recommendation 6

1.103 That any new Religious Discrimination bill adopt a similar approach to other anti-discrimination legislation, operating as a shield not a sword.

Senator Janet Rice
Senator for Victoria

Senator Lidia Thorpe
Senator for Victoria

[77] Public Interest Advocacy Centre, *Submission 6*, p. 3.

Additional comments from Senator Andrew Bragg

1.1 I believe in the ethos of live and let live. In my First Speech to the Senate, I said: 'Long may we remember the credo "live and let live"'. I am strongly committed to freedom of speech, worship, conscience and thought.

1.2 The Ruddock Review of Religious Freedom in Australia summarised my position:

> The human right to freedom of thought, conscience and religion belongs to all - the religious, the non religious and those moving towards, away from or between religions. The right protects freedom of thought, conscience and religion, not religion as such. The atheist and the agnostic receive the same protection as the religious adherent. Each is free to hold their beliefs and to live free of coercion to adopt some different set of beliefs.[1]

1.3 Ruddock's review found there was a high degree of religious freedom in Australia. It also found very few examples of religious freedom being imperilled. It said that the review panel 'did not accept the argument, put by some, that religious freedom is in imminent peril'.[2]

1.4 The Ruddock Review recommended a new Act which would establish clear anti-discrimination laws for religious belief. Recommendation 15 stated:

> The Commonwealth should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.[3]

1.5 That policy was taken to the election by the government and it is an entirely reasonable position and a policy which I support. I believe Australians should be able to practice their faith without facing any form of discrimination of any form. Freedom of religious belief, thought and conscience are fundamental tenets of a liberal democracy like Australia.

1.6 Professor Aroney, a member of the Review Panel says: 'The Bill implements this recommendation. It renders it unlawful for a person to discriminate on the basis of a person's religious belief or activity'.[4]

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1 *Religious Freedom Review Expert Panel*, p. 13.

2 *Religious Freedom Review Expert Panel*, p. 8.

3 *Religious Freedom Review Expert Panel*, p. 2.

4 *Submission 145*, p. 1.

1.7 In Parts 3 and 4 of the Religious Discrimination Bill, discrimination on account of religion is prohibited in a series of uniform, regular anti-discrimination provisions which reflect the approach taken in equivalent laws, such as the Sex Discrimination Act.

1.8 The Law Council of Australia describes these provisions as 'generally orthodox'.[5] These orthodox provisions protect people of faith and deserve the support of the Parliament. It is about time that people of faith enjoyed the same anti-discrimination protection as applies to age, sex, disability and race.

1.9 The more the bill can resemble the other anti-discrimination laws of the Commonwealth, the better. This orthodox position is supported by numerous groups, including the Australian Muslim Advocacy Network, Hindu Council and Buddhist Council of New South Wales.

1.10 Equally we must protect people who are not religious. Protections for religious freedom apply neutrally to people of all faiths, and none. A law which only benefits people who hold a religious belief, or people who belong to a major religious organisation, would not be appropriate.

1.11 Ensuring the equal application of this law would also reflect the expectations and interests of the wider Australian community.

1.12 According to the latest available census data (collected in 2016) 30.1% of Australians reported having no religion.[6] In 2011 that figure was 12.9%, and in 1966 it was 0.8%. 38.7% of Australians aged 18-34 professed no religion.[7]

1.13 Polling data tells a similar story. According to Roy Morgan Research, in 2020 53.4% of Australians could identify a religion to which they belonged.[8] In 2003, 73.2% could.[9] The proportion of Australians describing themselves as nonreligious stood at 45.5% in that same survey, up from 26.0% in 2003.[10]

1.14 The Rationalist Society of Australia reports:

> When expressly asked if they belong to their religious organisation, a majority (62%) of Australians say they don't, including 24% of Catholics, 44% of Anglicans, 27% of minor Christian denominations, and 45% of non-Christian denominations…Seven in ten Australians (71%) say that religion is not personally important, including around have of Catholics (49%) and

5 *Submission 8*, p. 10.

6 Australian Bureau of Statistics, Religion in Australia, 2016 Census Data Summary.

7 Australian Bureau of Statistics, Religion in Australia, 2016 Census Data Summary.

8 Roy Morgan Research, Single Source Survey 2021.

9 Roy Morgan Research, Single Source Survey 2021.

10 Roy Morgan Research, Single Source Survey 2021.

> non-Christian denominations (48%), nearly two thirds (64%) of Anglicans, and around one in four of minor Christian denominations (39%).[11]

1.15 While there is a trend away from organised religion, Australia's religious bodies play an outsized role in providing employment and social services, including to individuals outside their respective faith communities.

1.16 The Northern Territory Government has noted in their submission that throughout regional and remote Australia, religious organisations are often the sole providers of particular social services.

1.17 I have engaged heavily with communities of faith during my time in the Senate and I have seen the enormous contribution religious institutions make to our society through education and service provision. We are indebted to these organisations for their contribution to Australia. I am a product of a Catholic education and a Catholic university college.

1.18 That's why I am committed to working to ensure discrimination is intolerable in our society on religious grounds.

1.19 I welcome the Religious Discrimination Bill's stated objective in s4 which 'makes it unlawful to discriminate against a person on the ground of religious belief or activity in a range of areas of public life'. I strongly support this objective, notwithstanding my reservations about a number of specific provisions.

1.20 Unfortunately the Bill departs from orthodox anti-discrimination law by including a 'statement of belief'. There are significant issues with inclusion of this provision which has been canvassed in the majority report and in these additional comments. I note that the majority report does a fine job in cataloguing the problems with the statement of belief. These comments are designed to supplement the majority report's extensive commentary and recommendations.

1.21 There are two outstanding issues. First, I take issue with the statement of belief provisions in their entirety. Second, as the bill provides further exemptions for religious bodies to (rightly) discriminate to maintain the religious ethos of schools, it should remove the outdated Sex Discrimination Act provisions which allow sex-based discrimination. These issues should be addressed before the bill is considered by the Senate.

Statement of belief

1.22 Freedom of speech is a core tenet of our society and I want to see people of faith express their religiosity. The bill provides significant new protections for this to occur in workplaces, shops and in public.

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[11] Rationalist Society of Australia, Religiosity in Australia, pg. 1.

1.23 There is an additional clause known as the statement of belief. This provision proposes an exception from anti-discrimination laws, including state and territory anti-discrimination laws, for statements of belief, insofar as the statement is not 'malicious' of 'would threaten, intimidate, harass or vilify a person or group'.[12]

1.24 The Bill makes it unlawful for qualifying bodies to impose conduct rules which would restrict or prevent a person from making such statements.

1.25 The Bill says a statement of belief is a statement 'of a belief that person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'[13] or 'of a belief that the person genuinely considers to relate to the fact of not holding a religious belief'.[14] The statement must have a relationship to religious belief.

1.26 Strong evidence has been provided to the committee that the statement of belief is unworkable and undesirable. Numerous employers, religious organisations, anti-discrimination groups and legal experts are against it.

1.27 Many groups told the committee it was not something they asked for and is not a primary concern. The Uniting Church describes the statement of belief as 'overreach'[15] as it is concerned with the harm that could be caused by overriding other attributes.

1.28 The Anglican Church of Australia said they were 'greatly concerned' on 'the way statements of belief override other anti-discrimination legislation' and that it 'should be removed and operation of other anti-discrimination laws preserved'.[16]

1.29 In other words, a religious organisation is asking the Parliament not to preference religion in Australian law. This view was echoed by other religious organisations. The Executive Council of Australian Jewry stated 'It was not a primary concern of our community. It was not something that we specifically requested be included'.[17]

1.30 I can see no clear case for the statement of belief clause. Few witnesses and submissions to the committee made the case for why there needs to be this provision. What is the evidence of persecution of people of faith that justifies this proposal? The Ruddock Review did not recommend any such statement of belief and it does not appear in any public commitments.

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12 Religious Discrimination Bill 2022, s12(2).

13 Religious Discrimination Bill 2022, s5(1)(iii).

14 Religious Discrimination Bill 2022, s5(1)(b)(iii).

15 *Committee Hansard*, 20 January 2022.

16 *Committee Hansard*, 20 January 2022.

17 *Committee Hansard*, 20 January 2022.

1.31 There are five issues with the statement of belief provisions. Preference given to religion over other attributes, employment issues (adverse action), overriding of state law, Constitutional issues and the question of costs.

Preferencing of religion

1.32 Put simply, the bill proposes to privilege religion over other attributes in our laws. The purpose of the law is to enable statements to be made which would otherwise be discriminatory in a broad sense, overturn the Tasmanian Anti-Discrimination Act and federal anti-discrimination laws.

1.33 The statement of belief provisions prioritise only one aspect of the aforementioned freedoms, and the remainder are not currently protected in Australian law.

1.34 Without expressing a view on the merits of either position, it is worth noting that this makes Australia an outlier in the democratic world. Further, as Professor George Williams submitted:

> These freedoms are inseparable, but the Bill fails to reflect this. Statements of belief in the Bill only encompass statements relating to a religious belief or a belief relation to the fact of not holding a religious belief. In other words, it only protects statements connected to religious belief…This is inconsistent with article 18 of the International Covenant on Civil and Political Rights.[18]

1.35 The Australian Human Rights Commission is concerned 'clause 12 will permit discriminatory statements of belief to be made, whether they amount to racial discrimination, sex discrimination, discrimination on the ground of disability or on any other ground prohibited by law'.[19]

1.36 The Commission also states it considers:

> the explicit overriding of all other Australian discrimination laws is not warranted, sets an alarming precedent and is inconsistent with the stated objects of the Bill, which recognise the indivisibility and universality of human rights.[20]

1.37 Williams told the committee: 'There is no justification for conferring religious speech with special legal protection over and above that provided to other forms of speech'.[21]

1.38 Further, the Equality Rights Alliance told the committee:

> Religious speech and other manifestations of speech should not be protected at the cost of the human rights of others…the bill removes

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[18] *Submission 4*, pg. 1.

[19] *Submission 32*, pg. 5.

[20] *Submission 32*, pg. 6.

[21] *Submission 4*, pg. 2.

> existing protections for discriminatory behaviour in the form of statements of belief and makes no provision for balancing the freedom of religion against rights to non discrimination.[22]

1.39 I don't believe religion should be placed above age, sex, disability or race in federal law or any other protected attribute at state law.

1.40 However there is a need to balance the competing anti-discrimination provisions assuming the orthodox provisions of the bill are enacted by the Parliament. This has been flagged in evidence to the committee.

1.41 While I can see no case for the inclusion of this provision, it would be reasonable for the Parliament and the AHRC to turn its mind as to how the multiple anti-discrimination laws of the Commonwealth operate with one another.

Employer issues

1.42 It is clear that employers do not support the statement of belief. I do not want to make it harder to run a business in Australia. We should not be increasing burdens on employers more than necessary.

1.43 The Australian Industry Group (AIG) says the statement of belief should be deleted for two reasons. Firstly, they don't want this law to override the other anti-discrimination laws. Secondly, the exclusions set a very high bar which in their view, exposes Australians to discrimination.[23]

1.44 The AIG said the burden placed on employers by the operation of the Religious Discrimination Bill was unreasonable, stating:

> We do not consider that the current exceptions and exemptions in the Bill are adequate for employers who are trying to create a productive and harmonious workplace by accommodating employees holding a diverse range of religious and non-religious beliefs.[24]

1.45 As an example, AIG claimed that employers would not be able to act if a co-worker left religious pamphlets on an employee's desk every day, or a co-worker who makes constant unwelcome attempts to convince an employee to follow their religion.[25] AIG considers that the Bill should be amended to provide for reasonable management action, similar provisions of the Fair Work Act which deal with bullying in the workplace.[26]

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[22] *Committee Hansard*, 21 January 2022.

[23] *Submission 69*.

[24] *Submission 69*, pg. 4.

[25] *Submission 69*, pg. 4.

[26] *Submission 69*, pg. 5.

1.46 The Australian Chamber of Commerce and Industry, in their submission,[27] expressed concern the complexity of the proposed exemptions to unlawful discrimination in 39(2) of the Religious Discrimination Bill.

1.47 ACCI further noted 'confusion over the scope and application of requirements can lead to paralysis, avoidance or non-compliance, directly contrary to the overall legislative intent and purpose'.[28] It is vital that this complexity is avoided, given that the Bill would apply to employers of all sectors and sizes. Otherwise, small businesses could face an unreasonable addition to their already significant compliance burdens.

1.48 Both AIG and ACCI submitted that the statement of belief provisions could be amended to be made more practical in a workplace context.

Impact of the loss of state law

1.49 Clause 12 overrides state anti-discrimination law, including laws which already protect religion in many Australian states. The 1998 Tasmanian Act is a broad ranging anti-discrimination law which already states that discrimination on the grounds of religious belief is prohibited.

1.50 The State Government of Tasmania says their view is 'the Religious Discrimination package as drafted would diminish the ability of the Tasmanian Anti-Discrimination Tribunal to deal with certain complains, and that, as a government, we continue to strongly advocate for no weakening of our anti-discrimination laws'.[29]

1.51 Their concern and the concern of the Tasmanian civil society groups who appeared at the hearings is that this Bill would remove the ability of Tasmanians to bring actions under the state law. They are also concerned that it would push citizens into the federal system, to which I return to below under point four, 'costs'.

1.52 Section 17(1) prohibits conduct 'which offends, humiliates, intimidates, insults or ridicules another person on the basis of a specific attribute in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, insulted or ridiculed'.[30]

1.53 In general, I have reservations about laws which contain the word 'offend' but I believe there is a strong case for stronger actions such as 'incite' and

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[27] *Submission 133*.

[28] *Submission 133*, pg. 4.

[29] *Committee Hansard*, 21 January 2022.

[30] *Anti-Discrimination Act 1998* (Tasmania), s 17(1).

'intimidate'. I have long felt that federal laws which contain the word 'offend' such as 18C of the Racial Discrimination Act should be removed.

1.54 Incitement and intimidation are a different story, and my home state of New South Wales has enacted a law which shields citizens from incitement. The NSW Attorney General Mark Speakman SC said when announcing these amendments in 2018 that: 'We're not saying people can't have opinions or express their views, but if they cross the line into threatening and inciting violence they will not go unpunished'.

1.55 Ultimately these are the laws of the states and as a federalist, I do not see a case for the federal Parliament to seek to amend these particular laws. That is the preserve of the state Parliament.

1.56 The states and territories currently maintain a suite of anti-discrimination laws which generally also protect against religious discrimination. In response to my question on notice, the Attorney General's department set this out:

ACT	***Discrimination Act 1991* (ACT)** Religious conviction includes: • having a religious conviction, belief, opinion or affiliation; and • engaging in religious activity; and • the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people; and • engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; and • not having a religious conviction, belief, opinion or affiliation; and • not engaging in religious activity.
NSW	***Anti-Discrimination Act 1977* (NSW)** Race includes **ethno-religious origin**. ***Note religion is not, of itself, a ground of unlawful discrimination under the Act****
NT	***Anti-discrimination Act* (NT)** **Religious belief or activity** includes Aboriginal spiritual belief or activity [but the terms are otherwise undefined]
Qld	***Anti-Discrimination Act 1991* (Qld)** **Religious activity** means engaging in, not engaging in or refusing to engage in a lawful religious activity.

	Religious belief means holding or not holding a religious belief.
SA	***Equal Opportunity Act 1984* (SA)** **Religious appearance or dress** ***Note solely protects religious appearance or dress, and not religious belief or activity generally. Terms not further defined in legislation****
Tas	*Anti-Discrimination Act 1998* (Tas) **Religious belief or affiliation** means holding or not holding a religious belief or view **Religious activity** means engaging in, not engaging in, or refusing to engage in, religious activity
Vic	*Equal Opportunity Act 2010* (Vic) **Religious belief or activity** means: • holding or not holding a lawful religious belief or view; • engaging in, not engaging in or refusing to engage in a lawful religious activity
WA	*Equal Opportunity Act 1984* (WA) **Religious conviction** includes a lack or absence of religious conviction [but is otherwise undefined]

1.57 The Tasmanian law already protects against discrimination on religious grounds. There have been cases taken to the Tasmanian tribunal by people of faith seeking to protect their religious belief. Equally, people of faith have been forced to defend certain statements under the same laws which are very broad as canvassed above.

1.58 On the other end of the spectrum, NSW is an outlier, in that it does not expressly protect religion but the state government has flagged that it will move once the Commonwealth legislation is settled. The point is, these are state laws and should be maintained by the state Parliaments. The Commonwealth should not become the arbiter of state laws. It is not our role.

Costs and access to tribunals

1.59 The tribunal system of anti-discrimination law in the states is generally a free service. The proposed law would likely push Australians into the federal jurisdiction which is a "costs" jurisdiction and is therefore more expensive to access.

1.60 The High Court has held that state tribunals cannot hear federal matters.[31] The statement of belief provision is novel, broadly defined and would likely push Australians into a federal court.

1.61 At present, a complaint under a state or territory anti-discrimination law is handled primarily as an administrative matter. Complainants lodge with the relevant government agency at no cost, with no requirement for legal representation.

1.62 Agencies can conduct conciliation in an informal and accessible manner, allowing parties to reach a just, quick, and cheap settlement. If the complaint is not resolved, a person can lodge the complaint with a tribunal. Legal representation is optional, and costs (such as filing fees, hearing fees and conciliation fees) are minimal.

1.63 Section 12 of the Religious Discrimination Bill would give complaints and defendants the opportunity to raise a defence under federal law, which state agencies and tribunals are constitutionally barred from adjudicating on. This means that these matters will most likely be determined in Court.

1.64 This presents significant additional costs for both complainants and defendants alike, in addition to any costs of determining the matter at the administrative level. Unlike at the agency or tribunal level, legal representation will likely be highly desirable. This includes, but is not limited to:

- Court fees: if current fee exceptions for human rights matters apply the cost will be a minimum of $55. It is not clear that this is the case, if not, costs can run at $835 per hearing day.
- Legal representation: a junior barrister can charge $1500 a day.
- Costs of the other side for the losing party, subject to court discretion.

1.65 I note that the above costs would apply in the event a defence is raised. That is, in the event a party before a state tribunal claims that the discrimination was a statement of belief, then the matter would be immediately outside the jurisdiction of that tribunal, irrespective of the merits of that defence.

Constitutional issues

1.66 The constitutional issues have been well and truly flagged by various submitters and are canvassed in the majority report. It is clear that the statement of belief proposal in the Bill as drafted would not achieve its stated aims.

1.67 I note two positions canvassed by constitutional experts who submitted to, and appeared before, the committee. First, that the Bill may not be valid under the external affairs power as implementing the International Covenant on Civil

[31] *Burns v Corbett* (2018) 265 CLR 204.

and Political Rights.[32] Second, that the override of state and territory laws is invalid as drafted.[33]

1.68 I recommend the statement of belief be excluded from the legislation. I could not support any proposition that a law confers a special privilege as this entertains.

1.69 This particular provision seems unworkable. Some may argue that the removal of this provision would stop Australians from making a religious statement with legal protection. This is untrue.

1.70 If a person of faith manifests their religion in the workplace or school, for example, they will be protected by clauses 19 and 24 respectively. These clauses, and others covering accommodation, services and other areas, protects a person if they suffer any detriment from having a religious belief or engaging in their religious activities.

1.71 The primary clauses of this Bill go further than protect mere statements of belief. They protect statements, dress, prayer, rituals and other manifestations of religion against discrimination in many areas of Australian life.

1.72 This is in addition to the protections provided in state and territory law. The Attorney-General's Department confirmed this in my question on notice:

> *Senator Andrew Bragg asked the following question:*
>
> If the Religious Discrimination Bill was enacted with its orthodox anti-discrimination provisions and without the statement of belief provisions, could people bring a complaint to a federal tribunal? If so, which tribunal and how would that operate?
>
> Under existing federal anti-discrimination law, a person may make a complaint to the Australian Human Rights Commission about unlawful sex, race, disability or age discrimination. If the Religious Discrimination Bill 2021 is enacted, it will also be possible to make complaints to the Commission about direct discrimination (under clause 13) or indirect discrimination (under clause 14) on the ground of religious belief or activity.

1.73 The Attorney-General's Department's advice is clear. The primary elements of the Bill protect religious activity and guarantee access to the AHRC. Accordingly, removing the statement of belief, whilst proceeding with the primary elements of the Bill, is the prudent approach.

1.74 Once enacted, if the primary elements do not eliminate instances of religious discrimination in Australia, only then should the statement of belief be considered. So far, the case has not been made.

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[32] *Submission 31*, pg. 2; *Submission 4*, pg. 1; *Submission 8*, pg. 7.

[33] *Submission 31*, pg. 5 and *Submission 8*, pg. 15-16.

1.75 However, if the Parliament was minded to enact some form of this proposal in the immediate term, the statement of belief could be improved through two amendments.

1.76 First, the explicit override of state and territory laws should be removed from the Bill. Second, additional checks and balances should be provided in the Bill which would prevent abuse of these provisions in work contexts.

1.77 I note the numerous proposals for improving the statement of belief provisions which were received by this committee which are set out below.

Override provisions in respect of state and territory laws

1.78 Clause 12(1)(a) (vi)-(xii), clause 12(1)(b) and clause 12(1)(c) should be removed from the Bill. This alternative drafting position was put forward by the Australian Discrimination Law Experts Group.[34] The effect would be to only apply Clause 12 to federal discrimination laws, and to override state laws only to the extent of an inconsistency.

1.79 Removing the override clauses would address, in some measure, the very significant constitutional issues with clause 12, most notably those raised by Prof. Anne Twomey:

> It is not within the Commonwealth Parliament's power to legislate to control the legal operation of a State law…How can a Commonwealth law dictate the interpretation of what amounts to discrimination under a state law? It cannot do so. It cannot amend or alter a State law or instruct a court as to how to interpret a State law…It is confounding to contemplate why these provisions of a highly contentious Bill would be drafted in such a provocative manner.[35]

1.80 This position would not remove the capacity of a statement of belief to override Commonwealth anti-discrimination provisions. It would, however, retain the proposed privileged position for religious activity and remains undesirable in a pluralist society like Australia.

Additional workplace protections

1.81 It is clear that the legislation does not adequately take account of the burdens placed on employers, especially small and medium enterprises, and those who provide essential services such as health and social care.

1.82 The ACCI and AIG want a new clause, or a new defence to allow employers to stop unreasonable religious activity in the workplace. This could be based on the anti-bullying provisions in the Fair Work Act.

1.83 ACCI proposes that an exception is created to vicarious liability for employers to take reasonable steps to avoid discriminatory conduct. This would be a

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[34] *Submission 115*, pg. 21.

[35] *Submission 31*, pg. 5.

more flexible standard that the defence provided at cl 71 of the Bill, which requires 'reasonable precautions and exercised due diligence'. It would also mirror existing provisions in Victoria,[36] South Australia,[37] and Queensland.[38]

1.84 ACCI also proposes stronger protections for employers against unreasonable conduct by employees. ACCI proposes expanding the list of factors provided in 14(2) to protect the ability of employers to prevent unreasonable, unsafe, or capricious conduct within their organisation.[39]

1.85 I note that these provisions are especially important businesses of certain sectors and sizes. For instance, a small private medical practice would need to ensure that reception or support staff are professional in their interactions with patients and uses of patient information.

1.86 It is possible to imagine circumstances where the statement of belief provisions would prevent staff from being disciplined for unprofessional or inappropriate activity which hinders the provision of essential services.

1.87 I note the amendments proposed by AIG and the ACCI, and think that they are worthy of further consideration. Another option would be to introduce specific carve-outs for businesses below a certain revenue or employment threshold, or for businesses within particular sectors (such as medical or legal practices).

1.88 It is clear that these provisions would increase the burden on employers. It is also clear that this burden would not increase evenly, but rather affect employers of different sectors and sizes to different degrees. I do not believe that it is appropriate that the Bill applies to employers of all sectors and sizes.

Existing discrimination against students and teachers

1.89 It is unconscionable that same sex attracted students and teachers are being excluded from schools just because they are gay. I do not believe that Parliament should resile from addressing this issue. Rather, the passage of these Bills provides both the urgency and the opportunity to ensure that anti-discrimination law is not misused in such a malicious and inappropriate manner.

1.90 Testimony and submissions were received from all major religious organisations, comprising the vast majority of religious educational institutions in Australia. Each of these institutions affirmed that LGBT students and staff are active and supported members of their respective communities,

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[36] *Equal Opportunity Act 2010* (Vic), s 110.

[37] *Equal Opportunity Act 1984* (SA), s 91.

[38] *Anti-Discrimination Act 1991* (Qld), s 133.

[39] *Submission 133*, pg. 12.

not subjected to discrimination on account of their sexual orientation. As will be detailed below.

Students

1.91 There is a consensus that the exemptions for religious organisations in the Sex Discrimination Act are too broad, including among religious organisations.[40]

1.92 The National Catholic Education Commission told the committee that same sex attracted students are supported.[41] Therefore they do not need a law that allows a gay teacher to be sacked. The Anglican Church Diocese of Sydney also do not want to remove same sex attracted students from their schools.[42]

1.93 Dr Michael Stead, the Bishop of South Sydney and Chair of the Religious Freedom Reference Group at the Anglican Church Diocese of Sydney captured it perfectly:

> None of the religious bodies are arguing for the right to discriminate on the basis of sexuality or gender; what we are arguing for is the right to discriminate on the basis of religious belief…That's what's wrong with s38 of the Sex Discrimination Act, it's an exemption that's way too broad.[43]

1.94 Jewish groups said, no student would be removed from a Jewish school for being same sex attracted. Peter Wertheim of the ECAJ stated that LGBT students and teachers in Jewish schools are:

> treated the same as everybody else. To my knowledge, there have been teachers and even principles of orthodox Jewish schools - and certainly students - who reflect the full diversity of contemporary Australia in every respect.[44]

1.95 The National Catholic Education Commission confirmed that there were gay teachers in Catholic schools who teach in accordance with the ethos of Catholicism and the school. It was also confirmed that students who are gay are not removed from Catholic schools:

> All people in our school systems - students and staff - are to be considered, and are considered, equally for the bases of employment and enrolment. As the bishop said earlier, ours is an inclusive posture, not an exclusive posture.[45]

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40 *Submission 62*.

41 *Committee Hansard*, 20 January 2022.

42 *Committee Hansard*, 20 January 2022.

43 *Committee Hansard*, 20 January 2022.

44 *Committee Hansard*, 20 January 2022.

45 *Committee Hansard*, 20 January 2022.

Teachers

1.96 Too many teachers have been sacked just for being gay. The committee heard evidence that numerous teachers have been retrenched from teachers including Karen Pack, Nathan Zamprogno and Steph Lentz. These are brave Australians who have chosen to tell their stories. I thank them.

1.97 Councillor Zamprogno said:

> Christian schools can and do sack teachers because of their sexuality…when I was challenged about my sexuality I when I answered honestly I was told there was no place for me at the school the following year. The connection is crystal clear.[46]

1.98 Pastor Pack said:

> The particular trigger [for her sacking] was an email that the college received from a member of the wider Baptist community saying I have just discovered that Karen Pack is a lesbian that is disgusting and sick and you need to publicly denounce her because she is demonic.[47]

1.99 These are deeply upsetting case studies, including from a member of my own party. As the committee heard, this is the tip of the iceberg. Pastor Pack estimates that hundreds of people are not prepared to tell their stories. Pack told us, 'I've been approached by literally hundreds of people teachers and students who've been forced to remain closeted...[and] have been excluded from their jobs because of their gender identity or sexuality'.[48]

1.100 This is an issue of working in a workplace, not a moral code.

1.101 I do not accept the argument that teachers who teach in accordance with the school's ethos, but are gay, should be excluded from their workplace.

1.102 To do otherwise, extends the ability of the school to take into account personal factors which have nothing to do with the job at hand. Some educational organisations suggest that this right should be maintained, and that the institution should be allowed to sack teachers for being gay. Yet this is not a uniform position.

1.103 The National Catholic Education Commission said that within Catholic schools gay teachers are employed who teach in accordance with the religious ethos of the school. The Jewish groups said they employ gay teachers and a gay teacher would not be sacked for being gay.

1.104 This is a position I agree with, yet that is not always happening in practice. I checked this exact point during the hearings in Canberra:

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46 *Committee Hansard*, 21 January 2022.

47 *Committee Hansard*, 21 January 2022.

48 *Committee Hansard*, 21 January 2022.

> **SENATOR BRAGG:** For the avoidance of doubt and being conscious of time, I want to get on record whether you taught against the theology and the ethos of the school?
>
> **NATHAN ZAMPROGNO:** The answer is clearly no, my ability to teach technology had nothing to do with my own views.
>
> **KAREN PACK:** No. Very much not. Knowing that I was a gay woman I was asked to teach courses on ethics and faith. Even when I was asked directly about same sex relationships ... I never undermined the position of the college.[49]

1.105 The amendments to the Sex Discrimination Act to protect teachers against discrimination who are same sex attracted, are simple. They should be brought forward as amendments to this bill.

1.106 Ultimately, religious organisations should be allowed to discriminate on religious grounds to retain the religiosity of their institution. But there should not be discrimination on the basis of sexual preference or orientation.

1.107 The religious organisations which appeared before the committee stated that they needed the ability to run their organisation in accordance with their religious ethos.

1.108 The Religious Discrimination Bill and accompanying Bills, achieve that by rendering it unlawful to discriminate on the basis of religion, and creating a general exception to that principle for religious organisations, such as schools and care facilities.

1.109 However, the ability to create and foster a religious ethos should not require the unrestricted authority to exclude staff and students on the basis of their sexual orientation or gender.

1.110 It is important to draw a distinction between these two interests. Representatives of religious organisations who appeared before the committee agreed with this view. Bishop Stead noted:

> None of the religious bodies are arguing for the right to discriminate on the basis of sexuality or gender. What we're arguing for is the right to be able to discriminate on the basis of religious belief…Religious institutions are not seeking the right to discriminate on the basis of sexuality, gender or any other protected attributes…We are not seeking exemptions. That's what's wrong with s38…[of the Sex Discrimination Act]. It is an exemption that is way too broad.[50] (Emphasis mine.)

1.111 If the bill is passed into law and achieves its stated objectives, religious institutions will have the ability to run their organisations, including admission and oversight of staff, students, and wider community in accordance with their religious beliefs.

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[49] *Committee Hansard*, 21 January 2022.

[50] *Committee Hansard*, 20 January 2022.

1.112 This is provided for in Part 2, Clause 7 of the Act, which provides exceptions for religious bodies (including educational institutions) from the requirements of the Act. Clause 11 would also provide religious educational institutions with the ability to preference on the basis of religion in the running of educational institutions, notwithstanding the operation of a state and territory law which is prescribed by the Minister.

1.113 Further, s37 of the Sex Discrimination Act provides religious bodies with an exemption for religious acts or if necessary to avoid injury to religious adherents. This should be preserved with the appropriate safeguards.

1.114 These provisions should provide religious educational institutions with sufficient scope to preference on the basis solely of religious belief. To that effect, existing exemptions under s38 of the Sex Discrimination Act to be at best redundant, and at worst a licence to harass, ostracise, and bully LGBT members of these communities solely on the basis of their identity, and not on the basis of religiosity.

1.115 Put simply, the Religious Discrimination Bills allow management of organisations in accordance with religious ethos. The need for Sex Discrimination Act exemptions are therefore redundant.

1.116 To that effect, the Religious Discrimination (Consequential Amendments) Bill 2021 should provide for amendments which bring the exemptions in the Sex Discrimination Act into alignment with the Religious Discrimination Act. This would ensure that no individual would be excluded from educational institutions purely on the basis of their gender or sexual orientation.

1.117 Amendments to the Sex Discrimination Act should clarify the following three principles for members of religious organisations, particularly educational institutions. first, that same-sex attracted students cannot be excluded from Australian schools on those grounds alone; second, that same-sex attracted teachers cannot be excluded from teaching solely on these grounds; third, that in providing these assurances, religious organisations can still have confidence in their ability to lawfully include or exclude on the basis of religiosity.

1.118 Three sections of the Sex Discrimination Act are relevant to achieving this. s23(2)(b), which provides exemptions for accommodation provided by religious bodies; s37(1)(d) which provides a general exemption for religious bodies; and s38 which provides a general exemption from certain requirements of the act for religious educational institutions.

1.119 Section 23(2)(b) and s37(1)(d) should be amended to ensure that these provisions do not provide a general exemption to discriminate against LGBT students and teachers. Further, s38 should be removed in its entirety.

1.120 The ability to benefit from an exemption should be founded solely on the need for an organisation to maintain its religious ethos. It is right that religious

organisations can preference practicing members of their own faith. It is equally not right that religious organisations can discriminate against LGBT persons.

1.121 Removing the generalised exemptions in the Sex Discrimination Act provides that such discrimination must be founded in the specific needs of faith communities. The passage of orthodox anti-discrimination provisions in the Religious Discrimination Bill, alongside the preserved exemptions provided in s37(1)(a)(b)(c) and (d) (notwithstanding qualifications) would ensure that faith communities can run themselves in accordance with religious beliefs unimpeded.

1.122 Considering the new protections afforded to religious organisations, there is no justification for generalised exemptions, other than for the purposes of discriminating on the basis of sex or sexuality alone. Therefore, I believe that the Religious Discrimination (Consequential Amendments) Bill should include amendments to Sex Discrimination Act of the aforementioned effect.

Recommendation 1

1.123 Remove the Statement of Belief in its entirety.

Recommendation 2

1.124 Amend the *Sex Discrimination Act 1984* to end discrimination against students and teachers.

Senator Andrew Bragg
Liberal Senator for NSW

Appendix 1
Submissions and additional information

Submissions

1 Australian Christian Lobby
2 Dr Renae Barker
3 Dr Alex Deagon
4 Prof George Williams
5 Australian Christian Churches
6 Public Interest Advocacy Centre
7 Diversity Council Australia
8 Law Council of Australia
- Attachment 1

9 Tasmanian Council of Social Service
10 ACON
- Attachment 1

11 National Tertiary Education Union
12 Australian Education Union Federal Office
13 Wilberforce Foundation
14 Health Services Union
15 Aleph Melbourne
16 Australian Lawyers Alliance
17 Albany Free Reformed Church Education Association
18 Buddhist Council of NSW
19 St Vincent de Paul Society Australia
20 Mental Health Australia
21 ACOSS
22 Family Planning NSW
- Attachment 1

23 Commissioner for Children and Young People WA
24 Equal Opportunity Tasmania
25 Michael Douglas
26 Australian Council of Trade Unions
27 Ethnic Council of Shepparton and District Inc.
28 Just.Equal Australia
29 Equality Australia
- Attachment 1

30 Gender Research Network, Curtin University
31 Prof Anne Twomey
32 Australian Human Rights Commission

- 32.1 Supplementary to submission 32

33 Australian Association of Christian Schools
34 NSW Council for Civil Liberties
- Attachment 1

35 Catholic Education Tasmania
36 Australian Youth Affairs Coalition
37 Mr Timothy Tunbridge
38 Multicultural Council of Tasmania
39 ReachOut
40 Unions Tasmania
41 Scarlet Alliance, Australian Sex Workers Association
42 A coalition of disability advocacy organisations
43 LGBTIQ+ Health Australia
44 Uniting Church in Australia Assembly
45 Children by Choice
46 Amnesty International
47 Women With Disabilities Australia (WWDA)
48 Equality Rights Alliance
49 Youth Pride Network
50 Australian Nursing and Midwifery Federation
51 Queensland Advocacy Incorporated
52 MIGA - Medical Insurance Group Australia
53 Kingsford Legal Centre
54 Australian Medical Association
55 GRAI
56 Australian Sangha Association
- Attachment 1
- Attachment 2

57 Chief Executive Women
58 Sacred Heart Mission
59 Intersex Human Rights Australia
60 Coalition of Ex-Christians
61 PANDA - Perinatal Anxiety and Depression Australia
62 Public Affairs Commission, Anglican Church of Australia
63 ASHM - Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
64 ACTCOSS - ACT Council of Social Service Inc.
65 Professor Danielle Mazza, Professor Heather Douglas, Department of General Practice, Monash University.
66 PWDA - People with Disability Australia
67 Australian GLBTIQ Multicultural Council Inc.
68 Victorian Legal Services Board and Commissioner

69 The Australian Industry Group
70 The Clem Jones Group
71 Tasmanian Government
72 Respect Inc.
73 AFAO - Australian Federation of AIDS Organisations
74 Rainbow Families Queensland
75 Go Gentle Australia
76 Human Rights Law Centre
77 Queensland Council for Civil Liberties
78 Victorian Government
79 Josephite Justice Office
80 AHISA - Association of Heads of Independent Schools of Australia
81 Clubs Australia
82 FECCA
83 LGBTI Legal Service Inc
84 Harmony Alliance
85 A Gender Agenda
86 The Religious Society of Friends (Quakers) in Australia
87 Northern Territory Government
88 National Catholic Education Commission
89 Christian Schools Australia and Adventist Schools Australia
90 Sydney Atheists
91 Lutheran Education Australia
92 Australian Services Union
93 Faith Communities Network of Tasmania
94 Executive Council of Australian Jewry
95 Australian Catholic Bishops Conference
96 Freedom for Faith
97 Commissioner for Children and Young People Tasmania
- Attachment 1
- Attachment 2

98 Independent Education Union of Australia
99 Rainbow Families
100 ACT Government
101 NT Anti-Discrimination Commission
102 Tasmanian Labor
103 Australian Christian Higher Education Alliance
104 Hindu Council of Australia
105 Presbyterian Church of Australia
106 Humanists Victoria
107 Women's Health Victoria
108 Hillside Christian College
109 Australian Family Coalition

110 Catholic Women's League Australia – New South Wales Inc.
111 Recovering from Religion Australia
112 Association for Reformed Political Action (ARPA)
113 Anti-Discrimination NSW
114 Women's Electoral Lobby
115 ADLEG - Australian Discrimination Law Experts Group
116 Humanists Australia
117 Transgender Victoria
118 The Satanic Temple Australia
119 South Australian Government
120 ColourFull Abilities
121 Concerned Catholics Tasmania Inc.
122 Australian Muslim Advocacy Network
123 Seventh-day Adventist Church in Australia
124 Australian Association for Social Workers
125 Working It Out
126 DontDivideUs
127 Queensland Government
128 Institute for Civil Society
- Attachment 1
- Attachment 2

129 CoAL - Coalition of Activist Lesbians Inc Australia
130 ABBI - Ambassadors and Bridge Builders International
131 Transfolk of WA
132 PM Glynn Institute, Australian Catholic University
133 Australian Chamber of Commerce and Industry
134 National Secular Lobby
135 Planet Ally
136 Anglican Church Diocese of Sydney
137 Victoria Legal Aid
- Attachment 1
- Attachment 2

138 Uniting Network Australia
139 Church of the Flying Spaghetti Monster Australia
140 Presbyterian Church of Victoria
141 Western Sydney Community Forum
142 Rainbow Catholics InterAgency for Ministry
143 Diversity ACT Community Services
144 Australian National Imams Council
145 Professor Nicholas Aroney
146 Associate Professor Mark Fowler
- Attachment 1

147 Australia/Israel & Jewish Affairs Council
148 SWOP NSW
149 Australian Lawyers for Human Rights
150 Human Rights Law Alliance
151 Public Health Association of Australia
152 Rainbodhi LGBTQIA+ Buddhist Community
153 Dr Judith Dwyer
154 Professor Douglas Ezzy and Dr Bronwyn Fielder
155 Rev Kamal Weerakoon
156 Mrs Karina Okotel
157 Dr Sean Lau
158 Mr Geoffrey Binckes
159 Mr Daniel Stewart
160 Associate Professor Luke Beck
161 Ms Anja Hilkemeijer
162 Dr Denis Dragovic
163 Mr David Errington
164 Dr Patrick Quirk
165 Australian Council of Human Rights Authorities
166 Mr Benjamin Cronshaw
167 Mrs Margaret Airoldi
168 Dr Neil Simmons
169 Women's Health Tasmania
170 Ps Daniel Roberts
171 Rev. Dr Elenie Poulos
172 Mr Tony Whelan
173 Rev. Ian Carmichael
174 Dr Craig Glasby
175 Attorney-General's Department
176 Adrian Adair
177 Rosemary Albert
178 Martin Bibby
179 Chris Curtis
180 Dr Russell Blackford
181 Malcolm Eglinton
182 Dr Rodney Croome AM
183 Stefan Slucki
184 Graeme Lindsay
185 Eliana Freydal Miller (BDS)
186 Adam Johnston
187 Robert Heron
188 Sandra Englart
189 Joel Delaney

190 Patrick Coward
191 Steven Scott
192 Arnold Schiebaan
193 Phil Riordan
194 PFLAG+ - Parents and Friends of Lesbians and Gays
195 Yolande Stiffel
196 David Syme
197 Equality Tasmania

- Attachment 1
- Attachment 2
- Attachment 3
- Attachment 4
- Attachment 5
- Attachment 6
- Attachment 7
- Attachment 8
- Attachment 9

198 Mr Lyle Shelton
199 Mr John Rome
200 *Name Withheld*
201 *Name Withheld*
202 *Name Withheld*
203 *Name Withheld*
204 *Name Withheld*
205 *Name Withheld*
206 Catholics For Renewal Inc.
207 Marie Stopes Australia
208 Australian Baha'i Community
209 Frank Grahame Drew
210 Activate Church
211 Paul Groves
212 Doug Pollard
213 Disability Voices Tasmania
214 Heather Robinson
215 *Confidential*
216 Pride in Protest, National Union of Students, First Mardi Gras Inc.
217 Mr Rodney Crisp
218 Mr Steve O'Neill
219 Mr Stephen Leahy
220 Tim Oseckas
221 Cornelis Van Eldik

Form Letters

1 Form letter example received from 90 individuals.
2 Form letter example received from 956 individuals.
3 Form letter example received from 93 individuals.
4 Form letter example received from 95 individuals.
5 Form letter example received from 87 individuals.

Answer to Question on Notice

1 Associate Professor Mark Fowler, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 24 January 2022)
2 Executive Council of Australian Jewry, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 24 January 2022)
3 Professor Nicholas Aroney, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 25 January 2022)
4 National Catholic Education Commission, answer to question taken on notice at a public hearing in Canberra, 20 January 2022 (received 25 January 2022)
5 Christian Schools Australia, answers to written questions on notice, 20 January 2022 (received 26 January 2022)
6 Christian Schools Australia, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 26 January 2022)
7 Australian Sangha Association, answer to question taken on notice at a public hearing in Canberra, 20 January 2022 (received 21 January 2022)
8 Mr Dino Ottavi, answer to question taken on notice at a public hearing in Canberra, 21 January 2022 (received 21 January 2022)
9 Equality Rights Alliance, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 26 January 2022)
10 Presbyterian Church of Australia and Presbyterian Church of Victoria, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 27 January 2022)
11 Law Council of Australia, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 27 January 2022)
12 Australia/Israel & Jewish Affairs Council, answers to questions taken on notice at a public hearing in Canberra on 20 January 2022 (received 27 January 2022)
13 Australian Christian Higher Education Alliance, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 27 January 2022)
14 Australian Human Rights Commission, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 27 January 2022)
15 Public Interest Advocacy Centre, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 27 January 2022)
16 Ai Group, answer to question taken on notice at a public hearing in Canberra, 21 January 2022 (received 27 January 2022)

17 Anglican Church Diocese of Sydney, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 27 January 2022)

18 Australian Christian Lobby, answer to question taken on notice at a public hearing in Canberra, 20 January 2022 (received 27 January 2022)

19 Australian Catholic Bishops Conference, answers to questions taken on notice at a public hearing in Canberra, 20 January 2022 (received 27 January 2022)

20 Australian GLBTIQ Multicultural Council, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 27 January 2022)

21 Australian Discrimination Law Experts Group, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 27 January 2022)

22 Disability Voices Tasmania, Equality Tasmania, Independent Education Union (Tasmania), Multicultural Council of Tasmania, Unions Tasmania and Women's Health Tasmania, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 and answer to written question on notice, 25 January 2022 (received 28 January 2022)

23 Equality Australia, answer to written question on notice, 21 January 2022 (received 27 January 2022)

24 Australian Council of Trade Unions, Australian Nursing and Midwifery Federation, Independent Education Union and Australian Education Union, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 28 January 2022)

25 Attorney-General's Department, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022, Part 1 (received 2 February 2022)

26 Attorney-General's Department, answers to written questions on notice, 21 January 2022 (received 2 February 2022)

27 Attorney-General's Department, answers to written questions on notice, 20 January 2022 (received 2 February 2022)

28 Attorney-General's Department, answers to written questions on notice, 25 January 2022, Part 1 (received 2 February 2022)

29 Australian Chamber of Commerce and Industry, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022 (received 2 February 2022)

30 Attorney-General's Department, answers to questions taken on notice at a public hearing in Canberra, 21 January 2022, Part 2 (received 2 February 2022)

31 Attorney-General's Department, answers to written questions on notice, 25 January 2022, Part 2 (received 2 February 2022)

32 Department of Education, Skills and Employment, answer to written question on notice, 28 January 2022 (received 3 February 2022)

Media Releases

1 'Senate committee to examine religious discrimination bills' (7 December 2021).

Tabled Documents

1 Human Rights Law Alliance, Australian cases: Freedom of thought, conscience and religion (tabled 20 January 2022)

2 Australian Federation of AIDS Organisations, Opening Statement (tabled 21 January 2022)

3 Anglican Church of Australia, Public Affairs Commission, Opening Statement (tabled 20 January 2022)

4 Disability Voices Tasmania, Opening Statement (tabled 21 January 2022)

5 Australian Chamber of Commerce and Industry, Opening Statement (tabled 21 January 2022)

Additional Information

1 Navigating Intersectionality: Multicultural and Multifaith LGBTIQ+ Victorians talk about Discrimination and Affirmation report; received from the Australian GLBTIQ Multicultural Council on 18 January 2022

2 Article regarding the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021; received from the Institute for Civil Society on 19 January 2022

Appendix 2
Public hearings

Thursday, 20 January 2022
Committee room 2S1,
Parliament House
Canberra

Law Council of Australia (via videoconference)

- Ms Katherine Eastman SC, Chair, Law Council of Australia Equal Opportunity Committee
- Mr Simeon Beckett, Co-Chair, Human rights Committee, NSW Bar Association
- Ms Leonie Campbell, Deputy Director of Policy, Law Council of Australia

Dr Renae Barker (via videoconference)

Dr Alex Deagon (via videoconference)

Professor Nicholas Aroney (via videoconference)

Associate Professor Mark Fowler (via videoconference)

Australian Christian Lobby

- Mr Dan Flynn, Deputy Director

Freedom for Faith (via videoconference)

- Professor Patrick Parkinson, Director

Institute for Civil Society (via videoconference)

- Mr Mark Sneddon, Executive Director

Human Rights Law Alliance

- Mr John Steenhof, Principal Lawyer

Mr Lyle Shelton

Australian Association of Christian Schools (via videoconference)

- Mr Dylan Turner, Government Relations Advisor

Christian Schools Australia and Adventist Schools Australia

- Mr Mark Spencer, Director of Public Policy, Christian Schools Australia

Australian Christian Higher Education Alliance (in person and via videoconference)

- Dr Jeannie Trudel, Chair of ACHEA and President of Christian Heritage College
- Mr Nick Jensen, Political Liaison

Australian Catholic Bishops Conference (via videoconference)

- Bishop Mark Edwards OMI, Bishop of Wagga and Member of the Bishops Commission for Catholic Education
- Professor Rocque Reynolds, Australian Catholic University

National Catholic Education Commission (via videoconference)

- Ms Sally Egan, Acting Executive Director, National Catholic Education Commission
- Mr Dallas McInerney, Chief Executive Officer, Catholic Schools New South Wales

Executive Council of Australian Jewry (via videoconference)

- Mr Peter Wertheim AM, Co-Chief Executive Officer

Australia/Israel & Jewish Affairs Council (via videoconference)

- Dr Colin Rubenstein, Executive Director
- Ms Naomi Levin, Senior Policy Analyst

Australian National Imams Council (via videoconference)

- Mr Bilal Rauf, Spokesperson and Adviser

Australian Muslim Advocacy Network (via videoconference)

- Ms Rita Jabri Markwell, Legal Advisor

Buddhist Council of NSW (via videoconference)

- Mr Gawaine Powell Davies, Chair
- Bhante Akaliko, Board Member

Australian Sangha Association (via videoconference)

- Venerable Mettaji, Committee Member

Hindu Council of Australia (via videoconference)

- Mr Surinder Jain, National Vice President

Public Affairs Commission, Anglican Church of Australia (via videoconference)

- Dr Carolyn Tan, Chairperson

Anglican Church Diocese of Sydney

- Rt. Rev Dr. Michael Stead, Bishop of South Sydney; Chair of the Religious Freedom Reference Group

Presbyterian Church of Australia

- Dr John McLean, Convenor, Church and Nation Committee

Presbyterian Church of Victoria

- Rev Christopher Duke, Convenor, Church and Nation Committee
- Mrs Moira Deeming, Member, researcher, Church and Nation Committee

Uniting Church in Australia Assembly (via videoconference)

- Ms Sharon Hollis, President
- Ms Claerwen Little, National Director, UnitingCare Australia

Seventh-day Adventist Church (via videoconference)

- Pastor Michael Worker, General Secretary & Director of Public Affairs & Religious Liberty

Australian Christian Churches (via videoconference)

- Pastor Mark Llewellyn Edwards OAM, Representative of Australian Christian Churches in the area of Religious Freedom

Friday, 21 January 2022

Committee room 2S1
Parliament House
Canberra

Public Interest Advocacy Centre (via videoconference)

- Mr Jonathon Hunyor, Chief Executive Officer
- Mr Alastair Lawrie, Policy Manager

Australian Discrimination Law Experts Group (via videoconference)

- Ms Robin Banks, Member
- Mr Liam Elphick, Member
- Dr Alice Taylor, Member
- Dr Cristy Clark, Member

Just.Equal Australia (via videoconference)

- Mr Rodney Croome AM, National Spokesperson
- Mr Brian Greig OAM, WA Spokesperson

Equality Australia (via videoconference)

- Mr Ghassan Kassissieh, Legal Director
- Ms Karen Pack
- Clr Nathan Zamprogno

Unions Tasmania (via videoconference)

- Mrs Jessica Munday, Secretary, Unions Tasmania
- Mr Dino Ottavi, Organiser, Independent Education Union (Vic Tas, Hobart Office)

Women's Health Tasmania (via teleconference)

- Ms Jo Flanagan, Chief Executive Officer

Equality Tasmania (via videoconference)

- Mr Rodney Croome AM, President

Multi-Cultural Council of Tasmania (via videoconference)

- Mr Dattaraj Mahambrey, Chair

Disability Voices Tasmania (via videoconference)

- Fiona Strahan, Spokesperson on RDA
- Ms Robin Banks, Advisor

Youth Pride Network (via videoconference)

- Ms Charlotte Glance, Policy and Project Coordinator

Australian GLBTIQ Multicultural Council (in person and via videoconference)

- Mx Giancarlo de Vera, President
- Ms Michelle McNamara, Board Member
- Mr Carl Gopalkrishnan, AGMC WA Representative and Chair, AGMC Community Safety Working Group

Australian Federation of AIDS Organisations (via videoconference)

- Mr Heath Paynter, Deputy Chief Executive Officer

Diversity Council Australia (via videoconference)

- Ms Catherine Brown, Director, Communications and Advocacy

Australian Youth Affairs Coalition (via videoconference)

- Mr Luke Rycken, Executive Officer

Equality Rights Alliance

- Ms Helen Dalley-Fisher, Convenor

Harmony Alliance (via teleconference)

- Ms Nyadol Nyoun, Chair

People With Disability Australia

- Mx Giancarlo de Vera, Senior Manager of Policy

Federation of Ethnic Communities' Councils of Australia (via videoconference)

- Ms Alexandra Raphael, Director of Policy & Advocacy

Australian Industry Group (via videoconference)

- Mr Stephen Smith, Head of National Workplace Relations Policy

Australian Chamber of Commerce and Industry (via videoconference)

- Mr Scott Barklamb, Director, Workplace Relations
- Mr Simon Farrow, Adviser, Workplace Relations

Australian Education Union (via videoconference)

- Ms Susan Hopgood, Federal Secretary

Australian Council of Trade Unions (via videoconference)

- Mr Liam O'Brien, Assistant Secretary
- Ms Sophie Ismail, Legal and Industrial Officer
- Ms Lorri-Anne Sharp, Acting Federal Secretary, Australian Nursing and Midwifery Federation
- Dr Micha Peters, National Policy Research Advisor, Australian Nursing and Midwifery Federation

Independent Education Union of Australia (via videoconference)

- Mr Anthony Odgers, Assistant Federal Secretary

Australian Human Rights Commission (via videoconference)

- Emeritus Professor Rosalind Croucher AM, President
- Ms Lorraine Finlay, Human Rights Commissioner
- Mr Graeme Edgerton, Deputy General Counsel

Australian Council of Human Rights Authorities (via videoconference)

- Commissioner Ro Allen, Chair

Northern Territory Government (via teleconference)

- The Hon. Selena Uibo MLA, Attorney-General and Minister for Justice

Attorney-General's Department

- Mr Andrew Walter, A/g Deputy Secretary Integrity and International Group
- Mr Stephen Still, Assistant Secretary, Employment Standards Branch
- Mr Colin Minihan, A/g Assistant Secretary Human Rights Branch