



**Comments on the Exposure Draft of the *Religious
Discrimination Bill 2019* and the *Human Rights
Legislation Amendment (Freedom of Religion) Bill
2019***

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Executive summary

ICS believes that the Religious Discrimination Bill (RD Bill) has much to commend it. However, there are a number of amendments and improvements that should be made in order to bolster the protection of freedom of religion and to meet Australia's obligations under Article 18 of the *International Covenant on Civil and Political Rights*.

Key issues addressed within this submission include:

1. *The definition of 'statement of belief'*

Clause 41 of the Bill provides that a statement of belief does not constitute discrimination, if it is subject to certain conditions. The nebulous test of 'good faith' may be highly subjective, imposing inherently secular (and possibly inappropriate) considerations. Furthermore, having judges determine what is 'reasonably regarded' as being in accordance with the doctrines and tenets of a religion violates the separation of church and state, and puts power in the hands of those ill-equipped to make theological judgements. It is not necessary to require this exercise in order to provide appropriate limitations on unacceptable religious manifestation. Instead, adopting the approach in the United Kingdom and Canada, a court should look to the 'genuineness' of a belief.

2. *Statements of belief do not constitute discrimination cl 41*

The protection to 'statements of belief' is commendable, however if an employer can still discipline or sack an employee for a statement of belief, the protection offered by the RD Bill is weak. Additionally, the words 'harass' or 'vilify' should be omitted from the Bill or defined to ensure that they aren't interpreted in a way that effectively undermines the protection.

3. *A narrow interpretation of what constitutes a "religious activity": cl 5*

The words 'religious activity' in clause 5, may be read too narrowly and be restricted to activities such as prayer and worship, but not to the manifestation of religious moral or ethical views. The definition of religious activity should be amended to cover any conduct to which the religious person has a genuine conviction (with appropriate limitations being dealt with through other means).

4. *Application of the comparator test: cl 7*

Existing anti-discrimination law provides that if a person who acted in the same way without religious reasons would have been treated the same, an employer has not discriminated. In application, this will seriously undermine the protections provided. The Bill should avoid this outcome.

5. *Defining “lawful religious activity”: cl 5*

This definition at clause 5 permits the Bill’s protections to be held hostage to the whims of States or council by-laws that render a religious activity unlawful, thereby removing federal discrimination protection for the activity. As a result the Act would not protect against a State Government that imposed limitations on a religious school in its funding contract; or a State Government ban on homosexual ‘conversion therapy’, even where that ban limits affirmation of traditional Biblical views by religious ministers to their congregations; or a State Government requiring that faith-based aged-care providers facilitate euthanasia on their premises.

6. *The reasonableness requirement for indirect discrimination: cl 8*

The reasonableness criterion for indirect discrimination in cl 8(1)(c) is not consistent with the relevant international law. One way to do this may be to provide that a limitation on the expression of a religious belief or activity is not ‘reasonable’ if it fails to satisfy the test of being “necessary” to ensure public safety, order, health or morals, or the fundamental rights of others.

7. *The employer conduct rule: cl 8(3)*

The provisions under clause 8(3) of the RDA introduce a presumption that regulation of the speech of employees by small employers and government is reasonable, whether within or outside their workplace. Similarly, the provisions introduce a presumption that regulation of the speech of employees of large employers within the workplace is reasonable. These presumptions should be expressly displaced. Furthermore, any assessment of the financial hardship on the employer must exclude the anticipated and actual responses of third parties who threaten to impose hardship. This makes the law victim to the whims of boycotts by sponsors, suppliers, customers etc in order to assure a particular legal outcome. There is reason, however, to provide specific direction in respect of the regulation of the speech of employees and this submission provides a detailed framework.

8. *The exception for inherent requirements: cl 31*

Clause 31 of the RD Bill permits discrimination against a person in employment (cl 13) or partnerships (cl 14) or in relation to qualifying bodies (cl 15) or by employment agencies (cl 17) where, because of the person's religious belief or activity, the person is unable to carry out the "inherent requirements" of the employment, partnership, profession, trade or organisation. This exception could permit an employer, qualifying body etc to circumvent the RD Bill by simply making it an inherent requirement of a position that the person acts to affirm various matters that contradict his or her religious beliefs in circumstances where this has nothing to do with the core business of the employer. ICS recommends that the exceptions only apply to chaplaincy roles that are employed by non-religious employers (such as in hospitals, prisons or schools) or where being a religious adherent is an actual requirement of the role.

9. *Application to corporations and other unincorporated bodies*

The Bill does not make sufficiently clear that the full range of corporate and unincorporated bodies may take the benefit of its protections. As the Bill protects against discrimination 'on the ground' of a religious belief, it must also displace existing case law which holds that such bodies cannot adopt a religious belief. It must also clarify that such a body can incur compensable damage as a result of religious discrimination.

10. *Unprecedented Exclusion of Religious Bodies that Undertake "Commercial Activities": cl 10*

The Bill excludes from the exemption provided in clause 10 any body that engages solely or primarily in commercial activities. This exclusion has no precedent in any anti-discrimination law in any jurisdiction in Australia (or any Anglophone democracy). It will prevent a large swathe of the charitable religious sector from being able to ensure that its character remains identifiably religious. Drawing such a line in the RD Bill will also set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law. Drawing a distinction that provides an exemption for employment, but not for goods and service supply, is not an alternative.

11. *Freedom of Religion Commissioner: cl 45*

The RD Bill should include more detailed appointment criteria, in order to ensure that the appointee to this position is a person who understands religion and the importance of advocating for religious freedom. If this would violate s 116, the position should not be created.

12. *Federal RDA must be expressed to override State and Territory laws which are directly inconsistent*

It must be made clear that if a State or Territory Act does not protect religious freedom to the same extent as the Federal RDA, the Federal RDA must prevail to the extent of that inconsistency. The coverage of Section 60 of the RDA allows legislation to operate concurrently but does not provide a mechanism for explicit ‘overriding’.

13. *Compelling a person to act against their conscience is discrimination*

Religious persons or entities should not be required to engage in, or affirm, acts which are contrary to their genuine religious beliefs. In light of the watering-down of standard-form religious discrimination legislation by judicial interpretation overseas, to offer adequate protection, the Bill should clarify that such compulsion is religious discrimination.

14. *Health Practitioner Conduct Rule*

The provisions regarding objections by health practitioners (subparagraph 8(5) and (6)) do not extend to religious hospitals. This does not provide sufficient protection to faith-based health institutions from religious discrimination claims. To the extent that the protections to health practitioners are also made subject to weak State laws, they are inadequate.

15. *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019: cl 4*

Clause 4 of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* amends section 11 of the *Charities Act*, to provide that advocating for a traditional view of marriage will not lead to the loss of a charity’s tax status. That Bill has not, however, amended section 6 of that Act, which requires that charities be for the ‘public benefit’. Courts have removed the tax exemption of charities that have a traditional view of

marriage or sexuality in other common law countries for not satisfying the ‘public benefit’ requirement. This is an area of the law where developments overseas are uniquely influential. Section 6 must also be amended.

16. The Equal Status of Religious Freedom with Other Human Rights

The Expert Panel on Religious Freedom recommended that the Government amend the objects clauses in existing Commonwealth anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion. However, the current drafting of the proposed objects clauses only refers to the ‘indivisibility’ of human rights, rather than their ‘equal status’. The two terms do not parallel each other in protection and thus, the legislation fails to give accurate effect to the Expert Panel’s recommendation.

17. A Religious Freedom Act

A Religious Freedom Act would be based on the external affairs power to meet Australia’s international obligation to implement ICCPR Article 18. The history of weak purposive interpretation that the High Court has given to religious freedom under section 116 of the Constitution, demonstrates the need for such an Act. Under such an Act, any council or government agency would have to justify its administration of policy. The Act would also act as a defensive shield against practices which unduly burden religious freedom, unless they are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

18. Issues not addressed in the Religious Discrimination Bill

The following issues are not addressed in the RD Bill. Some of them are currently with the Australian Law Reform Commission, which is now not due to report until late 2020. Others are not addressed at all under the government’s agenda:

- parental rights in relation to schooling (in particular, the right of parents to remove their children from teaching that is not in conformity with the parents’ beliefs and morals pursuant to Art 18(4)); and
- the rules for allowing schools and religious bodies to manage their affairs in accordance with their faith under the Sex Discrimination Act and other discrimination laws.

Comments on the Exposure Draft of the Religious Discrimination Bill 2019 and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

1. Re protecting religious persons from liability for statements of belief

a. The definition of “statement of belief” cl 5

Clause 41 of the RD Bill provides that a statement of belief does not constitute discrimination for the purposes of any anti-discrimination law. The purpose of the clause is to protect religious persons from liability for statements of belief (such as the action taken against Archbishop Porteous) and is discussed below.

This section of our submission deals with the definition of a statement of belief.

A statement of belief is defined as such if the statement:

- (a) (i) is of a religious belief held by a person; (ii) is made by the person in good faith; and (iii) is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion; or
- (b) (i) is made by a person who does not hold a religious belief; (ii) is of a belief held by the person that arises directly from the fact that the person does not hold a religious belief; and (iii) is made in good faith; and (iv) is about religion.

The definition of “statement of belief” in paragraph (a) provides that the statement must be made by the person in good faith and must be of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion. We have two significant concerns about this definition.

First, what does good faith mean? If limitations are to be provided, they should be clearly set out. This test provides little guidance to religious bodies, and may be highly subjective in the hands of a judicial decision-maker. It also imposes what are inherently secular (and thus possibly inappropriate) principles on the operations of faith-based organisations. As set out in this submission, there are clearer means to articulate a boundary line for permissible religious manifestation and which provide greater certainty than this very nebulous test. ICS recommends that this term be omitted and that the statement of belief should instead be defined as “genuinely held by the person.”

Second, under this clause it will fall to a judge or tribunal member to determine whether the statement in question can be “reasonably regarded” as being in accordance with the doctrines, tenets etc. of a religion. This hands to judges the ability to determine matters of religious belief, which violates the separation of church and state. What if there is disagreement within a particular religion as to the existence, interpretation or application of a particular doctrine or teaching? Will the judge or tribunal member take evidence on the meaning of doctrine? If so, and if conflicting interpretations are proffered, how will the judge or tribunal member determine which interpretation is truly in accordance with the doctrines of the religion? And if a judge or tribunal member prefers an interpretation that is contrary to the person’s statement of belief, is the court or tribunal essentially telling the person that they are mistaken about their religion and that they have no protection from discrimination? ICS takes the view that judges and tribunal members are ill-equipped to make theological judgments of this nature on the basis of conflicting expert evidence. The danger is that judges and tribunal members will end up imposing secular values filters on religious doctrines and beliefs.

Emphasising this same point with reference to the Bill, Professor Nicholas Aroney has recently written that:

Although the wording of clause 10 seems intended to confer on religious bodies a degree of discretion in this area, there remains a question concerning the extent to which the Human Rights Commission when conciliating complaints, and the courts when called upon to decide cases, will defer to a school’s judgement about what is in accordance with its religious doctrines, or else substitute its own view as to what the school’s religious doctrine reasonably requires.

This is the kind of problem that arose in the *Christian Youth Camps v Cobaw* case in Victoria, where the Tribunal at first instance and the Court of Appeal disagreed with the Christian organisation’s own assessment of what its doctrine required. Under the Victorian legislation, the court had to determine whether a decision taken by the Christian organisation ‘conform[ed] with’ the doctrines of the religion. Clause 10 of the Exposure Bill does not require that the decision must simply ‘conform’ with the doctrine, but adopts the more generous standard, that the decision ‘may reasonably be regarded’ as being ‘in accordance with’ the doctrine. This may possibly help to avoid the problem that arose in the Cobaw case. However, doubts remain, partly because official religious doctrines don’t typically descend into the details of the employment policies of religious organisations.¹

¹ Nicholas Aroney, *Religious Discrimination and Religious Freedom: An Evaluation of the Exposure Draft of the Australian Religious Discrimination Bill 2019* (September 17, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455089.

To address these concerns, ICS strongly recommends that the wording of paragraph (a) of “statement of belief” be amended. A preferable approach would be to replace it with the following definition:

... (a) (i) is of a religious belief held by a person; and (ii) the person has a genuine conviction that the belief in question is in accordance with, or in furtherance of, the doctrines, tenets or teachings of the person’s religion

A conviction should be regarded as genuine unless it is fictitious, capricious or an artifice.

This test is based on the jurisprudence of the Canadian Supreme Court in *Syndicat Northcrest v Amselem*² and the subsequent affirmation by Lord Nicholls in the House of Lord decision in *R (on the application of Williamson) v Secretary of State for Education and Employment*.³ It represents a common sense means developed by those Courts to give proper regard to the beliefs of religious persons, and to avoid the difficulties of courts weighing disputes over doctrine. The test does not impact upon the ability of a court to impose proper limitations on religious manifestation, as would be permitted within a modern plural democratic nation.

The test also avoids the prospect of courts having to resolve the conflicting evidence of experts disagreeing as to the correct interpretation of a religious text. As recognised by the Supreme Court of Canada, an “expert” or an authority on religious law is not a surrogate for an individual’s affirmation of what his or her religious beliefs are’.⁴ The history of church relations within the West demonstrates that reasonable people may hold reasonable disagreement on the requirements of a given religious text when applied to a specific set of circumstances, but still affirm each other as fellow-believers. The Act fails to appreciate this possibility.

Instead of looking to the individual convictions of a believer, the test as formulated by the draft legislation requires a judge to determine whether the person’s beliefs reflect the teachings of their associated religious institution. By necessity, the Act will see the amassing over time of a body of law comprised of that which the State is willing to admit as a recognised doctrine for each religion. As the Supreme Court of Canada has recognised, it ‘is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine’.⁵ As Lord Nicholls

² 2004 SCC 47 (*Syndicat Northcrest*).

³ [2005] UKHL 15 at para 22 (*Williamson*).

⁴ *Syndicat Northcrest*, 53.

⁵ *Syndicat Northcrest*, 65.

has rightly said, for ‘the Court to adjudicate on the seriousness, cogency and coherence of theological beliefs ... is to take the Court beyond its legitimate role’.⁶

Rather than engage in an exercise of defining that which is acceptable belief, the focus of judicial determination should be on correctly regarding the belief, so to subsequently accurately consider which manifestations of that belief are to be permitted within a modern democracy. The focus should be on the boundaries of permissible limitation in society, not on discerning the content of belief. To that end, the Bill already proposes various detailed limitations on the exercise of religious belief, which, subject to the remaining comments in this paper, provide adequate means to balance religious claims with other interests. Courts do not need to conduct an exercise in weighing the content of true religious belief in order to consider the appropriate limitations to be placed upon a belief. It is in light of these interests that the test proposed by the House of Lords and Supreme Court of Canada was formulated.

b. Statements of belief do not constitute discrimination cl 41

Clause 41 provides that a statement of belief (as defined) does not constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*) or contravene sub-s 17(1) of the *Anti-Discrimination Act 1998* (Tas) or contravene a provision of a law prescribed by the regulations for the purposes of this paragraph. The intention is to ensure that persons such as Archbishop Porteous are free to promulgate their beliefs on issues such as marriage, Safe Schools, abortion, gender fluidity etc. whether they are speaking privately in their religious setting, publicly or on social media.

The protection does not apply to statements of belief that are malicious or to statements that would, or are likely to, harass, vilify or incite hatred or violence against another person or group of persons or to statements that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.

ICS commends this provision, since it permits people to express religious beliefs without the fear that they will be subjected to anti-discrimination laws. However, ICS notes that there is no protection under cl 41 from employer discipline or sacking – just from anti-discrimination complaints and lawsuits. An employee who is sacked for the expression of their religious belief must instead look to the direct and indirect discrimination tests at sections 7 and 8 respectively,

⁶ *Williamson* [2005] UKHL 15, 22 per Lord Nicholls.

or the applicable State or Territory law, for protection. If an employer can discipline or sack an employee for a statement of belief, the protection offered by the RD Bill is seriously compromised.

c. Definition of “harass” and “vilify”

Statements that are malicious, or that would harass or vilify or incite hatred or violence against another person or group of persons are not protected. ICS is concerned about the words “harass” and “vilify”. These phrases are not defined in the RD Bill and it is uncertain as to how they would be interpreted.

“Harass” seems to contemplate statements that annoy or upset the recipient. In other words, whether a statement is harassing is measured by its effect on the recipient. If so, this could result in the religious speaker losing the protection of cl 41 simply because the hearer finds the statement upsetting. ICS recommends that this term be omitted from the Bill.

“Vilify” is defined in the dictionary as “to speak or write about in an abusively disparaging manner”. If so, it appears to relate to tone, not merely content. If so, a person who expresses a statement of belief in traditional marriage or who expresses disagreement with gender theory or the Safe Schools program should not thereby become disentitled to the protection afforded by clause 41. However, this is not a “given”, and ICS recommends that this term be omitted from the Bill or be defined in such a way as to ensure that the expression of such views remain protected. One way to do this would be to consolidate the existing provisions in section 41 so that ‘vilification’ is defined to be ‘incitement to hatred or violence.’ Section 41 should apply to all vilification provisions in State and Territory law, including the Victorian *Racial and Religious Tolerance Act 2001*.

2. Re protecting religious persons against discrimination on the ground of religious belief or activity: the definition of religious belief or activity

One of the main purposes of the RD Bill is to prohibit direct and indirect discrimination against persons on the ground of their religious belief or activity (with some exceptions and exemptions). The definition and interpretation of “religious belief or activity” is therefore pivotal to the operation of the Bill.

Religious belief or activity is defined in s 5 to mean:

1. holding or not holding a religious belief; or
2. engaging in, not engaging in, or refusing to engage in, lawful religious activity.

In this context, ICS has three concerns about the RD Bill in its current form.

a. A narrow interpretation of what constitutes a “religious activity”: cl 5

The first is that the words “religious activity” might be read narrowly as restricted to prayer, worship, sacraments and proselytising, but not as extending to the expression of moral or ethical views that are based on a religious worldview or to actions based on those views. Even though a religious person may act within a secular context, many, if not all, of their acts may stem from, or be influenced by their religious convictions. The Bill should not protect solely ‘sacred acts’ or acts in the performance of a ‘religious ritual’, but should recognise that, for many religious believers, religious compulsion extends to the whole of their lived experience.

ICS is also concerned that a court or tribunal might take the view that the expression of a particular view – such as an anti-abortion or anti-euthanasia view – is not a religious activity because persons who are not religious may take the same view and thus the view is not peculiarly religious in that it can stem from a conviction that is not religious. The definition of religious activity should be amended to cover any expression of views and any conduct about which the religious person has a genuine conviction (as outlined above).

b. Application of the ‘comparator’ test

Under clause 7 of the RDA a complainant will need to establish that they have been discriminated against ‘on the ground of’ their ‘religious belief or activity’ and have been treated ‘less favourably’ than ‘another person who does not have or engage in the religious belief or activity in circumstances that are not materially different’. In anti-discrimination law, this latter requirement is described as the ‘comparator’ test. While the terminology of clause 7 (broadly) employs one of the standard formulations for direct discrimination, improperly applied, this test has the potential to undermine the substantive protections of the Bill.

The Bill or Explanatory Memorandum should make clear that just because an employer would sanction a person who seeks a form of accommodation for non-religious reasons does not mean that the employer has not discriminated when the employer refuses a person’s request for accommodation on the basis of their genuine religious convictions. To fail to allow that a

person may be treated unfavourably because of a burden that they uniquely carry as a religious believer would render the protections of the Act totally ineffective. The Act should then recognise that a person who is compelled to act in a manner contrary to their religious conscience suffers a disadvantage that they uniquely incur as a religious believer. The Act should also clarify that the acts flowing from a person's religious beliefs are not a component of the circumstances of the complaint (under clause 7); they are instead characteristics that attach to persons of religious belief (under clause 6). To fail to so clarify will wholly undermine the substantive protections that the Bill proposes for religious believers.

c. Defining “lawful religious activity”: cl 5

At first blush, it would seem reasonable to confine the protection to *lawful* religious activities, since there are some activities that might be described as religious activities that are obviously justifiably unlawful. The problem is that the definition would appear to permit a State or Territory law or council by-law to render a religious activity unlawful, thereby removing federal discrimination protection for the activity. If the protection afforded by the RD Bill is hostage to the whims of the States and Territories, then the Bill is clearly deficient. For example, a State government could in the terms of the applicable funding contracts issued pursuant to State legislation, impose limitations on the ability of a religious school to act consistently with its view of marriage, sexuality or gender. Such a school would find no protection under the RD Bill. Furthermore, a State government could require, by State law, that a faith-based aged care provider must facilitate the provision of euthanasia drugs on its premises. Again, such a body would find no protection under the RD Bill.

The following two examples illustrate the circumstances in which religious activity could be made unlawful at State or Territory level, which would then result in the forfeiture of the federal discrimination protection provided by the RD Bill:

1. If enacted, the *Racial and Religious Tolerance Amendment Bill 2019* (Vic), introduced by Fiona Patten, will extend Victoria's anti-vilification laws. The laws are currently restricted to speech which incites hatred against, serious contempt for, or revulsion or severe ridicule of a person on the ground of their race or religion. If enacted, the amending bill will extend these laws to gender, disability, sexual orientation, gender identity or sex characteristics. The impugned speech need not be an expression of a person's religious belief, but if it *was* such an expression, the statement would cease to be

a “lawful religious activity” under the RD Bill and the federal antidiscrimination protection would be forfeited.

Note: It is not being suggested that the RD Bill should protect the expression of religious activities that incite hatred. However, depending on the wording of provisions, the protection of the RD Bill could be forfeited in circumstances where this is not warranted, such as in relation to speech which merely offends or insults. It could operate as an invitation to State governments and councils to create such laws. As noted above, this issue also presents at clause 41, which defers to State vilification law. Both provisions mean that any future State Government could introduce laws that make unlawful ‘vilification’ ‘offensive or insulting’ comments, and the RD Bill would have no effect.

2. A State law criminalises homosexual ‘conversion therapy’. “Therapy” is defined to include any teaching or counselling about sexual orientation.

Would the RD Bill protect a priest who is discriminated against for affirming to a parishioner that the Bible calls for sexual relations to be entered into only in the context of a heterosexual marriage? Or would the priest lose any protection against discrimination that might otherwise have been available under the RD Bill on the basis that the priest’s religious activity (i.e. the counselling of the parishioner) was not lawful?

As a minimum, instead of referencing “lawful” religious activities, ICS recommends that the discrimination protection afforded by the RD Bill should be removed only in respect of religious activities that are criminal offences punishable by imprisonment. At the extreme end of the spectrum this would cover terrorist offences committed with religious motives, but would also cover practices such as female genital mutilation and bigamy, which are illegal. While such activities should clearly not be protected by the RD Bill, as a protection against undue encroachment by a future State or Territory Government, a provision that allows the prescription of laws that do not limit the Act’s protections by Regulation should be provided.

d. Application to corporations

The RD Bill protects “persons” from direct or indirect discrimination on the ground of their religious belief or activity in certain areas of public life. Section 5 defines “person” as having

the meaning affected by the *Acts Interpretation Act 1901*. Under section 2C of the Acts Interpretation Act 1901, an expression used to denote persons generally (such as “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” and “whoever”) includes a body politic or corporate as well as an individual. A note to s 5 affirms that this is the case and that a body corporate may include a religious body or other religious institution.

However, there are case law statements to the effect that a corporation cannot hold a religious belief. In order to experience discrimination ‘on the ground of’ a religious belief, a corporate body must be able to evidence it is able to hold such a belief. Thus, even though “person” is defined to include a body corporate, which is expressed in the note to include a religious body or institution, it is not clear that corporations will be protected from religious discrimination under the RD Bill e.g. the incorporated Baptist church, a Christian school, a missionary organisation, a charity, a counselling centre or a religious publishing company. In order to remove doubt, the RD Bill needs to expressly provide that corporations *can* hold a religious belief and specify how that belief can be evidenced e.g. by a statement of beliefs adopted by the board. To fail to do so might be to allow that corporation to be the subject of targeted discrimination with no protection under the Bill. A provision that would provide clarity for religious bodies is as follows:

An entity may state or adopt a belief as a belief the entity holds by:

- (a) including the belief in its governing documents, organising principles, statement of beliefs or statement of values; or
- (b) adopting principles, beliefs or values of another entity which include the belief;
- (c) adopting principles, beliefs or values from a document or source which include the belief; or
- (d) acting consistently with that belief.

This is effectively to offer a rule for attributing a religious belief to an entity. The Act should also make clear that such a body can experience a disadvantage or detriment or be treated unfavourably on the basis of its belief. This is required because, without specific provision, it is not clear in what circumstances a corporate body might experience a form of compensable damage on the basis of its religious belief.

Such discrimination against the association or corporation harms all the members of the association or the corporation but the individual members have no remedy if the association or corporation is not protected by the RD Bill e.g. a Christian or Hindu school or religious congregation operates as an incorporated entity and is discriminated against when it seeks to hire a public school hall or private meeting room because of its religious beliefs and activities. For example, it is refused the hire because of its religious nature or a condition is imposed on the hire that the body could not teach certain aspects of its religion on the premises (this happened to a church which hired a public school hall during the same sex marriage postal vote).

To cover religious associations and corporations requires the RD Bill to have a sufficiently broad definition of religious entity which is protected from discrimination on the ground of its religious belief and activity. There is current language describing religious bodies in exemptions in Commonwealth and State discrimination law such as “a body established for religious purposes” in section 38 of the Sex Discrimination Act or in clause 10 of the RD Bill, a “religious body”.

These existing descriptions are too narrow for the purpose of defining the religious entities which are protected from discrimination on the ground of religion by a RD Bill. For example, some charities are formed with religious motivations and funded by religious believers but their purpose is not a religious purpose but, rather, to relieve poverty (drawing the distinction between different types of charitable purpose). Some corporations are formed with religious motivations and funded by religious believers and operated with a religious ethos to trade not for profit or commercially to provide health services or job skills training for released prisoners or at risk youth. Some businesses are not formed for a religious purpose, but their identity is so identifiably religious that it is reasonably to be concluded that the discriminatory actions taken against them by third parties were ‘on the ground’ of their religious belief. These should be ‘persons’ for the purposes of being protected from discrimination on the basis of their religious beliefs, expression and activities by a RD Bill, even though they do not fall within the descriptions of “a body established for religious purposes” or the notion of ‘religious body’ under clause 10 of the RD Bill.

For a broad coverage of the entity types that may initiate an action under the RD Bill, use could be made of the GST legislation definition of “entity” along the following lines:

- (1) For the purposes of the Act, an entity means:

(a) an entity (other than an individual) within the meaning of section 184 1 of the A New Tax System (Goods and Services Tax) Act 1999; and

(b) a non entity joint venture within the meaning of section 195 1 of the A New Tax System (Goods and Services Tax) Act 1999.

Note: The term entity includes body corporates, body politics, partnerships, unincorporated associations or other bodies of persons, trusts and superannuation funds.

(2) For the purposes of subsection (1), an entity is an entity regardless of whether:

(a) the entity is for profit or not for profit; or

(b) the entity is a religious body or organisation; or

(c) the entity operates to make a profit or not.

3. Re protecting religious persons against discrimination on the ground of religious belief or activity: indirect discrimination under cl 8

a. The reasonableness requirement for indirect discrimination: cl 8

Clause 8 of the RD Bill provides that a person discriminates against another person on the ground of the other person's religious belief or activity if: the first mentioned person imposes, or proposes to impose, a condition, requirement or practice which has, or is likely to have, the effect of disadvantaging persons who have or engage in the same religious belief or activity as the other person and the condition, requirement or practice is not reasonable.

There is a list of factors in cl 8(2) which must be applied to determine reasonableness. It is essentially a proportionality test. But how will courts and tribunals weigh the damage to a religious conviction against the result sought to be achieved by the condition, requirement or practice?

Leading discrimination experts Rees, Rice and Allen acknowledge:

The concept of indirect discrimination delegates significant responsibility to courts and tribunals to make policy decisions of broad public importance in the absence of any legislative

guidance about relevant considerations. Tasks of this nature have seldom been openly undertaken by the Australian judiciary in any area of law, so it is not surprising that contested claims of indirect discrimination often fail and the status quo has been preserved. The judiciary has pushed the unfamiliar job of making difficult and complex social policy decisions back to the other branches of government ...⁷

...the current law of indirect discrimination delegates too much unstructured responsibility to the courts to determine broad issues of social policy.⁸

In light of these concerns, and in the interests of providing certainty to both employees and employers, specific guidance should be provided as to when conduct will amount to indirect discrimination.

Further, clause 8 compares unfavourably with Art 18(3) of the ICCPR, which provides that the right to religious liberty can be limited only where necessary to ensure five values – public safety, order, health or morals, or the fundamental rights of others, not whenever the limitation is reasonable.

Given the prevalence of codes of conduct, the reasonableness criterion in cl 8(1)(c) for indirect discrimination is too much at large. The Siracusa principles should be applied to require that the condition must ensure reasonable accommodation of religious belief and activity and that the limitation on religious belief and activity must be no greater than is necessary to ensure the goal of the condition is achieved. One way to do this may be to provide that a limitation on the expression of a religious belief or activity is not ‘reasonable’ if it fails to satisfy the test of being necessary to ensure public safety, order, health or morals, or the fundamental rights of others.

b. The employer conduct rule: cl 8(3)

An employer conduct rule is a condition, requirement or practice that is imposed on employees and which relates to the standard of dress, appearance or behaviour of employees: cl 5. Generally, an employer conduct rule falls to be assessed under the general reasonableness test for indirect discrimination.

However, cl 8(3) provides for a circumstance in which an employer conduct rule is *deemed* not to be reasonable, and hence, if imposed, could constitute indirect discrimination. The deeming

⁷ Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination and Equal Opportunity Law*, (3rd edition, 2018), The Federation Press, 3.8.15.

⁸ *Ibid*, 3.8.45.

provision applies to an employer conduct rule which is imposed by a “relevant employer” – defined as a non-government entity with revenue of at least \$50 million per annum - which would have the effect of restricting or preventing an employee from making a statement of belief at a time when the employee is not performing work on behalf of the employer.

However, there are two circumstances in which this deeming provision does *not* apply. The first is where compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer: cl 8(3). In this case, the reasonableness factors in cl 8(2) would apply. Second, the employee’s statement of belief must not be malicious, likely to harass or vilify or incite hatred or violence against another person and must not be such that a reasonable person, having regard to all the circumstances, would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence: cl 8(4).

ICS makes the following observations about this clause, which is presumably designed to address the Israel Folau situation:

1. It is unclear whether the period in which an employee is not performing work on behalf of the employer would include periods of time where the worker is at his or her workplace, but is on a break. In so far as an employer conduct rule would restrict or prevent an employee from making a statement of belief during that time, would cl 8(3) deem the rule unreasonable.
2. Why are only companies with over \$50m in revenue affected? Are smaller employers allowed to regulate the speech of their employees in their private lives? If so, why are the religious freedoms of employees of smaller companies and government agencies in their own time of less worth? Through these means, the provisions appear to introduce a statutory presumption that the regulation of the religious speech of employees within their workplace or within government workplaces or by small employers is *prima facie* reasonable. This presumption should be expressly displaced.
3. Any assessment of the financial hardship on the employer must exclude the anticipated and actual responses of third parties like sponsors or suppliers or customers or landlords who threaten to impose hardship unless the employee is disciplined or sacked. Including

third party responses just invites boycotts by sponsors, suppliers, customers etc in order to get a business to discipline one of its workers for their religious expression.

4. The comments made above in relation to “harass” and “vilify” apply.

Why not start with the proposition that no employer can restrict an employee’s freedom to state their genuine religious beliefs in their own time? Exceptions could then be made in respect of beliefs which incite hatred against, or which vilify etc., the employer or the employer’s goods, services or customers, or the employee’s co-workers. In such cases, the employer has a right to expect an employee not to engage in such conduct.

A secular organisation like Rugby Australia or a company or a local council would argue that it is a reasonable condition, requirement or practice (e.g. in its code of conduct) for its employees or brand representatives to only express or act on views (including on social media and in their own time) which promote a “safe and inclusive” workplace and society, meaning only views which do not offend customers or sponsors or any member of the public (e.g. views on sexual relations, optimal family structure, or avoiding greed or the meaning of life). The argument would be that it is reasonable and not indirect discrimination to restrict the expression of religious views which others might find offensive. If that argument succeeded, as it might if the test of reasonableness was at large, the RDA would do nothing to assist an incidence similar to the Folau case.

c. Religious conduct in the workplace

To avoid that outcome, the RD Bill needs to put boundaries on any test of reasonableness for the purposes of the defence against indirect discrimination.

First, as the Bill suggests, there is legitimate reason to provide some guidance in respect of the regulation of religious statements in the workplace. This could be done by providing that a condition, requirement or practice is not reasonable to the extent that it has the effect of directly or indirectly requiring a religious individual or entity to refrain from expressing or acting on their genuine religious beliefs unless that expression or action would threaten or incite violence or hatred against a person or group of persons or would constitute a crime.

In the case of a condition, requirement or practice imposed by an employer on an employee, it may be that the above formulation works for expressing or acting on a genuine religious beliefs

outside the workplace and work hours but more conditions can be imposed by an employer on religious expression or action in the workplace during work hours.

For example, the Bill could provide that a condition, requirement or practice imposed by an employer on an employee that has the effect directly or indirectly of requiring a religious individual or entity to refrain from expressing or acting on their genuine religious beliefs in the workplace during work hours is reasonable only to the extent that it is necessary to ensure the effective operation of the workplace and no lesser limitation on religious freedom would achieve that objective.

Another way of putting boundaries around what is a reasonable, is to require that the condition, requirement or practice limits religious expression and activity no more than is necessary to achieve one of the 5 permitted objectives in ICCPR Article 18(3). As suggested above, this could comprise a general test for determining what is 'reasonable' under section 8. The other, more bespoke tests, could relate to the regulation of permissible speech.

Australia's international commitment to ICCPR Article 18 applies to governments. So any condition, requirement or practice imposed directly or indirectly by a government agency that has the effect of limiting religious expression or activity would have to be no more restrictive than was necessary to achieve one of the five permitted objectives in ICCPR Article 18(3), in accordance with the Siracusa Principles.

Another way of dealing with employer restrictions on religious employees is found in the WA *Discrimination Act 1984* s 54 and the ACT *Discrimination Act 1991* s 11. These tests are too narrow in that they are limited to discrimination in relation to "carrying out of a religious practice" during work hours, whereas the protected activity should be expressing or acting on a religious belief during work hours. They also deploy a 'reasonableness' test without providing further guidance, and without contemplation of the requirements of international law that only 'necessary' limitations be permitted.

4. Re the exception for inherent requirements: cl 31

Religious freedom and workplace requirements

Clause 31 of the RD Bill permits discrimination against a person in employment (cl 13) or partnerships (cl 14) or in relation to qualifying bodies (cl 15) or by employment agencies (cl 17) where, because of the person's religious belief or activity, the person is unable to carry out the inherent requirements of the employment, partnership, profession, trade or organisation.

ICS does not disagree in principle with the proposition that the protection against discrimination that is afforded to a person by the RD Bill should not apply in contexts where the person is unable to carry out the inherent requirements of a particular profession, trade or occupation because of his or her religious belief.

However, ICS holds concerns that this inherent requirements exception would permit an employer, qualifying body etc. to circumvent the RD Bill by simply making it an inherent requirement of a position that the person acts to affirm various matters that contradict his or her religious beliefs in circumstances where this has nothing to do with the core business of the employer. Possible examples include:

1. a commitment to not proselytising or speaking about their religious faith in the workplace;
2. a requirement that the person attend yoga classes or engage in mindfulness training;
3. a requirement that the person promote the option of euthanasia or abortion;
4. a requirement that the person participate in Pride fundraisers or wear a Pride lanyard or uniform;
5. a requirement that the person engage in Pride training.

ICS envisages an argument being made by an employer that, in order to promote inclusion in the workplace, the employee must affirm or endorse the life choices of their fellow employees, customers or suppliers etc. If this kind of behaviour can qualify as an “inherent requirement”, then indirect discrimination through the imposition of such requirements will likely flourish.

A secular organisation might claim that it is an inherent requirement or genuine occupational requirement for its employees or brand representatives (expressed for example in a code of conduct) to only express or act on views (including on social media and in their own time) which promote a “safe and inclusive” workplace and society meaning only views which do not offend customers or sponsors or any member of the public (e.g. views on sexual relations, optimal family structure, or avoiding greed or the meaning of life).

If a religious employee expressed such views, even in a measured and non-derogatory manner, an inherent requirements or genuine occupational requirements exception would allow the secular organisation to discriminate against its religious employee by requiring them to keep quiet about some or all of their religious beliefs and sanctioning them if they do not. There are plenty of examples of this occurring (e.g. the Israel Folau case, the case of Adrian Smith who was demoted and lost 40% of his pay for expressing his view on Facebook that churches should

not be forced to host same sex civil partnership ceremonies⁹ and the case of Felix Ngole a social work student who was dismissed from his social work course because of his Facebook posts quoting the Bible about homosexuality). The RD Bill should not provide a vehicle for employers to do this through an inherent requirements or genuine occupational requirements exemption.

The inherent requirements exception is also applied to the authorisations provided by qualification bodies. It might be asserted that a couple seeking approval for fostering is not suitable on the basis of their religious beliefs. While the religious belief of a couple may be relevant to ensure alignment with a child's prior experience or family background, it should not entitle a blanket basis for refusal.

ICS recommends that, in the employment context, "inherent requirements" be defined in such a way that they are tied to the core business of the employer and do not extend to peripheral activities that have no bearing on the employee's ability to perform the specific tasks they are employed to do. One way to ensure this is to clarify that exceptions only apply to chaplaincy roles that are employed by non-religious employers (such as in hospitals, prisons or schools) or where being a religious adherent is an actual requirement of the role. The same principles can be applied to the accreditation of professionals and the accreditation of persons such as foster parents.

5. Unprecedented exclusion of religious bodies that undertake "commercial activities"

The Bill also excludes from the exemption provided in clause 10 any body that engages solely or primarily in commercial activities. This exclusion has no precedent in any anti-discrimination law in any jurisdiction in Australia (or any Anglophone democracy). It will prevent a large swathe of the charitable religious sector from being able to ensure that its character remains identifiably religious. This is because the exclusion would capture faith-based welfare charities that charge nominal fees for services, and also the faith-based hospital and aged-care sectors.

This provision is clearly inconsistent with the recommendations of the Ruddock Expert Panel on Religious Freedom, which treated faith-based charities as religious bodies for the purposes of anti-discrimination law. The Expert Panel also treated faith-based 'aged care, education and

⁹ *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch)

health'¹⁰ providers as religious bodies in its discussion on exemptions in anti-discrimination law. It clearly considered religious bodies to include the following forms of 'faith-based' charitable expression:

Faith-based organisations have played, and continue to play, a vital role in civic life in Australia. They assist the needy, provide hospitals and aged-care facilities, provide homecare and company to the elderly, run schools and institutions for higher learning, and provide humanitarian assistance in times of natural disaster.¹¹

The exclusion of such bodies on the basis that they engage in commercial activities in order to give effect to their charitable purposes is an arbitrary basis for the removal of their religious freedom, and indeed, their religious identity. Drawing such a line in the RD Bill will also set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law.

Distinction between employment and goods or service supply

Nor should a line be drawn to provide an exemption to religious bodies in respect of employment, but not in respect of goods or service supply. As outlined below in respect of health practitioners and faith-based hospitals, there are circumstances in which a religious institution may be compelled to supply a good or service against its conscience under the RD Bill, and thus lose its ability to authentically maintain its religious character (the example provided is in relation to IVF). Again, to allow such a distinction would mean that a faith-based aged care provider must facilitate the provision of euthanasia drugs on its premises. Such a body would find no protection under the RD Bill. Again, to draw such a distinction in the RD Bill will set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law.

6. Freedom of Religion Commissioner: cl 45

The RD Bill provides for the appointment of a Freedom of Religion Commissioner within the Australian Human Rights Commission. Clause 45(4) of the RD Bill provides that a person is not qualified to be appointed as the Commissioner unless the Minister is satisfied that the person has appropriate qualifications, knowledge or experience. The RD Bill should include more detailed appointment criteria, in order to ensure that the appointee to this position is a

¹⁰ Paragraph 1.183.

¹¹ Paragraph 1.169.

person who understands religion and the importance of advocating for religious freedom. If this would amount to a violation of s 116 of the *Constitution*, which prevents the imposition of a religious test as a qualification for any office or public trust under the Commonwealth, then ICS takes the view that the position should not be created.

7. Conflict between Federal and State laws

a. Federal RD Bill must be expressed to override State and Territory laws which are directly inconsistent

The RD Bill should override State and Territory laws which are directly inconsistent with it. Clause 60 of the RD Bill includes a concurrent operation provision for State and Territory Anti-discrimination Acts so that in general they continue to operate concurrently with the federal RD Bill. But it must be made clear that if the State or Territory Act does not protect religious freedom to the same extent as the federal RD Bill, the federal RD Bill prevails to the extent of that inconsistency.

For example, if the effect of the federal RD Bill is that an employer cannot require their employees to refrain from expressing or acting on their genuine religious beliefs in the workplace during work hours in specified circumstances but the State or Territory Act provides that the same employer may do so, then the State or Territory Act is closing up an area of liberty left open by the federal Bill and there is a direct inconsistency. An employer should not be able to rely on the State law to justify the employer's actions where the federal law has made them unlawful.

A second example is if the federal RD Bill provides that it is not religious discrimination for religious entities to positively select for and prefer in employment people who live out the religion but the State Act does not give that freedom or only gives it to a narrower class of religious entity (e.g. the State law does not give the freedom to positively select to religious charities like St Vincent de Paul). If a person brought an action for discrimination under the State law against the religious charity, the charity should be able to use the federal RD Bill provision as a defence because the federal right to positively select for religious compatibility overrides the State law to the extent of the inconsistency. This result needs to be made explicit in the drafting of the federal RD Bill.

b. Limited exemption for acts done in direct compliance with prescribed statutory provisions

While the RD Bill should apply to religious discrimination by federal, State, Territory and local government, there may be particular cases where it is not appropriate for the Bill to apply to acts authorised by statute. Section 29 of the Bill provides a blanket exemption for all acts done under statutory authority. The only acts to which the exemption does not apply are those prescribed by regulation. This provision allows governments to easily discriminate against religious believers without justification. The provision should instead allow acts which are done only in direct compliance with the provisions of a statute of the relevant jurisdiction which are prescribed by regulation - for example functions and powers in national security and intelligence agency statutes might be prescribed. Rather than a standing blanket exemption, this approach would follow the approach taken in section 40(2B) of the Sex Discrimination Act:

Nothing in [the anti-discrimination prohibition] applies to anything done by a person in direct compliance with a law of the Commonwealth, or of a State or Territory, that is prescribed by the regulations for the purpose of this subsection.

8. Protecting persons from being forced to express or endorse views contrary to their religious belief

One of the primary ways in which courts applying the European Convention on Human Rights have limited the scope of religious freedom protections is to hold that to require from a person an affirmation or action that is contrary to a sincerely held religious belief is not discrimination.¹² This proceeds from a narrow view of religious freedom, namely, that it is a freedom only to believe and pray and not to manifest the religion in practice in life through what the believer will do or will refuse to say or do on the basis of their religious belief.

Religious persons or entities should not be required to express or support views which are contrary to their genuine religious beliefs. A Muslim should not be required to say the Lord's prayer or a Christian to praise the Prophet Mohammed, nor either of them to affirm that gender is self-determined if their religious belief is that God made humans male and female.

This can be described as the "Asher's Bakery scenario": a person is asked to endorse a view contrary to their religious convictions. In that case, a bakery refused to bake a cake with a pro-gay marriage message on it. Possible drafting to provide this protection is given here:

- (1) Despite any law, it is unlawful for a person to:
 - (a) require another person to engage in relevant conduct in relation to a statement or opinion; or
 - (b) treat another person unfavourably because the other person or entity refuses or omits to engage in relevant conduct in relation to a statement or opinionif the other person or entity holds a religious belief and genuinely believes that the statement or opinion is not consistent with that religious belief.
- (2) In sub-section (1) relevant conduct in relation to a statement or opinion means:
 - (a) expressing, publishing or disseminating the statement or opinion;
 - (b) producing or distributing a thing which expresses or supports or endorses the statement or opinion;
 - (c) associating the second person or entity with the statement or opinion; or
 - (d) endorsing or supporting the statement or opinion.

¹² E.g. *Eweida, Ladele, Chaplin and Macfarlane v United Kingdom* European Court of Human Rights (Fourth Section) 15 January 2013
<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22ladele%22%2C%22documentcollectionid%22:%5B%22CHAMBER%22%2C%22itemid%22:%5B%22001-115881%22%5D%7D>

a. Compelling a person to act against their conscience is discrimination

Further, religious persons or entities should not be required to *engage in acts* which are contrary to their genuine religious beliefs. Where what is required of a religious individual or entity is an act (going beyond expression of a view, considered above) which is contrary to their genuinely held religious belief, that requirement may be imposed in limited circumstances using a balancing of other rights and interests. The following principles bring together the protection against being forced to express or endorse views contrary to their religious belief and the protection against compelling a person to act against their conscience:

Religious discrimination includes requiring, or making a benefit conditional upon, a religious individual or a religious entity having to:

(a) express or support a view, practice or action which is contrary to their genuinely held religious belief; or

(b) act in a way which is contrary to their genuinely held religious belief, unless:

(i) in the case of a requirement imposed by law the requirement is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others and (based on the Siracusa Principles) no lesser limitation on religious freedom would achieve that objective or

(ii) in the case of a requirement imposed by an employer on an employee during work hours or an educational institution on a student during education hours, it is necessary to ensure the effective operation of the workplace or educational institution and (based on the Siracusa Principles) no lesser limitation on religious freedom would achieve that effective operation.

This principle should be absolute in the case of required expression or support of a view, practice or action contrary to a genuinely held religious belief (para (a) above). These principles may also provide guidance for the resolution of competing claims, for example where a claim under the *Sex Discrimination Act* gives rise to a claim by an individual under the RD Bill that they are being compelled to act against their conscience.

As an example of requiring an act contrary to religious belief, if an employee's religious beliefs required prayers at set hours of the work day and the employer forbade that at a certain hour

because it was necessary for the effective operation of the workplace to have that employee engaged in work at that hour, then the requirement would not be unlawful discrimination. However, if the employer could have reasonably arranged work operations to allow the employee to pray at that hour, it would be unlawful discrimination.

As another example, if the law required a health professional to make an effective referral for an abortion or a pharmacist to stock and sell RU486 and doing so would be an act contrary to the person's religious beliefs, the law could require that act but only if it was necessary to protect public health or the rights and freedoms of others and no lesser limitation on the religious freedom of the person would achieve that goal. In practice, this may turn on whether there were other practically available health care providers who would make the abortion referral or dispense RU486. If there were others, then it would not be necessary to require the person with the religious conviction to do so and the requirement would be religious discrimination against that person. If the person with the religious conviction was the only person practically available to provide that service in the area, then the requirement would not be discriminatory against that person.

b. Health Practitioner Conduct Rule

To the extent that the protections to health practitioners are also made subject to weak State laws, which themselves do not adequately protect health practitioners, they are inadequate. In the context of health practitioners, it is also noted that the provisions concerning objection by health practitioners (subparagraph 8(5) and (6)) do not extend to religious hospitals. This does not provide sufficient protection to faith-based health institutions. There are circumstances in which an institution may be compelled to act against its conscience by a person requesting a supply of a service under the RD Bill. For example, a faith-based health clinic that provides IVF, may be subject to a claim for religious discrimination for refusing to supply IVF to a single woman. The claim would be made on the ground that the refusal to supply was based upon the absence of the woman's religious belief, or the holding of a religious belief that took no objection to the proposed service.

9. Religious Freedom and Charities: *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019*

Clause 4 of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* amends section 11 of the *Charities Act*, pertaining to the requirement that a charity must be in

conformity with public policy. That Bill has not, however, amended section 6 of that Act, which requires that charities be for the public benefit. As noted by the Australian Charities and Not-for-profits Commission during the Parliamentary debate on the legalisation of same-sex marriage, for clarity both provisions could be amended to provide that holding a traditional view that marriage is only between a man and a woman and engaging in, or promoting, activities that support only man-woman marriage will not, of itself, disqualify a body from being a charity under the *Charities Act* and so lose its tax status. These amendments are required to ensure the type of charity deregistration described above does not happen to Australian charities.

In England and Wales 19 Catholic adoption charities lost their charitable status and tax concessions because they preferred to place adoptive and foster children with opposite sex married couple than to same sex couples, based on their religious beliefs about God's model for optimal family structures. The Charities Commission considered that those bodies' adoption policies were no longer in conformity with public policy once it became unlawful to discriminate on the grounds of sexual orientation. The relevant law had no "exemptions" or accommodation provisions for religious adoption and fostering bodies. The Charities Commission held that the Catholic bodies' preference meant they no longer had a charitable purpose and were not entitled to charitable status. As a result, the bodies were all closed or sold to secular operators.

There were many secular agencies which adopted and fostered children to same sex couples, so it is difficult to understand why the religious views of the Catholic charities could not have been accommodated in a pluralist democracy along with secular agencies which together served the range of surrendering mothers, children and adoptive and foster parents. In contrast, the Scottish Charities Commission allowed Catholic charities continue their policies based on their religious freedom.

In the USA, the concern about conformity to public policy has led the head of the Internal Revenue Service to clarify that he would not administer the law to disentitle religious adoption charities from tax exemption on the basis that their traditional view of marriage was contrary to public policy. But that is an administrative policy, not the law. On a separate ground, last year the New Zealand High Court held in relation to a Christian lobby group (Family First) that 'it cannot be shown that Family First's promotion of the traditional family unit, though no

doubt supported by a section of the community, if achieved would be a public benefit'. As a result, it lost its charitable status.

This amendment should also be extended to permit charities to engage in, or promote, activities that are based on a genuine religious view that a person's gender is determined by genetics and anatomy rather than a person's self-identification.

10. The equal status of religious freedom with other human rights

Because of the existing structure of anti-discrimination Acts which have drafted religious freedom (and other rights) as "exceptions" to another person's right not to be discriminated against (e.g. on the grounds of relationship status), some courts and commentators have treated the "exception" right (e.g. religious freedom) as having lesser weight than the non-discrimination right. Recognising this, the Ruddock Expert Panel on Religious Freedom recommended 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. (emphasis added)

The current drafting of the proposed objects clause in the RD Bill and the amendments that are proposed to be made to objects clauses in discrimination law under the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* only refers to the 'indivisibility' of human rights. Indivisibility does not parallel 'equal status'. The inclusion of the words 'equal status' alongside indivisibility is necessary to give accurate effect to the Expert Panel's recommendation. These proposed amendments and others would make it clear that Parliament intended that religious freedom has the same status and weight as other human rights.

11. A Religious Freedom Act

This type of Act would go beyond prohibiting discrimination against religious individuals and groups. Suitably drafted, it would provide a statutory limit on government action by Ministers, public servants and councils which unjustifiably burden religion (whether by Federal, State and or local government). The government has not yet committed to introduce a Religious Freedom Act.

The need for such an Act is demonstrated by the weak 'purposive' interpretation the High Court has given to the free exercise of religion clause in s 116 of the Australian Constitution, which as a result has very limited effect. The limitations of s 116 and the generally very poor state of

legal religious freedom protection in Australian law was recently acknowledged by the Commonwealth Parliament Joint Standing Committee on Foreign Affairs Defence and Trade in its First Interim Report on its Inquiry into the status of the human right to freedom of religion or belief.

A Religious Freedom Act would be based on the external affairs power to meet Australia's international obligation to implement ICCPR Article 18. The Act could provide that, where any governmental action places a limitation upon religious belief or activity, an affected person would have the right to bring a court action where the government would need to justify to the court that the burden on religious freedom was:

1. necessary to achieve one of the five objectives of permissible limitation under the ICCPR, namely 'necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others' ; and
2. used no more restrictive means than were required to achieve the objective (this is a corollary of the burden being "necessary" and is made explicit in the Siracusa Principles).

For example, some State Education Departments implemented (at least for a period) rules that no sacred texts or quotes from these texts were to be brought by students into State schools or given by one student to another (even in Christmas cards) arguing that was necessary to provide a "safe environment" for all students. Under a federal Religious Freedom Act which bound the Commonwealth and the States and Territories, the Department would need to justify to a court that it was necessary to have such rules to achieve the objective of safety of students and would also need to justify why no lesser interference with religious freedom was not possible.

Another example would be a policy of a local council or government agency to refuse to hire its meeting rooms for or to provide permits for public meetings which it considered would promote offensive views. While that policy is neutral on its face towards religion, if it was administered in such a way that people with traditional religious views (e.g. that sexual relations should be reserved for man-woman marriage) were treated as promoting offensive views whereas people with competing non-religious views (e.g. that all and any consenting sexual relations between any persons over 16 years were healthy) were not promoting offensive views, there would be a governmental burden on the expression of those traditional religious views. Under a Religious Freedom Act, the council or government agency would have to justify to a court its administration of the policy as it related to the expression of religious views.

A Religious Freedom Act is also a *defensive shield* against acts and practices by governments which unduly burden religious freedom unless they can be justified to a court in terms of Article 18 of the ICCPR as necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Government action which is necessary to protect public and personal safety such as action against terrorism or domestic violence or assaults on people purportedly done in the name of religion will be clearly justifiable and not affected by a Religious Freedom Act. Likewise, government action which is necessary to protect the health of people and the rights of women or children or minorities will be justifiable under a Religious Freedom Act. Such an Act will not authorise separate systems of religious laws or stop justifiable government action which overrides private action based on systems of religious laws.

A Religious Freedom Act effectively forces governments at all levels to think twice before introducing measures which burden religious freedom and, if challenged, to justify the necessity of that burden against five permitted objectives and the extent of that interference to a court.

12. Issues not addressed in the Religious Discrimination Bill

The following issues are not addressed in the RD Bill. Some of them are currently with the Australian Law Reform Commission, which is now not due to report until late 2020. Others are not addressed at all under the government's agenda.

1. parental rights in relation to schooling (in particular, the right of parents to remove their children from teaching that is not in conformity with the parents' beliefs and morals pursuant to Art 18(4)); and
2. the rules for allowing schools and religious bodies to manage their affairs in accordance with their faith under the *Sex Discrimination Act* and other discrimination laws.

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