Human Rights Law Centre

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Submission on the Religious Discrimination Bills – Second Exposure Drafts

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Human Rights Law Centre

The Human Rights Law Centre works with people and communities to eliminate inequality and injustice. We use strategic legal action, policy solutions and advocacy to build a fairer, more compassionate Australia.

The Human Rights Law Centre is an independent not-for-profit organisation. Donations to the Human Rights Law Centre are tax-deductible.

The Human Rights Law Centre acknowledges and pays our deep respects to the traditional custodians of the lands and waters across Australia and we acknowledge that those lands and waters were never ceded. We recognise the ongoing, unrelenting work of Aboriginal and Torres Strait Islander peoples, communities and organisations to demand equality, justice and self-determination and we commit to standing with them in this work.

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1. Executive summary

The Human Rights Law Centre (**HRLC**) has long advocated for legal protection of the right to freedom of thought, conscience, religion or belief within a framework which guarantees robust human rights protections for all Australians.

The HRLC supports balanced laws that protect all people in Australia from discrimination on the ground of their religious belief or activity, as well as on the ground of not holding a religious belief or engaging in a religious activity. Discrimination against religious minority groups in particular has become more prominent in recent years.[1] Australian discrimination laws are not currently providing adequate protection for people of faith from bigotry and discrimination.

The Government's First Exposure Draft of the Religious Discrimination Bill 2019 (**the Bill**) failed to strike the right balance between freedom of religion on the one hand, and rights to equal treatment, access to healthcare and non-discrimination on the basis of a range of other protected attributes.

Disappointingly, the Second Exposure Draft sees a number of unprecedented, unjustified and unbalanced clauses reinforced and expanded. Of particular concern are provisions that:

- allow doctors with a religious objection to health services to abandon their ethical and professional duties to their patients;
- dramatically broaden the scope for religious bodies, including charities, schools, hospitals, aged care facilities and accommodation providers, *to discriminate* on the basis of religion;
- introduce an alarmingly broad and subjective test of religious belief that only requires two people to have the view that a harmful statement or conduct is consistent with a religion;
- authorise harmful "statements of belief" and override state and territory protections; and
- undermine the ability of employers to enforce codes of conduct that promote safe and inclusive workplaces.

The effect is to give a greater licence *to discriminate* on religious grounds than already exists in law, to the particular detriment of religious minorities, women, LGBTIQ+ communities and people with disabilities. At the same time, the Government is failing to uphold the Prime Minister's commitment to address the distressing discrimination LGBTIQ+ children experience in religious schools.

The Bill is unworkable and should not be introduced into Parliament in its current form. We recommend that the Government redraft the Bill to align with the commitment made by Attorney General Porter to draft a bill that does not provide a licence *to discriminate*.[2] The bill should be consistent with Australia's human rights obligations to all people and existing anti-discrimination laws.

A better approach would be for the Government to finally address the significant gaps in legal protections for the fundamental rights and freedoms of all people in Australia by consolidating and improving anti-discrimination laws and adopting an Australian Charter of Human Rights.

[1] See e.g. Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2018* (2018) 62-63; Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2019* (November 2019) 7.
[2] See e.g. Sarah Martin and Naaman Zhou, 'Coalition Stops Short of 'Licence to Discriminate' in Religious Freedom Bill', *The Guardian* (online) 20 August 2019.

2. Summary of recommendations

Overarching recommendations

The Australian Government should:

1. Not introduce the Bill into Parliament in its current form and instead re-draft the Bill in a manner that ensures consistency with all of Australia's international human rights obligations and with existing anti-discrimination protections in Australian law.

2. Consolidate and modernise federal anti-discrimination laws.

3. Prioritise enacting a legislative Charter of Human Rights.

Recommendations about specific provisions and omissions in the Bill

The Australian Government should:

Ensure access to healthcare is not impeded by the religious views of health practitioners by:

4. Deleting clauses 8(6) and (7) and 32(7) from the Bill, together with the definition of conscientious objection in clause 5.

Wind back the broad licence given to a broad range of religious bodies to discriminate on the basis of religion by:

5. Deleting and replacing clauses 11(1)-(4) with a test that requires that an act or practice of a religious body conforms to the doctrines, tenets, teachings or beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion, before it is exempt from the protective provisions of the Act. All references to preferencing people of the same religion should be removed.

   (Noting that the HRLC continues to advocate for the narrowing of permanent religious exemptions in anti-discrimination laws, including sections 37(1)(d) and 38 of the Sex Discrimination Act 1984).

6. At a minimum, revising the definition of "religious body" in clause 11(5)(b)-(c) to:

   (a) narrow its application to bodies established for a religious purpose (other than those engaging primarily or solely in commercial activities); and

   (b) expressly exclude bodies receiving government funding for service delivery, including education.

Remove the power for faith-based hospitals, aged care facilities, accommodation providers and camp and conference sites to discriminate by:

7. Removing clauses 32(8)-(11) and 33(2)-(5) from the Bill (*exemptions to discrimination protections in the Bill in relation to employment and accommodation*).

Stop discrimination against students and staff in religious schools by:

8. Acting on the Government's commitment to address religious exemptions for schools by removing outdated and discriminatory exemptions from the SDA, which allow faith-based educational institutions to discriminate against students, teachers and staff.

9. At a minimum, amending clause 11 of the Bill to expressly exclude its application to clause 19(2) (*protections for students against discrimination in schools*).

Remove provisions that authorise harmful statements of belief and undermine efforts to promote safe and inclusive spaces by:

10. Deleting clause 42 and the related definition of "statement of belief" in clause 5 (*protections for statements of belief that may be prejudiced or harmful*).

11. Deleting clauses 8(3) and (4) and related clauses 8(2)(d) and (e), 8(5) and 32(6) (*provisions limiting employer and qualifying body conduct rules outside of work*).

Not grant human rights protections to corporations by:

12. Revising clause 9 to only protect associates who are natural persons, such as spouses, housemates, relatives, carers, or other natural persons in a business, sporting or recreational relationship with the aggrieved individual.

13. Introducing consistent protection for natural person associates in all federal anti-discrimination legislation.

Better protect communities of faith, particularly minority faith communities, from hate speech and violence by:

14. Consulting carefully with religious groups, and particularly minority religious groups that have been disproportionately targeted by hate speech, and introducing laws to prohibit vilification on the grounds of religious belief or activity.

Ensure equal status for LGBTIQ+ people in Australia's anti-discrimination structures by:

15. If a Freedom of Religion Commissioner is being established, establishing an LGBTIQ+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.

Note: the HRLC endorses the submission of Justice Connect to the First Exposure Draft of the Bill in relation to the amendments to the *Charities Act 2013* (Cth).

3. Federal laws are needed to protect freedom of religion and belief

The HRLC supports the introduction of *balanced* laws that would make religious belief and activity, as well as the absence of religious belief and activity, a protected attribute in federal anti-discrimination law.

According to the 2016 Census, 52% of people in Australia identify as Christian and 8.2% of people identify with another religion, including Islam, Buddhism, Hinduism, Sikhism and Judaism. There has also been a rapid decline in religious belief in Australia in recent years, with 30% of Australians reporting no religion.[3]

Better protections against religious discrimination are particularly important for minority faith communities, with evidence of a rise in discrimination and vilification against religious minorities, and in particular Islamophobia and anti-Semitism.[4]

The right to freedom of thought, conscience, religion or belief is a fundamental right under international law[5] and should be protected under Australian law. The right to form, hold or change *inner* convictions extends to beliefs that may be objectionable to others. It is not however, a freedom *to discriminate* against others.

Equality and freedom from discrimination are also a fundamental human rights.[6] The Australian Government has an obligation to guarantee *all* people equal and effective protection against discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[7]

Including religious belief (and not holding a religious belief) as a protected attribute in federal discrimination law should reduce inconsistencies between federal and state and territory laws and strengthen protections for people with and without religious beliefs. This must not come at the cost of weakening discrimination protections for other groups of people, such as women, people living with disabilities and LGBTIQ+ people, which is precisely what this Bill does.

We note that the attribute of religious belief or activity in the Bill will encompass the traditional beliefs or activities of Aboriginal and Torres Strait Islander peoples, which have been woefully inadequate in Australia.[8] We are not aware of consultation with Aboriginal and Torres Strait Islander peoples in the preparation of this Bill, and strongly urge the Australian Government to do this.

[3] Australian Bureau of Statistics, "Religion in Australia", *2071.0 - Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (28 June 2017), accessible at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70>.
[4] Above n 1.
[5] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) (**ICCPR**) art 4(2) art 18(1).
[6] See e.g. UN Human Rights Committee, *General Comment No 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.6 (1989) 146; *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001).
[7] ICCPR art 26.
[8] See e.g. Katja Mikhailovich & Alexandra Pavli, "Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights", *Australian Institute of Aboriginal and Torres Strait Islander Studies* (2010).

4. Frameworks for getting the balance right

While the freedom to *hold* religious beliefs is absolute,[9] a person's right to outwardly display or *manifest* a religious belief through actions can be limited.

Limitations on the manifestation of a religious belief are important due to the potential for freedom of religion to suppress the freedom of religion of others as well as other fundamental human rights.[10] In international law, manifesting a religious belief can be limited where those limitations are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[11]

In addition, not all acts that a person claims are a manifestation of their religion will necessarily be protected. Article 18(1) of the ICCPR states that freedom of religion includes the freedom to manifest religion or belief in "worship, observance, practice and teaching". This encompasses a broad range of acts.[12] European case law provides that, to fall within the potential protection of the freedom, an external act must be "intimately linked" to the religious belief and there must be "a sufficiently close and direct nexus between the act and the underlying belief".[13] Places of worship, items connected to the observance of a particular religion and religious ceremonies are examples of public expressions of religious belief that are clearly protected.

Balancing competing rights and drawing a line as to which religious practices should be accommodated in a plural society that respects the rights of diverse groups is not a simple exercise.

International law however, provides a very helpful structured process for drawing this line.[14] In order for a limitation on a human right to be justified, the limitation must be necessary, pursue a legitimate aim and be proportionate to that aim. This is known as the proportionality test (or a general limitations test).[15]

In Australia, in the absence of a national Equality Act or Charter of Human Rights with a proportionality test, concepts of reasonableness, necessity and special measures have be used to balance competing rights and interests in anti-discrimination laws. For example, in all federal anti-discrimination laws, determining whether a requirement or condition is indirectly discriminatory is done by reference to whether it is reasonable, having regard to the circumstances of the case.[16] This allows for the balancing of a wide range of factors impacting both on the aggrieved person and respondent to a claim. Federal anti-discrimination laws also provide exemption from discrimination prohibitions for

[9] UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8].
[10] Manfred Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary (2nd revised edition)* (2005) 408.
[11] ICCPR art 18(3).
[12] UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993). The scope of these concepts are clarified at [4].
[13] *Eweida & Ors v The United Kingdom* [2013] ECHR 37 [82]. See also *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [52].
[14] See e.g. ICCPR art 18(3); UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8].
[15] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* UN Doc E/CN.4/1985/4 (1985) Annex. The "Limitations Criteria" in the Guide to Human Rights published by Australia's Parliamentary Joint Committee on Human Rights provides further explanation of these key concepts. These principles are also reflected in the limitation provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2), and the *Human Rights Act 2004* (ACT) s 28. For practical application in the UK context, see *Eweida & Ors v The United Kingdom* [2013] ECHR 37.
[16] See *Age Discrimination Act 2004* (Cth) s 15*; Disability Discrimination Act 1992* (Cth) s 6; *Sex Discrimination Act 1984* (Cth) ss 5 and 7B; *Racial Discrimination Act 1975* (Cth) s 9.

"special measures" or measure for "positive discrimination", which involve actions taken to assist or recognise the interests of particular disadvantaged groups.[17]

While these concepts are clear and reliable, the difficulty with an approach that relies on a patchwork of individual anti-discrimination laws is that not all human rights are recognised in law, and there is no consistent approach to exemptions and exceptions. These issues could be resolved by modernising and consolidating Australian's anti-discrimination laws and adopting a comprehensive Charter of Human Rights, both of which are discussed in more detail in section 6 of this submission.

Recommendation 1: The Australian Government should not introduce the Bill into Parliament in its current form and instead re-draft the Bill in a manner that ensures consistency with all of Australia's international human rights obligations and with existing approaches to anti-discrimination protections in Australian law.

Recommendation 2: The Australian Government should consolidate and modernise federal anti-discrimination laws.

Recommendation 3: The Australian Government should prioritise enacting a legislative Charter of Human Rights.

5. Key concerns with the Bill

5.1 The Bill threatens access to health care for many Australians

It is a basic expectation in Australia, that when we see our doctor, they will treat us with respect, provide us with information about all our medical options, or refer us to a doctor who can do this.

Clauses 8(6) and (7) and 32(7) of the Bill undermine this basic expectation. In particular, they threaten the health of women, LGBTIQ+ people, and people living with disabilities by allowing doctors, nurses, midwives, psychologists and pharmacists to prioritise their religious beliefs over their patient's health needs.

The Bill does this by creating special rules to benefit health professionals who refuse to participate in or provide certain kinds of health services on religious grounds. These unprecedented rules would override the non-legislative efforts of state and territory governments, hospitals, clinics and medical bodies to balance the religious freedom of health practitioners with their duties to their patients.

The HRLC urged the Government to remove these clauses in the First Exposure Draft of the Bill. While some clarity has been provided and the list of health services narrowed, these clauses continue to pose a threat to equitable access to healthcare for all and should be removed from the Bill.

Health professionals have a duty of care to the health of their patients

Doctors who assert a conscientious objection are a risk to their patients, particularly where they impede access to medical care, such as by failing to provide information about *how* to access medical care. Patients must be able to access the health services they need without discrimination or delay.

[17] See *Age Discrimination Act 2004* (Cth) s 33*; Disability Discrimination Act 1992* (Cth) s 45; *Sex Discrimination Act 1984* (Cth) s 7D; *Racial Discrimination Act 1975* (Cth) s 8.

Women, girls, and LGBTIQ+ people are most at risk because it is treatments disproportionately needed by these groups that are typically objected to – abortion, emergency contraception, long-term contraception, gender reassignment surgery and hormone treatments. Health professionals may also object to post-exposure prophylaxis for HIV exposure, infertility treatments, erectile dysfunction treatments and voluntary assisted dying.

Doctors in particular choose their profession, and are in a position of power and authority in relation to their patients and the public, particularly in regional and remote areas where choice of doctor is limited. A doctor's primary duty is to support the health needs of their patients.[18] Abandoning a patient at a critical time of need, even by denying provide to information, can pose a serious, and even life-threatening, danger to a patient. In regional and remote areas, time delays caused by objecting doctors can cause health complications and force vulnerable people to travel hundreds of kilometres at their own cost to access basic healthcare.[19]

A health practitioner's freedom of religion must be balanced against the rights of their patients to life, health, bodily autonomy and non-discrimination.[20]

A duty to disclose and refer, and to provide emergency treatment, strikes the right balance

It is important to understand that a conscientious objection is an objection to providing healthcare that is otherwise *legal*, *legitimate* and *medically appropriate*[21] (i.e. it is not the same as a doctor determining that a health procedure is not medically appropriate). The freedom of religion of the individual health professional is respected, however the consequence is that their patient may be left without access to the medical care they need.

As the Australian Medical Association (**AMA**) has noted, 'doctors who conscientiously object…still have ethical and professional obligations to patients and others who may be directly affected'.[22]

It is fundamental that there are clear rules that outline the duties on doctors and other health practitioners with a conscientious objection, that require them, at a minimum, to:

- disclose their objection and transfer the care of their patient or provide a referral or information to enable their patient to quickly find another doctor who can help;
- provide treatment in cases of medical emergency; and
- treat their patients with dignity and respect.

[18] Australian Medical Association, Submission to Human Rights Law Unit, Australian Government Attorney General's Department, *Religious Freedom Bills – First Exposure Drafts*, 31 October 2018, 4.
[19] See discussion in South Australian Law Reform Institute, *Abortion: A Review of South Australian Law and Practice* (Report 13, 2019), part 17.
[20] Note that freedom of conscience and religion can be limited in certain circumstances, including to protect health and to protect the rights and freedoms of others: ICCPR art 18(3); Committee on the Elimination of Discrimination Against Women, *General Recommendation 24 on Women and Health*, UN Doc A/54/38/Rev.1 (1999) chap 1.
[21] Australian Medical Association, *Conscientious Objection - 2019* (Position Statement, 2019).
[22] Australian Medical Association, above n 18, 3.

These duties strike the right balance between access healthcare for all and a doctor's freedom of religion.[23] This balancing is reflected in AMA guidelines on conscientious objection.[24] The Bill will undermine this balanced approach where it is not entrenched in state and territory law.

We note that the Committee on the Elimination of Discrimination against Women has said that governments are *required* to introduce measures to ensure that women are referred to alternative health services if a health provider conscientiously objects.[25] Where the effect of health practitioners exercising conscientious objection is to exclude the availability of health services (including medications) for whole groups or regions, state and territory governments should take proactive measures to ensure everyone can practically and equitably access the healthcare they need.

The definition of conscientious objection in the Bill will undermine patient healthcare

The Bill defines conscientious objection in a manner that is inconsistent with standard definitions adopted by the medical profession.[26] Of particular concern:

- The Bill allows for conscientious objection to providing or participating in a "particular *kind of health service"*. The term "kind of health service" is disconcertingly vague and appears to allow for objections to all aspects of medical, nursing, midwifery, psychology and pharmaceutical care, including the provision of referrals or information. In contrast, the AMA's statement on conscientious objection specifies that conscientious objection can only be asserted in relation to a "*treatment* or *procedure"*. The Medical Board of Australia limits conscientious objection to providing or *directly* participating in *treatments*, as does the Nursing and Midwifery Board's Code of Conduct.[27]
- The Bill fails to include the ethical and professional obligations on practitioners with a conscientious objection to provide appropriate care in emergencies; to minimise disruptions to patient care in a timely manner; and to not obstruct, impede or deny their patient's access to lawful healthcare, for example by failing to disclose their objection or give information about alternative access healthcare.[28]
- The Bill also appears to give permission for all health practitioners to express judgement about a patient's situation on the basis of their religious objection as a result of the broad protections given to "statements of belief" in clause 42. The Explanatory Notes state that a doctor telling their transgender patient that "God made men and women in his image and that gender is therefore binary" would constitute a statement of belief. The Bill is therefore likely to protect that doctor, despite the distress they caused to their patient and the barrier this creates to their patient accessing the healthcare they need. This contradicts professional codes of conduct, such as the Medical Board of Australia's, which requires that doctors not

[23] *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* [2019] ONCA 393. This case involved a rule requiring an 'effective referral' by conscientious objectors in relation to abortion, contraception, infertility treatment, erectile dysfunction medication, gender reassignment surgery and voluntary assisted dying. See also *Pichon and Sajous v. France*, Application no 49853/99 (2 October 2001), in which the European Court of Human Rights rejected a "manifestly ill-founded" application from pharmacists who refused to sell contraceptives because of their religious beliefs.
[24] See Australian Medical Association, *Conscientious Objection – 2019* (27 March 2019). See also the Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia* (17 March 2014).
[25] Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health*, UN Doc A/54/38/Rev 1 (1999) [11].
[26] Religious Discrimination Bill 2019 (Cth) cl 5.
[27] Nursing and Midwifery Board of Australia, *Code of Conduct for Nurses* (March 2018) 4.4(b).
[28] The Medical Board of Australia, above n 26, 2.4.6; Australian Medical Association, above n 26; Nursing and Midwifery Board of Australia, above n 28, 4.4(b).

express their personal beliefs in ways that exploit the vulnerability of their patients or is likely to cause them distress.[29]

- An objecting health practitioner would merely be required to show that another person of the same religion 'could reasonably consider' their refusal to provide or participate in a health service to be consistent with their religion. The use of a subjective test of two people of the same religion is inconsistent with best medical care and the consultative approach to regulating conscientious objection of health bodies, such as the AMA. The deeply problematic nature of this subjective test is further discussed below in section 5.2 of this submission.

This Second Exposure Draft clarifies that a conscientious objection must relate to a particular kind of health service, and not to the particular attributes of a person.[30] However, by objecting to provide health services, such as emergency contraception or transgender hormone treatments, to 'everyone', certain groups, such as women and LGBTIQ+ persons, are indirectly targeted. Further, some health services *are* for particular groups of people, such as gender affirming healthcare.

The Bill departs from standard anti-discrimination laws and will make it harder for health services to promote equitable and timely access to healthcare.

Under other federal anti-discrimination laws, indirect discrimination on the grounds of religion would be prohibited where a condition or requirement *that is not reasonable* is imposed that has a disproportionate negative impact on a health professional of a particular religion.[31] Reflected in clauses 8(1) and (2) of the Bill, this traditional test of reasonableness allows for balancing of a range of factors, such as the impact on the patient's health, the religious interests of health practitioner and any impacts on health service delivery.

However, clauses 8(6) and (7), together with clause 32(7), subvert this test and act as special 'deeming' rules for health professionals. These extraordinary clauses effectively elevate the freedom of religion of health professionals in certain circumstances, while relegating the rights of their patients:

- A 'health practitioner conduct rule'[32] that is not consistent with a state or territory law allowing conscientious objection is deemed *not reasonable* (and therefore will constitute indirect discrimination).
- Where a state or territory law is silent, health practitioner conduct rules that restrict or prevent a conscientious objection are presumed *not reasonable,* unless compliance with the rules is shown to be necessary to "avoid unjustifiable adverse impact", either on the provision of health services or patients.
- It will not be an inherent requirement of a role to comply with a health practitioner conduct rule that falls foul of clauses 8(6) or (7).

In essence, where a state or territory law imposes a duty on a doctor to disclose a conscientious objection and refer, such as in the case of abortion laws in Victoria, NSW and Queensland, the doctor

[29] The Medical Board of Australia, above n 26, 8.2.3.
[30] Religious Discrimination Bill 2019 (Cth) Note 2 in cll 6 and 7.
[31] Ibid cl 8(1).
[32] Defined in clause 5 of the Bill to mean a condition, requirement or practice that is imposed in relation to the provision or participation in a 'particular kind of health service', which has 'the effect of restricting or preventing the health practitioner from conscientiously objecting to providing or participating in that kind of health service'. The Explanatory Notes at 22, 171 states that this would include requirements to provide information or referrals related to services.

will be required to comply with this law and with government, hospital and other directives that are consistent with this law.

However, where a state or territory law is silent on whether conscientious objection is allowed, such as in the context of emergency contraception, any patient-centred conduct rules issued by governments, hospitals, clinics or medical bodies, will be *presumed not reasonable*. Hospitals, clinics, pharmacies and regulatory bodies that try to enforce such rules will be liable to indirect discrimination claims by other health practitioners. It would then be on the government, employer or health regulatory body responding to a complaint to meet the Bill's higher "unjustifiable adverse impact" test, rather than the more balanced reasonableness test. There is no justification for relegating patient rights in this way.

Further, it is not clear what type of adverse impacts on patient health will be "unjustifiable". The Explanatory Notes suggest that the rule is not intended to directly affect patients.[33] However, the very exercise of a conscientious objection by a practitioner impacts on patients by disrupting access to lawful and medically appropriate healthcare. The complexity and uncertainty created by clauses 8(6) and (7) and the override of state and territory health policies that the Bill enables *will* directly affect patients and the timely delivery of health services.

The Explanatory Notes also suggest that a woman being forced to travel a significant distance to access contraceptive care might be unjustifiable,[34] however each situation would require a case-by-case assessment in order to address the uncertainty for employers and patients created by the Bill.

Hypothetical case study based on cases reported to the HRLC: Lina

Lina's de facto partner is abusive and pressures her into having unprotected sex. She discovers she is 8 weeks pregnant, fears for her life and seeks to have an abortion.

Lina lives regionally, two hours from Perth. The law in WA allows her to have an early medication abortions and there are clinics that provide safe abortion services. She does not know this however.

Lina sees her local GP, Dr T. She does not know he objects to abortion on religious grounds. All Dr T tells Lina is that she has sinned and is evil to want an abortion and that no one can help her. Lina's physical and mental health deteriorates as a result of the stress of the pregnancy and family violence. It is not until Lina is hospitalised at 14 weeks that she learns that an abortion is an option. By this point her only option is to have invasive surgery.

Lina is supported by a social worker to complain to the Director of the clinic employing Dr T. The Director instructs Dr T to comply with a clinic policy, which requires Dr T to disclose his objection and provide information to his patients about a nearby family planning clinic. Further investigation reveals other instances of Dr T failing to comply with the policy, prompting the Director to put Dr T on probation.

Despite the consequences to Lina's health of Dr T's conduct, the Bill would enable Dr T to claim that he is being discriminated against on the basis of his religious belief. The Clinic's policy would be presumed "unreasonable" by clause 8(7) and the Clinic would carry the burden of proving that having Dr T comply with the policy is necessary to avoid 'unjustifiable adverse impact' on the clinic's service delivery and/or its patients.

[33] Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 23, 184.
[34] Ibid 23, 186.

The conscientious objection clauses of the Bill should be removed

While the health practitioners that clauses 8(6), (7) and 32(7) apply to have been narrowed in this Second Exposure Draft of the Bill, these deeply problematic clauses still apply to health professionals responsible for the provision of critical health services that all people in Australia rely on – doctors, surgeons, nurses, midwives, psychologists and pharmacists.[35]

Health practitioners are entrusted with making decisions that can have profound impacts on the health and life of their patients. The HRLC remains deeply concerned by the threat that these clauses pose to patients and to the smooth operation of state and territory health systems and services.

The Federal Government should not interfere in this way with efforts by state and territory governments, hospital, clinics and health regulatory bodies to implement policies that promote equitable and timely access to healthcare. Ultimately, it is patients and patient health outcomes that will suffer.

Recommendation 4: The Australian Government should delete clauses 8(6) and (7) and 32(7) from the Bill, together with the definition of conscientious objection in clause 5.

5.2 The Bill allows far-reaching discrimination *by* religious institutions

Clause 11 of the Bill provides far-reaching authorisation for religious bodies (including schools and charities) to discriminate on the basis of religion by engaging, in good faith, in conduct:

- that "a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion" (**the religion of two test**); or
- to 'avoid injury to the religious susceptibilities of adherents' of the same religion as the religious body (**the religious susceptibilities test**).

The scope of this licence to discriminate extends to giving preference to people of the same religion and is a direct threat to the right of every person to not have to disclose any religion or belief.[36] Further, this new licence to discriminate is not limited to particular areas of activity, which are otherwise protected in Part 3 of the Bill.[37]

In addition, clauses 32(8)-(11) now allow for religious hospitals, aged care facilities and accommodation providers to discriminate in employment and partnerships on the basis of the religion of two test and the religious susceptibilities test (including by giving preference to staff of the same religion). Similarly, people who direct or administer a camp or conference site would now be allowed to discriminate on the same grounds.[38]

[35] Religious Discrimination Bill 2019 (Cth) cl 5.
[36] UN Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Art 18)* (UN doc CCPR/21/Rev.1/Add.4, 1993) [2].
[37] Clause 11(6) of the Bill states "this section applies despite anything else in this Act."
[38] Religious Discrimination Bill 2019 (Cth) cl 33(2)-(5).

In our submission on the First Exposure Draft, the HRLC noted that while it is appropriate to provide some protection for religious bodies from religious discrimination claims, such as in the context of appointing priests, imams or other religious leaders, the drafting of (then) clause 10 was far too broad.

Disappointingly, the Government's changes to the Bill grant an even greater licence to discriminate and to a broader range of religious bodies and organisations, through clause 11 and new clauses 32(8)-(11) and 33(2)-(5). The HRLC opposes each of these clauses as drafted.

The Bill broadens the licence to discriminate through two new tests of religious belief

The HRLC is deeply concerned by the proposed new 'religion of two' test outline above. We note that this test also underpins parts of the Bill dealing with conscientious objection (see section 5.1) and statements of belief (see section 5.4), which we have recommended be deleted.

The religion of two test is completely unprecedented in Australian law. It is a very broad and subjective test that essentially requires just two people to demonstrate that a religious requirement exists and deserves protection.

This extraordinary test allows a broad range of religious institutions, including schools and charities, to discriminate against those with different or no religious beliefs by defining religion at an extremely individualised and subjective level. In practice, this will make it near impossible for aggrieved individuals to argue that conduct of a religious body is not in accordance with the doctrines, tenets or beliefs of the religion. We are also deeply concerned that it will legitimise conduct based on extreme interpretations of a religious text, belief or practice.

In addition to the religion of two test, the Bill also now incorporates a religious susceptibilities test, as outlined above. A similar version of this test exists in the *Sex Discrimination Act 1984* (**SDA**) and *Age Discrimination Act* (**ADA**). Critically however, the Bill creates a lower threshold for exempt conduct by excluding the word 'necessary', which is a key feature of the equivalent exemptions in the SDA and ADA (i.e. to be exempt, the conduct must be "*necessary* to avoid injury to the religious susceptibilities of adherents of that religion").

The Bill should narrow the scope of permanent exemptions to anti-discrimination laws

Anti-discrimination laws have a vital role to play in promoting healthy, safe and inclusive communities, by protecting all people from being treated unfairly because of an attribute that is central to their identity and sense of self. Exceptions to anti-discrimination laws can be harmful and create fear for minority groups, such as LGBTIQ+ people. They should therefore only be allowed where carefully and narrowly worded to directly address a legitimate aim.

Currently, all federal, state and territory laws already provide permanent religious exemptions that protect conduct that would otherwise constitute unlawful discrimination on the basis of religion, sex, sexual orientation, gender identity, intersex status, relationship status, age and other attributes. At the federal level, permanent exceptions sit in the SDA and ADA and exemptions can be applied for on a case by case basis.[39]

The HRLC has previously expressed concern at the breadth and harmful impact of permanent religious exceptions in the SDA and ADA, in particular that they perpetuate a false and unjustified

[39] *Sex Discrimination Act 1984* (Cth) ss 37, 44; Age *Discrimination Act 2004* (Cth) ss 35, 44.

hierarchy of rights and entrench systemic discrimination.[40] These exceptions should be significantly narrowed. We support limited exemptions for religious bodies to organise and conduct affairs closely connected to religious worship, observance, practice and teaching, but not blanket religious exemptions across a range of areas of public life. We also support provisions that enable applications for exemptions to be made and assessed against transparent and human rights-based criteria on a case-by-case basis.

As noted above, the Bill's religion of two test and religious susceptibilities test for excusing discriminatory conduct by religious institutions departs significantly from existing religious-based exceptions to anti-discrimination laws, in particular in the SDA, ADA and *Fair Work Act 2009*.[41]

While noting our position that permanent exemptions in sections 37(1)(d) and 38 of the SDA should be amended, we urge the Government to ensure that, at a minimum, this Bill not broaden religious exemptions, which would occur if clauses 11(1)-(4) were retained in the Bill as drafted.

The SDA exempts, an act or practice that *conforms to* the doctrines, tenets or beliefs of that religion or is *necessary* to avoid injury to the religious susceptibilities of adherents of that religion. We note that this test is similar to s 52(d) of the Tasmanian *Anti-Discrimination Act 1998*, however the Tasmanian law only allows exemptions on religious grounds and requires an act or practice to both conform with the religion and be necessary to avoid injury to religious susceptibilities.[42] We believe this is a sensible approach given the importance of the goals of anti-discrimination laws.

At a minimum therefore, and until our discrimination laws are comprehensively consolidated and improved, the general exemption in clauses 11(1)-(4) should be replaced by a test that requires exempt conduct to conform to the religion and be necessary to avoid injury to religious susceptibilities of adherents. All references to preferencing people of the same religion should be removed.

> ***Recommendation 5:*** The Australian Government should delete clauses 11(1)-(4) and replace them with a test that requires that an act or practice of a religious body *conforms* to the doctrines, tenets, teachings or beliefs of the religion and is *necessary* to avoid injury to the religious susceptibilities of adherents of that religion, before it is exempt from the protective provisions of the Act. All references to preferencing people of the same religion should be removed
>
> (Noting that the HRLC continues to advocate for the narrowing of permanent religious exemptions in anti-discrimination laws, including sections 37(1)(d) and 38 of the SDA).

Government-funded religious bodies should not be allowed to discriminate

The broad licence to discriminate on the basis of religion in clause 11 goes well beyond protecting religious bodies in the conduct of worship or the training or appointment of religious leaders. The clause applies to educational institutions, registered public benevolent institutions (regardless of their

[40] See Human Rights Law Centre, *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (2018) and *Freedom from discrimination in religious schools: Submission to the Senate Legal and Constitutional Affairs Committee on the inquiry into legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (2018) – both available at www.hrlc.org.au. The HRLC has advocated for a general limitations clause in place of the current permanent exemptions. We continue to support such an approach in principle, however believe that such a reform should form part of a broader review and consolidation of federal anti-discrimination laws, rather than introducing a new concept into a single piece of federal anti-discrimination law.
[41] See *Fair Work Act 2009* ss 153(2)(b), 195(2)(b), 351(2)(c); *Age Discrimination Act 2004* s 35; *Sex Discrimination Act 1984* ss 37(1)(d), 38, 40(2AB).
[42] It should be noted that s 51 of the Tasmanian Act outlines a different test for employment in religious schools.

involvement in commercial activities), and other types of religious charities that are not solely or primarily engaged in commercial activities. It also applies to a wide range of activities, including decisions about employment and who to deliver services to.[43]

Many religious bodies in Australia that receive government funding provide critical welfare and social services to Australians on behalf of the state. For example, in recent years:

- the St Vincent De Paul Society assisted 1.8 million Australians with housing and homelessness, food, aged care, disability employment and financial support services;[44]
- Anglicare Australia assisted over 1.3 million Australians with emergency relief, community capability building, home-based aged care, financial support and homelessness services;[45] and
- Catholic Social Services Australia organisations serviced around 450,000 disadvantaged Australians, including children in out of home care, families experiencing breakdown, people with disabilities, people experiencing homelessness, people experiencing addiction, Indigenous Australians, older Australians, refugees and people seeking asylum.[46]

These organisations have a significant positive impact on the lives of many people in Australia. However, charities or public benevolent institutions with a religious affiliation or connection should not be exempt from discrimination laws where their main purpose is to provide public goods, services or facilities such as food or shelter (as opposed to those established *for a religious purpose*). Further, it is not appropriate for a body funded by government to deliver such important services to be granted the power to discriminate on religious grounds, either in providing services or employment. Public money should not fund discrimination, particularly against vulnerable groups.

The following case study highlights the negative impacts of allowing government-funded religious bodies to discriminate against persons on religious grounds in providing services.

[43] Clause 11(6) sits in Part 2 of the Bill, which outlines the *concept* of discrimination on the ground of religious belief or activities, whereas Part 3 of the Bill sets out *when* that concept of discrimination on the ground of religious belief or activity is unlawful.
[44] St Vincent de Paul Society, *How Many People Does Vinnies Assist Annually In…* (2020) <https://www.vinnies.org.au/page/About/FAQs/How_many_people_does_Vinnies_assist_annually_in_Australia/>.
[45] Anglicare Australia, *Annual Report 2018-2019* (September 2019) 11.
[46] Catholic Social Services Australia, *Submission to the Productivity Commission Inquiry into the Social and Economic Benefits of Improving Mental Health* (April 2019) 7.

Actual case study: Discrimination by a rural religious support service

Sarah* moved to a country town and started experiencing financial hardship when she returned to study. She contacted a local Commonwealth funded religious organisation for assistance with paying her rent and bills to avoid being evicted into homelessness.

Sarah was initially treated well by volunteer staff and the organisation offered her financial counselling and support. After Sarah mentioned that she was gay, she was asked probing and inappropriate questions about her living situation from a staff member trying to ascertain whether she was sexually active with a woman. Sarah spoke to other staff about the change in how she was being treated by the organisation and was told she shouldn't have mentioned her sexual orientation. The organisation contacted Sarah and told her they could not assist her, but did not provide a reason why they had decided to withdraw their previous offer of assistance.

Sarah tried to find another support service but was told that the religious organisation was the only service in her area that could assist. The support service's refusal to assist her had a significant impact on Sarah's mental health and feelings of safety and support. Sarah fell behind in her rent and eventually became homeless.

*A pseudonym has been used to protect privacy.

It is vital that no one in need of help be denied that help because of their beliefs, nor face the fear of being rejected. Similarly, no one should be denied the opportunity to apply their skills to deliver such services as an employee because of their beliefs, except where it is genuinely an inherent requirement of the role.

At a minimum, clauses 11(5)(b)-(c) should be narrowed to bodies established for a religious purpose (other than those engaging primarily or solely in commercial activities) and to expressly exclude bodies receiving government-funding.

Recommendation 6: The Australian Government should, at a minimum, revise the definition of "religious body" in clause 11(5)(b)-(c) to:

- narrow its application to bodies established for a religious purpose (other than those engaging primarily or solely in commercial activities); and
- expressly exclude bodies receiving government funding for service delivery, including education.

Religious hospitals, aged care facilities, accommodation providers should not be allowed to discriminate

While religious-based hospitals, aged care facilities or accommodation providers are not allowed to discriminate in the delivery of services, the Bill would allow these institutions to discriminate against staff and prospective staff on the basis of religion (either under the religion of two test or religious susceptibilities test).[47]

[47]Religious Discrimination Bill 2019 (Cth) cll 32(8)-(11).

These provisions present a threat to the skilled and dedicated staff already employed who are not of the same religion as their organisation, as well as to their right to not have to profess any religion or belief. There is no justification for suddenly allowing these institutions services to discriminate in staffing decisions on the basis of religion, and particularly those that receive government funding. The Bill, along with the *Fair Work Act*, already provides exceptions for discrimination where religious belief or activity is an inherent requirement of a job at a religious body.[48]

Hospitals, aged care facilities and accommodation providers need to provide services to people of many different backgrounds. They should instead be being encouraged to ensure staff are well-trained to deliver high quality care and accommodation services and that the spaces that their staff, patients and residents reside in are respectful, tolerant and inclusive.

Camps and conference venues should not be allowed to discriminate against staff

Camps and conference sites should not be able to discriminate in deciding when to accept bookings and provide services.

New clauses 33(2)-(5) allow people who establish, direct, control or administer a camp or conference site to take religious belief or activity into account when deciding whether to provide accommodation, so long as it is in accordance with a publicly available policy. Again, the religion of two and religious susceptibilities test determine what discriminatory conduct will be allowed on the basis of religion.

No other federal anti-discrimination law creates a comparable exception which allows a commercial supplier of goods services or facilities to discriminate against another person on the basis of a protected attribute.

Recommendation 7: The Australian Government should remove clauses 32(8)-(11) and 33(2)-(5) from the Bill.

5.3 The Bill should put an end to discrimination against school students

All schools have a duty of care to their students to provide an environment that is safe and welcoming, including for LGBTIQ+ students. This may be a challenge for religious schools with doctrines, tenets or beliefs that do not support homosexual conduct or gender transition but the psychological welfare of children in their care should be paramount.

International law requires respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[49] However, it is reasonable and necessary to limit this right to protect the best interests of the child or the right of the child to an education appropriate to their needs.[50]

In 2018, Prime Minister Morrison committed to:

[48] Ibid cl 32(2); *Fair Work Act 2009* (Cth) ss 153, 195, 351. Note that religious body is defined differently in the FWA and tht there is also a religious susceptibilities test.
[49] UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [6].
[50] CRC arts 3, 28 and 29.

> *taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality […] and we should use the next fortnight to ensure this matter is addressed.*[51]

The Prime Minister did not implement this commitment and the Government has delayed the Australian Law Reform Commission's review of religious exemptions in anti-discrimination laws until December 2020.[52] The Bill, if anything, reinforces the provisions in the SDA that allow religious schools to discriminate – on the basis of religious belief. Overall, the message is that the Government does not consider the wellbeing of children experiencing discrimination at school a priority despite evidence of the distress and harm this is causing.[53]

The Government should act now on the Prime Minister's commitment to ensure that no Australian school can discriminate against LGBTIQ+ children by removing outdated and discriminatory exemptions for faith-based schools in the SDA.

In addition, clause 11, which authorises discrimination by religious schools on religious grounds, should, at a minimum, be amended to expressly exclude the protective provisions for students contained in clause 19(2) of the Bill. This will restrict discrimination by religious schools to decisions about admissions and only on the basis of religious belief. Once admitted into a school, this Bill should ensure that no student can be expelled, subjected to detriment or denied or limited benefits because of their religious beliefs. This approach is consistent with anti-discrimination laws in Queensland, Tasmania, the ACT and the NT.[54]

Recommendation 8: The Australian Government act on its commitment to address religious exemptions for schools by removing outdated and discriminatory exemptions from the SDA, which allow faith-based educational institutions to discriminate against students, teachers and staff.

Recommendation 9: The Australian Government should, at a minimum, amend clause 11 of the Bill to expressly exclude its application to clause 19(2).

5.4 The Bill further weakens protections against harmful statements

The Bill still provides for an unprecedented privileging of certain 'statements of belief' and overrides federal, state and territory laws that seek to protect all people from discrimination.

Under clause 42(1), a statement of belief would not constitute discrimination under any federal, state or territory anti-discrimination law, and specifically not contravene section 17(1) of the Tasmanian *Anti-Discrimination Act 1998*.

A "statement of belief" means written or spoken words, made in good faith, which another person of the same religion (or of no religion) "could reasonably consider to be in accordance" with that religion (the 'religion of two' test) or relate to not holding a religious belief.

[51] Prime Minister of Australia, Media Release (13 October 2018), accessible at https://www.pm.gov.au/media/media-statement.
[52] Australian Government Australian Law Reform Commission, *Review in the Framework of Religious Exemptions in Anti-discrimination Legislation* (10 April 2019, terms of reference altered 29 August 2019), accessible at https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/.
[53] Lynne Hillier et al, 'Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People' (Australian Research Centre in Sex, Health and Society, La Trobe University, 2010) 91.
[54] See *Anti-Discrimination Act 1991* (QLD) s 41; *Anti-Discrimination Act 1988* (TAS) s 51A; *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1992* (NT) s 30(2).

This new protection for statements of belief would now not extend to statements that are malicious, or that harass, threaten, *seriously* intimidate, vilify,[55] or that constitute certain offences.[56]

The Government has broadened the scope for harmful statements

In response to the First Exposure Draft, the HRLC recommended the deletion of (then) clause 41, in particular because it:

- overrode important anti-discrimination protections in existing laws, particularly Tasmania's;
- authorised the making of prejudiced and intolerant statements, including against people of a different religion, while creating a higher bar for people hurt by harmful religious speech to overcome in order to seek protection and relief; and
- introduced new levels of unfairness in access to justice because the legal complexity of the Bill and costs associated with testing its scope will benefit well-resourced individuals and bodies.

These concerns have not been addressed. Instead, the Government's amendments to the Bill have broadened the range of harmful and prejudiced 'statements of belief' that may be made without consequences. It will be women, LGBTIQ+ people, people with disabilities and people of minority faiths who disproportionately suffer the consequences. This has been done through two key changes:

- **Introduction of the 'religion of two' test in the definition of 'statement of belief' in clause 5:** addressed above in section 5.2 of this submission.
- **Inserting words into clause 42(2) that will make it harder for a person to show that intimidating and other harmful 'statements of belief' should *not* be protected:** a number of words have been added to clause 42(2), including the word "seriously" before "intimidate". This produces an uncertain and concerning distinction.[57] The word 'serious' has been described as an intensifier, which emphasises that something is grave, weighty or important.[58] The use of word in connection with 'intimidation' in the Bill communicates that there are forms of intimidation that are acceptable, which is clearly not a message the Government should to send.

The hypothetical example of Hayley in Tasmania below highlights the type of harmful statements that clause 42 of the Bill could authorise in circumstances where existing state laws would provide a shield.

[55] Clause 5 states that "vilify, in relation to a person or group of persons, means incite hatred or violence towards the person or group."
[56] *Religious Discrimination Bill 2019* (Cth) cl 42(2). Cll 28(1)(b) and 42(2)(c) refer to the criminal standard of harm and financial detriment punishable by at least two years imprisonment in the *Criminal Code*.
[57] No other Australian law uses the phrase "seriously intimidate", however offences exist for inciting "serious contempt" towards a person on the ground of religion. See *Anti-Discrimination Act 1991* (QLD) s 131A (1); *Racial and Religious Tolerance Act 2001* (VIC) s 25(2).
[58] *Burns v Cunningham* [2011] NSWADT 240 [75].

Hypothetical case study: Lawful offensive statements at work

Hayley works as a mechanic in Hobart. She identifies as a lesbian. A month ago, Hayley's boss John pulled her aside and said "I really care about you Hayley, I consider you to be like the daughter I never had, which is why there's something I've been meaning to talk to you about. Last week, you told me that you had just gotten engaged to another woman. Have you heard about conversion therapy? There's still a chance for you to find the right path."

John then made similar comments telling Hayley he believes she will go to hell if she doesn't end her engagement. Last week, he made a comment in front of customers and other employees. Hayley says that she finds this offensive, insulting and humiliating.

Hayley would be protected under the current Tasmanian legislation. However, clause 42 of the Bill would override the Tasmanian law and would likely make John's conduct lawful.

It is clear that statements of belief that are not malicious can still cause serious harm to people. Discrimination entrenched in laws and policies or experienced at work, school or home, contribute to alarmingly high rates of suicide, self-harm and depression among LGBTIQ+ people.[59]

Federal law should not create a broader scope for discriminatory statements, nor make it harder for people to take action to stop prejudiced and harmful statements, regardless of belief. Whether or not a statement of belief constitutes discrimination should be determined under existing anti-discrimination laws (and include religious belief or activity as a protected attribute).

Recommendation 10: The Australian Government should delete clause 42 and the related definition of "statement of belief" in clause 5.

5.5 The Bill undermines efforts to promote diversity and inclusion

We live in a diverse, pluralistic society. All people are entitled to equal protection under the law and to protection from discrimination on grounds such as sexual orientation, gender identity, sex, race and religion.

Employers and qualifying bodies should have policies and programs in place that promote equality of opportunity and workplace diversity. A positive example of this is the Australian Government's APS Jobs website, which explains the conditions of employment in the APS:[60]

> *The APS is a leader in diversity of opportunities. The diversity of the people in the APS is one of its greatest strengths. Diversity in this context covers gender, age, language, ethnicity, cultural background, sexual orientation, religious belief and family responsibilities. Diversity also refers to the other ways in which people are different, such as educational level, life experience, work experience, socio-economic background, personality and marital status. Workplace diversity involves recognising the value of individual differences and managing them in the workplace.*

[59] The Human Rights Law Centre, *End the Hate Report* (December 2018) 14.
[60] Australian Government APS Jobs, *About the Australian Public Service (APS)* (2012), accessible at <https://www.apsjobs.gov.au/about.aspx>.

The issue of when an employer can lawfully regulate what an employee can say outside of the course of their employment needs to be approached with care. As the HRLC stated in its submission on the First Exposure Draft, any restriction on a worker's freedom to express their beliefs outside of work must be reasonable and carefully tailored to achieve a legitimate aim. The standard indirect discrimination provisions set out in clauses 8(1) and (2)(a)-(c) of the Bill appropriately allow for a balancing exercise in relation to freedom of religion and belief.

However, clauses 8(3) and (4), which HRLC recommended be removed, have been retained and broadened in this Second Exposure Draft. This is disappointing, as these clauses undermine the ability of employers and qualifying bodies to foster diverse and inclusive workplaces.

Altering the standard indirect discrimination provisions elevates religion above other rights

Clauses 8(3) and (4) elevate the freedom of some to make 'statements of belief' above the rights of others to equality and to safe and inclusive workplaces in certain circumstances.

Clause 8(3) presumes that an 'employer conduct rule'[61] is *not* reasonable unless compliance with the rule is necessary to avoid 'unjustifiable financial hardship' to the employer. This clause applies to employers with an annual turnover of at least $50 million and to rules that restrict employees from making statements of belief "other than in the course of the employee's employment".

Clause 8(4) similarly alters the standard indirect discrimination provisions for "qualifying bodies".[62] It presumes that a "qualifying body conduct rule"[63] that restricts statements of belief outside of the practice of the relevant profession or trade is not reasonable unless compliance with the rule is an 'essential requirement' of the profession, trade or occupation.

As noted above, the new subjective 'religion of two' test alarmingly broadens the scope of what might be considered a 'statement of belief'.

Statements of belief that are malicious or likely to harass, threaten, seriously intimidate or vilify another person or group of people would *not* be protected[64] (see discussed above in section 5.4).

Undermining efforts to promote safe and inclusive spaces

Clauses 8(3) and (4), together with clause 42, are convoluted and will undermine efforts to create diverse, tolerant, safe and inclusive spaces, workplaces and communities for the following reasons:

- The distinction between large employers and smaller employers in clause 8(3) is arbitrary.
- It will be harder for all organisations to set standards that promote equality. It is legitimate for organisations and businesses to set policies and standards to promote equality in workplaces, and this may extend to standards outside of normal work hours for senior staff engaging in public debate. However, clause 42 in particular will provide a vehicle for staff to challenge employer policies that are consistent with state or territory anti-discrimination laws.

[61] Defined in clause 5 as "a condition, requirement or practice: (a) that is imposed, proposed to be imposed by an employer on its employees or prospective employees; and (b) relates to standards of dress, appearance or behaviour of those employees."
[62] Defined in clause 5 as "an authority or body that is empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates, the practice of a profession, the carryon of a trade or the engaging of an occupation."
[63] Defined in clause 5 as "a condition, requirement or practice: (a) that is imposed, or proposed to be imposed, by a qualifying body on persons seeking or holding an authorisation or qualification from the qualifying body; and (b) that relates to standards of behaviour of those persons."
[64] Religious Discrimination Bill 2019 (Cth) cl 8(5).

- The standard indirect discrimination test allows for the balancing of employer and employee interests and is sufficient to determine if employer rules about statements outside of work are reasonable. Instead of allowing for this careful balancing, clause 8(3) only allows for consideration of *financial* hardship for the employer. There are many good non-monetary reasons for an organisation to restrict public comments that undermine equality. For example, an employer may be motivated to ensure an inclusive culture for staff, clients and customers, or to contribute to promoting a national cultural of tolerance and inclusion in Australia.
- For qualifying bodies, which regulate a range of professions and trades such as medicine, law and construction, clause 8(4) is likely to hinder them from setting standards of behaviour that promote public confidence in their profession. In order to restrict harmful religious speech outside of work, qualifying bodies will need to establish that a rule is an 'essential requirement' of a profession. This high standard[65] will require a complicated and costly assessment of risk and the nature of the profession.

The issue of when employers and qualifying bodies can limit statements of belief should be regulated by the well-accepted and understood indirect discrimination test used in other anti-discrimination laws, with lawfulness assessed on the basis on reasonableness and the criteria in clause 8(2)(a)-(c).

Recommendation 11: The Australian Government should delete clauses 8(3) and (4) and related clauses 8(2)(d) and (e), 8(5) and 32(6).

5.6 Corporations should not be protected

The HRLC is concerned about the Bill's extension of human rights protections to corporations.

Clause 9 extends to persons who associate with individuals who hold or engage in a religious belief or activity. A "person" includes a natural or legal person (i.e. a company),[66] and "association" includes personal, business, employment and other forms of relationship between a company and individual.[67] The Explanatory Notes indicate that clause 9 would protect a corporation from religious discrimination towards a CEO.[68]

This Bill expressly empowers corporations to sue providers of goods, services, facilities, accommodation, clubs and sporting bodies based on their association with religious individuals. This is a significant and unwarranted expansion of corporate power. It will have the practical effect of privileging well-resourced religious bodies, as well as encouraging costly litigation.

Clause 9 should be revised to only protect associates who are natural persons, such as spouses, housemates, relatives, carers or other individuals in a business, sporting or recreational relationship with the aggrieved individual, consistent with the DDA.

In addition, if associates of individuals with religious beliefs (who are natural persons) are to be afforded protection in this Bill, the same protection should be extended to other federal anti-discrimination laws, including the *Sex Discrimination Act 1984* and *Age Discrimination Act 2004.*

[65] Explanatory Notes, Religious Discrimination Bill 2019 (Cth) 20, 157.
[66] Ibid 26, 203.
[67] Ibid 26, 202.
[68] Ibid 26, 204.

Recommendation 12: The Australian Government should revised clause 9 to only protect associates who are natural persons, such as spouses, housemates, relatives, carers or other natural persons in a business, sporting or recreational relationship with the aggrieved individual.

Recommendation 13: The Australian Government should also introduce consistent protection for natural person associates in all federal anti-discrimination legislation.

5.7 The Bill should protect people of faith from hate speech

Hate speech and vilification undermines the right of every person in our society to be treated equally and free from abuse, discrimination, intimidation or violence. If left unchecked, perceived acceptance or tolerance of vilification can embolden or encourage discrimination by providing an "authorising environment" for the escalation to violence.[69]

Australia's national laws are not protecting religious minorities from hate

Hateful conduct towards people of faith, and particularly minority faiths, is on the rise and going largely unchecked in Australia. Just last year, a Jewish school student in a Melbourne school was verbally abused, physically assaulted and forced to kiss the feet of another student.[70] In another incident, a child was reportedly called "Jewish vermin", "the dirty Jew" and a "Jewish cockroach".[71] Just a few weeks ago, a Nazi flag was flown over a home in north-west Victoria.[72]

Islamophobia in its various manifestations is rife, as documented in the *Islamophobia in Australia* reports.[73] In the first report, 243 incidents were reported in a 16-month period, while in the second report 349 incidents were reported over a 24 month time period. When looking at offline incidents, the most recent report found that half of the cases considered involved hate speech, while one-quarter consisted of vandalism and physical attacks.[74] Muslim women and children are particularly susceptible to hate conduct. Of the 113 female victims, 96 percent were wearing a headscarf (hijab), 57 percent were unaccompanied and 11 percent were with their children.[75]

Article 20 of the ICCPR explicitly requires countries to prohibit advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. Yet there are very limited federal

[69] See e.g. Gelber, Katharine & McNamara, Luke, "Anti-Vilification laws and public racism in Australia: Mapping the gaps between the harms occasioned and the remedies provided" (2016) 39(2) *University of New South Wales Law Journal* 44; Ronald Sackville, "Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act" (2016) 90(9) *Australian Law Journal* 631.
[70] Rebecca Davis, 'A rapidly spreading crisis', *Australian Jewish News* (online), 3 October 2019 <ajn.timesofisrael.com/a-rapidly-spreading-crisis/>.
[71] Guardian staff, 'Josh Frydenberg urges more Holocaust education after antisemitic bullying attacks', *The Guardian* (online), 4 October 2019 <www.theguardian.com/news/2019/oct/04/josh-frydenberg-urges-more-holocaust-education-after-antisemitic-bullying-cases>.
[72] Sean Wales and Leonie Thorne, 'Nazi flag taken down from amid calls to strengthen anti-vilification law', *ABC News* (online), 15 January 2020 <www.abc.net.au/news/2020-01-14/nazi-flag-flown-in-north-west-victorian-town-of-beulah/11866096>.
[73] See Derya Iner (ed), Islamophobia in Australia (2014-2015), Charles Sturt University and ISRA (2016), accessible at <www.islamophobia.com.au/Islamophobia-in-Australia-ISRA-Academic-Report.pdf)>; Derya Iner (ed), Islamophobia in Australia Report II (2017-2018), Charles Sturt University and ISRA (2019), accessible at <http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>.
[74] Derya Iner (ed), Islamophobia in Australia Report II (2017-2018), Charles Sturt University and ISRA (2019) 7, accessible at <http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>.
[75] Derya Iner (ed), Islamophobia in Australia Report II (2017-2018), Charles Sturt University and ISRA (2019), 6, accessible at <http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>.

protections from vilification on the basis of religion or belief and state and territory laws provide differing levels of protection.[76] The Bill fails to address these gaps.

Anti-vilification laws necessarily restrict some people's freedom of expression in order to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety. To ensure free and open debate, vilification laws typically include reasonable exemptions for fair media reporting, privileged communications, and public acts done reasonably and in good faith for a range of purposes.[77]

Recommendation 14: The Australian Government should consult carefully with religious groups, and particularly minority religious groups that have been disproportionately targeted by hate speech, and introduce laws to prohibit vilification on the grounds of religious belief or activity.

5.8 Establishing a Commissioner for LGBTIQ+ communities

Australia has seven Commissioners for Age, Sex, Race, Disability, Children and Aboriginal and Torres Strait Islander peoples. This Bill now proposes an eighth – a Freedom of Religion Commissioner.[78] If passed, this will mean that LGBTIQ+ people will be left without a dedicated Commissioner.

By not also establishing a Commissioner for sexual orientation, gender identity and intersex status (SOGII), the Government is indicating that the discrimination faced by these communities is of lower priority. This is unacceptable, particularly given the level and type of state-sanctioned discrimination experienced by many LGBTIQ+ people in Australia.[79]

Recommendation 15: If a Freedom of Religion Commissioner is being established, the Australian Government should establish an LGBTIQ+ Commissioner with responsibility for discrimination based on sexual orientation, gender identity and intersex status.

6. Better human rights laws for Australia

6.1 Comprehensive and modern equality laws

There are well-recognised weaknesses in the current framework of Australia's anti-discrimination laws.[80] Federal anti-discrimination laws currently provide inconsistent and piecemeal protections and rely on a fault-based system of individual complaints rather than incorporating measures to promote substantive equality.

[76] See Table 1 (Australian discrimination & vilification protections for religion or belief) in Human Rights Law Centre, "Protecting fundamental rights and freedoms on Australia: Submission to the Expert Panel on the Religious Freedom Review" (14 February 2018), accessible at <https://www.hrlc.org.au/s/Religious-Freedom-Review-Submission-HRLC-xwh7.pdf>.
[77] *Anti-Discrimination Act 1977* (NSW) s 49ZT.
[78] Religious Discrimination Bill 2019 (Cth) Part 6; Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) sch 1.
[79] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights National Consultation Report* (2015) 1.
[80] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [17]-[18].

In 2013, following a number of inquiries, the former Australian Government proposed a *Human Rights and Anti-Discrimination Bill 2013* (Cth) (**HRAD Bill**). The HRAD Bill would have consolidated and modernised the five separate federal anti-discrimination laws to ensure justice is not denied because of complex technicalities of our current laws.

The HRLC has consistently advocated for a modern, consolidated equality law with the following key features:[81]

- A unified test for discrimination incorporating the elements of direct and indirect discrimination. These forms of discrimination should not be treated as mutually exclusive.
- An expanded list of protected attributes, including "religious belief or activity".
- Prohibition of attribute-based harassment in all areas of public life covered by the legislation.
- Prohibition of vilification on the basis of all protected attributes.
- Specific protections against intersectional discrimination.
- A shifting burden of proof, so that a rebuttable presumption arises once the complainant establishes a prima facie case of discrimination.
- Discrimination is not unlawful if the discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose.
- A positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.
- A no-costs jurisdiction for discrimination complaints so that people who bring complaints of discrimination do not face the risk of being forced to pay huge legal costs.

As recommended above (recommendation 2), the Australian Government should prioritise modernising and consolidating federal anti-discrimination laws to bring them in line with our international human rights obligations as recommended by the UN Human Rights Committee in 2017.[82]

6.2 An Australian Charter of Human Rights

The HRLC has long advocated for the protection of the right to freedom of religion or belief within a framework which *guarantees robust human rights protections for all people in Australia*.[83]

Human rights are indivisible and have equal status. They cannot be positioned in a hierarchical order. It is important that human rights are not protected in isolation, or that one right is automatically privileged over other rights.

Australia has agreed to be bound by the major international human rights laws, but individuals cannot take action under Australian law when their rights are violated. Australian's support better human

[81] See e.g. Human Rights Law Centre, *Realising the Right to Equality: The Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Laws* (January 2012).
[82] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [18].
[83] See e.g. Human Rights Law Centre, *Rights and freedoms in Australia: Response to the Australia Law Reform Commission interim report of its inquiry into traditional rights and freedoms* (2009); *Striking the right balance: Submission to the inquiry into the status of the human right to freedom of religion or belief* (2017); *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (2018).

rights protections – in 2009-2010, the National Human Rights Consultation found that a Human Rights Charter was supported by over 87% of a record 35,000 public submissions.[84]

Australia is the only Western liberal democratic nation without comprehensive statutory or constitutional protection of human rights. There are many gaps in the protection of human rights in this country.

Rather than addressing these gaps in a comprehensive manner, the Australian Government is proposing a Bill that in a number of respects elevates the freedom of religion for some at the costs of the human rights of others.

A Charter of Human Rights would:

- protect human rights for all Australians;
- improve public service delivery and accountability, and enhance transparency and responsiveness;
- improve Australian laws and policies so that they better protect human rights; and
- contribute to the development of a human rights culture in Australia and enhance public awareness of human rights.

Instead of unbalanced and piecemeal pieces of legislation, the Australian Government should comprehensively protect *all* human rights through an Australian Charter of Human Rights.

As outlined in recommendation 3 above, it is time for Australia to comprehensively protect human rights through a Charter of Human Rights.

[84] National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009) 263.