SUBMISSION TO THE AUSTRALIAN PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

CONCERNING THE

RELIGIOUS DISCRIMINATION BILL 2021

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2021 AND

THE RELIGIOUS DISCRIMINATION (CONSEQUENTIAL AMENDMENTS) BILL 2021

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1. This submission is made to the Australian Parliament Parliamentary Joint Committee on Human Rights. It is made in respect of the legislative package containing the *Religious Discrimination Bill 2021* (the Bill), the *Human Rights Legislation Amendment Bill 2021* and the *Religious Discrimination (Consequential Amendments) Bill 2021* which was referred for inquiry by the Attorney-General on 26 November 2021 and is to report by 04 February 2022. It is made in my personal capacity.

2. This submission focusses on the human rights implications of the Bill and addresses the following matters, a summary of which is contained in the executive summary:

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Executive Summary

Strengths of the Bill

3. The Bill has many strengths, a summary of which is as follows.
    a. The Bill affords protection against religious discrimination in Commonwealth law across a range of public fields, consistent with other Commonwealth discrimination law (for example, education, employment, goods and services, Commonwealth laws and programs and State and Territory programs funded by the Commonwealth). Currently no protection against religious discrimination exists in New South Wales and South Australia. The Explanatory Memorandum (EM) provided with the Bill contains various examples illustrative of the Bill's scope: a Catholic who is 'aggressively' asked to leave a restaurant and 'banned' after saying grace; a Hindu told there is no place for 'someone who believes in things so different' in the football team; an Islamic childcare operator declined Commonwealth funding because the approving official 'dislikes Muslim people'. That such acts are not currently unlawful under Commonwealth law serves to demonstrate the pressing need for this legislation.
    b. Clause 5(1) - The Bill utilises a test for 'religious belief' that has regard to the claimant/respondent's 'genuine' religious convictions, thus avoiding judges having to act as theologians to interpret religious doctrines to determine if a belief 'conforms' to an identified religious doctrine (clause 5(1), definition of 'statement of belief'; EM para 39). This is consistent with the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes, as outlined in Mark Fowler 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).
    c. Clause 7 - The Bill recognises the long-standing principle of international law that when a religious body acts in accordance with its beliefs it is not discriminating. Clause 7 accords with the alignment between Article 18 and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR). Where a religious body acts in accordance with its religious precepts it is exercising a 'differentiation' that is 'reasonable and objective', with 'the aim is to achieve a purpose which is legitimate under the Covenant', being the manifestation of religious practices as protected by the Covenant, consistent with a democratic and plural society.[1] As such, clause 7 is correct when it states that a religious body 'does not discriminate' when it exercises rights as outlined therein (see paragraphs 14 to 19).
    d. Clause 7 - The Bill now encompasses all faith-based charities within the exclusion to discrimination in respect of employment. This is consistent with international human rights law, as I outline in 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020) (see also Appendix I providing an analysis of international human rights law concerning religious institutions and schools).

[1] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: http://www.refworld.org/docid/453883fa8.html.

e. Clause 7 - The Bill clarifies that a public benevolent institution may be 'conducted in accordance the doctrines, tenets, beliefs or teachings of a particular religion'. This is important, given judicial pronouncements that a faith-based welfare body cannot be a religious institution (see paragraph 11 and Appendix I).
f. Clause 7 - The Bill protects the freedom to establish independent religious schools. This human right has been recognised by the United Nations Human Rights Committee in *William Eduardo Delgado Páez v Colombia*[2] and is grounded in the long-standing international human right of parents to 'ensure the religious and moral education of their children in conformity with their own convictions'[3] (see paragraphs 20 to 23 see also paragraphs 40 to 43 in respect of the proposed override of Victorian legislation at clause 11. An analysis of the international human rights law supporting these provisions is provided at Appendix I).
g. Clause 12 - The Bill protects statements of religious belief against complaints in State and Territory anti-discrimination law, provided a series of tests are met, including that the statements are non-vilifying and made in 'good faith'. The protection is posed as a shield against discriminatory complaints against 'moderately' expressed religious views, not a sword. It can be seen as an exercise attempting to conserve the tolerant approach to religious discourse that has long been characteristic of our open and liberal democracy and operates in with neutrality between religious and non-religious worldviews in a manner that is consistent with international law (see paragraphs 44 to 47). Appendix II considers the wider interaction of clause 12 with the internationally protected right of freedom of expression and with protections to religious speech.
h. Clause 15 - The Bill protects professionals and tradepersons against regulatory bodies imposing discriminatory limitations on the exercise of their religious beliefs outside of the course of their profession or trade where such limitations do not pertain to 'essential requirements' of the profession or trade.
i. Clause 16 - The Bill prohibits discrimination against groups and organisations (which are organised around religious convictions) as well as against individuals. For example, a school or charity that is subjected to discrimination because of the religious views of its associate will be able to seek protection under the Bill, provided its actions are not unlawful and the discrimination occurs in an area of public life protected by the Bill (see paragraphs 57 to 62 below and the analysis of international law in support of this provision at Appendix III).
j. The legislative package protects institutions that hold a traditional view of marriage from loss of their charity status, as has occurred abroad (*Human Rights Legislation Amendment Bill 2021* clause 3). The amendment addresses both the requirement that charities conform with 'public policy'[4] and also that they exist for the public benefit. The rationale for addressing both requirements is stated in the enclosed article Mark Fowler, 'Attaining to Certainty: Does the Expert

[2] *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990).
[3] *International Covenant on Civil and Political Rights, opened for signature on 16 December 1966 (entred into force 23 March 1976)*, ('*ICCPR*'). Article 18(4). In the European context the equivalent right is contained in Article 2 of the First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ('*ECHR*').
[4] *Charities Act 2013* (Cth), s 11.

Panel's Proposal for Reform of the Charities Act Sufficient to Protect Religious Charities?' (2020) 2 *Third Sector Review* 87 (paragraph 64).

Various of these strengths are further elaborated upon in the body of this submission.

Areas for Further Improvement

4. Notwithstanding the foregoing strengths, there are several areas in which the Bill could be improved. These are further detailed in the body of this submission. They may be summarised as follows:
    a. Clause 5(1) – definition of religious body. Consideration should be given to removing not-for-profit bodies from the excluded category of bodies 'that engage solely or primarily in commercial activities' (see paragraphs 6 to 10 and Appendix I concerning the international human rights law concerning religious bodies (see particularly paragraph 78)). This would be consistent with international human rights law, as I outline in 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020) (see also Appendix I providing an analysis of international human rights law concerning religious institutions and schools).
    b. Clause 5(1) – definition of educational institution. The definition purports to include 'child care centres and early learning centres at which education or training is provided.' However, as highlighted by the *Charities Definition Inquiry* in 2001, there is serious doubt as to the extent to which such entities provide 'education', as understood at law. To address this concern early learning and child care centres would need to be recognised as being able to be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' regardless of whether they are recognised as providing 'education' or not (paragraphs 12 to 13 and Appendix I concerning the international human rights law concerning religious bodies (see particularly paragraph 78)).
    c. Clauses 7, 9, 40 – Various clauses that require determination of the beliefs of a religious body have retained a test which requires a decision-maker to ascertain whether 'a person of the same religion as the religious body could reasonably consider [the conduct in question] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. The Bill thus requires that judges act as theologians to interpret religious doctrines to determine if a belief 'conforms' to an identified religious doctrine, a proposal that has been directly criticised by the most senior courts within Australia, the United States, Canada and the United Kingdom. This test should be replaced with a rule of attribution that has regard to the genuine beliefs of the leaders of the institution, its documents and its conduct, a concept which is shown to enjoy wide-ranging judicial and academic support. The Bill also risks imposing an artificial restriction on the ability of religious institutions to evidence their beliefs by requiring that reference be had to 'foundational documents' of an institution (see EM paras 98, 125, 448) (paragraphs 24 to 37).
    d. Clauses 7(7), 9(3)&(7), 40(3) - The Ministerial ability to determine requirements for a policy issued by faith-based schools, religious hospitals, aged care, accommodation providers, disability service providers, religious camps and conference sites should be removed. It delegates a significant discretionary power to a future Minister, which power may conceivably encompass limitations

that would frustrate the effective operation of the applicable exclusions (paragraphs 38 to 39).

e. Clause 14 - To avoid a disjunct between the Bill and international law, clause 14(2) concerning factors to be fulfilled in satisfying the 'reasonableness test' for indirect discrimination should require reference to the 'necessary' standard imposed under Article 18(3) of the ICCPR (paragraphs 50 to 52, and also 40 to 43).
f. Clause 14 - consistent with existing Commonwealth anti-discrimination law[5] the burden of proof should lie with the person seeking to establish that a condition requirement or practice is reasonable (paragraphs 53 to 54).
g. Clause 14 - Consistent with the Report of the Former United Nations Special Rapporteur on Freedom of Religion or Belief titled *Elimination of all forms of religious intolerance*,[6] a 'reasonable adjustments' clause similar to that contained in the *Disability Discrimination Act 1992* would provide a means to deal with the 'comparator test' issue highlighted by *Purvis* judgement. Further examples of the kinds of attributes that would ordinarily be attributed or imputed to religious believers would also assist address this concern (see paragraphs 55 to 56).
h. Clause 20 - To be consistent with existing Commonwealth law, the prohibition on discrimination within partnerships should only operate in respect of partnerships of 6 or more persons (paragraph 63).

[5] See for example *Sex Discrimination Act 1984*, s 7C.
[6] Interim report of the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, A/69/261, 5 August 2014 https://www.ohchr.org/documents/issues/religion/a.69.261.pdf

Introductory Remarks

5. The Government is to be commended for introducing this legislation, in fulfilment of its response to the recommendations of the Expert Panel on Religious Freedom. Protection of persons against discrimination on the basis of religious belief is the missing piece in the constellation of Australian equality legislation. Of the five main equality rights recognised in the international law to which Australia is a signatory — being race, age, disability, sex and religion — only religion fails to receive dedicated protection in Commonwealth law. The introduction of a Commonwealth *Religious Discrimination Bill* completes the suite of Australian equality protections. In its 2017 Periodic Review of Australia, the United Nations Human Rights Committee expressed 'concern' at 'the lack of direct protection against discrimination on the basis of religion' and called upon Australia to address this deficiency by enacting Commonwealth discrimination protections.[7] The following comments are made according to the numbering of the relevant clauses within the Bill. They are not ranked in order of importance. Where my comments on a particular clause expand into a detailed analysis of the applicable human rights law, the analysis is contained in an Appendix. Detailed comments on international human rights law are made in respect of clause 7 (religious bodies and religious schools – Appendix I), clause 12 (statements of belief – Appendix II) and clause 16 (protection of religious corporations from discrimination – Appendix III).

Clause 5(1) – Definition of Religious Body

6. The Second Exposure Draft excluded charities that engage primarily in commercial activities. The definition of 'religious body' at clause 5(1) of the Bill now encompasses all charities that are 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion', but excludes not-for-profit bodies (NFPs) that engage solely or primarily in commercial activities. NFPs are, for the purposes of anti-discrimination law, effectively to be considered as analogous to charities, being purpose-based voluntary associations undertaking community-servicing acts. As a purpose-based sector, associational freedom remains at the core of the sector's ability to deliver social good.

7. The application of a commercial activities test to the not-for-profit sector draws a novel distinction, one completely alien to the understanding that it is the *purpose* of an entity that matters in the charity and NFP sector, not the *intrinsic character* of the activity they undertake. A similar framework that excluded charities that engage in commercial activities was found within the proposal for an unrelated business income tax by the Rudd/Gillard Governments in 2011-2013. The proposal failed due to opposition from the charity sector, which primarily located upon the arbitrariness of the attempt to exclude for purpose entities on the basis of the intrinsic character of their activity. To illustrate the difficulty, should we allow that because commercial fundraising and lamington drives comprised 51% of the activity of a faith-based book reading club across a year the club should be automatically excluded from the definition and lose the ability to preserve its religious ethos?

8. Both the not-for-profit sector and charity sector exist as for-purpose sectors. Indeed the charity sector is a subset of the not-for-profit sector, as all charities are required to be

[7] United Nations Human Rights Committee, 121st session 16 October-10 November 2017, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 09 November 2017, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/INT_CCPR_COC_AUS_29445_E.pdf

'not-for-profit'.[8] To exclude not-for-profits that undertake commercial activities would introduce a novel test that runs contrary to the law of not-for-profits and charities. As the High Court confirmed in *Word Investments Ltd v Commissioner of Taxation*[9] in determining whether an undertaking is carried out in furtherance of a charitable purpose attempts to delineate between intrinsically commercial or intrinsically charitable acts comprise a *reductio ad absurdum*. The application of an 'activities' measure to a 'purpose' sector calls for the reconciliation of two independent and mutually exclusive criteria, leading to uncertainty in application and illogical and erroneous results.

9. The foregoing leaves open the question as to how many not-for-profit bodies will be affected by the proposal to exclude bodies 'that engage solely or primarily in commercial activities'. The following considers the composition of the Australian NFP sector, with a view to investigating whether any NFPs would be prejudiced by the exclusion of bodies that 'engage solely or primarily in commercial activities'.
    a. At the time of writing there are 59,807 Australian charities registered with the Australian Charity and Not-for-profits Commission. There is limited data on the composition of the Australian NFP sector beyond the charity sector. From the following summary it can be seen that there is a very large number of NFPs operating within Australia:
        i. In 2010, the Productivity Commission estimated that there were 600,000 NFPs (inclusive of charities within Australia). The Commission included entities 'generating revenue to support charitable activities' within this grouping.[10]
        ii. In 2018 the Review of the ACNC Legislation summarised evidence provided by the Australian Taxation Office, based upon 2017 Business Activity Statement data, as follows:

> Currently, most not-for-profits not registered under the ACNC Act self-assess their tax status and ability to access tax concessions. Business Activity Statement data provided by the ATO estimates there are 130,000 entities that self-assess to be income tax exempt, with approximately 580 not-for-profits having annual Goods and Services Tax (GST) turnover greater than $5 million.[11]

        iii. In its 2018 submission to the Review of the ACNC Legislation the ACNC offered the following analysis:

> It is difficult to accurately estimate the number of not-for-profit entities in Australia. However the ACNC-AUSTRAC risk assessment of Australia's not-for-profit sector identified approximately 257,000 not-for-profit entities operating in Australia, not including unincorporated associations that are not registered with the ATO or the ACNC. There are approximately 190,000 not-for-profit entities endorsed by the ATO for tax concessions, of which approximately 54,000 are registered charities. The ACNC estimates that there are approximately

[8] *Charities Act 2013* (Cth), s 5, definition of charity.
[9] *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* (2008) 236 CLR 204 ('*Word Investments*').
[10] https://www.pc.gov.au/inquiries/completed/not-for-profit/report/not-for-profit-report.pdf.
[11] *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review Report and Recommendations* 2018, 89.

7,500 companies limited by guarantee and 131,000 incorporated associations that are 'non-charitable' not-for-profits.[12]

b. In 2018 the Sydney Anglican Diocese submission to the Review of the ACNC Legislation made an attempt to extrapolate the true number of religious affiliated charities in Australia from the proportion of faith-based charities identified within the charities with the highest turnover.[13] Their submission found that 51.1% of charities were religiously affiliated (comprised of 30.8% as 'advancing religion' and 20.3% being 'faith-based'). While it cannot be assumed that the proportion of faith-based entities within the charity sector will be as prevalent within the wider not-for-profit sector, if this trend within the charity sector can be extrapolated to the wider NFP sector, even with a more muted expression, this would lead to the conclusion that there is a very sizable grouping of NFPs that are religiously affiliated and which would be subject to the 'commercial activities' exclusion.

10. In light of this analysis, consideration should be given to removing not-for-profit bodies from the excluded category of bodies 'that engage solely or primarily in commercial activities'. The proposed regime risks preventing a sizeable proportion of the not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake.

Clause 5(1) - Clarifying that Public Benevolent Institutions Fall Within the Definition of a 'Religious Body'

11. Paragraph 85 of the EM clarifies that a 'public benevolent institution' (PBI) may be 'conducted in accordance with' religious beliefs. The recognition that a PBI may be conducted in accordance with religious beliefs is an important one. Courts have entertained the proposition that a body that has a primary benevolent purpose cannot be a religious body, on the basis that the body is undertaking an essentially secular activity (see for example *Walsh v St Vincent de Paul's Society (No 2)*[14] and *Spencer v World Vision, Inc*.[15] I have further outlined these authorities in 'Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law' in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020). The clarification provided in the EM will assist in removing the prospect that a court would read the reference to 'a registered charity' in the definition of 'religious body' to be limited to only 'advancing religion' charities, in a similar fashion to the approach adopted in the foregoing judgements. Appendix I further considers the international human rights law pertaining to faith-based charities (see particularly paragraph 78).

[12] Anglican Church, Diocese of Sydney, *Submission to the Review from the Australian Charities and Not-for-profits Commission*, 2018 https://www.acnc.gov.au/sites/default/files/Download%20review%20submission%20%5B%20PDF%20240MB%5D.pdf, 17.
[13] Available at https://treasury.gov.au/consultation/c2017-t246103.
[14] *(2008)* QADT 32, [74]-[76], [98], [108].
[15] 633 F.3d 723 (9th Cir. 2011), per Circuit Judge Berson).

Clause 5(1) - Including Childcare and Early Learning Centres in the Definition of Educational Institution

12. The definition of educational institution at clause 5(1) of the Bill includes the following note: 'This includes child care centres and early learning centres at which education or training is provided.' The Explanatory Memorandum provides the following statement (at paragraph 82 (see also paragraph 293)):

> The term 'educational institution' is defined in subclause 5(1) to include schools, colleges and universities or any other institution at which education or training is provided. Childcare or early learning centres which provide education as part of their functions or services will therefore be educational institutions for the purposes of this Act. This definition is consistent with the definition of 'educational institution' in the *Sex Discrimination Act*.

13. However, contrary to this statement, child care services are included as a charitable purpose under the *Charities Act 2013* not under the head of 'advancing education', but instead under the head of 'advancing social or public welfare'. This is consistent with the recommendations of the *Charities Definition Inquiry* in 2001,[16] which after extensive consideration of the arguments in respect of whether child care centres extend educational or benevolent purposes, recommended against placing child care within the charitable head of 'advancing education'. This recommendation reflected the serious doubt as to whether childcare centres and early learning centres *in fact* provide education. Many private religious schools provide an affiliated child care centre, either as an independently incorporated entity or within their existing corporate structure. This is often effected as an exercise that is ancillary to their wider educational purposes (by assisting the attendance of sibling children of schooling age). Such schools seek to ensure consistency in their employment practices across the school and the associated child care centre. That such practices are protected under international human rights law was the conclusion of the European Court of Human Rights in judgement *Siebenhaar v Germany.*[17] The formulation adopted in the Bill raises the concern that many child care and early learning centres will not actually fall within the scope of the intended definition of educational institutions. To address the concern early learning and child care centres would need to be recognised as being able to be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' regardless of whether they are recognised as providing 'education' or not.

Clause 7 – Religious Freedom and Equality

14. In what will be a first for Australian law, clause 7 of the Bill declares the long-settled principle of international human rights law that the legitimate exercise of religious freedom 'is not discrimination'. Existing law that characterises religious freedom as an 'exemption' from a more fundamental standard of equality does not reflect this international law principle. The language of 'exemptions' contains some beguiling and at times untested philosophical presumptions. We do not say, for instance, that the right of the press to free speech is an 'exemption' from majoritarian imposed control. Similarly, we do not say the citizen's freedom to associate around common interests is an 'exemption' granted by the state from compelled forms of association. Such laden terminology characterises religious freedom as a secondary right. The Bill addresses these concerns.

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[16] I Sheppard, R Fitzgerald and D Gonski (Commonwealth of Australia), *Report of the Inquiry into the Definition of Charities and Related Organisations*, 28 June 2001).
[17] *Siebenhaar v Germany* [2011] no. 18136/02 Eur Court HR.

15. Equality is a fundamental right. However, while most of the attention given to religious freedom is directed to the permissible grounds for limitation of that freedom, the central focus for the right to equality is a threshold one, requiring attention to the conditions in which the right will be enlivened. This is because international law recognises that the protection to equality will not apply to all acts of 'differentiation'. Equality is thus not a right that can be assumed to immediately apply to all conditions. Indeed, there may be legitimate forms of distinction that will not give rise to a breach of the right to equality. It is, for example, not contentious that the equality right will not be relevant where a comparison is being made between matters that are not alike in substance. It is the nature of the criteria that are being compared that will determine whether questions of equality can arise. This principle applies to the right to equality on the basis of religious belief and activity, as it does to other protected attributes.

16. These notions are reflected in the applicable human rights law. The right to equality, or freedom from discrimination is contained at Article 26 of the ICCPR. The United Nations Human Rights Committee's General Comment 18 on Article 26 provides:

> The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[18]

This statement is not qualified by necessity (as is the right to religious freedom under Article 18(3)), nor does it require that the purported differentiation is the most appropriate means of achieving the purpose, rather the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria. This test accords with common experience – individuals and organisations discriminate between differing substances through a multitude of means each day – the preference to purchase Thai over Vietnamese for dinner, the awarding of dux to the person who has earned it by merit, the awarding of first place to the person who completes the race before other competitors. These distinctions are reasonable and objective, and are not regarded as unlawful discrimination. Thus in *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka, Communication* the United Nations Human Rights Committee (UNHRC) observed:

> the notion of equality before the law requires similarly situated individuals to be afforded the same process before the courts, unless objective and reasonable grounds are supplied to justify the differentiation.[19]

17. The determination as to what comprises comparable substances will therefore be highly consequential in determining what is reasonably and objectively protected within the fold of the human right of equality. What it protects is defined by matters that are alike in the relevant criterion. Thus a degree of likeness must be established in order to assert that equality is required, or conversely to assert that inequality has arisen. These are not novel notions. In *The Politics* Aristotle writes:

[18] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: http://www.refworld.org/docid/453883fa8.html.
[19] *No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).*

> they admit that justice is a thing and has a relation to persons, and that equals ought to have equality. But there remains a question: equality or inequality of what?[20] …
> those who are equal in one thing ought not be to have an equal share in all, nor those who are unequal in one thing to have an unequal share in all.[21]

As noted by Finnis, Aristotle goes on to claim that 'it is a characteristic perversion of democracy to hold that because all persons are equal in some respects, all persons should be considered equal in all respects'.[22] He cites 'a key sentence in the page of Plato's Laws which anticipates much in Aristotle's and Hart's discussions of justice and equality: 'indiscriminate equality for all amounts to inequality [inequity], and both fill a state with quarrels between its citizens'.[23]

18. Professor Herbert Hart concludes his analysis of Plato and Aristotle and the tradition of thought about justice with this statement:

> the general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality… Hence [the] leading precept [of justice] … is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'… though … [this] is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinative guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant. Without this further supplement we cannot proceed to criticize laws or other social arrangements as unjust.[24]

19. How are these principles relevant to the religious freedom protections provided to 'religious bodies' within the Bill? To adopt the phraseology of the United Nations Human Rights Committee, where a religious body acts in accordance with its religious precepts it is exercising a 'differentiation' that is 'reasonable and objective', where 'the aim is to achieve a purpose which is legitimate under the Covenant', being the manifestation of religious practices as protected by the Covenant, consistent with a democratic and plural society.[25] As such, clause 7 is correct when it states that a religious body 'does not discriminate' when it exercises rights as outlined therein. The United Nations Human Rights Committee has affirmed these principles in *William Eduardo Delgado Páez v Colombia,*[26] where it stated its view that the selection of teachers that conform with the teachings of the Catholic church by that church does not amount to discrimination, not disclosing a 'violation of article 26'. The comments of

[20] Aristotle, *The Politics*, III, 12.
[21] Ibid, III, 13.
[22] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011), 461.
[23] Ibid.
[24] Herbert Hart, *The Concept of Law* (Oxford University Press, 2012), 159.
[25] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination,* 10 November 1989, available at: http://www.refworld.org/docid/453883fa8.html.
[26] *William Eduardo Delgado Páez v. Colombia* (n 2).

Sachs J in *Christian Education South Africa v Minister of Education* are particularly pertinent:

> To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. ... [T]he essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect.[27]

These principles disclose the alignment of Article 18 and Article 26. The same principles underpin the recognition of the 'the indivisibility and universality of human rights, and their equal status in international law' that is to be introduced into the objects of the various statutes pursuant to the *Human Rights Legislation Amendment Bill 2021*.

Clause 7 - Religious Schools

20. The Bill includes religious schools in clause 7. The right to establish private schools is protected by international human rights law that Australia has ratified, most directly the *International Covenant on Civil and Political Rights (ICCPR)*. The *United Nations Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* also provide relevant protections to children and their parents. The Expert Panel on Religious Freedom noted the important contribution that faith-based schools provided to pluralism in the Australian education system.

21. The freedom to establish independent religious schools has been recognised by the United Nations Human Rights Committee in *William Eduardo Delgado Páez v Colombia*[28] and is grounded in the long-standing international human right of parents to 'ensure the religious and moral education of their children in conformity with their own convictions' found at Article 18(4) of the ICCPR.[29] Bodies exercising jurisdiction under the European Convention of Human Rights have recognised this right as being 'indispensable for pluralism in a democratic society',[30] as protecting the 'guaranteed … right to think freely',[31] the presence of which provides a bulwark against State education systems where students are 'led to think only in the directions that are decided by the political majority of the Parliament'.[32] The right to establish private religious schools is the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society. To ensure its equitable application, the Bill provides a safeguard by requiring that schools declare their requirements to potential employees and act in 'good faith'.

22. As religious discrimination legislation, the Bill does not alter existing law concerning LGBTIQ students within religious schools. The dissenting reports from Coalition

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[27] *Christian Education South Africa* [2000] 4 SA 757 (Constitutional Court) [42].
[28] *William Eduardo Delgado Páez v. Colombia* (n 2).
[29] In the European context the equivalent right is contained in Article 2 of the First Protocol to the European Convention on Human Rights (n 3).
[30] *Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)* ('*Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)*'). See also *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).
[31] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).
[32] Ibid.

Senators to two separate inquiries in the last Parliament highlighted the limitations the removal of section 38(3) of the *Sex Discrimination Act 1984* would place upon the ability of schools to teach their religious beliefs and maintain their ethos.[33] The analysis offered by those reports is highly informative. Those limitations arise because of the expansive scope of the technical legal notion of 'discrimination' that would apply in the absence of an 'exemption'. Unable to resolve these tensions at the time, this complex matter was rightly referred to the Australian Law Reform Commission for detailed consideration.

23. It is noted that clause 3 now includes a recognition of the internationally protected 'freedom to manifest this religion or belief either individually or in community with others'. Such is consistent with the recommendation of the Expert Panel that 'Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.' Private religious schools are a manifestation of individual human rights that operate 'in community with others'. The international human rights law pertaining to religious educational institutions is further set out at Appendix I to this submission.

Clauses 7, 9, 40 - Genuine Belief Test and Corporations Evidencing Belief

24. A further major improvement within the Bill is the introduction of provisions requiring judges to have regard to the *genuine* views of a religious believer. The protection to 'statement of beliefs' at clause 12 now has regard to the 'genuine' beliefs of the maker of the statement and the Explanatory Memorandum clarifies that 'The term religious belief is intended to capture genuine religious beliefs' (paragraph 39). The latter addition clarifies that the general protections to religious belief are intended to operate consistently with the settled position developed by the highest courts in Australia, England, Canada and the United States as a means to prevent judicial determination of doctrinal disputes.

25. Notwithstanding this very substantial improvement, various clauses have retained a test which requires a decision-maker to ascertain whether 'a person of the same religion as the religious body could reasonably consider [the conduct in question] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. The test has been retained exclusively within those clauses that require the determination of the beliefs of a religious body, being:
    (a) Clause 7(2) – the general protection;
    (b) Clause 9(3) – concerning religious hospitals, religious aged care facilities, religious accommodation providers and religious disability service providers; and
    (c) Clause 40(2)(c) - religious camps and conference sites.

[33] Legislative and Constitutional Affair Committee Dissenting Report on *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* available here https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report/d01; Legislative and Constitutional Affair Committee Dissenting Report on the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, available here: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Sexdiscrimination

26. The ability of a religious body to act in a manner consistent with its religious beliefs should not turn on a court's assessment of the doctrinal correctness of the beliefs asserted by that institution, whether that assessment is made with regard to fellow adherents within that religion, or otherwise. Use of such means contemplate the possibility that a conviction that is sincerely and genuinely held by the founders or leaders of a religious institution will be defeated as a belief that is not religious simply because of a dispute as to doctrinal interpretation within the wider movement of which it is a part. That is not necessary, when the ultimate question is whether the manifestation accompanying the belief is to be accommodated in a plural society. Such a proposal has been directly criticised by the most senior courts within Australia, the United States, Canada and the United Kingdom. The full articulation of these concerns is found within 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).

27. In summary, that chapter asserts that the consensus among leading Anglophone courts on preferred models for judicial engagement with assertions of religious belief comprises:
    a. Regard to the 'genuineness' or 'sincerity' of an asserted belief as the evidentiary standard for identifying belief;
    b. As a subcategory of the foregoing, an avoidance of tests that assess the validity of a religious belief against the consensus interpretations of other adherents to that belief;
    c. That the foregoing conditions are necessary to:
        i. ensure that the task of identifying religious belief does not become the back-door means by which limitations are imposed, and
        ii. thus guarantee persons subjected to limitations (including where they manifest their religious belief in community with others) are given publicly available reasons determined according to objective limitation standards.

    International law prescribes a circumscribed number of strictly articulated grounds for limiting religious manifestation.[34] Whether a claimant's beliefs align with the beliefs of other members of their religion is irrelevant to that assessment.

28. As noted, the foregoing principles have been affirmed by leading courts across Anglophone democracies. In delivering the opinion of the U.S. Supreme Court in *Thomas v. Review Board of the Indiana Employment Security Division*,[35] Burger CJ stated:

> . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, *it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their*

[34] For Australia, the relevant obligation is found in Article 18(3) of the *International Covenant on Civil and Political Rights 1966*, Article 18(3), as applied in the jurisprudence of the United Nation Human Rights Committee. See further, paragraphs 40 to 43, 50 to 52 and Appendix I generally.
[35] 450 U.S.707 (1981).

> *common faith. Courts are not arbiters of scriptural interpretation*.[36] (emphasis added)

29. Similarly, in *Syndicat Northcrest v Amselem* Iacobucci J held:

> *claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make;…* In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" and not that a particular belief is "valid"… "it is not the role of this Court to decide what any particular religion believes".[37] (emphasis added, citations omitted)

Justice Iacobucci's admonition against judges interpreting doctrine applies to efforts to locate the true interpretation of a doctrine within a particular denomination, or religious sub-grouping. Such attempts breach a necessary component of separation between church and state:

> This approach to freedom of religion effectively avoids the invidious interference of the State and its courts with religious belief. The alternative would undoubtedly result in unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream … "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty".[38]

For substantively the same reasons, Iacobucci J also cautioned against reliance on the testimony of 'experts':

> The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion …
>
> A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. *Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief.*
>
> An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.[39]

[36] Ibid 715-16.
[37] (2004) 2 SCR 551 at [43].
[38] Ibid [55].
[39] Ibid [54].

30. This same approach has been adopted in the United Kingdom. As Lord Nicholls, with whom the Court agreed, set out in *R (on the application of Williamson) v Secretary of State for Education and Employment*:[40]

> emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question *or the extent to which the claimant's belief conforms to or differ from the views of others professing the same religion*. Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also notes religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.[41] (emphasis added, citations omitted)

This is not to say that a claimant may not, of their own volition, lead evidence in support of their claim. However, as Ahdar and Leigh assert: 'It is wrong to *insist* that expert evidence from religious authorities support the claimant's case'[42]

31. In light of these authorities it must be asked why has the Bill retained such a 'reasonable believer' test? It appears that the test that 'a person of the same religion as the religious body could reasonably consider [the conduct in question] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion' has been retained due to a concern as to how a religious institution may be said to hold a 'genuine' or 'sincere' belief. However, this difficulty may be addressed by a simple rule of attribution, rather than a test that requires courts to determine doctrinal matters. That such a provision could be utilised is affirmed by the reasoning of Maxwell P and Neave JA in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (*Cobaw*). Therein Maxwell P said:

> Finally, for a body corporate to avail itself of the protection under s 77, it would have to demonstrate that it had 'genuine religious beliefs or principles' and that the relevant conduct was 'necessary ... to comply with' those beliefs or principles. A corporation, of course, has 'neither soul nor body'. The state of mind of a corporation being a legal fiction, it would be necessary — for the provision to operate intelligibly — for the Court to identify a rule of attribution for the purposes of s 77. This would only be justified if the express provisions of the statutory scheme required for their effective operation the attribution to a corporation of a particular state of mind — in this case, the holding of genuine religious beliefs or principles.
>
> As senior counsel for the applicants pointed out, where the legislature wishes to attribute a belief to a corporation, it typically does so by enacting a special rule of attribution appropriate to the purpose. In such a case, the statute itself identifies the officers or employees of the corporation whose beliefs are to be attributed to the corporation for this purpose. The EO Act contains no such provision.[43]

Similarly, in *Cobaw* Neave JA said:

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[40] (2005) UKHL 15.
[41] Ibid 258.
[42] Ahdar, Rex and Ian Leigh, *Religious Freedom in the Liberal State* (OUP Oxford, 2nd ed, 2013), 196.
[43] Ibid [317]-[318].

> Because a corporation is not a natural person and has 'neither soul nor body', it cannot have a conscious state of mind amounting to a religious belief or principle. It follows that applying the s 77 exception to a corporation would require the adoption of a legal fiction which attributes the beliefs of a person or persons to the corporation.[44]

32. As Rajanayagam and Evans have noted, one way to do this is by the 'legislature expressly stipulating a rule by which the beliefs of the shareholders may be attributed to the corporation', or in the case of a charitable organisation under clause 7, the members or directors of the body.[45] Such attribution provisions are common in anti-discrimination law. Justice Redlich offered an alternative means in *Cobaw*:

> If the body corporate may have a religious belief, then having regard to the Constitution and Memorandum and arts of Association that belief will be that of the persons who are the 'embodiment of the company' or its 'directing mind and will'. They will ordinarily include the board of directors.[46]

33. The adoption of a rule of attribution that operates as a legal fiction is not a novel concept within the law and could be readily stated within the Bill. This solution is consistent with the existing common law enshrining the sincerity test. In *Syndicat Northcrest v Amselem* Iacobucci J provided the following practical evidentiary principles to guide the application of the sincerity test:

> Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.[47]

Each of the markers asserted by Iacobucci J might also readily be applied to a religious body claimant/respondent by a statutorily articulated rule of attribution that requires regard to any relevant documented statements of beliefs, the credibility of the testimony of the relevant leaders of the institution, as well as consideration of whether the asserted belief is consistent with the prior conduct of the entity. This is not to state that a corporate body itself 'sincerely' believes a matter, but instead adopts a legal fiction which provides a number of factors by which a court may attribute satisfaction of the 'sincerity test' to religious assertions made by a corporate body.

34. In substance, this would reflect the approach to the evidencing of religious belief by religious institutions adopted by the New South Wales Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*. Therein the Court of Appeal had regard to the affidavit testimony of the Superintendent and Chief Executive Officer of the Wesley Mission and whether the actions of the body were consistent with its asserted beliefs.[48] In adopting this approach the Court of Appeal exhibited the hallmarks of the sincerity approach when emphasising the importance of regarding the beliefs to

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[44] Ibid [316].
[45] Shawn and Carolyn Evans Rajanayagam, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review* 329, 330.
[46] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75, [573] (Redlich J) ('*Cobaw*').
[47] *Syndicat Northcrest v Amselem* (2004) 2 SCR 551 [53], see also [56].
[48] *OV & OW v Members of the Board of the Wesley Mission Council* (2010) NSWCA 155 ('*Wesley Mission*').

be attributed to the institution in question, contra the wider denomination in which it was located:

> there is no basis in s 56 to infer that Parliament intended to exempt from the operation of the Anti-Discrimination Act only those acts or practices which formed part (relevantly for present purposes) of the religion common to all Christian churches, or all branches of a particular Christian church (in the sense of denomination), to the exclusion of variants adopted by some elements within a particular Church, but not by others.[49]

The exemption 'section encompassed any body established to propagate a system of beliefs, qualifying as a religion'[50] and required regard to be had to the beliefs of the respondent organisation in question, not any other body.

35. The United States Supreme Court decision in *Burwell v Hobby Lobby Stores, Inc.* (*Hobby Lobby* case) is also pertinent to the question of how religious belief may be meaningfully attributed to a corporate body.[51] It concerned a private company which wanted a religious exemption under the US *Religious Freedom Restoration Act* ('RFRA'); the desired exemption was from obligations under the healthcare mandate because they did not want to be morally complicit in abortions by funding reproductive healthcare insurance for their employees.[52] The Supreme Court held 5:4 that this exemption should be granted because a private company can exercise the right to religious freedom and belief.[53] As the Supreme Court noted, the corporation is a legal person who can raise religious freedom claims under the RFRA.[54] The corporations may pay the penalty, but 'the humans who own and control these companies' are subject to the burden on religion.[55] Under RFRA there is a requirement to prove a substantial burden on religious exercise for an exemption to be granted, and a major issue in *Hobby Lobby* is how a corporation proves substantial burden. As Hardee explores, there are difficulties with determining the religious sincerity of a corporation when the members or shareholders of that corporation may have diverse religious convictions. She recommends a dual inquiry into the veracity of the shareholders' religious beliefs and an attribution inquiry into whose religious beliefs should be considered in determining the sincerity of the corporation.[56]

36. In *Hobby Lobby* the Supreme Court indicated that they would be 'deferential to a religious institution's claim of a burden on free exercise'; the Court's 'narrow function... is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction'.[57] The Court rejected the argument that the complicity was too attenuated to be cognizable on the basis that it could not engage in a theological analysis of whether the burden was true and substantial; 'a sincerely held belief that results in

[49] Ibid [41].
[50] Ibid [50].
[51] I acknowledge Alex Deagon as an equal co-contributor to this section of material.
[52] *Burwell v Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014) ('Hobby Lobby').
[53] For a detailed analysis, see Micah Schwartzman, Chad Flanders and Zoe Robinson (eds), *The Rise of Corporate Religious Liberty* (Oxford University Press, 2016).
[54] *Hobby Lobby* (n 52) 2768-70.
[55] Ibid 2768.
[56] Catherine Hardee, 'Schrodinger's Corporation: The Paradox of Religious Sincerity in Heterogenous Corporations' (2020) 61(5) *Boston College Law Review* 1764, 1764-1765.
[57] Helen Alvare, 'Beyond Moralism: A Critique and a Proposal for Catholic Institutional Religious Freedom' (2019) 19(1) *Connecticut Public Interest Law Journal* 149, 158.

severe penalties is sufficient to establish a substantial burden under RFRA'.[58] Hence, an appropriate solution for evidencing the religious belief of a corporation is to accept the testimony of the religious corporation as to their sincerity, and the content and nature of their belief, as expressed by those within the corporation who possess the recognised authority to speak on behalf of the corporation.[59] A provision should therefore be inserted into the RDB which defers to the religious corporation's articulation of its relevant religious beliefs and/or activities, including an evidential inquiry into the locus of authoritative expression of those beliefs for the corporation. The articulation of beliefs and/or activities itself must also provide supporting evidence of the sincerity (though not of the truth) of those beliefs.

37. In this respect it is to be noted that the Explanatory Memorandum clarify that (see paras 98, 125, 448):

> A court may still have regard to any foundational documents that a religious body considers supports the conduct under consideration, where those documents are used to demonstrate that particular religion's doctrines, tenets, beliefs or teachings.

This particular allowance, in requiring that beliefs be asserted in 'foundational documents' is problematic. It will require religious institutions, schools and faith-based charities to amend their constituting documents (being Constitutions, Trust Deeds etc). This is an unnecessary burden, as in many cases these documents may be dated, or require onerous and lengthy processes for amendment. Further, the artificial effect that such a requirement imposes on the ability to evidence religious beliefs was ably illustrated by the decision of the Victorian Court of Appeal in *Cobaw*.[60] Therein a majority held that the absence of any express mention of sexuality within the 1921 Trust Deed of the respondent meant that the institution's asserted beliefs did not comprise a doctrine. President Maxwell upheld the following conclusion by the judge at first instance, Hampel J:

> I accept Dr Black's evidence that although scripture is the source of doctrine, not all that is said in scripture is doctrine. I accept his evidence about the content of the fundamental doctrines of Christian religions, and the consistency of doctrines in the creeds and the statement of fundamental beliefs and doctrines in the 1921 Trust Deed. I consider compelling his conclusion that the absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith demonstrates the Christian Brethren beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the religion.[61]

The trust deed for CYC, which on the evidence was held to contain the core doctrines, listed only plenary inspiration, and contained no teachings 'that homosexuality was contrary to God's will.' As a result, the claim that the conduct conformed with the doctrines of the institution failed. The Bill risks imposing a similarly artificial

[58] Angela Carmella, 'Progressive Religion and Free Exercise Exemptions' (2020) 68 *Kansas Law Review* 535, 581, 581-582.
[59] See Alex Deagon, 'The "Religious Questions" Doctrine: Addressing (Secular) Judicial Incompetence' (2021) 47(1) *Monash University Law Review* (forthcoming); Neil Foster, 'Respecting the Dignity of Religious Organisations: When Is It Appropriate for Courts to Decide Religious Doctrine?' (2020) 47(1) *University of Western Australia Law Review* 175.
[60] *Cobaw* (n 46).
[61] Ibid [275].

restriction by requiring that reference be had to 'foundational documents' of an institution.

Clauses 7, 9, 40 - Future Ability of a Minister to Limit the Scope of the Religious Body Exclusions

38. The provisions concerning schools, religious hospitals, aged care, accommodation providers, disability service providers, religious camps and conference sites are all subject to the requirement that a subsequent Minister may promulgate Regulations imposing 'requirements' in respect of a written policy (see clauses 7(7), 9(3)&(7), 40(3), EM para 129). The basic formulation imposing the limitation is demonstrated by subclauses 7(6) and (7):

> (6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment):
>
> (a) the conduct must be in accordance with a publicly available policy; and
>
> (b) if the Minister determines requirements under subsection (7)—the policy, including in relation to its availability, must comply with the requirements.
>
> (7) The Minister may, by legislative instrument, determine requirements for the purposes of paragraph (6)(b).

39. There is no limit on the matters that may be addressed by the Minister in the Regulation. Requirements could potentially encroach upon or frustrate the operation of the exclusion as applied to a religious institution. There is no equivalent power granted to any Government Minister under any State or Territory law concerning the ability of religious institutions to act in accordance with their religious beliefs. Some comment attempting to limit the kinds of matters that may be imposed by a future Regulation is made at para 129 of the EM, but this is non-binding. By contrast, clause 11 does not contain a provision permitting the Minister to set policy requirements by legislation. The ability to determine requirements for a policy should be removed as it delegates a significant discretionary power to a future Minister, which power may conceivably encompass limitations that would frustrate the effective operation of the applicable provision.

Clause 11 – Overriding Certain State and Territory Laws

40. Clause 11 proposes a mechanism that would override State or Territory law. The Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021* is named as a potential subject of this override in the *Religious Discrimination (Consequential Amendments) Bill 2021*. The Victorian legislation contains two main contentious proposals. The first is the variously imposed requirement that a religious body's or schools actions must be 'reasonable and proportionate in the circumstances'. A 'reasonableness' test does not align with the strict 'necessity' test for the imposition of restrictions under international law.

41. Article 18(3) of the ICCPR, which contains the relevant standard of limitation that Australia has ratified, permits that only 'necessary' limitations may be imposed on the manifestation of religion or belief (see further Appendix I). This includes the freedom to associate with fellow believers (see further Appendix I). Human rights law

recognises that a standard that permit 'reasonable' limitations imposes a lesser standard than one of 'necessity'. For example, the European Court of Human Rights has recognised that the term 'necessary' imposes upon the relevant party a high threshold:

> ['Necessary'] is not synonymous with 'indispensable' … neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. … [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[62]

This principle has also received recognition in domestic law. In a passage later approved by the High Court, in *Secretary, Department of Foreign Affairs & Trade v Styles* Wilcox J stated that 'The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience.'[63] Similarly in *Mahommed v State of Queensland* Dalton P stated:

> The test of reasonableness (of the term) is an objective one, less demanding than a test of necessity, but more demanding than a test of convenience. I am required to weigh "the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the term on the other and all other circumstances, including those specified in section 11(2)"[64]

Although these statements are made in relation to domestic Australian law, they are illustrative of the differentiation between the requirements of a standard of 'reasonableness' and that of a standard of 'necessity', as applied within anti-discrimination law.

42. The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test (substantively akin to genuine occupational requirements tests) for certain roles. An analysis of the applicable jurisprudence under the ICCPR and as promulgated within the European Court is further set out at Appendix I. As Aroney and Taylor note in their summary of European Court of Human Rights judgements on religious institutional autonomy:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[65]

Serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law.

43. Australia has ratified the ICCPR and is also bound by the First Optional Protocol to the ICCPR. This means that individuals may make complaints to the United Nations Human Rights Committee that Australian legislation (including legislation of

[62] *Handyside v United Kingdom* (1976) 1 EHRR 737 [48].
[63] *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 387 (Brennan J) 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed), see also Law Council of Australia, *Submission 415*, 32.
[64] (2006) QADT 21, 37, referring to *HM v QFG & KG* (1998) QCA 228.
[65] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42, 58.

individual States and Territories pursuant to Article 50 of the ICCPR) does not align with the protections offered by the ICCPR. Under the ICCPR, the Commonwealth is held to account for the actions of the States in failing to protect human rights. The concern is accentuated by the fact that the violation of an ICCPR right by removal could be grounds for a complaint to the UN Human Rights Committee. As pointed out by Associate Professor Julie Debaljak (in respect of the Victorian *Charter of Human Rights and Responsibilities 2006*), 'where the Victorian Charter obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia's international human rights obligations.'[66] Importantly 50 the ICCPR applies in all parts of a federation 'without any limitations or exceptions'. The foregoing analysis would support the argument that the Commonwealth has legitimate bases on which to enact clause 11.

Clause 12 - Statements of Belief

Statements Protected by the Provision

44. The primary allegation against the protection contained at clause 12 is that it will license dreadful personal attacks. Such criticism has been apparently anticipated by the gauntlet of judicial tests built into the protection. To pass muster any statement must not harass, threaten, intimidate or vilify; or amount to the urging of a serious criminal offence, all determined according to whether a 'reasonable person would consider' that these standards had been breached. It must also be made in good faith and be not malicious. Drawing on existing understandings of equivalent provisions these are very significant hurdles to overcome.

45. The drafting appears as an attempt to protect the valued contribution of religious believers to civil discourse in this country. This would accord with the broad support for free speech within our community, with a recent McCrindle survey finding that 90% of Australians believe that people should have the freedom to share their religious beliefs in a peaceful way.[67]

46. The critique that the provision would give greater protection to religious people appears also to have been anticipated by the drafters, with the protection extending equally to statements by atheists or agnostics that relate to religious matters. The definition of 'statement of belief' provides that, for a statement 'of a belief held by a person who does not hold a religious belief' to receive protection it must be 'of a belief that the person genuinely considers to relate to the fact of not holding a belief.' This proposes a very wide scope of protection for agnostics or atheists. Take for example the atheist who genuinely proclaims their belief that 'secular ethics provides a sufficient basis to ground a pacifist morality, and that, accordingly, religion may be a sufficient condition for pacificism, but it is certainly not a necessary condition.'[68] The statement of that belief will be protected. If this hypothetical atheist were to go further and state that 'secular ethics provides a sufficient basis to ground a pacificist morality, whereas religion is at its heart an agent of violence, contrary to the principles of any true form of pacificism or morality'. Provided the latter statement is not malicious threatening, harassing, intimidating, vilifying and made in good faith within the context in which it

[66] Julie Debeljak 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) *Melbourne University Law Review* 32(2).
[67] https://cityinfield.com/#report.
[68] Anne Sanders, 'The Mystery of Public Benefit' (2007) 10(2) *Charity Law & Practice Review* 33.

is said, even though that statement may well be offensive or insulting to a religious believer, it would most likely receive protection under clause 12. This is because the latter statement remains a statement 'of a belief that the person genuinely considers to relate to the fact of not holding a belief.' This analysis is consistent with the example provided in the Explanatory Memorandum at paragraph 194:

> Terrance is an atheist. One day, his colleagues are discussing end of year plans and Terrance mentions that he does not celebrate Christmas. When asked about his beliefs, Terrance says that as an atheist, he thinks that prayer and belief in god is 'illogical'. Terrance does not realise that his colleague, Meaghan, is religious and is offended by Terrance's comments. In this example, Terrance's statement is a statement of belief and therefore not discrimination. However, if Terrance were to make repeated comments of this nature directed at Meaghan, knowing that she is religious, it may be possible to demonstrate that these comments are not being made in good faith.

47. Clause 12 does not protect conscientiously held views in respect of matters that are not relevant to religion. This is consistent with all existing Australian anti-discrimination law that protects religious belief or activity. These laws do not extend to conscientiously held beliefs. Such a proposal is not inconsistent with international human rights law. Article 18 of the ICCPR recognises a distinction between conscientiously held views and religious views. While the freedoms to adopt a religion or a conscientious worldview are absolute and cannot be subject to limitation (under Article 18(1)), it is only religious manifestation (which is inclusive of religious speech) as opposed to conscientious manifestation that receives dedicated protection against State imposed limitations (under Article 18(3)). This distinction in international law would not however prevent the protection of conscientiously held views in conjunction with a protection to religious views. Appendix II considers the wider interaction of clause 12 with the internationally protected right of freedom of expression and with protections to religious speech.

Operational and Procedural Considerations

48. Clause 12 has demonstrable work to do. Australian courts have recognised that in certain contexts comments can amount to discrimination, a statutory concept that is distinct from *vilification* (see for example *Nationwide News Pty Ltd v Naidu*;[69] *Qantas Airways v Gama*[70] and *Singh v Shafston Training One Pty Ltd and Anor*[71]).

49. Where a respondent relies on clause 12 in a State or Territory tribunal, as these bodies are not Chapter III Courts, within the meaning of the Australian Constitution, consideration will need to be given to whether the matter would need to be transferred to a federal court or a State court vested with Commonwealth jurisdiction. Several considerations are apposite:
    a. It is not necessarily the case that a Federal or State Court vested with Federal jurisdiction would need to hear the claim. If the assertion relying on section 12 is incidental to the determination of another claim, then a State tribunal may have power to determine the matter (see the rule in *Fencott v Muller*).[72]

[69] *Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* [2007] NSWCA 377 [378] Basten J.
[70] (2008) 157 FCR 537, [78].
[71] [2013] QCAT 008 (ADL051-11) Michelle Howard, Member 8 January 2013.
[72] (1983) 152 CLR 570 at 606-8 per Mason, Murphy, Brennan and Deane JJ.

b. The need to refer the complaint to a determination on the question of the override imposed by clause 12 would diminish rapidly over time as a body of law develops concerning the interpretation of clause 12. Once that body is developed, State Tribunals will perform their role of applying the law as stated by the relevant Courts.
c. There are many instances where matters are referred from a Tribunal to the Local or District Court for a specific determination. Costs in those matters then are determined according to the costs regimes implemented in those Courts. If a concern is held over the costs consequences in respect of the initial claims that will be referred until such time as a body of law develops around clause 12, specific provisions could be inserted into the relevant Commonwealth law to preserve the regime for costs in the respective jurisdiction from which the matter is referred (to the extent that the referral is made to a Federal court).

Clause 14 – Indirect Discrimination

Alignment with International Law

50. Clauses 14(1) and (2) retain the orthodoxy of the reasonableness exception to indirect discrimination. However under the Bill decision-makers are not provided with direction to align the test of 'reasonableness' to the international standard for permissible limitations stated at Article 18(3) of the ICCPR (being only on 'necessary' grounds). Such an alignment may be performed in the context of religious discrimination because Article 18(3)'s standard is uniquely imposed in respect of limitations on the manifestation of religious belief (which is essentially what the indirect discrimination reasonableness test does) in a way that is not the case for the other protected attributes.

51. The overlap between the prohibition on discrimination under Article 26 and the protection for religious freedom under Article 18 may be stated as follows: where a domestic court denies a person's religious discrimination claim, it imposes an effective limitation on that person's religious manifestation, and the future manifestation of similar conduct in comparable circumstances. Under the indirect discrimination test a limitation may be imposed where it is 'reasonable' to do so. All limitations on the forms of religious belief and activity that are protected by the Covenant are however to comply with the relevant international standard for the imposition of limitations stated under Article 18(3), being 'necessary' limitations only (see discussion further above at paragraphs 40 to 43). The overlap indicates that domestic religious discrimination protections can operate in a manner that fails to acquit the obligations imposed by Article 18(3). The importance of aligning permissible restrictions under domestic legislation with those proposed under international law has been emphasised by the Special Rapporteur in the following terms:

> The Special Rapporteur has gained the impression that restrictions imposed on religious manifestations at the workplace frequently fail to satisfy the criteria set out in relevant international human rights instruments. This critical assessment covers both public employers and the private sector. Limitations are often overly broad; it remains unclear which precise purpose they are supposed to serve and whether the purpose is important enough to justify infringements on an employee's right to freedom of religion or belief. The requirement always to minimize interferences to what is clearly "necessary" in order to achieve a legitimate purpose, as implied in the proportionality test, is frequently ignored. Moreover, restrictions are sometimes applied in a discriminatory manner.

> Indeed, many employers appear to lack awareness that they may incur serious human rights problems as a result of restricting manifestations of freedom of religion or belief by their staff. Under international human rights law, States — in cooperation with other stakeholders —have a joint responsibility to rectify this state of affairs.[73]

52. The EM contains the following statement at paragraph 15: 'In accordance with the ICCPR and Siracusa Principles, this Bill only limits the right to freedom of religion and other rights in circumstances where it is necessary to do so.' While a welcome clarification, this does not amount to a direction to align the reasonableness test to the standard for permissible limitations under Article 18(3). Rather, it appears as a statement that the indirect discrimination test already aligns with international law. To avoid a disjunct between the Bill and international law in this respect, clause 14(2) concerning factors to be fulfilled in satisfying the reasonableness test should require reference to the 'necessary' standard imposed under Article 18(3).

Burden of Proof

53. The Second Exposure Draft of the Religious Discrimination Bill clarified that the burden of proof lay with the person seeking to establish that the condition requirement or practice is reasonable. This is consistent with existing Commonwealth anti-discrimination law.[74] In addition, the Second Exposure Draft contained a provision clarifying that a qualifying body carried the burden of proving that a requirement imposed was 'essential'. These requirements were contained in the following provision:

> *Burden of proof*
>
> (8) For the purposes of subsection (1), the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.
>
> Note: As a result of this subsection, the person who imposes, or proposes to impose, the condition, requirement or practice also has the burden of proving that compliance with the rule is:
>
> (a) necessary as referred to in subsection (3) or (7); or
>
> (b) an essential requirement as referred to in subsection (4).

54. These requirements should be reinstated. The rationale for maintaining the existing position under other Commonwealth anti-discrimination law was adequately stated in the EM to the Second Exposure Draft:

> Placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the

[73] Interim report of the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, A/69/261, 5 August 2014 https://www.ohchr.org/documents/issues/religion/a.69.261.pdf [40].
[74] See for example *Sex Discrimination Act 1984*, s 7C.

complainant is unlikely to have access to the information required to prove that an action is unreasonable.

For example, an employer who imposes uniform standards for food safety purposes is best placed to show why those standards are required and why they are reasonable. An employee or prospective employee is less likely to have access to all the information about food safety requirements for that particular business and any alternatives that may be available to the employer in complying with those standards or imposing that condition.

Reasonable Adjustments

55. The Report of the Former United Nations Special Rapporteur of Freedom of Religion or Belief titled *Elimination of all forms of religious intolerance* provided to the sixty-ninth session of the General Assembly recommended the use of 'reasonable accommodation' provisions as a means to combat religious discrimination.[75] The Report would support the inclusion of a reasonable adjustments requirement within the Bill. The relevant part of the Special Rapporteur's analysis is provided at paragraphs 49 to 66, with a summary of conclusions at paragraphs 70-72 and 77-78. The Special Rapporteur concludes that 'there can be no reasonable doubt that the right to freedom of thought, conscience, religion or belief also applies in the workplace' [31] and that 'eliminating indirect discrimination may require measures of "reasonable accommodation"' [70]. A 'reasonable adjustments' clause similar to that contained in the *Disability Discrimination Act 1992* included within the tests for direct and indirect discrimination would provide a means to deal with the 'comparator test' issue highlighted by *Purvis* judgement.[76] That issue is that an alleged discriminator can avoid a finding of discrimination where they are able to assert that they would have treated any person who acted in the same way absent religious reasons in the same way. A reasonable adjustments provision reflects the approach adopted in amendments to the *Disability Discrimination Act 1992* in 2008/09 adopted in response to the problems with the comparator test highlighted by the High Court decision in *Purvis v New South Wales (Department of Education and Training)* [77] (*Purvis*).

56. Another way to deal with the *Purvis* issue is through clause 6 concerning characteristics attributed or imputed to religious believers. The Bill already provides certain examples. These could be further expanded to clarify the kinds of attributes that would ordinarily be attributed or imputed to religious believers. There is precedent for clarifying what characteristics attach to a protected attribute in Commonwealth anti-discrimination law. For example, s 5(1A) of the SDA states 'to avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.'

Clause 16 - Protecting Corporate Bodies from Discrimination

57. The Bill offers protection to religious institutions through an 'associates clause' at clause 16. There are sound policy reasons why religious corporations should be clearly protected under the Bill: religious belief is most often expressed in associational form.

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[75] Interim report of the United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, A/69/261, 5 August 2014 https://www.ohchr.org/documents/issues/religion/a.69.261.pdf

[76] *Disability Discrimination Act 1992* (Cth), ss 5(2), 6(2).

[77] (2003) 217 CLR 92.

To allow that a sole trader could take the benefit of religious discrimination protections, but not where they subsequently incorporated the business would be arbitrary, as Redlich JA said in *Cobaw*: 'That interpretation would produce the unintended result that individuals who operate a business would have different levels of religious freedom, depending upon whether the business was incorporated or not. It would force individuals of faith to choose between forfeiting the benefits of incorporation or abandoning the precepts of their religion'.[78] Similarly, as Rajanayagam and Evans note, the United States Supreme Court has recognised that:

> to deny corporations recourse to freedom of religion would require an untenable bright line to be drawn between corporations and other legal entities (partnerships, sole traders, incorporated and unincorporated associations, and so on) … It was suggested by Redlich JA in *Cobaw* and the majority in *Hobby Lobby* that this bright line rule, were it adopted, would operate unfairly and arbitrarily by making the availability of religious freedom protections contingent upon the happenstance of what form a business chooses to take. So, in effect, a business would be penalised for running its activities through a corporation, rather than as a sole trader or a partnership.[79]

58. Most Australian discrimination law provides that a 'person' may initiate a complaint, and the default position is that this would include corporate 'persons'. This was the view taken by Mason J in applying the *Racial Discrimination Act 1975* (RDA) in *Koowarta v Bjelke-Petersen*:[80]

> It is submitted that because, generally speaking, human rights are accorded to individuals, not to corporations, "person" should be confined to individuals. But, the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s. 12 being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race, colour or national or ethnic origin of any associate of that corporation. It is also submitted that the reference in the concluding words to "any relative or associate of that second person" is inappropriate to a corporation. Certainly that is so of "relative", but a corporation may have an "associate". The concluding words are therefore quite consistent with the "second person" denoting a corporation as well as an individual.[81]

The 'second person' referred to in the relevant provisions is the 'person' who is the subject of a discriminatory act, whether corporation or individual. Justice Mason thus clearly contemplates that corporate bodies may receive protection where they experience discrimination 'by reason of the race, colour or national or ethnic origin of any associate of that corporation'.[82]

59. The Human Rights and Equal Opportunity Commissioner (the forerunner to the Australian Human Rights Commission) applied this reasoning to conclude that an Aboriginal community organisation was a 'person aggrieved' for the purposes of the

[78] *Cobaw* (n 46).
[79] Shawn Rajanayagam and Carolyn Evans 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review*, 329.
[80] (1982) 153 CLR 168, 236.
[81] (1982) 153 CLR 168, 236.
[82] Ibid.

complaint provisions which then existed under the RDA. The HREOC found that the respondents' conduct had prejudicially affected the interests of the organisation in that it had hindered it from carrying out its objects.[83]

60. Clause 16 of the Bill requires that an associated religious institution be dealt with 'in the same way' as the associated religious believer. Interpreting equivalent provisions in 2018, Federal Court Judge Moshinsky said they are 'not free from doubt' and suggested alternative drafting that would remove this uncertainty.[84] At paragraph 247 the EM now clarifies that:

> Moshinsky J in *Eisele v Commonwealth* [2018] FCA 15 set out useful commentary on the interpretation of the associates clause in the Disability Discrimination Act, with which this associates clause is consistent. This commentary stepped out the understanding of the provision in plain terms, which may provide clarity when applying an associates provision to particular facts.

Given the centrality of the associate provision to the protection of religious institutions, and the fact that such provisions are largely untested in anti-discrimination law, this clarification is a welcome addition.

61. The analysis of international law provided at Appendix III demonstrates that there is strong support for the protection of groups against religious discrimination that is encountered because of their association with an individual who holds a religious belief or engages in a religious activity. Indeed, as Appendix III shows, that support may also extend to the protection of corporations as litigants in their own right, as a necessary means to give adequate protection to the rights of individuals. Both clause 16 and a direct right of corporations to allege discrimination in their own capacity would give effect to Article 18(1) of the *International Covenant on Civil and Political Rights* and other connected provisions and international law instruments, which protect individuals manifesting their beliefs in community with others (including through incorporated and unincorporated communities).[85] This is so because the external affairs power authorises a potentially broad range of Commonwealth laws on any subject matter which is the subject of rights and obligations arising out of an international treaty.[86] The Constitutional scope of the external affairs power is further outlined at Appendix III.

62. The importance of giving detailed consideration to the sufficiency of clause 16's ability to provide protection to the community aspect of religious belief under Article 18 is further accentuated when the limitations on the ability to make complaints through the representative complainant provisions is considered. While representative complainant provisions are available under the RDB, in conjunction with the *Australian Human Rights Commission Act 1986* (Cth) (ARCHA), they will not serve the end of protecting corporations that *themselves* are the subject of discrimination through denials of services, funding, contracts and the like. There are four main reasons for this:
    a. First, as outlined by Dawson and Gaudron JJ in *IW v City of Perth*, in the specific context of a denial of services, the person denied the supply is the person who

[83] [1993] HREOCA 24 (extract at (1994) EOC 92-653).
[84] *Eisele v Commonwealth* [2018] FCA 15.
[85] I acknowledge Alex Deagon as an equal co-contributor to this section of material and to Appendix III.
[86] As held by the majority in *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J) ('Tasmanian Dams').

must make the complaint.[87] Statutory provisions enabling representative complainant proceedings are thus inapplicable where the corporate body is the body that has been denied services.

b. Second, section 46PB(1)(a) of the AHRCA provides that a representative complaint may only be lodged where the class of members are themselves each able to lodge a complaint. The separate means to lodge a complaint 'on behalf' of a person contained at sections 46P(2)(a)(ii) and 46P(2)(c) are only available where the person on whose behalf the complaints are lodged is an 'aggrieved person'. The contention that these provisions would be available to a corporate body in the absence of a provision clarifying that corporate bodies may make a complaint is incorrect. Conceptually, representative complainant provisions have been considered to enable parents to make complaints on behalf of minors, or for a person to make complaints on behalf of another person suffering a disability, where those latter persons have suffered discrimination. They will not enable a person to lodge a complaint on behalf of a corporate body if the corporate body is not able to itself make the complaint.

c. Third, the representative complainant provisions in the AHRCA are styled to enable representation in a class-action type of proceedings, not the denial of a specific approval or of funding to a corporate body. As Maxwell J outlined with reference to the Victorian *Equal Opportunity Act 1995* provisions:

> There are several conditions to be satisfied before a complaint may be made by a representative body on behalf of named persons. In particular, each named person must have been entitled, as an individual, to make a complaint of discrimination in his or her own right.[88]

Where the discriminatory act is against a corporate business, these conditions will often not exist.

d. Finally, as Rees, Rice and Allen admit representative complainant provisions are rarely utilised:

> The legislative provisions governing representative complaints have rarely been used but it is difficult to determine the precise reason for this. Some of the possible reasons include: the provisions are complex; and the remedies available in a representative complaint are usually more limited than those available in an individual complaint.[89]

The scope of the protections enabled by such provisions thus entails a degree of uncertainty.

These reasons support the inclusion of clause 16, and the provision of further attention to the ability of groups to take the benefits of the protections against religious discrimination in their own capacity.

Partnerships – Clause 20

63. It is also noted that to be consistent with existing Commonwealth law, the prohibition on discrimination within partnerships should only operate in respect of partnerships of 6 or more persons (the current drafting limits the exception to partnerships of three or less persons).

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[87] *IW v City of Perth* (1997) 191 CLR 1, 25 (Dawson and Gaudron JJ).
[88] *Cobaw* (n 46) [32] (Maxwell J).
[89] Neil Rees, Simon Rice and Dominque Allen, *Australian anti-discrimination and equal opportunity law* (Federation Press, 2018) [15.2.22].

Charities

64. The legislative package protects institutions that hold a traditional view of marriage from loss of their charity status, as has occurred abroad (*Human Rights Legislation Amendment Bill 2021* clause 3). The amendment addresses both the requirement that charities conform with 'public policy'[90] and also that they exist for the public benefit. The rationale for addressing both requirements is stated in the enclosed article Mark Fowler, 'Attaining to Certainty: Does the Expert Panel's Proposal for Reform of the Charities Act Sufficiently Protect Religious Charities?' (2020) 2 *Third Sector Review* 87.

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[90] *Charities Act 2013* (Cth), s 11.

Appendix I - The International Human Rights of Religious Educational Institutions

65. All Australian jurisdictions provide exemptions to religious educational institutions in both the areas of employment[91] and in respect of the supply of services to students.[92] As set out in the first section, these provisions give effect to the internationally recognised human rights of religious freedom and associational freedom. The framework of those rights has been primarily considered within matters that concern the ability of a private school to define its religious ethos through its employment policies.

United Nations Jurisprudence

66. The right to establish and maintain private religious schools is protected under various United Nations instruments. Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* states:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13(4) provides a guarantee that individuals and bodies may establish private educational institutions:

> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The *United Nations Universal Declaration of Human Rights* (UDHR) simply protects the prior right of parents to choose the kind of education that shall be given to their children.

67. Article 18(4) of the *International Covenant on Civil and Political Rights* (ICCPR), which has been ratified by Australia provides:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

This right also protects the right to establish private religious schools. In his commentary on the ICCPR Nowak concludes that '[w]ith respect to the express rule in Art.13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the

[91] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1); *Anti-Discrimination Act 1991* (Qld) s 25.

[92] *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 1984* (SA) s 35(2b); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3); *Anti-Discrimination Act 1991* (Qld) s 41(a).

parental right covers the freedom to establish private schools.'[93] As further discussed below, the jurisprudence of the European Court of Human Rights (ECHR), has confirmed that the right under Article 2 of the First Protocol to the *European Convention on Human Rights* (which is closely aligned to Article 18(4) establishes a human right to found and maintain private schools.

68. In *Delgado Páez v Colombia* the UNHRC considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment due to his advocacy of 'liberation theology'. The UNHRC stated:

69. With respect to Article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.[94]

    Similarly, the UNHRC found no breach of Article 19. The Committee's view would support the assertion that religious institutional autonomy under Article 18 permits the exercise of discretion over staff and teaching by religious bodies in the context of education.

70. The *Convention on the Rights of the Child*, also ratified by Australia, requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents …'.[95] The right of the child to 'freedom of thought, conscience and religion' is explicitly protected in Article 14 of the Convention.[96] Further, it requires States to respect the 'rights and duties of parents … to provide direction to the child in the exercise of his or her right.'[97] This also includes in the substantive content of education the development of respect for the child's parents, and the child's own cultural identity, language, and values.[98]

71. It is therefore clear that international human rights law protects freedom of religion for both adults and children. The right to establish private schools is also protected by international human rights law that Australia has ratified. To deny the discretion of a private faith-based school to ensure that those persons appointed to its leadership, staff and volunteer roles also share its faith is to remove the ability to maintain the unique religious identity of that school. Such a proposal is thus a breach of the right to establish private religious schools.

72. Furthermore, in the context of faith-based schools, it is also relevant to note that the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom, 'to establish and maintain appropriate charitable or humanitarian

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[93] Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 443.
[94] *Delgado Páez v Colombia* (n 2) [5.7].
[95] *Convention on the Rights of the Child* (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2) ('CRC').
[96] Ibid art 14(1).
[97] Ibid art 14(2). See also art 5, which contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.'
[98] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 243.

institutions'.[99] The establishment and maintenance of such faith-based schools in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers. This instrument was declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986*" by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993, thus enabling the making of a complaint alleging a breach of these principles to the Australian Human Rights Commission.

73. Former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has offered the following comments in relation to the community aspect of religious freedom and the right to determine appointments to critical roles:

> 57. Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.[100]

74. The Special Rapporteur has emphasised that these principles also apply to religious schools, noting that limitations on the ability to incorporate private religious schools:

75. may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions – a right explicitly enshrined in international human rights law as an integral part of freedom of religion or belief.[101]

Religious Institutional Autonomy

76. At a broad conceptual level, the European Court of Human Rights summarised its view of the correlation between religious institutional autonomy and plural democratic society in *Hasan v Bulgaria*:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the

[99] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.
[100] UN General Assembly, *Elimination of all Forms of Religious Intolerance*, 7 August 2013, A/68/290, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/421/91/PDF/N1342191.pdf?OpenElement
[101] UN General Assembly, Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, 22 December 2011, A/HRC/19/60 [47].

> very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[102]

77. In respect of members' rights, in *Sindicatul "Păstorul Cel Bun" v Romania*,[103] the Grand Chamber of the ECHR considered that:

> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones.… in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.[104]

78. In its developed consideration of religious institutional autonomy the Court has applied these principles to a range of faith-based institutions, including in the case of religious educational institutions. In doing so it has not seen fit to drive a wedge between religious bodies and their other charitable emanations. In *Rommelfanger v Germany*[105] a faith-based hospital was permitted to sanction staff that made public statements on abortion contrary to its beliefs. In *Siebenhaar v Germany*[106] a day-care centre run by the German Protestant church could act lawfully in dismissing a member of a differing religious body in order to maintain the credibility of the church in the eyes of the general public and parents and to avoid the risk that children would be influenced. The decision discloses particular regard to the ethos of the organisation, and its engagement with the wide public, as opposed to any imposition of an inherent requirements style test that would have regard to the particular requirements of any given role. In *Obst v Germany* (2010) the dismissal of the European Director of Public Relations of the Church of Latter Day Saints for entering into an extramarital relationship was upheld as a legitimate expression of religious institutional autonomy in light of the public position assumed by the role. In *Martinez v Spain* (2014) the Court held that a Catholic scripture teacher in public schools can be required to live a life consistent with the teachings of the Church, demonstrating a sufficiently close proximity between the role and the requirements of the faith.[107] The availability of an unemployment benefit was also a relevant determinant.

79. Extending similar principles, in *Syndicatul "Păstorul cel Bun" v Romania* (2013) the formation of a Romanian Orthodox priest's trade union without the consent of the Bishop was held to not breach Article 11 (right to freedom of association and to form unions), as it was not role of the State to interfere in internal governance of dissidents of religious institutions:

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[102] *Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)* ('*Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)*'). See also *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).

[103] (2014) 58 EHRR 284, 319 [137] (citations omitted).

[104] *Ibid* 324 [165].

[105] *Rommelfanger v Federal Republic of Germany* (1989) ECHR 27 ('*Rommelfanger v Federal Republic of Germany*'); ibid.

[106] *Siebenhaar v Germany* (2011) ECtHR, App. No. 18136/02 ('*Siebenhaar v Germany*').

[107] *Fernández Martínez v. Spain* [GC], no. 56030/07, ECHR 2014.

> it is the domestic courts' task to ensure that both freedom of association and the autonomy of religious communities can be observed within such communities in accordance with the applicable law, including the Convention. Where interferences with the right to freedom of association are concerned, it follows from Article 9 of the Convention that religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.[108]

80. As Aroney and Taylor note in their summary of European Court of Human Rights judgements on religious institutional autonomy:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[109]

81. In eschewing the distinction between secular and religious roles when determining whether an employee may be subject to a heightened degree of loyalty,[110] the Court has on occasion conducted a proportionality analysis that looks to the specific roles assigned to an employee, and the proximity between the applicant's activity and the proclamatory mission of the religious body.[111] The few occasions in which the Court has not upheld institutional autonomy include a church organist who was not able to locate employment elsewhere[112] and where there had been a failure of fundamental natural justice.[113] The proximity test is not a relevant consideration under Commonwealth law and has not been adopted within the United Nations jurisprudence.

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[108] *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, ECHR 2013.
[109] Aroney and Taylor (n 65).
[110] *Case of Fernández Martínez v Spain* (2014) ECHR 615 ('*Case of Fernández Martínez v Spain*'); ibid.
[111] *Schuth v Germany (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010)* ('*Schuth v Germany (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010)*'). *Obst v Germany* (2010) ECtHR, App. No. 425/03 ('*Obst v Germany*').
[112] *Schuth v Germany (European Court of Human Rights, Grand Chamber, Application no. 1620/03, 23 September 2010)* (n 111). That case involved a Catholic organist dismissed for entering an extra marital relationship. The Court upheld the applicant's complaint on the basis that the German court failed to adequately consider the nature of the post, and provided only limited judicial scrutiny. The Court have therefore have reached a differing outcome if sufficient consideration had been given by the domestic courts. *Case of Fernández Martínez v Spain* (n 110); *Obst v Germany* (ECtHR, App. No. 425/03, §§ 12-19, 23 September 2010).
[113] *Lombardi Vallauri v. Italy*, no. 39128/05, 20 October 2009. This matter concerned the dismissal of an academic in the absence of any explanation as to the grounds for dismissal, or an ability to respond to the proposed dismissal.

Similarly, the United Nations Human Rights Committee has refused to apply the European Court's margin of appreciation doctrine.

Right to Establish Private Religious Institutions

82. The right corresponding to Article 18(4) of the ICCPR is contained within Article 2 of the First Protocol to the European Convention on Human Rights. It states that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

83. The European Court of Human Rights judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark (Kjeldsen)*[114] concerned the right of parents to remove children from sex education. Therein the European Court of Human Rights held that Article 2 aims at securing pluralism across the education sector:

> The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[115]

As noted by Rivers '[t]he two sentences of the article are connected, in that parents have the prior duty to ensure that children receive an education, and the right to determine what that education shall be. State provision is only legitimate if it respects this prior parental responsibility.'[116] The Court held:

> The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education …. It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.[117]

84. The Court also noted the important role private schools play in offering an opportunity for parents to excuse their children from sex education that does not align with their religious or philosophical convictions:

> the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.[118]

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[114] (1979-80) 1 EHRR 711.
[115] At 21. Also affirmed in *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) at para 84(b).
[116] Rivers (n 98) 245, commenting upon the decision of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711.
[117] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 116) [22].
[118] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 116) [24].

85. Thus, Article 2 will be breached where a state's education system fails to make reasonable provision for parental convictions across the entire education system. The presence of alternative private religious schools was held to be a critical component of a state's ability to satisfy this requirement.

86. Importantly in the context of the current Inquiry, in *Ingrid Jordebo Foundation of Christian Schools v Sweden*[119] the European Commission on Human Rights applied the principles set out in *Kjeldsen* to the context of independent schools. In *Jordebo v Sweden* the Commission considered that Article 2 of the First Protocol guarantees the right to start and run religious educational institutions as a 'corner-stone' protection to individual freedom.[120] The Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the European Convention on Human Rights] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that it should be possible at a private school to give certain topics a more, and others a less, prominent position than that given in public schools and that the activity in a private school should be allowed "within very wide ranges to bear the stamp of different views and values".[121]

87. The Commission criticised the Swedish Government, which:

> seem[ed] to regard the right to keep a school as something entirely within "le fait du Prince" [permissible acts of government]. But this is clearly different from the mainstream in the countries of the High Contracting Parties, necessitating an autonomous way of judgment… The Government seem to look at schooling the same way as at military service, where of course no competing "private regiments" could be tolerated.[122]

88. Legislative proposals that fail to afford religious education associations the ability to maintain their ethos could be said to be subject to similar concerns.

89. In linking a diversity in private schooling to a flourishing democratic State the Commission was critical of the unitary nature of Swedish schooling system in the following terms:

> The applicants' school was founded with the aim of preserving the tradition of the Christian school in Sweden before the secularisation of the municipal schools. There is thus nothing odd or strange in these general ideas, although this kind of school no longer fits in the general system of a secularised school and State. Thus, in the applicants' school, the teaching of religion, although ecumenical and not pertaining to any particular Christian sect or movement, is confessional and founded on Christian belief. There are morning prayers and prayers before and after meals, such as was common in all schools 30 years ago…

[119] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (n 31).
[120] Klaus Beiter *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).
[121] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (n 31).
[122] Ibid.

> The State has the right to have the applicants' school inspected, but the judgment over the school and its quality should be made in an independent way, avoiding all harassment, by inspectors free of bias. The school has not been treated in such a way, and Mrs Jordebo's right, as a parent, has thereby been violated, as also by decisions of the instances which are bound to be biased by their coupling to the State and the municipal school system…
> Finally, as general information the following is mentioned. Sweden is nearly unique among countries belonging to the Council of Europe as far as the school policy is concerned. In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country. For this reason private schools, although formally allowed, are in practice stopped with all means. The children should be kept within the State-municipal public schools in order to prevent any other influence on the education than such as has been accepted by the political majority. A formal decision has been made that not more than 0.3 % of the children of compulsory school age may be allowed to visit private schools, three out of 1000 children. The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament. When this majority has decided that the public education should be non-confessional, it means that this majority can allow only three children out of 1000 to have a confessional education. To maintain a democratic outlook, private schools cannot be totally forbidden but instead economic rules have been adopted to stop private schools in Sweden in reality. These measures are very efficient. The Anna school has, in spite of all these difficulties of a financial kind, been successful and created an alternative in Jönköping. Then other ways have been used in order to stop its development. In this respect it is easy to say that the education offered at the Anna school is not good enough. In the applicants' opinion the education offered to the children was good enough for reasons which it is not necessary to explain here.[123]

90. Again, a failure to afford religious education associations the ability to maintain their ethos gives rise to similar concerns. Legislative restrictions on the freedom of religious educational institutions to maintain their ethos give rise to the need for careful consideration as to whether they evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament'.[124]

91. Having emphasised the need for a non-biased approach to religious schooling and the importance of private schooling in ensuring civil society freedoms, the Commission concluded:

> The question which arises is whether Article 2 of Protocol No. 1 (P1-2) could be interpreted as granting a right to start and run a private school, and whether, when a private school is as such approved, the school should have a right to run

[123] Ibid.
[124] Ibid.

> classes at all stages of the compulsory school … The Commission considers that it follows from the judgment of the European Court of Human Rights in the Case of Kjeldsen, Busk Madsen and Pedersen (judgment of 7 December 1976, Series A no. 23, pp. 24-25, para. 50) that Article 2 of Protocol No. 1 (P1-2) guarantees the right to start and run a private school.[125]

92. The 'free-standing right, regardless of State provision, to establish and run private schools, including faith-based schools, subject to State oversight and conformity to minimum standards' was affirmed by the Commission in *Verein Gemeinsam Lernen v Austria*.[126] It is also worth noting that in that decision the Commission also confirmed that private schools have a right based on article 14 in the context of article 2 First Protocol to non-discriminatory conditions of existence, including equal access to State funding for schools of their type.[127] Similarly, in *Waldman v Canada*,[128] the United Nations Human Rights Committee held that the differential treatment granted by Ontario to Roman Catholic religious schools, which were publicly funded, as opposed to schools of other religions, which were not, amounted to discrimination. The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26.

93. In applying these principles, the ECHR has held that the obligation to 'respect' religious conviction sets a high standard on the State in the education of children:

> That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. [129]

94. In addition, the ECHR has recognised the unique nature of religious conviction as a ground for its separate protection under the Protocol:

> The term "conviction", taken on its own, is not synonymous with the words "opinions" and "ideas". It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[130]

95. In summary, the above rulings are inconsistent with any proposal to remove the distinct exemptions for faith-based schools that concern employment in Commonwealth law. The Bill affords strong protection in this regard, providing strong support for the contention that it aligns with the requirements of international law. Failure to do so may jeopardise the ability of religious schools to control their leadership, staff and volunteers, and thus the ability of religious schools to offer students a holistic religious education in accordance with their religious convictions. The Bill preserves the right to establish independent schools, protected in human rights law as a fundamental right central to the preservation of pluralistic democracy. To that extent, the Bill also

[125] Ibid. Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[126] (1995) 20 EHRR CD 78.
[127] Rivers (n 98) 248.
[128] *Waldman v Canada* No. 694/1996 [10.5] – [10.6].
[129] *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) [84(c)].
[130] Ibid.

preserves the legitimate expression of the rights of children and their parents to ensure the religious and moral education of their children. The Bill thus preserves the ability of parents to choose a school consistent with the ethical and religious values of themselves and their children. It should also be noted that failure to recognise the ability of religious educational bodies to employ persons consistent with their religious values would also limit their right to freedom of association.

96. A failure to allow proper recognition to the discretion of religious schools over leadership and staff could jeopardise their unique identity. Such would be a proposal to breach what the European Commission on Human Rights has termed the 'guaranteed … right to think freely'; the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society.

The Expert Panel Recommendations on Staff

97. In its analysis of international law, the Expert Panel on Religious Freedom considered the question of the religious ethos of faith-based schools in considerable detail, having had the benefit of a wide consultation with academics, peak bodies and community groups and having received 15,620 submissions. The Expert Panel's report states:

> In the absence of any specific and comprehensive law dealing with freedom of religion, the Panel noted the pivotal role of exceptions to discrimination laws in the protection of freedom of religion.[131]

98. The Expert Panel also noted the contribution of such faith-based schools to diversity within Australia in the following terms:

> The Panel noted the wide variety of faith-based schools in Australia and the communities in which they operate. The Panel considered there is value in this variety, as it supports parental rights to select the best education for their individual child. While many faith-based schools choose not to rely on the existing exceptions in legislation to discriminate against staff on the basis of protected attributes, others consider that the freedom to select, and to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs.[132]

99. The Panel linked the ongoing presence of this diversity to the ability of faith-based schools to exercise discretion in their hiring practices. [133]

[131] *Religious Freedom Review, Report of the Expert Panel* (May 2018) https://www.pmc.gov.au/domestic-policy/religious-freedom-review, [1.418].
[132] *Ibid* [1.245].
[133] *Ibid* [1.246].

Appendix II - The Interaction of Clause 12 with the Internationally Protected Right of Freedom of Expression

100. Various critiques of clause 12 focus on the offensive statements that are asserted to be enabled by the clause. Some of these examples have been offered without any evidence as to any actual current mischief, or without any rational correlation to the doctrines of mainstream religions within Australia. The presumption behind these critiques is that the law should be enforceable by private citizens so as to prevent the giving of offence. If given effect, this would entail an extraordinary expansion of the power of the State as between private citizens. Further, as demonstrated by the following analysis, these critiques are not formulated with any apparent regard to international law. This is because international human rights law recognises the importance of free speech within an open and democratic polity.

101. The rights governing the permissible curtailment of expression are contained in the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR), both of which instruments Australia has ratified. The latter treaty is of direct relevance to the Bill, whereas the former is relevant in this context to the extent that it is illustrative of the scope of the protections afforded to speech within international human rights law. As will be seen, this scope has been particularly illustrated by judicial and academic consideration of section 18C of the *Racial Discrimination Act 1975*.

102. Article 4(a) of the CERD provides the international requirement to prevent racial hatred:

> Article 4
> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

38. Article 20 of the ICCPR similarly provides:

> 1. Any propaganda for war shall be prohibited by law.
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 19 of the ICCPR provides the relevant rights to freedom of speech:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

103. In elaborating on the requirements of this right the United National Human Rights Council (UNHRC) has stated:

> The exercise of the right of freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.[134]

104. Article 20 clause is also consistent with Article 19. Article 19(2) protects freedom of expression. Article 19(3) places limitations on the exercise of this right, recognising that freedom of expression carries 'special duties and responsibilities', and is subject to restrictions as 'provided by law' and necessary for 'respect of the rights or reputations of others' or 'for the protection of national security, or of public order, or of public health or morals'. The tests that must be satisfied under clause 12 arguably give effect to these standards of limitation. The UNHCR has also clarified that Article 20's 'required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities'.[135]

105. In the terms of Article 4 of the CERD, the requirement extends to 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence'. In the terms of Article 20 of the ICCPR, as Taylor notes 'The threshold in Article 20(2) is extremely high'.[136] This is because Article 20(2)'s reference to 'incitement to discrimination, hostility or violence' is confined to circumstances where such incitement flows from 'Any advocacy of national, racial or religious hatred'. In these ways the ICCPR places a high value on freedom of speech, tightly curtailing permissible limitations thereupon. Therefore, as noted by the ALRC in its 2016 *Freedoms Inquiry Report*, there is an important distinction to be drawn between

[134] UN Human Rights Council, Resolution 12/16, preamble.
[135] UN Human Rights Committee, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29/07/1983.
[136] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020).581

'vilification' as understood within international law and domestic laws which render 'offensive' conduct unlawful (when commenting on section 18C of the *Racial Discrimination Act 1975*):

> Racial vilification, in this context, generally refers to public acts that encourage or incite others to hate people because of their race, nationality, country of origin, colour or ethnic origin. Vilification carries with it a sense of extreme abuse or hatred of its object, and can provoke hostile and even violent responses. Arguably, the words of s 18C do not convey this meaning.[137]

106. In order for the Commonwealth to implement international law under the external affairs power, certain tests must be adhered to, including that the law 'conforms' to the requirements of international law. The High Court has held that, in order to validly implement a treaty, a law must pass a four-stage test:

> 1. The treaty is a bona fide treaty.
> 2. The subject of the treaty is a matter of international concern.
> 3. The treaty specifically obliges the Commonwealth of Australia to take legislative action (known as the 'specificity requirement').
> 4. The law conforms to the relevant treaty (known as the 'conformity requirement'). The test for the conformity requirement is whether the law is reasonably capable of being considered appropriate and adapted to implementing the treaty.[138]

In short, the relevant international norms do not provide constitutional force, on the basis of the external affairs power, to a prohibition on speech that offends, humiliates, intimidates or insults.

107. The inconsistency of legislated prohibitions on offensive or insulting speech with international law has received domestic judicial affirmation. *Coleman v Power* concerned Queensland legislation prohibiting 'threatening, abusive or insulting words' in a public place. Therein Kirby J observed that the widest possible meaning of the term 'insulting'—would go beyond the permissible limitations on freedom of speech set out in Article 19.3 of the ICCPR.[139]

108. That international law does not encompass the provisions of section 18C was also noted by the Parliamentary Research Service in the *Bills Digest* that accompanied the Bill originally inserting section 18C into the RDA:

> There is no requirement in proposed s. 18C that the act include ideas based on racial superiority or hatred, or incite racial discrimination or violence, nor is there a requirement that it involve the advocacy or racial hatred or incite hostility. There appears to be quite a wide chasm between racial hatred and

[137] Australian Law Reform Commission *Freedoms Inquiry Report* 2016 [4.178]
[138] *Victoria v Commonwealth of Australia* [1996] HCA 56; (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ). Joshua Forrester, Augusto Zimmerman and Lorraine Finlay submission to PJCHR Freedom of Speech in Australia, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Submissions.
[139] *Coleman v Power* (2004) 220 CLR 1, [242].

> 'offending' a person by an act, where one of the reasons for the act was the race of a person[140]

109. It should also be noted that, prior to the enacting of section 18C, the Australian Human Rights Commission (at the time that was known as the 'Human Rights and Equal Opportunity Commission') in its 1991 *National Inquiry into Racist Violence* recommended a protection against racial hatred, but warned against a broader standard:

> The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation in New Zealand, where legislation produced a host of trivial complaints… The Inquiry is of the opinion that the term "incitement to racial hostility" conveys the level and degree of conduct with which the legislation would be concerned.[141]

110. In 2016 the ALRC concluded that section 18C 'may be vulnerable to constitutional challenge on two fronts'. The first of those fronts was the concern that section 18C fails to acquit Australia's international obligations:

> [4.203] The first is the question of whether s 18C is validly supported by the external affairs power under s 51(xxix) of the Constitution. This would arise if the provision extends beyond Australia's international obligations under the ICCPR and CERD, which may be said to 'focus on protecting against racial vilification and hatred rather than prohibiting offence or insult'.[142]

The second related to the scope of the Constitutional implied freedom of political communication, of less direct relevance to clause 12 of the Bill. While a prohibition equivalent to section 18C is not proposed by the Bill, the foregoing discussion is relevant to the extent that arguments are made against clause 12 on the basis that it will permit offensive statements. The point of the foregoing discussion is that international human rights law places a high value on freedom of speech, and thus resiles from the placing of limitations on speech that would see domestic courts determining disputes between private citizens where the purportedly unlawful conduct is the giving of offence.

111. Turning to the particular question of the protections to religious speech recognised in international law, the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Religious Declaration) provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the 'freedom … To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.'[143] Importantly, the UNHCR has relied

[140] Parliamentary Research Service (Department of the Parliamentary Library), *Bills Digest: Racial Hatred Bill 1994*, 14 November 1994, 12.
[141] Australian Human Rights and Equal Opportunity Commission *National Inquiry into Racist Violence* 1991 [300].
[142] Lorraine Finlay, 'Freedom's Limits: Speech, Association, and Movement in the Australian Legal System' (Speech, ALRC Freedoms Symposium, Constitutional Centre of Western Australia, Perth, 29 September 2015)
[143] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6(i).

upon the Religious Declaration as an appropriate authority for the interpretation of the scope of Article 18.[144]

112. In response to growing sense of the need for greater understanding of the scope of Article 20, in 2008 the United Nations High Commissioner for Human Rights promulgated the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*. That document states:

> It is often purported that freedom of expression and freedom of religion or belief are in a tense relationship or even contradictory. In reality, they are mutually dependent and reinforcing. The freedom to exercise or not exercise one's religion or belief cannot exist if the freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters could be held. Indeed, free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to or distort the original values that underpin religious belief.[145]

The Rabat Plan goes onto to highlight that while acts that would constitute breaches of Article 20 go unpunished, domestic laws overly restricting speech could have a chilling effect:

> It is of concern that perpetrators of incidents, which indeed reach the threshold of article 20 of the International Covenant on Civil and Political Rights, are not prosecuted and punished. At the same time members of minorities are de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation, jurisprudence and policies. This dichotomy of (1) non-prosecution of "real" incitement cases and (2) persecution of minorities under the guise of domestic incitement laws seems to be pervasive.[146]

113. These various authorities lend support to the contention that clause 12 gives effect to the protections to religious belief recognized under the international law which Australia has ratified in a way that is consistent with protections to speech under that law. Rather than being characterized as an effort intended to license offensive comments, the clause can be seen as an exercise attempting to conserve the tolerant approach to religious discourse that has long been characteristic of our open and liberal democracy. As such, the protection is posed as a shield against discriminatory complaints against 'moderately' expressed religious views, not a sword.

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[144] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka,* Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).
[145] Annual report of the United Nations High Commissioner for Human Rights, appending the *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* A/HRC/22/17/Add.4 8, appendix [10].
[146] Ibid appendix [11].

Appendix III – By what Means does International Law Protect Religious Corporations?

114. The body of this submission has set the context of the Bill's attempt to protect religious bodies from discrimination and has established why additional protection is required beyond that which is currently offered in the RDB. The following section canvasses relevant international law that supports the contention that religious corporations may be protected from discrimination as a means to adequately give effect to the religious freedom rights of individuals. The AHRC asserts that 'it is an axiomatic principle of international law that human rights extend only to humans.'[147] In itself, this is a non-contentious statement of general human rights principles (with the exception of Article 1 of the ICCPR concerning the collective rights of 'peoples'). However, to extend this principle to the absolute conclusion that human rights law precludes corporations from making complaints where discriminatory action against them places a limitation on the religious freedom rights of individuals goes too far. As illustrated by the following discussion, a wide range of international bodies and the domestic courts of certain countries have recognised that, due to the unique communal aspects of religious belief, corporate bodies may assert rights on the basis of their religious beliefs.

United States and Canadian Law

115. Rienzi notes that in the United States:

> both legally and socially, businesses are understood to be capable of having a religious identity if that identity is relevant to their status as a victim of discrimination.[148]

For example, in *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe* the Seventh Circuit Court of Appeals upheld a complaint of religious discrimination by a privately operated (non-charitable) nursing facility owned and operated by Jews:

> Sherwin presents a cognizable equal protection claim since it alleges that it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus.[149]

Similarly in *The Amber Pyramid, Inc. v. Buffington Harbor Riverboats* it was held that 'a 'minority-owned corporation, like Amber Pyramid, assumes an "imputed racial identity" from its shareholders.'[150]

116. In the 2014 decision of the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* ('*Hobby Lobby*'), the Court held that 'closely held' business corporations can assert religious freedom rights, acknowledging that '[f]urthering their religious freedom also "furthers individual religious freedom"'.[151] The United States Supreme Court recognised:

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[147] Australian Human Rights Commission, *Submission on the Religious Discrimination Bill*: Religious Freedom Bills | Australian Human Rights Commission.

[148] Mark Rienzi, 'God and the Profits: Is there religious liberty for money makers?' (2013) 21(59) *George Mason Law Review*, 94.

[149] 37 F.3d 1216, 1221 (7th Cir. 1994).

[150] L.L.C., 129 F. App'x. 292, 295 (7th Cir. 2005), (quoting *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc*., 368 F.3d 1053, 1059 (9th Cir. 2004)).

[151] *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014)* ('*Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014)*').

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights … are extended to corporations, the purpose is to protect the rights of these people.[152]

117. Again, in *Ontario (Human Rights Commission) v. Brockie* the Canadian Supreme Court held that the Ontario Human Rights Commission 'ought not to require Mr. Brockie to print material of a nature that could reasonably be considered to be in direct conflict with the core elements of his religious beliefs', including those beliefs on the immorality of same-sex conduct.[153] Mr Brockie's business took a corporate form.

European Court of Human Rights

118. Turning to the European Convention context, these rights are affirmed in the jurisprudence of the European Court of Human Rights (ECHR). A ruling of the ECHR is not binding in Australian law. The ECHR has developed the 'margin of appreciation' doctrine which has seen a substantial departure from the jurisprudence under the ICCPR, which is the relevant international instrument to which Australia is a signatory. Nevertheless, in certain respects the jurisprudence of the ECHR can be informative as a statement of the requirements of international human rights law, to which Australian courts look for guidance and may be informative in considering the application of human rights law to corporate bodies.[154]

119. As Ahdar and Leigh recognise, bodies exercising jurisdiction under the Convention have 'accepted that it was artificial to distinguish between rights of the individual members and of the religious body itself.'[155] Accordingly, 'The importance of the collective dimension to religious freedom has emerged as an important theme in Convention jurisprudence'.[156] In *X and Church of Scientology v Sweden* the European Commission of Human Rights held that a church could exercise Article 9 religious freedom rights on behalf of its members: '[w]hen a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members.'[157] This can be seen as an extension of the Court's reasoning in *Hasan & Chuash v Bulgaria:* 'religious communities traditionally and universally exist in the form of organised structures' necessitating the recognition that 'participation in the life of [such communities] is a manifestation of one's religion.'[158] Similarly the Court has recognised that 'Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.'[159] Applying these principles, subsequent decisions have confirmed

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[152] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751, 2768 (Alito J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2014) (emphasis in original).
[153] (2002) Carswell Ont 2518 Ont. Sup. Ct. (Div.Ct.) [58].
[154] See for example *Cobaw* (n 46). As a further example, reference to such judgements may be had by Courts applying the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[155] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 138.
[156] Ibid.
[157] (1979) 16 DR 68, 70.
[158] *Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)* (n 30).
[159] *Case of Fernández Martínez v Spain* (n 110).

that religious corporations are direct beneficiaries of the rights conferred under Article 9 and may exercise those rights in their own capacity,[160] with the European Court of Human Rights (ECHR) clarifying:

> a complaint lodged by a church or a religious organisation alleging a violation of the collective aspect of its adherents' freedom of religion is compatible ratione personae with the Convention, and the church or organisation may claim to be the "victim" of that violation within the meaning of Article 34 of the Convention.[161]

On the question of commercial businesses, the European Court of Human Right's Guide to Article 9 states 'the Commission and the Court would appear to leave it open whether Article 9 applies to a profit-making activity conducted by a religious organisation'.[162]

120. With specific reference to the right to freedom from discrimination, the Court has recognized the ability of corporations to make discrimination claims. In *Cha'are Shalom Ve Tsedek v. France* the Court confirmed that religious corporations may take the benefit of the Article 14 protections from discrimination.[163] In that matter the applicant, a Jewish association, considered that the meat slaughtered by an existing Jewish organisation no longer conformed to the strict precepts associated with kosher meat, and sought authorisation from the state to conduct its own ritual slaughters. This was refused on the basis that it was not sufficiently representative within the French Jewish community, and that authorised ritual slaughterers already existed. Although the ECHR found in the circumstances that there was no actual disadvantage suffered by the organisation since it was still able to obtain meat slaughtered by the required method from other sources, it held that the association could assert rights under Article 14 (freedom from discrimination).

121. In respect of State funding to incorporated bodies, *Verein Gemeinsam Lernen v Austria* confirms that private schools have a right to non-discriminatory conditions of existence, including equal access to State funding for schools of their type.[164] That right is based upon Article 14 of the European Convention in the context of Article 2 of the First Protocol. As Aroney and Taylor note, the European jurisprudence is also relevant to the standards applied under the ICCPR. which 'are usefully supplemented by those established by the ECHR as interpreted by the European Court of Human Rights (ECtHR) on issues not specifically faced by the Human Rights Committee, the body charged with implementing the ICCPR.'[165]

United Nations Jurisprudence

122. Article 18.1 of the ICCPR in its express terms protects the right to exercise the 'freedom, either individually *or in community with others* and in public or private, to

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[160] See in particular *Kontackt-Information-Therapie and Hagen v Austria* No. 11921/86, 57 DR 81 (Dec 1988), 88; *A.R.m. Chappell v UK*, No. 12587/86, 53 DR 241 (Dec. 1987), 246; *Iglesia Bautisti 'El Salvador' and Ortega Moratilla v Spain* No. 17522/90 72 DR 256 (Dec 1992).
[161] European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion* (30 April 2020), https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.
[162] Ibid.
[163] *Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, 27 June 2000.
[164] (1995) 20 EHRR CD 78.
[165] Aroney and Taylor (n 65) 45.

manifest his religion or belief in worship, observance, practice and teaching.' General Comment 22 further elaborates:

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in *community with others.*[166]

As Evans notes, 'while human rights belong to individuals, the right to manifest religious freedom collectively means that it has an organisational dimension', whereby it 'is for the individual, rather than the state, to decide whether to exercise the right individually and/or collectively.'[167]

123. Article 6 of the 1981 *Religious Declaration*, a statement by the General Assembly that has been utilised by the Human Rights Committee in interpreting the scope of Article 18's protections, recognises a range of rights that are by their nature necessarily expressed through corporate vehicles.[168] These include the right 'to establish and maintain appropriate charitable or humanitarian institutions', the maintenance of places of worship, and the observance of ceremonies and holidays.[169] In 2005 the United Nations Human Rights Committee (UNHRC) found that Sri Lanka had breached both Articles 18 (freedom of religion) and 26 (freedom from discrimination) by refusing the incorporation of an Order of Catholic nuns whose activities included providing 'assistance to others' as a 'manifestation of religion and free expression'.[170] The complaint was brought by eighty individual sisters, reflecting the procedures under the Optional Protocol, which permit of individual complaints only. The UNHRC concluded:

> As to the claim under article 18, the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3. The authors have advanced, and the State party has not refuted, that incorporation of the Order would better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. It follows that the Supreme Court's determination of the Bill's

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[166] *Human Rights Committee, General comment No. 22 (48) (art. 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), [1] ('*Human Rights Committee, General comment No. 22 (48) (art. 18),*').

[167] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 35.

[168] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka,* Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005). [7.2].

[169] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.

[170] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka,* Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).

> unconstitutionality restricted the authors' rights to freedom of religious practice and to freedom of expression… [171]

124. The focus maintained by the UNHRC was on the effect of the discriminatory denial of incorporated status on the exercise of the individual rights of the members of the body. It is clear that the Committee considered that a limitation placed upon the ability of individuals to exercise their religious freedom rights through a corporate vehicle placed an illegitimate limitation on the religious manifestation of the members.[172] The reasoning is summarised by Aroney (albeit it another context) as follows:

> If it is essentially an individual's right to believe and practice, then the freedom will indirectly protect the beliefs and practices of religious groups and organisations in so far as this is necessary to protect the rights of individuals to manifest and practice their religious beliefs.[173]

125. Adopting an approach even more generous than that adopted by the ECHR in *Verein Gemeinsam Lernen v Austria,*[174] in *Waldman v Canada,* the UNHRC held that the differential treatment granted by Ontario to Roman Catholic religious schools (which were publicly funded) as opposed to schools of other religions (which were not) amounted to discrimination against the author (and other individuals).[175] The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26. Again the UNHCR focused on the effect that the treatment of a corporate body would have on individual religious freedom rights:

> The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in a religious school, constitutes a violation of the author's rights under the Covenant.[176]

Again, the principle that human rights are enjoyed by individuals did not preclude the conclusion that discriminatory treatment between religious corporations can amount to a limitation on individual religious freedom rights as collectively enjoyed by those corporations.

126. It should be noted that the First Optional Protocol to the ICCPR recognizes the competence of the UNHRC to receive and determine complaints from individuals claiming to be victims of a violation by the respondent State of any ICCPR rights.[177] That limitation to individuals is a procedural stipulation of the First Optional Protocol, and does not confine any rights within the ICCPR of individuals which are exercised collectively. As individuals enjoy the applicable rights under Article 18, it is technically correct to state that corporate bodies do not have human rights. However, the right of

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[171] Ibid [7.2].
[172] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153.; Dwight Newman, *Community and Collective Rights* (Hart, 2011).
[173] Aroney (n 172) 154.
[174] (1995) 20 EHRR CD 78.
[175] *Waldman v Canada* Case No 694/1996, Views adopted on 3 November 1999, [10.5]-[10.6].
[176] Ibid [10.2].
[177] *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, Article 1.

individuals includes the right to come together collectively in associations. As the foregoing discussion demonstrates, the United Nations jurisprudence recognises that discriminatory treatment against a corporation may impact upon that individual right.

127. Furthermore, religious freedom is not the only individual right recognised as incorporating a collective expression for its full enjoyment under the Covenant. As leading jurist Manfred Nowak also acknowledges, the communal and associational aspects of religious freedom are further supported by Article 22. Article 22 protects the 'right to freedom of association with other people.' Nowak explains that this right includes the collective right of an existing association to represent the common interests of its members.[178] Freedom of association becomes a nonsense if it cannot be exercised through legally incorporated persons.

128. The Human Rights Committee has recognised that the freedom of expression under Article 19 necessitates protections to incorporated 'commercial and community broadcasters' or media.[179] Such is in recognition of the fact that the legitimate exercise of certain individual Covenant rights can only be fully enjoyed through the grant of protections to incorporated entities. Article 18.4 recognises the liberties of 'parents' in the religious and moral education of their children. Article 23 recognises the family as 'the natural and fundamental group unit … entitled to protection by society and the State.' Again, the Human Rights Committee recognises that 'the persons designed to be protected [by Article 27] are those who belong to a group and share a common culture, religion and/or language'.[180] Article 1 explicitly recognises the collective rights of 'peoples' (although, as noted above, the machinery of the Optional Protocol prevents this right being the subject of a complaint to the UNHRC). In addition, although the ICCPR is the primary instrument on which the RDB seeks its authority (relying on the external affairs power), it also lists the Convention on the Rights of the Child as an instrument to which it 'gives effect' in clause 64. Aroney and Parkinson note that Articles 3.2 and 5 concerning the 'responsibilities, rights and duties of parents' and 'the members of the extended family or community as provided for by local custom' 'reflect an understanding that individual rights are often exercised within a social context.'[181]

129. In short, the underlying principle within the United Nations jurisprudence is that things done to corporate entities can impact on the religious freedom or other human rights of individuals. To that extent, the jurisprudence under the ICCPR recognises both the individual and collective dimensions of religious manifestation. Given the propensity of religious belief to inspire collective effort, to fail to so recognise would provide incomplete protection. As recognised by the ECHR, the principle that human rights are enjoyed by individuals does not preclude the ability of a corporate body to initiate a religious discrimination complaint as a litigant due to the impact upon the religious exercise of its members.

130. To provide a concrete and pertinent example, where a government limits the expression by a religious institution of its traditional view of marriage, this imposes a

[178] Manfred Nowak, *CCPR Commentary* (Engel, Kehl am Rhein, 1993) 386–9.
[179] United Nations Human Rights Committee, *CCPR General Comment No 34 Article 19: Freedoms of opinion and expression,* UN Doc CCPR/C/GC/34 (12 September 2011) [39].
[180] United Nations Human Rights Committee, *CCPR General Comment No 23: Article 27 (Rights of Minorities),* UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) [5.1], [5.2].
[181] Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 9.

limitation on the effective exercise of the rights of the members of that institution through their designate representatives. It limits the ability of the members to define the particular religious character and ethos of the institution that they have chosen to create, what Aroney and Parkinson term 'the right to shape the identity and culture' of their religious institution.[182] This is the kind of limitation that would enliven Article 18, in conjunction with Article 26, providing the rudimentary elements sufficient to seek a determination within a domestic court as to whether direct or indirect discrimination had occurred under legislation giving effect to the external affairs power. As Aroney and Parkinson assert 'if legislative approaches to discrimination policy are to be consistent with the full range of human rights that ought to be recognised and protected, then they should equally recognise and respect the communal aspects of the international human rights standards and their associated jurisprudence.'[183] Applying this framework, there is a strong argument that the Commonwealth may provide corporate religious bodies with the ability to make a discrimination complaint on the basis that the Commonwealth is enacting a law that implements obligations in a treaty, or secures benefits under a treaty.

Constitutional Considerations

131. The external affairs power authorises a potentially broad range of Commonwealth laws on any subject matter which is the subject of rights and obligations arising out of an international treaty.[184] As noted by Gibbs CJ in *Commonwealth v Tasmania* (*Tasmanian Dams* case), 'there is almost no aspect of life which under modern conditions may not be the subject of an international agreement, and therefore the possible subject of Commonwealth legislative power'.[185] If the Commonwealth law is for the purpose of implementing rights or obligations under a treaty, it will be supported by the external affairs power. In the seminal *Victoria v Commonwealth* (*Industrial Relations* case), the joint judgment further confirmed there has been 'a continual expansion in the range of the subject matter of treaties', and this expansion has been well recognised.[186] The implication is the Commonwealth can legislate for the purpose of implementing rights and obligations by reference to a specific treaty under the external affairs power. 'The legislative power was designed to authorise the implementation of treaties which bound Australia … accepted independently by the Commonwealth of Australia'.[187]

132. The *Industrial Relations* case also outlined the applicable test: the law 'must be reasonably capable of being considered appropriate and adapted to implementing the treaty', and the law 'must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states'.[188] The first aspect (conformity) entails a proportionality analysis which considers the purpose of the treaty, and 'it is for the legislature to choose the means by which it carries into or gives effect to the treaty'; 'the validity of the law depends on whether its purpose

[182] Ibid 12-13.
[183] Ibid 19-20. See also Rex Ahdar, 'Companies as Religious Liberty Claimants' (2016) 5(1) *Oxford Journal of Law and Religion* 1.
[184] As held by the majority in *Commonwealth v Tasmania* (1983) 158 CLR 1, 125 (Mason J) ('Tasmanian Dams').
[185] Ibid 100 (Gibbs CJ).
[186] *Industrial Relations* (1996) 187 CLR 416, 478 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
[187] Ibid 483. See also J Gleeson, 'The Australian Constitution and International Law' (2015) 40 *Australian Bar Review* 149.
[188] *Industrial Relations* (1996) 187 CLR 416, 486-487.

or object is to implement the treaty… And the purpose of legislation which purports to implement a treaty is considered… to see whether the legislation operates in fulfilment of the treaty and thus upon a subject which is an aspect of external affairs'.[189] However, 'deficiency' in implementation 'is not necessarily fatal to the validity of the law'; partial implementation is sufficient where the deficiency is not 'so substantial as to deny the law the character of a measure implementing the Convention' or it is a deficiency which does not render the law 'substantially inconsistent with the Convention'.[190] The second aspect (specificity) requires that the treaty embodies precise obligations, rather than mere aspirations which are 'broad objectives' permitting 'widely divergent policies'.[191]

133. In terms of applying the *Industrial Relations* case specifically, Article 18(1) provides a precise obligation. The manifestation of belief through worship, observance, practice and teaching in community with others is protected, including public sharing and the promulgation of religious beliefs.[192] Furthermore, the UN *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief* states that the right to freedom of religion includes freedom to worship and assemble, establish charitable and humanitarian institutions, and appoint appropriate leaders consistent with the requirements and standards of the religion.[193] It follows that there is a close connection between Article 18 and other fundamental human rights including freedom of association (Art 25). Freedom of religion in conjunction with freedom of association under the ICCPR thus protects the right to found an association based on a common purpose, the right of that association to be recognised as and function as a distinct legal person, and the right of such an association to select and regulate members of the association in accordance with the common interest of the association, including expulsion of those who breach the terms of the association.[194] International law therefore prescribes a clear right to freedom of religion which includes freedom to manifest religion in in community with others. Manifesting religion in community with others entails the creation and continuance of incorporated and unincorporated religious associations which function as distinct legal persons for a common purpose. Since persons form and incorporate religious associations as a function of exercising their rights of freedom of religion and association, the right entails an obligation not to discriminate against such bodies, which in turn presumes the ability of such bodies to seek redress in the event of such discrimination. The right also correspondingly entails the ability of religious individuals to seek redress against a body in the event of discrimination.

134. The Religious Discrimination Bill ('RDB') is also reasonably capable of being considered appropriate and adapted to implementing the relevant international law obligations. As intimated above, the purpose of the RDB in this respect is to protect the religious freedom of religious corporations by protecting them against discrimination

[189] Ibid 487.
[190] Ibid 489.
[191] Ibid 486. Though the 'absence of precision does not… mean any absence of international obligation.' See *Tasmanian Dams* (1983) 158 CLR 1, 261-2 (Deane J).
[192] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93(9) *Australian Law Journal* 708, 711.
[193] Ibid 711-712; *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, Supp No 51, UN Doc A/RES/26/55 (25 November 1981) Art 6.
[194] Aroney (n 192) 712; Manfred Nowak, *CCPR Commentary* (Engel, Kehl am Rhein, 1993) 386-389; Rivers (n 98) 34-38.

in their own right. The RDB may legitimately implement these specific obligations by empowering religious corporations as litigants in religious discrimination matters. The obligations include the 'right of a group to a legal framework making possible the creation of juridical persons' and 'the collective right of an existing association to represent the common interests of its members'; these two rights necessarily entail the ability of religious corporations to sue in their own right, including in relation to discrimination claims.[195] 'Religious communities need to be able to secure legal personality status within a society in order to exercise many of their collective religious freedoms'.[196] Articles 22 and 27 of the ICCPR also protect the right of freedom of association in community with others. As noted above, Article 6 of the 1981 Declaration concordantly affirms an array of freedoms which are communal in expression and necessitate the recognition of legal personality, such as the maintenance of places of worship and the establishment of charitable institutions. The overlapping protections of the ICCPR and 1981 Declaration demonstrate that under international law, freedom of religion requires freedom from religious discrimination, and freedom from religious discrimination in turn requires the capacity to be a litigant.[197]

[195] Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 8.
[196] Ibid 10.
[197] Ibid 11; See the discussion in Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 235-292.