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NSW Council for Civil Liberties Submission

Parliamentary Joint Committee on Human Rights

Inquiry into Religious Discrimination Bill 2021 and related bills

21 December 2021

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Inquiry into Religious Discrimination Bill 2021 and related bills. Unless otherwise specified, a reference to "the bill" should be taken to refer to the Religious Discrimination Bill 2021.

Summary of NSWCCL's submission

1. The suite of bills, in their current form must be withdrawn for reconsideration and redrafting, or opposed. They do not get the balance right between the important task of protecting religious adherents and non-believers from religious discrimination; and protecting others from discrimination by religious adherents and non-believers (for ease and economy of words throughout this submission, we will simply refer to religious adherents).
2. Throughout this submission we make a number of primary and alternative submissions as to amendments which should be made to the bills if they are to proceed through parliament and not be withdrawn for reconsideration. In the following paragraphs, we summarise our primary submissions with respect to key sections of the bills.
3. In relation to the Religious Discrimination Bill 2021, we primarily submit:
    a. Persons making statements of belief should not be exempt from anti-discrimination laws. Clause 12 should be removed.
    b. Religious bodies, particularly in educational and healthcare settings, should not be allowed to discriminate based on religion. Clause 7 should be removed.
    c. The bill should not override state, territory and local government laws. Other elected bodies should be able to make laws, as is their right, free from fetter by the Commonwealth. Clauses 11 and 5(3) should be removed.
    d. Qualifying bodies should be trusted to make their own rules which govern their professions and occupations. Clause 15 should be removed.
    e. Corporations should not receive unprecedented standing to seek relief for religious discrimination. Clause 16(3) should be removed.
4. In relation to the Human Rights Legislation Amendment Bill 2021, we primarily submit:
    a. Organisations should not be presumptively charitable because they advocate for the traditional view of marriage. They should be subject to the same laws as any other organisation with respect to the regulation of charities. Clause 19 should be removed.
    b. Organisations should not be allowed to refuse access to premises or services for the purposes of a same-sex marriage. Clause 47C should be removed.

c. These provisions legalise marriage discrimination and are repugnant to the overwhelming public support for marriage equality, the achievement of which was intended to conclusively end marriage discrimination.

5. More generally we submit:
    a. The most appropriate way to properly protect freedom of religion is through a Human Rights Act or Charter, which contains appropriate measures for the balancing of rights and freedoms against one another. The government should take steps to draft and pass such a measure forthwith.
    b. These bills cannot pass until LGBTQI+ (lesbian, gay, bisexual, trans*, queer, intersex and others of diverse sexual orientation, gender identity and gender expression) students and teachers are afforded sufficient protections from discrimination in educational settings. NSWCCL rejects the government's assertions that these issues are best dealt with in other fora. The issues must be dealt with in this suite of bills.
    c. The truncated terms of reference and timeframes for this Inquiry are deeply unsatisfactory when the bill under consideration is of such importance and directly concerns the rights and freedoms of citizens.

Previous engagement with this issue

6. NSWCCL has engaged with the development of these bills in the following way:
    a. Making a Submission to the Religious Freedom Review, commonly known as the Ruddock Review.
    b. Making a Submission in response to the release of the first exposure draft on 2 October 2019.
    c. Making a Submission in response to the release of the second exposure draft on 31 January 2020.
7. To the extent that our previous work has remained relevant, we adopt it in this submission.

Objects of the bill

8. NSWCCL, in principle, supports the objects of the Religious Discrimination Bill 2021, as specified in clause 3:

    (1) Recognising the freedom of all people to have or adopt a religion or belief of their choice, and freedom to manifest this religion or belief either individually or in community with others, the objects of this Act are:

> *(a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and*
>
> *(b) to ensure, as part 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.*
>
> *(2) In giving effect to the objects of this Act, regard is to be had to:*
>
> *(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.*

9. Read alone these objects are appropriate and consistent with the existing framework of anti-discrimination law in Australia and coincide with the objects of international human rights law. NSWCCL continues to support the general proposition that religious adherents should have enforceable rights to protect them from discrimination on the basis of their religion.
10. However, the Explanatory Notes (at 32) identify that while the objects broadly reflect those in existing federal anti-discrimination laws, sub-clause 3(1)(d) signals that the underpinning principles set out in clause 12 are inconsistent with existing anti-discrimination law:

> *9. Paragraph 3(1)(d) reflects the principles underpinning clause 12 of the Bill, which protects the expression of certain statements of belief, in good faith, from the operation of certain provisions of Commonwealth, state and territory anti-discrimination law.*

11. In our view, this exposes the fundamental problem with the suite of legislation. Clause 12 directly undermines key protections in existing anti-discrimination legislation, Australia's international human rights obligations[1] and subverts the primary objects of

[1] On this point we agree with the relevant parts of Submission 2 to this Inquiry from the Australian Lawyers Alliance, dated 7 December 2021, p. 12; Submission 5 to this Inquiry from Anja Hilkemeijer, dated 12 December 2021; Submission 9 to this Inquiry from Michael Douglas dated 15 December 2021 (available on the committee webpage).

the bill. It accordingly legalises discrimination which is otherwise unlawful and places the interests of religious adherents above the interests of everyone else.

12. We agree with the ALA's submission to this Inquiry at paragraphs [35]-[36] that international human rights law does not accept that freedom of religions should be given priority over the right to non-discrimination and equality.[2]
13. Much attention is given to the adverse effects that the suite of bills will have on the LGBTQI+ community. But it must be recalled that the adverse effects will extent to many other groups and individuals within society, those of minority faiths, women, disable persons and people of colour. The bill could potentially also have adverse effects for members of faith communities that engage in practices which may be frowned upon by some, such as single parents, women seeking access to abortion services or those who also identify with the LGBTQI+ community.[3] The breadth of the potential adverse impacts of these bills are hard to overstate and to this extent we agree with the Diversity Council of Australia that an intersectional approach which considers 'the ways in which different aspects of a person's identity can expose them to overlapping forms of discrimination and marginalisation' should be taken by the committee when considering these bills.[4]
14. As identified by cl 3(2)(b), the "indivisibility and universality of human rights" is a central concept in the approach to human rights frameworks and legislation including anti-discrimination legislation. Insofar as this reference appeared in the first and second exposure draft, we had hoped that this might allow for a more cohesive approach to human rights legislation in Australia than has unfolded in the debates around the drafting of this bill.
15. It remains NSWCCL's firm and longstanding view that the protection and balancing of human rights must occur through the adoption of a Human Rights Act or Charter and a coinciding review of Australia's state and federal human rights laws to ensure the appropriate coherence and consistency of this important body of legislation. It remains disappointing and outrageous that Australia is without widespread enforceable human rights protections.

[2] Submission 2 to this Inquiry from the Australian Lawyers Alliance dated 7 December 2021 (available on the committee website).
[3] A proposition which is supported in some of the submissions received to date. For example, Submission 4 to this Inquiry from ALEPH Melbourne dated 9 December 2021; Submission 8 to this Inquiry from Rainbodhi, undated; Submission 17 to this Inquiry from Dr Michael Barbezat, Dr Timonthy W. Jones and Dr Miles Pattenden dated 15 December 2021, pp. 4 - 5 (available on the committee website).
[4] Submission 13 to this Inquiry from the Diversity Council of Australia dated 16 December 2021(available on the committee website).

Direct and indirect discrimination

16. NSWCCL continues to support the bill's coverage of both direct and indirect discrimination (see part 3).
17. Such an approach is consistent with existing anti-discrimination laws and is reflective of the lived experience of discrimination.
18. The provisions provide a reasonably clear framework for establishing direct and indirect discrimination.

Statements of belief

19. Clause 12 stipulates that a statement of belief cannot constitute a breach of various anti-discrimination legislation which includes Commonwealth, state and territory laws. This is unless it is malicious, a reasonable person would consider it to 'threaten, intimidate, harass or vilify a person or group' (cl 12(2)) or a reasonable person would consider that it counsels, promotes, encourages or urges conduct constituting a serious offence (cll 12(2)(c), 35(1)(b)).
20. A statement of belief is defined in cl 5 as one which:

> *(i) Is of a religious belief held by a person; and*
>
> *(ii) is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and*
>
> *(iii) is a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.*

21. Given the inclusion of statements of belief held by persons who do not hold a religious belief in the second limb of the definition of 'statements of belief' in cl 5, cl 12 similarly exempts statements of non-belief from anti-discrimination laws.
22. Our primary submission in respect of this clause is that statements of belief should not be exempt from other provisions of anti-discrimination law and cl 12 should be removed from the bill. Religious belief (or non-belief) does not entitle an individual to preferential treatment. Preferencing one species of belief cuts against the liberal democratic value (now recognised in international human rights law) of equality of all persons and indeed in the objects of the bill. In a liberal democratic society, a myriad of different, competing views subsist in the public domain. The parliament should not be in the business of elevating the legal status of beliefs above others, except perhaps to the extent that those beliefs are inherently and inextricably tied to our constitutional order, such as representative government or the rule of law. Religious belief simply does not have such a connection. Indeed, the Commonwealth of Australia resisted the establishment of a

state religion and, unlike in many jurisdictions around the world, our constitutional order has never embraced the privileging of religious belief.

23. As other submissions have noted, the effect of cl 12 is that religious statements of belief enjoy legal protections that other statements of belief do not enjoy and in effect create a hierarchy of freedom of speech in Australia with religious speech sitting at the top.
24. More fundamentally, the bill does not merely preference some beliefs over other beliefs. It preferences some beliefs to the detriment of those with protected immutable or otherwise inherent characteristics like race, sexual orientation or gender identity. This is harmful and unjustifiable.
25. Our secondary submission is that if clause 12 is retained, the test should require more than just that the statement is of a belief that the person 'genuinely considers to be in accordance with' their religion. The bill should, at the very least, require that a person can demonstrate that the belief accords with the accepted views of their religious tradition. NSWCCL would be content if the wording were altered to reflect the test at clause 7(2) which requires a religious body to engage in 'conduct that a person of the same religion as the religious body could reasonably consider to be within the doctrines, tenets and beliefs or teachings of that religion'. This would change the definition back to how it appeared in the second exposure draft. At the very least, this requires a stronger degree of connection between a purported religious belief and the religious foundation for the belief that is objectively reviewable. However, there would still be ample potential for litigation and confusion surrounding this test. Many religious beliefs are contentious within religious communities, some of which can even lead to violence. It is difficult to avoid the impression that cl 12, even if enacted in this way, would see conflicting evidence adduced with respect to what a person could reasonably consider to be in accordance with their religion. For example, a person may reasonably consider that showing kindness to LGBTQI+ Australians is in accordance with their religion and not doing so is a violation of that religion. Yet another person could consider precisely the opposite to be true. This underscores again why cl 12 should not be enacted in any form.
26. Finally, cl. 12(1)(c) allows regulations to be made which allow the relevant Minister add additional pieces of legislation to that which the statement of belief provision creates an exemption. Legislation which concerns human rights and will allow for more, not less, discrimination should not be able to be expanded by executive action and avoid the scrutiny of the parliamentary process. Human rights legislation, particularly that which has the capacity to curtail the rights of others must be subject to the proper parliamentary processes. Accordingly, cl 12(1)(c) should be removed from the bill.

27. The in-built limitations on the degree to which statements of belief will override anti-discrimination law referred to above in [19] still leave room for harmful discriminatory statements to be made with impunity. There is some suggestion that anti-discrimination law would only very rarely have application in circumstances where the acts concerned are only expressions of statements of belief.[5] However even these submitters accept that there is dicta to the effect that statements of belief can constitute discrimination under existing discrimination law, mostly notably the Full Court of the Federal Court in *Qantas Airways Limited v Gama* (2008) 167 FCR 537; [2008] FCAFC 69 at [76]-[78] (French and Jacobson JJ, Branson J agreeing) which has been approved explicitly and implicitly in later decisions of the Federal Court and Federal Circuit Court.
28. NSWCCL also regards it as outrageous that the Commonwealth would specifically seek to override s 17(1) of the *Tasmanian Anti-Discrimination Act* 1998. It is surely undesirable for the Commonwealth to step into the field of human rights protections with the explicit goal of reducing protections for vulnerable Australians on whom the people of Tasmania, through their elected representatives in Parliament, have seen fit to afford greater protection. The Commonwealth should seek to extend human rights protections, not diminish them. In our view, this bill will diminish them.

Inclusion of non-believers

29. NSWCCL continues to support the inclusion of non-believers, secular people, atheists and agnostics as subjects of protection under the bill.
30. NSWCCL recommends that the definition of “religious body” be amended to ensure that organisations built of values of non-belief, secularism, atheism or agnosticism can also receive protection under the Bill.
31. As a matter of principle, and international human rights law, there is no reason to draw a distinction between believers and non-believers, and insofar as the bill presently does, demonstrates that the purpose of this bill is fundamentally to elevate the rights of religious adherents over and above the rights of all others within society, an approach which is contrary to the spirit of international human rights law which compels equality.

Qualifying body rules

32. Clause 15 stipulates that a qualifying body engages unlawful discrimination when it ‘imposes or proposed to impose, a condition, requirement or practice’ on individuals seeking to qualify in certain professions and obligations who are obligated to abide by rules of conduct, where the condition, requirement or practice “has, or is likely to have,

[5] Submission 10 to this Inquiry from Freedom for Faith, undated (available on the committee website), 9.

the effect of restricting or preventing the 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." Statements of belief are subject to the same limitations imposed in cl 12, see above in [19].

33. As outlined above, NSWCCL is opposed to cl 12 which gives preferential treatment to individuals who make statements of belief, and restates that the clause should be removed from the bill.
34. For the same reasons, we submit that cl 15 should be removed. It should be a matter for qualifying bodies to determine rules of appropriate conduct for members of their professions or occupations.
35. There is a reason why qualifying bodies have been empowered by legislation to make rules governing the conduct of those to whom they give their professional imprimatur. Those who hold authorisation or qualification to practice in the professions governed by such qualifying bodies are practitioners of professions. Professions Australia has described "a profession" as "a disciplined group of individuals who adhere to ethical standards and hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others."[6] Professional bodies make rules because they reflect "the profession's collective judgment of the standards expected of its members",[7] having regard to the expectations of the public and the role of the profession in society. Given the role of professions in society and their defining characteristic of adhering to ethical standards and practising for the benefit of society, they ought to be given wide latitude to determine the ethical standards expected of their members. The parliament should not intervene to determine what can and cannot be included as part of the ethical duties of professionals because it is a fundamental characteristic of professions that their governing bodies can determine these voluntary ethical standards themselves.
36. In any case, once again there is no justification offered for why religious statements of belief should be privileged by qualifying bodies over statements founded on other forms of belief.

[6] Professions Australia, 'What is a Profession', Australian Council of Professions, 2003, accessed 18 December 2021, http://www.professions.com.au/.
[7] G E Dal Pont in Lawyers' Professional Responsibility, 6th ed, 2017, [1.125].

37. In the alternative, if cl 12 is to remain, it should be further circumscribed in the following way to ensure that it only captures conduct which infringes on the religious adherent's free expression:
    a. In clause 15(1)(a), the words 'or proposes to impose' should be removed. A proposal to impose a condition does not cause any detriment, and may never, in fact, be imposed.
    b. In clause 15(1)(b), the words 'or is likely to have' should be removed. A mere likelihood that a rule imposed restricts or prevents someone from making a statement of belief, in our submission, is of insufficient gravity to give rise to standing to seek relief for religious discrimination.

Religious bodies may act in accordance with faith

38. NSWCCL continues to strongly oppose exemptions for religious bodies, particularly schools and healthcare service providers, from anti-discrimination laws, except where absolutely essential to the exercise of function of the religious body (such as a priest being a member of the religious order).
39. Our concern also extends to any bodies which benefit from receipt of government funding to carry out services to the public. At the very least, the State should not be complicit in discrimination if it says it values the absence of discrimination. Organisations that wish to be subsidised by the State should not act in a manner that is contrary to public policy and there is no fundamental reason why it is favourable to public policy to allow adherents of particular belief systems to discriminate.
40. Clause 7(1) states:

> *This section sets out circumstances in which a religious body's conduct is not discrimination under this Act. Because the conduct is not discrimination, it is therefore not unlawful under this Act in any area of public life, including work, education, access to premises and the provision of goods, services and accommodation.*

41. As cl 7 shows, the bill continues to allow and in fact greatly expands the ability of religious bodies to discriminate, if such actions are in accordance with their faith. NSWCCL continues to find this unacceptable and considers that all provisions which enable this type of discrimination by religious bodies ought to be removed from the bill.
42. If cl 7 is retained, the most appropriate way for it to apply would be to compel the religious body to prove that the need to discriminate was essential to them acting in accordance with their religious beliefs.

43. While we appreciate that cll 8 and 9 circumscribe the exemptions available to religious bodies in healthcare settings, we especially do not see room for discrimination in these settings when they are in receipt of any public funding.

Religious discrimination in educational institutions

44. The bill continues to fail to provide needed and promised protections for LGBTQI+ students and teachers in religious and private schools. One of the most urgent and disturbing manifestations of religious discrimination that should be impermissible is the discriminatory acts that can be perpetrated against children and young people in educational settings, which are seemingly permitted under cl 7.
45. It is highly unsatisfactory for the government to continue to argue that such provisions are better placed elsewhere, when the bill as presently drafted will bolster existing rights of religious and private schools to exclude LGBTQI+ students and teachers.
46. The government appears to continue to argue that provisions which deal with LGBTQI+ students and teachers should be considered by the Australian Law Reform Commission (ALRC) during the course of their Inquiry into the *Framework of Religious Exemptions in Anti discrimination Legislation*. However, the Inquiry is not due to report until a date twelve months from the date of passage of this suite of legislation.[8] The terms of reference of the Inquiry require that the ALRC 'confine its inquiry to issues not resolved by [the Religious Discrimination Bill], and should confine any amendment recommendations to legislation other than the Religious Discrimination Bill'[9].
47. Discrimination against LGBTQI+ school students is extremely harmful and must be addressed in this Bill. The solution must put the interest of the child first in accordance with Australia's obligations under article 3 of the *Convention on the Rights of the Child*. Discrimination against LGBTQI+ children and young people in educational settings should be expressly prohibited by this bill.
48. Schools should be safe spaces for learning and the development of personal identity, not spaces where discrimination on the basis of sexual orientation, gender identity and gender expression can occur.
49. While we do not doubt the capabilities of the ALRC, the terms on which the Inquiry has been referred severely curtail the nature of the findings and recommendations that could be made by it. Given that the Religious Discrimination Bill will allow more, not less,

[8] https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/
[9] https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/

discrimination towards LGBTQI+ teachers and students, the proper vehicle through which this must be remedied is this bill.

50. Accordingly, NSWCCL recommends that the bill expressly prohibit all discrimination in the context of educational institutions, subject to an essentiality requirement as expressed above in [38].

Freedom of Religion Commissioner

51. NSWCCL remains unconvinced of the evidential basis for the introduction of a Freedom of Religion Commissioner and instead considers that this function should be included in the remit of the Human Rights Commissioner. Freedom of religion is only one type of human right and does not deserve special status.
52. Irrespective of whether the proposed new Commissioner position is instituted, NSWCCL urges the government to ensure that the Australian Human Rights Commission receives an increase in funding to ensure that whoever is responsible for overseeing freedom of religion has adequate resources and staffing levels to carry out their functions.

Marriage discrimination

53. Clause 19 of the Human Rights Legislation Amendment Bill confirms, by operation of a presumption, the charitable status of an organisation which "engages in or promotes activities advancing, expressing or supporting a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life; or encourages others to engage in or promote activities that advance, express or support such a view."
54. With specific reference to cl 19, NSWCCL does not object to charities advocating for things with which we may disagree. Yet why pass a special amendment conclusively presuming that advocating for a traditional (and in particular, a Judeo-Christian) conception of marriage is for the public benefit and not contrary to public policy? There is no justification other than that the government is choosing to favour such views on the basis of an ostensible agreement with those views. Such organisations, which seek to avail themselves of charitable status should be subject to the same rules that apply to all other charities.
55. Clause 47C of the Human Rights Legislation Amendment Bill allows religious educational institutions to refuse access to facilities and goods and services which are sought to be used for "the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage".
56. Clause 47C has very broad operation, extending to denial of goods and services or facilities directly associated with the solemnisation of marriage. The marriage equality

campaign attracted widespread support from all segments of society, and this surreptitious attempt to bring back marriage discrimination flies in the face of the results of the plebiscite to allow marriage equality.

57. NSWCCL consider that both of these provisions essentially enact marriage discrimination because they privilege the views of those opposed to marriage equality and directly allow the denial of goods, services and facilities to same-sex couples. They should be removed from the bill. These clauses are yet another example of the way in which this suite of bills seeks to privilege the rights of religious persons (and even then, only certain religious persons with certain views of marriage) over and above all other categories of beliefs or identities within society.

Overriding state and territory laws

58. Throughout this submission we have articulated that the fundamental flaw in the bill is that it privileges the rights of religious adherents above all other people. In doing so, the bill privileges itself over various state and territory based anti-discrimination laws. We reiterate our general objection to this and restate that the best way to develop coherent human rights protections is through a Human Rights Act or Charter.
59. In addition to the general thrust of the bill, there are aspects of it which explicitly seek to override state and territory laws in specific contexts. Clause 11 does so with respect to religious bodies that are educational institutions. The precise state and territory based laws that the Commonwealth seeks to override remain unclear, because it allows the Minister to prescribe such laws for override by way of regulation (cl 11(2)-11(3)).
60. Building from our earlier submissions we repeat that religious institutions should not be able to engage in religious discrimination in educational settings and cl 11 should be removed from the bill.
61. However, if clause 11 is maintained, the list of state and territory laws which are sought to be overridden should be included in the bill and made subject to parliamentary scrutiny. It is entirely improper for a member of the executive branch to be able to override the laws of elected state parliaments by way of delegated legislation on matters of this kind. This is particularly the case when the human rights of citizens are going to be infringed.
62. Clause 5(3) also has the effect of negating by-laws made by democratically elected local governments when read with cl 5(2). Clause 5(2) stipulates that ‘religious activity does not include an activity that is unlawful’. Clause 5(3) then states ‘an activity is not unlawful merely because a local by-law prohibits the activity’. We cannot see any reason for this provision. Adopting the same reasoning set out above, it is entirely

inappropriate and highly unusual for the Commonwealth to override the views of democratically elected local governments. Clause 5(3) should be removed from the bill.

Corporations' ability to sue

63. Unlike immutable or otherwise inherent characteristics already protected by anti-discrimination law such as race, gender identity, or sexual orientation, a body corporate easily be interpreted as identifying with a religion.
64. Section 5 of the bill no longer defines person by reference to the effect of s 2C of the *Acts Interpretation Act 1901* (Cth) thereby including bodies corporate, bodies politic, and incorporated associations, as the first exposure draft did. This was strongly opposed by NSWCCL and other human rights groups and presumably dropped for that reason. However, references to persons will still be affected by s 2C unless the bill shows a contrary intention. It does not do so. Therefore, as the explanatory memorandum notes,

> *"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…*

65. As the Law Council explained in its submission to the first exposure draft, this definition of person may be regarded as exceptional in the landscape of Australian discrimination law.[10] The International Covenant on Civil and Political Rights (ICCPR) protects the rights of individuals and in some cases, groups of individuals. It is true, as the explanatory notes state and some submissions argue, that the right to manifest one's religion in Art 18 of the ICCPR includes the freedom to do so in community with others. However, this does not mean corporations should have the benefit of anti-discrimination law, only that individuals can manifest their religion 'in community' with others. The Human Rights Committee which administers and interprets the ICCPR has emphasised that the "beneficiaries of the rights recognised by the Covenant are individuals" and complaints made to the HRC under the Optional Protocol to the ICCPR may only be made by individuals.[11]
66. Notwithstanding that there is some dicta interpreting the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth) to the effect that a person

[10] Law Council of Australia, Submission to first exposure draft review dated 3 October 2019, 5, 10, 16-19.
[11] 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]; Under the Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature16 December 1966, UN Doc No 14668 (entered into force 23 March 1976), arts 1 and 2.

aggrieved may include a corporation, this does not mean that such a course is desirable. There was no recommendation to this effect by the Ruddock Review.

67. We note that whether unincorporated associations may be persons aggrieved for the purposes of discrimination law, a question considered in *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537; [1998] FCA 66, is a separate question because unincorporated associations do not have separate legal personality and therefore they are in a real sense a community of individuals, all of whom should have the benefit of anti-discrimination law.
68. The United States and European cases relied on by Dr Alex Deagon in his submission to support the notion that corporations may enjoy the rights under the US Constitution and *European Convention on Human Rights* respectively do not and should not determine the course of Australian anti-discrimination law.[12] Nor is there any analysis of the unintended consequences of this change, explored below in [73]. Nor does it matter that regulating constitutional corporations would make it easier for the bill to come within the power of the Commonwealth parliament.
69. There must be sufficient explanation of the rationale for this aspect of the bill. But the explanation to date is insufficient and concerning.
70. Clause 16(3) of the bill states "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". This extends the ambit of "person" for the purposes of clause 16(1) which states "[t]his Act…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."
71. A consequence of this provision is that corporations, including religious organisations and lobby groups have standing to seek relief for discrimination on the basis of religion even if they are only associated with an individual.
72. This extension of persons who have standing to litigate is virtually unknown and has not been the subject of widespread or certain adoption in the wider field of anti-discrimination law in Australia. Furthermore, in the absence of similar provisions across the landscape of discrimination law, this would seem to be yet another privileging of religion in Australian life effected by this bill.
73. NSWCCL imagines with concern plausible scenarios in which large, well-funded corporate entities, possibly incorporated religious lobby groups, take legal action against natural persons under this Act (if it becomes law) for dubious reasons. A key feature of anti-discrimination law is that it gives effect to the sometimes delicate weighing of

[12] Submission 3 to this Inquiry from Dr Alex Deagon, undated (available on the committee website), 19-23.

different rights and freedoms – for example freedom of speech and the right to not be discriminated against. It would not be a correct balance to allow large corporations to enforce a right not to be discriminated against on the basis of religion, which only individuals can properly maintain, against, say, a natural person critical of the bodies' professed religion. The unintended consequences could also be large, as noted in this hypothetical posited by the Law Council:

> …for example, for Commonwealth funding for a mental health program to be allocated to a secular counselling service, in preference to a religious affiliated applicant. The strictures of the particular religion and their application to counselling of clients drawn from the general population may make funding the service quite counterproductive to the mental health objectives being sought. Despite this, under the Bill, the government funding body may face questions of whether the Commonwealth has directly discriminated against the applicant.[13]

74. Clause 16(3) should be removed. Consistent with what we have submitted in our previous two submissions on past exposure drafts, only natural persons should have standing to seek relief under the bill, if it passes. In the alternative, this aspect of the Bill withdrawn pending a broader based review by the Australian Law Reform Commission on whether non-natural persons should be afforded standing in anti-discrimination and human rights based jurisdictions.

Constitutional validity

75. We note the discussion in some submissions as to the constitutional validity of the bills.
76. Given the time constraints, we have been unable to fully develop this point in the submission, but note our agreement with the Submissions made to this Inquiry by the Australian Lawyers Alliance and Ms Anja Hilkemeijer that the bill, at least in part, may not be constitutionally valid.
77. Clause 64 of the bill indicates that the provisions are intended to give effect to Australia's obligations under the following international legal instruments (*inter alia*):
    a. *International Covenant on Civil and Political Rights* (1966)
    b. *International Covenant on Economic, Social and Cultural Rights* (1966)
    c. *Convention on the Rights of the Child* (1989)
78. In doing so, the validity of the bulk of the bill is underpinned by the external affairs power contained within s 51(xxix) of the *Australian Constitution.* The parts of the bill concerning the regulation of corporations are said to be underpinned by the corporations power (s 51(xx) of the *Australian Constitution*).
79. In order for the Commonwealth to validly invoke the external affairs power for the purpose of treaty implementation, the legislation must be:

[13] Law Council of Australia, Submission to first exposure draft review dated 3 October 2019, 19.

> *[C]apable of being reasonably considered to be "appropriate and adapted" to deal with some matter of international concern or to achieve an identified purpose or object which is itself a legitimate subject of external affairs.*[14]

80. This test is drawn, with approval, from that set out in *Tasmania v Commonwealth* (1983) 158 CLR 1 at 259, where Deane J stated:

> *[T]he law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs.*

81. As indicated throughout this submission, the suite of bills elevates the rights of religious adherents above the interests of all other people. It does so in a way which is inconsistent with international human rights law.
82. Implementing international human rights obligations must require more than simply stating so in the objects of the bill. Failure to look beyond statements of formal compliance and implementation with international human rights law would elevate form over substance, a vice upon which the High Court does not look upon favourably.[15]
83. When the bill is considered in detail, it goes beyond the type of freedom of religion which is articulated by art 18 of the *International Covenant on Civil and Political Rights*. Note that art 18(3) expressly states that '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are…necessary to protect…the fundamental rights and freedoms of others'. This necessarily concerns rights that would be protected by art 26 which concerns equality of all persons and an entitlement to be free from discrimination.
84. As this bill allows for more, not less, discrimination, and undermines the human right to equality of all persons, it cannot be seen as reasonably appropriate and adapted to achieving the objectives of the treaties that it purportedly implements, and may not enjoy constitutional validity.

Comments on this Inquiry

85. NSWCCL strongly supports this committee's scrutiny of this suite of bills. We recommended that they attract the scrutiny of a parliamentary committee in our submission to the second exposure draft. Failure to have these bills scrutinised would abrogate the parliamentary convention that human rights legislation is considered by this committee.

[14] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 604-605 (Deane J).
[15] *Street v Queensland Bar Association* (1989) 168 CLR 461 523 (Deane J); *Magaming v The Queen* [2013] HCA 40 [81] (Gageler J).

86. However, we hold a number of concerns about this Inquiry, which we raised with the Chair by letter dated 2 December 2021, namely:
    a. The short timeframe for the filing of submissions before the Inquiry has left stakeholders only 22 days to draft and file submissions and then, if called to give evidence, to prepare to give evidence, over a period that many stakeholders would close down and take holidays. Many organisations with an interest in these issues are volunteer and membership based. Not to speak of the burden placed on some religious communities who are entering intense periods of practice and workshop. To place such a burden on stakeholders is unacceptable and we are disappointed to see this occurring again in relation to these bills.
    b. The terms of reference are unduly narrow as these bills are inextricably linked to the gamete of human rights and anti-discrimination legislation at both Commonwealth and State and Territory level. To confine the Inquiry to the provisions of these bills alone is to take a myopic view of the effects and interactions that this legislation has with others and is unacceptable.
    c. When serious human rights concerns are being scrutinised in the context of three technical and complex bills the narrow nature of the Inquiry, coupled with the insufficient amount of time to properly prepare submissions and evidence flies in the face of the purpose of such parliamentary inquiries which are expected give careful and considered attention to the bills and the views of relevant stakeholders. It also placed a serious burden on the Members of Parliament who are expected to get across very complex bills, with significant community input over a period where they too may have less availability.

Conclusion

87. Improving protections for individuals who are discriminated against because of their religious adherence or non-belief is important and something that NSWCCL endorses.
88. However, the suite of bills in their current form go much further than this. They do not get the balance right between the important task of protecting religious adherents and non-believers from religious discrimination; and protecting others from discrimination by religious adherents and non-believers.
89. Accordingly, the suite of bills must be withdrawn for reconsideration and redrafting, or opposed if pressed unamended.

This submission was prepared by Josh Pallas, Vice President, with the assistance of committee members Jared Wilk and Dr Lesley Lynch. We hope our submission is of assistance and would be pleased to assist further, if required.

Yours sincerely,

Michelle Falstein

Secretary

NSW Council for Civil Liberties