RELIGIOUS DISCRIMINATION AND RELIGIOUS FREEDOM

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I. INTRODUCTION

On Thursday, 29 August 2019, the federal Attorney General released the long-awaited Religious Discrimination Bill. The Exposure Bill seeks to implement three recommendations of the Report of the Expert Panel on Religious Freedom. The most relevant is Recommendation 15, which proposed enactment of a Religious Discrimination Act to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. Recommendation 15 also proposed that consideration be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities, in order to protect their religious freedom.

Notice that there are two elements here: a rule against discrimination and an exception to protect religious freedom. Religious freedom and religious discrimination are not exactly the same thing, but they are closely related. The exact relationship between the two is complicated and needs to be understood carefully. The right to religious freedom means that everyone has the liberty to act on the basis of their own religion. This may *require* discrimination. For example, a religious organisation may need to ensure that it appoints only people of its own religion so as to protect its religious character. However, the exercise of religious freedom by an organisation may also involve *interference* with someone's freedom of religion. For example, an organisation may adopt policies and practices that prevent their employees from exercising their religion while employed within an organisation. On the other hand, a law which prohibits religious discrimination involves the imposition of a duty not to treat someone less favourably because of their religion. This may be necessary to *protect* that someone's religious freedom. For example, to enable them to exercise their religion without being treated less favourably because of it—by losing their job for instance.

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But a prohibition on religious discrimination may also *contravene* religious freedom—by preventing a religious organisation from appointing people of the religion to positions within the organisation, for example.

This makes it difficult and controversial to navigate the balance between the principle of non-discrimination and the principle of freedom of religion. They are often compatible, but if pressed too far they can also be contradictory. Neither can be an absolute right. The Religious Discrimination Bill illustrates this in several ways.

II. FOUR COMPONENTS OF THE RELIGIOUS DISCRIMINATION BILL

Anti-discrimination laws typically consist of four components. First, they identify a set of protected attributes, against which you cannot discriminate. Second, they define two ways in which discrimination can occur: either directly or indirectly. Third, they identify particular areas of public life in which discrimination is prohibited. Fourth, they carve out a set of exceptions or exemptions designed to permit certain justifiable forms of discrimination. These exceptions recognise that the right not to be discriminated against cannot be an absolute right. Any prohibition on discrimination has to be balanced against other rights, such as the right to freedom of religion. But where and how is the balance to be struck? This is the crucial issue for all anti-discrimination laws, and the Exposure Bill is no exception.

Under the Exposure Bill, the protected attribute is described as 'religious belief or activity', which is defined as: '(a) holding a religious belief; (b) engaging in lawful religious activity; (c) not holding a religious belief; or (d) not engaging in, or refusing to engage in, lawful religious activity'. This makes clear that the protection against discrimination will apply equally to those who hold religious beliefs and those who do not. Notably, there is no contemplation of 'unlawful' religious *belief* – unlike the Victorian *Equal Opportunity Act*, which takes the extraordinary approach of suggesting that there might be such a thing as a unlawful religious belief. This is flatly inconsistent with Article 18 of the International Covenant on Civil and Political Rights, which treats the freedom to hold a religious belief as an absolute right which must not be limited or restricted in any way. On the other hand, however, the Exposure Bill does contemplate the possibility of 'unlawful' religious *activity*. In a sense, this is necessary, because there are some actions that are motivated by or based upon religious belief that can and should be prohibited by law—acts of physical violence, prohibited by our general criminal law, are obvious examples. However, one problem with

this restriction of 'religious activity' to '*lawful* religious activity' is that the Exposure Bill does not specify the particular kinds activities that are lawful or unlawful. This will make the protections offered by the Exposure Bill vulnerable to frustration by laws or ordinances enacted at a state, territory or local level that adopt politically controversial stances in relation to activities about which there is disagreement in the Australian community. What would happen if an idiosyncratic position was adopted by a particular state or local council? Would this mean the protections conferred by the Exposure Bill no longer apply? I don't believe it is good drafting practice to make the beneficial effect of a law subject to the unknown and unspecified content of a law enacted within some other jurisdiction.

Consistently with most anti-discrimination laws, the Exposure Bill says that *direct discrimination* occurs when a discriminator treats another person who has a protected attribute less favourably than they would treat a person without the attribute, in circumstances that are not materially different, while *indirect discrimination* occurs when a discriminator imposes a requirement or condition which disadvantages persons who have a protected attribute in circumstances where the requirement or condition is not reasonable. The Exposure Bill also identifies a very typical array of areas in which discrimination is to be prohibited. These areas of common or public life include employment and education. This means that the Bill, if enacted, will prohibit discrimination on the basis of religious belief or activity in the employment of staff and the admission of students in schools, including in religious schools. Without any further provision, this would mean that religious schools must not discriminate on the basis of religion when deciding who to employ as a principal, a maths teacher, a sports instructor, an administrator, or a gardener. But what if a religious school *needs* to discriminate in order to maintain its religious character and ethos?

Traditionally, anti-discrimination laws deal with this problem through exceptions or exemptions which say that it is lawful to discriminate in order to enable religious organisations to conduct themselves in accordance with their religious beliefs or in order to avoid injury to the religious sensitivities or susceptibilities of adherents of the religion. However, this approach suggests that religious organisations are given a 'right to discriminate' – in the negative or pejorative sense of being allowed to exclude people on the basis of prejudicial attitudes. It also suggests that religious people have tendency to be especially sensitive or susceptible to religious bigotry.

One of the most important, and welcome, initiatives of the Exposure Bill is to address this issue in a way that more carefully acknowledges that the need for exceptions arises not because religious people should have a right to discriminate, but rather to acknowledge that a religious organisation cannot maintain its religious identity unless its personnel themselves adhere to the religion. To achieve this objective, clause 10 of the Exposure Bill expressly says that it is *not discrimination* when a specified religious organisation acts on its religious principles when deciding who to employ or not employ.

Cause 10 has three key elements. First, it only applies to 'religious bodies'; second, the conduct of the religious body must be exercised 'in good faith'; and third, it must be possible to say of the conduct that it 'may reasonably regarded as being in accordance with' the doctrines of the religion. Each of these elements raises important questions about the scope and operation of the Bill. They are central to the balance that the Bill strikes between religious freedom and religious discrimination.

I will return to these questions shortly; but before I do, it is important to note two other important ways in which the Exposure Bill strikes a balance between religious freedom and religious discrimination. These relate to the way the Bill deals with indirect discrimination in clause 8. It will be recalled that indirect discrimination occurs when a discriminator imposes a requirement or condition which disadvantages persons who have a particular religious belief in circumstances where the requirement or condition is not reasonable. There are, therefore, three elements that must be satisfied for an action to constitute indirect discrimination. First, there must be a 'requirement or condition' laid down by an employer, with which employees are required to comply; second, the requirement or condition must 'disadvantage' people who have particular religious convictions; and third, the requirement or condition must be 'not reasonable'. This threefold definition of indirect discrimination is similar to the approach adopted in most anti-discrimination laws. However, the Exposure Bill introduces two important innovations, directed to protecting religious freedom. These additional protections work by identifying certain circumstances in which a requirement or condition imposed by an employer is *not reasonable*, and is therefore unlawful discrimination.

The first of these innovations is found in sub-clauses 8(3) and 8(4). They have already been dubbed 'the Israel Folau' clauses, although whether they would help someone in Folau's situation is not clear. They turn on four elements. First, there must be a rule of conduct

imposed by a relevant employer. Second, the rule must have the effect of restricting or preventing an employee from making a 'statement of belief'. Third, the requirement or condition—even if it restricts employees from making religious statements—will be justified if it is necessary for the employer to avoid unjustifiable financial hardship. And fourth, the statement of belief must not be malicious, and must not be likely to harass, vilify or incite hatred or violence. As I will explain shortly, each of these elements is important.

There are also a set of provisions in sub-clauses 8(5) and 8(6) which seek to protect health practitioners who have conscientious objections to the provision of certain 'health services'. The kinds of controversial 'health services' that this might include involve the provision of abortion or facilitation of euthanasia. These sub-clauses are drafted in a complicated manner, but the point of them is to offer some limited protection to health practitioners from being required *by their employers* to perform or facilitate procedures to which they conscientiously object. They do not protect health practitioners from being required by state or territory law to perform or facilitate such procedures, as is now the case in some Australian jurisdictions.

III. RELIGIOUS DISCRIMINATION AND RELIGIOUS ETHOS

Clause 10, as has been noted, seeks to protect the ability of specified religious organisations to maintain their religious ethos, especially in their employment decisions. Three particular categories of religious body are protected by clause 10: educational institutions, registered charities, and other bodies conducted in accordance with religious doctrines. To this extent, clause 10 adopts a principled approach to defining religious bodies and institutions. The institution must conduct itself in accordance with the doctrines of a religion. However, several concerns have been expressed about the drafting of clause 10.

The first concern is that registered charities and other bodies are only protected under clause 10 if they do not engage 'solely or primarily in commercial activities'. Such an approach runs the risk of drawing too sharp a distinction between religious organisations and commercial activities. Many charitable organisations are expressly religious in their purposes, ethos and motivation: in order to afford to provide their services to the public, they operate commercially (in the sense that they charge fees for their services), but they do so on a not-for-profit basis. It is not obvious that a not-for-profit organisation that is religious in purpose and ethos should not be able to employ staff that adhere to its religious beliefs. As a religious organisation, it wants its services to be offered to the public by employees who

wholeheartedly embody its deepest religious motivations. A more nuanced approach is therefore desirable. There is no good reason in principle for thinking that 'religion' and 'commerce' are mutually exclusive categories. At the least, charitable organisations that operate on a not-for-profit basis should enjoy the protection of clause 10 so that they can maintain their religious ethos.

Clause 10 enables religious bodies to engage in conduct that 'may reasonably be regarded as' being in accordance with religious doctrine. Some concerns have been expressed that clause 10 will not adequately protect religious bodies, including religious schools, in terms of their employment policies. The essential problem is the gap that may exist between the employment policies and decisions of a religious school and the religious doctrines of the school. Religious doctrines typically concern theological propositions, ecclesiastical principles, religious rituals and codes of moral conduct. Employment policies, by contrast, are concerned with much more mundane matters such as employment criteria and the particular duties expected of employees when undertaking specific tasks within the organisation. Some religious schools require that *all* their staff—maths teachers, administrators and gardeners alike—adhere to the religion and conduct themselves in accordance with it, while others merely *prefer* to appoint such staff wherever possible, while yet others are willing to appoint staff who do not adhere to the religion to particular positions that do not involve a teaching role, or a role that involves specifically religious instruction, provided that they do not openly or actively undermine the religious ethos or mission of the school. Moreover, two schools could adhere to the same doctrinal standards as a matter of theology, but could adopt different policies in relation to the employment of staff. Concerns have been expressed that the wording of clause 10 does not make clear that all these kinds of schools will be protected. Yet one of the most striking things about the submissions received by the Religious Freedom Review was that all of the religious schools—no matter what their particular policies might be—supported the freedom of all religious schools to determine their own distinct policies in relation to the religious beliefs and practices of their staff in order to maintain the particular religious ethos and mission of the school.

In order to address this complicated issue, the Religious Freedom Review recommended that religious schools be able to discriminate in relation to the employment of staff provided the discrimination is founded in the precepts of the religion; the school has a publicly available policy; and the school provides a copy of the policy to employees and prospective employees.

Among other things, this recommendation recognised the importance of the school having a clear set of policies that are publicly available and provided to employees, and operating consistently with those policies. It also recognised that a gap potentially exists between the theological doctrines on which the school is founded and the day-to-day policy stances and employment decisions that have to be developed by each school in order to enable it to operate—a gap which may be filled through the development of carefully framed employment policies that reflect a considered judgment about the best way for the school to pursue its religious mission in accordance with its religious beliefs.

Does the wording of clause 10—that it must be possible to say of an employment decision that it 'may reasonably be regarded as being in accordance' with religious doctrine—provide sufficient and appropriate protection to religious schools and other religious bodies? In this context, *who* decides what is 'reasonable', and on *what* basis? The words 'may reasonably be regarded' seem intended to confer on religious bodies a degree of discretion in determining what employment policies and decisions are appropriate and adapted to conducting the organisation in accordance with its religious doctrines. The phrase has very occasionally been used in federal legislation, and similar language has also been used in constitutional law to describe the discretion available to the Commonwealth Parliament when enacting a law that seeks to implement Australia's obligations under an international treaty. But although the wording of clause 10 seems intended to confer on religious bodies a degree of discretion in this area, there remains a question concerning the extent to which the Human Rights Commission when conciliating complaints, and the courts when called upon to decide cases, will defer to a school's judgement about what is in accordance with its religious doctrines, or else substitute its own view as to what the school's religious doctrine reasonably requires.

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

descend to the details of the employment of policies of religious organisations. In this context, one way in which the matter could be further clarified is by inserting into the definitions clause of the Bill a provision that clarifies the kinds of conduct that will meet the requirements of clause 10. The definitions clause could clarify that such conduct will include decisions to employ or engage a particular person, or allocate particular duties or responsibilities to that person, on the ground that the person adheres to or conducts himself or herself in accordance with the religious beliefs of the organisation; as well as decisions not to employ or engage a particular person, or to terminate the employment or engagement of a particular person, or not to allocate particular duties or responsibilities to a particular person, on the ground that the person does not—or no longer—adheres to or conducts himself or herself in accordance with the religious doctrines of the organisation. A helpful precedent for this kind of provision is found in the *Fair Work Act 2009* (Cth), s 355.

Another helpful approach has been proposed by the President of the Australian Law Reform Commission, Justice Sarah Derrington, in her personal capacity. She has suggested that the religious freedom exceptions contained in the *Sex Discrimination Act* could be replaced by a positive right of religious organisations to act in accordance with written and publicised policies which articulate each organisation's assessment of how best to conduct itself in accordance with its religious beliefs and religious mission, including in its employment decisions. Such an approach builds on the relevant recommendation of the Religious Freedom Review in a way that addresses the problem of the 'gap' between religious doctrine and mundane employment policies and decisions of religious organisations. The same approach could suitably be applied to the religious freedom provisions of any anti-discrimination law, including the Exposure Bill on religious discrimination.

IV. RELIGIOUS STATEMENTS

As noted, sub-clauses 8(3) and 8(4) seek to protect the freedom of employees to make religious statements outside of working hours. However, the protection is defined so that it only applies in particular circumstances.

First, there must be a relevant 'rule of conduct' imposed by an employer. Under the Exposure Bill, an employer conduct rule is defined as 'a condition, requirement or practice: that is imposed, or proposed to be imposed, by an employer on its employees or prospective

employees; and which relates to standards of dress, appearance or behaviour of those employees'. The protection is thus clearly and appropriately intended to protect people of any religion, who regard their religion as requiring them to dress or behave in certain ways.

Secondly, the Exposure Bill defines a 'relevant employer' as a business whose revenue for the current or previous financial year is at least $50 million; and which is not a government employer or public body established by statute. These criteria have the merit of involving 'bright line' distinctions that are relatively easily applied. However, two concerns have been raised. First: does this definition imply that an employer with a lower turnover is exempt, and can therefore control an employee's private expressions of religious belief? Why should that be the case? It is difficult to think of a principled reason why the line should be drawn on the basis of turnover, let alone at such a high turnover. Second: why should government employers enjoy a 'blanket exemption'? This is not the standard that was upheld by the High Court in its well-publicised decision in *Comcare v Banerji* [2019] HCA 23. There the High Court specifically accepted that the Australian Public Service can require civil servants to be 'apolitical' or politically neutral in their conduct and speech. It makes sense for government employees to be expected to perform their duties in a manner that maintains the integrity of the public service, but it is difficult to see any principled reason why this should extend to controlling what civil servants say in their own time about religious matters generally.

Thirdly, clause 8(3) protects statements of religious belief that 'may reasonably be regarded' as being 'in accordance with' the doctrines of the religion. Notably, clause 8(3) uses two key terms: the 'religious belief' adhered to by a person, and the doctrines of 'the religion'. As with clause 10, there is a potential gap here between the 'religious belief' of the individual and the doctrines of 'the religion'. Two individuals may adhere to the *same* religion, but have conscientiously *different* views about what they should say publicly, and how they should say it. The whole Israel Folau saga—including Christian commentary both in defence and in criticism of what he said—illustrates this gap very strikingly. Is the application of the 'reasonably regarded as' test able to bridge the gap appropriately?

This raises the problem encountered in the NSW Wesley Mission case, where the question concerned a provision of the NSW Anti-Discrimination Act, which grants an exception in relation to 'any … act or practice of a body established to propagate religion that conforms to the doctrines of that religion …'. The Equal Opportunity Division of the Administrative Decisions Tribunal at first instance held that the relevant 'religion' was that of Christianity

generally, or alternatively of the Uniting Church as a whole, with the implication that the particular, more conservative theological stance taken by the Wesley Mission was not protected because it could not be shown that it was in accordance with the doctrines of Christianity or the Uniting Church. The Appeal Panel of the Administrative Decisions Tribunal overturned the tribunal decision, however, on the basis that the relevant 'religion' was the 'Wesleyan (or Methodist) understanding of Christianity'. And the NSW Court of Appeal tended to agree with the Appeal Panel, although it criticised its approach to some extent as well. It considered that the key question concerned the particular religion that Wesley Mission was established to propagate. This might (or might not) be the doctrines of the Uniting Church as a whole or the doctrines of the Methodist Church established by John Wesley. This would depend on the evidence, although the Court of Appeal noted that it appeared from the evidence that the latter was probably the case.

In order to avoid this kind of problem, it seems, the Exposure Bill once again uses the 'may reasonably be regarded' test to address the issue. This might well resolve the issue, except that it remains necessary to identify the relevant 'religion' in the first place. On this issue, the approach of the NSW Court of Appeal seems preferable: it must be the *particular* religious doctrines adopted by the organisation itself, rather than the *generic* doctrines of the 'religion' or 'denomination' with which the organisation is most broadly identified.

Fourthly, clause 8(3) does not apply if the rule of conduct imposed by the employer is necessary to avoid unjustifiable financial hardship. While this seems reasonable in its general intent, as many have already observed, this may have the (seemingly unintended) consequence of enabling third party sponsors to place an employer under financial pressure to control an employee's free speech—as appears to have happened in Israel Folau's case—and that the same kind of pressure or coercion could be exerted through orchestrated social media boycotts—as appears to have occurred in the Coopers Brewery case.

Finally, clause 8(4) stipulates that a statement of belief will not be protected if it is malicious; is likely to harass, vilify or incite hatred or violence against another person; or encourages conduct that would constitute a serious offence, such as physical violence. Some aspects of clause 8(4) are clearly appropriate. However, other aspects arguably place too much of a restriction on free speech, especially the undefined references to 'harass' and 'vilify'. To explain why this might be the case, some context is necessary.

The Exposure Draft, in clause 41, goes so far as to provide that a statement of belief does not constitute discrimination within the meaning of any state or territory anti-discrimination law;[1] and does not contravene s 17(1) of the Tasmanian *Anti-Discrimination Act*. This Tasmanian law imposes what is probably the most restrictive prohibitions on free speech in the country. It prohibits engagement in 'any conduct'—including any speech—which offends, humiliates, intimidates, insults or ridicules another person' on the basis of a protected attribute. Thus, speech which merely 'offends' is illegal in Tasmania in the terms specified. There are other laws in Australia that place significant restrictions on speech. Section 18C of the Commonwealth *Racial Discrimination Act* prohibits any public act which is 'reasonably likely to offend, insult, humiliate or intimidate another person or a group of people' on the basis of race. Several other state 'vilification' laws prohibit the incitement of 'hatred, serious contempt, or severe ridicule' of a person or group of persons on the basis of race or religion. Apart from the Tasmanian law, clause 41 of the Exposure Bill does not have any impact on these provisions of federal and state law. Rather, the Exposure Draft imposes its own implicit restriction on free speech to the extent that it allows an employer to control the speech of an employee if it would 'harass' or 'vilify' another person or group of persons.

In this area, over time, there has been an extraordinary inflation in the concept of 'hate speech'. However, the leading international human rights instrument, the International Covenant on Civil and Political Rights (ICCPR), in Article 20.2, defines 'hate speech' very carefully and specifically. There are three elements, all of which have to be satisfied. There must be *advocacy* of national, religious hatred. This advocacy must constitute *incitement* to the commission of particular conduct. The incited conduct is specified as *discrimination, hostility or violence*. The various State, Territory and Commonwealth laws that I have referred to are not limited in the way required by the ICCPR. In some cases, they prohibit conduct which merely 'offends' someone on the basis of a protected attribute. The Exposure Draft itself merely refers to conduct that 'vilifies', without further definition or clarification of its meaning.

[1] The Explanatory Notes indicate that this does *not* mean that such a statement will not contravene State laws prohibiting harassment, such as sexual harassment.

An Expert Workshop convened by the UN High Commissioner for Human Rights[2] concluded in its 2013 report that article 20.2 of the ICCPR deliberately establishes a 'high threshold' for the restriction of free speech because 'as a matter of fundamental principle, limitation of speech must remain an exception'. While article 20.2 calls for the prohibition of 'hate speech' (carefully and narrowly defined), it must be read with article 19, which calls for the protection of 'freedom of expression', and requires that it can only be restricted by measures that are 'necessary' to protect the rights or reputations of others or 'necessary' to protect national security, public order, public health or public morals. The UN Expert Report stated that, read together, articles 19 and 20.2 require that any restriction of hate speech must be 'clearly and narrowly defined', the 'least intrusive' means to achieving the objective, 'not overly broad', 'proportionate', and must accord closely with the precise language of article 20.2.[3] The UN Expert Report expressed concern about the use of 'increasingly vague' terms to define hate speech offences and the development of 'new categories of restrictions', and noted that the 'broader the definition … the more it opens the door for arbitrary application of the laws'. The Expert Report also reflected on the relationship between freedom of religion and freedom of speech in the following terms:

> The freedom to exercise … one's religion or belief cannot exist if … freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters [can] be held. Indeed, free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to or distort the original values that underpin religious belief.

There is reason to be concerned that Australia may be in breach of its international obligations to protect freedom of expression and freedom of religion through vaguely defined and excessively broad restrictions on what is described as 'hate speech'.

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[2] *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, A/HRC/22/17/Add.4, Appendix (2013).

[3] 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]. Similar observations about articles 19 and 20.2 have been made by the UN Human Rights Committee in its General Comments on the ICCPR and in its Reports assessing the compliance of particular countries with the ICCPR, including its 2009 Report on Australia. Australia entered a reservation in relation to its obligations under art 20, but this reservation relates to its obligation to prohibit hate speech under that article. This does not affect its obligation to protect freedom of expression under article 19.

V. CONCLUSIONS

The Religious Discrimination Bill is—on the whole—a careful and nuanced attempt to implement the recommendation of the Religious Freedom Review to enact a Religious Discrimination Act.

In drafting such a law it is inevitable that tensions will arise between the protection of religious freedom and the prohibition of religious discrimination. The two principles are distinct, but closely related. In many contexts, they are mutually reinforcing. It is only when one or the other principle is overextended that conflicts can arise.

The Religious Discrimination Bill gives careful attention to this problem in several ways. It is an admirable first step, but as the Attorney General understandably anticipates, various adjustments will be required. In my view, these will be mostly in the form of clarifications, to ensure that the Bill achieves what is intended to achieve.