

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS
INQUIRY INTO THE RELIGIOUS DISCRIMINATION BILL AND OTHER RELATED BILLS
OPENING STATEMENT
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1. I am a Professor of Constitutional Law at the University of Queensland. In 2017 the Prime Minister appointed me a member of the Religious Freedom Review Expert Panel chaired by the Hon Philip Ruddock. A selection of my publications on the topic of religious and associational freedom are set out in an Appendix to this document.
2. The Expert Panel received more than 15,000 submissions and held about 90 consultations throughout the country. It recommended that the Commonwealth fill a gap in the law by enacting a Religious Discrimination Act in the following terms:

Recommendation 15: The Commonwealth Parliament should amend the *Racial Discrimination Act 1975* or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

3. The Religious Discrimination Bill 2021 (the **Bill**) implements this recommendation. It renders it unlawful for a person to discriminate on the basis of a person's religious belief or activity. It provides appropriate exceptions and exemptions, including to enable religious bodies, religious schools and charities to function in accordance with their religious convictions.
4. The Bill is premised on the human right to freedom of religion (cl 3(1)). This right includes freedom to manifest religion or belief, either individually or in community with others, and in public or private, in worship, observance, practice and teaching (ICCPR, article 18.1). Freedom of religion thus has both an individual and a collective aspect, under which religious bodies ought to be free to manifest the religious beliefs of their members.¹
5. Consistently with Australia's obligations under article 18.1 of the ICCPR, the Bill provides that religious bodies may generally act in accordance with their faith and that such conduct is not discrimination provided that it is done in good faith and could reasonably be considered to be in accordance with the doctrines of the religion or to avoid injury to the religious susceptibilities of adherents of the religion (cl 7). Consistently with Recommendation 5 of the Expert Panel, the Bill requires that the conduct of religious educational institutions in respect of employment must be in accordance with a publicly available policy (cl 7(6)).

¹ Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153, 178-181 (available at: <https://ssrn.com/abstract=2507045>); Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 8-13 (available at: <https://ssrn.com/abstract=3543308>).

6. Consistently with Australia's obligations under article 18.1 of the ICCPR, the Bill provides that religious hospitals, age care facilities, accommodation providers and disability service providers are enabled to preserve their religious ethos by making faith-based decisions in relation to employment (cl 9).
7. Consistently with the Commonwealth's responsibility to ensure Australian law complies with Australia's international human rights obligations, the Bill seeks to protect the right of religious educational institutions in employment decisions to give preference, in good faith, to persons who hold or engage in a particular religious belief or activity, notwithstanding provisions in prescribed State or Territory laws (cl 11(1)).² Again consistently with Recommendation 5 of the Expert Panel, the Bill requires that the conduct of religious educational institutions in respect of employment must be in accordance with a publicly available policy (cl 11(1)(b)). This protection of religious educational institutions contributes to Australia's compliance with its international human rights obligation to have respect for:
 - the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions (art 18.4 ICCPR)
 - the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, ... and to ensure the religious and moral education of their children in conformity with their own convictions (art 13.3 ICESCR).
8. Consistently with Australia's obligations under article 18.1 of the ICCPR, the Bill provides that certain statements of belief do not, of themselves, constitute discrimination under Commonwealth, State and Territory discrimination laws or contravene prescribed State and Territory laws, including subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998* (cl 12(1)). The Bill appropriately provides that this protection does not apply to statements that are malicious, threatening, intimidating, harassing or vilifying or which encourage conduct that would constitute a serious offence (cl 12(2)).
9. Consistently with Australia's obligations under articles 2 and 26 of the ICCPR, the Bill provides that discrimination on the basis of religious belief or activity is unlawful in several areas of public life, including work, education, access to premises, and the provision of goods, services, facilities and accommodation (Pt 4). These provisions are subject to a range of exceptions and exemptions typical of anti-discrimination laws.
10. Although the Expert Panel did not recommend appointment of an additional human rights commissioner, it did recommend that the Australian Human Rights Commission should take a leading role in the protection of freedom of religion (Rec 19). Consistently with that recommendation, the Bill confers functions on the Commission that include promotion of the

² The Religious Discrimination (Consequential Amendments) Bill 2021 contingently prescribes the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic), which was enacted for the express purpose of limiting the exceptions available to religious bodies and religious educational institutions that previously existed under the *Equal Opportunity Act 2010* (Vic).

objects of the Bill (cl 61(c)). These objects are premised on the recognition of the freedom of all people to have or adopt a religion or belief of their choice and to manifest this religion or belief either individually or in community with others, as required by article 18.1 of the ICCPR (cl 3(1)). The role of the Religious Discrimination Commissioner should, consistently with these provisions, extend to the promotion of religious freedom as well as addressing problems of religious discrimination.

11. The primary constitutional basis of the Bill is the power of the Parliament to make laws with respect to external affairs (Constitution, s 51(xxix)). This legislative power extends to the implementation of Australia's treaty obligations under the international instruments indicated in the Bill (cl 64). The Parliament also has power to legislate relevantly with respect to constitutional corporations, Commonwealth and Territory matters, interstate trade and commerce, banking and insurance, telecommunications, and defence (cl 65).
12. My engagement with issues of religious freedom and religious discrimination as a member of the Expert Panel has convinced me that enactment of the Religious Discrimination Bill 2021 is a pressing necessity. Recent international research by Professor Jonathan Fox of Bar-Ilan University in Tel Aviv demonstrates that the problem of religious discrimination is a growing one worldwide and that Australia is not exempt from these trends.³ His analysis is based on the most detailed and comprehensive data set on religious discrimination yet compiled. He notes that while many assume that the liberal democracies of the West are the strongest bastions of religious freedom, the evidence does not support this claim. He demonstrates that secularised Western democracies such as France, Germany, and Switzerland engage in more government-based religious discrimination than many countries of Asia, Africa, and Latin America. Fox singles out Australia as a clear example of the recent rise of socially-based discrimination, especially against Jews and Muslims. Jews, in particular, have been the victims of literally hundreds of instances of vandalism, harassment and threats of violence reported each year.
13. A Religious Discrimination Act is needed at a federal level to provide principled protection of the human right to freedom of religion and belief, a right that protects equally both religious belief and non-religious belief. As the Expert Panel observed:

the human right to freedom of thought, conscience and religion belongs to all—the religious, the non-religious and those moving towards, away from, or between religions. The right protects freedom of thought, conscience and religion, not religion as such. The atheist and the agnostic receive the same protection as the religious adherent. Each is free to hold their beliefs and to live free of coercion to adopt some different set of beliefs.⁴

³ Jonathan Fox, *Thou shalt have no other gods before me: Why governments discriminate against religious minorities* (Cambridge University Press, 2020). See Nicholas Aroney, 'Australia's problem with religious discrimination', ABC Religion and Ethics, 10 August 2020 (available at: <https://www.abc.net.au/religion/australias-religious-discrimination-problem-nicholas-aroney/12542800>).

⁴ Religious Freedom Review, *Report of the Expert Panel* (18 May 2018), para [1.34].

APPENDIX

PUBLICATIONS ON RELIGIOUS AND ASSOCIATIONAL FREEDOM

1. 'Australia's problem with religious discrimination', *ABC Religion and Ethics*, 10 August 2020 (available at: <https://www.abc.net.au/religion/australias-religious-discrimination-problem-nicholas-aroney/12542800>).
2. 'New research shows religious discrimination is on the rise around the world, including in Australia', *The Conversation*, 6 August 2020 (available at: <https://theconversation.com/new-research-shows-religious-discrimination-is-on-the-rise-around-the-world-including-in-australia-141789>).
3. 'Can Australian law better protect freedom of religion?' (2019) 93(9) *Australian Law Journal* 708.
4. 'The politics of freedom of religion in Australia: Can international human rights standards point the way forward?' (2019) 47 *University of Western Australia Law Journal* 43 (with Paul Taylor).
5. 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1 (with Patrick Parkinson) (available at: <https://ssrn.com/abstract=3543308>).
6. 'Freedom of Religion', in Matthew Groves, Janina Boughey & Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury, 2019) (with Benjamin Saunders).
7. 'Religious Freedom under the Victorian Charter of Rights', in Colin Campbell and Matthew Groves (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) (with Paul Babie and Joel Harrison).
8. 'Individual, community and state: Thoughts on Jane Norton', *Freedom of Religious Organizations* (2017) 42 *Australian Journal of Legal Philosophy* 270.
9. *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) (with Peter Gerangelos, Sarah Murray and James Stellios) pp 338-355.
10. 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153 (available at: <https://ssrn.com/abstract=2507045>).
11. 'The territory of marriage: Constitutional law, marriage law and family policy in the ACT same sex marriage case' (2014) 28 *Australian Journal of Family Law* 160 (with Patrick Parkinson).
12. 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287.