Submission on the Second Exposure Drafts 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 Second Exposure Draft of the Religious Discrimination Bill (RDB2) is a considerable improvement on the First Exposure Draft. We welcome the fact that a number of our concerns that were raised in our submission on the First Exposure Draft have been addressed. However, a number of those concerns remain unaddressed and new provisions have been added to the Bill that give rise to additional concerns. There are therefore a number of further amendments and improvements that should be made in order to effectively protect individuals and organisations from religious discrimination 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 the following:

1. **The test that a religious believer must 'reasonably consider conduct or belief to be in accordance with the doctrines, tenets, beliefs or teachings of the religion' is an improvement on the prior test but is still highly problematic.**

   At the very least it should be made explicit in the Bill that there can be multiple and conflicting reasonably considered views by believers in the same religion as to whether particular conduct or a belief is in accordance with the doctrines, tenets, beliefs or teachings of the religion (consider for example the different and conflicting positions on treatment of divorce and same sex sexual relationships within some religions). If this is not made clear a court may consider there is only one reasonably considered view of whether conduct or belief is in accordance with doctrine and exclude all others. This would effectively intrude the State into deciding disputes and disagreements on doctrine and beliefs within a religion. It will also lead to the State telling a believer that their sincerely held religious belief was an "incorrect" version of a religion and not worthy of protection from discrimination.

   Some conduct in accordance with genuine religious belief should not to be protected from discrimination. But that is far better achieved by the other specific provisions in the Bill which exclude protection of certain conduct *based on the nature of the conduct* (eg the reasonableness defence to indirect discrimination, no protection for unlawful conduct and no protection for statements of belief which are malicious or incite hatred) rather than by a court telling a person whether they have got their sincere religious beliefs right or not. A much better solution is to replace the "reasonably considered to be in accordance with doctrine" test with a test that the person whose conduct or belief is in question *genuinely believed that their conduct or belief was in accordance with the doctrines, tenets, beliefs or teachings of the religion*. The test of genuineness of belief is used across the common law world. (page 12).

   The RDB2 requires a judge to construct a hypothetical religious believer and then determine whether that believer would 'reasonably consider that the [complainant or religious body's beliefs or conduct are] in accordance with the doctrines, tenets, beliefs or teachings of that religion.' This test must be satisfied by religious bodies seeking to defend a claim of religious discrimination under clause 11, by employees in respect of statements made outside of the workplace (subclause 8(3)), by accredited professionals and tradespersons in respect of

statements made outside the course of their employment (subclauses 8(4) and 32(6)), by health practitioners seeking to assert a conscientious objection (subclauses 8(5) and (6) and 32(7)) and by a person seeking to defend a discrimination claim for a statement of belief that they have made under clause 42.

We list five significant concerns with this test. Courts and academics across the world have emphasised the importance of avoiding exercises that measure an individual's beliefs against the beliefs of other members of the religion. Where a range of views on a particular doctrinal matter exist within a 'religious denomination, sect, stream or tradition' (to use the words employed in the EM), how is a court to determine which view is the correct one that would be adopted by a 'reasonable' religious believer? Either the court will have to prefer one view over another, or it will conclude that that the particular beliefs of the complainant or respondent are not beliefs that are to be attributed to the 'relevant reasonable person' and the protections are lost. Perhaps most concerning, the test could conceivably have divisive consequences, causing 'religious denominations, sects, streams or traditions' to clarify their official position on contentious matters. In this way, the Bill risks undermining the ability of religious denominations to bring together believers who hold sincere, albeit differing, convictions in respect of the same religious texts.

The Bill displaces the High Court's jurisprudence by requiring a judge to objectively determine what conduct is sanctioned by a reasonable believer, regardless of the sincerely held convictions of the believer-claimant/respondent in question.

Instead, the focus should remain on the sincerity of the belief, consistent with the approach taken amongst leading common law jurisdiction Courts across the world, including the High Court in the Scientology Case, the Supreme Court of Canada, the House of Lords and the United States Supreme Court. These sincerity tests recognise that when limitations are to be imposed upon the manifestation of religious beliefs, they should be imposed *after* the sincere belief has been evidenced, rather than through a refusal of the claim as a properly asserted religious claim, which engages the court in an unnecessary exercise of resolving doctrinal disputes. Importantly, a sincerity test will not permit a religious believer to merely write themselves into legal protection. In the *Scientology* case in the High Court, Mason ACJ and Brennan J after endorsing the test of sincerity of belief stated that it would not lead to the acceptance of a trumped up religious belief that was no more than a parody of religion or a sham such as the claimed religion of "Chief Boo Hoo" and the "Boo Hoos".

Even if the government persists with the test that a person of the same religion would 'reasonably consider that the [complainant or religious body's] beliefs or conduct are in accordance with the doctrines, tenets, beliefs or teachings of that religion', it is essential to make explicit in the Bill that there can be multiple and conflicting reasonably considered views by believers in the same religion as to whether particular conduct or a belief is in accordance with the doctrines, tenets, beliefs or teachings of the religion. If this is not made clear a court may consider it must choose the one reasonably considered view of whether something is in

accordance with doctrine and exclude all others which effectively intrudes the State into deciding disagreements on religious doctrine.

2. Protection of incorporated religious bodies from discrimination and the new Associates clause– see also points 12 and 13 below

In addition to the external affairs power, the corporations power enables the Parliament to (a) protect a constitutional corporation from discrimination on the basis of religious belief or activity and (b) to make it unlawful for a constitutional corporation to discriminate against an individual or incorporated or unincorporated body on the basis of the religious belief or activity of that individual or body. The Bill does the second of these in clause 59 but not the first. To facilitate the first would require a provision as to how a corporation demonstrates a religious belief and our first submission addressed that need. To confer protection from discrimination on a constitutional corporation is within the core of the corporations power and not its incidental scope. That could be done though a further additional operation provision like clause 59. Such an additional operation provision would be a severable provision if it were held invalid, but we think there is no basis for it being held invalid given the *Work Choices case*.

Newly inserted clause 9 on associates appears intended to be the mechanism through which religious corporations, such as schools or charities, will be able to assert a complaint of religious discrimination under the Bill. The intended application of clause 9 is not clear and may be ineffective. Several issues need to be addressed to make it effective.
(a) As the AHRC has emphasised in respect of the equivalent provisions in the Disability Discrimination Act 1992, the definition of direct and indirect discrimination do not but need to make reference to how they are to be applied to associates. We propose drafting to address this concern.
(b) The substantive provisions dealing with unlawful discrimination across various fields of Australian life in the RDB2 (under Part 3) do not but should cover discrimination against associates. In the absence of reference to associates within the definitions of discrimination and the substantive provisions, the effective force of clause 9's application to associates may well be lost and the clause is rendered meaningless.
(c) Unlike the DDA, the Bill fails to define 'associate'. By operation of ejusdem generis the drafting appears to limit the wider application of the associate's clause to bring it within the class 'of near relatives. To avoid the need to resolve the uncertainty as to the reach of the notion 'associate' through costly litigation, the Bill should provide a definition and that definition should include the relationship between incorporated and unincorporated religious bodies and their members and board members and, in the case of bodies conducting or facilitating religious gatherings, the attendees at such gatherings.

We support both the above changes to make the associate provisions effective and the use of the corporations power to give the Bill additional operation to protect constitutional corporations as described above. See also points 12 and 13 below.

3. Problems with some aspects of defining 'statement of belief' and the scope of protection

Various provisions of the Bill protect statements of belief which are made in good faith, not malicious, harassing, vilifying, inciting hatred or violence (we refer to these as "reasonable statements of belief") e.g. clause 42 of the Bill. The purpose and effect of the test that the statement is made in 'good faith' is unclear. If it means that it is not made in bad faith, then the requirement that the statement not be malicious already seems to cover that. If its purpose is that the belief be genuinely held then provide for that. A requirement of "good faith" could be interpreted in many unhelpful ways, imposing secular (and inappropriate) considerations, such as a statement is not made in good faith if the maker of the statement know that the statement could cause offence and distress to the person to whom it is addressed.

Puzzling new amendments to the Bill protect only statements made 'by written or spoken words'. Many religious statements are made by pictures, images and symbols such as a cross or crucifix or menorah. In the UK a mobile electrician was threatened with dismissal for displaying an 8-inch palm cross on the dashboard of his company van. Is that not a statement of belief which should be within clause 8(3)'s protections from employer conduct rules and within clause 42 even though it is not written or spoken words? The clause excludes the display or symbols and pictures and drives a wedge between religious belief and religious action.

Additionally, the Bill provides no clarification as to whether the words 'malicious', 'harass', 'threaten' or 'seriously intimidate' focus on the subjective intent of the statement maker (presumably "malicious" does) or the response of the hearer, or the response of a reasonable member of the community. The EM provides no substantive clarification as to the operation or intended meaning of these words. The Bill should make clear that the test is whether a reasonable person would be harassed, threatened or seriously intimidated by the statement in the circumstances.

The protection for reasonable statements of belief in clause 42 is commendable, however if an employer can still sack or discipline an employee for a reasonable statement of belief, or an education authority can discipline a student or a qualifying body impose a detriment or remove a right to practise a trade or business or a grant body reject an application because of a person's reasonable statement of belief, the protection offered by the RDB2 clause 42 of itself is very limited. Hence there must also be protection of reasonable statements of belief from indirect discrimination through conduct rules by employers, partnerships, qualifying bodies, registered organisations, employment agencies, educational institutions and providers of goods, service and facilities and accommodation included in clause 8. So far, the Bill only provides this protection against conduct rules of employers and qualifying bodies and only to a limited extent.

4. Clause 42 must protect statements of belief from vilification complaints as well as discrimination complaints (page 27)

Clause 42 should protect reasonable statements of belief (as defined in 42(2)) not only from complaints of discrimination under anti-discrimination law, but also from complaints made pursuant to State or Territory prohibitions on vilification whether those prohibitions are in anti-discrimination laws or in standalone vilification laws like the Racial and Religious Tolerance

Act (Vic). Religious speech may in comes cases constitute technical discrimination and therefore the current draft clause 42 has work to do. However, the failure to extend the provision to vilification laws is a very serious omission, undermining the stated aim of the provision. The most significant limitations placed upon religious speech within Australia are imposed under vilification provisions, which are distinct from the relevant prohibitions on discrimination.

5. A narrow interpretation of what constitutes a "religious activity" could render the Bill largely useless: cl 5 (page 28)

The words 'religious activity' in clause 5, may be read too narrowly in accordance with some existing judicial precedent and be restricted to activities such as prayer and worship, but not to the manifestation of religious, moral or ethical views. The Bill protects some statements of belief made outside work hours by employees in large businesses from discriminatory codes of conduct but the majority of statements of belief are not protected from discrimination unless they fall within the phrase "religious activity". If existing judicial precedent to that effect is applied under the Bill, that interpretation has the potential to exclude religious statements on matters such as marriage, gender or the family from the Bill's protections, or to exclude religiously motivated acts, or to exclude refusals to perform 'secular' acts that are contrary to religious teaching. *The definition of religious activity should be amended to cover any conduct to which the religious person has a genuine conviction is in accordance with or in furtherance of religious doctrine or beliefs. Appropriate limitations on permitted religious should be dealt with through other means such as the requirement that the activity or statement not be in breach of the law.*

6. Application of the comparator test: cl 7 (page 28) and Reforms to clauses 7 and 8 to introduce a reasonable accommodation requirement for religious belief and activity along the lines of the Disability Discrimination Act's reasonable adjustment requirement

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. We discuss how the Bill can avoid this outcome including by using a reasonable adjustment requirement

There should be a new provision in the Bill requiring those who may discriminate in the relevant fields where unlawful discrimination is prohibited (e.g. employment, accommodation, provision of good and services) to make reasonable adjustment for people who refuse to engage in conduct or to express or associate themselves with particular views because of their genuine religious beliefs e.g. the Jewish or Adventist believer who won't work on Saturday, the Muslim who needs to be absent from work duties to pray at midday on Friday, the health practitioner who won't participate in abortion or euthanasia.

There is a similar concept of *reasonable adjustment* in the Disability Discrimination Act.

We propose amending both clause 7 on direct discrimination and clause 8 on indirect discrimination to require persons who may discriminate on the basis of a religious belief or activity to make reasonable adjustments for persons with that religious belief or activity.

This will reduce the comparator test problem that courts may say there is no discrimination if the same consequences apply equally to all persons who engage or refuse to engage in particular conduct regardless of whether the conduct is motivated by religious belief.

In terms of indirect discrimination, we propose that both:

(a) the *result* sought by the person imposing the condition, requirement or practice (e.g. that all staff must be working at midday on Fridays if rostered on or all interns must assist as required at all medical procedures) must include a reasonable adjustment for religious belief and activity of people affected by the conditions, requirement or practice; and

(b) the condition, requirement or practice itself must make a reasonable adjustment for religious belief and activity of people affected by it (e.g. no roster swaps or flexitime can be taken for absences at midday on Friday, or interns who do not attend a medical procedure when required will lose pay and promotion credits).

7. Defining "lawful religious activity": cl 5 (page 29)

This definition at clause 5 permits the Bill's protections to be held hostage to the whims of State 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 practices (such as is currently proposed in Queensland and Victoria), even should that ban limit teaching , prayer, counselling or pastoral care based on traditional religious views of human sexuality; or a State Government requiring that faith-based aged-care providers facilitate euthanasia on their premises.

The Queensland *Health Legislation Amendment Bill 2019*¸promulgated after the release of the First Exposure Draft, criminalises any act of conversion therapy by a health practitioner, including unregistered counsellors. On passage of the Queensland Bill, any public or private religious school chaplain prosecuted for affirming a traditional Biblical view of gender would not be protected under the RDB2, as the act of affirmation is not 'lawful' under Queensland law. Further, we note that any such 'statement of belief' would not be protected under clause 42, as the provisions prohibiting such statements are not made within the context of 'discrimination' law prohibitions. If the Queensland Bill or the Victorian proposal becomes law they should be added to the list in clause 42(1) or prescribed by regulation for the purposes of clause 42.

8. The reasonableness requirement for indirect discrimination: cl 8 (page 31)

The 'reasonableness test' for indirect discrimination under clause 8 devolves significant matters of policy to the courts. The reasonableness criterion for indirect discrimination in cl 8(1)(c) is not consistent with the relevant international law which only permits such limitations on manifestation of religious belief which are established by law and which are "necessary" to ensure public safety, order, health or morals, or the fundamental rights of others (ICCPR Art 18). The reasonableness defence to indirect discrimination in clause 8(1) does not use any concept of necessity but instructs a tribunal or court to determine whether the disadvantage is proportionate to the result sought to be achieved by the person imposing the condition or

practice which discriminates against religion. A proportionality test is a broad gift of policy making power to the tribunal or court.

The proportionality test should be replaced with a test that
(a) the condition, requirement or practice must provide reasonable accommodation for the religious beliefs, expression of beliefs and religious activities of persons affected by it; and
(b) the condition, requirement or practice must create no more disadvantage for persons of the religious belief, and no more limitation of such persons' ability to hold or express their religious belief or engage in a religious activity, than is necessary to achieve a result sought by the person who imposes the condition, practice or requirement.

In addition, Commonwealth law should only permit religious manifestation to be limited where such is consistent with the international standard Australia has ratified. Where a set of circumstances gives rise to a claim of discrimination under the *Sex Discrimination Act 1984* and a crossclaim of religious discrimination under the Bill, the two claims should be balanced according to the 'necessary' limitations standard set out in the ICCPR.

9. The employer conduct and qualifying body conduct reasonableness rules: cl 8(3) and 8(4) and extending protection of reasonable statements of belief to education and other areas of discrimination (page 32)

The provisions under clause 8(3) of the RDA effectively introduce an implied presumption that regulation of statement of belief of employees by small employers and government is reasonable, whether within or outside their workplace. Similarly, the provisions introduce an implied presumption that regulation of the speech of employees of large employers within the workplace is reasonable. It also introduces an implied presumption that regulation of the speech of accredited professionals and tradespersons by qualifying bodies within the course of their profession or trade 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. That framework starts with the proposition that no employer or qualifying body can restrict an employee's freedom to state their genuine religious beliefs, whether within or outside the workplace, with exceptions applying for criminal activity, for vilification, and where internal workplace restrictions are required for the effective operation of the workplace.

If the special rules about employer conduct rules and qualifying body conduct rules which limit reasonable statements of belief are retained, they should be expanded to cover educational institutions and accommodation providers. Not all education institutions are qualifying bodies in respect of all their students because some of the courses they offer do not qualify or facilitate entry into a profession or trade. Many tertiary education institutions have over-reaching codes of conduct purporting to regulate what students can say off campus in their own time. These

have the potential to restrict freedom of religious speech through imprecise language around maintaining respect and student well-being and appeals to 'reputational damage'. Some of these were criticized in the review into University Freedom of Speech by the Hon Robert French AC.[1] There are currently many Australian universities with written policies which could be applied in ways which violate the religious freedom of the student.[2] Many of these apply to all on-campus and off-campus expression by students including all online expression regardless of whether there is any connection between the communication and the student's enrolment at the university.[3] We recommend a provision stating that education institution conduct rules are not reasonable to the extent they limit reasonable statements of belief by students.

10. The exception for inherent requirements: cl 32

Clause 32 of the RDB2 permits discrimination against a person in employment (cl 14) or partnerships (cl 15) or in relation to qualifying bodies (cl 16) or by employment agencies (cl 18) 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 RDB2 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. To clarify that the 'inherent requirements' test cannot be abused by employers who assert that a religious believer's expression of belief or conduct is contrary to the requirement that all employees support the secular "values" of the organisation an example to that effect should be provided in the Bill itself. 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. Religious businesses such as medical practices or law firms should be able to maintain their ethos by preferring employees who share their faith, not just in respect of senior leadership roles, but across the entire organisation. The inclusion of new cl 8(4) will require, for consistency with 32(6) and 32(7) in respect of employer conduct rules and health practitioners conduct rules, the inclusion of a subparagraph that provides any qualifying body conduct rule that contravenes cl 8(4) cannot impose an inherent requirement under cl 32.

[1] https://docs.education.gov.au/system/files/doc/other/report_of_the_independent_review_of_freedom_of_speech_in_australian_higher_education_providers_march_2019.pdf, page 151.

[2] The Institute for Civil Society has developed a list of these university policies, and the review into University Freedom of Speech by the Hon Robert French AC also raises similar concerns.

[3] Eg. Monash University Student Use Procedures - When using social media in the context of education or research training, and when making identifiable personal use of social media, students must not:

- make any comment or post material that is, or might be construed to be, racial or sexual harassment, offensive, obscene (including pornography), defamatory, discriminatory towards any person, or inciting hate;
- make any comment or post material that creates, or might be construed to create, a risk to the health or safety of a student, contractor, staff member or other person, including material that amounts to bullying, psychological or emotional violence, coercion, harassment, sexual harassment, aggressive or abusive comments or behaviour, and/or unreasonable demands or undue pressure;

11. Application to corporations and other unincorporated bodies (page 37)

The addition of the 'associates' clause' (clause 9) appears intended to preclude a corporation from making a religious discrimination claim as a 'person' in its own right. To provide sufficient certainty as to their protection (and in light of the novelties associated with clause 9), the original intent of the Bill in allowing corporations to directly assert a claim of religious discrimination should be reinstated (in addition to addressing the concerns stated above in respect of clause 9). The Commonwealth has clear power to protect corporate bodies utilising the Constitutional corporations power, and both incorporated and unincorporated bodies through the external affairs power.

Even with that clarification the Bill would not make sufficiently clear that the full range of incorporated 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.

12. Representative actions (page 40)

Representative actions do not provide sufficient protection for incorporated or unincorporated associations. Part IVA of the Federal Court of Australia Act 1976 only permits such actions to be initiated where seven or more people have been discriminated against. The result is that unincorporated bodies that have less than seven members will not be able to either assert that they comprise a 'person' in order to lodge a direct complaint under clauses 7 or 8 or take the benefit of the protections to associates at clause 9. The representative complainant provisions in the Australian Human Rights Commission Act 1986 are largely untested and rarely utilised. In order to be enlivened, the provisions require that any incorporated or unincorporated body be the subject of the discrimination. If an incorporated or unincorporated body is not a 'person' protected from discrimination under the Bill, a representative complaint may not be lodged on its behalf.

13. Scope of Protected 'Fields' (page 40)

In order to provide sufficient protection to incorporated and unincorporated bodies, clause 21 of the Bill should also clarify that the protected 'field' of 'services' clearly includes the determination of funding and the allocation of contracts and tenders by State and Territory Governments. It should be unlawful for such Governments to engage in religious discrimination, regardless of whether they are operating under a Commonwealth programme or law under clause 27.

14. Clause 16 should extend to the qualifications of corporate bodies, not just individuals (page 40)

The Bill should clarify that the provisions binding qualifying bodies (at clause 16) extend not just to individuals (for example in the accreditation of foster carers or adoptive parents or tradespeople or professionals), but also to corporate bodies. This will grant protection to bodies such as accredited independent faith-based schools or tertiary education providers or incorporated student clubs within universities or accredited service providers under government or other contracts. It is not at all clear that the associate's clause (clause 9) would protect such bodies if the protected field of accreditation extends only to individuals.

15. The provisions enabling Religious Bodies to Preference employees and members on religious grounds has become unwieldy with the use of Public Benevolent Institutions and the unprecedented exclusion of religious bodies that undertake "Commercial Activities": cl 12 (page 40). We propose a more nuanced policy regime.

Appendix 1 provides a table overviewing the proposed regime in RDB2. From this overview, it is readily apparent that the Bill introduces a very complicated regime and excludes a range of religious charities that are not excluded by existing exemption provisions in Commonwealth anti-discrimination law. PBIs comprise a very limited proportion of the wider religious and faith-based charitable sector (including churches). The new bespoke rules for aged care and hospitals do not allow them to act in accordance with their religious convictions (including in respect of euthanasia or IVF). The regime will prevent a sizeable proportion of the charitable and not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake. This submission analyses ACNC data to identify the wide range of excluded faith-based organisations as a result of the commercial activities test. These include, for example, faith-based marriage guidance and marriage or family counselling organisations, radio stations, public libraries, civic activity bodies, culture, historical and arts bodies, environmental bodies, grant-making and philanthropic, bodies volunteering bodies, religious bookstores (whether for profit or not), and childcare centres. The exclusions have no precedent in any anti-discrimination law in any jurisdiction in Australia (or any common law-based democracy). Drawing such distinctions in the RDB2 will set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law. Finally, it is important to note that the exemptions granted to religious bodies in anti-discrimination law have never been limited to charities alone. In 2010 the Productivity Commission estimated the number of Australian not-for-profits (bodies not able to distribute profit to their members) to be in the order of 600,000 (there are around 57,000 charities registered with the ACNC).

In Appendix 2 we set out the preferred policy framework for deciding when various classes of religious organisations can and cannot apply preferences on religious grounds in:

- The selection of members and governors (e.g. board members) of the organisation
- Employment decisions relating to staff, contractors and volunteers
- Selection of attendees, clients or recipients of benefits, facilities or services provided by the organisation
- Rules limiting the use of facilities, products and services provided to members, attendees, clients or recipients of services where the rules are in accordance with the doctrines, tenets, beliefs or teaching of the religion

16. Freedom of Religion Commissioner: cl 45 (page 45)

The RDB2 should include more detailed appointment criteria, in order to ensure that the appointee to this position is a person who understands religion and has experience with religious freedom issues. This does not require that the person be a member of any religion or hold a religious belief.

17. Federal RDA should be expressed to override State and Territory laws which are directly inconsistent (page 45)

It should 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 prevails to the extent of that inconsistency. We give examples of such inconsistency below.

For example, clause 62(1) could add at the end: "but this Act is intended to exclude or limit the operation of a law of a State or Territory to the extent that law is inconsistent with this Act within the meaning of section 90 of the Constitution".

18. Compelling a person to act against their conscience is discrimination (page 47)

Religious persons or entities should not be required to engage in, or affirm, acts or statements 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 (including by making benefits conditional upon such affirmation) is religious discrimination.

Religious discrimination includes requiring, or making a benefit conditional upon, a religious individual or a religious entity having to express or support (including by conduct) a view, practice or action which is contrary to their genuinely held religious belief.

19. Health Practitioner Conduct Rule (page 48)

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. New statements in the Bill and the EM call into question the ability of the health practitioner to assert a claim of religious discrimination where the patient could be considered to be a subclass of the wider public. This draws an arbitrary line: the religious basis for a conscientious objection to providing a service to a particular class of persons may be as doctrinally sound as the religious basis for refusing to provide a type of service to all persons. As a result of the new clarification provided, the 'unjustifiable adverse impact' test now appears to capture almost any imposition on a patient, regardless of the profundity of the effect on the religious health practitioner.

20. Protection of Charities - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019: cl 4 (page 50)

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.

21. Issues not addressed in the Religious Discrimination Bill (page 52)

The following issues are not addressed in the RDB2. 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.

- Religious Freedom Act (page 52) - 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.
- 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.

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

1. Conduct 'a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines …' test

In order to gain the Bill's protection several provisions require a judge to determine that the conduct in question satisfies the following test: 'a person of the same religion as the first person could reasonably consider [the conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.' This test must be satisfied by religious bodies seeking to defend a claim of religious discrimination under clause 11, by employees in respect of statements made outside of the workplace (subclause 8(3)), by accredited professionals and tradespersons in respect of statements made outside the course of their employment (subclauses 8(4) and 32(6)), by health practitioners seeking to assert a conscientious objection (subclauses 8(5) and (6) and 32(7)) and by a person seeking to defend a discrimination claim for a statement of belief that they have made under clause 42.

The EM clarifies that the provisions are intended to create a 'reasonable' religious believer test. It provides the following important clarification (at paragraphs 237 to 239):

> This provision imports an objective reasonableness test. This will ensure that courts are not required to determine whether particular conduct is in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, but rather whether members of that same religion would reasonably consider that to be so. This recognises as a matter of general principle that courts are not well-placed to make decisions on matters of religious doctrine, and whether conduct conforms with such doctrine, and will avoid the need for courts to do so.
>
> The requirement for an assessment as to whether a person could reasonably consider whether conduct is in accordance with the doctrines, tenets, beliefs or teachings of a religion recognises that religious bodies implement the teachings of their faith in a variety of ways and should have the autonomy to do so. The requirement for reasonableness means that strict or technical interpretations as to the requirements of a doctrine or undertaking is not required; religious bodies in this respect have a 'margin of appreciation' about how they conduct their activities in accordance with their faith.
>
> A person of the same religion for the purposes of this test is intended to be a person of the same religion, or relevant religious denomination, sect, stream or tradition, as the religious body. For example, *the relevant reasonable person* in relation to conduct engaged in by a Methodist church would be a Methodist person, rather than a Catholic person, or a Christian generally. In addition, *the relevant reasonable person* in relation to conduct engaged in by an Orthodox Jewish religious body would be a reasonable Orthodox Jew who adhered to that religious stream (emphasis added).

In respect of the equivalent formulation at the definition of 'conscientiously object' at section 5(1), the EM similarly states (at paragraph 168):

> Finally, a person of the same religion must be able to reasonably consider that the objection is in accordance with the doctrines, tenets, beliefs or teachings of that religion. For example, this

> definition would likely capture a Catholic nurse who refused to participate in abortion procedures consistent with Catholic beliefs and teachings that life begins at conception. The relevant 'religion', in this sense, is the denomination, sect, stream or tradition to which person adheres.

Through these means the Bill requires a judge to artificially construct a hypothetical religious believer and then determine whether that believer would 'reasonably consider that the [complainant or religious body's actions are] in accordance with the doctrines, tenets, beliefs or teachings of that religion.' We have significant concerns about this definition, broadly grouped under the five following areas.

First, where a range of views on a particular doctrinal matter exist within a 'religious denomination, sect, stream or tradition' (to use the words employed in the EM), how is a court to determine which view is the correct one that would be adopted by a 'reasonable' religious believer? Either the court will have to prefer one view over another, or it will conclude that that the particular beliefs of the complainant or respondent are not beliefs that are to be attributed to the 'relevant reasonable person' (to again use the words employed in the EM) within that religious 'denomination, sect, stream or tradition'. Because there is a difference of opinion, a reasonable religious believer of that denomination need not hold the particular asserted view. If there is a range of views on a particular matter within a tradition, a court may well conclude that this must be an area in which reasonable religious believers might disagree. It will thus fall out of the realm of the Bill's protections. In this way the protections offered by the Bill are relegated to the lowest common denominator, matters over which uniform agreement is held.

In substance this latter approach was the approach adopted by the Victorian Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*[4] *(Cobaw).* That judgement illustrates the primary danger in tests that look to whether a belief is held by other religious believers: where a court is able to locate some variation in opinion amongst religious believers, it can use this to assert that there is no central doctrine or belief that is promulgated by the religion in respect of that matter. In *Cobaw* Maxwell J said:

> 277 The appeal submission for the applicants was that her Honour erred in viewing particular teachings and beliefs as applications of doctrine, rather than as doctrine in themselves. This conclusion was said not to be open on the evidence. In my opinion, this submission must be rejected. On the evidence before her Honour, the distinction was inescapable.
>
> 278 Mr Keep said that the doctrines listed in the Trust Deed were 'the fundamental beliefs and doctrines of Christian Brethren'. They were 'the core doctrines'. Plenary inspiration was the only one of those doctrines which was said to have any bearing on the present issue. According to each of the experts called by CYC, it was by virtue of that doctrine, as it applied to the relevant passages from the Bible, that members of the Christian Brethren believed that homosexuality was contrary to God's will.
>
> 279 As noted earlier, the applicability of that doctrine to individual passages in the Bible was shown by the evidence to be quite variable, and to have changed over time. *Mr Keep acknowledged, moreover, that there was even some diversity between Christian Brethren*

[4] [2014] AVSCA 75.

> *congregations as to which parts of the Bible were to be applied literally.* These were properly to be regarded as applications of doctrine, as her Honour found.[5] (emphasis added)

In *Cobaw*, the Court held that a religious group could not act in accordance with what they asserted were their genuinely held convictions in respect of sexuality because of the presence of (what the Court said were) differing views within the wider relevant religious movement. In substance the Court told the believer what the content of their religious belief entailed. This was not necessary, as the real question to be determined was whether the particular manifestation of that belief engaged in by the believer would be permitted in a plural society.

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.

Second, and perhaps most concerning, the test could conceivably have divisive consequences, causing 'religious denominations, sects, streams or traditions' to clarify their official position on contentious matters, rather than allowing for individual members to retain fellowship while holding to their own sincerely held convictions on particular applications or interpretations of religious texts. In this way, by failing to measure the protections against the sincerely held convictions of religious believers, the Bill risks undermining the ability of religious denominations to bring together believers who hold sincere, albeit differing, convictions in respect of the same religious texts. The history of church relations within the West demonstrates that reasonable people can 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 Bill fails to appreciate this possibility, in fact, it potentially undermines this ability.

Third, by necessity, the Act will see the amassing over time of a body of law comprised of that which the State regards as 'reasonably in accordance with' the 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'.[6] As Lord Nicholls 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'.[7]

Fourth, some insight may be gained from judicial treatment of akin provisions in existing law that require judges to weigh a form of conduct against the response of an artificially created hypothetical 'reasonable' person to whom is ascribed particular attributes. Existing authority demonstrates that such efforts are fraught with complexity and devolve significant discretion to the courts. By parity of reasoning, the test at section 11 requires a similar exercise to that proposed by section 18C of the *Racial Discrimination Act 1975*, namely the creation of a hypothetical person, the imputation of certain attributes to that person and the subsequent determination of the legitimacy of impugned actions against, what would hypothetically be, the views of that hypothetical person, in this case, the reasonable religious believer.

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[5] *Ibid*, para 277-9.
[6] *Syndicat Northcrest v Amselem* (2004) 2 SCR 551, 65.
[7] *Williamson* [2005] UKHL 15, 22 per Lord Nicholls.

The judgement of Bromberg J in *Eatock v Bolt*[8] provides ample demonstration of the complexity and uncertainties entailed in such an analysis. In endeavouring to determine whether certain 'Newspaper Articles were reasonably likely to offend … from the perspective of the "ordinary" or "reasonable" member of the group in respect of which the claim was made'[9] Bromberg J attributed the following characteristics to reasonable members of the group (direct quote):

> will, like most people, have been raised to identify with a particular racial identity;
>
> will not have chosen to identify as an Aboriginal person as a conscious choice but will have been raised to identify as an Aboriginal person and identified as such since childhood;
>
> will have a non-Aboriginal parent or earlier ancestor;
>
> will have had significant exposure to Aboriginal culture;
>
> will regard herself as genuinely Aboriginal and entitled to be recognised as such by the rest of the community;
>
> will regard her cultural and lived experiences as an Aboriginal person to be a vital aspect of her identification as an Aboriginal person;
>
> will be sensitive to appearance based, or purely biologically based assessments of racial identity which give little or no regard to her cultural and lived experiences;
>
> will be sensitive to suggestions that she is not Aboriginal or not sufficiently Aboriginal to be identifying as such, particularly when made by non-Aboriginal people;
>
> will have experienced racism from non-Aboriginal persons;
>
> will have, because of her appearance, experienced challenges to her identity as an Aboriginal person and has or does feel vulnerability as a result; and
>
> will have strong feelings of solidarity with other Aboriginal people who, like her, have pale skin and are exposed to challenges to their identity by reason of their appearance.[10]

It was against the '"reasonable" member of the group' who exhibited these imputed characteristics that Bromberg J then determined whether offence had been given. The matter illustrates the complexity that can arise in efforts to ascribe attributes to a reasonable member of a race. To what extent will that same exercise be further complicated where it is applied by a court endeavouring to ascribe agreed beliefs to members of 'religious denominations, sects, streams or traditions'? The analysis of the Victorian Supreme Court of Appeal in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc*[11] provides a further illustration of the complexities that entail from legislation that requires judicial determination of the attributes of a reasonable member of a group. Such tests provide little certainty for religious bodies endeavouring to operate in a way that complies with the law.

Fifth and finally, the importance of avoiding exercises that measure an individual's beliefs against the beliefs of other members of the religion has been recognised by courts and academics across the world. This is often linked to warnings against placing reliance on the testimony of experts. Against

[8] [2011] FCA 1103 (28 September 2011).
[9] *Ibid,* para 268.
[10] *Ibid,* para 282.
[11] [2006] VSCA 284 (14 December 2006)

these warnings, in application the Bill will lead to contests between 'religious experts' as to the appropriate interpretation of religious doctrine. Use of such means contemplate the possibility that a sincerely and genuinely held belief will be defeated as a belief that is not religious simply because of a dispute as to doctrinal interpretation. That is not necessary, when the ultimate question is whether the manifestation accompanying the belief is to be accommodated in a plural society. As Julian Rivers writes 'Courts often remind themselves that it does not matter whether the litigant is part of a recognised religious community asserting a right on behalf of many others, or an individual with idiosyncratic views; each deserves respect.'[12]

This reticence to rely upon agreement amongst religious devotees defines the position in the United States. For example, in *Thomas v. Review Board of the Indiana Employment Security Division*,[13] the court held that it was the plaintiff's subjective beliefs, and not the official position of the particular religion, which must be considered in evaluating the free exercise guarantees under the First Amendment of the U.S. Constitution. In delivering the opinion of the U.S. Supreme Court, Chief Justice Burger stated:

> . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, *it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation*.[14] (emphasis added)

The Supreme Court of Canada has also avoided an approach that requires determinations of belief against the beliefs of other members of the religion. Having reviewed a range of authorities considering the question 'what is the definition and content of an individual's protected right to religious freedom under the Quebec Charter', Iacobucci J, with whom the majority agreed, held in *Syndicat Northcrest v Amselem*[15]:

> The emphasis then is on personal choice of religious beliefs. In my opinion, these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion.
>
> *Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make;* see, e.g., Re *Funk and Manitoba Labour Board*. In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" and not that a particular belief is "valid"… in *Ross v. New Brunswick School District No. 15*, … La Forest J. reasoned that "it is not the role of this Court to decide what any particular religion believes".[16] (emphasis added, citations omitted).

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[12] Rivers, Julian, *The Law of Organized Religions, Between Establishment and Secularism* (Oxford University Press, 2010), 321.
[13] 450 U.S.707 (1981).
[14] *Ibid,* at pp. 715-16.
[15] *Syndicat Northcrest v Amselem* (2004) 2 SCR 551.

[16] *Syndicat Northcrest v Amselem* (2004) 2 SCR 551, [43]. See also *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [33].

Justice Iacobucci emphasised the danger of evidencing a person's belief by reference or comparison to standards held by others who hold the same belief:

> A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief.
>
> An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.[17]

This same approach has been adopted in the United Kingdom. As Lord Nicholls, with whom the Court agreed, set out in *R (on the application of Williamson) v Secretary of State for Education and Employment* (*Williamson*)[18]*:*

> emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question *or the extent to which the claimant's belief conforms to or differ from the views of others professing the same religion*. Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also notes religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.[19] (emphasis added, citations omitted).

The Australian High Court has also placed the same emphasis on the genuineness or sincerity of belief in assessing religious claims. Acting Chief Justice Mason and Justice Brennan[20] and Wilson and Deane JJ[21] proffered a sincerity test for the recognition of religious belief in *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (the *Scientology Case),* the seminal Australian decision defining religion. Justices Wilson and Deane held:

> Perusal of the whole of the evidence at first instance makes clear that, apart from some questions asked of Mr. Cockerill about his having acquiesced in being sworn on a Christian Bible, t*here was no suggestion made in the cross examination of Mrs. Allen and Mr. Cockerill that they were other than sincere in the beliefs they professed. Nor does the judgment of the learned trial judge contain any finding that any significant number of the more than 5,000 Victorian members of the applicant was other than genuine and sincere*… the great majority of the Australian members of the applicant are sincere and genuine in their acceptance of current Scientology writings and practices.(emphasis added)

[17] *Syndicat Northcrest v Amselem* (2004) 2 SCR 551, [53].
[18] (2005) UKHL 15.
[19] *Ibid,* 258.
[20] *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, per Mason ACJ and Brennan J at pp 129-130.

[21] *Ibid,* per Wilson and Deane JJ at 174.

In finding that Scientology comprised a religion Mason ACJ and Brennan J determined that:

> the sincerity and integrity of the ordinary members of the Scientology movement were not in doubt … No attack was made upon the sincerity or integrity of the witnesses who stated what the general group of adherents believed and accepted.

For Mason ACJ and Brennan J, the focus on a sincerity test permitted adequate scope for refusal of fraudulent claims:

> That is not to deny that there are cases where what is put forward as being a religion cannot properly be so characterized for the reason that it is, in truth, no more than a parody of religion or a sham: the claimed religion of "Chief Boo Hoo" and the "Boo Hoos" in *United States v. Kuch* provides an obvious example of such a parody. (citations omitted)

In many senses, this is the background Australian common law against which the Bill would operate, but for the fact that the test imposed is that 'a person of the same religion as the first person could reasonably consider [the impugned conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.' Although the EM states 'the Act is informed by the approach taken by the High Court in *Church of the New Faith*' (at paragraph 71), in effect, the Bill displaces the High Court's jurisprudence by requiring a judge to objectively determine what conduct is sanctioned by a reasonable believer, regardless of the sincerely held convictions of the believer-claimant/respondent in question.

The New South Wales Court of Appeal effectively applied this reasoning to corporate bodies in *OV & OW v Members of the Board of the Wesley Mission Council*[22] (*Wesley Mission*), where it held that:

> there is no basis in s 56 to infer that Parliament intended to exempt from the operation of the Anti-Discrimination Act only those acts or practices which formed part (relevantly for present purposes) of the religion common to all Christian churches, or all branches of a particular Christian church (in the sense of denomination), to the exclusion of variants adopted by some elements within a particular Church, but not by others.[23]

The exemption 'section encompassed any body established to propagate a system of beliefs, qualifying as a religion'[24] and required regard to be had to the beliefs of the respondent organisation in question, not any other body.

This is not to say that a claimant may not, of their own volition, lead evidence in support of their claim. However, as Ahdar and Leigh assert: 'It is wrong to *insist* that expert evidence from religious authorities support the claimant's case (although [a claimant] may invoke such testimony if she considers it helpful).'[25]

In summary, the protections in the Bill to religious bodies and persons should not turn on whether 'a person of the same religion … could reasonably consider [the conduct] to be in accordance' with the beliefs. Instead, the focus should remain on the sincerity of the belief, consistent with the approach taken amongst leading Anglophone Courts across the world, including the High Court in the *Scientology Case*, the Supreme Court of Canada, the House of Lords and the United States Supreme Court and the Australian High Court. These sincerity tests recognise that when limitations are to be imposed upon the manifestation of religious beliefs, they should be imposed after the belief has been

[22] (2010) NSWCA 155.
[23] *Wesley Mission* at 41.
[24] *Wesley Mission* at 50.
[25] Ahdar, Rex and Ian Leigh, *Religious Freedom in the Liberal State* (OUP Oxford, 2nd ed, 2013), 196.

evidenced, rather than through a refusal of the claim as a religious claim, which engages the court in an unnecessary exercise of resolving doctrinal disputes.

Recommendation for Amendment

To address these concerns, ICS strongly recommends that all enunciations of the test that has regard to the beliefs of a reasonable adherent be amended to instead focus on the genuine beliefs of the adherent relying on the provision. For example, the wording of paragraph (a) of "statement of belief" should be amended 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 ….

The EM could state that 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*[26] and the subsequent affirmation by Lord Nicholls in in the House of Lord decision in *R (on the application of Williamson) v Secretary of State for Education and Employment*),[27] outlined further above. It represents a commonsense 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.

Importantly, as recognised by the above listed courts, the genuineness test does not permit a religious believer to merely write themselves into legal protection. There are several reasons for this. The recognition of a belief as sincere does not, in itself, impose any necessary immunity on the believer – it does not impose any limit on the State's power to impose legitimate lawful limitations. What it does do is impose limitations on the State's power to validly determine matters of religious dispute. To that end, the Bill already contains sufficient limitations on the types of religious expression and conduct which are protected from discrimination *based on the nature of the expression or the conduct* rather than the "conformity" of the belief (eg the broad defence to indirect discrimination in clause 8, no protection for unlawful conduct and no protection for statements of belief which are malicious, harassing or vilifying etc.).

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 on the expression of the belief 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 'fictitious, capricious or an artifice' test proposed by the House of Lords and Supreme Court of Canada was formulated.

[26] 2004 SCC 47 (*Syndicat Northcrest*).
[27] [2005] UKHL 15 at para 22 (*Williamson).*

2. Protecting incorporated and unincorporated religious bodies from discrimination

a. Application to corporations

The RDB2 protects "persons" from direct or indirect discrimination on the ground of their religious belief or activity in certain areas of public life. The definition of "person" previously provided at section 5 has been deleted. That definition clarified that a corporate body could be a complainant under the Act by defining "person" as having the meaning affected by the *Acts Interpretation Act 1901* (AIA). 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. An accompanying note affirmed that this is the case and that a body corporate may include a religious body or other religious institution.

Various clauses in the Bill make a distinction between a natural 'individual' and a 'person' (see the definition of health practitioner, clause 9, and clause 65). The prohibitions on discrimination extend to 'persons' and, of itself, this would appear to support an assertion that corporate persons may make a claim in their own right (without reliance on clause 9 as an 'associate'). However the EM appears to rule out this possibility (paragraphs 64 to 66):

> The Act does not define the term 'person'. Section 2C of the Acts Interpretation Act provides that expressions used to denote persons generally, such as person, include a body politic or corporate as well as an individual.
>
> Accordingly, consistent with that Act, a person for the purposes of this Act includes natural persons, bodies corporate and bodies politic. This will ensure that the Act prohibits all discriminatory conduct, regardless of whether that conduct was engaged in by a natural person, body corporate or body politic.
>
> The Act is intended primarily to protect individuals from discrimination and does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities. However, the Act does not preclude bodies corporate or other non natural persons from being 'persons aggrieved' for the purposes of the AHRC Act in appropriate cases.

It appears that the reference to 'persons aggrieved' under the AHRCA would be a reference to a complaint by a corporate body in their capacity as an 'associate'. The removal of the definition of 'person' at clause 5(1) therefore appears consistent with an interpretation that the Bill does not intend to allow corporations to take the benefit of its protections. To provide sufficient certainty as to their protection (and in light of the uncertainties novelties associated with clause 9), the original intent of the Bill in allowing corporations to directly assert a claim of religious discrimination should be reinstated (in addition to the implementation of the recommendations we have made in respect of clause 9 on associates).

In order to give proper effect to that reinstatement, several further alterations to the Bill are required. Importantly, 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 (absent consideration of clause 9, a matter we have discussed elsewhere) it is not clear

that corporations will be protected from religious discrimination under the RDB2 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 RDB2 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. 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 to make clear that a corporate body can experience a form of compensable damage on the basis of its religious belief e.g. because it is refused a venue for a religious observance for its members or it is refused media or advertising services on the basis of its religious beliefs or activities. This is the case whether a corporation asserts direct reliance on the protections in section 7 or 8, or in the case that it relies on clause 9.

Such discrimination against the association or corporation could include, for example, a Christian or Hindu school or religious congregation that 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).

Notwithstanding the inclusion of clause 9, to adequately cover religious associations and corporations requires the RDB2 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 11 of the RDB2, 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 the 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 RDB2, even though they do not fall within the descriptions of "a body established for religious purposes" or the notion of 'religious body' under clause 11 of the RDB2.

For a broad coverage of the entity types that may initiate an action under the RDB2, 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.

b. Constitutional considerations

The Commonwealth has clear power to protect constitutional corporations utilising the Constitutional corporations power, and both incorporated and unincorporated bodies through the external affairs power. The latter power is available to give effect to Article 18(3) of the ICCPR, which protects individuals manifesting their beliefs in practice in community with other believers including through incorporated and unincorporated communities of believers.

The corporations power enables the Parliament to (a) protect a constitutional corporation from discrimination and (b) to make it unlawful for a constitutional corporation to discriminate against an individual or incorporated or unincorporated body. The Bill does the second of these in clause 59 but not the first. To facilitate the first would require a provision as to how a corporation evidences its religious belief as discussed. To confer protection from discrimination on a constitutional corporation is within the core of the corporation's power and not its incidental scope. That could be done though a further additional operation provision like clause 59. Such an additional operation provision would be a severable provision if it were held invalid, but we think there is no basis for it being held invalid given the *Work Choices case*.

c. Representative actions and unincorporated associations

Representative actions do not provide sufficient protection for incorporated or unincorporated associations. Part IVA of the *Federal Court of Australia Act 1976* only permits such actions to be initiated where seven or more people have been discriminated against. The result is that unincorporated bodies that have less than seven members will not be able to either assert that they comprise a 'person' in order to lodge a direct complaint under clauses 7 or 8, or take the benefit of the protections to associates at clause 9. The representative complainant provisions in the *Australian Human Rights*

Commission Act 1986 are largely untested and rarely utilised. In order to be enlivened, the provisions require that any incorporated or unincorporated body be the subject of the discrimination. If an incorporated or unincorporated body is not a 'person' under the Bill, a representative complaint can not be lodged on its behalf.

d. Scope of Protected 'Fields'

In order to provide sufficient protection to incorporated and unincorporated bodies, clause 21 of the Bill should also clarify that the protected 'field' of 'services' clearly includes the determination of funding and the allocation of contracts and tenders by State and Territory Governments. It should be unlawful for such Governments to engage in religious discrimination, regardless of whether they are operating under a Commonwealth programme or law under clause 27.

e. Clause 16 and the definition of "qualifying body" should extend to the qualification and authorisation of corporate bodies, not just individuals

The definition of "qualifying body" refers to an authorisation or qualification that is needed for the practices of a profession, the carrying on of a trade or the engaging in of an occupation. This language can be read as limited to the activities of individuals. The definition should be extended to include the carrying on of a business (whether or not for profit) e.g accreditation to provide an accommodation services, aged care services, medical services, education services, or a food services such as meals for marginalised people.

The Bill should clarify that the provisions relating to qualifying bodies (at clause 16) extend not just to individuals but also to corporate bodies. This will grant protection to bodies such as accredited independent faith-based schools or tertiary education providers or incorporated student clubs within universities or accommodation or health care services or accredited service providers under government or other contracts. It is not at all clear that the associate's clause (clause 9) would protect such bodies if the protected field of accreditation extends only to individuals.

3. The new protection for 'associates' of religious believers does not work but can be made to work with drafting changes

The RDB2 inserts a new clause 9, which is modelled on section 7 of the *Disability Discrimination Act 1992* (DDA). It appears intended to be the primary mechanism through which religious corporations will be able to assert a complaint of religious discrimination under the Bill. At the same time, the definition of 'person' at clause 5(1) has been deleted. That definition clarified that under the Bill a 'person' includes a corporation. The associates clause will become central to whether corporate bodies, such as schools or charities, receive protection against religious discrimination.

Section 7 of the DDA provides that that 'Act applies in relation to a person *who has an associate* with a disability in the same way as it applies in relation to a person with the disability' whereas section 9 of the RDB2 provides that it 'applies to a person *who has an association (whether as a near relative or otherwise)* with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity' (emphasis added). Section 7 of the DDA was inserted by the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*. The EM to that Bill stated that 'The new section 7 clarifies that discrimination against a person because of the disability of any of his or her associates also amounts to discrimination under the Disability Discrimination Act.' It appears that both provisions intend to

define the status of having an association with an individual (an individual with a religious belief in the case of the RDB2) to be, itself, a protected attribute. However, this is by no means clear from the drafting of the Bill.

The use of 'associates clauses' is novel and largely untested. Cases on the DDA provisions show that it is ambiguous and needs clarification. As leading commentators Ronalds and Raper clarify, 'in some circumstances, the link between the act of discrimination and any less favourable treatment of the associate may be difficult to establish... That nexus remains a crucial part of establishing a discrimination claim and is not rendered irrelevant just by the introduction of the associate concept.'[28] They further clarify that 'the extension of all grounds to an associate has led to some absurd statutory interpretation results and to the provisions being essentially unworkable. This is due to the attempt to transfer the personal characteristics of which the person complains, such as their race or disability, onto their associate, without any of the defining characteristics.'[29]

The same might be said of the RDB2. How can the Act apply 'in the same way' to a corporation as it applies to its associated religious believer? The individual religious believer may not have engaged in the acts which have led to the discrimination. The religious believer has not themselves suffered the discrimination. For example, where a corporate body has a venue booking declined because of the religious belief of its 'associate' director, the associated religious believer has not suffered any discrimination, they have not been refused a supply. If the Act were to apply to the corporation in 'the same way' as it applies to the associated religious believer, it would not offer protection to the corporation. To extend the foregoing example, is it intended that any emotional distress or affront resulting to the director would be attributed to the corporation? Can a corporation incur such distress and what would be the appropriate level of damages?

For the purposes of illustration, consider the example of a faith-based school that has a Principal and Board members who are of the Christian faith. Assume the relevant the State Government imposes a condition in the school's funding contract that it not teach its traditional view of marriage. If the condition is validly imposed pursuant to a State law (such as a law that regulates the making of conditions on the allocation of government funding), the school will find no protection under the RDB2 (this is the consequence of limiting the protection to 'lawful' religious activity – a matter further dealt with below). However, for the purposes of illustration, assume that the imposition has not been 'lawfully' imposed, in that it has not been validly made under the relevant legislative framework, or has been imposed without the requisite authority.

In that case, it is not at all certain that the school would be able to take the benefit of the associate provision. First, as the notion of 'associate' is not defined in the Bill, it is not certain that the Principal or Board members would be associates (this is addressed further below). Second, it is not clear how it can be said that clause 7 or 8 'apply to a person *who has an association (whether as a near relative or otherwise)* with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity'. The Principal or Board members have not been directly discriminated against as a result of the refusal of funding. Neither clause 7 nor 8 operate in respect of those persons. How is it then that clause 9 may operate 'in the same way' while offering protection to the incorporated school?

An alternative interpretation of clause 9 would be that where it states the Act applies to a corporation 'in the same way' as it applies to its associated religious individual, it requires the court to adopt a legal fiction that it was the individual who experienced the discrimination incurred, in fact, by the

[28] Chris Ronalds and Elizabeth Raper *Discrimination Law and Practice* (fifth ed, 2019), The Federation Press, 172.
[29] *Ibid*, 26.

corporation. The religious believer sits in the shoes of the corporation. In effect this would require that the corporation who is the associate of a religious believer has the religious belief of that individual attributed to it. However it is by no means clear that this is the intention of clause 9 when it requires the court to consider that the corporation had been treated 'in the same way' as the religious individual.

The source of the confusion has been possibly explained by the Australian Human Rights Commission, with respect to the equivalent definitions of discrimination in the DDA. Clauses 7 and 8 of the RDB2 suffer from the same uncertainty as the equivalent provisions in the DDA (section 5 and 6 of the DDA): the definitions of discrimination do not directly refer to associates:

> [T]he definitions of direct and indirect discrimination in sections 5 and 6 refer only to a disability of the aggrieved person. At present (consistent with accepted rules of statutory construction) the AHRC seeks to interpret and apply the DDA in a way which gives effect to the substantive provisions regarding associates rather than rendering them meaningless. It would be preferable however for the definitions of discrimination to expressly include associates rather than leaving this to interpretation.[30]

The comment of the AHRC highlight a further concern. The 'substantive provisions' dealing with unlawful discrimination across various fields of Australian life in the RDB2 (under Part 3, including employment, education, goods and services etc) do **not** address discrimination against a person because of the religious belief or activity of the person's associates. In the absence of reference to 'associates' in the definitions of discrimination and in the substantive provisions in the RDB2, the effective force of clause 9's application to associates may well be lost. To use the wording of the AHRC, clause 9 'is rendered meaningless'.

A similar concern was expressed by Collier J in *Forest v Queensland Health* (in relation to the prior stand alone provisions concerning palliative and therapeutic devices and auxiliary aids, interpreters, readers and assistants, guide dogs, hearing assistance dogs and trained animals):

> First, although I presume that the rationale in specifying forms of discrimination in ss 7, 8 and 9 separately from definitions of direct and indirect discrimination in ss 5 and 6 was to provide more support to disabled people who had been the subject of specific discrimination as defined in ss 7, 8, and 9 (neither the Second Reading Speech of the Minister nor the Explanatory Memorandum illuminates this point), the nature of these sections as stand-alone provisions tends to lend itself to lack of clarity. It is usual that, in a claim for disability discrimination, the applicant will allege either direct or indirect discrimination. Providing further, separate grounds of discrimination in ss 7, 8 and 9, as distinct from a more comprehensive definition of discrimination to fall within ss 5 and 6, in my view can potentially result in confusion and overlapping claims.[31]

One of the few occasions in which section 7 of the DDA has been considered is in *Eisele v Commonwealth.*[32] That case illustrates a possible way forward. There Moshinsky J considered that '[i]n order to establish a breach of s 5 of the Disability Discrimination Act, applied in the manner described in s 7, [the applicant] had to establish that she was treated less favourably because she had an associate with a disability.' In that matter, Moshinsky J placed the following interpretation on section 7:

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[30] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96), Sydney, 2003, 9.110.
[31] [2007] FCA 936 at 173.
[32] [2018] FCA 15.

> the way in which the associate provision (s 7) interacts with s 5 is not free from doubt and may be expressed in different ways. However, it would appear to be intended that s 5(1) apply to persons who have associates with disabilities as if it were expressed as follows or to the following effect: "For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of his or her associate if, because of the fact that the aggrieved person has an associate with a disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without an associate with a disability in circumstances that are not materially different."[33]

As noted above, clause 9 of the RDB2 fails to clarify that this is the intended application in respect of acts of discrimination incurred by a corporate body on the ground of its associate's religious beliefs and activities. There is another case on section 7 of the DDA which emphasise its lack of clarity.[34]

The AHRC (Dr Sev Ozdowski OAM Acting Disability Discrimination Commissioner) proposed amendments to the DDA to fix the weaknesses in its association provisions in 2003 (the DDA provisions were different then to the current ones but the AHRC's criticisms are still valid) – see proposal 8-4 at https://www.humanrights.gov.au/our-work/disability-rights/genetic-information-submission-alrc-inquiry

We think a good route to fixing the problems with the associates provisions is to adopt Moshinsky J's formulation, which would mean the followng sub-clause should be added to clause 7 of the RDB2 to cover direct discrimination against a person on the ground of their associate's religious belief or activity:

> 7(2) A person (*first person*) discriminates against another person (*second person*) on the ground of the religious belief or activity of an associate of the second person if:
>
> > (a) the first person treats, or proposes to treat, the second person less favourably than the first person treats, or would treat, another person who does

[33] *Ibid*, para 90.

[34] In the sole remaining judicial consideration of section 7 of the DDA we were able to locate, *Robinson v Commissioner of Police, New South Wales Police Force*,[34] Buchanan J considered, in the context of an interlocutory application, that the relevant question to be determined under section 7 of the DDA was:
has the Respondent treated Ms EI-Masri less favourably on the ground of being an associate of Mr Robinson when compared to a person without Mr Robinson's disability in the same or similar circumstances, within the meaning of s 5(1) of the DD Act (as it was prior to and post 5 August 2009) and s 7 of the DD Act (after 5 August 2009).
This is a differing construction from that placed on section 7 of the DDA by Moshinsky J in *Eisele v Commonwealth*. It requires a comparison between a person with an associate with a disability and a person who themselves is not disabled. It is not consistent with Moshinsky J's construction and, with respect, again appears to require an impossible comparison, or (again) one with no substantive meaning or effect. It is also noted that clause 9 of the RDB2 does not contain the additional interpretive clause in the DDA that assists in determining the application of the associates mechanism. Section 7(2) of the DDA states:

> *(2) For the purposes of subsection (1), but without limiting that subsection, this Act has effect in relation to a person who has an associate with a disability as if:*
> *(a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has an associate with the disability; and*
> *(b) each other reference to a disability were a reference to the disability of the associate.*

not have an associate that has or engages in that religious belief or activity in circumstances that are not materially different; and

(b) the reason for the less favourable treatment is the religious belief or activity of the associate of the second person.

An alternative, modelled on a proposal to include associates within the definition of discrimination proposed by the AHRC in 2003,[35] is as follows:

> 7(2) A person (first person) discriminates against another person (second person) on the ground of the aggrieved person being an associate of a person who has or engages in a religious belief or activity if:
>
> (a) the first person treats, or proposes to treat, the second person less favourably than the first person treats, or would treat, another person who does not have an associate that has or engages in that religious belief or activity in circumstances that are not materially different; and
> (b) the reason for the less favourable treatment is the religious belief or activity of the associate of the second person.

This has the benefit of clearly articulating that the protected attribute is the association itself.

A new clause 8(2) is also needed to cover indirect discrimination against a person on the ground of their associate's religious belief or activity:

> 8(2) A person (*first person*) discriminates against another person (*second person*) on the ground of the religious belief or activity of an associate of the second person if
>
> (a) the first person imposes, or proposes to impose a condition, requirement or practice; and
>
> (b) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who have associates who hold or engage in the same religious belief or activity; and
>
> (c) the condition, requirement or practice is not reasonable.

An alternative, modelled on the proposal of the AHRC in 2003 is as follows:

> 8(2) A person (the first person) discriminates against another person (the second person) on the ground of the second person being an associate of a person who has or engages in a religious belief or activity if:
>
> (a) the discriminator imposes, or proposes to impose, a condition or requirement or practice; and
> (b) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who have associates who hold or engage in the same religious belief or activity as the associate of the second person; and

[35] https://www.humanrights.gov.au/our-work/disability-rights/genetic-information-submission-alrc-inquiry

(c) the condition, requirement or practice is not reasonable.

Either of these drafting models would remove the uncertainty concerning the interaction of clause 9 with the definition of direct and indirect discrimination at clauses 7 and 8.

In addition, ***each of*** the relevant substantive provisions in Part 3 of the RDB2 need to be amended to make discrimination against a person unlawful on the basis of their 'associates' as is done in the DDA. Eg for clause 21

> 21 It is unlawful for a person who [provides good, services or facilities] to discriminate against *another person on the ground of the religious belief or activity of the other person or on the ground of the religious belief or activity of an associate of the other person* …

Further, the DDA includes a definition of 'associate', whereas the RDB2 does not, but merely states that an association can include one arising as a 'near relative or otherwise'. This formulation would appear to run afoul of the statutory interpretation principle *ejusdem generis*. That principle provides that where a general word immediately follows a collection of specific words, which in themselves constitute a class, the interpretation of the general word is restricted so as to give it a meaning which would bring it within the class. This would limit the scope of the associate's clause to the notion of 'near relative', or relations that would be akin to such a relationship. The EM states: 'Other forms of association that may be protected by this clause may include personal, business, employment or other forms of relationships with an individual.'

To avoid the need to resolve the uncertainty as to the reach of the term 'associate' through costly litigation, the Bill should provide a definition. There should be a definition of "associate" which goes beyond that in the DDA to clearly include associations between corporate bodies and unincorporated bodies and individuals (eg members, officers, employees, service providers, volunteers to a body) and between members and attendees of the same religious bodies.

We propose the following definition as a starting point, noting that it works in several directions – individuals can be associates of other individuals and of incorporated and unincorporated bodies, incorporated and unincorporated bodies can be associates of other incorporated and unincorporated bodies and of individuals.[i]

> ***"associate" includes***:
>
> ***(1)*** in relation to a person who is an individual:
>
> (a) a spouse of the person; and
>
> (b) another person who is living with the person on a genuine domestic basis; and
>
> (c) a relative of the person; and
>
> (d) another person who is a member of a religious body or an attendee at meetings of the religious body with the person; and
>
> (e) another person who is in a business, sporting or recreational relationship with the person; and

(f) another person by whom the person is employed or for whom the person provides services as a contractor or volunteer; and
(g) another person who is an associate of the person by operation of sub-clause (2).

(2) in relation to a person who is a corporation or unincorporated association,

(a) a director or officer, leader or member of a governing body of the person;

(b) a member of the person;

(c) another person who is employed by the person or who provides services as a contractor or volunteer for the person;

(d) another person who provides goods, services or facilities to the person;

(e) a related body corporate of the person, a trustee of the property used to benefit the person, or a beneficiary of a trust administered by the person.

If all of the above changes are made the incorporated religious school referred to in our example above would be protected on the basis that it had been discriminated against because of the religious beliefs of its Principal or Board.

Finally, in relation to corporations, we note that the EM provides (at 203-204):

> this Act only protects a person – including a natural person or body corporate – from discrimination on the basis of their association with a natural person who holds or engages in a religious belief or activity. This clause does not purport to protect corporations from discrimination on the basis of their association with other corporations. For example, a corporation would be protected against discrimination in relation to their association with a natural person, such as their CEO. However, a corporation would not be protected due to their association with another body corporate, such as a supplier.

This is an arbitrary distinction, prejudicing corporate entities where an act of discrimination arises due to their relationship with another corporation. It is not followed in our proposed definition of associate. If that definition is adopted, this paragraph in the EM needs to be omitted.

If all the foregoing changes are made, the associates provisions should work to protect individuals and corporate and unincorporated bodies from discrimination on the basis of the religious beliefs and activities of their associates.

But as further outlined elsewhere, there are no valid reasons why a recognition that constitutional corporations may make a complaint in their own right should not be retained, alongside the associates provisions, in order to provide certainty. This would mean that, if there is any doubt as to the validity of the ability of a corporation to lodge a direct complaint of discrimination, the associate provisions may still assist a corporate complainant.

4. Protecting religious persons from certain liability for statements of belief

Clause 42 of the RDB2 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 3 actions taken under the Tasmanian Anti-Discrimination Act section 17 against Archbishop Porteous and 2 other Christian ministers).

There is a growing list of religious people whose reasonable statements of belief, often on social media, have been used by offended third party activists (who were not in the intended audience of the statement) as the basis for complaints to the employers or accreditation bodies of the religious people seeking to have the religious people sacked or disqualified from their trade or profession or expelled as students or otherwise sanctioned for the statements. There are 30 such cases documented at australiawatch,com.au and more to be published. Many religious people were sacked or disqualified or suspended or had months of trauma and cost fighting such actions. This is the real world problem of discrimination against religious people who make reasonable statements of belief to which clause 42 and equivalent protections of reasonable statements of belief in clause 8 are directed.

That real problem needs to be fixed, not ignored. That real problem is ignored by campaigns of gay rights groups asserting that clause 42 gives people a rights to be bigots. For example the Discrimination Law Expert Group is quoted in the SMH on 31/1/20 as saying that under the Bill, a receptionist in a medical practice who tells a person with a disability "they have been given their disability by God so they can learn important lessons" would be “protected” under the Bill.

Various judges have acknowledged that, in certain contexts, words (e.g. racially abusive or sexually abusive epithets especially when repeated and said in front of peers) can amount to discrimination causing psychological harm. Although it is not clear that a one-off statement of So clause 42 has work to do in protecting reasonable statements of belief from being held to amount to discrimination in law.[36] The hypothetical receptionist’s statement of itself might not be actionable discrimination under current law if it is a one-off, not heard by others and there is no discriminatory refusal of service. So clause 42 may change the current a discrimination law outcome but it all depends on the facts. The statement might well breach the low bar in section 17 of the Tasmanian Anti-Discrimination which prohibits conduct that insults or offends. The Bill would change that.

We would also argue that there is no legal right to be a bigot but neither is there a legal right (as opposed to the social restraints of civil behaviour) never to be offended or insulted. So while the hypothetical statement could reasonably be received as insensitive and insulting, we are strongly of the view that in a pluralist democracy where we disagree on many things, there should not be a legal

[36] In *Nationwide News Pty Ltd v Naidu* Basten J recognised ‘racially abusive epithets of a kind … could readily give rise to a racially hostile working environment. Like cases of sexual harassment, racial harassment of that kind would also be unlawful’ as racial discrimination.[5] Similarly in *Qantas Airways v Gama* the Full Court of the Federal Court held that ‘remarks [by fellow employees] which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin’ could amount to discrimination.[6] Similarly, in *Singh v Shafston Training One Pty Ltd and Anor*[7] it was held that racially ‘insulting’ comments directed against an employee in front of his peers could comprise discrimination. There the complainant asserted that the comments made against him on the basis of his race: *caused him significant distress, disturbance to his concentration, and from time to time, poor appetite and sleeping habits. He says that he has been diagnosed with depression as a result.[8]*. Drawing these various authorities together it is clear that verbal statements can in certain circumstances amount to a form of discrimination where they ‘insult’, ‘humiliate or demean’ in a way that creates psychological harm.

right through discrimination or vilification law to seek legal censorship and compensation for any statement which persons with a protected attribute might find to be insulting or offensive.

But many of these hypothetical examples are very misleading because they are unrealistic and omit all the other real-world consequences that will flow from such statements. If a medical receptionist did make such a statement, the obvious avenue for complaint is to other staff in the medical practice and to other patients. Medical practices operate in a market and can't afford to be insulting their patients who will go elsewhere and tell others (including the media) about their experience. They operate in a profession dedicated to providing patient care, not fatalistic aphorisms. The doctors and managers of the practice would tell the receptionist not to make such statements and might issue a notice to all staff to reinforce that conduct expectation. The receptionist owes a duty of loyalty to the employer under his or her employment contract not to drive away patients and there may be contractual consequences for breach of that duty which the Bill will not affect (clause 8(3) will not apply). We haven't checked but it is likely AHPRA will have patient care standards which restrict such statements to patients, and this may lead to regulatory consequences for the medical practice and the receptionist. All of these consequences would happen without recourse to an Anti-Discrimination Tribunal and completely unaffected by the Bill. So, it is highly misleading to say that such a statement is "protected" by the Bill.

Further, the hypothetical examples as reported in the SMH, appear to fail to give adequate consideration to the various protections against unacceptable statement of belief already built into clause 42. It is difficult to contemplate that the examples provided would survive the gauntlet of being in good faith, not malicious, not threatening, harassing, vilifying, seriously intimidating, etc. Against the unrealistic hypothetical example statements provided, these tests in clause 42 will provide sufficient resources for a judge to refuse section 42 protection to abusive statements of belief.

a. The definition of "statement of belief" cl 5

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

> (a) (i) is of a religious belief held by a person (the first person); (ii) is made in good faith by written or spoken words by the first person; and (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
>
> (b) (i) is made by a person who does not hold a religious belief; (ii) is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief; and (iii) is made in good faith.

The definition of "statement of belief" in paragraph (a) provides that the statement must be made by the first person in good faith by written or spoken words by the first person; and must be of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of a religion. We have addressed our concerns with the conduct 'a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines …' test above.

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 could be used to impose what are inherently secular (and thus possibly inappropriate) principles on the speech and operations of faith-based individuals and 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.

b. Statements of belief do not constitute discrimination cl 42

Clause 42 provides that a statement of belief in and of itself (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 and the numerous religious persons described at australiawatch.com.au are free to promulgate reasonable statements of their religious beliefs on issues such as marriage, sacrificial giving, Australia's overseas aid budget, sexual relations, Sabbath observance, prison conditions, 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, threaten, seriously intimidate or vilify 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 the general concept underpinning this provision, to the extent that it aims to permit 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 42 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, 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 RDB2 from -discrimination complaints is of limited comfort.

c. Statements made by written or spoken words

The definition of 'statement of belief' now only pertains to a statement that 'is made by the person … by written or spoken words'. Coupled with this is the insertion of the words 'in and of itself' at subsection 42(1). The rationale is apparently provided at paragraph 548 of the EM:

> It is not intended that this would capture broader expressions of a person's religious belief, such as through action or other illustrations. As such, this clause solely exempts oral and written expressions of belief, and does not capture any form of behaviour that goes beyond the making of a statement such as employment decisions, decisions not to provide goods, services, or facilities or the destruction of religious symbols.

Various religious acts make statements in a form that is neither verbal, nor written, leading examples being the wearing of a Christian cross or other religious symbols or clothing or the display in a personal workspace of a picture with religious symbolism . Individuals should not be subject to discrimination proceedings for such symbolic displays of personal religious conviction.

Further, as a result of these amendments, clause 42 now drives a wedge between religious belief and religious action. The clause should protect a person from not just detrimental action arising from a

statement they have made, but also from being compelled to act in a way that contravenes their deeply held conscientious religious convictions.

In light of existing international jurisprudence, clarification is required to ensure the Bill's protections are not undermined, including by clarifying that compelling a person against their religious conscience is a form of discrimination. In the *Asher's Baking decision*[37] the United Kingdom Supreme Court affirmed the proposition that the common law has never compelled a person to support or affirm views that are contrary to their sincerely held religious convictions. This fundamental principal should be reflected in the Bill. The means to do so are discussed below under the heading 'Protecting persons from being forced to express or endorse views contrary to their religious belief'.

d. Definition of "harass", "vilify", "threaten" or "seriously intimidate"

Statements that are malicious, or that would harass, vilify, threaten or seriously intimidate another person or group of persons are not protected. ICS is pleased that the word "vilify" has now been defined but is concerned about the word "harass". This word is not defined in the RDB2 and it is uncertain as to how it would be interpreted.

"Harass" seems to contemplate statements that annoy or upset the recipient and it would seem, although this is not clear, to involve unwelcome, repeated conduct. 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 42 simply because the hearer finds the statement upsetting. Similarly, the Bill provide no clarification as to whether the terms 'threaten' and 'seriously intimidate' focus on the subjective response of the hearer, or the response of a reasonable member of the community, or of the group of which the hearer is a member. The EM provides no substantive clarification as to the operation or intended meaning of these words. ICS recommends that the section be amended to clarify that the test is whether a reasonable person would be harassed, threatened or seriously intimidated by the statement of belief and clarify that harassment involves unwelcome repeated behaviour.

e. Definition of 'vilify'

Consistent with our recommendations 'vilify, in relation to a person or group of persons' is now defined at section 5(1) to mean 'incite hatred or violence towards the person or group.' We commend the inclusion of this definition which will assist in providing certainty. However, section 42 should apply to all vilification provisions in State and Territory law, including the Victorian defined as such if the statement *Racial and Religious Tolerance Act 2001*. The failure to make this alteration is a very serious omission. While religious speech may in certain circumstances of serious and repeated utterances constitute technical discrimination[38] (and therefore clause 42 has work to do) the most significant limitations placed upon religious speech within Australia are imposed under vilification provisions, which are distinct from the relevant prohibitions on discrimination. We note, however, that there is no reasonable basis on which racial vilification could be endorsed by a religious belief. Nevertheless, this failure to extend the provision to vilification laws undermines the stated aim of the provision, (as stated at paragraph 534 of the EM):

[37] *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49.
[38] See for example: *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 [378]; *Qantas Airways v Gama* (2008) 157 FCR 537, [78]; *Singh v Shafston Training One Pty Ltd and Anor* [2013] QCAT 008 (ADL051-11) Michelle Howard, Member 8 January 2013.

> A key aspect of protecting the right to freedom of religion is protecting the ability of individuals to explain, discuss and share their fundamental beliefs. Protecting the freedom to express religious beliefs civilly and as part of public discourse is an essential part of maintaining a healthy and functioning democracy

Notwithstanding these sentiments, religious persons will not be protected from vilification complaints brought under State law. A recent example is the acceptance by the New South Wales Anti-Discrimination Board of a vilification complaint against Israel Folau for comments made in an Instagram post.[39] Clause 42 should extend not only to complaints of discrimination under anti-discrimination law but also to complaints of vilification made pursuant to State or Territory vilification provisions whether those provisions are in anti-discrimination laws or in standalone vilification laws like the Racial and Religious Tolerance Act 2001 (Vic).

5. The definition of religious belief or activity, the comparator test for discrimination and requiring reasonable accommodation of religious belief and activity by a reasonable adjustment requirement

One of the main purposes of the RDB2 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:

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

In this context, ICS has three concerns about the RDB2 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

[39] A complaint has been lodged against Israel Folau's post. https://www.news.com.au/sport/sports-life/antidiscrimination-board-of-nsw-accept-complaint-against-israel-folau/news-story/056174646709131379829ca6b0207846.

to cover any expression of views and any conduct about which the religious person has a genuine religious conviction (as outlined above).

Courts have taken restrictive views of what comprises 'religious activity', confining that notion to prayer, worship or the observance of religious rituals or customs. This interpretation has the potential to exclude religious statements on matters such as marriage, gender or the family from the Bill's protections, or to exclude religiously motivated acts, or to exclude refusals to perform 'secular' acts that are contrary to religious teaching. In light of this jurisprudence, such activities should be clearly included within the protected notion of 'religious activity'.

b. Application of the 'comparator' test and the need for reasonable accommodation of religious belief and activity

Direct discrimination

Under clause 7 of the RDB 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.

Existing anti-discrimination cases establish that if a person who acted in the same way without religious reasons would have been treated the same, an employer has not engaged in direct discrimination.[40] Under this case law, if an employee refuses to attend a work shift on a Friday evening because of religious observance obligation and a non-religious employee also refuses to attend because of a social date and the employer penalises them both the same for non-attendance, there is no direct discrimination. This is an artificially narrow reading of the concept of direct discrimination and it forces most claims of religious discrimination to be considered as indirect discrimination claims which allows the employer or other discriminator to justify the discrimination as reasonable.

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 make clear that just because an employer would sanction a person who seeks a form of accommodation for non-religious reasons in the same way as it would a person who seeks the accommodation because of a religious belief or activity, does not mean that the employer has not discriminated on the grounds of religious belief or activity.

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.

Indirect discrimination

[40] E.g McFarlane v Relate Avon Ltd [2010] EWCA Civ 880.

Indirect discrimination claims sometimes fail because the person setting the condition, requirement or practice alleged to be discriminatory is allowed to determine the *result* sought by the condition, requirement or practice. The permitted disadvantage from the condition, requirement or practice must be proportionate to the result to be achieved, so the ability to set the result without regard to reasonable accommodation of religious belief or activity can doom an indirect discrimination claim. For example in *Ladele v Islington LBC* [2010] 1 WLR 955 [46]-[52] the Islington Borough Council decided that all its civil registrars must perform same sex civil partnership ceremonies as part of its Dignity for All policy. Ms Ladele, a West Indian Christian who had been a registrar for many years had asked for a long time to be excused from doing so for religious conviction reasons and had arranged informal roster swaps with other registrars to achieve this. There were plenty of registrars who would perform same sex ceremonies and no same sex couple would have been denied or delayed in obtaining that service had Ms Ladele been allowed to continue to switch duties with other registrars. But Islington BC insisted she conduct the same sex ceremonies and when she refused she was sacked.

Her claim of religious discrimination was successful in the Employment Tribunal which found that the result Islington was pursuing was the adequate provision of a civil partnership service which could be achieved while providing reasonable accommodation to Ms Ladele's religious convictions. However this was overturned on appeal by Islington which argued that the result it sought to achieve was that all staff must deliver all services under Dignity for All. The Court of Appeal took the view that it was up to Islington to define the result it sought to achieve. Once the aim of all staff to deliver all services was accepted, it followed that it was necessary and proportionate that Ms Ladele conduct the ceremonies or be terminated. The court did not subject to any scrutiny the legitimacy of Islington's stated result or Islington's failure to consider the reasonable accommodation of its staff's religious beliefs when setting the result it sought to achieve.

c. Reforms to introduce a reasonable adjustment requirement along the lines of the Disability Discrimination Act

There should be a new provision in the Bill requiring those who may discriminate in the relevant fields where unlawful discrimination is prohibited (eg employment, accommodation, provision of good and services) to make reasonable adjustment for people who refuse to engage in conduct or to express or associate themselves with particular views because of their genuine religious beliefs e.g. the Jewish or Adventist believer who won't work on Saturday, the Muslim who needs to be absent from work duties to pray at midday on Friday, the health practitioner who won't participate in abortion or euthanasia.

There is a similar concept of *reasonable adjustment* in the Disability Discrimination Act.

We propose amending both clause 7 on direct discrimination and clause 8 on indirect discrimination to require persons who may discriminate on the basis of a religious belief or activity to make reasonable adjustments for persons with that religious belief or activity.

This will reduce the comparator test problem that courts may say there is no discrimination if the same consequences apply equally to all persons who engage or refuse to engage in particular conduct regardless of whether the conduct is motivated by religious belief.

In terms of indirect discrimination we propose that both:

(a) the *result* sought by the person imposing the condition, requirement or practice (eg that all staff must be working at midday on Fridays if rostered on or all interns must assist as required at all

medical procedures) must include a reasonable adjustment for religious belief and activity of people affected by the conditions, requirement or practice; and

(b) the condition, requirement or practice itself must make a reasonable adjustment for religious belief and activity of people affected by (e.g. no roster swaps or flexitime can be taken for absences at midday on Friday, or interns who do not attend a medical procedure when required will lose pay and promotion credits).

In terms of drafting this could look something like the following:

> Insert a definition of reasonable adjustment as follows
>
> *reasonable adjustment: an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.*

- Amend clause 7 to include the following provisions:

> (2) A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the aggrieved person in relation to their religious belief or activity; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of their religious belief or activity (including engaging in conduct or refusing to engage in conduct on the basis of the their religious belief or activity) treated less favourably than a person without the religious belief or activity would be treated in circumstances that are not materially different.
>
> (3) For the purposes of this section, circumstances are not materially different because of the fact that, because of their religious belief or activity, the aggrieved person requires adjustments.

Importantly, in employing this test, the effect of Bromberg J's judgement in *Sklavos v Australasian College of Dermatologists*[41] should be displaced. That is, the test as applied by Nicholas J in *Haraskin v Murrays Australia Limited (No 2)*[42] and Mortimer J in *Watts v Australian Postal Corporation*,[43] which directs attention to the substantive requirements of equality in the effect or outcome, should be preferred as opposed to the test applied by Bromberg J which focusses on cause for the refusal. This is because, by focussing on the cause of the refusal the substantive operation of the reasonable adjustments requirement is defeated. As Rees, Rice and Allen recently clarified in respect of the DDA:

[41] [2017] FCAFC 128.
[42] [2013] FCA 217.
[43] [2014] FCA 370.

The decision in *Sklavos* means that s 5(2) identifies conduct by which, because of the disability, the discriminator does not make, or proposes not to make, reasonable adjustments for the person, thereby causing less favourable treatment. This makes no sense. It negates the provision's intended purpose, and renders the provision meaningless. A discriminator's reasons for not making or proposing to make reasonable adjustments will be many and varied. They are anticipated by the coverage of the 'unjustifiable hardship' defence. A discriminator's reasons for not making or proposing to make reasonable adjustments cannot logically include the person's disability that gave rise to the issue of making reasonable adjustments in the first place. Bromberg J's construction means that, for example, a job applicant has a claim of reasonable adjustments discrimination only if an employer says 'a reason I will not put in a wheelchair ramp is because you can't walk', or a theatre patron has such a claim only if an employer says 'a reason I will not put in a hearing loop is because you can't hear properly'.[44]

- In section 8 (indirect discrimination) include a new sub-clauses as follows:
- 8(1A) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the religious belief or activity, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons who hold the religious belief, or who engage in, the religious activity.

8(2A) For the purposes of paragraph (1)(c) a condition, requirement or practice is not reasonable unless:

(a) the result sought by the person who imposes or proposes to impose the condition, requirement or practice makes reasonable adjustments for persons who hold or engage in the religious belief or activity; and

(b) the condition, requirement or practice makes reasonable adjustments for persons who hold or engage in the religious belief or activity; and

(c) the condition, requirement or practice creates the least possible restriction on the ability of persons to hold, express or engage in the religions belief or activity which is necessary to achieve the result mentioned in paragraph (a); and

(d) where the condition, requirement or practice is imposed or proposed to be imposed in order to protect the fundamental rights and freedoms of others, it is necessary to protect those rights and freedoms.[45]

[44] Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination and Equal Opportunity Law*, (3rd edition, 2018), The Federation Press, 7.6.29.

[45] This is based on the requirement of necessity to limit manifestation of religious belief under ICCPR Article 18(3)

Importantly the above test needs to be reconciled to the general reasonableness requirement at section 8(1)(c) in a way that ensures the substantive effect of the provisions is not undermined. As Rees, Rice and Allen explain (in respect of the DDA):

> The effect of s 6(3) is that, if a requirement or condition is found to be reasonable in the circumstances, there is then no consideration of reasonable adjustments. This is what happened in Sklavos. In practice, a duty bearer can assert that a requirement, with which a person with a disability cannot comply, is reasonable in the circumstances, and say that, therefore, no duty arises to provide the very adjustments that would enable the person to meet the requirement. The person with a disability then has to complain of discrimination and, if the matter proceeds to a hearing, put the duty bearer to proof on the reasonableness of the requirement. Only if the requirement is found to have been not reasonable in the circumstance will the person then be able claim indirect 'failure-to-make-reasonable-adjustments' discrimination.[46]

As for the DDA, the burden of proof for persons seeking to establish that an adjustment would impose an unjustifiable hardship is placed upon the person seeking to refuse making the adjustment.

d. Defining "lawful religious activity": cl 5

At first blush, it would seem reasonable to confine the protection against discrimination of religious activity to *lawful* religious activities, since there are some activities that might be described as religious activities that are obviously justifiably unlawful. In response to concerns of various submitters about local laws targeted at outlawing certain religious conduct or the expression of religious views, section 5(2) now provides that 'For the purposes of paragraphs (b) and (d) of the definition of religious belief or activity in subsection (1), an activity is not unlawful merely because a local by law prohibits the activity.'

The problem is that the definition would appear to permit a State or Territory law to render a religious activity unlawful, thereby removing federal discrimination protection for the activity. If the protection afforded by the RDB2 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 RDB2. 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 RDB2.

The following 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 RDB2:

[46] Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination and Equal Opportunity Law*, (3rd edition, 2018), The Federation Press, 7.6.34.

- A State law criminalises homosexual 'conversion therapy'. "Conversion therapy" is defined as a "treatment or any other practice that attempts to change or suppress a person's sexual orientation or gender identity". This definition is so broad as to cover prayer and religious counselling including group prayer and counselling which:
    - asks God to change a person's sexual orientation or gender identity or
    - encourages the person to engage in activities more typical of a person with a particular sexual orientation or gender identity with a view to changing or suppressing a particular sexual orientation or gender identity; or
    - encourages or prays for a person to be able to live celibate.

Would the RDB2 protect an imam or priest who is discriminated against for counselling a believer that the Bible calls for sexual relations to be entered into only in the context of a heterosexual marriage and praying with the believer for chastity outside marriage? Or would the imam or priest lose any protection against discrimination that might otherwise have been available under the RDB2 on the basis that the religious activity (i.e. the counselling of the parishioner) was not lawful?

The example is not hypothetical. Subsequent to the release of the first Exposure Draft, the Queensland Government has released the *Health Legislation Amendment Bill 2019.* Further information on the Bill is available here: https://www.parliament.qld.gov.au/work-of-committees/committees/HCDSDFVPC/inquiries/current-inquiries/HealthLAB2019.
Proposed section 213F criminalises any act of conversion therapy by a health practitioner, including unregistered counsellors. This will likely capture counsellors and chaplains within both public schools and private religious schools. On passage of the Queensland Bill, any such chaplain prosecuted for affirming a traditional Biblical view of gender would not be protected under the RDB2, as the act of affirmation is not 'lawful' under Queensland law. Further, we note that any such 'statement of belief' that affirmed a Biblical view of gender would not be protected under clause 42, as the provisions prohibiting such statements are not made within the context of 'discrimination' law prohibitions.

The Victorian government has announced an inquiry into implementing the report of the Health Services Commissioner to ban conversion practices with a similarly broad definition to the Queensland Bill. The inquiry is yet to determine who will be affected by the ban but one option is to extend the ban beyond registered health practitioners and so cover religious believers and priests and imams and rabbis.

As a minimum, as a protection against undue encroachment by a future State or Territory Government on ordinary religious activities, there should be a provision that allows the prescription by Regulation of laws the breach of which does not make a religious activity unlawful for the purposes of the Act and hence does not lose the Act's protections against discrimination. The effect of prescribing would not be to override the State or Territory law but to continue the Act's federal discrimination protection for religious activities which breached the prescribed law.

6. Indirect discrimination under cl 8 and the reasonableness test

a. The reasonableness requirement for indirect discrimination: cl 8

Clause 8 of the RDB2 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[47]…
>
> …the current law of indirect discrimination delegates too much unstructured responsibility to the courts to determine broad issues of social policy.[48]

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.

In addition, Commonwealth law should only permit religious manifestation to be limited where such is consistent with the international standard Australia has ratified. Where a set of circumstances gives rise to a claim of discrimination under the *Sex Discrimination Act 1984* and a cross-claim of religious

[47] Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination and Equal Opportunity Law*, (3rd edition, 2018), The Federation Press, 3.8.15.
[48] *Ibid*, 3.8.45.

discrimination under the Bill, the two claims should be balanced according to the 'necessary' limitations standard set out in the ICCPR.

b. The employer conduct rule (cl 8(3)) and qualifying body conduct rule (cl 8(4))

ICS welcomes the inclusion of a separate provision addressing discrimination by qualifying bodies (including universities as clarified at paragraphs 126 and 154 of the EM) at cl 8(4). 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. A qualifying body conduct rule is '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.'

Generally, an employer conduct rule and a qualifying body conduct rule fall to be assessed under the general reasonableness tests for indirect discrimination in 8(2) and we have recommended amendments to those above including requiring reasonable adjustments for religious belief and activity.

However, cl 8(3) and 8(4), respectively, provide for circumstances in which an employer conduct rule or qualifying body conduct rule is *deemed* not to be reasonable, and hence, if imposed, could constitute indirect discrimination. The first deeming provision (contained at clause 8(3)) 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, threaten or seriously intimidate or vilify 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(5).

The second deeming provision applies to a conduct rule which is imposed by a qualifying body (being 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 carrying on of a trade or the engaging in of an occupation) 'that would have the effect of restricting or preventing a person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation'.

However, there are two circumstances in which this deeming provision does *not* apply. The first is where compliance with the rule by accredited persons is an "essential requirement". 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, threaten or seriously intimidate or vilify 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(5).

ICS makes the following observations about clause 8(3), which is presumably designed to address the Israel Folau situation, and clause 8(4):

- As noted above, the interaction between the protection to statements of belief at section 42 and the protections to employees and accredited persons against indirect religious discrimination in section 8 is not sufficiently clear. Clause 8 does not make clear that it is religious discrimination for an employee to be dismissed or professional to have their accreditation removed for a statement protected by clause 42. The reasonableness test at clause 8 leaves open the prospect that an employer may dismiss an employee, or a professional may have their accreditation removed, even though their statement of belief is protected under clause 42.
- The protections at cl 8(3) and (4) should clearly extend to reasonable statements of belief (defined at clause 42 and 8(5)) made inside and outside of the workplace.
- It is unclear whether the period in which an employee is not performing work would include periods of time where the worker is at his or her workplace, but is on a break. In so far as a conduct rule would restrict or prevent a person from making a statement of belief during that time, would cl 8(3) or cl 8(4) deem the rule unreasonable?
- For consistency across the Bill, equivalent protections should apply to the conduct of registered organisations and employment agencies (the other areas of public life in which equivalent anti-discrimination prohibitions operate under sections 17 and 18, respectively).

- Why are only employers with over $50m in revenue affected by clause 8(3)? Why should smaller private employers and government employers be given more scope to regulate the speech of their employees in their private lives? Why are the religious freedoms of employees of smaller companies and government agencies in their own time of less worth? Surely *government employers* are directly subject to Australia's obligations in ICCPR 18(3) that the right to manifest a religious belief cannot be limited except by law where necessary to ensure public safety, order, health or morals, or the fundamental rights of others.

- Through these means, the provisions appear to introduce an implied 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. Clause 8(4) also gives rise to such a presumption in respect of accredited professionals or tradespersons.[49] This presumption should be expressly displaced.

- Any assessment of the financial hardship on the employer under cl 8(3) 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.

[49] Paragraph 155 of the EM provides:

> This presumption only operates in relation to conduct rules that restrict or prevent a person from making a statement of belief other than in the course of practising their profession, trade or occupation. Nothing in this subclause affects the ability of qualifying bodies to regulate religious expression by persons in the course of engaging in their profession, trade or occupation. The reasonableness of such rules must be considered in accordance with the general reasonableness test at subclause 8(2), including paragraph 8(2)(e).

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.

- The comments made above in relation to "harass", "threaten" and "seriously intimidate" apply to the exception at clause 8(5).

c. The current provisions do not clearly protect an Israel Folau type of case

Instead of the complexity of large private employer special rules why not start with the proposition that no employer or qualifying body can restrict an employee's freedom to state their genuine religious beliefs? Exceptions could then be made in respect of beliefs which incite hatred against, or which vilify or ridicule or promote contempt for 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. The same should apply to professionals or tradespeople now protected under clause 8(4) in respect of comments that are made in the course of their profession or trade.

A secular organisation like Rugby Australia or a company or a local council or a professional accreditation body would argue under the current provisos in the Bill that it is a reasonable condition, requirement or practice (e.g. in its code of conduct) for its employees or brand representatives or for accredited professionals 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 with cases similar to the Folau case. The same is true of a professional or tradesperson who is disciplined by a qualifying body for such comments.

d. Religious conduct in the workplace and for accredited persons

To avoid that outcome, the RDB2 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 or qualifying body on an accredited person, 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 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.

Finally, we have proposed above in section 5 the use of a reasonable adjustments requirement to tighten the reasonableness tests in clause 8.

7. Re the exception for inherent requirements: clause 32

Clause 32 of the RDB2 permits discrimination against a person in employment (cl 14) or partnerships (cl 15) or in relation to qualifying bodies (cl 16) or by employment agencies (cl 18) 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 RDB2 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 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:

- a commitment to not proselytising or speaking about their religious faith in the workplace;
- a requirement that the person attend yoga classes or engage in mindfulness training;
- a requirement that the person promote the option of euthanasia or abortion;
- a requirement that the person participate in Pride fundraisers or wear a Pride lanyard or uniform;
- 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 ceremonies[50] 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 RDB2 should not provide a vehicle for employers to do this through an inherent requirements or genuine occupational requirements exemption.

In response to these concerns, ICS welcomes the inclusion of the following statement at paragraph 434 and 435 of the EM:

> 434. Whether a requirement constitutes an inherent requirement must be determined by reference to the particular position. It will not be sufficient for an employer to merely describe certain elements of a position as inherent requirements to establish that they are in fact inherent requirements for the purposes of this exception. As held in *X v Commonwealth* (1999) 200 CLR 177, an employer is not able to organise or define their business so as to permit discriminatory conduct. As such, an employer cannot simply declare that it is an inherent requirement for an employee or partner to hold, or not hold, a religious belief or engage, or not engage, in a religious activity, unless this was, objectively in the circumstances, an essential element of the particular position.
>
> 435. To illustrate, an employer could not simply determine that adherence to a statement of corporate values is an inherent requirement of a position, and then discriminate against employees on the grounds that their faith was inconsistent with those corporate values.

Although this statement is of assistance, statements made in Explanatory Memoranda are readily disregarded by courts. To clarify that the 'inherent requirements' test cannot be abused by employers who assert that a religious believer's conduct is contrary to the requirement that all employees support the secular "values" of the organisation, as proposed by the EM, an example to that effect should be provided in the Bill itself. An example of the valid application of the provision in the case of a chaplain provided by a secular employer for a particular religious or atheist group of employees being required to be of that religious or atheist belief would also be of assistance.

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

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.

On a technical note, the inclusion of new cl 8(4) will require, for consistency with 32(6) and 32(7) in respect of employer conduct rules and health practitioners conduct rules, the inclusion of a subparagraph that provides any qualifying body conduct rule that contravenes cl 8(4) cannot impose an inherent requirement under cl 32.

Also, religious businesses such as medical practices or law firms should be able to maintain their ethos by preferring employees who share their faith, not just in respect of senior leadership roles, but across the entire organisation (see paragraph 441 of the EM which precludes this possibility).

8. Unprecedented Exclusion of Religious Bodies that Undertake "Commercial Activities"

a. Overview of amendments

The amendments made to clause 11 address the concern expressed by many religious submitters that public benevolent institutions (PBIs) would not be considered to be religious bodies, as far as this Bill is concerned. However, the amendments give rise to other issues, by introducing a partial (employment only) exemption for hospitals and aged care and by making all other religious charities (apart from religious camps, schools and universities) subject to a commercial activities test. Appendix 1 provides a table overviewing the proposed regime. From this overview, it is readily apparent that the Bill introduces a very complicated regime and excludes a range of religious charities that are not excluded by existing exemption provisions in Commonwealth anti-discrimination law.

A simplified description of the proposed regimes is as follows. The Bill gives a total exemption to faith-based public benevolent institutions, in response to the concerns of religious leaders. Faith-based hospitals or aged care facilities may only discriminate in respect of employment, but not their other actions. Bodies that solely or primarily provide accommodation (including retirement villages, housing providers, faith-based student residential colleges, and possibly school boarding houses) may discriminate only in employment. Camps or conference sites may discriminate in the bookings they take, provided they have a publicly available policy. All other bodies (including other religious charities and not-for-profits) remain subject to the 'solely or primarily' commercial activities exclusion.

b. Introductory comments by way of consideration

PBIs comprise a very limited proportion of the wider religious and faith-based charitable sector (including churches). The new bespoke rules for aged care and hospitals do not allow them to act in accordance with their religious convictions. As outlined in the following discussion, the regime will prevent a sizeable proportion of the charitable and not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake.

The exclusions introduced at clause 11 have no precedent in any anti-discrimination law in any jurisdiction in Australia (or any Anglophone democracy). The 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 health'[51] 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.[52]

The Expert Panel did not propose the distinction between employment and services proposed in the Bill. 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 RDB2, and thus lose its ability to authentically maintain its religious character (the example provided is in relation to IVF). To allow such a distinction could mean that a faith-based aged care provider must facilitate the provision of euthanasia drugs on its premises. Again, to draw such a distinction in the RDB2 will set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law.

The exclusion of religious 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 RDB2 will also set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law.

c. The Australian religious and faith-based charitable and not-for-profit sector

The exemptions in anti-discrimination law have never been limited to PBIs. PBIs are a very limited subset of the wider religious and faith-based charitable sector. In 2014 there were around 9,000 secular and religious public benevolent institutions in Australia. That is in contrast to the approximately 57,000 charities within Australia.

According to the ACNC 2017 annual information statement statistics (the most recent available), 14,763 of a total of 48,312 charities (30.55%) contained in the publicly available data reported their

[51] Paragraph 1.183.
[52] Paragraph 1.169.

main activity as 'religious activity'. It can be assumed that these bodies do not meet the criterion of 'faith-based', but instead have a purpose of 'advancing religion'.

Of the remaining charities, 2,113 reported 'religious activity' as a non-main activity (excluding the 412 who double-reported their main and other activities as 'religious'). That gives a total of 16,876 charities (34.93%) that reported that they undertake religious activities. This figure is likely to be understated, a result of:

a) the ACNC's approach that a faith-based PBI cannot have a religious purpose (a large proportion of the faith-based PBIs who comprise the 17.5% (2014 figure) of Australian charities would not report 'religious activities' for fear of loss of PBI status), and

b) under reporting by faith-based charities who fail to record their religious affiliation (possibly on the assumption that religious affiliation does not amount to a religious activity).

This also means that the ACNC data does not disclose the true figure of the number of charities that are 'religiously affiliated' (being those with a purpose of 'advancing religion', and those with another charitable purpose, but which are 'faith-based'). In 2018 the Sydney Anglican Diocese submission to the ACNC Panel Review made an attempt to extrapolate the true number of religious affiliated charities in Australia from the proportion of faith-based charities identified within the charities with the highest turnover. Their submission found that 51.1% of charities were religiously affiliated (comprised of 30.8% as 'advancing religion' and 20.3% being 'faith-based'). In sum, it is reasonable to conclude that a sizeable proportion of the charitable sector are faith-based and are not either 'advancing religion' bodies or PBIs.

d. Who will be excluded by the commercial activities test?

The Australian Charities and Not-for-profits Annual Information Statement 2017 data set (the most recent available) discloses that charities that reported a main activity that was not a religious activity, but that stated that they do engage in religious activities, reported the following as their main activities:

1. advocacy and civic activity bodies
2. animal protection
3. culture and arts
4. environmental bodies
5. grant-making bodies
6. rehabilitation providers
7. philanthropic intermediaries and voluntarism promotion
8. other recreation
9. social club activity
10. research
11. social services
12. sports
13. economic, social and community development
14. emergency and relief
15. employment and training
16. income support and maintenance
17. international activities
18. law and legal services

19. mental health crisis and intervention.

The list serves to demonstrate the breadth of faith-based charitable institutions in Australia. Many will be excluded by the commercial activities test proposal at section 11(5)(c). The reasons for this include because the exclusion would capture charities that charge nominal fees for services. As disclosed in the first row on the enclosed table at Appendix 1, categories 13 to 19 may be eligible for PBI status (and then fall within the exemption at cl 11(5)(b)) where they are focussed on the service of beneficiaries in need of benevolent relief, but otherwise such faith-based institutions would be excluded where they undertake primarily or solely commercial activities.

In addition, the subjection of churches and other religious institutions to the commercial activities exclusion at clause 11(5)(c) would exclude, for example, charities such as faith-based marriage guidance and marriage or family counselling organisations, faith-based radio stations, faith-based public libraries, historical societies, religious book stores (whether for profit or not), and child care centres (see the discussion further below on child care centres for the rationale for included such centres in this list).

Furthermore, in respect of the commercial activities exclusion, paragraph 225 of the EM states:

> Commercial activities may include activities such as providing goods, services or facilities to the public, or sectors of the public, on a for-profit basis (for example, not on a cost-recovery basis).

This example is oblivious to the operations of the charitable sector. Almost all charities provide services at a margin that is above cost in order to provide an allowable contingency for future operations or for other purposes, such as an expansion into yet-to-be serviced areas. It is arbitrary and punitive to exclude such charities from being able to maintain their religious ethos for undertaking such reasonable and prudent endeavours. As a result, the example given in the EM offers no protection to charities.

e. Not-for-profit sector

In relation to 11(5)(c) it is highly important to recall that the exemptions granted to religious bodies in anti-discrimination law have never been limited to charities alone. In 2010 the Productivity Commission estimated the number of Australian not-for-profits (bodies not able to distribute profit to their members) to be in the order of 600,000 (there are around 57,000 charities registered with the ACNC). To cast a commercial activities exclusion upon such bodies would, again, be entirely novel.

f. Faith-based aged care, retirement villages and hospitals and euthanasia

The proposal that faith-based aged care, retirement villages and hospitals only be permitted to discriminate in respect of employment, but not services, will seriously compromise their ability to act consistently with their religious ethos. The Attorney-General has said that aged care providers do not seek to discriminate in respect of the supply of their services or facilities. However, when proper regard is had to the technical reach of discrimination law, this proposition is not accurate. For example, any aged care provider that imposes a condition on the supply of its facilities or care services that they not be used to facilitate physician assisted suicide or euthanasia could be subject to a claim of unlawful religious discrimination by a resident (on the basis of the resident's absence of a religious objection to euthanasia, or the resident's religious belief that does not oppose euthanasia) This is the necessary consequence of the example at paragraph 232 of the EM, which says 'it would not be appropriate for

a religious hospital to discriminate against a potential or existing patient on the basis of the patient's religious belief or activity'. If a Court chose to ignore that statement, such a claim would only be defeated if the operator's actions were 'reasonable' under clause 8, leaving high levels of discretion to a court. The same is true of a faith-based hospital that assists with IVF, such an institution would need to argue that the refusal was reasonable pursuant to clause 8. This demonstrates that the religious ethos of an organisation may be detrimentally impacted, not only by the staff that it is required to engage, but equally by the actions it is required to perform.

g. Child care centres

In respect of child care, the EM provides the following statement (at paragraph 218):

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

However, contrary to this statement, child care services are included as a charitable purpose under the *Charities Act 2013* not under the head of 'advancing education', but instead under the head of 'advancing social or public welfare'. This is consistent with the recommendations of the Charities Definition Inquiry in 2001, which gave consideration to the educational and benevolent purposes extended through child care, but recommended that the relevant head not be education. Many private religious schools provide an affiliated child care centre, either as an independently incorporated entity, or as ancillary to their wider educational purposes (by assisting the attendance of sibling children of schooling age). Such schools seek to ensure consistency in their employment practices across the school and the associated child care centre. The Bill should clarify that such child care centres are educational and exempt pursuant cl 11(5)(a).

h. Clause 11 will establish a precedent

Finally, there is also a wider concern, beyond just the current *Religious Discrimination Act* proposal. The religious exemptions in the *Sex Discrimination Act* are currently the subject of a reference to the Australian Law Reform Commission. In October ALRC President Justice Sarah Derrington informed Senate Estimates that her view of the reference is that "What we've been asked to do is to restrict ourselves to a drafting exercise which would ensure that the Sex Discrimination Act and the Fair Work Act were consistent with the government's bill." If the recommendations of the ALRC are implemented, the proposed distinctions in the *Religious Discrimination Act*, or a framework that is commensurate with that regime, would be introduced into the *Sex Discrimination Act*.

9. Freedom of Religion Commissioner: cl 45

The RDB2 provides for the appointment of a Freedom of Religion Commissioner within the Australian Human Rights Commission. Clause 45(4) of the RDB2 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 RDB2 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 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.

10. Conflict between Federal and State laws

a. Federal RDB2 must be expressed to override State and Territory laws which are directly inconsistent

The RDB2 should override State and Territory laws which are directly inconsistent with it. Clause 60 of the RDB2 includes a concurrent operation provision for State and Territory Anti-discrimination Acts so that in general they continue to operate concurrently with the federal RDB2. 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 RDB2, the federal RDB2 prevails to the extent of that inconsistency.

For example, if the effect of the federal RDB2 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 RDB2 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 RDB2 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 RDB2.

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

While the RDB2 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 30 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.

11. 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.[53] 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 Baking 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 opinion
>
> if 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.

[53] 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#{%22fulltext%22:[%22ladele%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-115881%22]}

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 RDB2 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

In the context of health practitioners, it is also noted that the provisions concerning objection by health practitioners (subparagraph 8(6) and (7)) do not extend to religious hospitals. Given the concerns raised above in respect of clause 9 and the removal of the definition of 'person' at clause 5(1), it is not at all clear how such institutions could assert discrimination on the basis of their association with a religious believer. Given the amendments to clause 11, it is clear that they will only be able to refuse a religious discrimination claim by a patient where such is reasonable under section 8. 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 RDB2. 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.

The protection offered to health practitioners seeking to exercise a conscientious objection provides no greater protection than existing State laws that regulate such objections. For many this is considered to be insufficient.

Further, the RDB2 now provides two additional notes that clarify the operation of subparagraphs 8(6) and (7), respectively:

> this provision does not have the effect of allowing a health practitioner to decline to provide a particular kind of health service, or health services generally, to particular people or groups of people. For example, refusal to prescribe contraception to single women may constitute discrimination under the *Sex Discrimination Act 1984*.

The EM provides the following clarification (at paragraph 167):

> In addition, the objection must be to providing or participating in a particular kind of health service, such as procedures like abortion or voluntary assisted dying, not an objection to the personal attributes of the person seeking the service. That is, the objection must be to the service generally, rather than attaching to the personal attributes or characteristics of the individual receiving that service. For example, the definition would capture a refusal by a Catholic doctor to prescribe contraception generally, but would not capture a refusal to prescribe contraception to single women.

(In addition to the example provided in the Bill, another example is a health practitioner who refuses to provide IVF assistance to a single woman.) These statements in the Bill and the EM call into question the ability of the health practitioner to assert a claim of religious discrimination where the patient could be considered to be a subclass of the wider public.

ICS' concern with the limitation is that it draws an arbitrary line: the religious basis for a conscientious objection to providing a service to a particular class of persons may be as doctrinally sound as the religious basis for refusing to provide a type of service to all persons.

The comment at paragraph 184 of the EM is also concerning, in that it would also limit the operation of ss 8(7):

> It is not intended that this provision would allow health practitioners to exercise their conscientious objection in a manner which directly affects the patient, causes disruption to patient care or intentionally impedes patients' access to care.

This appears to capture almost any imposition on a patient, deeming such to be an unjustifiable adverse impact, regardless of the profundity of the effect on the religious health practitioner.

The proposed distinction will drive medical practitioners with a conscientious objection from practice areas solely on the basis that the service they provide may be provided to some persons without conscientious objection.

12. 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'.[54] 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.

[54] *In the matter of an appeal under section 59 of the Charities Act 2005 from a decision of the Charities Commission dated 21 August 2017 and in the matter of Family First New Zealand*, CIV-2017-485-775, High Court of New Zealand, France J.

13. 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:

- 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
- 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.

14. Issues not addressed in the Religious Discrimination Bill

The following issues are not addressed in the RDB2. 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.

APPENDIX 1 – Table showing lawful religious body actions

	Exempt	**Not exempt**	**Resulting bodies / acts excluded**
Section 11(5)	Religious Body includes: (a) Faith-based **educational** institutions (b) Faith-based **public benevolent institutions** (c) **Churches and faith-based not-for-profits and for-profits**, provided they do not engage solely or primarily in commercial activities. Religious body does not include 'an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation' (see below).	Any charity or not-for-profit outside religious schools and PBIs that engages solely or primarily in commercial activities. This would preclude: Any institution that is a hospital or aged care facility (see section 32(8) to (12)). Any institution that solely or primarily provides accommodation (see section 32(8) to (12)).	The following faith-based entities cannot discriminate in respect of *employment or supplies* where they engage primarily or solely in commercial activities ((f) to (w) are charities that disclosed religious activities in the ACNC 2017 AIS data): 1. religious book stores (whether for profit or not), 2. faith-based marriage guidance and marriage counselling organisations, 3. radio stations, 4. public libraries 5. child care centres <that do not provide education 6. advocacy and civic activity bodies 7. animal protection 8. culture and arts 9. environmental bodies 10. grant-making bodies 11. rehabilitation providers 12. philanthropic intermediaries and voluntarism promotion 13. other recreation 14. social club activity 15. research 16. social services 17. sports. The following charities that disclosed religious activities in the ACNC 2017 AIS data could be exempt PBIs, depending on whether the community serviced is in need of benevolent relief, but otherwise they would be excluded where they undertake primarily or solely commercial activities: 18. economic, social and community development 19. emergency and relief 20. employment and training 21. income support and maintenance 22. international activities 23. law and legal services

			24. mental health crisis and intervention.
Section 32(8)(a)(i) & 32(10)(a)(i)	Faith-based **hospital or aged care** facility in respect of employment only	Faith-based hospital or aged care facility in respect of supplies of goods, services, facilities, accommodation and access to premises.	Faith-based domestic aged care service providers are excluded in respect of employment and services. To prohibit euthanasia on their premises aged care providers must argue the policy is 'reasonable' under section 8. To refuse supply of IVF to a single mother, a faith-based provider must argue the policy is 'reasonable' under section 8.
Section 32(8)(a)(ii) & 32(10)(a)(ii)	Faith-based **sole or primary accommodation provider** (including camp sites) in respect of employment only	Faith-based sole or primary accommodation provider in respect of supplies of goods, services, facilities, accommodation and access to premises. Faith-based camp or conference sites that do not supply accommodation in respect of employment.	Retirement villages, housing providers, faith-based student residential colleges, and independently incorporated school boarding houses in respect of supplies of goods, services, facilities, accommodation and access to premises. To prohibit euthanasia on their premises retirement villages or housing providers must argue the policy is 'reasonable' under section 8.
Section 33(2) & 33(4)	Faith-based **camp or conference site** in respect of supply of accommodation, where a policy is publicly available.		Camp or conference sites that *do not supply accommodation* cannot discriminate in respect of employment (other than under the standard inherent requirements test at 32) or in respect of supplies of bookings.

APPENDIX 2 - Policy Proposal on Freedoms of Different Religious Bodies to preference on religious grounds in relation to employment, clients/service recipients and rules governing use of facilities, products and services

Freedom of Body to Preference ⟹ **Type of Body ⇩**	**Free to preference in *employment of staff, contractors and volunteers* according to the person's conformity to the doctrines, tenets, beliefs or teaching of the religion or the religious susceptibilities of adherents**	**Free to preference in *selection of attendees, clients or recipients of benefits, facilities or services* according to the person's conformity to the doctrines, tenets, beliefs or teaching of the religion or the religious susceptibilities of adherents**	**Free to apply *rules limiting use of facilities, products and services provided to* members, attendees, clients or recipients of services where the rules are in accordance with the doctrines, tenets, beliefs or teaching of the religion or the religious susceptibilities of adherents[55]**	**Free to preference *(i) in membership (however described) of the body and/or (ii) in membership of the governing board and committees (in both cases however described) of the body,* according to the person's conformity to the doctrines, tenets, beliefs or teaching of the religion or the religious susceptibilities of adherents**
1. "Core" Religious Body Body which conducts, provides or facilitates religious gatherings, worship, prayer, observance, a religious community, education in the religion and religious activities (for any age group), proselytising, pastoral care, or other religious activities (including production of materials and programs for	Yes, noting that in practice many religious organisations may restrict employment preferencing to certain roles	Yes, noting that many religious organisations in practice welcome and seek non-believers to participate in many of their religious	Yes eg rules against promoting contrary religious views or undermining the religious ethos of the body	Yes, noting the importance, especially to numerically smaller faith communities, of having people of their own faith in control of religious

[55] A framework to do this may be through what the ICS submission proposes as an Asher's Bakery clause:

(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 opinion

if 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.

any of the above) in accordance with the doctrines, tenets, beliefs or teaching of a religion. This could capture any body with a purpose of advancing religion (as understood in charity law, including as described by Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor*[56]), whether or not they are registered as a charity. Intended to cover bodies providing or facilitating CORE religious activities eg Churches, mosques, synagogues, temples, theological and training colleges, proselytising/ missionary organisations, religious pastoral care and counselling, trusts holding property for such purposes, religious media producers, publishers and sellers.		activities and services		organisations in order to preserve their religious ethos
2. Religious Education Institution Body which controls or directs an educational institution that is conducted in accordance with doctrines, tenets, beliefs or teaching of a religion (whether or not a charity and whether or not	Yes, noting that in practice some religious educational institutions may restrict employment preferencing to certain roles	Yes, noting that many or most (but not all) religious schools have open enrolment policies for students who are not	Yes eg rules against promoting contrary religious views or undermining the religious ethos of the education institution	Yes, noting the importance, especially to numerically smaller faith communities, of having people of their own faith in control of

[56] (1934) 51 CLR 1, 33:
In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it. The purpose may be executed by gifts for the support aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification; by gifts for ecclesiastical buildings, furnishings, ornaments and the like; by gifts to provide for religious services for sermons, for music for choristers and organists, and so forth; by gifts to religious bodies, orders or societies, if they have in view the welfare of others. A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover a disposition is valid which in general terms devotes property to religious purposes or objects. *But, whether defined widely or narrowly, the purposes must be directly and immediately religious.* It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion. The law has found a public benefit in the promotion of religion as an influence on human conduct; but it has no standard by which to estimate what public benefit that order is produced indirectly or incidentally by means which although they may be considered to contribute to the good of religion, are not in themselves religious and do not serve directly a religious object.

engaged in commercial activities eg fee charging). Intended to cover religious schools, colleges and training institutions conducted in accordance with doctrines, tenets, beliefs or teaching of a religion. Eg Muslim, Jewish or Christian school or college.		members of the religion		religious educational institutions in order to preserve their religious ethos
3. Religious Charity or NFP whether or not engaged in commercial activities Body which is conducted in accordance with the doctrines, tenets, beliefs or teaching of a religion, is a registered charity or operates on a not for profit basis, whether or not it engages in commercial activities. Religious welfare charity or NFP, religious hospital or medical service or aged care facility. NB: The key distinction in the law of charities has always been whether an entity is 'for-profit' or 'not-for-profit' (i.e. whether it is able to distribute profits to members for personal gain or not), NOT whether it engages in 'commercial activities'. Against this, a commercial activities exclusion (in charity income tax law) was attempted by the Rudd/Gillard Governments in around 2011-13. It failed due to the difficulty in distinguishing between commercial and non-commercial activities and the resulting complexity of the regime. Rather than create such a novel distinction in	Yes, noting that in practice many religious charities and NFPs may restrict employment preferencing to certain roles.	Yes, noting that many or most religious charities and NFPs do not preference members of the religion in service delivery. .But there is a need for institutions of numerically smaller faith communities to do so. They cater to the religious, cultural and linguistic needs of their community *in addition to* providing the service. Equivalent institutions outside the faith community usually do not, and cannot reasonably be expected to do so.[57]	Yes eg rules against any use of facilities or services which is not in conformity with the doctrines, tenets, beliefs or teaching of the religion e.g. no storage of or staff assistance in administration of drugs for assisted dying, no use of facilities or staff to promote views contrary to beliefs of the religion. Those rules should be made known to prospective users of the facilities or services before or at the time of use but need not be publically available	Yes, noting the importance, especially to numerically smaller faith communities, of having people of their own faith in control of religious charities and NFPs in order to preserve their religious ethos

[57] In general such rules should be made known to prospective users of the facilities or services unless that is obvious from the nature of the service. However, if such a test is to be applied, the EM should clarify that the policy need only be available at the entity's office or on enquiry or as part of an application process. It need not be available on the internet to avoid trolling by third party activists not interested in using the service.

anti-discrimination law, the focus should remain on whether a body is for profit or not-for-profit.				
4. **Commercial for profit body organised on religious principles which pays profits to its private owners**[58] Body which is conducted in accordance with the doctrines, tenets, beliefs or teaching of a religion which is not a charity or a not for profit and engages in commercial activities on a for profit basis and pays profits to its owners who are not any of the bodies listed above eg kosher or halal butcher or baker.	No, except where observance of the religion is an inherent requirement of the position. However clarification is needed that certain businesses legitimately may apply this requirement for all employees (not just senior employees) in order to maintain a religious ethos.	Generally, no	Yes eg rules against use of facilities or staff or provision of certain products or services of the body in a manner constituting an express or implied statement of belief which is contrary to the doctrines, tenets, beliefs or teaching of the religion of the body. Those rules should be made known to prospective users of the facilities or services but need not be publically available Eg Asher's Bakery, Brockie (printer)	No. This would be a matter for the private owners.

5. **Faith-based clubs** Body which is defined as a club in the Bill	Yes.	Yes, noting that many or most religious clubs do not preference members of the religion in service delivery, but there is a need for some clubs of numerically smaller faith communities to do so. They cater to the religious, cultural and linguistic needs of their community *in addition to* providing the service. Equivalent clubs the faith community usually do not, and cannot reasonably be expected to do so eg Maccabi junior sports club	Yes eg rules against use of facilities or provision of certain products or services of the body in a manner constituting an express or implied statement of belief which is contrary to the doctrines, tenets, beliefs or teaching of the religion of the body. But those rules must be made known to prospective users of the facilities or services	Yes, noting the importance, especially to numerically smaller faith communities, of having people of their own faith in control of faith-based clubs in order to preserve their religious ethos eg Dooleys clubs, Hakoah club

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