



Law Council
OF AUSTRALIA

Religious Discrimination Bill 2021 and related bills

**Parliamentary Joint Committee on Human Rights
Senate Legal and Constitutional Affairs Committee**

17 December 2021

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful for the contributions of the Law Institute of Victoria (**LIV**), Queensland Law Society (**QLS**), Law Society of New South Wales (**LS NSW**), the Law Society of South Australia (**LSSA**), its National Human Rights Committee, Equal Opportunity Committee and the Constitutional Law Committee of its Federal Litigation and Dispute Resolution Section in responding to this submission.

Executive Summary

1. The Law Council welcomes the opportunity to respond to the Parliamentary Joint Committee on Human Rights (**PJCHR**) and the Senate Legal and Constitutional Affairs Committee (**the Committee**) regarding their inquiries into the Religious Discrimination Bill 2021 (**the Bill**) and related bills (the Religious Discrimination (Consequential Amendments) Bill 2021 (**Consequential Amendments Bill**) and Human Rights Legislation Amendment Bill (**Human Rights Bill**)).
2. The Law Council continues to recognise that there are opportunities to consolidate and strengthen federal protection against discrimination on the basis of religion. It refers in this regard to the 2018 findings of the Expert Panel on Religious Freedom² (**Religious Freedom Review**). While highlighting the absence of federal protections, the Religious Freedom Review also did not accept that religious freedom was in 'imminent peril'. As such, a measured and moderate approach to law reform, which accords with established federal, state and territory anti-discrimination laws, would seem appropriate.
3. The Law Council considers that many aspects of the Bill are unobjectionable. It also recognises improvements made since the Bill's second exposure draft. It welcomes the removal of the employer conduct rules concerning statements of belief, and health practitioner conduct rules concerning conscientious objections, which it considered to be unorthodox, complex and unnecessary departures from standard 'reasonableness' tests for indirect discrimination.
4. The Law Council is, however, concerned about certain aspects of the Bill. These include clause 12, which provides that statements of belief will not constitute unlawful discrimination under any Commonwealth, State or Territory anti-discrimination law. This provision 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. It waters down long-standing and hard-fought protections, upsets the usual balance of federal laws operating concurrently with State and Territory laws, and provides a defence for potentially harmful and humiliating statements made in public arenas which would otherwise be unlawful discrimination. The provision also adds significant procedural complexities and costs to resolving discrimination matters at the State and Territory level. The Bill's object in clause 3 regarding statements of belief should also be removed.
5. 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. Instead, Division 4 of Part 4 should set out any exceptions and exemptions as necessary and proportionate to these core objects, having regard to the indivisibility and universality of human rights, and the principle that every person is free and equal in dignity and rights.

² Religious Freedom Review: Report of the Expert Panel, 18 May 2018 (**Religious Freedom Review**).

6. Beyond clause 12, the Law Council raises for attention certain clauses of Part 2:
- Clause 7, which provides a general carveout for circumstances in which a religious body's conduct is not discrimination under the Bill. Such conduct is, therefore, not unlawful discrimination on the grounds of religion in any area of public life, including work, education, access to premises and the provision of goods, services and accommodation. The Law Council considers that this clause is overly broad, both in terms of the wide range of 'religious bodies' covered, and the loosely framed, subjective and uncertain thresholds established for conduct to fall within its scope. It recommends that this test be significantly tightened. It further suggests that religious educational bodies employment and education exceptions should be considered by the Australian Law Reform Commission's (**ALRC's**) inquiry into such matters.
 - Clause 9, which provides that employment and partnership-related conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is not discrimination under the Bill. This clause has a wide reach and covers bodies which are major employers in Australia and recipients of significant public funding. The Law Council understands the need for such providers to preserve the religious ethos of their organisations by ensuring that senior staff or chaplains, whose roles are inherent to achieving this objective, are of a particular faith. However, clause 9 is applicable across all employment. It may result in increased religious discrimination against individuals, including in lower paid roles, in circumstances in which it would not be reasonable to expect that they adhered to the faith of the hospital or service in order to perform the role. The Law Council queries the necessity for this clause in light of proposed 'inherent requirements' exception in subclause 39(2).
 - Clause 10, which provides an exception for reasonable conduct intended to meet a need or reduce a disadvantage. The Law Council supports including a positive discrimination exception. However, clause 10 is not, unlike comparable anti-discrimination law provisions, clearly directed towards ensuring equality, or remedying inequality. Instead, relevant conduct comes into consideration where there is an intention to 'meet a need' or 'reduce a disadvantage' based on a religious belief or activity. These are open-ended, undefined concepts. Clause 10 should be amended in line with comparable positive discrimination provisions.
 - Clause 11, which provides that a religious educational institution does not contravene a prescribed State or Territory law, if, when engaging in employment-related conduct, it gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity, and the conduct accords with a written, publicly available policy. Consequential amendments define the *Equal Opportunity Act 2010* (Vic) (**the Victorian Act**), which has recently been amended to tighten the exceptions available to religious educational institutions with respect to employment, as a prescribed law. The Law Council is concerned that there has been little public consultation on this new clause. It departs from orthodox Commonwealth anti-discrimination law, which is generally designed not to exclude or limit the operation of State or Territory law that is capable of operating concurrently with it. It also pre-empts the ALRC inquiry. It should be deleted from the Bill.
7. The Law Council generally supports Part 3 of the Bill, which defines the concept of discrimination on the ground of religious belief or activity. However, it does not support clause 15, concerning qualifying body conduct rules, which may impede the proper regulation of professions, including the legal profession. It is important that

legal professional bodies maintain the ability to regulate such conduct effectively and reasonably, under well-established professional ethical standards. Statements, even if they are made in a personal capacity, could reflect negatively on the profession, particularly its historical commitment to ensure equality before the law and defend the rights of all persons. Clause 15 is also unnecessary in light of the standard indirect discrimination provision in clause 14.

8. While the Law Council generally supports including an associates provision, it does not support the extension in clause 16 of the protections for ‘associates’ of religious individuals to body corporates. The Bill should protect natural persons, not body corporates, given that human rights are innately human.
9. With respect to Division 4 of Part 4, which includes clauses 46 to 48, relating to ability of the Australian Human Rights Commission (**AHRC**) to grant certain exemptions, the Law Council recommends amendments to ensure greater public transparency regarding these decisions, in line with comparable Commonwealth anti-discrimination provisions. It also considers that the Minister should not have the power to vary or revoke exemptions. Such powers are best exercised by the AHRC as an independent body with specific functions relating to the Bill.
10. Clause 64 provides the main Constitutional basis for the Bill, indicating that it gives effect to Australia’s obligations under listed international instruments. This submission identifies that the Bill does not align well with key human rights treaties in important respects. For example, clause 12, concerning statements of belief, does not reflect that the rights to manifest religion are subject to limitation, including where necessary to protect the fundamental rights and freedoms of others. This is a significant departure from the approach adopted under international human rights law. While the Law Council cannot, in the time available, be conclusive on this point, it considers that there are questions to resolve as to whether the external affairs power may be relied upon as the main Constitutional basis for the Bill.
11. Clause 68, concerning the relationship between the Bill and State or Territory laws, differs from the wording in comparable Commonwealth anti-discrimination law provisions, which more clearly demonstrate an intention that the Commonwealth laws are intended to operate concurrently with State or Territory laws which are capable of operating concurrently with them. This may mean that the Bill is more likely to lead to invalidity of provisions of State and Territory laws. The Law Council considers that clause 68 should reflect comparable Commonwealth provisions.

Introduction

12. The Law Council welcomes the opportunity to respond to the PJCHR’s and Committee’s inquiries into the Bill, the Consequential Amendments Bill and the Human Rights Bill. It has previously responded to:
 - (a) the second exposure draft of the Bill, in February 2020 (**Second Exposure Draft Bill**);³
 - (b) the first exposure draft of the Bill, in October 2019;⁴ and

³ Law Council of Australia, *Religious Freedom Bills – Second Exposure Drafts*, Submission to the Attorney-General’s Department, 4 February 2020.

⁴ Law Council of Australia, *Religious Freedom Bills*, Submission to the Attorney-General’s Department, 8 October 2019.

(c) the Religious Freedoms Review which preceded these Bills, in 2018.⁵

13. The current package of reforms comprises the Bill, the Consequential Amendments Bill and the Human Rights Bill.
14. 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. As such, should the Law Council's preliminary views in this submission require refining or augmenting, it may need to provide a supplementary submission.
15. The Law Council is also, at this time, generally responding to the Bill rather than the other legislation outlined above.

Need for a Federal human rights act

16. The Law Council considers that rights and freedoms should be protected in a coherent legal framework. Any option for reform in this area should promote the understanding that human rights are 'universal, indivisible, interdependent and interrelated'.⁶ The Law Council considers it is preferable to embed freedom of religion in a comprehensive and coherent framework of substantial rights protection, which recognises that limitations on rights⁷ must be necessary, and proportionate to the specific need, in order to be justified and permissible. This is best achieved through a federal human rights act.⁸ In the absence of such an act, piecemeal legislation which places an undue emphasis on giving effect to a single freedom may risk unjustifiably limiting the rights of others.
17. The Law Council has, since the release of the second exposure draft of the Bill, released a new Federal Human Rights Charter Policy Position setting out what might be appropriately contained in a federal human rights act.⁹ It emphasises in this context that Australia is the only democratic nation to not have a constitutional or statutory bill or charter of rights. It strongly recommends that the Australian Parliament should redress this situation.
18. There is also a need to pursue greater consistency and accessibility across Australia's federal anti-discrimination law framework, again avoiding a piecemeal legislative approach which creates further complexity and creates the potential for an uneven approach to rights protection. However, this should not be at the expense of lowering existing protections based on Australia's international obligations.
19. While the Law Council is yet to consider in detail the AHRC's newly released *Free and Equal: A reform agenda for federal discrimination laws* position paper, it

⁵ Law Council of Australia, *Religious Freedom Review*, Submission to the Expert Panel on Religious Freedom, 27 February 2018.

⁶ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5].

⁷ Other than rights which are absolute, as discussed below.

⁸ See HRC, *Concluding observations on the sixth periodic report of Australia*, 102nd sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [5]-[6].

⁹ Law Council of Australia, *Federal Human Rights Charter*, Policy Position, November 2020.

welcomes this contribution to reform and suggests that Parliament should carefully consider the AHRC's final report when released.

Recommendation:

- **The Australian Parliament should enact a Federal Human Rights Act.**
- **Careful consideration should also be given to pursuing greater consistency and accessibility across Australia's federal discrimination law framework, provided that this process preserves or enhances existing protections against discrimination, and does not lower such protections, based on Australia's international obligations.**

Outline of the Bill

20. The Bill responds to key recommendations of the Religious Freedom Review, in particular, that:

*The Commonwealth should... 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.*¹⁰

21. The purpose of the Bill is to promote the human rights to freedom of religion, equality and non-discrimination on the basis of religious belief or activity.¹¹ It is directed to ensuring 'that all people are able to hold and manifest their faith, or lack thereof, in public without interference or intimidation.'¹²
22. The Bill is said to be further intended to bring legislative protections for religious belief and activity to the same standard as those already afforded under federal discrimination law to discrimination on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities, marital or relationship status, pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status.¹³
23. The Bill makes it unlawful to discriminate against a person on the ground of religious belief or activity in a range of areas of public life, including in work, education, access to premises, the provision of goods, services, and accommodation.¹⁴ It encompasses both direct discrimination and indirect discrimination.¹⁵ Discrimination is unlawful if it occurs, eg, because of a religious belief or activity that the person holds or engages in.¹⁶ It is also unlawful if it occurs because of a person's

¹⁰ Religious Freedom Review report, Rec 15. The Bill also responds to: Recommendation 3 of the Religious Freedom Review, that Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretative clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion; and Recommendation 19, that the Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

¹¹ Parliament of the Commonwealth of Australia, House of Representatives, Religious Discrimination Bill, Explanatory Memorandum (**EM to the Bill**), 8.

¹² Ibid.

¹³ Ibid.

¹⁴ The Bill, Part 4.

¹⁵ The Bill, Part 3.

¹⁶ Ibid, cl 6.

association with someone else who holds or engages in a religious belief or activity.¹⁷

24. This approach to discrimination in Parts 3 and 4 of the Bill is generally orthodox in that it reflects the approach to prohibiting discrimination found in the *Sex Discrimination Act 1984 (Cth)* (**SDA**), the *Disability Discrimination Act 1992 (Cth)* (**DDA**) and the *Age Discrimination Act 2004 (Cth)* (**ADA**). Parts 3 and 4 are also generally in line with State based protections against religious discrimination which exist in all States and Territories, except new South Wales.¹⁸ There are certain exceptions to the Bill's approach in these Parts, including its provisions regarding qualifying bodies and associates provisions, as discussed in this submission.
25. The Bill departs from an orthodox approach to discrimination law, including religious discrimination, law in a number of important respects:
- it *permits* religious discriminatory conduct in a wide variety of ways¹⁹ including in religious hospitals, aged care facilities, accommodation providers and disability service providers;²⁰
 - it exempts from religious discrimination religious conduct which is substantially wider and more subjective than recognised religious exemptions in State religious discrimination provisions;²¹
 - it permits certain, but unspecified, State or Territory laws to be overridden so that a religious educational body may give preference on the grounds of religion in employment;²²
 - it makes *lawful* a 'statement of belief' by a person or a corporate body which would otherwise be unlawful by exempting such statements from all federal, State and Territory discrimination laws;²³
 - it extends the protection of religious discrimination laws to corporate bodies and unincorporated associations.²⁴
26. Although the Bill purports to implement certain international human rights conventions ratified by Australia it in fact departs from those relied on, putting in doubt the constitutional foundation for parts of the Bill. In particular, the preferencing of religious statements of belief over all other forms of discriminatory conduct departs in a major way from the interrelatedness, interdependence and indivisibility of human rights. This is particularly so where there is no mechanism for the balancing of different rights or for the application of the principle of proportionality in doing so.
27. The Bill provides for general and specific exceptions to unlawful discrimination.²⁵ Particular conduct involving advertisements and victimisation is an offence.²⁶
28. Conduct that is unlawful or an offence under the Bill is discrimination for the purposes of the *Australian Human Rights Commission Act 1986 (Cth)* (**AHRC Act**). Complaints can be made about such conduct to the AHRC, which can conciliate

¹⁷ Ibid, cl 16.

¹⁸ In South Australia, the relevant attribute on which unlawful discrimination is prohibited is religious appearance or dress.

¹⁹ Ibid cls 7(2) and 7(4).

²⁰ Ibid, cls 8-9.

²¹ Ibid cls 7(2), 9(3)(c) contrast ss 82-84 of the *Equal Opportunity Act 2010 (Vic)*

²² Ibid cl 11.

²³ Ibid cl 12.

²⁴ Ibid cl 16.

²⁵ Ibid, Part 4, Division 4.

²⁶ Ibid, Part 5.

complaints. Where conciliation is unsuccessful, an individual may apply to the Federal Court or the Federal Circuit and Family Court of Australia for a remedy, including compensation.

29. The Bill also establishes the new role of a Religious Discrimination Commissioner at the AHRC,²⁷ and confers functions on the AHRC in relation to discrimination on the ground of religious belief or activity.²⁸
30. The Bill's Explanatory Memorandum states that it 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.²⁹ In light of clause 12, this statement is not correct because a statement of belief can constitute discrimination.

Need for a proportionate response

31. The Law Council has previously recognised that there are opportunities to consolidate and strengthen the protections against discrimination on the basis of religion at the federal level, noting that the current federal protections for religious freedom are fragmented and inconsistent. In this context, the United Nations Human Rights Committee (**HRC**) has also registered its concerns regarding the 'lack of direct protection against discrimination on the basis of religion at the federal level'.³⁰
32. The Law Council also considers that a measured, balanced and proportionate approach should be adopted in addressing these federal gaps and inconsistencies. This is borne out by Religious Freedom Review remarks that it:

*... did not accept the argument, put by some, that religious freedom is in imminent peril, [however] it did accept that the protection of difference with respect to belief or faith in a democratic, pluralistic country such as Australia requires constant vigilance.*³¹

33. As such, the Law Council 'acknowledged the timeliness of the obligations ... to look again at the protection of religious freedom and its relationship with other rights, which are of equal weight and significance'.³²
34. The Religious Freedoms Review found that there was a significant data gap on the prevalence of harm suffered by people of faith in Australia.³³ It further found that 'by and large, Australians enjoy a high degree of religious freedom',³⁴ and that 'basic protections are in place in Australian law, including in the Australian Constitution, and in Commonwealth, State and Territory laws.'³⁵ Notably, it received relatively few personal examples of religious freedoms being infringed in Australia.³⁶
35. The data sources reviewed by the Religious Freedoms Review also suggested that the experience of discrimination may not be evenly experienced across all religious

²⁷ Ibid, Part 6.

²⁸ Ibid, Part 7.

²⁹ EM to the Bill, 2 [6].

³⁰ HRC, *Concluding observations on the sixth periodic report of Australia*, 102nd sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) (**Concluding Observations**), [17].

³¹ Religious Freedom Review, 8.

³² Ibid, 100.

³³ Ibid.

³⁴ Ibid, 104.

³⁵ Ibid.

³⁶ Ibid, 98.

groups, but possibly most acutely experienced amongst particular groups, such as Muslim and Jewish people.³⁷

36. In this context, research undertaken by RMIT Professor Anna Hickey-Moody regarding the experiences of faith groups reportedly found that Muslim women in Australia endure disturbing levels of public violence, abuse and racism.³⁸ At the same time, the labour force participation rate of Muslim women is very low, partially due to discrimination.³⁹ In the Law Council's view, these findings underline the importance of avoiding laws which are disproportionate and/or may exacerbate discriminatory outcomes amongst certain religious groups.
37. Importantly, the Religious Freedoms Review concluded that it did not support a Religious Freedom Act.⁴⁰ Further, the 'statutory expression of positive 'religious freedom' rights would need to be carefully crafted having regard to the need to reconcile them with the full suite of other human rights.⁴¹ This raises questions about the inclusion and proportionality of a number of measures in the Bill which are discussed below.

Context – Australia's international law obligations

38. The Appendix discusses several of Australia's relevant international law obligations, as set out in the International Covenant on Civil and Political Rights⁴² (ICCPR), International Covenant on Economic, Social and Cultural Rights⁴³ (ICESCR) and other core human rights treaties. They include the rights:
- (i) to freedom of religion and belief (including to manifest one's religion or belief);
 - (ii) for religious minorities, to profess and practise their own religion, alongside their culture and language;
 - (iii) to equality and non-discrimination on the basis of religion as well as other grounds such as race, sex and 'other status' including sexual orientation;
 - (iv) to freedoms of opinion and expression;
 - (v) to work; and
 - (vi) to education.
39. The Appendix refers briefly to how religious freedom in international human rights law addresses or relates to different scenarios, including the propagation of religious beliefs, and religious schools.

³⁷ Religious Freedom Review, 98-101.

³⁸ Sowaibah Hanifie, 'Muslim Australians found to suffer the 'most disturbing' experiences in public among all faiths', ABC (online), 7 May 2019, <<https://www.abc.net.au/news/2019-05-07/muslim-australians-found-to-suffer-most-disturbing-experiences/11058582>>.

³⁹ 'Fact check: Are more than half of Australia's working-age Muslims not in the workforce?', ABC (online), 6 September 2018, <<https://www.abc.net.au/news/2018-06-04/fact-check-muslim-workforce/9800656>>.

⁴⁰ Religious Freedom Review, 41.

⁴¹ Ibid.

⁴² Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴³ Opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976).

40. As the PJCHR is well aware, it is a well-established principle of international law that human rights are interrelated, interdependent and indivisible. International human rights law also recognises that certain human rights are absolute, and no limitation upon them is permissible. For all other human rights, limitations may be imposed, provided certain standards are met.
41. For example, as the Committee is also aware, the right to freedom of thought, conscience and religion, and the right to hold opinions, are held without limitation. However, the right to manifest one's religion or to freedom of expression can be subject to limitations. For example, the freedom to manifest one's religion may be subject to limitation as indicated in article 18(3) of the ICCPR - that is, as prescribed in law and where necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Meanwhile, the freedom of expression carries with it 'special duties and responsibilities'.⁴⁴ It may be subject to restrictions but only those that are provided by law and as necessary to protect others' rights and reputations, national security, public order, public health or morals.⁴⁵
42. Where limitations on rights are permissible, consideration must be given to the principles on which such limitations are justifiable. The Law Council notes that while freedoms of religion and expression are fundamental human rights and should be protected by law, they should not be protected at the expense of other rights and freedoms. There is also a fundamental right of each individual to respect for their personhood and dignity on the basis of equality. Any limitation on that must be clearly shown to be necessary and proportionate.
43. Where tensions arise with respect to conflicting rights, the mechanism used to balance these tensions is that of proportionality, a well-established principle of international law embodied in the above limitation. In general, a State must only interfere with a person's rights if the interference is proportionate to the legitimate aim pursued.
44. It is expected that domestic legislation that aims to implement international human rights obligations will utilise the principle of proportionality as part of an assessment of the necessity of a measure in order to determine whether a limitation on a right is justifiable. In considering when limitations on human rights may be permissible, the Law Council endorses the analytical framework adopted by the PJCHR. In general, where a provision appears to limit rights, the PJCHR considers whether and how:
 - the limitation is prescribed by law;
 - the limitation is aimed at achieving a legitimate objective;
 - there is a rational connection between the limitation and the objective; and
 - the limitation is proportionate to that objective.
45. The Law Council has had regard to the above matters, as discussed in more detail in the Appendix, in analysing the Bill's provisions below.

Analysis of the Bill

Improvements since Second Exposure Draft Bill

46. The Law Council welcomes key improvements which have been made to the Bill since its Second Exposure Draft was released.

⁴⁴ ICCPR, art 19(3).

⁴⁵ Ibid.

47. In particular, it welcomes the removal of ‘employer conduct rule’ provisions⁴⁶ from the Bill. In previous drafts, these proposed that it be prima facie unreasonable, and therefore indirect discrimination, for relevant employers to make employer conduct rules which restricted employees from making statements of belief outside the course of employment. The Law Council was concerned that these provisions formed unorthodox, complex and unnecessary departures from standard ‘reasonableness’ tests for indirect discrimination. It considered that they gave undue emphasis to the manifestation of religious freedom over other rights, and employers’ legitimate objectives of maintaining diversity and tolerance in the workplace.⁴⁷
48. The Law Council also welcomes the removal of ‘health practitioner rules’ provisions⁴⁸ from the Bill. These proposed that it be unreasonable, and therefore indirect discrimination, for an employer of a health practitioner to require that practitioner to provide a service to which they conscientiously object on religious grounds. They were, in the Law Council’s view, problematic in that they would have enabled conscientious objections to be made by practitioners to participating in health services, overriding State and Territory policy decisions, existing directives and medical codes of conduct, and departing from orthodox approaches to indirect discrimination. The Law Council was concerned that the case had not been made as to why these provisions were necessary in light of the existing indirect discrimination reasonableness test, and having regard to their potential impact on access to health care by vulnerable individuals.⁴⁹

Part 1 – Preliminary

Objects

49. The objects of the Bill are set out in clause 3. Recognising the freedom of all people to have or adopt a religion or belief of their choice, and freedom to manifest this religion either individually or in community with others, these include, under subclause 3(1):
- (a) to eliminate, so far as possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life;
 - (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and
 - (c) to promote the recognition and acceptance within the community of the principle that people of all religious beliefs, including people with no religious belief, have the same fundamental rights in relation to those beliefs; and
 - (d) to ensure that people can, consistently with Australia’s obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief (paragraph 3(1)(d)).
50. Under subclause 3(2), in giving effect to the objects of the Bill, regard is to be had to:

⁴⁶ Second Exposure Draft of the Bill, cls 8(3) and 8(5).

⁴⁷ Law Council of Australia, *Religious freedom bills – second exposure drafts*, Submission to the Attorney-General’s Department, 4 February 2020, 7.

⁴⁸ Second Exposure Draft of the Bill, cls 8(6) and 8(7).

⁴⁹ Law Council of Australia, *Religious freedom bills – second exposure drafts*, Submission to the Attorney-General’s Department, 4 February 2020, 18.

- (a) the indivisibility and universality of human rights, and their equal status in international law; and
- (b) the principle that every person is free and equal in dignity and rights.

51. The Law Council generally agrees with these objects and principles.
52. However, it holds concerns that certain provisions of the Bill, such as clause 12, privilege particular human rights over others and do not reflect the principles under subclause 3(2). This means that in practice, the underlying purposes will be defeated should clause 12 be retained.
53. The Law Council further supports the removal of paragraph 3(1)(d), which places undue weight upon ensuring that persons can make 'statements of belief' as one of the Bill's four objects. This may, with other problematic clauses in the Bill, contribute to a statutory imbalance between the protection of freedom of religion, compared with a range of other human rights, noting that the Bill's provisions will be interpreted in light of its objects. While the propagation of religious beliefs is recognised as part of the right to manifest religion, it is subject to limitations, and yet the Bill does not provide any mechanism for balancing religious statements against other human rights.

Recommendation:

- **Paragraph 3(1)(d) of the Bill should be removed.**

Definitions

54. The Explanatory Memorandum to the Bill states that:

The Bill does not define the term 'person'. Section 2C of the Acts Interpretation Act provides that expressions used to denote persons generally, such as person, include a body politic or corporate as well as an individual. Accordingly, consistent with that Act, a person for the purposes of this Bill includes natural persons, bodies corporate and bodies politic. This will ensure that the Bill prohibits all discriminatory conduct, regardless of whether that conduct was engaged in by a natural person, body corporate or body politic.

*The Bill is intended primarily to protect individuals from discrimination and does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities. However, the Bill does not preclude bodies corporate or other non-natural persons from being 'persons aggrieved' for the purposes of the AHRC Act in appropriate cases. For example, unincorporated associations may make a complaint under this Bill where the members who comprise the unincorporated association would be persons aggrieved (as per *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537). In addition, clause 16 of the Bill may protect a body corporate from discrimination on the basis of its association with a natural person who holds or engages in a religious belief or activity.*

This is consistent with existing anti-discrimination law, which protects individuals from discrimination on the basis of their inherent attributes, which can only be held by a natural person. This is also consistent with the ICCPR, namely the freedom of all people to engage in a religious

*belief or activity of their choice and to manifest this either individually or in community with others.*⁵⁰

55. The Law Council agrees that the Bill should protect natural persons, not bodies corporate. Human rights protect characteristics which are innately human, such as sex, race and religion.
56. As discussed in Part 3, the Law Council does not agree that clause 16, concerning 'associates', should extend to bodies corporate and recommends it be amended.
57. The Law Council notes that 'religious belief or activity' are defined under subclause 5(1) as:
 - (a) holding a religious belief; or
 - (b) engaging in a religious activity; or
 - (c) not holding a religious belief; or
 - (d) not engaging in, or refusing to engage in, religious activity.
58. Beyond this, the concepts of 'religious belief', 'religious activity' and religion itself are not defined in the Bill.
59. As noted in the Explanatory Memorandum to the Bill⁵¹, the Bill is informed by the broad, principled approach adopted by the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 (***Church of the New Faith***). Mason CJ and Brennan J provided that for the purposes of the law, the criteria for a religion are twofold:
 - (a) first, belief, in a supernatural Being, Thing or Principle; and
 - (b) second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.⁵²
60. In adopting this approach, the High Court intended to avoid exhaustive and rigid definitions which may become outdated over time and to accept that faith traditions may emerge or develop over time. The Law Council considers that the Bill's reliance on the High Court's decision in *Church of the New Faith* is appropriate.

Part 2 – Conduct that is not discrimination

61. The Bill is unorthodox in that 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.⁵³
62. A more standard approach to federal anti-discrimination laws sets out the key concepts of discrimination, followed by prohibitions on lawful discrimination, followed by general and specific exceptions to those prohibitions. It is noted that Part 4,

⁵⁰ EM to the Bill,

⁵¹ EM to the Bill, 35.

⁵² *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 137.

⁵³ Contained in the Bill, Part 4.

Division 4 of the Bill separately establishes exceptions from the Bill's prohibitions. The inclusion of exceptions and exemptions in both Parts 2 and 4 is confusing, and this is reflected in the need for clause 7(1).

63. As drafted, Part 2 may undermine the Bill's clause 3 objects, in particular:
- (a) eliminating, so far as possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life;
 - (b) ensuring, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and
 - (c) promoting the recognition and acceptance within the community of the principle that people of all religious beliefs have the same fundamental rights in relation to those beliefs.
64. The Law Council is concerned that Part 2 will not ensure that all Australians are protected from discrimination, and will instead enable such discrimination, including on the grounds of religious belief or activity.
65. It will, at certain points, override or invalidate Commonwealth and/or State and Territory anti-discrimination laws, which embody general standards of civilised conduct and should not be overridden by religious privileges.
66. The Law Council considers that rather than commencing with wide-ranging provisions which explicitly permit discrimination, the Bill should commence by prohibiting discrimination on the grounds of religious belief or activity, and then moving to exceptions and exemptions, as per the usual approach.
67. On this basis, it considers that Part 2 should be removed. Division 4 of Part 4 should set out any exceptions and exemptions as necessary and proportionate to the Bill's above objects, having regard to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.
68. However, this should not result in current Part 2 provisions being automatically transferred in their current form to Part 4. As discussed below, the Law Council considers that several of these provisions are either unnecessary or require substantial narrowing.

Recommendations:

- **Part 2 of the Bill should be removed. Division 4 of Part 4 should set out exceptions and exemptions, to the extent that these are necessary and proportionate, in light of:**
 - **the Bill's principal objects of eliminating discrimination and ensuring equality before the law, and**
 - **the indivisibility and universality of human rights.**

Clause 7 - Religious bodies may generally act in accordance with their faith

69. Clause 7 provides a general carve out for circumstances in which a religious body's conduct is not discrimination under the Act. Because this conduct is not discrimination under the Act, it is not unlawful to discriminate on the grounds of religion by engaging in that conduct in any area of public life, including work,

education, access to premises and the provision of goods, services and accommodation.

70. There are two general (alternative) tests for a religious body's conduct to fall within the carve out from the Bill:
- (a) the first, provides that a religious body does not discriminate against a person under the Act by engaging, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion.⁵⁴ This may include giving preference to persons of the same religion as the religious body,⁵⁵
 - (b) the second provides that a religious body does not discriminate under the Act, by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.⁵⁶ Again, this may include giving preference to persons of the same religion as the religious body.⁵⁷
71. There is a further requirement that religious educational institutions must have a publicly available policy in relation to conduct in the context of employment. Should a religious body which is an educational institution engage in conduct mentioned under the above tests in relation to matters described in clause 19 (about employment):
- (a) the conduct must be in accordance with a publicly available policy; and
 - (b) any other requirements determined by the Minister for the purposes of the policy.⁵⁸ The Law Council queries leaving these important requirements to delegated legislation.
72. Clause 19 of the Bill prohibits unlawful discrimination by employers on the ground of a person's religious belief or activity, including in relation to hiring employees, their terms or conditions of employment, promotions, dismissals and any other detriment. 'Employment', under the Bill, has an extended meaning and includes work under a contract, work that a person is otherwise engaged to perform, and paid or unpaid work.⁵⁹
73. Clause 7 thus enables religious bodies to discriminate against a person on the basis of their religious belief/activity, in circumstances which would otherwise be prohibited by the Act. It is noted that other federal anti-discrimination acts, eg the SDA, would continue to prohibit discrimination on the basis of other attributes, such as sex or sexual orientation.
74. As noted in the Bill,⁶⁰ clause 7 does not cover the conduct of religious hospitals, aged care facilities, accommodation providers or disability service providers. The conduct of these bodies is covered by clause 9.

⁵⁴ The Bill, cl 7(2).

⁵⁵ Ibid, cl 7(3).

⁵⁶ Ibid, cl 7(4).

⁵⁷ Ibid, cl 7(5).

⁵⁸ Ibid, cl 7(6). Subclause 7(7) contains the power for the Minister to, by legislative instrument, determine such requirements.

⁵⁹ Ibid, cl 5(1).

⁶⁰ The Bill, cl 7(1), Note 2.

Response

75. The Law Council is concerned that clause 7, as drafted, is disproportionately broad for the following reasons, and that this will foster greater religious discrimination, not less.

Religious body

76. Under clause 5(1) 'religious body' means any of the following that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion:

- (a) an educational institution (that is, a school, college, university or other institution at which education or training is provided)⁶¹;
- (b) a registered charity⁶²; or
- (c) any other kind of body (other than a body that engages solely or primarily in commercial activities).

77. The Law Council continues to be concerned at the breadth of the definition of 'religious body', especially when it is considered alongside the relatively loosely framed thresholds in clause 7, which are discussed below.

78. There is no requirement that the relevant body be 'established for religious purposes', only that it is 'conducted in accordance with the doctrines, etc of a particular religion'. The Law Council further notes that:

- (a) with respect to registered charities, there is no requirement that the charity have the sub-purpose of advancing religion, or that it is a Basic Religious Charity.⁶³ The Bill is broader than the Second Exposure Draft Bill, which referred to 'registered public benevolent institutions',⁶⁴ and
- (b) multiple bodies may fall within the 'any other kind of body' limb, provided that they do not engage solely/primarily in commercial activities. This requirement may be difficult for bodies to determine.

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

80. The definition of a religious body contrasts with the exceptions in paragraph 37(1)(d) of the SDA and section 35 of the ADA. These general exceptions from the

⁶¹ Ibid.

⁶² Which in turn means an entity that is registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) as the type of entity mentioned in column 1 of the item 1 of the table in subsection 25-5(5) of that Act (that is, a 'charity'): Ibid. Under section 5 of the *Charities Act 2013* (Cth), a 'charity' means an entity: (a) that is a not-for-profit entity; and (b) all the purposes of which are: charitable purposes that are for the public benefit; or purposes that are incidental or ancillary to, and in furtherance or in aid of, the charitable purposes of the entity; none of the purposes of which are disqualifying purposes; and that is not an individual, a political party or a government entity.

⁶³ Under the ACNC Act, 'Basic Religious Charities' are exempt from certain reporting requirements and the ACNC's Governance Standards. To be classified as a Basic Religious Charity, a charity can be registered only with the subtype of advancing religion and could not be registered as any other subtype (eg, it could not also be registered for the subtype of advancing education).

⁶⁴ That is a charitable institution with a main purpose of providing benevolent relief to people in need.

prohibitions on unlawful sex or age discrimination are afforded to 'bodies established for religious purposes', which significantly confines their scope.⁶⁵

Tests

81. As noted, the alternative tests are, that a religious body does not discriminate against a person under the Act by engaging, in good faith, in conduct:
- (a) 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 the religion (subclause 7(2); or
 - (b) to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body (subclause 7(4)).
82. The Law Council recognises that the 'good faith' element of this test is important. However, it has previously identified that this clause enables a lower threshold for conduct to come within the general exception than comparable Commonwealth exceptions.
83. In the Law Council's view, the general exceptions for religious bodies in existing paragraph 37(1)(d) of the SDA, and section 35 of the ADA provide the most appropriate comparison for the general clause 7 carveout.⁶⁶ These include tighter wording than subclauses 7(2) or 7(4) and apply to:
- ... an act or practice of a body established for religious purposes that:*
- *conforms to the doctrines, tenets or beliefs of that religion; or*
 - *is necessary to avoid injury to the religious sensitivities of adherents of that religion.*
84. These require an objective assessment of the relevant act or practice by the court by reference to the faith and its doctrines. By comparison, subclauses 7(2) or 7(4) are wider and more subjective in scope. The effect of the two definitions is that the discriminator may discriminate on the ground of religion even where the act of discrimination does not, in fact, conform to any teaching, benefit, tenet or doctrine of the religious body.
85. The Law Council recognises that courts and tribunals are generally reluctant to trespass into matters of religious doctrine and will usually afford a wide latitude in this regard. In *Hozack v The Church of Jesus Christ of Latter Day Saints*⁶⁷, Madgwick J observed that it is not appropriate for a Court to comment on the validity of doctrines.⁶⁸
86. However, under Commonwealth, State and Territory laws, it is generally the role of the court to determine whether a person's or body's conduct conforms with such doctrine or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion, where the resolution of conflicting rights is concerned under civil laws. The definitions remove determination of religious matters from a

⁶⁵ While section 38 of the SDA, provides exceptions for educational institutions which are conducted in accordance with the doctrines, etc of a particular religion or creed, these exceptions are narrower and more specific than the general exception under clause 7 of the Bill.

⁶⁶ These tests remove relevant conduct from being considered for the purposes of whether they are unlawful sex or age discrimination under the SDA or ADA.

⁶⁷ (1997) 79 FCR 441 (*Hozack*).

⁶⁸ *Hozack*, 460.

civil court, even though it is the civil court which is being asked to protect persons from religious discrimination. The Law Council is concerned that the clause 7 tests move away from this standard approach.

87. Subclause 7(2) moves the relevant lens to an assessment by a person of the same religion as the religious body. The Law Council considers that there may be multiple 'reasonable' interpretations amongst adherents of a religion as to what is in accordance with the doctrines, tenets, beliefs or teachings of a religion. Some religions have very large numbers of followers. This may undermine the certainty and clarity of the relevant provisions and broaden their scope. Further, there is no requirement that the relevant religious adherent be particularly well informed or senior within the religion, or that the reasonable interpretation be correct. This goes to the balance and proportionality struck in this provision.
88. The Law Council is not aware that this test appears elsewhere in Commonwealth, State or Territory legislation. It does, however, appear three times in the Bill,⁶⁹ and the Law Council's concerns also apply to those provisions. The SDA and ADA test, that an act or practice should 'conform' to the relevant doctrines, etc, would appear more appropriate.
89. With respect to the subclause 7(4), the Law Council recognises that the test that 'religious bodies do not discriminate by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of their faith' aligns with the wording of certain Commonwealth exceptions, in:
 - (a) paragraph 351(2)(c) of the *Fair Work Act 2009* (Cth) (**FWA**), which permits discriminatory adverse action to be taken against a staff member of an institution which is conducted in accordance with religious doctrines etc;
 - (b) the AHRC Act, which excludes employment-related discrimination by institutions conducted in accordance with religious doctrines etc from the definition of discrimination⁷⁰; and
 - (c) section 38 of the SDA, which provides a limited exception for religious educational institutions⁷¹ with respect to staff and students.
90. However, these exceptions are narrower and more specific in their application than the broad and general carveout which is proposed for religious bodies under subclause 7(4). As such, the general exceptions in paragraph 37(1)(d) of the SDA, and section 35 of the ADA, which require that the conduct be objectively 'necessary' to avoid injury, again appear more appropriate. They operate by reference to an element of necessity on the body to avoid injury to adherents, rather than the more subjective and less restricted approach of the Bill.

Policy requirement – religious educational institutions and employment

91. The Law Council's concerns remain despite subclause 7(6), which would require religious educational institutions to have a publicly available policy in relation to conduct in the context of employment. While it would result in greater transparency, such a policy may enable blanket discrimination on the basis of religious belief or activity against all employees or potential employees, regardless of the nature of the employment.

⁶⁹ The Bill, cls 7, 9 and 40 (religious camps).

⁷⁰ Other than Part IIB unlawful discrimination: AHRC Act, s 3(1).

⁷¹ An educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed: SDA, s 38.

92. The Law Council recognises that it may be necessary, to preserve the religious ethos of a religious educational institution, to ensure that senior leaders, whose positions inherently involve the upholding of the institution's values, have and practise a particular faith. This is a legitimate objective.
93. It is not, however, clear that this should extend to all employees, including a childcare worker, a school cleaner or gardener, a teacher of mathematics or a university soccer coach who is of a different religion, or who has no religion. Clause 7 may undermine the rights to work and to equality and non-discrimination of such individuals on the basis of their religious belief or activity, where it is irrelevant to their role in the institution. It is unclear that there is a rational connection between the limitations posed by clause 7 and its legitimate objective.
94. The Law Council also recognises that under article 18(4) of the ICCPR, parents and legal guardians are afforded the liberty of ensuring that their children receive a religious and moral education in conformity with their own views. However, clause 7 has a broad application to employment by religious educational institutions generally, rather than being clearly directed to what is required to receive such education. It is not established that a cleaner or gardener has a role in providing a religious and moral education. Clause 7 also applies to religious educational institutions beyond schools.
95. The Law Council considers that the necessity of including religious educational institutions and employment in clause 7 exclusions should be considered in light of the 'inherent requirements' exception in clause 39.
96. Subclause 39(2) provides that it is not unlawful for a person⁷² to discriminate against another person on the ground of religious belief or activity in employment or in a partnership, if the other person is unable to carry out the inherent requirements of the employment or the partnership because of their religious belief or activity. This exception applies with respect to much, although not all, work-related conduct, as set out in subclause 39(3).⁷³
97. It is unclear why subclause 39(2) provides an insufficient exception to enable religious educational institutions to discriminate in the area of employment or partnerships, where because of their religious belief or activity, a person is unable to carry out the inherent requirement of the employment or partnership. Should this be considered too narrow, a fallback exception could refer to 'a genuine occupational requirement'.
98. The Law Council adds that the requirement for a policy under subclause 7(6) would not apply to religious educational institutions in non-employment contexts. For example, provided that such an institution met the subclause 7(2) or 7(4) tests, it could expel a child or a student of a different faith, regardless of whether it had such a policy.

⁷² which may include a body politic or corporate: *Acts Interpretation Act 1901*(Cth), s 2C.

⁷³ Eg, arrangements for determining who should be offered employment, determining who should be offered employment or who should be invited to become a partner, the terms or conditions on which employment is offered, or a person is invited to become a partner, the terms or conditions of employment that are offered, determining who should be offered promotion or transfer, or dismissing the employee or expelling a partner. Certain other work-related conduct is excluded under subclause 39(3). For employment, this refers to denying/limiting access to opportunities to promotion, transfer or training, or any other benefits associated with employment; subjecting the employee to any other detriment). For partnerships, similar conduct is excluded.

99. This raises questions about the extent to which religious educational institutions should be included in the definition of a 'religious body' for the purposes of the general clause 7 carveout.
100. Such matters have also been referred to the ALRC for review. The terms of reference require the ALRC, inter alia, to inquire into, and report on, what reforms to relevant anti-discrimination laws, the FWA and any other Australian law should be made in order to:
- ...limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos.⁷⁴*
101. This inquiry is to have regard to certain matters, including the rights of all people, and children in particular, to be free from discrimination in education, as well as the importance of allowing religious institutions to conduct themselves in a manner consistent with their religious ethos.
102. While the ALRC will be tasked with confining its approach to matters not resolved by the Bill,⁷⁵ clause 7 seems to pre-empt that review.

Effect

103. As a result of the above features, clause 7 may except from the Bill's prohibition on religious discrimination:
- (a) a religious school which expels a student who entered in early primary school but has now relinquished his faith in his secondary school years;
 - (b) a religious-run homeless or family violence support centre which preferences individuals of the same religion over other people in need who are atheist or of a different religion;
 - (c) the rejection of a customer by a religious-run charity for a second hand shop on the basis that she lacked the same faith; and
 - (d) a religious-run university which sacks a migrant cleaner of a different faith from that of the institution for having different religious beliefs, provided that a policy is in place.

Law Council view

104. Clause 7 is not concerned with prohibiting discrimination on religious grounds, it is aimed at *permitting* religious discrimination in the name of religion.
105. The clause is aimed at providing a protection to those religious bodies which wish to exclude persons from other religions. In a religious school setting this would allow a

⁷⁴ The Terms of Reference for this inquiry (amended on 4 March 2020) also require the ALRC to inquire into, and report on, what reforms should be made in order to remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), where such impediments continue to exist despite the enactment of the Religious Discrimination Bill. The ALRC must confine its inquiry to issues not resolved by that Bill, and should confine any recommendations to legislation other than the Religious Discrimination Bill.

⁷⁵ Ibid.

school to require that its students be of the same faith as the school. It would allow the same school to exclude ('give preference to') people of other faiths or of no faith from employment, even where the employment had nothing to do with the propagation of religion, and was not clearly connected to parents' rights to ensure the religious and moral education of their children, in conformity with their own convictions.⁷⁶ The provisions do not encourage diversity, they point to narrower and more exclusive religious bodies which, in fact, provide services to the general community and generally receive significant public funding.

106. The Law Council queries whether cause 7 is reasonable, proportionate and necessary as drafted. The clause has the potential to enable a wide range of religious bodies to discriminate on religious grounds against people of other faiths, or with no faith. In turn, this is likely to undermine their rights including to equality and non-discrimination, work and education. This discrimination is likely to operate most strongly against already disadvantaged people who are least likely to be able to find alternative services or employment.
107. This undermines the Bill's expressed intention to promote a tolerant, diverse and inclusive Australia, by providing that many religious bodies, including those who engage daily with, serve, teach or employ a broad cross-section of the public, are exempt from its prohibitions for a wide range of conduct which would otherwise constitute religious discrimination.
108. In those States where religious discrimination is currently prohibited it will have the effect of making it easier to discriminate on the grounds of religion. This is because, as discussed under Part 8 below, subclause 68(1) of the Bill only permits State based anti-discrimination legislation to operate where it can do so concurrently with the Act. As clause 7 would permit religious discrimination which is prohibited under State laws there is a reasonable likelihood that s 109 of the Constitution would have the effect of excluding the operation of the State law. That is, there would be a direct inconsistency in the way described by the High Court in *Work Health Authority v Outback Ballooning* (2019) 93 ALJR 212 at [32].
109. As State law has a narrower religious exemption for discriminatory conduct, as set out above, this would mean that more religious discrimination could occur, not less.
110. Clause 7 may also have a particular impact upon adherents of minority religions. In this regard, the HRC has noted that:
 - (a) measures which discriminate against adherents of minority religions, or non-believers, such as measures imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.⁷⁷
 - (b) it also considers that information as to respect for the rights of religious minorities under article 27 of the ICCPR is necessary to assess the extent to which the right of freedom of thought, conscience, religion and belief has been implemented by States parties.⁷⁸
111. The Law Council considers that clause 7 should be narrowed and aligned with paragraph 37(1)(d) of the SDA and section 25 of the ADA. This would bring it into line with comparable general Commonwealth exceptions, and ensure that it has a

⁷⁶ Eg, ICCPR, art 18(4).

⁷⁷ HRC General Comment No 22, [9].

⁷⁸ *Ibid*, [9].

more limited scope in its application to acts or practices of bodies 'established for religious purposes'. It would also bring greater objectivity and a higher threshold of 'injury or compulsion' to relevant thresholds.

112. To the extent that further exceptions are necessary to deal with particular scenarios, such as for religious educational institutions in the context of employment, these should be set out in Part 4 and limited in scope— eg, limited to staff whose religious belief or activity is inherent to the requirements of their position. Should this be considered too narrow, the exception could refer to 'a genuine occupational requirement'.

Recommendations:

- **Clause 7 should be amended, in line with paragraph 37(1)(d) of the SDA and section 25 of the ADA, to apply only to:**
An act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Clause 9 - Conduct of religious hospitals, aged care facilities, accommodation providers and disability services

113. Clause 9 sets out some areas of public life (employment and partnerships) in which the conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is not discrimination under the Act.

114. Under subclause 9(2), clause 9 applies to:

- (i) a body (**a religious hospital**) that establishes, directs, controls or administers a hospital in accordance with the doctrines, tenets, etc of a particular religion;
- (ii) a body (**a religious aged care facility**) that establishes, directs, controls or administers an aged care facility in accordance with the doctrines, tenets, etc of a particular religion;
- (iii) a body (**religious accommodation provider**) that solely or primarily provides accommodation in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and
- (iv) a body (**a religious disability service provider**) that solely or primarily provides services to people with disability in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

115. Under subclauses 9(3) and 9(5), these bodies do not discriminate against a person under the Act by engaging in conduct which:

- (a) is either employment-related, or partnership-related;⁷⁹

⁷⁹ That is, if the body is an employer – the relevant conduct is described in clause 19 (about employment); or if the body is a partnership or a partner in a partnership – the conduct is described in section 20 (about partnerships): eg, the Bill, cls 9(3)(a) and 9(5)(a).

- (b) is engaged in by the body in good faith;
- (c) in accordance with a publicly available policy, which meets any requirements determined by the Minister; and
- (d) either:
 - (i) 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 the religion (subclause 9(3)); or
 - (ii) the body engages in the conduct in good faith to avoid injury to the religious susceptibilities of adherents of the same religion as the body (subclause 9(5)).

116. This includes giving preference to a person of the same religion as the body (subclauses 9(4) and 9(6)).

117. As noted, 'employment' has an extended meaning in the Bill and includes; work under a contract of employment; or work that a person is otherwise appointed or engaged to perform (whether the work is on a full-time, part time, temporary or casual basis or whether it is casual or unpaid).⁸⁰

118. As above, relevant conduct may still breach other federal anti-discrimination laws if, eg under the SDA, it unlawfully discriminates in the area of employment or partnerships on the basis of sexual orientation.

Response

119. While it recognises that clause 9 is restricted to religious discrimination in the employment and partnership contexts, the Law Council raises concerns about the breadth of clause 9.

120. It notes that a wide range of bodies are covered, which provide services of importance across the community. As with clause 7, the relevant tests in subclauses 9(3) and 9(5) are overly broad, subjective and uncertain. The Law Council's above comments at paragraphs 81 to 90 also apply here.

121. The Law Council recognises the need for religious hospitals, aged care facilities, accommodation providers and disability services to preserve the religious ethos of their organisations, in particular by ensuring that senior staff or chaplains, whose roles are inherent to achieving this objective, are of a particular faith. However, clause 9 is applicable across all employment by these organisations, including junior roles. It may enable discrimination against hospital orderlies or occupational therapists, whose religious views are irrelevant to their effective performance in their role. This suggests a lack of rational connection between the measure and its objective.

122. Religious hospitals, aged care facilities, accommodation providers and disability service providers are major employers in Australia, as well as recipients of significant public funding. According to Catholic Health Australia, the total number of employees in the Catholic health and aged care sector is over 83,000 (noting that a

⁸⁰ The Bill, subclause 5(1).

substantial subset of these will be hospital and aged care staff).⁸¹ It provides approximately 10 per cent of hospital and aged care services in Australia.⁸²

123. As drafted, the Bill may result in increased discrimination on the basis of religious belief or activity against, eg migrants of minority faiths, many of whom perform lower paid aged care or hospital care services and have few economic choices, in circumstances in which it would not be reasonable to expect that they adhered to the faith of the hospital or service in order to perform the role.
124. Migrants form a significant and growing proportion (37 per cent) of Australia's non-professional frontline care workforce, including care for the elderly and people with disability.⁸³ A sizeable and increasing proportion of this low-skilled, predominantly female workforce is from South Asia, South East Asia, and South and East Africa.⁸⁴ Many will be employed by the bodies which come within the ambit of clause 9, and many are likely to hold and practise religions which are in the minority in this country.
125. The Law Council refers to the HRC's authoritative statements discussed in paragraph 110 above, regarding the importance of ensuring that measures which are directed towards upholding religious freedom do not breach the rights to equality and non-discrimination of adherents to minority religions, and the separate protections afforded to minority groups under article 27.
126. On this basis, the Law Council does not consider that, if the Bill is intended to promote religious tolerance and diversity, the case has been made that such a broad-based carveout, which enables religious discrimination against staff across a substantial employment sector, is reasonable, necessary and proportionate.
127. It is also the case that there are critical workforce shortages in the aged care sector, with calls for urgent migrant intakes to fill these gaps.⁸⁵ Given that lack of quality staff has undermined the standard of patient care able to be reliably provided, there may be practical ramifications for vulnerable older Australians, should clause 9 be passed, due to its imposition of additional employment barriers.
128. More generally, religious hospitals, aged care facilities, accommodation providers and disability service providers provide services for many members of society who are in vulnerable situations. Such bodies should employ the most suitably qualified candidates to ensure the highest standards of care.
129. Finally, the need for clause 9 should be carefully considered in light of the proposed 'inherent requirements' exception in clause 39 of the Bill. As set out above, subclause 39(2) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity in employment or in a partnership, if the other person is unable to carry out the inherent requirements of the employment or the partnership because of their religious belief or activity.⁸⁶

⁸¹ Catholic Health Australia, '[The Sector](#)' (undated).

⁸² *Ibid.*

⁸³ Christine Eastman Sara Charlesworth and Elizabeth Hill, 'Factsheet 1: Migrant Workers in Frontline Care', Markets, Migration and the Work of Care, RMIT University, UNSW, University of Sydney and University of Toronto [publication](#).

⁸⁴ *Ibid.*

⁸⁵ Dana Dariel, 'Skilled migration needed to relieve aged care staffing crisis, providers say', Sydney Morning Herald, 9 November 2021.

⁸⁶As noted above, this exception applies with respect to particular, although not all, work-related conduct (see subclause 39(3)).

130. It is unclear why subclause 39(2) provides an insufficient exception to enable religious hospitals, aged care facilities, accommodation providers and disability services to discriminate in the area of employment or partnerships, where because of their religious belief or activity, a person is unable to carry out the inherent requirement of the employment or partnership.
131. Alternatively, the Law Council recommends that should clause 9 be retained, it should be narrowed to apply only where it is a genuine occupational requirement that a person be of a particular religion in order to perform their role in the organisation effectively.
132. Further, paragraphs 9(3)(c) and 9(5)(c) are in the same terms as subclauses 7(4) and 7(6) addressed above. For the same reasons set out, should clause 9 be retained, the same test should be adopted.

Recommendations:

- **The necessity and proportionality of clause 9 should be reconsidered in light of the proposed ‘inherent requirements’ exception for employment and partnerships in clause 39 of the Bill.**
- **Should clause 9 be retained, it should:**
 - **be narrowed to apply only where it is a genuine occupational requirement that a person be of a particular religion in order to perform their role in the organisation effectively; and**
 - **be amended to apply only to:**

An act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Clause 10 - Reasonable conduct intended to meet a need or reduce a disadvantage

133. Clause 10 provides a further carveout or exception from discrimination under the Bill. Under clause 10, a person does not discriminate against another person under the Bill by engaging in conduct that:
- (a) is reasonable in the circumstances; and
 - (b) is consistent with the purposes of the Bill; and
 - (c) either:
 - is intended to meet a need arising out of a religious belief or activity of a person or group of persons; or
 - is intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person’s or group’s religious beliefs or activities.
134. It is notable that clause 10 does not seek to ensure that persons with religious beliefs or engaging in religious activities have equality of opportunity with other persons in the circumstances in Part 4 of the Bill. In doing so it departs from the positive discrimination provisions in allied legislation such as section 45 of the DDA and section 7D of the SDA.

135. Rather than being addressed to remedying inequality, clause 10(1)(c) permits conduct where there is an intention to 'meet a need' or 'reduce a disadvantage' based on 'a religious belief or activity' or 'the person's or group's religious beliefs or activities', respectively. Either intention need not be in accordance with the constraints provided by subclauses 7(2) (in accordance with doctrines, tenets, beliefs or teachings) or 7(4) (injury to religious susceptibilities).
136. Such a 'need' or 'a reduction of a disadvantage' may be viewed by the persons engaging in such conduct as very wide. The word 'disadvantage' is at large and is not tied to the carefully drafted definition of 'discrimination' found in Part 3 of the Bill and therefore sits outside the objects and structure of it.
137. Clause 10(1)(a) is objectionable because it has the effect of requiring that the conduct be reasonable to meet the need or reduce the disadvantage. In a departure from the objects and structure of the Bill. It does not require that the conduct be reasonable *to achieve equality*.
138. Further, clause 10(1)(b) directs attention to whether conduct is consistent with the Bill's purposes. Its objects, along with clauses 12 and 15, would be relevant to the interpretation of its purposes. Currently, these include ensuring that people can make statements of belief.⁸⁷
139. As drafted, clause 10 may make conduct which would otherwise be unlawful under the Bill - because it discriminates on the basis of religious belief or activity – lawful, where such conduct is intended to 'meet a need arising out of a religious belief or activity of a person or group of persons' eg, by facilitating statements of belief. This may be considered consistent with the purposes of the Bill; and reasonable in the circumstances.
140. That is not to say that positive discrimination should not be permissible. The preferable model is that provided in section 45 of the DDA.
141. Subsection 45(1) provides that it is not unlawful to do an act 'reasonably intended' to ensure people with disabilities have equal opportunities, equal access to goods and facilities and affords persons who have a disability with grants, benefits or programs to meet their special needs. However, subsection 45(1) is limited to where the discrimination is 'necessary for implementing the measure' (subsection 45(2)).
142. In the Law Council's opinion, exceptions to anti-discrimination provisions should only be as broad as is necessary to achieve the principles of equality and non-discrimination as set out in the objectives of the Bill (clause 3) other than clause 3(1)(d).
143. The Law Council recommends that clause 10 be removed and replaced with an ability to permit positive discrimination in the way set out at section 45 of the DDA.

⁸⁷ The Bill, para 3(1)(d).

Recommendation:

- **Clause 10 of the Bill should be removed, and replaced with an ability to permit positive discrimination following the model in section 45 of the DDA.**

Clause 11 – Conduct in relation to employment by religious educational institutions – overriding certain State and Territory laws

144. Subclause 11(1) provides that a religious body that is an educational institution does not contravene a prescribed State or Territory law if:
- (a) when engaging in conduct described in clause 19 (about employment), the religious body gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity, and
 - (b) the conduct accords with a written, publicly available policy that:
 - (i) outlines the religious body's position in relation to particular religious beliefs or activities; and
 - (ii) explains how the position in subparagraph (i) is or will be enforced by the religious body; and
 - (iii) is publicly available, including at the time employment opportunities with the religious body become available.
145. A 'particular religious belief or activity' is not defined in the Bill.
146. Under subclause 11(2) of the Bill, a 'prescribed State or Territory law' means a law of a State or Territory that is prescribed under subclause 11(3).
147. Under subclause 11(3), the regulations may prescribe one or more laws of a state or a territory for the purposes of subsection (2) if the Minister is satisfied that the law has the effect of both:
- (a) prohibiting discrimination on the ground of religious belief or activity; and
 - (b) preventing religious bodies that are educational institutions from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity.
148. Any regulations made would appear to be subject to disallowance under section 42 of the *Legislation Act 2003* (Cth).
149. Subclause 11(4) states that clause 11 is intended to apply to the exclusion of a law of a State or Territory so far as it would otherwise apply in relation to the conduct of a religious body that is an educational institution only if the law is prescribed under subclause 11(3).

Consequential Amendments Bill

150. Schedule 2 of Consequential Amendments Bill will commence on the later of: immediately after the commencement of: the Bill; and immediately after Division 2 of Part 2 of the *Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic)*.⁸⁸
151. Schedule 2, item 1 repeals above clause 11(2) and substitutes that a ‘prescribed State or Territory law’ means:
- (a) the Victorian Act; or
 - (b) a law of a State or Territory that is prescribed under subsection (3).
152. It also repeals subclause 11(4) as set out above.

Victorian legislation

153. The Victorian Parliament recently passed amendments to the Victorian Act, under the *Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic)* (**Victorian Amendment Act**), with the intention of better protecting LGBTIQ+ Victorians working within religious organisations and schools.⁸⁹ It was given Royal Assent on 14 December 2021.⁹⁰
154. Previously, under the Victorian Act, religious schools and bodies could discriminate against a person on the basis of attributes such as sexuality, marital status, gender identity or other protected attributes – eg, in refusing to employ, or firing a person. They could do so where the discrimination conformed to the doctrines, beliefs or principles of the religion, or was reasonably necessary to avoid injuring other people’s beliefs.⁹¹
155. Amongst its other amendments, the amendments have the effect that when employing staff, religious bodies and religious educational institutions can only discriminate where conformity with religious doctrines, beliefs or principles is an inherent requirement of the position, the other person cannot meet that inherent requirement because of their religious belief or activity and the discrimination is reasonable and proportionate in the circumstances.⁹²

Response

156. Clause 11 is new in the Bill, and did not appear in the First or Second Exposure Draft Bills. Therefore, there has not been public consultation on clause 11 prior to the Bill’s introduction to Parliament.

⁸⁸ Consequential Amendments Bill, cl 2.

⁸⁹ Premier of Victoria, The Hon Daniel Andrews, ‘Stronger Protections Against Discrimination Introduced’ (Media release, 27 October 2021).

⁹⁰ Section 2 of the Victorian Act states that: 1) Subject to subsections (2) and (3), this Act comes into operation on a day or days to be proclaimed. (2) If a provision of this Act, other than Division 2 of Part 2, does not come into operation before the day that is 6 months after the day on which this Act receives the Royal Assent, it comes into operation on that day. (3) If Division 2 of Part 2 does not come into operation before the day that is 12 months after the day on which this Act receives the Royal Assent, it comes into operation on that day.

⁹¹ The Victorian Act ss 82(2) (religious bodies) and 83(2) (religious schools).

⁹² Ibid new paras 82A(1)(a) (religious bodies) and 83A(1)(a) (religious educational institutions). In addition, when providing government funded goods of services, religious bodies will only be able to discriminate on the basis of a person’s religious belief, and not on other personal characteristics: Ibid new s 82B.

157. The Law Council notes that there is relatively little explanation or rationale provided for clause 11 in the Explanatory Memorandum.⁹³ The latter states that:

*This provision recognises that religious educational institutions may preference in employment an individual who holds or engages in beliefs or activities that are consistent with the school's religious approach. This operates irrespective of whether the relevant person is of the same religion as the educational institution, or has no religion.*⁹⁴

158. It further states that:

*The requirement for a written, publicly available policy would increase certainty and transparency and ensure the general public is able to ascertain and understand the position of a religious body in relation to preferencing in employment prior to seeking employment or otherwise engaging with the religious body.*⁹⁵

159. The Law Council does not consider that the requirement for an institution to have a policy in place provides a sufficient safeguard. While this would increase transparency, it may nevertheless enable blanket discrimination against individuals on the basis of their 'particular religious belief or activity' in the context of employment preferences.

160. It is readily apparent that clause 11 is aimed at State or Territory anti-discrimination laws that prohibit religious discrimination but is not limited to such legislation. An obvious example is the religious discrimination provisions of the *Anti-Discrimination Act 1991* (Qld).⁹⁶ There are similar protections in Victoria, South Australia, Western Australia, Tasmania, the ACT and the NT (but not NSW).

161. The Law Council notes that this clause represents a potentially significant departure from orthodox Commonwealth anti-discrimination law, which is generally designed not to exclude or limit the operation of State and Territory law that is capable of operating concurrently with it.⁹⁷ However, clause 68 of the Bill adopts a different approach, by which the Bill is not intended to exclude or limit the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with it. Clause 68 is discussed below.

162. Under the Bill, a religious educational institution could give preference to persons who hold a particular religious belief or activity in employment as described under subclause 11, provided that it met the remainder of the requirements set out in subclause 11(1). It would not contravene the

163. The Law Council has previously queried whether existing exceptions in the SDA permitting religious educational institutions to discriminate on the basis of employment are appropriate as they are currently worded.⁹⁸ It highlighted that there was scope to consider whether the current use of broad, permanent exemptions in

⁹³ EM to the Bill, 52-53.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Qld Act, ss 7-11.

⁹⁷ Eg, SDA, s 10(3).

⁹⁸ Eg, subsection 38(1) of the SDA provides an exception for such institutions to discriminate on such grounds for the purposes of determining eg, who should be offered employment, or dismissing an employee, provided that this was done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed: Law Council of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 January 2018.

the SDA strikes the appropriate balance between the freedom to manifest one's religion and protections for other rights in this area. It submitted that, if discrimination against people employed or contracted by religious schools was to be maintained, there needed to be consideration by Parliament as to whether this is justified, necessary and proportionate to what schools are trying to protect.⁹⁹

164. In the circumstances, the Law Council is reluctant to support new clauses which may override efforts to narrow similar exemptions at the State and Territory level. It is particularly mindful of the views of its constituent bodies in this regard. The LIV has emphasised that it has been a longstanding advocate of the recent Victorian reforms. It is concerned that if the Bill is passed, it will:

... override legislation that protects Victorians with protected attributes and promotes inclusivity. These reforms were hard fought for and it would be detrimental to the Victorian population to see them overridden.

165. The QLS is similarly concerned that the Bill's explicit intention in clause 11 to override State and Territory laws is ill advised and, if applied to Queensland legislation under the Minister's new ability to prescribe State and Territory laws, will produce multiple adverse consequences.
166. With respect to subclause 11(3), the Law Council's general position is that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. It does not consider that Parliament's ability to disallow any regulations made provides a sufficient safeguard in this regard.
167. As noted, religious exemptions in federal, State and Territory laws have also been referred to the ALRC for review. It must consider what reforms should be made in order to:

... limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos.¹⁰⁰

168. While the ALRC will be tasked with confining its approach to matters not resolved by the Bill,¹⁰¹ clause 11 seems to pre-empt that review.
169. The Law Council does not consider that the case for clause 11 has been made out. It recommends that it be removed from the Bill.

Recommendation:

- **Clause 11 should be removed from the Bill.**

⁹⁹ Ibid.

¹⁰⁰ The Terms of Reference for this inquiry (amended on 4 March 2020) also require the ALRC to inquire into, and report on, what reforms should be made in order to remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), where such impediments continue to exist despite the enactment of the Religious Discrimination Bill. The ALRC must confine its inquiry to issues not resolved by that Bill, and should confine any recommendations to legislation other than the Religious Discrimination Bill.

¹⁰¹ Ibid.

Clause 12 - Statements of belief

170. Subclause 12(1) of the Bill provides that a statement of belief, in and of itself, does not:
- (a) constitute discrimination for the purposes of specified Commonwealth anti-discrimination laws¹⁰² (including the Bill, when passed), and State and Territory anti-discrimination laws;¹⁰³ or
 - (b) contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) (**the Tasmanian Act**)¹⁰⁴; or
 - (c) contravene a provision of a law prescribed by the regulations for the purposes of that paragraph.
171. The Explanatory Memorandum explains that by providing for exceptions for statements of belief from all Commonwealth, State and Territory anti-discrimination laws, this will have the flow-on effect of removing the ability of an employee to commence an adverse action claim under the FWA, where the statement of belief was otherwise discriminatory and unlawful.¹⁰⁵
172. Subclause 12(2) provides that subclause 12(1) does not apply to a statement of belief that is:
- (a) 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) (ie, would counsel, promote, encourage or urge conduct that would constitute a serious offence).
173. Note 1 to subclause 12(2) states ‘a moderately expressed view that does not incite hatred or violence would not constitute vilification’.¹⁰⁶
174. Under subclause 5(1), a statement is a ‘statement of belief’ if the statement:
- (a) is of a religious belief held by a person; and
 - (b) is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and

¹⁰² The *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth), as well as the Bill, when passed.

¹⁰³ The *Anti-Discrimination Act 1977* (NSW); the *Equal Opportunity Act 2010* (Vic); the *Anti-Discrimination Act 1991* (Qld) (**Qld Act**); the *Equal Opportunity Act 1984* (WA); the *Equal Opportunity Act 1984* (SA); the *Anti-Discrimination Act 1998* (Tas); the *Discrimination Act 1991* (ACT); the *Anti-Discrimination Act* (NT).

¹⁰⁴ Subsection 17(1) of the Tasmanian Act provides that a person must not engage in any 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, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

¹⁰⁵ EM to the Bill, [180].

¹⁰⁶ The Commonwealth, by making all material in an Act a part of the Act, elevates all notes to the same status as the provisions of the Act: *Acts Interpretation Act 1901* (Cth), s 13(1).

(c) is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

175. A statement of belief may, under subclause 5(1), also be made by a person who does not hold a religious belief, where it is made in good faith etc, and is of a belief that the person genuinely considers relates to the fact of not holding a religious belief.

176. The Law Council notes there are some differences from the Second Exposure Draft Bill. These differences include the subclause 12(2) exclusion, which now introduces a 'reasonable person' test and covers a statement which would 'intimidate'. Previously, this required that the statement would 'seriously intimidate'. It expands the scope of statements which would not be covered by subclause 12(1).

177. However, the definition of a statement of belief has also altered since the Second Exposure Draft Bill. Under the earlier definition:

(a) the second limb of the above test did not refer to 'or other communication (other than physical contact)' by the person. This expansion is intended to capture physical gestures that have a religious meaning, such as a person crossing themselves;¹⁰⁷

(b) the third limb referred to 'a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. Under the Bill, this has altered so that it requires only a subjective - while genuine - belief by the maker of the statement. There is no requirement that the statement could reasonably be considered to be in accordance with the religious doctrines etc.

178. These latter amendments have the effect of expanding the range of statements of belief which fall within the subclause 12(1) defence, unless they fall within the subclause 12(2) exclusion.

Law Council view

179. The Law Council considers that clause 12 should be omitted. Its view is that reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination and promote substantive equality. By expressly overriding existing Commonwealth, State and Territory discrimination laws, the Bill prioritises freedom of religion at the expense of existing anti-discrimination provisions. It extends a positive right to discriminate and denigrate based on religious beliefs, and prevents legitimate discrimination claims from being brought under well-established laws. It has the potential to impact social cohesion and reinforce stigma for those who are already marginalised in the community.

180. Clause 12 is highly unusual in that it seeks to override existing anti-discrimination laws at the Commonwealth, State and Territory level. This does not appear in other Commonwealth anti-discrimination laws which are generally intended to operate concurrently with State and Territory laws.¹⁰⁸ Clause 12 stands alone in this respect.

181. One relevant situation may involve a discriminatory course of conduct in a workplace, which consists of a number of statements of religious belief. This could include, for example, an oral statement that 'the Koran says that a woman's word is

¹⁰⁷ EM to the Bill, 54.

¹⁰⁸ Eg SDA, s 10, which states that. Contrast with clause 68(1) of the Bill, as discussed below.

worth half that of a man's' which is repeated multiple times. This would appear to attract the protection offered by subclause 12(1), which would provide a defence to a discrimination under specified federal, or State or Territory anti-discrimination law. That is, subclause 12(1) provides a complete defence where the discriminatory conduct is comprised entirely of such statements.¹⁰⁹ The inclusion of such a defence will place a major limitation on well-established federal, State and Territory protections against sex discrimination in the workplace (and other forms of discrimination across multiple areas of public life).

182. Another example may involve a doctor whose patient is a single teenage girl seeking contraception, where the doctor states throughout a consultation that according to the Bible, it is a sin for unmarried women to fornicate. Even if the contraception is prescribed, this may have a harmful effect on the girl, and inhibit her future access to healthcare.
183. Clause 12 does not reflect that the rights to manifest religion or to freedom of expression are subject to limitation under international human rights law.¹¹⁰ As noted, whereas the freedom to have or adopt a religion or belief is not subject to limitation, the freedom to manifest one's religion or beliefs may be subject to limitation as indicated in article 18(3) of the ICCPR - that is, as prescribed in law, and where necessary to protect public safety, order, health, or morals, **or the fundamental rights and freedoms of others.**¹¹¹ [emphasis added]
184. In this specific context, the United Nations HRC has observed that:

*In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the ICCPR, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. Limitations must be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.*¹¹²

185. Clause 12 conflicts with this authoritative interpretation of, and does not give effect to, Australia's international law obligations, or reflect:
- the preamble to the ICCPR, which emphasises the importance of recognising 'the inherent dignity and the equal and inalienable rights of all members of the human family in the foundation of freedom, justice and peace in the world'; or
 - the well-established principle of international law that:
All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights

¹⁰⁹ Given the words, 'in and of itself' in subclause 12(1), a discriminatory course of action which consists of religious statements *combined* with other unlawful conduct (eg, in the workplace example above, the demotion of sacking of the woman concerned), then the subclause would not appear to provide a defence to a complaint of discrimination.

¹¹⁰ ICCPR, arts 18(3) and 19(3).

¹¹¹ HRC, *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience of Religion)*, UN Doc CCPR/C/21/Rev.1, 48th sess (30 July 1993) (**General Comment No 22**), [8].

¹¹² *Ibid*, [8].

*globally in a fair and equal manner, on the same footing and with the same emphasis.*¹¹³

186. The Law Council recognises that subclause 12(2) excludes statements of belief which are malicious, or which would threaten, intimidate, harass or vilify a person or group, or counsel, promote, encourage or urge a serious offence, from the subclause 12(1) defence.
187. As noted, the requirement that the statement would ‘seriously intimidate’ to fall within this exclusion has been altered to ‘intimidate’. In the Law Council’s view, this is an improvement.
188. However, subclause 12(2) remains a very high threshold for statements to be excluded from the scope of subclause 12(1). It means that statements of belief which merely offend, humiliate, insult, ridicule or otherwise harm others which formerly amounted to discrimination under specified Commonwealth, State and Territory laws, or contravened subsection 17(1) of the Tasmanian Act, will no longer do so.
189. With respect to the exclusion for statements of belief which would counsel, etc a ‘serious offence’, this is defined as meaning an offence involving harm (within the meaning of the Criminal Code¹¹⁴) or financial detriment, that is punishable by imprisonment for 2 years or more under the law of the Commonwealth, a state or a territory.¹¹⁵ The Law Council considers that it is, in fact, unacceptable to protect statements of belief that counsel *any* criminal offence, which is what clause 12 permits.
190. It is important to note that the clause 12 defence is not restricted to religious bodies or to recognised representatives of a religion. It is a defence available to any person against whom a bona fide complaint of discrimination, on any prohibited ground, has been made. It applies across the board in the areas in which other forms of discrimination are prohibited: in employment, in education, in the provision of goods and services, in accommodation, in club membership, in sport and local government.¹¹⁶
191. Still further, the definition of a ‘statement of belief’ is entirely subjective, giving it a potentially broad and damaging scope. There is no requirement that such statements be reasonably considered to be in accordance with the doctrines, etc of a religion. This means that statements of belief, including those which objectively do *not* accord with the doctrines, tenets, beliefs or teachings of the relevant religion, can ‘trump’ other rights such as freedom from discrimination on the grounds of race, sex, sexual orientation, disability and age.
192. As such, clause 12 is antithetical to an inclusive, tolerant and safe environment in a range of public arenas – sporting, education, health, workplace, and goods and services, of which federal, State and Territory laws play an integral role. This is likely to undermine considerable efforts over time which have been made to foster such environments.

¹¹³ The Vienna Declaration and Programme of Action, adopted in 1993 by 171 states (including Australia), article 5.

¹¹⁴ *Criminal Code 1995* (Cth), Schedule, s 146.1.

¹¹⁵ The Bill, cl 25(2).

¹¹⁶ See Part 4 of the *Equal Opportunity Act 2010* (Vic) for an orthodox approach to the areas in which discrimination is prohibited.

Complexity

193. Clause 12 is also likely to involve significant complexities for relevant organisations - employers, sporting clubs and associations, small businesses - to administer in practice. The definition and operative provisions are confusing and will likely lead to uncertainty in workplaces and other settings, as well as increased litigation.
194. For example, the combined effect of subclause 15(1), subclauses 12(1) and 12(2) and Note 1 to subclause 12(2) is that:
- (a) a person can make a statement in good faith about a belief genuinely held and this will not amount to discrimination;
 - (b) it could be discriminatory if it is malicious or a reasonable person considers the statement would threaten, intimidate, harass or *vilify* a person or group; but
 - (c) the statement will not amount to vilification, and thus may not be discriminatory, if the statement was a moderately expressed religious view.
195. The term 'religious view' is not defined as a standalone term, nor is it included in the definition of 'religious belief or activity'. Further, a 'moderately expressed religious view' is not referred to in the definition of 'statement of belief'. The use of 'moderately' is not otherwise required if the elements of 'good faith' and 'genuinely held belief' are satisfied.
196. Note 1 effectively adds a further element to the assessment required in clause 12 about whether the statement of belief is discriminatory.
197. The cumulative effect of these provisions may be perplexing for all parties.

Impact on State and Territory laws

198. The Law Council's constituent bodies have raised specific concerns about the impact of clause 12 on relevant State and Territory laws.
199. As noted, QLS emphasises that Queensland's anti-discrimination laws are among the most comprehensive and effective in the country, and together with its *Human Rights Act 2019* (Qld), constitutes a comprehensive and robust legislative framework which can take account of different rights and attributes. This system is operating well and should not be infringed upon, and the QLS considers that there is no evidence for overriding it, noting that this approach is not adopted under other federal laws.¹¹⁷
200. The LIV further explains the potential impacts on State and Territory laws which are not directly caught by clause 12. For example, it considers that a doctor who informs a transgender patient of their religious belief that God made men and women in his image, and therefore gender is binary, may discourage that patient from seeking hormone treatment for gender transition. This will have flow-on effects to the patient, including feelings of isolation and depression. It will directly contradict the objectives of Victoria's *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic), which sought to strengthen the rights of LGBTIQ+ people.

¹¹⁷ The QLS states that this is not to suggest that Queensland's laws are above scrutiny and that, in fact, the Queensland Human Rights Commission is currently reviewing the *Anti-Discrimination Act 1991* (Qld).

Procedurally unworkable

201. In addition to the above substantive concerns regarding clause 12, the Law Council retains its concerns regarding the procedural difficulties for anti-discrimination complaints raised by this clause. As raised previously, protection from discrimination is provided through a combination of federal, State and Territory laws. Discrimination complaints are overwhelmingly heard and determined in State and Territory tribunals, rather than through the federal court system. The primary reason is that each of the State and Territory tribunals currently operates on a 'no costs' basis in the area of discrimination law.¹¹⁸
202. In all states and territories save Queensland, the tribunal which hears anti-discrimination complaints is not a Chapter III court and cannot exercise Federal jurisdiction or determine a question of federal law.¹¹⁹
203. Clause 12 of the Bill provides a federal defence to a complaint of unlawful discrimination made under State or Territory legislation. The determination of such a defence is plainly a question of federal law.
204. 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. In New South Wales, Victoria and Tasmania this means, as a result of recent legislative amendments, transfer of the matter to a Magistrates Court,¹²⁰ but in other jurisdictions may necessitate Supreme Court proceedings. Of course, further court costs will be incurred by both parties as a result.
205. The NSW LS further advises that notwithstanding the insertion of section 34B of the *Civil and Administrative Act 2013* (NSW), which permits applications involving federal jurisdiction to be resolved by a Chapter III Court, this remains a complex route to resolving discrimination matters which should be dealt with quickly and cheaply.

Conclusion

206. In summary, clause 12 should not be enacted because:
- it prioritises the protection of freedom of religious expression over well-recognised human rights such as the right not to be discriminated on the grounds of race, sex, sexual orientation, disability, or age in a manner which allows a disproportionate limitation on the enjoyment of those rights and is contrary to well-established principles of international law;¹²¹
 - the provision reduces current protections against discrimination in federal, State and Territory discrimination statutes;
 - the provision upsets the balance of federal, State and Territory discrimination laws in Australia; and

¹¹⁸ *Civil and Administrative Tribunal Act 2013 No 2* (NSW) s 60(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100; *State Administrative Tribunal Act 2004* (WA) s 87(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57(1); *Anti-Discrimination Act 1998* (Tas) s 95; *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 131.

¹¹⁹ Eg, *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 at [281] (Leeming JA); *Burns v Corbett* [2018] HCA 15.

¹²⁰ See for example Part 3A of the *Civil and Administrative Tribunal Act 2013* (NSW).

¹²¹ The rights protected by article 26 of the ICCPR are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- the provision is unworkable as it will draw both the complainant and the respondent into secondary litigation, causing further delay and cost to both parties.

Recommendation:

- **The Law Council recommends that clause 12 be deleted.**

Part 3 - Concept of discrimination on the ground of religious belief or activity

207. Part 3 defines the concept of discrimination on the ground of religious belief or activity, including direct and indirect discrimination.

Clause 15 – Qualifying body conduct rules

208. Subclause 15(1) provides that a qualifying body¹²² discriminates against a person on the ground of religious belief or activity if:

- (a) it imposes, or proposes to impose, a condition, requirement or practice (**a qualifying body conduct rule**) on persons seeking or holding an authorisation or qualification from the qualifying body that relates to standards of behaviour of those persons; and
- (b) the qualifying body conduct rule has, or is likely to have, the effect of restricting or preventing a person from making a statement of belief, other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation.

209. However, under subclause 15(2), a qualifying body does not discriminate against a person under subclause 15(1), if compliance with the qualifying body conduct rule by the person is an 'essential requirement' of the profession, trade, or occupation.

210. Under subclause 15(3), subclause 15(1) would also not apply to statements of belief that are: malicious; that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or would counsel, promote, encourage or urge conduct which would constitute a serious offence.

211. Clause 15 does not limit clause 14, concerning indirect discrimination.

212. The Law Council notes that a slightly differently drafted clause was included in the Second Exposure Draft Bill. This provided that for the purposes of indirect discrimination 'reasonableness' test, a qualifying body conduct rule was prima facie unreasonable.

213. The current clause instead states that the relevant conduct constitutes discrimination. There does not appear to be a need to demonstrate either indirect or direct discrimination separately (which are defined under clauses 13 and 14, respectively), although its elements reflect elements of indirect discrimination.

¹²² 'Qualifying body' means an authority or body that is empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilities, any of the following by an individual: the practice of a profession; the carrying on of a trade; the engaging in of an occupation: The Bill, cl 5(1).

Response

214. The Law Council considers that this is an unorthodox approach to defining discrimination, which does not exist elsewhere in Commonwealth anti-discrimination law.
215. It is concerned that clause 15 may affect legal professional bodies' own ability to regulate the legal profession effectively. For instance, the Australian Solicitors Conduct Rules (**ASCR**¹²³) provide a common set of well-established professional obligations and ethical principles for Australian solicitors when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.
216. The ASCR are intended to assist solicitors to act ethically and in accordance with principles of professional conduct. A breach of the rules is '*capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority...*'¹²⁴ They have been adopted in South Australia, Queensland, Victoria, New South Wales, Tasmania, and the Australian Capital Territory (and shortly Western Australia).
217. The ASCR form an appropriate and effective form of regulation of the legal profession. They include rule 5(1), that:
- A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:*
- *be prejudicial to, or diminish the public confidence in, the administration of justice; or*
 - *bring the profession into disrepute.*¹²⁵
218. This rule addresses the important public policy reasons for preserving confidence in the legal profession and the administration of justice. Conduct that undermines such public confidence both discourages compliance with the legal system and restricts access to justice. A general public that is distrustful of lawyers and the legal system is less likely to seek redress.
219. As noted above, the Law Council supports freedom of religion, and the right to manifest religious expression. In most instances, it considers that statements of belief made by practitioners would be reasonable.
220. However, in rare instances, statements of belief which are, for example, publicly made by a senior member of the profession, outside the course of their practice, which have the effect of seriously denigrating a group of people, may bring the legal profession into disrepute and raise questions about its fairness in delivering justice. Some individuals may be dissuaded from accessing the justice system, with alarming consequences.
221. Under clause 15, legal professional bodies may be prevented from investigating or taking action in relation to a lawyer on the grounds of a breach of rule 5(1). It may be difficult to prove that the application of the rule in these circumstances was an

¹²³ Law Council of Australia, [Australian Solicitors Conduct Rules](#) (2015).

¹²⁴ Ibid, rule 2.

¹²⁵ Ibid, rule 5(1). Other relevant rules include that a solicitor must also 'avoid any compromise to their integrity and professional independence', under clause 4.1.4.

'essential requirement' of the legal profession, particularly where the statement was made outside of the course of legal practice.

222. An 'essential requirement' is not defined in the Bill. The EM states that this:

*... will require consideration of whether compliance is an essential element of the profession, such as whether compliance is clearly necessary to carry out the particular profession or whether the practice of that profession would be essentially the same if that requirement were dispensed with.*¹²⁶

223. An example in paragraph 236 of the EM directly relates to the legal profession. It provides the example of a rule that prohibits the expression of religious beliefs related to the legitimacy of the legal system, and states that this rule might be *essential* as belief in the legitimacy of the legal system would be essential to lawyers. This example does not, however, provide clarity or resolve the broader potential problems with interpreting these clauses, including the scenario set out above.

224. The Law Council further notes that the exclusion of statements of belief which are malicious, threatening, intimidating, harassing or vilifying etc is also a high threshold. It would not exclude statements of belief which offend, humiliate, ridicule or insult others.

225. It is important that legal professional bodies maintain the ability to regulate such conduct effectively and reasonably, having regard to the circumstances and their effects. Statements, even if they are made in a personal capacity, could reflect negatively on the profession, particularly its historical commitment to ensure equality before the law and defend the rights of all persons. On this basis, the Law Council does not support clause 15, on the basis that it may impede the proper regulation of professions, including the legal profession.

226. It considers that should a practitioner be disciplined for making a statement of belief be disciplined under rule 5(1) in circumstances which are unfair or unreasonable, the practitioner should have recourse to making a claim for unlawful discrimination under the Bill. Clause 21 provides that it is unlawful for a qualifying body to discriminate against a person on the ground of the person's religious belief or activity.

227. The practitioner could argue that the qualifying body has, in requiring the practitioner to refrain from making statements which would breach rule 5(1), indirectly discriminated against him or her.

228. The test for indirect discrimination, as set out in subclause 14(1), states that a person has discriminated against another person on the ground of religious belief or activity if:

- (a) the person imposes, or proposes to impose, a condition, requirement or practice;
- (b) which has, or is likely to have, the effect of disadvantaging persons to hold or engage in the same religious belief or activity as the other person; and
- (c) the condition, requirement or practice is not reasonable.

¹²⁶ EM to the Bill, 63 [230].

229. Subclause 14(2) provides that ‘reasonableness’ depends on all the relevant circumstances of the case.¹²⁷
230. The Law Council considers that this is a sufficiently flexible test to ensure that the full circumstances are taken into account, including by legal professional bodies as required, while also enabling a practitioner to have recourse to the Bill where a bar on making statements of belief has an unduly discriminatory and harmful effect.

Recommendation:

- **The Law Council recommends that clause 15 be deleted.**

Clause 16 – Associates

231. Subclause 16(1) provides that the Bill¹²⁸ applies to a person who has an association with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.
232. A note¹²⁹ to that subclause states that it is therefore unlawful under the Bill to discriminate against a person (irrespective of whether they hold or engage in a religious belief or activity) in the areas of public life that the Bill covers on the basis of the person’s association with someone who does hold or engage a religious belief or an activity.
233. Subclause 16(2) provides a non-exhaustive list of examples of associates, such as near relatives, business colleagues, and persons in recreational relationships.
234. Subclause 16(3) provides that for the purposes of subclause 16(1), a person that is a body corporate has an association with an individual if a reasonable person would closely associate the body corporate with that individual.

Response

235. Subject to the comments below about the inclusion of body corporates as associates, the Law Council generally welcomes this clause, noting that the *Racial Discrimination Act 1975* (Cth) (**RDA**) and DDA also include specific provisions concerning associates.¹³⁰
236. The Law Council is nevertheless concerned by the intention to extend the protections for ‘associates’ of religious individuals to body corporates. The Explanatory Memorandum states that:

A body corporate would be able to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely

¹²⁷ Including the following: the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; the feasibility of overcoming or mitigating the disadvantage; and whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

¹²⁸ Other than clause 15, regarding qualifying body conduct rules, and Part 2.

¹²⁹ The Commonwealth, by making all material in an Act a part of the Act, elevates all notes to the same status as the provisions of the Act: *Acts interpretation Act 1901* (Cth), s 13(1).

¹³⁰ Eg, RDA, s 11; DDA, s 7.

associated with. This is the only mechanism by which a body corporate could make a claim of unlawful discrimination under the Bill.

This provision is important to protect the religious freedoms of individuals who may be associated with bodies corporate. In order for a person to freely express their religious views, it is necessary to protect their associates, including bodies corporate from unlawful discrimination.

...This clause does not purport to protect bodies corporate from discrimination in relation to their association with other bodies corporate. For example, a body corporate would be protected against discrimination in relation to their association with a natural person, such as their Chief Executive Officer. However, a body corporate would not be protected due to their association with a non-natural person, such as a body corporate that was a supplier.¹³¹

237. The Law Council recognises that there has been some case law relating to the inclusion of bodies corporate as associates. In *Koowarta v Bjelke-Peterson*¹³², Gibbs CJ considered that a 'second person' within the meaning of section 12 of the RDA, concerning unlawful discrimination in the area of land, housing and other accommodation, may include a corporation.
238. More generally, however, it considers that this approach, however, is inconsistent with the ICCPR and other United Nations human rights treaties, which protect the rights and dignity of individuals and in some cases groups of individuals,¹³³ rather than corporates or governments. While the human right to manifest religious belief may be enjoyed either by individuals or in community with others,¹³⁴ the United Nations HRC has outlined that the beneficiaries of the rights recognised by the ICCPR are individuals,¹³⁵ and complaints under the ICCPR may only be brought by individuals.
239. As discussed, the Law Council considers that the Bill should protect natural persons, not bodies corporate. Human rights protect characteristics which are innately human, such as sex, race and religion. The intention that the protections in the Bill should be extended to bodies corporate, does not appear to have been recommended by the Expert Panel or supported by the ICCPR, or accord well with the Bill's objects regarding the 'indivisibility and universality of human rights'. It could result in an uneven landscape of rights protection in which the rights of natural persons based on certain attributes are weighed against those of potentially large corporations.
240. Currently, it is possible under section 46P of the AHRC Act, for a complaint to be lodged with the AHRC alleging unlawful discrimination under the primary anti-discrimination acts by a 'person aggrieved'. Cases have recognised that it is possible, although not automatic, for a 'person aggrieved' to be a body corporate

¹³¹ EM to the Bill, 66.

¹³² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, [7] (Gibbs CJ).

¹³³ Eg, ICCPR, art 27.

¹³⁴ ICCPR, art 18(1).

¹³⁵ HRC, *General comment no 31* [80], The Nature of the general legal obligation imposed on States Parties to the Covenant, 80th sess, UN Doc CCPR/C/21 Rev.1/Add.13 (26 May 2004), [9]. The HRC has, however, recognised that these rights may have a communal element and has dealt with claims lodged by members of a religious order, that protected their collective interest and are entitled to have their Order registered as a juridical entity: HRC, *Views: Communication No 1249/2004*, 85th sess, UN Doc CCPR/C/85/D/1249/2004 (21 October 2005) (*Sister Immaculate Joseph v Sri Lanka*). See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UNGAOR, 36th sess, UN Doc A/36/684, art 6.

acting on behalf of its members.¹³⁶ However, this does mean that anti-discrimination law protections of the primary legislation are extended to bodies corporate in their own right. The Law Council corrects that this is the correct approach.

241. It considers that the protections contained in clause 16 (associates) should be amended to apply to individuals (or natural persons), and not bodies corporate.

Recommendation:

- **The protections contained in clause 16 (associates) should be amended to apply to individuals (or natural persons), and not bodies corporate.**

Part 4– Unlawful discrimination

242. Part 4 prohibits unlawful discrimination in a range of public areas, that is, in:

- work - employment, partnerships, qualifying bodies, registered organisations, employment agencies (Division 2);
- other areas – education, access to premises, goods, services and facilities, accommodation, land, sport, clubs, requesting or requiring information, Commonwealth laws and programs, and victimisation (Division 3).

243. Division 4 of Part 4, provides for both specific and general exceptions. The AHRC may also grant certain exemptions.

AHRC exemptions

244. Clause 44 states that the Commission may, by notifiable instrument, grant to a person or body an exemption from the operation of a provision of Division 2 or 3 of Part 4 (discrimination in work, or in other areas). This must:

- specify the persons or bodies covered by the exemption; and
- the provision or provisions to which the exemption applies; and
- be granted for a specified period, not exceeding 5 years.¹³⁷

245. It may be granted subject to such terms and conditions as are specified in the instrument, and be expressed to apply only in specified circumstances or in relation to specified activities.¹³⁸

246. One or more persons or bodies may apply to the Commission for the granting of an exemption under clause 44.

247. Under clause 46, Part 4 does not make it unlawful for a person or body covered by an exemption, or an employee etc, to engage in conduct covered by the exemption.

248. Under clause 47, the AHRC or the Minister may, by notifiable instrument, vary or revoke an exemption granted by section 44.

¹³⁶ Eg, *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313.

¹³⁷ The Bill, s 44(1)-(2).

¹³⁸ Ibid, s 44(3).

249. Decisions of the AHRC and Minister may be reviewed by the Administrative Appeals Tribunal under clause 48.

Response

250. The Law Council considers that the availability of AHRC exemptions is appropriate, and notes that comparable exemptions exist in other federal anti-discrimination legislation eg, the SDA and the DDA.¹³⁹

251. However, these acts also require the AHRC to publish in the Gazette, no later than a month after an exemption decision, a notice of the making of the decision:

- (a) setting out its findings on material questions of fact;
- (b) referring to the evidence on which those findings were based; and
- (c) giving the reasons for the making of the decision; and
- (d) containing a statement to the effect that application may be made to the AAT for review of the decision.¹⁴⁰

252. While clause 44 requires that the Commission make exemptions via notifiable instrument, it is not required to set out its findings on the relevant facts, evidence, reasons and to notify of the possibility of AAT review.

253. The Law Council considers that it is important that exemptions, which operate to permit conduct which would otherwise form unlawful discrimination under the Bill, are afforded in a transparent and clear manner. It supports these matters being required in the Bill, consistent with comparable legislation.

254. Further, the SDA and DDA do not enable the Minister to vary or revoke an exemption granted. The Law Council queries the necessity for the Minister to have the power to vary or revoke exemptions, noting that these are best made by the AHRC, as an independent body with the specific functions of promoting an understanding and acceptance of, and compliance with the Act and its objects.¹⁴¹

255. It further considers that there should be a requirement to publish notices and reasons etc, with respect to the variation or revocation of exemptions granted.

Recommendations:

- **Part 4, Subdivision D of the Bill should require that the AHRC publish in the Gazette, within a month of an exemption decision:**
 - **setting out its findings on material questions of facts;**
 - **referring to the evidence on which those findings were based;**
 - **giving the reasons for the making of the decision; and**
 - **stating that application may be made to the AAT for a review of the decision.**

¹³⁹ SDA, s 44; DDA, s 55.

¹⁴⁰ SDA, s 46; DDA, s 57.

¹⁴¹ The Bill, s 61.

- **The power of the Minister to vary or revoke exemptions under clause 47 should be deleted.**
- **Variation and revocation decisions and reasons concerning exemptions should be published in line with the above recommendation.**

Part 6

Commissioner

256. Part 6 would establish a new Religious Discrimination Commissioner. The Law Council has not, in the time available, considered Part 6 in detail.
257. However, it considers that the establishment of the Commissioner should take place alongside increasing the funding and resources available to the AHRC to perform its essential national functions across the board with respect to human rights. Despite new one-off funding injections to establish specific inquiries, the Law Council has been concerned for several years that the baseline funding of the AHRC has been declining over time.
258. Preserving and bolstering the role of the AHRC as a statutorily independent national human rights institution into the 21st century and beyond is essential. The AHRC has the capacity to conduct inquiries (including on its own motion), undertake research and provide educational programs on human rights. As such, it has a fundamental role in promoting community understanding of human rights.
259. Under the Principles relating to the Status of National Institutions, in order to be effective and granted an ‘A status’, national human rights institutions must be independent, adequately funded and have a broad human rights mandate.¹⁴²
260. The HRC has, in recent years, expressed its concern about the AHRC’s budget cuts, and called on Australia to restore these.¹⁴³ The Law Council recommends that if the AHRC’s national leadership role is more important than ever in upholding Australia’s obligations to respect, protect and fulfil human rights in law and in practice.

Recommendation:

- **The AHRC’s funding should be substantially increased across the board, to address longer term budget declines and to ensure that it is well positioned to perform its national leadership role on human rights effectively and independently into the future.**

Part 8

Clause 64 and 65 – Constitutional basis and additional operation of the Bill

261. The main constitutional bases for the Bill are set out in clause 64:

64 Constitutional basis of this Act

¹⁴² Principles relating to the Status of National Institutions (**The Paris Principles**), GA Res 48/134, UN Doc E/CN.4/RES/1993/55 (20 December 1993).

¹⁴³ HRC, Concluding observations on the sixth periodic report of Australia, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [13]-[14].

This Act gives effect to Australia's obligations under one or more of the following international instruments, as amended and in force for Australia from time to time:

the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

the Convention on the Rights of the Child done at New York 21 on 20 November 1989 ([1991] ATS 4);

the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation done at Geneva on 25 June 1958 ([1974] ATS 12);

the ILO Convention (No 158) concerning Termination of Employment at the Initiative of the Employer done at Geneva on 22 June 1982 ([1994] ATS4).

262. That is, the main constitutional basis of the Bill is the external affairs power under section 51(xxix) of the Australian Constitution.

263. Associate Professor Luke Beck has observed that Federal Parliament may not have the constitutional power to enact all parts of the bill.¹⁴⁴ He states that:

The government says it is relying on the 'external affairs power', which allows federal parliament to pass laws implementing treaty obligations, like article 18 of the International Covenant on Civil and Political Rights about the right to freedom of thought, conscience and belief.

But international human rights law is clear that religious freedom cannot be used to interfere with other rights, which is exactly what some parts of the bill do.¹⁴⁵

264. The Law Council notes that under subsection 51(xxix), the Commonwealth Parliament has power to legislate to fulfil Australia's obligations under any treaty to which Australia is a party.¹⁴⁶

265. For the external affairs power in subsection 51(xxix) of the Constitution to support a law solely on the basis that it gives effect to Australia's obligations under a treaty, the law must conform to the treaty and carry its provisions into effect.¹⁴⁷ The High Court will determine whether particular provisions are 'capable of being reasonably considered to be appropriate and adapted' to that end,¹⁴⁸ or whether they can

¹⁴⁴ Associate Professor Luke Beck, 'Third time lucky? What has changed in the latest draft of the religious discrimination bill?', *The Conversation* (online), 23 November 2021.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1; 57 ALJR 450 (**Tasmanian Dam Case**).

¹⁴⁷ *Tasmanian Dam Case*, Mason J at 131 (CLR); *Richardson v Forestry Commission* (1988) 164 CLR 261; 62 ALJR 158, Gaudron J at 345 (CLR).

¹⁴⁸ *Tasmanian Dam Case*, Deane J at 259–260, 267, 278, Murphy J at 172, see also Mason J at 130–131 (CLR).

“reasonably be considered conducive to the performance of the obligation imposed”¹⁴⁹ by the treaty.

266. Legislation will be supported if it can be seen ‘with ‘reasonable clearness’ to be ‘referable’ to and explicable by’ the purpose of giving effect to the treaty.¹⁵⁰ The law will not be considered appropriate to the achievement of that object if the means which the law adopts are disproportionate to the object to be achieved.¹⁵¹ No ‘wide departure’ from the purpose is permissible,¹⁵² and there must be no material inconsistency between the provisions of the legislation and those of the treaty.¹⁵³
267. The Law Council has above outlined its concerns that the Bill does not align well with key human rights treaties in several respects. For example, it has identified that clause 12, concerning statements of belief, does not reflect that the rights to manifest religion or freedom of expression are subject to limitation under international human rights law.¹⁵⁴ These may be subject to limitation as indicated in article 18(3) of the ICCPR - that is, as prescribed in law, and where necessary to protect public safety, order, health, or morals, or the *fundamental rights and freedoms of others*.¹⁵⁵ The provision does not reflect that States parties should proceed from the need to protect the rights guaranteed under the ICCPR, including the right to equality and non-discrimination. It further does not reflect that all human rights are universal, indivisible and interdependent and interrelated, or the ICCPR’s purpose of recognising the ‘inherent dignity and equal and alienable rights of all members of the human family’.
268. Other parts of the Bill, such as Part 2, also do not appear to be proportionate in their approach to respecting religious freedom while also upholding the rights to non-discrimination on the basis of religious belief and activity.
269. While the Law Council cannot, in the limited time available, be conclusive on this topic, it considers 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.
270. It recognises that clause 65 provides additional bases to support the Bill, including under the Constitutional powers regarding:
- (a) corporations;
 - (b) Commonwealth and Territory matters;
 - (c) trade or commerce;
 - (d) banking and insurance;
 - (e) telecommunications; and
 - (f) defence.

¹⁴⁹ Ibid, Brennan J at 232 (CLR).

¹⁵⁰ Ibid, Deane J at 260 (CLR).

¹⁵¹ Ibid, Deane J at 260, 266–267, 278 (CLR).

¹⁵² Ibid, Brennan J at 232 (CLR).

¹⁵³ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608

¹⁵⁴ ICCPR, arts 18(3) and 19(3).

¹⁵⁵ HRC, General Comment No 22, [8].

271. The Law Council has not, in the time available, been able to consider these additional powers in full. It recommends that the Committee inquire closely into the sufficiency of the Constitutional basis for the Bill.

Recommendation:

- **The Committee should inquire closely into whether clauses 64 and 65 provide a sufficient Constitutional basis for the Bill.**

Clause 68 - Relationship with State or Territory laws

272. Clause 68 concerns the relationship between the Bill and State or Territory laws. Clause 68(1) states that:

This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with it.

273. It does not define a 'law of a State or Territory'.

274. A note to clause 68 states that nothing in subclause 68(1) detracts from the operation of section 12 (statements of belief).

275. Provisions also exist in other federal anti-discrimination laws regarding the 'Operation of State and Territory laws' (compared to the Bill's 'Relationship with State and Territory laws').

276. For example, the DDA provides that:

*This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.*¹⁵⁶

277. Subsection 13(2) of the DDA defines, for the purposes of section 13, a 'law of a State or Territory' as a law which deals with discrimination on the grounds of disability.

278. A similar provision is included in the SDA,¹⁵⁷ which also refers to a 'law of a State or Territory' as one which deals with discrimination on the grounds of sex, sexual orientation and so on.

279. The RDA, at section 6A, states that:

This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

280. Section 109 of the Australian Constitution states 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.'

¹⁵⁶ DDA, s 13(3).

¹⁵⁷ SDA, s 10(3).

281. As discussed in the High Court decision of *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, when a law of a State is inconsistent with a law of the Commonwealth, section 109 of the Constitution resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid to the extent of the inconsistency.¹⁵⁸ The majority (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) stated that:

In Victoria v The Commonwealth ('The Kakariki'), Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws. They were subsequently adopted by the Court in Telstra Corporation Ltd v Worthing ... [etc].

The first approach has regard to when a State law would 'alter, impair or detract from' the operation of the Commonwealth law. This effect is often referred to as a 'direct inconsistency'. Notions of 'altering', 'impairing' or 'detracting from' the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth law if the State law in its operation and effect would undermine the Commonwealth law.

The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'. This is usually referred to as an 'indirect inconsistency. A Commonwealth law which expresses an intention of this kind is said to 'cover the field' or, perhaps more accurately, to 'cover the subject matter' with which it deals. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law.

The question whether a State or Territory law is inconsistent with a Commonwealth law is to be determined as a matter of construction. In a case where it is alleged that a State or Territory law is directly inconsistent with a Commonwealth law it will be necessary to have regard to both laws and their operation. Where an indirect inconsistency is said to arise, the primary focus will be on the Commonwealth law in order to determine whether it is intended to be exhaustive or exclusive with respect to an identified subject matter.

It is not to be expected that a Commonwealth law will usually declare that it has this effect. In some cases the detailed nature or scheme of the law may evince an intention to deal completely and therefore exclusively with the law governing a subject matter. It may state a rule of conduct to be observed, from which the relevant intention may be discerned. Any provision which throws light on the intention to make exhaustive or exclusive provision on the subject matter with which it deals is to be considered. A provision which, expressly or impliedly, allows for the operation of other laws may be a strong indication that it is not so intended. The essential notion of indirect inconsistency is that the Commonwealth law contains an implicit negative proposition that nothing

¹⁵⁸ *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, [29] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

*other than what it provides with respect to a particular subject matter is to be the subject of legislation.*¹⁵⁹

282. Section 6A of the RDA was enacted following the decision of *Viskauskas v Niland*.¹⁶⁰ In that decision, the High Court concluded that the race discrimination provisions of the *Anti-Discrimination Act 1977*(NSW) (**NSW Act**) were invalid because the RDA covered the field of racial discrimination.

283. Section 6A was intended to overcome this, by ensuring concurrent operation of the relevant laws.¹⁶¹ Other federal anti-discrimination acts have followed suit, as in the SDA and DDA provisions above. It is:

... likely now that section 6A(1) and the equivalent provisions in the other Commonwealth legislation would be 'accepted by the High Court as a virtually conclusive indication of legislative intent'.¹⁶²

Response

284. The Bill differs markedly from the SDA, DDA and RDA provisions in:

- (a) titling the provision 'relationship with State and Territory laws' compared to 'operation of State and Territory laws';
- (b) adding the words 'to the extent that' a State or Territory law is capable of operating concurrently with the Bill. This is likely to take the focus away from whether a State or Territory law is capable of operating concurrently as a whole with the Bill, and onto whether particular provisions are consistent, with the Bill taking precedence; and
- (c) not defining a 'State or Territory law' as one which deals with eg, discrimination on the grounds of religious belief or activity.

285. The Bill is therefore wider than the DDA, SDA, and RDA concurrency provisions. The legislative intent is less clear regarding concurrent operation with State and Territory laws. As such, the Bill is more likely to lead to invalidity of provisions of State and Territory laws. In contrast, the DDA, SDA, RDA are more directed towards ensuring concurrent operation with State and Territory discrimination laws.

286. The Law Council considers that clause 68 is an unorthodox approach to federal anti-discrimination law which may upset the balance achieved between federal, State and Territory laws.

Recommendation:

- **Clause 68 be redrafted, in line with standard approaches in federal anti-discrimination laws, so that the Bill is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with it.**

¹⁵⁹ Ibid, [31]-[35] (citations omitted).

¹⁶⁰ (1983) 153 CLR 280.

¹⁶¹ Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination law & equal opportunity law* (2018), Federation Press, 3rd edition, 107.

¹⁶² Ibid, citing G Williams, S Brennan and A Lynch, *Blackshield and Williams Australian Constitutional Law and Theory – Commentary and Materials*, 7th ed, Federation Press, Sydney 2018, 423.