



Submission to the Inquiry into the Religious Discrimination Bill 2021 and Related Bills

Parliamentary Joint Committee on Human Rights

Parliament of Australia

Our background and expertise

We are a group of academics from diverse backgrounds. Collectively we have expertise in law, public health and sociology, stigma, discrimination and social policy, and have collectively authored many books, articles and reports on areas of direct relevance to this Inquiry and to the proposed Bills. Our affiliations and expertise are detailed below.

Sean Mulcahy is a Research Officer at the Australian Research Centre in Sex, Health and Society at La Trobe University. Dr Mulcahy is the corresponding author for this submission.

Kate Seear is Associate Professor at the Australian Research Centre in Sex, Health and Society at La Trobe University. An Australian Research Council Future Fellow, she is also a practising lawyer.

Andrea Waling is a Senior Research Fellow at the Australian Research Centre in Sex, Health and Society at La Trobe University and an Australian Research Council DECRA Fellow.

Whilst we welcome the opportunity to provide submissions on the Bills, the timeframe within which the Committee will accept submissions makes it difficult to respond in a meaningful manner.

Overview

The Religious Discrimination Bills 2021 is a suite of three bills – the Religious Discrimination Bill 2021; the Religious Discrimination (Consequential Amendments) Bill 2021; and the Human Rights Legislation Amendment Bill 2021 – that would have serious adverse consequences for rights to equality, non-discrimination and privacy. In summary, the Bills would:

- Override future Victorian laws that protect workers from discrimination based on their beliefs;
- Allow religious hospitals, aged care facilities, accommodation providers and disability service providers to discriminate against workers that do not share their beliefs;
- Allow religious charities to refuse to provide accommodation or services to people in need that are not part of their religion;
- Allow religious camps and conference sites to refuse accommodation to groups that do not share their beliefs;



- Allow religious schools and universities to refuse to make facilities available for same-sex weddings;
- Protect offensive and humiliating statements of belief from action under anti-discrimination and anti-vilification laws; and
- Protect the charitable status of anti-marriage equality groups.

In brief, the Bills weaken existing anti-discrimination protections for vulnerable groups, including LGBTQ+ people and women, but also others who engage in behaviour or have attributes or characteristics that might be considered as being at odds with certain religious beliefs. This includes an extremely wide range of members of Australian society including: people who use/have used drugs, sex workers, people who use/have used contraception, people who have terminated pregnancies (or are considering doing so), people who live together but are not married, people who have had children outside marriage, divorcees and/or people who have left relationships and/or marriages (including, critically, people who have left due to family and intimate partner violence), and people who hold different beliefs on any of the above matters.

Crucially, the Bills have the potential to undermine various public policy priorities, strategies and measures being implemented by the Commonwealth, states and territories, including initiatives designed to support the needs of many of the populations we mention above, and initiatives designed to address some of Australia's most pressing social problems, such as stigma, discrimination and family violence. The Bills are potentially at odds with initiatives that aim to:

- Improve the health and wellbeing of marginalised populations, such as LGBTQ+ populations;
- Reduce stigma and discrimination experienced by specific populations (such as people who use drugs and people experiencing drug-related health concerns such as hepatitis C). The need to reduce such stigma and discrimination is recognised in both the *Fifth National Hepatitis C Strategy: 2018-2022*¹ and the current *National Drug Strategy 2017-2026*,² and the effects of stigma and discrimination on these populations has been documented in numerous studies undertaken by the authors of this submission and our colleagues;³
- Support the sexual and mental health needs of priority populations such as young mothers and sex workers;
- Adopt a consistent approach to tackling family and intimate partner violence, providing support to victims, and addressing the enormous cost to society of this form of violence.⁴

Discrimination against people based on religious belief

¹ Australian Department of Health, *Fifth National Hepatitis C Strategy 2018-2022* (Department of Health, 2018).

² Department of Health, *National Drug Strategy 2017-2026* (Commonwealth of Australia, 2017).

³ See, e.g., Kate Seear, 'Addressing alcohol and other drug stigma. Where to next?' (2020) 39 *Drug and Alcohol Review* 109-113; Lancaster, Seear, & Ritter, *Reducing Stigma and Discrimination for People Experiencing Problematic Alcohol and Other Drug Use*. (National Drug and Alcohol Research Centre, 2017); Seear, Lancaster, & Ritter, 'A new framework for evaluating the potential for drug law to produce stigma: Insights from an Australian study' (2017) 45(4) *Journal of Law, Medicine and Ethics*. 596-606; Fraser et al, 'Addiction stigma and the biopolitics of liberal modernity: A qualitative analysis' (2017) 44 *International Journal of Drug Policy* 192-201.

⁴ See, e.g., Council of Australian Governments, *National Plan to Reduce Violence Against Women and their Children* (Department of Social Services, 2010).



The Bills stipulate that religious bodies may discriminate against people who do not hold their religious beliefs if to do so accords with their religious beliefs, or would avoid injury to the religious feelings of adherents of their religion.⁵ Though the explanatory memorandum states that these provisions ‘do not provide a basis for discrimination on the grounds of a protected attribute’,⁶ it could be used to allow discrimination against people who do not hold particular religious beliefs *about* a protected attribute (e.g. sexual orientation, gender identity, etc.). Therefore, it could be used to discriminate against people with a protected attribute; for example, a gay person who does not hold a religious belief that homosexuality is a sin. In this way, it is not correct to say, as the explanatory memorandum does, that ‘the provisions do not affect the operation of other Commonwealth anti-discrimination law’.⁷ This is because these provisions could be used to circumvent protections under other Commonwealth anti-discrimination law. For example, a gay person may not be discriminated against under this provision on the basis of their sexual orientation,⁸ but this provision would allow discrimination on the basis of religious beliefs about their sexual orientation. Furthermore, existing provisions of Commonwealth anti-discrimination laws, namely the *Sex Discrimination Act 1984*, allow discrimination by religious bodies based on sexual orientation and gender identity.⁹ Research from *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* shows that 9.9% of LGBTIQ+ people have been refused employment or promotion in the year preceding the report.¹⁰ The Bills do nothing to protect LGBTIQ+ people from discrimination, but further entrench discrimination based on religious beliefs *about* sexual orientation or gender identity, etc.¹¹

As the explanatory memorandum notes, these provisions ‘could limit an individual’s rights to equality and non-discrimination by preventing them accessing the provision of services and education or employment opportunities from that religious body on the basis of their religious belief or activity’.¹² The explanatory memorandum goes on to state that ‘the provisions have been carefully balanced to ensure they only exempt conduct engaged in [...] which [...] is *necessary* for that body to continue to act in accordance with their religious beliefs and to maintain their religious ethos’.¹³ However, there is no requirement for necessity in these provisions. The conduct need only be done in good faith:

- ‘in accordance with the doctrines, tenets, beliefs or teachings of that religion’;¹⁴ or
- ‘to avoid injury to the religious susceptibilities of adherents of the same religion’.¹⁵

In other Commonwealth anti-discrimination law, there is a requirement that the conduct be *necessary* to avoid injury to the religious feelings of adherents of the religion.¹⁶ If the objective is to allow religious bodies to engage in conduct that is *necessary* to accord with their religious beliefs and maintain their religious ethos, then this should be included in the provisions. Otherwise, the measure is unduly broad and could include conduct that is done simply to avoid injury to the religious feelings of adherents of the

⁵ Religious Discrimination Bill 2021 cl 7.

⁶ Explanatory Memorandum, Religious Discrimination Bill 2021, 10.

⁷ Explanatory Memorandum, Religious Discrimination Bill 2021, 10.

⁸ See, e.g. *Sex Discrimination Act 1984* s 14.

⁹ *Sex Discrimination Act 1984* ss 37-38.

¹⁰ Adam Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (La Trobe University, 2020) 40.

¹¹ Sean Mulcahy and Liam Elphick, ‘Scott Morrison cannot be allowed to wind back anti-discrimination reforms’, *Star Observer* (27 November 2021).

¹² Explanatory Memorandum, Religious Discrimination Bill 2021, 10.

¹³ Explanatory Memorandum, Religious Discrimination Bill 2021, 11 (emphasis added).

¹⁴ Religious Discrimination Bill 2021 cl 7(2).

¹⁵ Religious Discrimination Bill 2021 cl 7(4).

¹⁶ See, e.g. *Sex Discrimination Act 1984* s 37(1)(d).



religion or to accord with religious beliefs (for example, taking action against an employee who has upset people that share the religious belief of their employer), without any consideration of whether that conduct is *necessary* to accord with a religious belief or maintain a religious ethos. The provision is not proportionate and allows broad discrimination on the part of religious bodies.

Discrimination by religious hospitals, aged-care facilities, accommodation providers and disability service providers

Furthermore, religious hospitals, aged care facilities, accommodation providers and disability service providers may refuse to hire or decide to fire staff who do not share their religious beliefs.¹⁷ This would mean a religious hospital could fire a worker if the person does not hold a belief that homosexuality is a sin. The explanatory memorandum notes that this provision ‘limits the right to non-discrimination for potential employees on the basis of their religious belief or activity’.¹⁸ The Australian Lawyers Alliance has noted that the provision ‘effectively authorises discriminatory employment policies and practices’.¹⁹

The explanatory memorandum states that the provision ‘requires an objective connection between the religious body’s conduct and the beliefs and practices of the relevant religion’.²⁰ However, the provision also allows conduct to avoid injury to the religious feelings of adherents of their religion.²¹ This is a broader exception than conduct in accordance with the body’s religious beliefs. There is no consideration of whether allowing bodies to discriminate against potential employees in order to avoid injury to the religious feelings of adherents of their religion is a proportionate means of maintaining the religious ethos of the body.

Refusal to hire employees who do not hold a religious belief

The Bills stipulate that religious schools and institutions may refuse to hire a person that does not hold their religious beliefs if to do so is in good faith and in accordance with their policy.²² This would mean that a religious school could refuse to hire a person if the person does not hold a belief, for instance, that marriage should only be between a man and a woman or that women are not suited to the priesthood or any other views about women or LGBTQ+ people that are held among some religious bodies.

There is limited consideration in the explanatory memoranda of how this provision limits the right to non-discrimination for potential employees,²³ though the explanatory memorandum recognises that this is an ‘imposition on the right to anti-discrimination’.²⁴ Other legislatures have noted that ‘restricting a person’s ability to obtain or retain employment [...] is a substantial limitation on that person’s right to non-discrimination and privacy’.²⁵ The Australian Lawyers Alliance has noted that the provision ‘effectively authorises discriminatory employment policies and practices in educational institutions’ and will ‘exacerbate [...] existing exemptions in the [*Sex Discrimination Act*] that allow educational institutions

¹⁷ Religious Discrimination Bill 2021 cl 9.

¹⁸ Explanatory Memorandum, Religious Discrimination Bill 2021, 12.

¹⁹ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 7.

²⁰ Explanatory Memorandum, Religious Discrimination Bill 2021, 12. See Religious Discrimination Bill 2021 cl 9(3)(c).

²¹ Religious Discrimination Bill 2021 cl 9(5)(c).

²² Religious Discrimination Bill 2021 cl 11.

²³ Explanatory Memorandum, Religious Discrimination Bill 2021, 28.

²⁴ Explanatory Memorandum, Religious Discrimination (Consequential Amendments) Bill 2021, 8.

²⁵ Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4641 (Jaclyn Symes, Attorney-General).



to discriminate against staff.²⁶ (These existing exemptions are discussed further above.) There are two main issues with this provision: overriding state or territory laws and giving preference based on religious belief. There is also the issue of the right to privacy.

Overriding state or territory laws

Noted constitutional law expert Professor George Williams has stated that the Bills contain ‘problematic interactions with other federal and state anti-discrimination laws’.²⁷ The provision that religious schools and institutions may refuse to hire a person that does not hold their religious beliefs is one such example. The Minister can prescribe the limitation on the right to anti-discrimination through regulations, ‘if the Minister is satisfied’ that a state or territory law prevents religious educational institutions from giving preference to potential employees who hold or engage in a particular religious belief or activity.²⁸ This gives the Minister an overly broad and wide discretion to override state or territory laws based on their personal satisfaction that the law prevents religious educational institutions from giving preference to religious employees. There is no right of review for the affected state or territory, only the Commonwealth Parliament may disallow the regulations.²⁹ It is arguable that the Minister’s power to override state or territory laws is not appropriately circumscribed – being based only on their personal satisfaction that the law prevents religious educational institutions from giving preference to religious employees – and lacks adequate review. The Senate Standing Committee for the Scrutiny of Bills had raised similar concerns.³⁰

Furthermore, the Bills specifically target Victorian law.³¹ They would specifically override Victorian laws that stipulate that religious schools and institutions may only discriminate based on religious belief if the religious belief is *an inherent requirement of the role* and to do so is reasonable and proportionate.³² The Victorian laws provide ‘an exception that is tailored to the specific position and restricts the discrimination to only those positions where it is necessary’.³³ The Victorian laws balance the rights and interests of the individual to equality and privacy against the rights of religious educational institutions to freedom of religion. They preserve the right to freedom of religion by allowing religious educational institutions ‘to select staff based on their religious belief, *where the particular role requires this*’.³⁴ The Australian Lawyers Alliance agrees that ‘the only circumstances in which a religious school should be able to discriminate in employment decisions is when a particular religious belief is an *inherent requirement of the role* (for example, as a chaplain)’.³⁵ By contrast, the federal Bills allow discrimination in the selection of staff even when the role does not require the practice or teaching of religion, as discussed further below.

²⁶ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 8.

²⁷ Professor George Williams, Submission No 1 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 3 December 2021, 1.

²⁸ Religious Discrimination Bill 2021 cl 11(3).

²⁹ *Legislation Act 2003* s 42.

³⁰ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 18 of 2021* (2021) 27.

³¹ Religious Discrimination (Consequential Amendments) Bill 2021 sch 2 cl 1.

³² *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) cl 6.

³³ Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4639 (Jaclyn Symes, Attorney-General).

³⁴ Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4641 (Jaclyn Symes, Attorney-General) (emphasis added).

³⁵ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 8 (emphasis added).



The Victorian laws are also ‘consistent with contemporary community attitudes and standards, which support removal of discrimination against individuals’.³⁶ By contrast, the federal Bills entrench discrimination against individuals based on religious beliefs. The Victorian laws are ‘the least restrictive means to achieve the purpose of protecting the right to freedom of religion’.³⁷ They require a consideration of ‘the particular facts and circumstances of the case, including the impact of the decision on the employee, the nature and extent of the person’s non-conformity with the religious beliefs [...] and whether there are alternative and more appropriate options available to the employer’.³⁸ Again, in contrast, the federal Bills allow broad discrimination.

To demonstrate this, let us consider an example.³⁹ For ten years, Rachel Colvin taught English at Ballarat Christian College. In 2018, she was required to sign a statement by the school that marriage must be between a man and a woman, which was contrary to her own religious beliefs. As a result of refusing to sign the statement, she lost her job and took action against the school. Under Victorian laws, schools like Ballarat Christian College would have to show that holding a religious belief about marriage was essential to the role of English teacher and that it was reasonable and proportionate for the school to enforce that belief. The Victorian laws would almost certainly protect teachers like Ms Colvin. However, these laws would be overridden by the federal Bills, which would offer no such protection. Teachers such as Ms Colvin could be turned away for slight differences in religious views or interpretations, even if they have no bearing on their job and their classes.

Giving preference based on religious belief

The explanatory memorandum to the federal Bills notes that the United Nations Human Rights Committee has indicated, by way of a General Comment, that ‘the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools’.⁴⁰ However, a couple of points should be noted. First, the right to freedom of religion, in this comment, is limited to the freedom to choose religious teachers, being people who teach religion, whereas the provision in the federal Bills extends to all teachers and staff at religious educational institutions, including those who teach other subjects and those who do not teach at all. Notably, the European Court of Rights considers the proximity between the nature of a position and the mission of the religious organisation when determining the extent to which the organisation can impose its particular religious beliefs on its employees.⁴¹ The General Comments goes on to state that ‘restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner’.⁴² Second, the freedom to *establish* religious schools does not extend, in this comment, to a broad power to discriminate in the hiring of staff at religious schools and, as the provision in the federal Bills allows, universities and other educational institutions. In short, the federal provision is much broader than the right to establish religious schools and choose religious teachers; it allows discrimination in the hiring of teachers and staff

³⁶ Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4641 (Jaclyn Symes, Attorney-General).

³⁷ Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4639 (Jaclyn Symes, Attorney-General).

³⁸ Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4641 (Jaclyn Symes, Attorney-General).

³⁹ This is discussed further in Sean Mulcahy and Liam Elphick, ‘Scott Morrison cannot be allowed to wind back anti-discrimination reforms’, *Star Observer* (27 November 2021).

⁴⁰ Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [4].

⁴¹ See Anja Hilgemeijer and Amy Maguire ‘Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence’ (2019) 93 *Alternative Law Journal*.

⁴² Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [8].



who may play no role in the practice and teaching of religion in religious schools, universities and other educational institutions.

The only proviso, aside from the requirement for a policy (which these institutions would be able to simply set themselves), is that the discrimination be ‘in good faith.’⁴³ The explanatory memorandum states that ‘tying the provision to whether conduct is in good faith ensures that there is a reasonable nexus between the religious ethos that the provision is trying to recognise and protect, and the operation of the provision in practice’.⁴⁴ However, there is no requirement in the federal provisions that there be a nexus between the decision to preference religious employees and maintaining the religious ethos of the educational institution. For example, a religious university may refuse to hire a gardener that believes in same-sex marriage even though their belief would have no bearing on the religious ethos of the school. In this case and in others, there may be no rational connection between the employment decision and the objective to maintain a religious ethos at the educational institution. The provision is broad and allows discrimination against all potential employees, even where those employees play no real part in upholding the religious ethos of the educational institution.

The explanatory memorandum states that ‘this provision is necessary to support religious educational institutions to be able to [...] provide a community for adherents who share their religious beliefs’.⁴⁵ This goes far beyond the recognised right to practice and teach religion to claim that there is a right to ‘provide a community’, within educational institutions, of staff that only adhere to a particular religious belief. Noting that this is about religious *belief* and not religion, this provision would allow a religious educational institution to discriminate against staff of the same religion but with a different religious belief; for example, a Catholic university could discriminate against a Catholic professor that believes in sex before marriage. This is not an established right under international human rights law. Moreover, the federal provision is not proportionate to the objective of maintaining a religious ethos within an educational institution, as it allows broad discrimination against teachers and staff who may play no role in the practice and teaching of religion in religious schools, universities and other educational institutions.

Right to privacy

Though not contemplated in the explanatory memorandum,⁴⁶ these provisions also engage the right to privacy. The Bills limit the right to privacy by allowing religious educational institutions to discriminate against prospective employees on the basis of religious belief, which could form part of a person’s private life. As noted in *ZZ v Secretary, Department of Justice*, in considering the right to privacy under the Victorian *Charter of Human Rights and Responsibilities Act* (which is modelled on the right to privacy in article 17 of the *International Covenant on Civil and Political Rights*), there is ‘intrinsic connection between employment, dignity and the private lives of individuals’.⁴⁷

There is no consideration of how the Bills balance the interests of the individual to privacy as to their religious beliefs and the rights of religious educational institutions to freedom of religion. This provision may require individuals to declare their privately held religious beliefs in order to gain employment. As discussed above, there are less restrictive means to protect the right to freedom of religion whilst

⁴³ Religious Discrimination Bill 2021 cl 11(1)(a).

⁴⁴ Explanatory Memorandum, Religious Discrimination (Consequential Amendments) Bill 2021, 9.

⁴⁵ Explanatory Memorandum, Religious Discrimination (Consequential Amendments) Bill 2021, 9.

⁴⁶ Explanatory Memorandum, Religious Discrimination (Consequential Amendments) Bill 2021, 27-28.

⁴⁷ [2013] VSC 267 [87].



protecting the right to privacy, including by requiring that religious belief is an inherent requirement of the role and that any discrimination is reasonable and proportionate, as is the case under Victorian law.

Discrimination by religious charities

The Bills stipulate that religious charities may refuse to provide benefits to people that do not share their religious beliefs.⁴⁸ This would mean that a religious charity could refuse to provide supports such as accommodation or food to a person that does not share their religious beliefs. Though the explanatory memorandum states that this exception is intended to operate alongside other provisions that allow discrimination against people based on religious belief (as discussed above),⁴⁹ this exception is broader in that there is not a requirement that the conduct be engaged in ‘in good faith.’⁵⁰ The explanatory memorandum further states that ‘in order to address disadvantage it may be *necessary* to restrict benefits to persons most in need, which may include restricting benefits to persons of a particular religious group or activity’.⁵¹ However, like many of the other provisions in the Bills, there is no requirement that the conduct is necessary to give effect to the charity’s governing rules.

Though similar provisions exist in other anti-discrimination laws, this allows discrimination on the comparatively broad basis of religious beliefs. Many absolutely critical and life-saving supports are provided to marginalised groups by religious charities and this could mean that people who really need help could be refused essential supports on the basis that they do not subscribe to the same religious beliefs as the charity. This could include LGBTQ+ people, women, people who use drugs, sex workers, pregnant teenagers or teen parents, unmarried women, people (especially women and LGBTQ+ people) fleeing family or intimate partner violence and others who might in some way be said to be engaging in behaviours against the religious beliefs of the charity.

For example, if a charity held a religious belief that a person should not leave a marriage and a woman who left a marriage to flee family violence turned up at that charity seeking food and help, the charity could turn her away based on their religious beliefs. This could extend to people who have taken contraception, who are contemplating or have had an abortion, who have engaged in sex work, or who have engaged in drug use. There is a wide range of people who could be affected and refused help.

Refusal to provide accommodation at religious camps and conferences

The Bills stipulate that religious camps and conference sites may refuse to provide accommodation to people who don’t share their religious beliefs if to do so is in good faith in accordance with their policy.⁵² This would mean, for instance, that a religious camp could refuse to provide accommodation to a youth group that supports queer youth, unmarried or sole parents, people who have left marriages due to family violence, and others. As the explanatory memorandum notes, these provisions ‘limit the rights to equality and non-discrimination of people seeking or utilising accommodation or associated facilities from a religious camp or conference site’.⁵³

⁴⁸ Religious Discrimination Bill 2021 cl 36.

⁴⁹ Explanatory Memorandum, Religious Discrimination Bill 2021, 16.

⁵⁰ Religious Discrimination Bill 2021 cl 7(2), (4) cf Religious Discrimination Bill 2021 cl 36.

⁵¹ Explanatory Memorandum, Religious Discrimination Bill 2021, 16 (emphasis added).

⁵² Religious Discrimination Bill 2021 cl 40.

⁵³ Explanatory Memorandum, Religious Discrimination Bill 2021, 22.



The explanatory memorandum states that ‘these provisions solely provide that certain religious camps and conference sites do not discriminate under this Act by engaging in conduct in relation to the provision of accommodation or associated facilities that is in accordance with the doctrines of their religion or is *necessary* to avoid injury to the susceptibilities with adherents of the religion’.⁵⁴ As with the provisions discussed above, however, there is no requirement for necessity in these provisions. The conduct need only be done 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’;⁵⁵ or
- ‘to avoid injury to the religious susceptibilities of adherents of the same religion’.⁵⁶

In summary, there is no requirement that the conduct is necessary to maintain the religious ethos of the camp or conference, but simply that the conduct accords with religious beliefs (based on what a person of the same religion *could* reasonably consider to be conduct that accords with religious beliefs) or that the conduct is to avoid injury to the religious feelings of adherents of the religion. This is, once again, an overly broad exception that is not proportionate to the objective of maintaining the religious ethos of the camp or conference.

Publicly available policies

Many provisions of the Bills enable religious organisations to discriminate if it is in accordance with publicly available policies and, further, that the Minister may determine requirements for such policies.⁵⁷ The Senate Standing Committee for the Scrutiny of Bills has stated that ‘significant matters, such as the requirements for policies relevant to the application of discrimination law, should be included in the primary legislation unless a sound justification is provided for the use of delegated legislation’ and, further, that ‘no explanation for the use of delegated legislation is provided in the explanatory memorandum’.⁵⁸ Delegated legislation is not subject to the same level of parliamentary scrutiny as primary legislation and, as such, there should be guidance provided in primary legislation as to the requirements of such policies.⁵⁹

Refusal of goods and services for same-sex marriage

The Bills stipulate that religious schools and universities may refuse to make facilities available, or provide goods and services, for same-sex marriages if doing so would not conform to their religious beliefs or would injure the religious feelings of adherents of their religion.⁶⁰ This would mean a religious school could refuse to hire a hall for a wedding reception to a same-sex couple. The explanatory memorandum notes that this provision ‘limits the rights to equality and non-discrimination’ as it allows ‘differential treatment [...] on the basis of certain characteristics of the individuals within [a] couple’.⁶¹

⁵⁴ Explanatory Memorandum, Religious Discrimination Bill 2021, 22.

⁵⁵ Religious Discrimination Bill 2021 cl 402(c) (emphasis added).

⁵⁶ Religious Discrimination Bill 2021 cl 40(5)(b).

⁵⁷ Religious Discrimination Bill 2021 cl 7, 9, 40.

⁵⁸ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 18 of 2021* (2021) 26.

⁵⁹ See, e.g., Religious Discrimination Bill 2021 cl 11(1)(b).

⁶⁰ Human Rights Legislation Amendment Bill 2021 cl 6.

⁶¹ Explanatory Memorandum, Human Rights Legislation Amendment Bill 2021, 9.



On the other hand, a secular organisation, such as a pride centre, could not refuse to rent its venue to a religious group.⁶² This creates unevenness in the law.

There is a similar provision in existing law that allows religious *bodies* to refuse to make facilities available or to provide goods and services.⁶³ Two points need be raised here. First, the existing provisions were created deliberately for religious bodies in order for them to maintain their own religious practices and services; it was not intended to apply broadly.⁶⁴ If an educational institution is a religious body, they can rely on the existing provision; if they are not, it is questionable whether they have religious practices and observances that justify refusal to make facilities available, or to provide goods and services, for same-sex marriages. Second, this Committee has noted that even if a new provision is ‘broadly consistent with current Australian anti-discrimination law [...] this is not determinative of the question of proportionality [as] the scope of exceptions to anti-discrimination laws has never been subject to a foundational review by the Committee for human rights compatibility’.⁶⁵

The Australian Law Reform Commission is currently conducting a review into the framework of religious exemptions in anti-discrimination legislation. Ideally, that would be completed before the Bills are considered by parliament, and would be used to inform assessments of the human rights compatibility of provisions such as those proposed. However, the Commission’s reporting deadline is set at one year after the date that these Bills are passed by Parliament (assuming that they are passed). This means a proper assessment of the proportionality of provisions such as these cannot be made with the benefit of input from Australia’s peak law reform expert body.

Protection of offensive statements of belief

The Bills stipulate that statements of belief that are offensive, humiliating, insulting or ridiculing are lawful.⁶⁶ The explanatory memorandum states that this provision ‘is not intended to capture discriminatory *conduct*’.⁶⁷ However, two points need be made. First, the Federal Court has held that statements or remarks can constitute discriminatory acts for the purposes of anti-discrimination law.⁶⁸ Second, the provision states that ‘a statement of belief, in and of itself, does not constitute discrimination’ under anti-discrimination laws.⁶⁹ Therefore, the provision allows statements that would otherwise infringe protections under anti-discrimination laws that prohibit discrimination against women, LGBTQ+ people, people with disabilities, people of faith, divorced people, people in de facto relationships and single parents, among others. This includes written or spoken words or other forms of communication that:

- are in accordance with the person’s religious beliefs; or
- relate to not holding a religious belief.⁷⁰

⁶² Religious Discrimination Bill 2021 cl 25.

⁶³ *Marriage Act 1961* s 47B.

⁶⁴ Explanatory Memorandum, Marriage Amendment (Definition and Religious Freedoms) Bill 2017, 11; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Report 13 of 2017* (2017) 35.

⁶⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Report 13 of 2017* (2017) 35.

⁶⁶ Religious Discrimination Bill 2021 cl 12.

⁶⁷ Explanatory Memorandum, Religious Discrimination Bill 2021, 26 (emphasis added).

⁶⁸ *Qantas Airways v Gama* [2008] FCAFC 69 [76]-[77] (per French and Jacobson JJ).

⁶⁹ Religious Discrimination Bill 2021 cl 12(1)(a).

⁷⁰ Religious Discrimination Bill 2021 cl 5(1).



There are few restrictions, duties or responsibilities on the part of the person making the statement: only that the statement is made in good faith and is not malicious, threatening, intimidating, harassing or vilifying.⁷¹ This would still allow statements that are offensive, humiliating, insulting or ridiculing, which are prohibited in other anti-discrimination laws.⁷² As the Australian Lawyers Alliance points out, the Bills are ‘effectively legislating bigotry, by enabling religious statements of belief to be used as a cloak for sexism, racism, homophobia and other prejudices’.⁷³

The explanatory memorandum states that this provision ‘is important as religion is a fundamental part of Australia’s strong and diverse social fabric’.⁷⁴ However, there is no consideration of how statements that are offensive, humiliating, insulting or ridiculing might impact Australia’s diverse social fabric. Such statements could be used to target specific groups, such as LGBTQ+ people and women. The provision also weakens Australia’s strong anti-discrimination laws, and other laws that could be overridden by this provision, including potentially laws against vilification⁷⁵ and laws prohibiting practices seeking to change or suppress a person’s sexual orientation or gender identity.⁷⁶

Research from *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* shows that 34.6% of LGBTQ+ people reported experiencing verbal abuse in the year preceding the report.⁷⁷ This is an increase from 25.5% in the previous report.⁷⁸ As the report concludes, this has ‘social impacts on the lives [of those] who are victimised’, including feelings of suicide and poorer physical health.⁷⁹ The Bills do nothing to protect LGBTQ+ people from victimisation, but allow offensive, humiliating, insulting or ridiculing statements of belief to be directed at LGBTQ+ people. Such statements are likely to cause harm and distress to LGBTQ+ people.⁸⁰

Furthermore, as Professor Williams points out, there is no protection provided to statements of conscience; the provision only protects statements connected to religious belief.⁸¹ As a result, the Bills provide ‘an elevated status to religious speech’ but fail to protect ‘speech on matters of thought or conscience’;⁸² for example, legitimate scholarly debate or discussion that is academically rigorous and ethically grounded. This fails to conform with article 18 of the *International Covenant of Civil and Political Rights* as it does not protect the expression of believers and non-believers equally.⁸³

⁷¹ Religious Discrimination Bill 2021 cl 5(1), 12(2).

⁷² Explanatory Memorandum, Religious Discrimination Bill 2021, 57. *Anti-Discrimination Act 1998* (Tas) s 17(1), which is overridden by Religious Discrimination Bill 2021 cl 12(1)(b). See also *Racial Discrimination Act 1975* s 18C(1)(a).

⁷³ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 9.

⁷⁴ Explanatory Memorandum, Religious Discrimination Bill 2021, 26.

⁷⁵ See e.g. *Racial and Religious Tolerance Act 2001* (Vic), which could be overridden by Religious Discrimination Bill 2021 cl 12(1)(c).

⁷⁶ See, e.g. *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

⁷⁷ Adam Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (La Trobe University, 2020) 40.

⁷⁸ Adam Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (La Trobe University, 2020) 41.

⁷⁹ Adam Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* (La Trobe University, 2020) 41.

⁸⁰ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 10.

⁸¹ Professor George Williams, Submission No 1 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 3 December 2021, 1.

⁸² Professor George Williams, Submission No 1 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 3 December 2021, 2.

⁸³ Professor George Williams, Submission No 1 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 3 December 2021, 1.



This is also another example of what Professor Williams has identified as problematic interactions with state and territory anti-discrimination laws.⁸⁴ In particular, as the Australian Lawyers Alliance note, if a respondent to a discrimination matter claims a ‘statement of belief’ exemption, the matter will have to be heard by a federal court, which ‘will significantly increase the cost of complainants [...] making the complaint process less accessible’⁸⁵ or perhaps even inaccessible to some people.

Qualifying body conduct rules

The Bills also prevent trade qualifying bodies from imposing rules of conduct which would restrict a person from making an offensive, humiliating, insulting or ridiculing statement of belief, unless the conduct rule is an essential requirement of the occupation.⁸⁶ In practice, this means that a doctor could tell a patient that they believe that any number of activities or attributes are wrong based on their religious beliefs, including homosexuality, sex outside marriage, the use of contraception, or the decision to end a relationship or marriage (for any reason but including family or intimate partner violence). In this situation, as the Australian Lawyers Alliance points out, the relevant professional association could not discipline a member of that association for making a statement of belief.⁸⁷

This provision does not appear in other Commonwealth anti-discrimination laws and, as the Australian Lawyers Alliance points out, ‘effectively privileges people of faith above other people with protected attributes under federal discrimination laws’.⁸⁸ It also places professionals in a situation of conflict with the religious belief and their duty to their profession, and could undermine public confidence in the conduct of professions.⁸⁹ It may also undermine other public health and public policy initiatives, including those designed to reduce stigma and discrimination of marginalised populations, efforts to improve health and wellbeing, including mental health, and the protection of victims of family violence.

Charity status of anti-marriage equality groups

The Bills stipulate that promoting anti-marriage equality views is not contrary to public policy and is for the public benefit.⁹⁰ This would mean an anti-marriage equality group could claim that they are a charity.

Under existing law, a charity must show that their purposes are for the public benefit.⁹¹ However, this provision creates a conclusive presumption that the promotion of anti-marriage equality views is for the public benefit. The explanatory memorandum states that this is intended to ensure that religious

⁸⁴ Professor George Williams, Submission No 1 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 3 December 2021, 1. See also Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 8.

⁸⁵ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 9. See *Burns v Corbett* [2018] HCA 15.

⁸⁶ Religious Discrimination Bill 2021 cl 15.

⁸⁷ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 10.

⁸⁸ Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 10.

⁸⁹ See Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Religious Discrimination Bill 2021 and Related Bills*, 7 December 2021, 10-11.

⁹⁰ Human Rights Legislation Amendment Bill 2021 cl 3.

⁹¹ *Charities Act 2013* pt 2 div 2.



charities can promote anti-marriage equality views ‘without threat to their charitable status’;⁹² however, the provision in fact goes further than that to stipulate that promoting anti-marriage equality views is conclusively deemed to be a charitable purpose. Conversely, promoting pro-marriage equality views is not conclusively deemed to be a charitable purpose.

Overriding local council bylaws

The Bills stipulate that local by-laws cannot prohibit religious activity.⁹³ This means that local council by-laws that prohibit hate-based conduct may be susceptible to challenge. These include local by-laws prohibiting:

- ‘indecent, insulting, offensive or abusive language’ or behaviour;⁹⁴ and
- using a device to ‘display... offensive or inappropriate pictures, words, works or any other thing’.⁹⁵

Victorian local laws must be consistent with human rights,⁹⁶ and subject to community engagement.⁹⁷ It is therefore inappropriate for the Bills to override local laws that meet these criteria.

Conclusion

We thank the Committee for the opportunity to make this submission and for their time and consideration and can be contacted via the corresponding author if any further details are required on our submission.

Yours sincerely,

Dr Sean Mulcahy
BPA (Hons), LLB (Hons), PhD
Research Officer
Australian Research Centre in Sex, Health and Society,
La Trobe University, Bundoora
Corresponding Author
Email: s.mulcahy@latrobe.edu.au

⁹² Explanatory Memorandum, Human Rights Legislation Amendment Bill 2021, 8.

⁹³ Religious Discrimination Bill cl 5(3).

⁹⁴ Manningham’s Community Local Law 2013 cl 2.1(c). See also City of Stonnington General Local Law 2018 (No 1) cl 123(1)(i); Melbourne City Council Activities Local Law 2019 cl 2.1(f), (g); Manningham’s Community Local Law 2013 cl 2.6(b).

⁹⁵ City of Stonnington General Local Law 2018 (No 1) cl 117(1)(h).

⁹⁶ *Local Government Act 2020* (Vic) s 72(a).

⁹⁷ *Local Government Act 2020* (Vic) s 73(2).



Dr Kate Seear
BA (Hons), LLB (Hons), PhD
Associate Professor
Australian Research Centre in Sex, Health and Society,
La Trobe University, Bundoora

Dr Andrea Waling
BA (Hons), PhD
Senior Research Fellow
Australian Research Centre in Sex, Health and Society,
La Trobe University, Bundoora