



PROTECT ALL OF US, EQUALLY:

SUBMISSION ON THE RELIGIOUS DISCRIMINATION BILL
2021 AND RELATED BILLS

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Borne out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to redress discrimination, disadvantage and distress experienced by LGBTIQ+ people.

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

This submission can be made public. The cases of Rachel Colvin, Karen Pack and Steph Lentz are shared with permission, and can be made public.

Annexed to this submission is a submission on behalf of individual supporters who have signed up to *Protect all of us, equally: The People's Submission on the Religious Discrimination Bill 2021*.

SUBMISSION ENDORSEMENTS

This submission has been endorsed by the following organisations:

1. A Gender Agenda (AGA)
2. ACON
3. ACT Council of Social Service (ACTCOSS)
4. Activate Church Adelaide
5. Ambassadors & Bridge Builders International (ABBI)
6. Asian Australian Rainbow Alliance
7. Asylum Seeker Resource Centre (ASRC)
8. Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine (ASHM)
9. Australian Catholics for Equality
10. Australian Council of Social Service (ACOSS)
11. Australian Federation of AIDS Organisations (AFAO)
12. Australian GLBTIQ Multicultural Council Inc (AGMC)
13. Australian Lawyers for Human Rights
14. Centre for Social Research in Health, UNSW Sydney
15. Children and Young People with Disability Australia (CYDA)
16. Children by Choice
17. cohealth
18. Community Legal Centres Australia
19. Dayenu – Sydney’s Jewish LGBTQ+ Community Group
20. Emily’s List
21. Equal Voices
22. Fair Agenda
23. Family Planning NSW
24. Federation of Ethnic Communities’ Councils of Australia (FECCA)
25. Forcibly Displaced People Network
26. Full Stop Australia (formerly known as Rape and Domestic Violence Services Australia)
27. GLBTI Rights in Ageing (GRAI)
28. Inner City Legal Centre (ICLC)
29. Intersex Human Rights Australia (IHRA)
30. Kindred Spirits Australia
31. LGBTIQ+ Health Australia (LHA)
32. Mannifera
33. New City Church, Sydney
34. Planet Ally
35. Pride in Law
36. Queensland Council for LGBTI Health (formerly QuAC)
37. Rainbow Catholics InterAgency for Ministry
38. Rainbow Families NSW
39. Rainbow Families Queensland
40. Rainbow Futures WA
41. Rainbow Health Australia
42. Rainbow Roo
43. ReachOut
44. Sacred Heart Mission
45. Sexual Health Information Networking & Education (SHINE SA)
46. Social Policy Research Centre, UNSW Sydney
47. South Australian Council of Social Service (SACOSS)
48. South Australian Rainbow Advocacy Alliance (SARAA)
49. Sydney Gay and Lesbian Mardi Gras
50. Sydney Queer Muslims
51. Thorne Harbour Health
52. TLLPC
53. Transcend Australia
54. Transgender Victoria
55. Twenty10 (including Gay and Lesbian Counselling Service NSW (GLCS))
56. Uniting Network Australia
57. UNPACKED International
58. Welcoming Australia
59. Western Sydney Community Forum
60. WEstjustice
61. Women With Disabilities Australia (WWDA)
62. Women’s Electoral Lobby (WEL)
63. Women’s Health Victoria
64. Working it Out
65. Yfoundations
66. Youth Affairs Council of Western Australia
67. Youth Pride Network (YPN)
68. YWCA Australia

EXECUTIVE SUMMARY

Thank you for the opportunity to make a submission on the Religious Discrimination Bill 2021, Religious Discrimination (Consequential Amendments) Bill 2021 and Human Rights Legislation Amendment Bill 2021. This is Equality Australia's third – and most comprehensive – submission on this proposed suite of legislation.

Our laws should protect all of us, equally. Regretfully, as our submission sets out in detail, these bills still fail to meet that principle in a number of significant ways. Accordingly, we still cannot support the Religious Discrimination Bill and its related bills. We urge this committee to reject these bills and instead call for fair and equal discrimination laws that protect all of us, equally – no matter who we are, whom we love or what we believe.

In making this submission, we acknowledge that there have been some improvements to the Religious Discrimination Bill since its second exposure draft. We welcome the removal of the conscientious objection in healthcare clauses and the attempt to make faith-based organisations more accountable for any discriminatory employment practices. However, as the stories of Rachel Colvin, Karen Pack, Steph Lentz and a number of others who have contacted us for assistance demonstrate, discrimination against LGBTIQ+ people and the people who affirm our right to live with dignity and respect remains a pressing issue that has not been addressed and will be made worse by this proposed legislation. Simply requiring organisations to be more transparent about their discriminatory practices does not prevent or prohibit the discrimination from occurring in the first place.

There have also been significant changes for the worse in this final suite of proposed legislation. Hard-fought discrimination protections, including for women, LGBTIQ+ people, people with disability and even people of faith, are being overridden in an unprecedented overreach by the Commonwealth Government. With a stroke of a pen, this proposed legislation tramples all over laws made by democratically elected state and territory parliaments who have sought over decades to protect people from discrimination.

As our submission details, the Religious Discrimination Bill and its related bills will:

- allow people to discriminate against others by protecting offensive, derogatory and demeaning statements based in or about religion in the places we work, study and access goods and services (see section 4);
- hinder the work of regulatory bodies seeking to ensure that the public can maintain the trust and confidence placed in our doctors, teachers, lawyers and other professionals (see section 5);
- enable faith-based schools and other organisations to discriminate against people with different religious beliefs in areas where religion is not relevant to the role or service in question, and where the discrimination cannot be justified by a legitimate religious need (see section 6);
- protect people who breach local by-laws that everyone else has to comply with (see section 7);
- allow powerful organisations and corporations to weaponise our discrimination laws to force their views on others (see section 8);
- protect religious beliefs and activities of people and organisations in ways that do not adequately protect the rights of others (see section 9);
- expand liability to a broad class of people and organisations in an unprecedented, unpredictable and unprincipled way (see section 10);
- leave LGBTIQ+ people as the only group protected by discrimination laws without a dedicated Commissioner at the Australian Human Rights Commission (see section 11);

- provide special treatment to charities whose purpose is to advocate for discrimination against married couples of the same gender (see section 12);
- add to, rather than remedy, the existing carve-outs which allow religious schools and other educational institutions to discriminate against people based on their sexual orientation and gender identity in addition to other attributes (see section 13).

The Bills should not be passed by the Commonwealth Parliament in their current form. Apart from the issues above, the proposed Bills have not adequately resolved when and how faith-based organisations should be able to discriminate based on the religious beliefs or activities of their employees, students and members of the public who rely on their services. The existing exemptions that unfairly allow faith-based organisations to discriminate based on sex, sexual orientation, gender identity, marital status or pregnancy also remain unaddressed by these proposed reforms. If these Bills are passed as proposed, there will be different levels of protection for employees of religious organisations across three Commonwealth laws – the *Sex Discrimination Act 1984* (Cth), *Fair Work Act 2009* (Cth) and Religious Discrimination Bill 2021, as well as introducing different and unprecedented legal standards in other areas.

For these reasons, we do not recommend the passage of these bills and instead support fair and equal discrimination laws that protect all of us, equally – no matter who we are, whom we love or what we believe.

LIST OF RECOMMENDATIONS

While we do not recommend the passage of these bills and instead support fair and equal discrimination laws that protect all of us, equally, we have made specific recommendations should the committee determine to proceed with these bills.

Here is our list of specific recommendations:

1. Delete sections 3(1)(d) and 12 of the Religious Discrimination Bill (and associated definitions).
2. Delete section 15 of the Religious Discrimination Bill (and associated definitions).
3. Delete section 11 of the Religious Discrimination Bill and Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021.
4. Delete section 38 and amend sections 23(3)(b) and 37(d) of the *Sex Discrimination Act 1984* (Cth) to protect LGBTQ+ people, among others, from discrimination by religious bodies and religious educational institutions in employment, education and when goods, services, facilities and accommodation are made available generally to the public.
5. If the committee is minded to endorse the Bills (which we do not recommend) then, at the very least, pending the review below and in addition to the requirement for a written policy, replace sections 7-9 and 40(2)-(7) of the Religious Discrimination Bill with provisions that are consistent with the limitations in existing Commonwealth, state and territory laws, including:
 - a. defining religious bodies as ‘*a body established for religious purposes*’;
 - b. allowing discrimination by religious bodies on the ground of religious belief or activity when it ‘*conforms to the doctrines, tenets or beliefs of a religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion*’;
 - c. prohibiting religious discrimination by faith-based organisations when delivering any health or aged care services (not only faith-based ‘hospitals’ and ‘aged care facilities’), disability, homelessness, family and domestic violence, financial assistance and other community services or government-funded services to the public, regardless of their mixture of services;

- d. prohibiting religious discrimination by faith-based educational institutions in respect of existing students;
- e. standard exemptions that allow the appointment and training of religious leaders and members of a religious order, and the appointment of persons to participate in religious worship and observance.

Commission an urgent and proper review of the appropriateness of all permanent exemptions in federal anti-discrimination law and the *Fair Work Act 2009* (Cth) by an appropriate expert body with an appropriate terms of reference. This should consider what amendments are necessary to introduce a better balancing mechanism that accommodates the rights of individuals of different and no faith, as well as LGBTQ+ people among others, who are employed, enrolled or rely on services delivered to the public by faith-based organisations.

6. Delete subsection 5(3) from the Religious Discrimination Bill. Implement a comprehensive mechanism for the review of laws which infringe on any human right.
7. Only humans should be afforded *human* rights, and all humans should be afforded equal rights.
8. In subsections 16(1) and (2) of the Religious Discrimination Bill, replace “person” wherever appearing with “individual”. Delete subsection 16(3) of the Religious Discrimination Bill.
9. Amend the *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) to include protections against discrimination for associates.
10. Make the objects clause (section 3(1) of the Religious Discrimination Bill) consistent with other federal anti-discrimination legislation. Insert a new section 35A in the Religious Discrimination Bill which provides that: *‘Nothing in this Act makes it unlawful to discriminate against a person on the ground of the person’s religious belief or activity if the conduct is done reasonably and in good faith and is necessary to protect the safety, health or fundamental rights and freedoms of another person.’*
11. Replace section 70 of the Religious Discrimination Bill with a provision which states: *‘A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Part 4 is, for the purposes of this Act, taken also to have done the act.’*
12. Establish an LGBTQ+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.
13. Delete proposed section 19 of the *Charities Act 2013* (Cth) from the Human Rights Legislation Amendment Bill.
14. Delete proposed section 47C of the *Marriage Act 1961* (Cth) from the Human Rights Legislation Amendment Bill.

INTRODUCTION

Our laws should protect all of us, equally. Regrettably, the Religious Discrimination Bill 2021 and its related bills still fail to meet that principle. Accordingly, we still cannot support this Bill and its related bills.

Being our third submission on the Religious Discrimination Bill, this submission consolidates our legal and policy analysis of the problems remaining in this proposed legislation, while acknowledging some improvements which have been made since previous iterations.

Equality Australia's position on the Religious Discrimination Bill has always been informed by our commitment to protecting and promoting human rights, listening to the voice of our community, and balancing the complex policy considerations that come with reform in this area.

This section sets out the underlying legal and policy considerations which have informed our position on the Religious Discrimination Bill and its related bills.

1. UNDERSTANDING FREEDOM OF RELIGION

It is essential when talking of freedom of religion that we are clear about what it is and what is not. It is not, and has never been, a licence to discriminate against others.

The freedom of thought, conscience and religion is a fundamental human right.¹ It includes the right to hold a religious view, as well as the right *not* to profess any religion or belief.² It includes protections against being compelled to reveal your thoughts or adherence to a religion or belief.³

The freedom of religion includes the right to manifest religion or belief individually or in community with others and in public or private.⁴ However, the right to manifest a religion or belief may be limited if prescribed by law and if those limitations are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.⁵ Limitations must be applied only for those purposes and must be directly related and proportionate to the specific need on which they are predicated.⁶

It is in the balancing of competing rights and freedoms that the rights of LGBTIQ+ people to live, work and study free from discrimination often arise. Many national and international courts have confronted questions regarding the intersection between the freedom of thought, conscience and religion and the freedom from discrimination. For example, in *Eweida v United Kingdom*,⁷ the European Court of Human Rights ruled against Mr McFarlane, an orthodox Christian counsellor, who refused to comply with his employer's equal opportunities policy requiring him to provide sex therapy and relationship counselling services equally to all couples, including same-sex couples. The Court was strongly persuaded by the reason for the employer's actions in dismissing him; namely to secure the

¹ *Universal Declaration of Human Rights (UDHR)*, art 18; *International Covenant on Civil and Political Rights (ICCPR)*, art 18.

² UN Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (article 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993 (**General Comment No 22**), [2].

³ General Comment No 22, [3].

⁴ General Comment No 22, [4].

⁵ ICCPR, art 18(3); see also UDHR, art 29(2).

⁶ General Comment No 22, [8].

⁷ *Eweida and Ors v The United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) European Court of Human Rights, 27 May 2013 (*Eweida v UK*).

implementation of its policy of providing a service without discrimination.⁸ Protecting the rights of people to access services without discrimination was therefore a legitimate reason for restricting Mr McFarlane’s freedom of religion. The European Court of Human Rights thereby refused to overrule previous determinations of United Kingdom courts to that effect.⁹

With a couple of notable exceptions,¹⁰ Australia has mostly avoided the conflicts which have arisen in courtrooms across the globe.¹¹ LGBTIQ+ people, along with women, people with disability and even people with different or no beliefs, have a lot to lose from legislation that fails to protect all of us, equally.

2. SUPPORT AND RELIGIOUSITY WITHIN THE LGBTIQ+ COMMUNITY

When speaking of the freedom of religion, it is also essential that we do not introduce divisions where there are none. Many people of faith support and affirm LGBTIQ+ people and many LGBTIQ+ people are themselves people of faith. Freedom of religion means protection for all persons, whether of or no faith.

In preparing our first submission on the Religious Discrimination Bill, we conducted a survey of our supporters and received responses from over 2,800 people, including 646 people who identified as religious and 369 people who identified as spiritual or agnostic.¹² Moreover, of the 1,728 LGBTIQ+ respondents to our survey, 367 (21%) specified having a religion, with a further 233 (13.5%) identifying themselves as either agnostic or spiritual.

The degree of religious affiliation within the LGBTIQ+ community is also noted in other research. Of the 6,818 LGBTIQ+ respondents in the *Private Lives 3* national survey who identified their religious identity, around 74% identified themselves as having no religion, with 13.7% identifying a specific religious affiliation (such as Catholic, Anglican, Buddhist, Uniting Church, Jewish and Muslim) and the remaining 12.1% identifying themselves as ‘other’.¹³

It is true, however, that LGBTIQ+ people and people who support them are particularly vulnerable to discrimination from religious institutions. Of the 1,236 LGBTIQ+ participants who indicated belonging to a religious/spiritual community in *Private Lives 3*, a third (35.1%) said their religious/spiritual community was ‘very’ or ‘extremely’ LGBTIQ+ inclusive/friendly, while 44.4% said that their religious/spiritual community was either ‘a little’ or ‘not at all’ LGBTIQ+ inclusive/friendly.¹⁴

⁸ *Eweida v UK*, [109].

⁹ *Eweida v UK*, [38]-[40], [110]; *McFarlane v Relate Avon Ltd* [2008] UKEAT 0453 – 08 – 1912; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

¹⁰ *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75; *OV & OW v Members of the Board of the Wesley Council* [2010] NSWCA 155.

¹¹ See, for example, *Lee v United Kingdom* (Application No. 18860/19) European Court of Human Rights, 23 March 2020; *North Coast Women’s Care Medical Group v San Diego County Superior Court*, 44 Cal. 4th 1145 (2008); *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. ____ (2018) and *Law Society of British Columbia v Trinity Western University and Brayden Volkenant* [2018] 2 SCR 293.

¹² The survey was advertised via email to subscribers and promoted on the Equality Australia social media channels. The survey was first advertised on 16 September 2019 and was closed on 24 September 2019. Only responses from those who indicated an Australian postcode were included.

¹³ A Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, Melbourne: The Australian Research Centre in Sex, Health & Society, La Trobe University, p. 26.

¹⁴ *Ibid.*

3. POLICY CHALLENGES IN PROHIBITING RELIGIOUS DISCRIMINATION

Regulation relating to religious belief and activity is a complex area for public policy. Our laws must recognise and address these complexities, if we are to provide effective protection against discrimination on these protected attributes without diminishing the rights of others.

While religious belief and activity shares some similarities with other protected attributes such as race, sex, disability or age, they also differ from other protected attributes. Legislation prohibiting discrimination on the grounds of religious belief or activity needs to contend with these key policy considerations.

These policy considerations include:

1. **Everyone has the religious belief or activity attribute**, either because they have particular religious beliefs or engage in particular religious activities, or they do not.¹⁵ These laws attempt to extend protections to everyone, which ultimately means protecting a religious belief held by one person, that may conflict with a different belief or the absence of a belief in a different person. Take, for example, the story of the couple carrying the Christmas ham who were allegedly refused a ride by their Muslim Uber driver.¹⁶ Under the Religious Discrimination Bill, the couple refused service would be protected because they do *not* engage in the religious activity of observing halal dietary requirements.¹⁷ Meanwhile, the Muslim driver would be protected if Uber required him, as a condition of using its platform, to carry the couple's ham contrary to his religious observance of halal dietary requirements.¹⁸ Protecting people against discrimination on the grounds of race, sex, or age rarely collides with the races, sexes or ages of others in this way. As we explore further in this submission, the Religious Discrimination Bill must adequately address what happens when beliefs collide in areas of public life.
2. **Religious belief, and its expression, is limitless and diverse.** Religious diversity means that the Religious Discrimination Bill provides obligations in respect of a very large, disparate and heterogeneous group. The differences within this group are often larger than their similarities. For example, some feel compelled to cover their heads, while others are compelled to remove head coverings in sacred places. Some are required to refrain from pork, while others are forbidden from eating beef. Some believe polygamy is permitted, while others believe polygamy is forbidden. Some believe women have an equal place in society, while others believe that place is equal but separate. Some believe laws of the land must be followed, while others are called to break laws they consider unjust. Not all believe that violence is never justified, nor do they all agree on what constitutes violence. Yet, qualifying bodies are called to respond to conduct expressing these limitless and diverse beliefs by reference to legal straightjackets.¹⁹ Employers, educators, service providers and others are called to make requirements which reasonably accommodate religious beliefs in all its forms so as not to indirectly discriminate.²⁰

¹⁵ Religious Discrimination Bill 2021 (Cth) (**Religious Discrimination Bill**), s 5(1) (definition of *religious belief or activity*).

¹⁶ [“We were furious”: Uber driver rejects couple because of their Christmas ham](#), 3AW 693 News Talk, 19 December 2019.

¹⁷ Religious Discrimination Bill, s 26(a).

¹⁸ Religious Discrimination Bill, ss 19(2)(a) or 26(b).

¹⁹ Religious Discrimination Bill, s 15.

²⁰ Religious Discrimination Bill, s 14(1), together with Part 4 Divisions 2 and 3.

3. **Some religions are dominant while others are not.** There are different challenges for different faith groups in Australia, based on their collective size and the degree of historical and current discrimination they face. For example, Muslim Australians have experienced markedly high levels of harassment and abuse, particularly since September 11.²¹ Many Jewish Australians live with the continued impacts of anti-Semitism in their lives.²² While some faiths in Australia command a large following and can assert a degree of social, financial and political dominance and/or acceptance, others do not. The purpose of anti-discrimination laws has always been about the alleviation of barriers to participation in areas of public life, such as employment and education. But when those areas of public life also happen to be delivered by dominant faiths, there can be few barriers to the participation of those faiths. Instead there is a risk that their dominance overbears the wills of those who are less dominant, such as people from minority faiths who work or interact with these organisations. Considering those differences in power and resources, there is a materially different impact in giving all faith-based organisations exemptions under discrimination laws, when it also includes dominant faith-based organisations. Indeed, faith-based organisations, including large, well-established and sophisticated organisations, employ, educate and provide goods and services to many Australians.²³ Many of these organisations and services are taxpayer funded or provide services in areas which the public sector has vacated.²⁴ This Bill contains broad exemptions for faith-based organisations²⁵ which fails to grapple with the diversity of this sector and the responsibility it has, and will have for the foreseeable future, in employing, educating and delivering essential services to millions of Australians of differing or no religious belief.

4. **Religious beliefs, doctrines, tenets and teachings evolve.** Religions have changed their views as their holy texts are reevaluated and reinterpreted. Accordingly, doctrines, tenets, beliefs and teachings change. So, when drafting a law that will protect against religious discrimination in the enduring way that anti-discrimination statutes come to be held, it is important to get the settings right from the start. Laws require language imbued with flexibility, which work to keep the statute contemporary. The test of ‘reasonableness’ in anti-discrimination laws, as do other balancing provisions, do that work. On the other hand, the ‘no consequences for misconduct’ provisions applicable to qualifying bodies displace that flexibility, preventing all relevant circumstances from being taken into account. Given the evolution of beliefs and values, it is an error to draw on isolated cases today and convert them into inflexible principles, which will apply to everyone, tomorrow.

Any legislation proposing to enter the field of religious discrimination needs to confront and accommodate these policy considerations. As explored further in this submission, through its provisions and exceptions, this Religious Discrimination Bill has not done this effectively.

²¹ Human Rights and Equality Opportunity Commission (HREOC) (2004) [Islam – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians](#), Sydney: HREOC; Derya Iner (2019) [Islamophobia in Australia Report II \(2017-2018\)](#), Sydney: Charles Sturt University and ISRA.

²² J Nathan (2019) [Report on Antisemitism in Australia 2019](#), Sydney: Executive Council of Australian Jewry.

²³ P Knight and D Gilchrist (2015) [Faith-Based Charities in Australia](#), March 2015, Australian Charities and Not-for-profits Commission, at 7, 12 and 17.

²⁴ Ibid, at 17.

²⁵ Religious Discrimination Bill, ss 7-9, 11, and 40(2)-(7).

ENABLING DISCRIMINATION

The Religious Discrimination Bill removes existing discrimination protections for LGBTIQ+ people, women, people with disabilities and others when people make discriminatory statements based in or about religion.

4. MAKING DISCRIMINATORY STATEMENTS LAWFUL (SECTION 12)

Section 12 of the Religious Discrimination Bill overrides existing anti-discrimination protections in federal, state and territory laws to privilege certain 'statements of belief' based in or about religion that may be expressed in workplaces, schools and service settings across Australia. The 'statement of belief' provisions have been amended since the second exposure draft of the Religious Discrimination Bill, to the effect that they now endorse a wider range of potentially offensive, uninformed, insulting, derogatory, demeaning and harmful statements.

These provisions will remove existing discrimination protections for women, LGBTIQ+ people, people with disabilities, people of faith, divorced people, de factos and single parents, among others. They will also introduce complexity and cost into discrimination complaints for applicants and defendants alike. They are not necessary and should be removed.

(a) Licensing discriminatory statements

Section 12 means that many Australians will be without discrimination protections if their workplaces, schools and services are peppered with polite bigotry based in or about religion. In fact, a broader range of 'statements of belief' are now protected because the legal test for what constitutes a 'statement of belief' has been broadened (see sections 4(b) and 7 below) while the exclusions have been further narrowed (see section 4(c) below).

Examples of statements which may be protected include:

- a colleague telling another colleague that women must learn to stay silent;²⁶
- a boss writing in an employee's book that her lesbianism is sinful;²⁷
- a teacher telling a student that children born out of wedlock are the product of sin;²⁸
- a dentist telling his patient that her schizophrenia is caused by evil spirits and that spiritual healing can cure her;²⁹
- a taxi driver telling a person with a guide or assistance dog that their dog is unclean;³⁰
- a bus driver telling a passenger that she is oppressed by her faith;³¹
- a shop assistant telling a customer that his prophets are not to be revered;³²

²⁶ Ephesians 5: 22-23; 1 Timothy 2: 11-12.

²⁷ Queensland Human Rights Commission, [Sexuality case studies](#).

²⁸ A similar case occurred in the US to a child with two dads: Gwen Aviles (2019) ['Substitute teacher fired after telling boy with two dads 'homosexuality is wrong'](#), *NBC News*, 3 December.

²⁹ *Dr Paul Gardner* [2007] DPBV 1.

³⁰ ['Unclean' guide dog banned by Muslim cab driver](#), *Daily Mail*, 6 October 2006. A refusal of service, however, would not be protected.

³¹ Stereotypes that Muslim women are oppressed were noted as issue in the Australian Human Rights Commission consultation with Muslim women: see HREOC (2004) [Isma' - Listen: National consultations on eliminating prejudice against Arab and Muslim Australians](#), section 2.3.6.

³² A similar scenario was considered in the *E.S. v Austria* (Application No 38450/12), European Court of Human Rights, 25 October 2018.

- a psychologist telling her client that gay people are broken;³³
- a psychiatrist telling his patient diagnosed with depression that ‘she should be looking forward to the Kingdom of heaven’;³⁴
- a doctor telling a trans patient that God made men and women and attempts to affirm their gender are wrong;³⁵
- a medical, support or aged care worker telling a person who is HIV positive that AIDS is a punishment from God;³⁶
- a lecturer refusing to use a student’s pronouns because he believes her ‘gender to be false’.³⁷

Statements of this kind undermine the dignity of everyday Australians going about their lives. They make workplaces, schools and places where services are provided less welcoming and more hostile places for women, LGBTIQ+ people, people with disability, people of faith and others, increasing barriers to their equal participation in society.

Such statements, if expressed in workplaces, educational institutions or when goods and services are provided, are capable of constituting discrimination today.³⁸ As French and Jacobson JJ of the Federal Court said in *Gama*³⁹:

‘The making of a remark is an act. ... Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person’s race then that linkage establishes both the distinction and its basis upon race [which are necessary to establish unlawful discrimination under section 9 of the Racial Discrimination Act 1975 (Cth) (RDA)].’

However, because of section 12 of the Religious Discrimination Bill, discriminatory remarks made in the places where people work, study or access goods and services will no longer constitute discrimination if they amount to a ‘statement of belief’ and are not excluded by proposed subsection 12(2).

The effect of section 12 will be to lower-the-bar for acceptable conduct in the workplace and in education settings, as organisations change their policies and approach to accommodate offensive, harmful or demeaning speech in the workplace for fear that they will be sued for religious discrimination if they do not. So, beyond its legal effect, section 12 will have a detrimental and practical effect in enabling and authorising discrimination that may be unlawful today. The provision will also discourage people from calling out discriminatory statements as inappropriate or unwelcome. This is because section 12 clearly sends the message that discriminatory speech

³³ See, for example, J Butler (2019) ‘[Conversion ‘therapy’ survivors speak of cruel tactics used against them](#)’, *10 Daily*, 24 October; T Jones et al (2018) [Prevent Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia](#), Melbourne: Human Rights Law Centre and GLHV@ARCSHS, at 31-33.

³⁴ *Health Care Complaints Commission v Sarah* [2015] NSWCATOD 99.

³⁵ [Gender Identity Initial Principles of Engagement](#) (as adopted by the Anglican Synod on 20 October 2018, Resolution No 49/18), at [9.1.1(d)] and [9.1.5(d)].

³⁶ See, for example, A Ziersch et al (2021) ‘[It is not an acceptable disease: A qualitative study of HIV-related stigma and discrimination and impacts on health and wellbeing for people from ethnically diverse backgrounds in Australia](#)’, *BMC Public Health* 21: 779.

³⁷ Similar cases have occurred in the US to transgender students who were misgendered based on their teacher’s religious beliefs: see T Armus (2019) ‘[A Virginia teacher was fired for refusing to use a trans student’s pronouns. Now, he’s suing his school district.](#)’, *The Washington Post*, 1 October; D Hawkins (2021) ‘[A professor was reprimanded for refusing to use a transgender student’s pronouns. A court says he can sue.](#)’, *The Washington Post*, 27 March.

³⁸ To see how demeaning or derogatory statements may amount to discrimination in and of themselves, see e.g.: *Qantas Airways Limited v Gama* [2008] FCAFC 69 (Indian-born employee called racist comments, including ‘monkey’ and ‘Bombay taxi driver’); *Trapman v Sydney Water Corporation* [2011] FMCA 398 (Aboriginal employee subjected to a racist joke at work found to constitute discrimination; [96]-[101]) and *Vata-Meyer v Commonwealth* [2015] FCAFC 139 (Indigenous employee subjected to remarks based on race could constitute discrimination).

³⁹ *Qantas Airways Limited v Gama* [2008] FCAFC 69 at [76]-[77] per French and Jacobson JJ (Branson J generally agreeing).

based on a religious view or about religion is protected and privileged over other forms of discrimination, including protections for people of faith.

(b) Privileging certain beliefs over others (definition of ‘statement of belief’)

Section 12 does not protect freedom of expression for everyone, equally. It merely privileges religious expression for some, particularly when those expressions discriminate against others. This is because of the asymmetrical definition of a ‘statement of belief’.

A ‘statement of belief’ is defined as a form of communication (other than physical contact), made in good faith, which a person *‘genuinely considers’* to be in accordance with their religion or which relates to the fact of not holding a religious belief.⁴⁰ This definition does two things.

It allows people who hold a religious belief to make statements about *any* topic or matter that they consider to be in accordance with their religion, even if no other member of their religion agrees with them. This subjective legal test means that no one but the maker of the statement has to consider that the statement actually (or even generally) accords with the doctrines, tenets, beliefs or teachings of their religion. It could therefore protect the most extreme and unorthodox views on any topic or matter as being genuinely religious speech.

The definition also fails to extend an equal protection for statements made by non-believers. Non-believers are only protected when making statements related *only* to the fact of not holding a religion. As the Explanatory Memorandum says, it is not intended that this definition would capture philosophical beliefs which do not relate to a lack of religious belief.⁴¹ This means that section 12 fails to conform with the requirements of article 18 of the ICCPR, given it does not protect the expressions of believers and non-believers equally.

Paragraph 172 of the Explanatory Memorandum provides a good example of the asymmetrical protection offered by this provision. Take, for example, a Muslim making a statement encouraging the ritualistic slaughter of animals in accordance with halal principles, and a vegan making a statement discouraging the ritualistic slaughter of animals that they consider to be barbaric. In this example, the Muslim person’s statement would be protected while the vegan’s would not be.

(c) What will people be allowed to say that they can’t say now? (subsection 12(2))

Subsection 12(2) excludes from protection ‘statements of belief’ that are malicious, that *‘a reasonable person would consider would threaten, intimidate, harass or vilify a person or group’*, or that encourage serious offences.

Statements of belief must also be made in *‘good faith’*. This leaves the question, what will people be allowed to say that they can’t say now? What discrimination is section 12 designed to protect?

Changes since the second exposure draft

Two changes have been made to subsection 12(2)(b) since the second exposure draft.

The first change is that there is now no protection for statements that *‘intimidate’* (rather than those that *‘seriously intimidate’*). This change is an improvement, although the Explanatory Memorandum suggests that *‘intimidation’* means that the statement may have to indicate that *‘the speaker intends to inflict physical harm, or instil fear of physical harm, in another person, or is encouraging others to do the same’*.⁴²

⁴⁰ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*).

⁴¹ Explanatory Memorandum to Religious Discrimination Bill 2021 (EM Religious Discrimination Bill), [172].

⁴² EM Religious Discrimination Bill, [187].

The second change is that there is now a narrower test in subsection 12(2)(b). The phrase *'likely to'* has been removed, and a *'reasonable person'* test has been inserted instead. The effect of this change is to protect a broader range of statements that a person or group would be likely to find harassing, threatening, intimidating or vilifying, particularly where an objective bystander who is not a member of the targeted group does not appreciate or understand the harm caused.

In legal terms, as explored further below, this legislative choice of words has significance – it opens the door on statements that may offend, insult and humiliate others wherever they work, study or access goods, services or accommodation. In practical terms, these words also add uncertainty and confusion, and demonstrate why the whole of section 12 is better removed rather than amended.

Offend, insult and humiliate

In contrast to the phrase 'offend, insult, humiliate or intimidate' contained in section 18C of the RDA, the words 'offend', 'insult' and 'humiliate' are not included in subsection 12(2)(b).

There is a general principle of statutory construction that words take meaning from their context and different words are used when parliament intends them to mean different things.⁴³ Accordingly, in *Eatoock v Bolt* [2011] FCA 1103, when considering the phrase 'offend, insult, humiliate or intimidate' in section 18C of the RDA, Bromberg J made the observation:⁴⁴

The definitions of "insult" and "humiliate" are closely connected to a loss of or lowering of dignity. The word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word "offend" is potentially wider, but given the context, "offend" should be interpreted conformably with the words chosen as its partners.

In partnering the word 'harass' with 'threaten', 'intimidate' and 'vilify' in subsection 12(2)(b), and omitting words such as 'offend', 'insult' and 'humiliate', it now becomes relatively clear that a great degree of latitude is being given to statements which could offend, insult and humiliate others. Moreover, although the word 'harass' could have had a broader meaning on its own, given its context, it is likely to be interpreted much more narrowly to conform with the words chosen as its partners, namely, 'threaten', 'intimidate' and 'vilify'.

Coupled with an objective *'reasonable person'* test that ignores how a particular group would be affected by certain statements, and a statutory note that states *'a moderately expressed religious view that does not incite hatred or violence would not constitute vilification'*, it becomes likely that statements which offend, insult or humiliate particular groups of people are being authorised by subsection 12(2)(b).

The Explanatory Memorandum effectively confirms this when it says:

*'Speech that is offensive or insulting towards a person or group of persons, but does not incite hatred, violence or contempt, is not vilification. Similarly, speech that is offensive or insulting, or that others may disagree with, but which does not harass, threaten or intimidate others, would not be excluded under paragraph 12(2)(b).'*⁴⁵

⁴³ See, for example, *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 at [35] per French CJ and Hayne J; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at [4] per Gibbs CJ and at [11] per Mason J; Pearce and Geddes (2014) *Statutory Interpretation in Australia*, 8th edition, Lexis Nexis at 153.

⁴⁴ *Eatoock v Bolt* [2011] FCA 1103 at [265].

⁴⁵ EM Religious Discrimination Bill, [186].

In 'good faith'

Statements of belief must be made in 'good faith' in order to find protection under section 12. The Explanatory Memorandum does not provide a definition of 'good faith', saying instead that the term will take its ordinary legal meaning.⁴⁶

To understand the meaning of 'good faith' in the context of this legislation, courts will attempt to interpret the statute purposively; that is, seeking to achieve the purpose that the legislature intended through an examination of the language used by the statute.⁴⁷

In *Bropho*,⁴⁸ when considering the phrase 'reasonably and in good faith' in section 18D of the RDA, French J said that, while the phrase 'good faith' has a core meaning of general application, the particular construction of the phrase 'will be adapted to the particular statute or rule of law in which the words are used'.⁴⁹ Absent any contrary intention express or implied, good faith will 'require honest action and fidelity to whatever norm, rule or obligation the statute prescribed as attracting the requirement of good faith observance'.⁵⁰

When looking at section 12 itself (which protects certain statements which are made), there is no requirement for 'good faith' at all. The 'good faith' requirement only sits within the second limb of the three-limb definition of a 'statement of belief'. The second limb states that a statement must be made, in good faith, by written or spoken words, or other forms of communication (other than physical contact). This suggests that the requirement for 'good faith' only constrains the way in which a statement is made. It does not constrain the content of that statement, which is covered by the first limb (and this does not have a 'good faith' requirement). Nor does it appear concerned with the effect that the statement will have on the person to whom it was made, as this is covered by subsection 12(2)(b). So, at best, the requirement for 'good faith' might prevent someone shouting or screaming a discriminatory remark at someone else, but it does little else to protect the person on the receiving end of the statement, particularly when you consider the ultimate purpose of section 12.

The sole purpose of section 12 is to enable certain statements to be said, written or communicated that would otherwise:

- constitute discrimination (for example, in employment, education, and in the provision of goods, services or accommodation);
- offend, humiliate, insult or ridicule another person within the meaning of subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas); or
- contravene a prescribed law.

Compare this with section 18D of the RDA which allows race-based statements (that would otherwise be offensive, insulting or humiliating) to be said 'reasonably and in good faith' for several purposes in the public interest, including discussions or debates for genuine artistic, academic or scientific purposes and in the making of a fair and genuine comment on any event or matter of public interest.

⁴⁶ EM Religious Discrimination Bill, [163].

⁴⁷ *Acts Interpretation Act 1901* (Cth), s 15AA.

⁴⁸ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16.

⁴⁹ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [87]-[88] per French J.

⁵⁰ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [93] per French J.

Unlike section 18D of the RDA:

- there is no requirement for a 'statement of belief' to be made *reasonably* and in good faith – suggesting the standard of 'good faith' required by the Religious Discrimination Bill is little more than mere honesty and for the purpose of expressing a belief; and
- the only purposes for which 'statements of belief' are being protected are to enable discrimination and other contraventions of prescribed laws.

The Government has failed to make a case for section 12

Having explored the complex legal issues that arise from section 12 above, this leaves the question: what is the intended purpose of section 12?

The only examples that the Explanatory Memorandum gives us are:

- a manager wishing his employees 'Merry Christmas'; and
- an atheist telling a co-worker that he thinks prayer and belief in God is 'illogical'.⁵¹

The problem with these examples is they show exactly why section 12 is not necessary. If either the manager or the atheist employee was unreasonably prevented from expressing their religious beliefs (or lack of religious beliefs) at work, they would both have a religious discrimination complaint under a standard religious discrimination law. There is no need to take away everyone else's protections in order to give the manager and the atheist employee protection. But this is what section 12 does. Rather than give everyone an equal legal protection against discrimination, it takes away that protection from others to privilege the statements of some.

The result of this is that section 12 protects a wide range of prejudiced, harmful or derogatory statements that could be made by bosses, colleagues, teachers, support workers and service providers towards their fellow Australians, and which could constitute discrimination today but not tomorrow if the Religious Discrimination Bill is passed.

(d) Overriding other laws (subsection 12(1)(c))

Subsection 12(1)(c) will allow the Governor-General (on the advice of the Commonwealth Attorney-General) to prescribe, and thereby override, any federal, state or territory law which the Government considers '*unreasonably limits freedom of religious expression*'.⁵²

Although such regulations are subject to disallowance by the Senate, this provision means that the Commonwealth Parliament is legislating a blank cheque now which authorises the overriding of state and territory legislation in the future without the usual parliamentary process. Such a provision flies in the face of Australia's federalist system, allowing a future Commonwealth Government with a Senate hostile to one state or territory to use regulation to override the laws made by the democratically elected parliament of another state or territory.

A number of recent state or territory laws come to mind which have been raised with the Commonwealth Government for their alleged impact on religious expression. These include:

- Victoria's conversion practices legislation, which prohibits practices seeking to change or suppress a person's sexual orientation or gender identity;⁵³

⁵¹ EM Religious Discrimination Bill, [193]-[194].

⁵² EM Religious Discrimination Bill, [183].

⁵³ *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

- laws in various states and territories that enforce ‘safe access zones’ around abortion clinics;⁵⁴
- laws in various states and territories that require the provision of certain information about abortion services if the medical practitioner conscientiously objects.⁵⁵

Subsection 12(1)(c) would provide a defence to the contravention of any prescribed law that prohibits certain statements of belief. If any of the above laws were prescribed, section 12 could limit the extent to which state or territory laws could operate in respect of such statements.

(e) Introducing complexity and cost into discrimination complaints

By introducing a federal defence to discrimination complaints involving statements of belief, section 12 will undermine the accessibility of state and territory-based anti-discrimination mechanisms.

States and territories generally provide low cost, low risk forums for people bringing discrimination complaints. These are characterised by a system of tribunals where costs orders cannot be made – except in exceptional circumstances – for or against any party.⁵⁶ Save for matters that are appealed on narrow questions of law, discrimination matters can largely be heard and resolved without ever going to court.

The High Court of Australia has confirmed that state tribunals cannot hear disputes about federal matters,⁵⁷ which is what section 12 would introduce. A dispute about whether section 12 applies to oust an anti-discrimination complaint founded in state law will therefore require a court ordered resolution. That will introduce, by necessity, additional costs and effort, and the unattractive possibility of costs orders being made against a losing party. This will only serve to discourage complaints from being brought by people who are genuinely aggrieved and increase the costs for all parties in complaints which are brought.

Given the drafting of section 12, there is a very high likelihood of matters being brought to court. For example, section 12 allows protection for certain statements of belief, but not those which are malicious, harassing or inciting of hatred or violence against a person or group of persons. None of those terms are defined by the legislation, and where the line might be drawn between a statement a belief which is permitted and one which is not, will require testing in a court. Rather than providing a defence to discrimination complaints, section 12 just introduces complexity and costs for all concerned.

(f) Section 12 is not necessary

Section 12 is not necessary, given discrimination laws already allow people to express themselves freely while appropriately balancing the freedom of others to work, study or live without discrimination.

The effect of section 12 is to say that a ‘statement of belief’ conforming to the requirements of section 12 can never constitute discrimination. As French and Jacobson JJ said in *Gama*:⁵⁸

‘The denigration of an employee on the grounds of that person’s race or other relevant attribute can properly be found to have the effect of impairing that person’s enjoyment of his or her right to work or to just and favourable conditions of work. The question then is whether two or three racist remarks over a period of time

⁵⁴ See, for example, *Clubb v Edwards; Preston v Avery* [2019] HCA 11.

⁵⁵ See, for example, *Abortion Law Reform Act 2019* (NSW), s 9(3)(a).

⁵⁶ See, for example, *Civil and Administrative Tribunal Act 2013* (NSW), s 60.

⁵⁷ *Burns v Corbett* [2018] HCA 15 at [49]-[50] per Kiefel CJ, Bell and Keane JJ; [76]-[79] per Gageler J.

⁵⁸ *Qantas Airways Limited v Gama* [2008] FCAFC 69 at [76]-[77] per French and Jacobson JJ (Branson J generally agreeing).

can have such a purpose or effect. That is a matter of fact dependent upon the nature and circumstances of the remarks.'

What *Gama* shows is that discrimination laws already allow a consideration of the context in which speech is expressed to ensure that a person who genuinely expresses a view – even a remark that they did not understand to be racist – would be very unlikely to be found to have discriminated against someone else. Section 12 is therefore trying to solve a legal problem that does not exist. But along the way, section 12 authorises a range of discriminatory statements that undermine everyone's right to a workplace, education, goods, services and accommodation without judgemental remarks that are neither welcome nor necessary.

In respect of subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1997*, the Government has failed to explain why the existing defence in the Tasmanian Act does not already provide a better defence than section 12 of the Religious Discrimination Bill would provide. Section 55 of the Tasmanian *Anti-Discrimination Act 1997* provides a defence to subsection 17(1) when public acts are done in good faith for any purpose in the public interest. Accordingly, section 55 already allows the public expression of religious, political and other views, with the benefit that this defence can be raised in the context of a relatively informal, inexpensive and no-costs jurisdiction.⁵⁹ Section 12 would only serve to muddy the waters, by disturbing the balance between free speech and hate speech which states and territories have already resolved.

Notably, the two examples cited by the Government in support of this clause were discrimination complaints that were ultimately withdrawn or discontinued.⁶⁰ There is no evidence to support the unprecedented and radical step of introducing a new federal law to override federal, state and territory anti-discrimination laws, with confusing and complicated provisions that have uncertain legal effect, and which have negative consequences for vulnerable communities. Nor does it achieve the intention that the former Attorney-General has given to it, namely avoiding a situation where the process becomes a punishment.⁶¹

(g) Section 12 must be removed

Section 12 is a provision which is beyond repair and must be removed. It is not necessary to licence discrimination against some people in order to protect others from discrimination. Conventional discrimination protections would protect the ability for people to express their faith by requiring any restrictions on religious expression at work, school and in the provision of goods and services to be consistently and reasonably applied.

RECOMMENDATION 1

Delete sections 3(1)(d) and 12 of the Religious Discrimination Bill (and associated definitions).

⁵⁹ See *Civil and Administrative Tribunal Act 2013* (NSW), s 60; *Anti-Discrimination Act 1998* (Tas), s 95.

⁶⁰ Attorney-General for Australia, The Hon Christian Porter MP, [Speech on the Religious Discrimination Bill 2019](#), 29 August 2019.

⁶¹ Ibid: *'These complaints were ultimately withdrawn or discontinued. But the process here was the punishment – the message sent is that before you say something on a public issue from a traditional religious underpinning be warned that you can face a long costly action designed to achieve a state sanctioned punitive response for expressing your religious view.'*

NO CONSEQUENCES FOR MISCONDUCT

Qualifying bodies that confer professional qualifications necessary to practice medicine, law and other jobs will find it harder to enforce universal standards of appropriate conduct across their professions.

5. HINDERING THE WORK OF REGULATORY BODIES (SECTION 15)

The Religious Discrimination Bill imposes unorthodox, unworkable and unnecessary rules on qualifying bodies when their members make certain statements based in or about religion outside the course of their employment. The effect of these provisions is to make it harder for bodies conferring professional, trade or occupational qualifications and licences to enforce rules regarding appropriate standards of behaviour when certain statements are made by their members outside professional contexts.

(a) No consequences for prejudiced, harmful or dangerous comments

Section 15 of the Religious Discrimination Bill will allow people who wish to express prejudiced, harmful or dangerous views based in or about religion to do so without facing consequences for their conduct even when it impacts on other employees, clients or customers or diminishes public trust in a profession. These provisions undercut the ability of professional bodies to promote inclusive and respectful workplace cultures by putting them in complex legal straightjackets with a test that is one-sided, and almost impossible to apply or understand, let alone meet.

The range of statements which are protected are broad. Not only are protections potentially afforded to statements based in or about religion which offend, humiliate and insult others (see section 4(c) above), but statements about any topic based on what the person genuinely considers to be a religious belief are protected (see section 4(b) above and section 7 below). Each statement is individually protected, meaning it must be assessed individually to see whether it meets the exceptions in subsection 15(3).

Statements which could be protected include:

- Statements that certain treatment should be rejected because they offend religious principles, such as principles about when life begins or the use of stem cells in treatment;⁶²
- Statements that encourage breaches of professional or contractual obligations.

(b) Complex laws with bad outcomes

Section 15 leads to bizarre outcomes for people of faith and no faith alike. The degree of protection afforded to professionals, tradespeople and other workers depends on a range of largely arbitrarily factors, such as whether they are religious or not,⁶³ the nature of their profession, trade or occupation,⁶⁴ when and where the harmful conduct affecting other employees, clients or customers occurred,⁶⁵ and whether their conduct offends an

⁶² See, for example, Holy See Press Office (2020) [Note of the Congregation for the Doctrine of the Faith on the morality of using some anti-Covid-19 vaccines](#), 12 December.

⁶³ People of faith are able to express views on a wide range of topics based in their religious beliefs, while people of no faith are only protected if they express views about religion: see definition of *statement of belief* in s 5(1) of the Religious Discrimination Bill.

⁶⁴ The provisions apply only to certain professions, trades or occupations that have qualifying bodies that impose authorisations or qualifications: see definition of *qualifying body* in s 5(1) of the Religious Discrimination Bill.

⁶⁵ The provisions apply when statements are made 'other than in the course' of the person's practice or occupation, notwithstanding that the impacts of those statements may be felt by other employees, clients or customers who hear these comments: Religious Discrimination Bill, s 15(1)(b).

‘essential requirement’ of the profession, trade or occupation⁶⁶ (a phrase which is unknown to anti-discrimination law, legally uncertain and must mean something other than an ‘inherent requirement’, which is another phrase used in the Bill⁶⁷ and in anti-discrimination law more broadly).

Meanwhile, highly relevant factors such as impacts on public trust and confidence in the profession cannot inform the response taken by qualifying bodies.

Further, qualifying bodies will not necessarily know, and cannot ask, whether statements which have been made are based in religious beliefs or not.⁶⁸ That means, when considering whether and how to respond to complaints about such statements, qualifying bodies may unknowingly offend these provisions.

(c) Undermining the proper role of qualifying bodies: case studies

The role of qualifying bodies is to protect the public from the risk of harm which may be caused by their members who are vested with the titles, powers and privileges of their profession or occupation. Qualifying bodies do this work by undertaking a future-focused risk assessment of whether a person is fit and proper to practice, using clues from past conduct, including conduct engaged in outside the course of practice. So, for example, a law society may consider the fitness of a solicitor to comply with their professional duties to uphold the law by considering a drink driving charge that occurred on a weekend. Statements of belief made outside the workplace are relevant in that assessment because they provide a clue to the person’s willingness or ability to comply with professional obligations in the future.

Dr Kok

A good example of the need for qualifying bodies to be able to flexibly take into account statements of belief, even if made outside the course of practicing, is the example of Dr Kok. Dr Kok had his registration suspended temporarily by the Medical Board of Australia pending an investigation into his fitness to practice. The Victorian Civil and Administrative Tribunal reviewed and affirmed the Medical Board’s decision.⁶⁹

The facts in that case were:

- Dr Kok made 3 volumes worth of social media and internet comments spanning a period of 10 years, informed by his religious views.
- Among the comments considered by the Medical Board were those that denigrated, demeaned and slurred medical practitioners who provided abortions and treated gender dysphoria in a manner consistent with accepted medical practice. He also expressed sentiments endorsing/calling for violence and/or genocide towards racial and religious groups, and demeaning LGBTIQI people.
- The Board made its decision relying on 30 examples of these comments.
- Dr Kok argued that some of the comments – particularly those advocating violence and genocide – were made ‘tongue in cheek’.

⁶⁶ Religious Discrimination Bill, s 15(2).

⁶⁷ Religious Discrimination Bill, s 39(4).

⁶⁸ Religious Discrimination Bill, s 31.

⁶⁹ *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405.

The Tribunal delivered a nuanced and very considered judgment giving Dr Kok plenty of latitude to express his views,⁷⁰ but found that Dr Kok had gone too far – particularly given the posts identified himself as a member of the medical profession.⁷¹ The Tribunal found that such comments undermined public confidence in medical professionals and breached professional standards of conduct. Given the nature of his comments, the Tribunal held grave concerns about the ability of Dr Kok to switch from providing disrespectful views online to providing respectful and appropriate treatment to those who fell within one of the classes he denigrated online.⁷² The Tribunal considered the serious consequences to Dr Kok of suspension, but found it was reasonable and proportionate to suspend his ability to practice while the Medical Board completed its investigation.

If passed in its current form, section 15 of the Religious Discrimination Bill would considerably stymie and complicate the ability of the Medical Board to consider statements made outside the course of practice (like those made by Dr Kok) in an effort to prevent the potential for future harm to current and prospective patients. The Medical Board would have extremely difficult legal questions to answer in such cases, particularly when considering the volume of statements made by Dr Kok and that, while all of them were made outside work contexts, some identified him as a doctor. The Medical Board would have had to consider *each* statement individually and determine whether:

- the statement was a ‘statement of belief’;
- the statement was made ‘*other than in the course of the person practicing in the relevant profession*’;
- each statement rose to the standard of being malicious, threatening, intimidating, harassing or vilifying of a person or group – but not merely offensive, insulting or humiliating – such that it could be taken into account by the body; and
- the professional conduct rule sought to be enforced was an ‘essential requirement’ of the profession.

Without section 15, Dr Kok could still rely on indirect discrimination protections if he felt that the Medical Board had unreasonably limited the expression of his religious beliefs. So the necessity or utility of such a convoluted legal provision is doubtful.

Other cases

The importance of qualifying bodies being able to properly consider conduct which occurs outside professional practice is highlighted by several other cases.

There are numerous cases where qualifying bodies have cautioned or disciplined health professionals who have been unable to meet their professional standards in a manner influenced by their religious beliefs. The misconduct highlighted below involves conduct that occurred outside traditional occupational settings, and a feature of some of these cases has been the inability of the professional involved to maintain professional boundaries, instead allowing their private religious views to interfere in the care they provide to their patients.

For example:

- in 2012, a doctor and member of the Exclusive Brethren had restrictions placed on his licence to practice after consulting with an 18-year-old man from his church *in his home*, and prescribing a

⁷⁰ *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405 at [49]-[50], [55]-[56].

⁷¹ *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405 at [48].

⁷² *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405 at [88].

medication that reduces testosterone and can be used to treat advanced prostate cancer or manage sexual deviation, because the man had been sent to him for a ‘cure’ for his homosexuality;⁷³

- in 2005, a psychologist was found to have engaged in misconduct for, among other things, selling or loaning religious books to his patient, attending an interstate religious conference with his patient, and sending his patient (who ultimately committed suicide) to a priest when his patient became more aggressive and agitated and reported to the psychologist that he was “talking to saints”.⁷⁴

Any provision that would create barriers to qualifying bodies taking into account statements of belief made outside the workplace should be opposed, as they prevent qualifying bodies from exploring how statements of belief made outside work reveal views, biases or prejudices that may interfere with the performance of a role.

(d) Conventional discrimination protections are enough

Conventional discrimination protections would provide adequate protection for professionals, tradespeople and other workers who wish to express religious views (whether at or outside of work), while ensuring the rights of others are not unreasonably affected.

The standard indirect discrimination test in section 14 would already make unlawful any unreasonable rules which had the effect of limiting the expression of religious beliefs or activities, whether at work or after work.

Conventional discrimination provisions would avoid the issues addressed above by protecting all professionals, tradespeople and other workers regardless of their religious beliefs or where they work. Importantly, the in-built ‘reasonableness’ test would allow for the balancing of all relevant considerations, including any harm to a person’s freedom of religion from a qualifying body imposing rules limiting its expression.

(e) Section 15 must be removed

Section 15 should be removed. Conventional indirect discrimination protections would achieve the purpose of protecting people of faith against unreasonable incursions on their religious expression without impeding the work of qualifying bodies with unnecessarily complex, technical and difficult to apply legal provisions.

RECOMMENDATION 2

Delete section 15 of the Religious Discrimination Bill (and associated definitions).

⁷³ *Re Craddock* [2012] NSWMPSC 8.

⁷⁴ *Case 7* [2005] SAPSB 1.

ENTRENCHING DOUBLE STANDARDS

Faith-based organisations will maintain an ability to discriminate against others with different beliefs or no beliefs in employment and when delivering many services, even when they are publicly funded. These exemptions will add to existing ones that already allow faith-based organisations to discriminate against LGBTQ+ staff and students, among others. Finally, people will be protected from religious discrimination even where they contravene local by-laws.

6. DISCRIMINATION BY FAITH-BASED ORGANISATIONS (SECTIONS 7-9, 11 AND 40(2)-(7))

While it purports to provide people of faith and no faith with protections against discrimination, the Religious Discrimination Bill stops short of doing so in many cases when people with different or no religious beliefs are employed, enrolled or rely on certain services delivered by faith-based organisations to the public. Further still, the Religious Discrimination Bill and Religious Discrimination (Consequential Amendments) Bill 2021 overrides state and territory laws which have sought to provide people with different or no religious beliefs with protection if they are discriminated against in employment by religious educational institutions. The single improvement made to these exemptions since the exposure drafts is a requirement for some religious bodies (including schools, hospitals, aged care facilities, accommodation providers and disability service providers) to put their discriminatory employment policies in writing. But the drafting of these provisions leaves much ambiguity and uncertainty, that they need reconsideration. At the very least, in addition to the requirement for a written policy, the Religious Discrimination Bill should include exemptions that are consistent with the limitations found in existing Commonwealth, state or territory law, while an urgent and proper review of the appropriateness of all permanent exemptions in federal anti-discrimination law and the *Fair Work Act 2009* (Cth) can be conducted by an appropriate expert body with an appropriate terms of reference.

(a) A licence to discriminate for religious bodies

Sections 7-9 and 40(2)-(7) of the Religious Discrimination Bill allows religious bodies to discriminate against people on the basis of their religious belief or activity, if that conduct is done in 'good faith' and either:

- *'a person of the same religion as the religious body could reasonably consider [the conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'*⁷⁵ or
- the conduct is engaged in *'to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body'*.⁷⁶

Religious educational institutions, religious registered charities and any other religious body not engaged solely or primarily in commercial activities, will be covered by these sections, in addition to other potential exemptions (such as section 36 relating to registered charities or subsections 39(2)-(3) relating to the inherent requirements of a job).⁷⁷

⁷⁵ In respect of religious bodies generally: see Religious Discrimination Bill, s 7(2). In respect of religious hospitals, aged care facilities, accommodation providers and disability services providers in employment: see Religious Discrimination Bill, s 9(3)(c). In respect of religious camps or conference sites: see Religious Discrimination Bill, s 40(2)(c).

⁷⁶ In respect of religious bodies generally: see Religious Discrimination Bill, s 7(3). In respect of religious hospitals, aged care facilities, accommodation providers and disability services providers in employment: see Religious Discrimination Bill, s 9(5)(c). In respect of religious camps or conference sites: see Religious Discrimination Bill, s 40(5)(b).

⁷⁷ Religious Discrimination Bill, s 5(1) (definition of *religious body*).

Religious educational institutions will be able to discriminate on the basis of religious belief or activity against staff or students, provided that they publicly make available a policy if they are proposing to discriminate in employment.⁷⁸ Section 11 goes even further, and allows these policies to override existing laws, such that a religious educational institution can give preference in employment to a person with a particular religious belief over another even when it breaches state or territory anti-discrimination laws (such as the laws recently passed in Victoria). These provisions are consolidated by the contingent amendments in schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021.

If the religious body is a hospital, aged care facility, accommodation provider or disability service provider, they will be able to discriminate on the basis of religious belief or activity in employment, provided they comply with their own publicly available policies.⁷⁹ However, depending on the nature of the organisation, they will not be able to discriminate on the basis of religious belief or activity in the course of delivering certain services, such as healthcare, aged care or disability services.⁸⁰

As explored further below, these sections place an ambiguous, uncertain and unwieldy hole in the legislation, allowing religious bodies to discriminate within their organisations against people who hold different religious beliefs (including those who are not religious).

For example, these provisions appear to allow a Jewish school to refuse to enrol students of Jewish converts. Provided a school did so in accordance with a policy that they unilaterally set or amended, these provisions would also appear to allow:

- a Christian school to refuse to hire a science teacher of the Jewish, Muslim or no faith, or fire a staff member who converted from Christianity;
- an Islamic school to refuse to employ a female Muslim teacher who refuses to wear the hijab.

The problem with these carve-outs becomes apparent when you consider the diversity and scale of the faith-based sector in Australia, as well as how difficult it is to actually define the scope of the sector. In 2015, the Australian Charities and Not-for-profits Commission found that charities with an identified religious affiliation employed at least 132,950 staff, however this figure was likely underreported given many faith-based charities did not identify religion as among their charitable purposes or activities.⁸¹ Many of the services in this sector, such as education, health and aged care, are significantly publicly-funded.

People from minority faiths or who have no faith are those who are most vulnerable under these exemptions. That is not to say that faith-based organisations want to, or do, discriminate – only that they can, and people will have no recourse if they do. It is not surprising then that several faith-based organisations have come out against such exemptions, arguing that they do not wish to discriminate against others of different or no faith.⁸² In fact, these exemptions impact on the reputations of such faith-based organisations as inclusive employers, educators and service providers, depriving them of talented workers who assume they are not welcome and donors who direct their donations to other organisations they assume will not discriminate.

For legislation aimed at protecting the fundamental *human* right to religious freedom, these sections prioritise institutional views over the individual beliefs of the people who work, study or rely on services provided by faith-

⁷⁸ Religious Discrimination Bill, s 8(6).

⁷⁹ Religious Discrimination Bill, s 9.

⁸⁰ Religious Discrimination Bill, s 8.

⁸¹ P Knight and D Gilchrist (2015) [Faith-Based Charities in Australia](#), March 2015, Australian Charities and Not-for-profits Commission, at 1-2, 9.

⁸² Media release, '[Prominent faith-based services providers are concerned the Religious Discrimination Bill overreach its initial intention](#)', 29 November 2019.

based organisations. This is not freedom of religion for everyone, but a licence, granted to some institutions, to discriminate against individuals on religious grounds.

(b) The religious bodies exemptions are not fit-for-purpose

Sections 7-9 and 40(2)-(7) differ from comparable religious body exemptions currently existing in other discrimination laws, leaving their scope broader in some respects, narrower in others, and largely untested and uncertain in other respects. These provisions need more clarity in their drafting, just to do the work that they are intended to do.

Too broad in some respects

First, these sections merely require the religious body to show that ‘a person of the same religion as the religious body could **reasonably consider** the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion’, or that its conduct is ‘**to avoid injury** to the religious susceptibilities’ of religious adherents. By contrast, under the *Sex Discrimination Act 1984* (Cth) (SDA) and *Age Discrimination Act 2004* (Cth), a religious body must show that its conduct ‘**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’.⁸³ That is, the threshold for meeting the exemption under the Religious Discrimination Bill is much more relaxed.

Secondly, the Religious Discrimination Bill seeks to differentiate between bodies whose activities are primarily or solely commercial, and those which are not. While we welcome the intention behind this drafting, its application needs more clarity. Here the Religious Discrimination Bill departs from the drafting in the SDA limiting religious exemptions to only those bodies ‘*established for religious purposes*’,⁸⁴ as opposed to any other kind of body conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion.⁸⁵

The drafting in these sections also does not remove exemptions from religious bodies in receipt of government funding, as the *Sex Discrimination Act* does in respect of Commonwealth-funded aged care services,⁸⁶ or for students already enrolled at a religious school, as Queensland,⁸⁷ Tasmania,⁸⁸ the ACT⁸⁹ and Northern Territory⁹⁰ anti-discrimination laws currently do.

The definitions applying to hospitals, aged care facilities, accommodation providers and disability service providers in section 8 and subsection 9(2) also mean that a large number of community services provided to the public by faith-based organisations, including home-based aged care, domestic and family violence services and financial assistance, may not be subject to the narrower exemptions regarding service delivery. These definitions also suffer from the problem of making unclear to what extent faith-based organisations providing mixed services can discriminate, given they may provide a mixture of accommodation, disability and other services.⁹¹ Further, the meaning of a ‘hospital’ is not clear, given the Explanatory Memorandum uses the example of a ‘medical centre’ (and

⁸³ *Sex Discrimination Act 1984* (Cth), s 37; *Age Discrimination Act 2004* (Cth), s 35.

⁸⁴ *Sex Discrimination Act 1984* (Cth), s 37(1)(d).

⁸⁵ Religious Discrimination Bill 2021, s 5(1) (definition of *religious body*).

⁸⁶ *Sex Discrimination Act 1984* (Cth), s 37(2).

⁸⁷ *Anti-Discrimination Act 1991* (Qld), s 41.

⁸⁸ *Anti-Discrimination Act 1998* (Tas), s 51A.

⁸⁹ *Discrimination Act 1991* (ACT), s 46(1).

⁹⁰ *Anti-Discrimination Act 1992* (NT), s 30(2).

⁹¹ Religious Discrimination Bill, s 8(b) and (d).

not a hospital) to illustrate the exemption applicable to hospitals.⁹² Nor is the distinction between a provider of accommodation (the area covered under section 27 of the Religious Discrimination Bill) and a provider of goods, services and facilities that includes accommodation, such as a hospital, respite centre or refuges (the area covered under section 26) made clear. This makes it uncertain as to which religious bodies qualify as ones that ‘solely or primarily provide accommodation’ in subsection 9(b) as opposed to other types of services, goods and facilities.

Narrower in others

In some respects, these exemptions are also narrower and may not protect the legitimate religious activities of religious bodies such as places of worship. The exemptions do not include the standard exemptions that are provided to religious bodies that allow them to appoint and train their own religious leaders or appoint any person they wish to participate in religious worship and observance.⁹³ Instead, the Explanatory Memorandum suggests that these are intended to be covered by the general sections discussed above,⁹⁴ meaning that religious organisations would have to defend their ability to appoint and train religious leaders, or appoint people to engage in religious practice and observance, by reference to more complex legal tests that they do under existing federal, state and territory exemptions.

These problems arise because these sections have pre-empted the recommendations of the Government’s own Australian Law Reform Commission inquiry into religious exemptions by departing from existing formulations for religious exemptions in Commonwealth, state and territory laws, despite their problems. Accordingly, at the very least, in addition to the requirement for a written policy, the Religious Discrimination Bill should include exemptions that are consistent with the limitations found in existing Commonwealth, state or territory law, while an urgent and proper review of the appropriateness of all permanent exemptions in federal anti-discrimination law and the *Fair Work Act 2009* (Cth) can be conducted by an appropriate expert body with an appropriate terms of reference.

(c) A better way forward

Ultimately, we contend that the religious exemptions in current anti-discrimination laws, and which will be added to by the Religious Discrimination are already too broad. They do not adequately balance the rights of people with different or no religious beliefs who work, study or rely on services provided to the public by faith-based organisations. They have also been used by some faith-based organisations to discriminate against LGBTQ+ people and the people who support them, among others.

Broad exemptions are unnecessary

The effect of sections 7-9 and 40(2)-(7) is to leave a large hole in the protections afforded by the Religious Discrimination Bill, particularly for people of minority faiths or no faith. It is incompatible with the approach taken in comparable cases overseas. For example, the European Court of Human Rights considers the proximity between the nature of a position and the mission of the religious organisation when determining the extent to which the organisation can impose its particular religious views on its employees.⁹⁵

⁹² EM Religious Discrimination Bill, [113].

⁹³ *Sex Discrimination Act 1984* (Cth), s 37(1)(a)-(c); *Anti-Discrimination Act 1998* (Tas), s 52(a)-(c); *Equal Opportunity Act 2010* (Vic), s 82(1)(a)-(c); *Anti-Discrimination Act 1991* (Qld), s 109(1)(a)-(c); *Discrimination Act 1991* (ACT), s 3(1)(a)-(c); *Equal Opportunity Act 1984* (WA), s 72(a)-(c); *Anti-Discrimination Act 1992* (NT), s 51(a)-(c). See also *Anti-Discrimination Act 1977* (NSW), s 56(a)-(b) and *Equal Opportunity Act 1984* (SA), s 50(1)(a)-(b).

⁹⁴ EM Religious Discrimination Bill, [103].

⁹⁵ *Fernandez v Spain* (Application No 56030/07) European Court of Human Rights, 12 June 2014, at [130]; *Schüth v Germany* (Application No 1620/03) European Court of Human Rights, 23 September 2010, at [69]. See Anja Hilkmeyer and Amy Maguire (2019) ‘Religious Schools and

It has never been explained why the further exemption in section 10, which allows reasonable conduct that is consistent with purposes of the Religious Discrimination Bill, and which is intended to meet a religious need or reduce disadvantage experienced by people of particular faith, would not capture the vast majority of instances where religious discrimination would be justified. We previously submitted that a faith-based organisation, particularly a minority faith-based organisation, could rely on this provision to appoint religious leaders or school pastoral workers, organise religious spaces and observances for their adherents, and otherwise meet the needs of their adherents, without additional and untargeted blanket exemptions for faith-based organisations as a whole. The drafting note which has been introduced to explain section 10 now makes clear that this is the very purpose of this provision, and our earlier submissions were correct.

Considering the diversity of faith-based organisations, there are few roles or services where the individual beliefs of a person prevents them from performing a role or alleviates their need for a service which they might otherwise be eligible to receive. And again, when that is to be the case, conventional anti-discrimination provisions fill that gap, for example, by providing an exception when religious beliefs are an inherent requirement of a role, or allow a service to express preferences when it is reasonable to impose a condition, requirement or practice notwithstanding the effect it has of disadvantaging persons of particular beliefs.

Towards a human rights conforming approach

When it comes to framing any exemptions allowing faith-based organisations to discriminate, it is essential that exemptions are only granted where they can be justified when balanced with the fundamental rights and freedoms of others. The manner in which the exemptions in the Religious Discrimination Bill – and similar exemptions in Australian law – are framed do not comply with international human rights law. International human rights law requires a balancing of competing rights to ensure that discriminatory conduct is not permitted unless there is a legitimate purpose for the conduct, and the means by which that purpose is achieved is proportionate.⁹⁶ Specifically, the exemptions in the Religious Discrimination Bill (even if amended consistently with existing laws) are not consistent with the freedom of thought, conscience and religion in article 18 of the *International Covenant on Civil and Political Rights*, given they fail to faithfully implement the important limitations under article 18(3) for protecting the fundamental rights and freedoms of others (including the rights of others to non-discrimination and to have different religious beliefs).⁹⁷

Many exemptions for religious bodies in Australia do not currently strike this balance well, and thereby do not promote religious freedom. Instead, they stifle it by granting faith-based institutions a simple and legal way to exclude anyone who does not share their views in areas which are not closely connected to religious practice, observance or the requirements of the role at hand. If religious exemptions are to be granted, they must employ a better balancing mechanism to accommodate the rights of individuals with different and no religious beliefs who are employed, enrolled or rely on services delivered by faith-based organisations. They must also prevent the selective application of religious beliefs to target and single out LGBTQ+ people and the people who support them for less favourable treatment, as we have seen in a number of recent cases.

That is why we support considering and amending the religious exemptions contained, not only in the Religious Discrimination Bill, but also in the SDA and other legislation at the same time. Religious exemptions in Commonwealth law should not allow discrimination based on sexual orientation or gender identity by faith-based

Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', 93 *Alternative Law Journal* 752.

⁹⁶ UN Human Rights Committee, [CCPR General Comment No. 18: Non-discrimination](#), 10 November 1989, [13].

⁹⁷ General Comment No 22, [8].

organisations (as they currently do),⁹⁸ but should allow for discrimination based on a person's religion if religious adherence is actually relevant to the particular role, program or service in question, and it is reasonable and proportionate for the religious body's religious practice or requirement to dominate an individual's own religious practice. This is the approach which has recently been adopted in Victoria,⁹⁹ and responds to the inadequacy of a pure 'inherent requirements' approach in employment, which effectively allows the employer to structure its operations in order to preserve its ability to discriminate. This has been the experience in some cases overseas,¹⁰⁰ and is a risk identified in the case law on 'inherent requirements' in Australia.¹⁰¹ The Victorian approach represents a better-practice amalgamation of the approach taken in Europe, Tasmania and Queensland on employment exemptions for faith-based organisations.¹⁰²

Using religion as a proxy for LGBTQ+ discrimination: cases studies

In our experience, some faith-based organisations have attempted to reframe discrimination based on sexual orientation and gender identity as a matter of the organisation instead requiring conformity with religious beliefs that deny the equal dignity of LGBTQ+ people. We have recently assisted several people employed by faith-based educational institutions who were dismissed or forced to resign because of their sexual orientation and/or their views about LGBTQ+ people. All of these people were highly regarded and faithful employees who ably performed their roles and subscribed to many of the religious beliefs of their employer – except those which undermined or diminished the equal dignity of LGBTQ+ people and their relationships.

One such case is that of **Mrs Rachel Colvin**, which was brought before the Victorian Civil and Administrative Appeals Tribunal, and which demonstrates the very real issue of institutions imposing religious beliefs on individuals employed by them. Mrs Colvin, a married woman with three children and a committed Christian, held religious beliefs in favour of same sex marriage. In 2019, she was forced to resign after the non-denominational Christian school at which she was employed in Victoria required her to personally accept and abide by an amended statement of faith stating that marriage must be between 'a man and a woman'. The statement of faith was amended and imposed on Mrs Colvin following the national marriage postal survey, some 10 years after she was first employed by the school and did not conform with her own religious beliefs. Mrs Colvin was forced to resign notwithstanding she offered to teach in accordance with the schools' beliefs.¹⁰³



Above: Rachel Colvin and her family

⁹⁸ *Sex Discrimination Act 1984* (Cth), ss 37-38.

⁹⁹ *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

¹⁰⁰ See, for example, *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 556 U.S. 171 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 591 U.S. ____ (2020).

¹⁰¹ *X v Commonwealth* [1999] HCA 63 at [31]-[33], [37] per McHugh J, and [102]-[103] and [105]-[106] per Gummow and Hayne JJ (with whom Gleeson CJ and Callinan J agreed, see also [173]); cf at [105]-[151] per Kirby J dissenting.

¹⁰² *Anti-Discrimination Act 1997* (Tas), ss 50-51; *Anti-Discrimination Act 1991* (Qld), ss 25(3)-(8), 109(2); A Hilgemeijer and A McGuire (2019) 'Religious schools and discrimination against staff on the basis of sexual orientation: lessons from European human rights jurisprudence', *Australian Law Journal*, 93(9): 752-765.

¹⁰³ H Elg (2019) '[Ballarat Christian College under fire for same-sex marriage views](https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/)', *The Courier*, 16 September. See also <https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/>.



Above: Karen Pack and her wife, Bronte

In 2020, Ms Karen Pack, a committed Christian and respected teacher, was fired from her job at a Baptist tertiary college in Sydney after she became engaged to her same-sex partner. Ms Pack, herself an ordained pastor, was employed by the college in February 2018 and lectured in chaplaincy and spiritual care, a post-graduate program she had been engaged by the college to develop. In a statement emailed to Ms Pack's students after her employment was terminated, the college admitted that Ms Pack had a 'deep and abiding faith in Jesus' and was an 'excellent and committed educator'. It explained that the decision to end her role was made by the Principal with the support of the College Board and Leadership Team, based on the position held by the college on same-sex marriage.¹⁰⁴

As some of you may already be aware, Karen is in a committed same-sex relationship. Recently her and her partner decided to formalise this commitment by getting engaged to be married. Over the past month or so, Karen, myself, [REDACTED], [REDACTED] and our Principal [REDACTED] have met (together and in smaller groups) to discuss what this means for Karen's role at College. The decision for Karen to end her lecturing role was made by the Principal, with the knowledge and support of the Morling College Board and College Leadership Team. It was based on the position on same-sex marriage held by the College as stated in our Community Code as well as the Baptist Association's position and ongoing discussions.

In no way does this decision indicate that we question Karen's deep and abiding faith in Jesus and her desire to live with integrity and honesty. She is an excellent and committed educator. She has taught you to think deeply about your faith and be further equipped with skills which will impact many. She has made a significant contribution to Morling, particularly in the establishment and flourishing of the Chaplaincy and Spiritual Care programs over the past two and a half years. She has become a good friend, teacher and colleague to many of us. Karen will still be warmly welcomed on campus and we thank her for serving you and our community so well.

Above: Extract from the statement sent to Karen's students by the college

In 2021, Ms Steph Lentz, a committed Christian and teacher, was fired from her role as an English teacher at a Christian school in Sydney after she came out as a lesbian. The school fired Ms Lentz because she would not affirm the "immorality" of homosexuality, which the school argued breached an 'inherent, genuine occupational requirement' of her role. This was despite Ms Lentz offering to respond to any questions raised by students about sexuality by presenting the school's strong convictions while acknowledging that some Christian held different views.¹⁰⁵

¹⁰⁴ M Vincent and L Kewley (2021) '[Karen Pack was praised as an 'excellent' educator, but she says she was sacked by her employer Morling College for being gay - but the College disputes this](#)', ABC News, 8 April.

¹⁰⁵ B Schneiders and R Millar (2021) '[Steph Lentz was sacked this year for being gay. It was perfectly legal](#)', Sydney Morning Herald, 10 August.

'Protect all of us, equally': Submission on the Religious Discrimination Bill 2021 and related bills

In paragraph 5 of your letter of 28 December you have stated, with respect to the church you attend, that your church's doctrinal position is consistent with the beliefs and ethos of the School and the School's Summary Statement of Beliefs, except for the issue of its position on LGBTQIA+ people and relationships. The School repeats that the issue relating to your church is solely whether you maintain an active commitment to and involvement with a Christian church holding a doctrinal position consistent with the beliefs of the School, as required by clause 35.1(c) of the MEA. However, on your repeated admissions, you attend a church which does not hold a doctrinal position consistent with the beliefs of the School because it affirms homosexual relationships.

In paragraphs 2, 3, 5 and 6 of your letter of 28 December, you have asserted that you believe the School's issue is your sexual orientation or sexuality. The School again assures you that is not the case. The School's questions to you have at all times been directed to whether you fulfil the inherent, genuine occupational requirement of clause 35.1(c) of the MEA. The School accepts that there are

faithful Christians who see their sexual orientation as homosexual or who experience same sex attraction, and yet who recognise that it would be wrong to act on their temptations and who prayerfully live a celibate life. Accordingly, the issue is not your sexual orientation but whether you fulfil the inherent, genuine occupational requirement of clause 35.1(c) of the MEA.

Above: Extracts from the letter dated 13 January 2021 terminating Steph Lentz's employment

These cases show the real need for reform to religious exemptions that currently allow faith-based organisation to discriminate on the basis of sexual orientation and gender identity, and insist that their employees, students and clients agree with every single religious belief – including on matters of sexuality and gender – in order to keep their job or access their services. These laws are not fair, and they are applied inconsistently and unreasonably so that faith-based organisations can selectively fire, expel or refuse services to LGBTQ+ people and the people who affirm them. In some cases, doctrines are updated on the run, and imposed retrospectively on people who are already contributing faithfully to the work of these organisations.

Sadly, the purge of those who do not share institutional religious views is commonplace and has been exacerbated by the marriage postal survey. Following the marriage postal survey, religious institutions have taken to amending their policies to reinforce discriminatory views towards LGBTIQ+ people and others. For example, the Sydney Anglican Church passed a policy prohibiting the use of its hundreds of properties for same-sex wedding receptions, yoga derived from Hindu practices or by Christian groups 'whose basis of faith' differed from the four principles constituting the Church's Doctrine of Salvation.¹⁰⁶ It stopped short of banning Indigenous smoking ceremonies.¹⁰⁷ The rationale for the policy was squarely explained by Bishop Stead as an attempt by the Church to 'rely on existing anti-discrimination exemptions'.¹⁰⁸ In Mrs Colvin's case, the non-denominational school at which she worked amended its statement of faith and imposed it on staff who were already employed at the school as a condition of their ongoing employment.¹⁰⁹ Exemptions for religious bodies do not promote religious freedom; they stifle it by granting religious institutions a legal way to exclude anyone who does not share their views.

¹⁰⁶ Synod of the Anglican Diocese of Sydney (2018) [Property Use Policy: A Policy of the Synod of the Diocese of Sydney](#), 23 October, cls 14(c) and 20(c).

¹⁰⁷ J Baird and S Boltje (2018) ['Sydney Anglicans to ban SSM, yoga and Indigenous smoking ceremonies on all church property'](#), ABC News, 19 October; J Baird and S Boltje (2018) ['Sydney Anglicans ban same-sex marriage on hundreds of church properties'](#), ABC News, 23 October.

¹⁰⁸ J Baird and S Boltje (2018) ['Sydney Anglicans to ban SSM, yoga and Indigenous smoking ceremonies on all church property'](#), ABC News, 19 October; J Baird and S Boltje (2018) ['Sydney Anglicans ban same-sex marriage on hundreds of church properties'](#), ABC News, 23 October.

¹⁰⁹ See <https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/>.

It is for this reason that the exemptions allowing religious bodies to discriminate against LGBTQ+ people, among others, must be addressed in tandem with the Religious Discrimination Bill. Otherwise, the exemptions imposed by the Religious Discrimination Bill will serve to further embolden religious schools and other organisations to continue their purge of LGBTQ+ people and the people who affirm them.

SOME FURTHER PERSONAL STORIES SHARED WITH US BY OUR SUPPORTERS:

"I'm a Catholic lesbian and my LGBTIQ+ advocacy work is underpinned by tenets of the faith I grew up with such as "love thy neighbour" and "do not judge others." ... [A] heavily pregnant colleague [of mine at a Catholic school in Melbourne] was told to hide her pregnancy because, although living with her male partner for many years, wasn't married. She wore a heavy woollen jumper over summer to hide her growing bump. Unfathomable." – Former teacher at Catholic school

"I'm seventeen, and as far as finding work goes in my future, this bill has me genuinely scared if I'm totally honest. I want to become a high school teacher, and if schools are given the power to be able to refuse to hire me based on my (visibly butch) lesbian identity, I know that my chances of being hired will massively decrease as I will be judged on my looks and who I love INSTEAD of my ability to help students learn..." – 17-year-old Christian lesbian

"As a teacher in a Christian school and mother to a gay school student, I consider myself an LGBTQI+ ally. I don't think religious schools should be allowed to expel, refuse enrolment to or discriminate against LGBTQI students. Neither should they be allowed to fire, refuse to hire, refuse to promote or be allowed discriminate against LGBTQI staff who practise the same religion - whatever that means! Sadly, some Christian denominations/churches, eg. Sydney Anglicans, believe other Christian denominations/churches, eg. Uniting Church Christians, are 'going to hell'! Aaagggghh! Likewise LGBTQI staff/student allies of the same religion (eg. those who support SSM) should be protected. Unfortunately, these things will continue - subtly - even if it were possible to legislate against them." – 55-64-year-old heterosexual Christian woman

(d) Section 11 must be removed, and sections 7-9 and 40(2)-(7) and exemptions in the SDA should be amended

The latitude given to religious bodies to discriminate against others of different faiths or no faith are currently framed too broadly.

Firstly, section 11 should be removed. Democratically elected state and territory parliaments should be able to legislate to prohibit discrimination without having their laws overridden by the Commonwealth.

Secondly, at the very least, in addition to the requirement for a written policy, the Religious Discrimination Bill should replace sections 7-9 and 40(2)-(7) with exemptions that are consistent with the limitations found in existing Commonwealth, state or territory law, pending the review referred to below.

This includes ensuring, at the very least, that:

- religious bodies are defined as 'a body established for religious purposes' (consistent with the SDA);
- discrimination by religious bodies on the ground of religious belief or activity is allowed when it 'conforms to the doctrines, tenets or beliefs of a religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion' (consistent with the SDA);
- no religious discrimination is permitted by faith-based organisations delivering any health or aged care services, not only faith-based 'hospitals' and 'aged care facilities';

- no religious discrimination is permitted by faith-based educational institutions in respect of students who are already enrolled at the institution (consistent with ACT, NT, Queensland and Tasmanian laws);
- no religious discrimination is permitted by faith-based organisations when delivering disability, homelessness, family and domestic violence, financial assistance and other community services or government-funded services to the public, regardless of their mixture of services (consistent with laws in Victoria, or as proposed by draft laws in SA);
- standard exemptions are provided to allow the appointment and training of religious leaders and members of a religious order, and the appointment of persons to participate in religious worship and observance (consistent with the SDA, and laws in Tasmania, Victoria, Queensland, the ACT, NT and WA, and to a degree in NSW and SA).

Thirdly, remove existing exemptions in the *Sex Discrimination Act 1984* (Cth) allowing religious bodies and educational institutions to discriminate against LGBTQ+ people, among others.

Finally, we recommend an urgent and proper review of the appropriateness of all permanent exemptions in federal anti-discrimination law and the *Fair Work Act 2009* (Cth) by an appropriate expert body with an appropriate terms of reference. This must include a genuine consideration of how to achieve a better balancing mechanism that accommodates the rights of individuals of different and no faith, among others including LGBTQ+ people, who are employed, enrolled or rely on services delivered to the public by faith-based organisations.

RECOMMENDATION 3

Delete section 11 of the Religious Discrimination Bill and Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021.

RECOMMENDATION 4

Delete section 38 and amend sections 23(3)(b) and 37(d) of the *Sex Discrimination Act 1984* (Cth) to protect LGBTQ+ people, among others, from discrimination by religious bodies and religious educational institutions in employment, education and when goods, services, facilities and accommodation are made available generally to the public.

RECOMMENDATION 5

If the committee is minded to endorse the Bills (which we do not recommend) then, at the very least, pending the review below and in addition to the requirement for a written policy, replace sections 7-9 and 40(2)-(7) of the Religious Discrimination Bill with provisions that are consistent with the limitations in existing Commonwealth, state and territory laws, including:

- defining religious bodies as *'a body established for religious purposes'*;
- allowing discrimination by religious bodies on the ground of religious belief or activity when it *'conforms to the doctrines, tenets or beliefs of a religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'*;
- prohibiting religious discrimination by faith-based organisations when delivering any health or aged care services (not only faith-based *'hospitals'* and *'aged care facilities'*), disability, homelessness, family and domestic violence, financial assistance and other community services or government-funded services to the public, regardless of their mixture of services;
- prohibiting religious discrimination by faith-based educational institutions in respect of existing students;
- standard exemptions that allow the appointment and training of religious leaders and members of a religious order, and the appointment of persons to participate in religious worship and observance.

Commission an urgent and proper review of the appropriateness of all permanent exemptions in federal anti-discrimination law and the *Fair Work Act 2009* (Cth) by an appropriate expert body with an appropriate terms of reference. This should consider what amendments are necessary to introduce a better balancing mechanism that accommodates the rights of individuals of different and no faith, as well as LGBTQ+ people among others, who are employed, enrolled or rely on services delivered to the public by faith-based organisations.

7. OVERRIDING LAWS PROTECTING PUBLIC ORDER AND SAFETY (SUBSECTION 5(3))

The Religious Discrimination Bill extends religious discrimination protections to people who breach local by-laws. Subsection 5(3) means that local by-laws which prevent or restrict religious activities, such as local government rules requiring a permit to hand out proselytising material in public malls,¹¹⁰ or which impose noise restrictions, are susceptible to challenge.

In principle, Equality Australia has no objection to overriding council by-laws which impermissibly limit any human right but does object to the exceptionalism by which the Religious Discrimination Bill does so. In our view, all by-laws that impermissibly limit human rights (such as the right to peaceful political assembly) should be amended or subject to challenge, and the mechanism for doing so should be available equally to all – not only to those whose religious beliefs or activities are intruded upon.

¹¹⁰ *Attorney-General for South Australia v Corporation of the City of Adelaide and Ors* [2013] HCA 3.

Equality Australia considers it is time for a broader review of laws which discriminate on all prohibited grounds, and greater statutory protection for all human rights, such as equality before the law. That review should be done through a comprehensive framework which incorporates the balancing approach necessary when considering whether laws impermissibly infringe human rights.

RECOMMENDATION 6

Delete subsection 5(3) from the Religious Discrimination Bill.

Implement a comprehensive mechanism for the review of laws which infringe on any human right.

HUMAN RIGHTS ARE FOR HUMANS

Corporations associated with religious individuals will be given discrimination protections. Meanwhile, other discrimination laws do not protect associates, such as the children of same-sex couples, from discrimination.

8. PROTECTING CORPORATIONS AGAINST DISCRIMINATION (SUBSECTION 16(3))

Subsection 16(3) of the Religious Discrimination Bill protects legal entities from religious discrimination based on their association with an individual with particular religious beliefs. While some other anti-discrimination laws give protection to ‘associates’ (such as the spouse, partner or relative of a person with a protected attribute),¹¹¹ subsection 16(3) of the Religious Discrimination Bill is unique in proposing to give these human rights protections explicitly to companies.

This new provision will open an unprecedented opportunity for business-on-business disputes. It will also silence the ability of ordinary Australians to boycott companies as a way of showing their disagreement with individuals associated with these companies who have expressed discriminatory, outdated, dangerous or offensive views either based in or about religion. It will require Australian businesses to provide services, goods, facilities and accommodation to legal entities endorsing people whose views undermine the equality of others.

So, for example:

- a sporting code could sue a sponsor who refused to supply it goods and services while it continued to employ a sports star expressing discriminatory views based on their religious beliefs;
- a conference provider could sue a hotel if it refused accommodation to a prominent individual speaking at the conference with religious views in favour of racial segregation;
- a company could sue a printer who refused to print pamphlets authorised by its managing director that ‘abortion is murder’;
- a charity could sue the Commonwealth for cancelling a funding contract because its CEO made public comments that women are commanded to cover themselves in order to avoid unwanted sexual advances.

Paragraphs 254 and 254 of the Explanatory Memorandum makes clear that this is the intended purpose and effect of this clause.

This approach demonstrates the exceptionalism in the Religious Discrimination Bill. Neither the *Sex Discrimination Act* nor the *Age Discrimination Act* include any protections for associates, while the Religious Discrimination Bill seeks to extend these protections to legal entities. Accordingly, while a child has no protection under the *Sex Discrimination Act* if they are discriminated against because of the marital status or sexual orientation of their parents, companies will be able to sue other companies if they are refused goods, services, facilities, accommodation or access to premises because of associations with individuals with objectionable religious views. Not only is this a double standard, but it fails to grapple with the policy propositions relating to religious belief or activity (discussed at the opening of our submission) which require laws in this space to carefully balance competing beliefs and power relations.

¹¹¹ See, for example, RDA and DDA.

This provision is markedly different to protecting individual members of an organisation, or a group of individuals, who are refused services or facilities on religious grounds. A group of individuals who experience discrimination would be protected under existing mechanisms in the *Australian Human Rights Commission Act 1986* (Cth) for bringing representative complaints.¹¹² If an association comprising members who were, for example, Muslim or Christian, were refused access to a facility for the purposes of communal prayer, a member of the association could challenge that refusal on behalf of the class of members. Accordingly, it is not necessary to extend the protections to legal entities themselves, which this Bill does.

By extending protection to legal entities, it is the lost revenue or damage done to the legal entity which become compensable – not the harm caused to an individual. This clause could therefore result in significant damages for being payable to companies who lose revenues because another company has refused them a service, facility or accommodation (such as a bank account, conference centre or advertising space) because that company did not want to be associated with a person whose religious views were highly objectionable.

RECOMMENDATION 7

Only humans should be afforded *human* rights, and all humans should be afforded equal rights.

RECOMMENDATION 8

In subsections 16(1) and (2) of the Religious Discrimination Bill, replace “person” wherever appearing with “individual”. Delete subsection 16(3) of the Religious Discrimination Bill.

RECOMMENDATION 9

Amend the *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) to include protections against discrimination for associates.

¹¹² *Australian Human Rights Commission Act 1986* (Cth), s 46P(2).

OTHER ISSUES

There are a number of technical issues that should be addressed to ensure the Religious Discrimination Bill does not result in unintended adverse consequences, particularly where there is a conflict of beliefs or rights. Looking to overseas experience, it is important to ensure that the Religious Discrimination Bill does not result in undermining the fundamental rights and freedoms of others.

9. DEFINING RELIGION AND THE ‘IT JUST TAKES TWO’ / ‘RELIGION OF ONE’ TESTS

The Religious Discrimination Bill does not define what constitutes a religious belief or activity, nor does it limit the types of beliefs which may be protected. For example, there is no requirement that a belief be worthy of respect in a democratic society, be compatible with human dignity or not conflict with the fundamental rights of others.¹¹³

Further, the objects clause in the Religious Discrimination Bill imports a selective part of the freedom of thought, conscience and religion recognised in article 18 of the International Covenant on Civil and Political Rights.¹¹⁴ In particular, the objects clause makes no reference to the ways in which the freedom is limited by article 18(3) of the International Covenant on Civil and Political Rights; that is, where prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Instead, the Religious Discrimination Bill recognises a wide range of religious doctrines, tenets, beliefs or teachings without any effective minimum requirements or definitions. The Religious Discrimination Bill does this by extending protections, and providing exemptions, to people of any and all religious beliefs, including based on two new and unprecedented legal tests:

- **‘It just takes two’ test:** This test allows faith-based organisations to discriminate against others with different or no beliefs if ‘a person of the same religion ... could **reasonably consider** [their conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion’.¹¹⁵
- **The ‘religion of one’ test:** This test protects a ‘statement of belief’ that a person ‘**genuinely considers** to be in accordance with the doctrines, tenets, beliefs or teachings’ of their religion.¹¹⁶

This means that the protections provided by this Bill, and the exemptions provided for faith-based organisations, may extend to extreme and unorthodox beliefs.

Schools, charities and other faith-based organisations who wish to discriminate against others with different or no beliefs will be able to do so by pointing to doctrines, tenets, beliefs or teachings which only one other person reasonably considers to be part of their particular brand of faith.¹¹⁷ Or in other words, it will just take two people to establish a religious requirement exists and deserves protection.

¹¹³ See *R v AM* [2010] 5 ACTLR 170.

¹¹⁴ Religious Discrimination Bill, s 3(1).

¹¹⁵ Religious Discrimination Bill, ss 7(2), 9(3)(c) and 40(2)(c).

¹¹⁶ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*) and 12.

¹¹⁷ Religious Discrimination Bill, ss 7(2), 9(3)(c) and 40(2)(c).

Meanwhile, people who wish to obtain immunity under anti-discrimination laws by making statements based on their beliefs, must simply '*genuinely consider*' their statement to be based in religion – even if no one else of the same religion agrees with them.¹¹⁸

The Explanatory Memorandum explains that the intention is to protect the religious beliefs or activities of different denominations or sects within a particular religion.¹¹⁹ But with the absence of any definition of a 'religion', and with the intention to include emerging and new faith traditions, what might qualify as a religious belief or activity is extremely broad, uncertain and highly subjective. For faith-based organisations seeking to discriminate against others, a hypothetical person who believes what the organisation believes will be the final arbiter of the organisation's religious beliefs.

The 'religion of one' and 'it just takes two' tests will respectively mean that people and faith-based organisations will not need to show conformity with any established doctrines, tenets, beliefs or teachings of any established faith tradition in order to justify discrimination against others with different or no beliefs, or to make discriminatory 'statements of belief'. People of very wide and varying beliefs will also be afforded protections under the Religious Discrimination Bill.

If people are to be afforded protection for whatever religious doctrines, tenets, beliefs or teachings they believe in, the Religious Discrimination Bill must ensure that, consistent with article 18(3) of the *International Covenant on Civil and Political Rights*, no conduct is protected, authorised or permitted where it is contrary to '*public safety, order, health, or morals or the fundamental rights and freedoms of others*'.

This could be done by the inclusion of a general limitations clause, similar to section 35, that provides that nothing in the Act makes it unlawful to discriminate against a person on the ground of the person's religious belief or activity if the conduct is done reasonably and in good faith and is necessary to protect the safety, health or fundamental rights and freedoms of another person.

RECOMMENDATION 10

Make the objects clause (section 3(1) of the Religious Discrimination Bill) consistent with other federal anti-discrimination legislation.

Insert a new section 35A in the Religious Discrimination Bill which provides that: '*Nothing in this Act makes it unlawful to discriminate against a person on the ground of the person's religious belief or activity if the conduct is done reasonably and in good faith and is necessary to protect the safety, health or fundamental rights and freedoms of another person.*'

10. EXPANDING LIABILITY TOO FAR (SECTION 70)

Instead of using existing anti-discrimination legal frameworks to define legal liability, the Religious Discrimination Bill makes anyone who is '*directly or indirectly, knowingly concerned*' in a contravention also responsible for the contravention, expanding liability to a broad and undefined group of individuals and organisations. The Bill also expands liability to attempted contraventions, misunderstanding the compensatory purpose of anti-discrimination laws.

¹¹⁸ Religious Discrimination Bill, s 5(1) (definition of *statement of belief*) and 12.

¹¹⁹ EM Religious Discrimination Bill, [38]-[40].

Most federal anti-discrimination laws provide that a person who causes, instructs, induces, aids or permits another person to unlawfully discriminate is themselves responsible for a contravention,¹²⁰ and thereby could themselves be liable to remedy the loss and damage suffered by a complainant. These provisions expand the duty directly placed on employers, educational institutions and goods and services providers, among others, to people who cause, instruct, induce, aid or permit these people to unlawfully discriminate. They could, for example, cover a senior executive in a related body corporate that instructs a human resources manager in a subsidiary entity to unlawfully terminate the employment of a person on discriminatory grounds. These provisions are important and justified in expanding liability to the person (whether natural or legal) ultimately responsible for the discrimination.

However, rather than using the existing anti-discrimination legal liability frameworks in the *Sex Discrimination Act*, *Disability Discrimination Act* and *Age Discrimination Act*, the Religious Discrimination Bill takes the civil penalty provisions in an unrelated Act to expand liability for unlawful discrimination.¹²¹ This liability provision seems to fundamentally start in the wrong place. This is because anti-discrimination laws do not seek to punish; they seek to compensate for loss and damage suffered as a result of discrimination. Accordingly, it makes little sense to expand liability to people who have attempted (but not actually) contravened the law, because there is nothing to remedy or compensate.

The proposal to expand liability to people who are '*directly or indirectly, knowingly concerned*' in a contravention is particularly expansive. To be '*knowingly concerned*' in a contravention means to have actual knowledge of the 'essential elements' of the contravention but does not require a person to have known that the conduct in question was unlawful or to have caused the contravention.¹²² Actual knowledge includes wilfully shutting one's eyes to the obvious, wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make, or knowledge of circumstances which would indicate the facts to an honest and reasonable person.¹²³

The case of *Sutton v A J Thompson Pty Ltd (in liq)* (1987) highlights just how broad the phrase '*knowingly concerned*' can be. In that case, an accountant who remained silent was found to have withheld vital information from purchasers of a business and thereby jointly responsible for false statements which were actually made by the vendor.¹²⁴

Expanding liability to people who are '*directly or indirectly, knowingly concerned*' in a contravention has the potential to weaponise anti-discrimination laws, expanding liability to a very broad range of persons and organisations (with potentially deeper pockets than the person ultimately responsible for the discrimination).

Consider these potential scenarios:

- A media organisation has an advertising agreement with a significant client. After a non-religious high-profile person at the organisation makes offensive statements about the Virgin Mary, the client decides to end the advertising agreement after pressure from its own stakeholders to disassociate itself from the comments. Hearing that its client will pull their advertising spend, the media organisation tells its client that it will be requiring its high-profile employee to retract the statement and apologise, or they will be terminated. The high-profile person sues the media organisation for religious discrimination, saying they were merely

¹²⁰ *Sex Discrimination Act 1984* (Cth), s 105; *Disability Discrimination Act 1992* (Cth), s 122; *Age Discrimination Act 2004* (Cth), s 55. The *Racial Discrimination Act 1975* does not have any similar provisions.

¹²¹ Explanatory Memorandum to the Religious Discrimination Bill, [599].

¹²² *Yorke v Lucas* [1985] HCA 65; *Wheeler Grace & Pierucci Pty Ltd v Wright* [1989] FCA 127; *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; *Trade Practices Commission v Australian Meat Holdings Pty Ltd* (1988) 83 ALR 299; *HIH Insurance Ltd (in liq) v Adler* [2007] NSWSC 633.

¹²³ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

¹²⁴ *Sutton v A J Thompson Pty Ltd (in liq)* (1987) 73 ALR 233.

expressing their lack of religious beliefs, and sues the advertising client for being '*directly or indirectly, knowingly concerned*' in the contravention because their decision to pull the advertising spend is what led to the media organisation making the demand that they retract the statement or resign.

- An Archbishop directs all Catholic hospitals to provide women seeking terminations of pregnancy information on the stages of development for an unborn child and alternative pathways to abortion, including counselling, financial support and adoption. A woman who is admitted to the hospital objects to the material, which she finds distressing given the reasons she seeks an abortion. She complains about the hospital discriminating against her by failing to provide her with healthcare that is consistent with her own (lack of) religious beliefs. When the hospital tells her its policy is set by the Archdiocese, she makes a complaint about the Archbishop to the Australian Human Rights Commission. The Australian Human Rights Commission accepts the complaint on the basis that the Archbishop is '*directly or indirectly, knowingly concerned*' in the policy that caused her substandard experience in healthcare.

We recommend making the liability provisions under the Religious Discrimination Bill consistent with section 105 of the *Sex Discrimination Act 1984* (Cth), section 122 of the *Disability Discrimination Act 1992* (Cth) and section 55 of the *Age Discrimination Act 2004* (Cth).

RECOMMENDATION 11

Replace section 70 of the Religious Discrimination Bill with a provision which states: '*A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Part 4 is, for the purposes of this Act, taken also to have done the act.*'

11. RELIGIOUS DISCRIMINATION COMMISSIONER

If a Religious Discrimination Commissioner is introduced as proposed by the Religious Discrimination Bill, LGBTI people will be the only group protected under federal anti-discrimination legislation without a dedicated Commissioner at the Australian Human Rights Commission. This will mean that responsibility for developing systemic responses to LGBTIQ+ discrimination will continue to fall through the gaps.

As former Human Rights Commissioner Tim Wilson noted in 2011:¹²⁵

'There is no dedicated commissioner for sexual orientation, gender identity and intersex (SOGII) issues in the Commission's legislation, nor Commonwealth Ministers or government agencies that take primary responsibility for advancing issues that arise for lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians.

As a consequence, SOGII issues too often fall through the cracks of policy. This is particularly concerning because of the level and type of State-sanctioned discrimination experienced by LGBTI Australians. To address this, I have also taken on the role as the de facto SOGII Commissioner at the Commission to ensure that LGBTI people have a voice.'

¹²⁵ Australian Human Rights Commission (2015) [Resilient Individuals: Sexual orientation, gender identity & intersex rights – national consultation report](#). Sydney: Australian Human Rights Commission, p.1.

'Protect all of us, equally': Submission on the Religious Discrimination Bill 2021 and related bills

The Ruddock Religious Freedom Review expressly considered the proposal for a specific Religious Freedom Commissioner and rejected it on the basis that it was not necessary.¹²⁶ The review stated that the existing Human Rights Commissioner already had the capacity to perform many of the functions proposed for a Freedom of Religion Commissioner.¹²⁷

We welcome the Government's recognition that a Religious Discrimination Commissioner, rather than a Freedom of Religion Commissioner, would be a more consistent way to complement the existing suite of Commissioners covering the grounds of sex, age, race and disability discrimination. Now is the time to also ensure that LGBTIQ+ people have a dedicated Commissioner responsible for discrimination based on sexual orientation, gender identity and intersex status.

RECOMMENDATION 12

Establish an LGBTIQ+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.

¹²⁶ Ruddock Religious Freedom Review, [1.415].

¹²⁷ Ruddock Religious Freedom Review, [1.416].

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2021

Accompanying the Religious Discrimination Bill are two related bills. One, the Human Rights Legislation Amendment Bill 2021, defies its name, by reintroducing discrimination against LGBTIQ+ people into federal law. Two provisions in this Bill attempt to re-litigate issues that were already addressed in the marriage equality debate, while the commitment to address discrimination against LGBTIQ+ people in religious schools remains unaddressed.

12. ADVOCATING DISCRIMINATION IS NOT A ‘PUBLIC BENEFIT’

The Human Rights Legislation Amendment Bill 2021 has proposed amendments to the *Charities Act 2013* (Cth) that would *conclusively* presume that an entity which advances, expresses or supports a view that marriage can only be ‘a union of a man and woman’ is always acting ‘for the public benefit’ when it undertakes those activities.¹²⁸

This is the equivalent of a provision which says that charities that promote a view that only people of the same race should marry, or that women do not have the intellect to be able to exercise a right to vote, are always acting ‘for the public benefit’ when they undertake those activities.

This is an unprecedented, offensive and repugnant provision to all LGBTIQ+ people who suffered the indignity of a nationwide postal survey about the equality of their relationships, having convincingly won that argument with the Australian public. No provision of Australian law should conclusively presume any activity which promotes discrimination to be for the public benefit. Indeed, if the activities being promoted by the charity are for the public benefit, then they would not need a deeming provision giving them a protected status as they could easily demonstrate that benefit to the public.

While the offensiveness of such a provision should not be understated, it is also an amendment which is entirely unnecessary. Despite years of marriage being defined as a union between a man and a woman, no charity was disqualified for advocating *in favour of* marriage equality and against that government policy. Section 11 of the *Charities Act* already provides clarity, by way of an explanatory note, that activities are not contrary to public policy merely because they are contrary to government policy. Accordingly, there is no risk of a charity being disqualified merely because it advocates for marriage being between a man and a woman, and no Australian charity has lost its status as a charitable organisation in the 4 years since marriage equality.

The lack of need for such provisions was a view also shared by the Australian Charities and Not-for-profits Commissioner when the Senate considered and rejected proposed amendments to the same effect when debating the Marriage Amendment (Definition and Religious Freedoms) Bill 2017.¹²⁹

The insertion of this provision may also have an unintended legal consequence on the ability of charities to express their views more generally. Calling out advocacy on so-called ‘traditional marriage’ for special protection implies that other forms of advocacy, which are not specifically called out in the *Charities Act*, might therefore constitute a disqualifying purpose for the meaning of a charity under the Act. The legal effect of this provision may therefore be to cast greater doubt on the ability of charities to advocate on issues more generally.

¹²⁸ Human Rights Legislation Amendment Bill, Sch 1, cl 3 (proposed section 19 of the *Charities Act 2013* (Cth)).

¹²⁹ See amendments moved by Senators Fawcett and Paterson (item (4) on sheet 8329); *Senate Hansard*, 28 November 2017, p.9082.

RECOMMENDATION 13

Delete proposed section 19 of the *Charities Act 2013* (Cth) from the Human Rights Legislation Amendment Bill.

13. ADDRESS THE EXEMPTIONS FOR RELIGIOUS SCHOOLS

The Human Rights Legislation Amendment Bill amends the *Marriage Act 1961* (Cth) to allow religious educational institutions to refuse to make facilities available, or provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of the marriage, provided the refusal conforms with their religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.¹³⁰ Given the genesis of this proposal was the marriage postal plebiscite, the sole purpose of this provision appears to be to allow religious universities, schools and colleges to deny facilities they make available to the public to same-sex couples wishing to marry.

This is another discriminatory legislative proposal in search of a problem. There is already a wide exemption for religious bodies under the *Marriage Act 1961* (Cth),¹³¹ in addition to the wide exemptions already given to religious bodies under the *Sex Discrimination Act 1984* (Cth).¹³² There is also no evidence of any issues of this nature arising in religious schools since the achievement of marriage equality in 2017.

The real issue that needs to be addressed are broad exemptions in the *Sex Discrimination Act 1984* (Cth) which continue to licence discrimination against LGBTQ+ people, including students. In the lead up to the Wentworth byelection, the Government made a commitment to repeal exemptions for religious schools allowing them to expel students based on their sexual orientation.¹³³ That promise remains unfulfilled. Moves to entrench exemptions for religious schools in connection with marriage, while the broader issue of religious school exemptions remain, highlights a lack of balance in the approach to exemptions generally and a prioritisation of religious privilege over and above the interests of LGBTQ+ people.

In light of the Prime Minister's remarks that he does not support the expulsion of gay students or the sacking of gay teachers,¹³⁴ it is not clear why this religious exemption is being legislated now while LGBTQ+ people have to wait for a further 12 months for an Australian Law Reform Commission inquiry to tell us what we already know: that LGBTQ+ staff, teachers and students at religious schools are not adequately protected from discrimination based on their sexual orientation or gender identity.

Given our previous submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, and the submissions above on the need to achieve a better balance in religious exemptions generally, Equality Australia considers that the issue

¹³⁰ Human Rights Legislation Amendment Bill 2021, Sch 1, cl 6 (proposed s 47C of the *Marriage Act 1961* (Cth)).

¹³¹ *Marriage Act 1961* (Cth), s 47B.

¹³² *Sex Discrimination Act 1984* (Cth), ss 37-38.

¹³³ Prime Minister Scott Morrison (2018) *Media Release*, 13 October, available at www.pm.gov.au/media/media-statement (accessed 2 October 2019): "To address this issue I will be taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality. I believe this view is shared across the Parliament and we should use the next fortnight to ensure this matter is addressed."

¹³⁴ P Karp (2021) '[Scott Morrison says gay teachers should not be fired under religious discrimination laws](#)', *The Guardian*, 25 November.

of exemptions for religious schools more broadly should be considered together to ensure that discrimination against LGBTQ+ people is reduced not increased.

RECOMMENDATION

Delete proposed section 47C of the *Marriage Act 1961* (Cth) from the Human Rights Legislation Amendment Bill.