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Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Religious Discrimination Bill 2021 and Related Bills

7 January 2022

The Institute for Civil Society (ICS) is a social policy think tank. Established in August 2016, ICS seeks to:

1. Promote recognition and respect for the institutions of civil society that exist between individuals and the government. Included in this space are clubs, schools, religious organisations, charities and NGOs.
2. Uphold traditional rights and liberties, including the freedoms of association, expression, conscience and religion.
3. Promote a sensible and civil discussion about how to balance competing rights and freedoms in Australian society.

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A. Introduction

Thank you for the opportunity to make a submission to this inquiry.

The Institute for Civil Society supports the Religious Discrimination Bill and accompanying Bills as a long overdue protection of people of faith and their organisations from being discriminated against on the ground of their religious belief or religious activity.

Discrimination against people of faith is real and growing in Australia but there are no legal protections against it in federal, NSW or South Australian anti-discrimination law. This is a gap in anti-discrimination law we would not accept for any other minority.

www.australiawatch.com.au documents 44 real life cases of religious discrimination against ordinary Australians at work, in education, in businesses and in professions and trades that demonstrate that there are real cases of religious discrimination and there is a need for the Bill. Five of these cases are described in the **attached** sheet.

The Executive Council of Australian Jewry 2020 anti-semitism report at https://www.ecaj.org.au/the-ecaj-2020-antisemitism-report/ and the Islamophobia Report 2019 at https://www.islamophobia.com.au/resources/ document real cases of religious discrimination against Jews and Muslims.

Despite many claims to the contrary, the Bill does not authorise or protect acts which are discriminatory on other grounds such as age, race, disability, sex, marital status, sexual orientation or gender identity nor does the Bill change any law which prohibits discriminatory acts on such grounds.[1]

A document responding to 5 key objections raised to the Bill by opponents is also **attached**.

In Section B we outline the Bill's strengths and explain and, in some cases, justify these provisions.

The Bill has a few puzzling departures from non-controversial standard provisions in other federal anti-discrimination which should be fixed. We note these in Section C.

The Bill provides less protection than was sought by people of faith. Many reasonable protections sought by faith groups were left on the cutting room floor by the government in the policy formation process. We argue for the inclusion in the Bill of additional reasonable protections in Section D.

[1] The first part of Clause 12 (12(1)(a)) protects a tightly defined class of moderate *statements* of belief or unbelief, not actions, from being treated as discrimination, but does not protect them from other forms of legal sanction such as being a breach of an employment contract or vilification or defamation. This is to stop the increased use of anti-discrimination complaints as a means of chilling and censoring moderate expressions of belief or unbelief. This is discussed in section B.

B. The Bill's strengths

1) **The Bill provides for the first time national protection for individuals against discrimination on grounds of their religious belief or lawful religious activity in many fields of public life** (like employment, education, accommodation, provision of goods or services).

Currently there is no protection against discrimination by federal government officers or agencies and no protection at all against religious discrimination in NSW or (except for religious dress) in South Australia. A business can put up a sign saying "No Muslims/Christians allowed" and it is not unlawful discrimination in NSW or SA. We wouldn't accept that for any other minority group.

Australiawatch.com.au documents 44 real life cases of religious discrimination against ordinary Australians at work, in education, in businesses and in professions and trades that demonstrate that there are real cases of religious discrimination and there is a need for the Bill.

The ECAJ 2020 anti-semitism report at https://www.ecaj.org.au/the-ecaj-2020-antisemitism-report/ and the Islamophobia Report 2019 at https://www.islamophobia.com.au/resources/ document real cases of religious discrimination against Jews and Muslims.

The Ruddock Review recognised that religious discrimination does exist. It recommended a Religious Discrimination Act to fill the gap in existing law. 'While the Panel did not accept the argument, put by some, that religious freedom is in imminent peril, it did accept that the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance.'

2021 polling from McCrindle Research shows that 29% of Australians report having experienced discrimination against them because of their "religion or religious views". [2]

In its 2017 Periodic Review of Australia, the United Nations Human Rights Committee expressed 'concern' at 'the lack of direct protection against discrimination on the basis of religion' and called upon Australia to address this deficiency by enacting Commonwealth discrimination protections.

An analysis of bias crime in NSW from 2013 to 2016 (that is crime where the victim is targeted because of an aspect of his or her identity, including race, ethnicity, religion or sexual orientation) showed that 44% were recorded by police as motivated by religious bias, 37% by racial/ethnic bias and 14% by bias towards the victim's sexual orientation/gender identity.[3] But in NSW, federal and State anti-discrimination law provides remedies to people for racial discrimination and SOGI discrimination but not religious discrimination – yet anti-religious bias motivated a much higher incidence of bias crimes than SOGI bias.

[2] Australias-Changing-Spiritual-Landscape-Report-2021.pdf (mccrindle.com.au)

[3] Mason, G. *A Picture of Bias Crime in New South Wales* in Cosmopolitan Civil Societies: an Interdisciplinary Journal (2019) 11:1, 47-66. ISSN 1837-5391 | Published by UTS ePRESS | https://mcs.epress.lib.uts.edu.au

There is a gaping hole in discrimination law protection in federal, NSW and South Australian law. Sex, sexual orientation, gender identity, age, race, and disability all have their own discrimination acts in Commonwealth Law. Religion does not.

2) **The Bill appropriately protects groups and corporations (e.g. churches and charities) against discrimination based on them being associated with an individual who holds a religious belief or engages in a lawful religious activity** (Clause 16).

For example, an application by an incorporated religious group to hire a hall is refused hire because of the religious beliefs or lawful religious activity of its leaders or members. The individual members of the group did not apply to hire the hall and have not been refused and have no direct claim for discrimination. The corporation was refused the hire but if is treated as being incapable of having a religious belief or activity, it has no claim for being discriminated against on the basis of its religious beliefs either, which means that in practice the corporation and the individual members of the group have no recourse for the discriminatory refusal.

The shallow slogan "human rights are for humans" is unhelpful here – it does not address how groups of humans who organise themselves into incorporated or unincorporated groups to manifest their human rights can vindicate their group human rights including the right not to be discriminated against. Some human rights are group rights as well as individual rights. Race and language and religious belief and activity are examples. Faith is very commonly expressed in communities of believers worshipping, acting and serving together and educating their children together.[4]

ICCPR Article 18(1) recognises that manifesting religious belief is an individual and a group right when it states that:

> *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually* ***or in community with others*** *and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

ICCPR Article 27 also describes a set of individual and group rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

There is a blind spot in Australian human rights law when it comes to vindication of rights that are both individual and group rights. An anti-discrimination law concerning religious belief and activity needs to recognise that religious belief is manifested in groups of believers and

[4] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 University of Queensland Law Journal 153, 178-181 (available at: https://ssrn.com/abstract=2507045); Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 Australasian Journal of Legal Philosophy 1, 8-13 (available at: https://ssrn.com/abstract=3543308).

provide effective protection for the group (be it incorporated or unincorporated) from religious discrimination.

This can be done directly by prohibiting discrimination against the group (including a corporation) on the basis of the group's religious beliefs of activities. That requires a statutory rule acknowledging that corporations can hold religious beliefs and engage in religious activities and preferably a means for those corporations to evidence their religious beliefs by adopting a statement of beliefs which they follow. It is not conceptually difficult to agree that an incorporated church or mosque or religious school or religious welfare body holds religious beliefs and engages in religious activities.

The government has chosen an indirect path to protecting groups and their members through the associates provisions in clause 16. Although indirect, this is workable and is based on similar provisions in other anti-discrimination laws.

So the incorporated religious group which is refused hire of a hall because of the religious beliefs of its leaders or members can itself bring a religious discrimination complaint under the Bill on the basis that it has been discriminated against because of its association with individual leaders or members who hold a particular religious belief.

3) **The Bill is for the most part consistent with other federal discrimination legislation on grounds of race, age, disability and sex and sexual orientation** (but see section C below for some significant departures which need to be fixed).

4) The Bill (clauses 7 to 9) protects the freedom of association of religious groups and organisations to prefer to have as members and employees those who agree with the beliefs of the religion and who live it out – the same freedom that political parties and MPs and other organisations with a mission to promote a world view and way of life have and use.

The Bill recognises that when a religious body acts in accordance with its religious beliefs (e.g. in membership and employment decisions), it is not discriminating on the grounds of religious belief or activity (Clause 9). This is a long overdue recognition that religious bodies when applying religious belief filters to membership and employment decisions are expressing their freedom of association – they can choose to prefer to have as members and employees those who agree with the beliefs of the religion and who live it out.

In the same way, political parties and MPs use their freedom of association to choose as members or candidates for pre-selection or employees, people who agree and continue to agree with the party's political beliefs. This freedom of association is not a "licence to discriminate" against people of other political beliefs, or other religions or no religion. Most ethos based organisations which promote a way of life and worldview also want to employ ambassadors for the cause and do exactly the same. Greenpeace does not, and should not have to, hire or retain people who advocate for fossil fuel development. LGBTI lobby groups do not, and should not have to, hire or retain people who advocate that gay and lesbian Australians should live celibate or only have sexual relations within marriage.

The Bill protects the right, in federal law, of religious bodies (and if they have a publicly available policy) religious schools, hospitals, aged care and disability providers and charities to choose to employ people whose religious beliefs will uphold the religious ethos of their organisation.

It is important to stress that clauses 7 to 9 only protect conduct of religious bodies (including preferencing of persons as employees or members based on the person's religious belief or activity) from being treated as *discrimination under the Religious Discrimination Act*, that is, it is not discrimination on the ground of religious belief or activity. Any such conduct including preferencing in employment or membership may still be unlawful discrimination under another anti-discrimination law if it is done on the basis of another protected attribute such as the person's sex or age or disability or sexual orientation, and the Religious Discrimination Bill does not affect the operation of those other Acts in relation to other protected attributes.

5) **The Bill provides a limited power to override State and Territory laws which take away the freedom of religious education institutions to choose to preference staff who share and support the religious beliefs and activities of the religion (clause 11)**

The Bill also provides in clause 11 for a limited override of specified State and Territory anti-discrimination laws to ensure that religious schools do not breach those laws when they make employment decisions to preference people with the same religious beliefs as the school. The Consequential Amendments Bill names the Victorian Equal Opportunity Act 2010 for the purposes of the override. Other State and Territory anti-discrimination laws which prohibit religious schools preferencing people with the same religious beliefs as the school in employment can be specified in future regulations.

But the override will apply only to one part of the changes made by the Victorian Equal Opportunity Amendment (Religious Exceptions) Act 2021. That Act also restricts all other religious bodies (including churches, mosques, synagogues and temples) from making employment decisions to preference people with the same religious beliefs as the body (and imposes 3 other restrictions on religious bodies' governance, employment[5]).

It should be obvious that a mosque should be free to choose to preference Muslims in employment and a Jewish religious body free to preference Jews. The override in clause 11 should be amended to ensure that *all religious bodies, not just educational institutions,* are free to choose to preference in employment people with the same religious beliefs as the body.

Further, the override in clause 11 should not depend on the making of regulations naming specific State and Territory anti-discrimination laws. Such regulations can be made and unmade and changed by different Ministers and governments. If the Parliament considers that,

[5] A critique of the 5 ways in which the Victorian Religious Exceptions Amendment Act 2021 creates unprecedented interference by the State with the internal governance and employment and operations of religious bodies can be found at http://www.i4cs.com.au/victorias-frontal-attack-on-freedoms-of-religious-bodies-and-educational-institutions/

as a matter of principle, religious bodies (including churches, mosques, synagogues and temples) and schools should be free to choose to preference in employment people with the same religious beliefs as the religious body (just as political parties and MPs are free to preference people with the same political views in employment), then the Parliament should enact a simple statutory right for religious bodies to do so which will override inconsistent State and Territory laws to the extent of the inconsistency, without having arguments about whether there should be a regulation for each new State and Territory law.

6) **The test of an individual's religious belief is not determined by a judge or court interpreting what is the doctrine of a religion but is simply based on a belief genuinely held by the individual (Clause 1, EM para39).**

This avoids dragging secular courts into determinations of what are the doctrines or beliefs of a religion for which they are ill-suited and the invidious outcome of a secular court telling a religious person or religious body that their religious beliefs are not part of the religion's doctrines as determined by a tribunal or court (as occurred in *COBAW v Christian Youth Camps* at VCAT (2014) 50 VR 256).

7) **People making moderate, non-vilifying statements of belief and unbelief are protected from being sanctioned for discrimination under anti-discrimination laws and under broad offensive conduct laws like the Tasmanian Antidiscrimination Act s.17** (clause 12)

Despite claims to the contrary, clause 12 only protects moderate non-vilifying statements of belief or unbelief from *3 limited forms of legal sanctions and not from any other legal or non-legal sanctions.* (To be protected under clause 12, statements of belief (or unbelief) must be made in good faith, not malicious, not harassing, threatening, intimidating, or vilifying – hereafter referred to as "moderate non-vilifying statements".)

(1) Clause 12(1)(b) protects people who make moderate, non-vilifying statements of belief and unbelief from sanction under section 17 of the Tasmanian Anti-Discrimination Act. Section 17 is a broad offensive conduct provision as follows:

> *A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e) , (a), (b), (c), (d), (ea), (eb) and (k), (f) , (fa) , (g) , (h) , (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*

Clause 12(1)(b) is based in part on the experience of Tasmanian Catholic Archbishop Porteous and 2 other Tasmanian preachers against whom complaints were made under Tasmanian ADA section 17 for moderate statements of standard Christian teaching that marriage is between a man and a woman and that sexual relations should only be between a man and woman in marriage. In the case of Archbishop Porteous the statements were in a Catholic Bishops Conference booklet on the Catholic view of marriage distributed to parents of students in Catholic schools. A non-Catholic trans-activist objected to the statements of traditional

Catholic teaching and complained to the Tasmanian Antidiscrimination Commissioner under section 17.

The complaints were accepted by the Tasmanian Antidiscrimination Commissioner which entailed months of costly and ultimately fruitless conciliation before the complainants dropped the complaints. These complaints about moderate statements of standard religious teaching should never have been accepted. These cases show the overbreadth of section 17 and the Commonwealth is justified in overriding section 17 as it applies to moderate, non-vilifying statements of belief and unbelief.

The content of such teaching may offend or insult some people who disagree with and live differently to the teaching (there are many age-old disagreements on sexual morality and many age-old disagreements on religious truth). But if offence or insult is said to arise from the content of long-established religious (or atheist) teaching that should not be a basis for using the law to shut down such teaching. The risk of being offended or insulted by an idea or teaching is a necessary consequence of living in a pluralistic democracy and the price of freedom of expression. In most cases, the appropriate responses are to discuss the idea, rebut it or ignore it or use social sanctions, not to have the State use the force of law to silence the idea and punish its proponents.

As Professor Nicholas Aroney has suggested, the human rights issue is with section 17 of the Tasmanian Act, not clause 12 of this Bill:

> *Australia's obligations under article 18.1 and 19.2 of the ICCPR are to ensure that all Australian laws, including State and Territory laws, do not unjustifiably restrict freedom of religion and freedom of expression. Subsection 17(1) of the Tasmanian Anti-Discrimination Act 1998 is the broadest provision of its kind in Australia. …*
> *This provision goes considerably further in constraining freedom of expression than is contemplated by article 20.2 of the ICCPR, which addresses hate speech in carefully defined terms, i.e. "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". An Expert Workshop convened by the UN High Commissioner for Human Rights concluded in its 2013 Report that article 20.2 deliberately establishes a "high threshold" because "as a matter of fundamental principle, limitation of speech must remain an exception". Read together, articles 19.2 and 20.2 require that any restriction of hate speech must be "clearly and narrowly defined", "least intrusive", "not overly broad" and "proportionate" so as to ensure that freedom of expression is not unduly limited.*[6] *It is consistent with these principles for the Commonwealth to form the view that subsection 17(1) of the Tasmanian Act constitutes an unjustified restriction on freedom of expression which the Commonwealth is obliged to protect under articles 18.1 and 19.2 of the ICCPR.*

(2) Clause 12(1)(c) enables regulations to prescribe other laws from which moderate, non-vilifying statements of belief and unbelief would be protected. For example, if current

[6] *Rabat Plan of Action on National, Racial or Religious Hatred* (*Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, Appendix) (11 January 2013) UN Doc A/HRC/22/17/Add 4, [18], [21].

proposals for harm-based speech laws in Victoria and Queensland were to be as broad as section 17 of the Tasmanian Act (based on insult or offence), consideration should be given to prescribing such laws.

(3) Clause 12(1)(a) provides that moderate, non-vilifying statements of belief and unbelief do not constitute *discrimination* under listed anti-discrimination laws. This provision seems directed to preventing the future use of anti-discrimination law to censor moderate, non-vilifying statements of belief and unbelief, rather than dealing with a significant existing problem (as clause 12(1)(b) re section 17 of the Tasmanian Act does). Various judges have acknowledged that, in certain work contexts, words (e.g. racially abusive or sexually abusive epithets especially when repeated and said in front of peers in a work environment) can amount to discrimination causing psychological harm, but it is not clear that a one-off statement can amount to discrimination.[7] So clause 12 has some work to do in protecting reasonable statements of belief or unbelief from being held to amount to discrimination in law. But given that the cited cases involved statements which were harassing or vilifying or malicious or not in good faith and clause 12 does not protect such statements, clause 12(1)(a) would not affect outcomes in the cited workplace cases. Hence clause 12(1)(a) is best viewed as heading off current and future attempts in commissions and tribunals to expand anti-discrimination law to chill the expression of moderate, non-vilifying statements of belief and unbelief by threat of lengthy complaints proceedings and punishment.

There is a growing list of religious people whose reasonable statements of belief, often on social media, have been used by offended third parties (often third party activists (who were not in the actual or intended audience of the statement) as the basis for complaints to the employers or accreditation bodies of the religious people or discrimination tribunals seeking to have the religious people sacked, disqualified from their trade or profession, suspended or expelled as students or otherwise sanctioned under discrimination law for the statements. There are 44 such cases documented at www.australiawatch.com.au

Many religious people were sacked or disqualified or suspended or had months of trauma and cost fighting such complaints. This is the real world problem of discrimination against religious people who make reasonable statements of belief to which clause 12 and equivalent protections of reasonable statements of belief in clause 15 are directed.

[7] 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 a series of 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.

That real problem is ignored by campaigns focussing instead on extreme hypotheticals e.g. a nurse in a medical practice who tells a person with a disability "they have been given their disability as God's judgment on their sin".

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. In the unlikely event that a nurse 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 judgmental aphorisms. The doctors and managers of the practice would tell the nurse not to make such statements and might issue a notice to all staff to reinforce that conduct expectation. The nurse 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. It is likely AHPRA's patient care standards will prohibit such statements to patients, and this may lead to regulatory consequences for the medical practice and the nurse. All of these consequences would happen without recourse to an Anti-Discrimination Tribunal and be completely unaffected by the Bill. So, it is highly misleading to say that such a statement is "protected" by the Bill as if it were protected from any type of accountability or sanction.

Further, the hypothetical example fails to give adequate consideration to the various limits on protected statements of belief already built into clause 12. It is difficult to contemplate that the hypothetical example provided would survive the gauntlet of being in good faith, not malicious, not threatening, harassing, vilifying, intimidating, etc. At the very least it sounds malicious.

In a pluralist democracy where we disagree on many things, we should not use discrimination and insult or offend laws to seek legal censorship and compensation for every statement which persons with a protected attribute might consider to be insulting or offensive.

8) **Professionals and tradespeople who make moderate, non-vilifying statements of belief or unbelief *outside a work context* are protected from their qualifying bodies (e.g., a licensing or conduct standards body) making a rule to prevent such statements unless the rule is an essential requirement of the profession or trade** (Clause 15).

This is similar to point 7 above. There are several real life cases documented at australiawatch.com.au where professionals or others subject to qualifying bodies made moderate statements of belief outside their work context (in one case on a church camp) but which were picked up by activists and complained about to a qualifying body and led to professional discipline. We note that the protection in clause 15 is only for statements of belief or unbelief made *outside a work context*. Again the statements must be in good faith, not malicious, threatening, harassing, vilifying or intimidating.

9) Clause 3 of the Human Rights Legislation Amendment Bill 2021 protects institutions from loss of charity status if they hold to a traditional view of marriage.

C. The Bill's omissions and errors

1) The Bill omits some key provisions found in every other federal anti-discrimination law.

   Burden of proof for the reasonableness defence to indirect discrimination.
   One glaring example is in the reasonableness defence to indirect discrimination. If a person is discriminated against because a (facially equal) general condition, requirement or practice is more disadvantageous to them because of their religious belief or activity (e.g. a general rule that all employees have to work on the 4th Saturday of a month disadvantages employees whose religious Sabbath falls on Saturday), there is a defence if the discriminator can prove the rule is reasonable. But in the Religious Discrimination Bill alone that burden of proof rule is absent meaning the burden of proof is on the person discriminated against to prove that the rule is unreasonable. The standard burden of proof provision appeared in the 2019 Exposure Draft of the Bill (clause 8(8)) and that should be reinstated in the current Bill so it uses the standard burden of proof provision in relation to the reasonableness of indirect discrimination.

2) **The Minister's power to make requirements about the content of the religious bodies' employment policies is too broad.**
   Religious schools, hospitals, aged care and disability providers can preference in employment people whose religious beliefs accord with the religious body provided they have a publicly available policy explaining how that works. The Bill currently gives the Minister the power to make requirements about those employment policies (Clauses 7(7), 9(3), 40(3)). This power is expressed so broadly that it would allow the Minister to make requirements about the content of the religious bodies' employment policies. That is completely unacceptable and a gross overreach in control by the government of religious bodies. It seems to be an error in the Bill because the Minister's power to make such requirements for religious schools' employment policies in the override clause 11 was removed. The Minister's power to control employment policies needs to be removed in all parts of the Bill or limited to a power to specify how the policies of the religious bodies are to be made publicly available.

D. What needs to be added to the Bill

1) **The limited override of State and Territory law in clause 11 needs to protect employment preferencing by religious bodies, not just religious schools, of people with the same religious beliefs as the body.** The Victorian Equal Opportunity Act also limits employment preferencing by all other religious bodies. If it is accepted that religious education institutions need to be able to preference for staff who share the beliefs of the religion, how much more should mosques, churches, synagogues and other religious bodies be able to preference for staff who share the beliefs of the religion? It is bizarre for the Commonwealth to choose to override the Victorian Equal Opportunity Act (and other prescribed State laws) to let religious education institutions preference for staff who share the beliefs of the religion but not do the same for mosques, churches, synagogues and other religious bodies.

The override in clause 11 should be amended to ensure that *all religious bodies, not just educational institutions,* are free to choose to preference in employment people with the same religious beliefs as the body.

Further, the override in clause 11 should not depend on the making of regulations naming specific State and Territory anti-discrimination laws. Such regulations can be made and unmade and changed by different Ministers and governments. If the Parliament considers that, as a matter of principle, religious bodies (including churches, mosques, synagogues and temples) and schools should be free to choose to preference in employment people with the same religious beliefs as the religious body (just as political parties and MPs are free to preference people with the same political views in employment), then the Parliament should enact a simple statutory right for religious bodies to do so which will override inconsistent State and Territory laws to the extent of the inconsistency, without having arguments about whether there should be a regulation for each new State and Territory law.

2) **Religious organisations and schools need to be protected from qualifying bodies imposing limitations or requirements on them that discriminate against them on the basis of their religious belief or activity** (e.g., a government decision on accrediting a religious school or college or a course of study is affected by religious discrimination) (Clause 21). The definition of 'qualifying bodies' needs to be expanded to include bodies which have power over an authorisation or qualification that is needed for, or facilitates, the establishment, operation or funding of a religious body or educational institution (e.g. accrediting an institution to operate, or to receive funding or a category of funding or accreditation of teaching quality or approving a course of study). Sections 21 and 15 need to be expanded to cover discrimination by qualifying bodies against religious bodies on the basis of the body's religious beliefs or activity.

3) For the purposes of qualifying body discrimination, amendments should be made to recognise religious communities are able to hold or engage in religious beliefs, and be directly discriminated against according to those beliefs. A provision should be included enabling religious educational bodies to evidence what their religious beliefs and activities are by adopting a statement of their religious beliefs and activities. An example should be included in the EM of how qualifying bodies might discriminate against religious bodies e.g. by refusing grants or registration due to religious beliefs.

4) **The Bill should contain a 'reasonable adjustments' clause, equivalent to the Disability Discrimination Act provisions.**

Organisations would be obliged to make *reasonable* adjustments to accommodate a person's genuine religious beliefs unless to do so would cause the organisation substantial hardship. E.g. If there are 10 staff and machinery running on Friday requires 8 of those staff to handle the machinery, it is likely to be a reasonable adjustment to let 2 Muslim staff take time off for afternoon prayers and then make up the time later, rather than rostering them on during their prayer time. If an exceptional customer order or breakdown of other machinery requires all staff to work at that time the employer would not need to make the adjustment to rosters that day because the adjustment would not be a reasonable one and/or would cause the employer

substantial hardship. The reasonable adjustments requirement has operated for many years in the Disability Discrimination Act.

5) Permitting employer conduct rules re employee speech but requiring them to be necessary and proportionate if they restrict moderate non-vilifying statements of belief or unbelief by employees

The Bill should protect employees from employer conduct rules which sanction employees from making moderate non-vilifying statements of belief or unbelief. The former clause 8(3) in the Exposure Draft was too rigid and complex. But the principle of protecting employees who make moderate non-vilifying statements of belief or unbelief from employer code of conduct overreach is a sound one.

The Bill should provide a flexible proportionality standard which still allows employers to make employer conduct rules about employee speech for legitimate objectives such as avoiding inflammatory language and fights in the workplace. However, if challenged, the application of the rule would be unlawful discrimination under the Bill if the employer cannot show that the rule is necessary to achieve a legitimate goal of the employer in managing the workplace and that, in achieving that goal, the rule has the *least restrictive effect on employee freedom to make moderate, non-vilifying statements of belief and unbelief*. This will require employers to draft their codes of conduct to be reasonable and justified and avoid overreach.

Without such a provision, the current reasonableness defence to indirect discrimination in clause 14 allows the potential for an employer to sanction or dismiss an employee for making moderate non-vilifying statements of belief or unbelief. This is because the proportionality of the effect of the employer conduct rule on employee speech is but one of many factors the commissioner, tribunal or court can take into account in determining if a rule is reasonable discrimination. If the commissioner, tribunal or court considers that protecting other groups from the risk of insult or offence is a paramount factor, they could decide that an employer conduct rule is reasonable discrimination even if it permits a disproportionate, over-reaching restriction and sanction on employees making moderate non-vilifying statements of belief or unbelief.

More broadly, modern management theory values a diverse workforce where employees can "bring their whole selves to work". The Diversity, Equity and Inclusion policies of many corporates extol in general the virtues of their approach to having a diverse and inclusive workforce. But many of these policies are silent on any detail as to how employees are encouraged to bring their spiritual or faith identities to work and express them without discrimination, while the same policies are eloquent on how employees are encouraged to bring their LGBTI orientation (or other) identities to work and express them.[8]

[8] For example, on the IKEA Australia Equality, Diversity & Inclusion web page, 30% of the wording consists of general statements, about the value of diversity and inclusion, 24% is about building a gender-equal business and 40% describe in detail what IKEA is doing as an ally of LGBTI inclusion locally globally. There is no mention of faith or age or other identities. See https://www.ikea.com/au/en/this-is-ikea/work-with-us/equality-diversity-and-inclusion-pub86a2cb59

Obviously, employees should be able to bring their LGBTI identities to work and express them without discrimination. But the lack of any detail in polices as to how employees are encouraged to bringing their spiritual or faith identities to work and express them may reveal at least a blind spot or worse an unconscious bias against employees with spiritual or faith identities which could lead in practice to a preference in favour of other identities whose values may conflict with spiritual or faith identities.

Clearly, employees with different identities can have different perspectives on issues. That produces the multiple perspectives and creative insights which employers value in a diverse workforce. It also requires a management commitment to fostering the equal acceptance and harmonious co-existence of all employees with different identities and perspectives rather than consciously or unconsciously preferencing some staff identities and perspectives over others to the detriment of some individuals.

If this Bill was amended to protect employees of faith better, it could encourage employers to have "thicker" Diversity, Equity and Inclusion policies by adding a real and practical welcome and inclusion of people with faith-based identities in their workforce alongside the welcome and inclusion of people with other identities.

6) When determining the religious beliefs of a religious body, the test should not require a judge to identify and interpret the doctrines of the religion, thus breaking the well-established convention of excluding the judiciary from assessing questions of theology. Instead, the body should be able to adopt a statement of its religious beliefs and that should be sufficient evidence of what they are (Clauses 7(2), 9(3), 40(2)(c)).

7) The Bill should expressly clarify that it provides protections for organisations and individuals from being required by another person to express, publish, associate or support statements or opinions which contravene the individual's or organisation's religious beliefs.

8) The Bill should clarify that secular workplaces cannot impose 'inherent requirements tests' of secular beliefs to stifle religious expression by employees.

9) 'Religious activity' must be lawful (clause 5(2) and (3)) for it to be protected from discrimination. Given the rise in use of conditions on funding and on authorities to operate to limit religious bodies in their operations, an activity should not be "unlawful" for the purposes of section 5(2) of the Act unless made so by a primary statute enacted by a Parliament. So if a Ministerial or departmental or statutory body's subordinate instrument imposed a condition on the funding or operation of a religious body which the religious body breached because it engaged in a religious activity (e.g. a religious school or college or prison ministry taught its religious views on relationships or gender), that would still be a breach of the subordinate instrument with consequences under the instrument, but it should not permit third parties to discriminate against the religious body because of an "unlawful" religious activity.

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7 January 2022 marks@i4cs.com.au