Religious Discrimination Bill 2019 – Exposure Draft

Submission from Freedom for Faith

Freedom for Faith welcomes the considerable efforts that the Government has made to consult on the drafting of this Bill. Many features of it are very good, including general provisions for protection of people of faith from discrimination in Commonwealth law; but Freedom for Faith also has significant concerns about certain provisions which have consequences that are probably unintended.

In revising the Bill, attention needs to be paid not only to its text, but also to the eventual Explanatory Memorandum. At several points the current Notes provide examples and explanations that suggest a very limited scope for religious organisations to retain their ethos and identity, and conversely an expansive scope for suppression of free speech. It is difficult to reconcile these Notes, at various points, with government policy as expressed by the Prime Minister and Attorney-General.

The overwhelming concern of faith-based organisations across the country with whom we have spoken is about the effect of the Bill on their religious mission, with particular reference to their staffing policies, but also in relation to other issues.

Staffing policies in faith-based institutions

At a meeting in Sydney with a range of faith leaders a few weeks ago, the Prime Minister promised that the law would not take faith groups backwards in terms of protection of religious freedom. The difficulty is that this Bill does, in relation to staffing of faith-based organisations. The issues are existential ones for many faith-based organisations. If the issues are not resolved, this may lead us to conclude that the Bill is better not being enacted. That said, we have every confidence that the Attorney-General will be able to sort the drafting problems out.

Currently, at least in some States, it is lawful for faith-based organisations to appoint, or prefer to appoint, adherents of the faith without breaching anti-discrimination laws. So for example, a Catholic school may prefer practising Catholic staff, or at least practising members of other Christian denominations. A Jewish school may prefer Jewish staff, and so on. This is no different to a political party which may choose or prefer staff who support the policies of the party, or an environmental group that wants staff who will believe in its mission. Organisations that exist for a particular purpose or are associated, for example, with a particular ethnic group, need to be able to have staffing policies that reflect their purpose and identity.

This is not a right to discriminate. It is a right to select. And it is just plain common sense. A Church's childcare centre is not like the Commonwealth Bank or a shop selling bedroom furniture. The childcare centre is part of the mission and ministry of the Church. If it could not insist on employing Christian staff, or at least having a critical mass of Christian staff, it would cease to be a Christian ministry.

Many faith-based organisations have a strong preference for staff who are practising adherents to the faith, in order to maintain their religious identity and culture. However, larger organisations typically do not make it an inherent requirement of working there, because they need the flexibility to meet their staffing needs without drawing from too narrow a pool.

In NSW and South Australia, this right is protected because there are no prohibitions on religious discrimination that impinge on religious institutions. In NSW, there are quite broad exemptions for private schools generally in the *Anti-Discrimination Act* 1977. In Tasmania, the *Anti-Discrimination Act* 1998, s.51(2), provides:

> A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

This is a fairly broad provision covering educational institutions in a piece of legislation that makes little room for freedom of religion.

The drafting of section 10

This Bill, in its present form, will make it very difficult indeed for faith-based organisations to preserve their identity and ethos, although the Explanatory Notes to s.10 say that it is the Government's intention to support the rights of faith-based organisations to retain their culture and ethos in their staffing policies. Section 10 provides:

> "(1) A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted."

The explanatory notes to section 10 support the view that only faith-based organisations with a policy of requiring *all* staff and volunteers to be adherents to the faith will be protected, notwithstanding the opening sentence quoted below. The notes state (underlining added):

> This provision will also ensure that religious bodies are able to maintain their religious ethos through staffing decisions. For example, it would not be unlawful for a Jewish school to require <u>that all staff be Jewish</u> and accordingly refuse to hire someone because they were not Jewish, <u>if that conformed</u> to the doctrines, tenets, beliefs or teachings of Judaism.

> Similarly, a Catholic charity could require that all employees, including volunteer workers, were Catholic, and refuse to engage a volunteer worker who was not Catholic, provided this was in good faith and in accordance with the doctrines, tenets, beliefs and teachings of Catholicism.

Neither of these examples cover situations where there is merely a *preference* to employ practising Catholics or practising Christians more generally. Furthermore, even if a Catholic school or other charity did have a policy of only employing Catholic staff, it would only be lawful if this could reasonably be regarded as in accordance with the doctrines, tenets, beliefs and teachings of Catholicism. That may be a difficult test to satisfy in the eyes of a court. The court may find it hard to see how the Catholic school's *preference* in terms of employment may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion. The school, however, may take the view that it is a necessary implication of their doctrines that they want to maintain a Catholic ethos by having a "critical mass" of believing staff. Whether or not this policy does flow from religious doctrines – it is really about the purpose of having a Catholic school – it would be best if the legislation made it clear that such a policy was not unlawful.

The definition of religious body excludes hospitals, aged care, publishing houses and youth campsites

The problems are exacerbated by the definition of a religious body in s.10 which excludes any body that "engages solely or primarily in commercial activities". There is no definition of commercial activity in the Bill. The Explanatory Notes, paras [170-175] take a very broad view of what it means to engage in commercial activities. Although the examples in the explanatory notes concern refusal to provide goods and services in an everyday commercial context (e.g. bakers and same-sex weddings), those notes also state that religious hospitals and aged care providers are not religious bodies for the purposes of this clause.

There is an important distinction between those people whom an organisation serves and by whom those people are served. The great majority of faith-based aged care homes, child care centres and hospitals serve all who come to them for services that they provide; but in order to maintain the religious and cultural ethos of an organisation, it is necessary that the faith-based service provider has a right to prefer staff who practise the faith with which the organisation is associated and by which it is motivated.

This was recognised, for example, in the 2013 amendments to the *Sex Discrimination Act 1984* concerning aged care in s.37(2) of that Act. These amendments were made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*. While, as a consequence of these amendments, there is no exemption on religious grounds in service provision relating to the provision of aged care, s.37(2) nonetheless preserved religious freedom in relation to employment of staff. The Explanatory Memorandum in relation to that section provides:

> Proposed new paragraph 37(2)(b) makes it clear that this qualification only applies in the context of service provision. That is, an aged-care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion. This recognises that organisations should be able to engage staff who share their values and organisational ethos.

There was cross-party support for this in 2013. The Religious Discrimination Bill, in its current form, expressly contradicts this. If left unamended, this would create an inconsistency of purpose between the two Commonwealth discrimination laws.

If commercial activity is understood simply as charging a fee, then it will capture a very wide number of authentically religious activities such as corporations established within a denomination to provide accounting and other such professional services to the Church on a fee-paying basis. It will also prevent Christian publishers and Christian youth campsites advertising for Christian staff. This would be a bizarre and profoundly damaging outcome of laws ostensibly designed to bolster religious freedom.

The whole exclusion of religious organisations that engage in commercial activities is a red herring. This is not about tax exempt status for religious organisations or any other such perceived advantage. The real issue is, surely, that the Government does not want to extend the rights conferred in section 10 to organisations that do not have an educational or religious purpose or a purpose to help those who are sick or in need. It is exceedingly rare to find work conducted by religious organisations that are charities within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* that are not for a bona fide educational or religious purpose or which do not provide welfare and caring services, broadly defined. Religious organisations run hospitals and aged care homes and provide welfare services as part of their religious mission and calling. They are not secular organisations. A Christian aged care home seeks to care for the elderly in a way that expresses Christian love and care for those people, whatever their infirmities of body or mind. Christian values motivate the ministry and should infuse the conduct of the organisation. That it charges fees is irrelevant to its role as engaging in ministry.

It would be very confusing indeed if we were to move away from a standard definition of a religious body within Commonwealth law, and with the collateral effect of creating inconsistencies with definitions in state laws. Legislation needs to avoid unnecessary complexity wherever possible.

Relationship to the Fair Work Act 2009

The third issue to sort out is the relationship between the Religious Discrimination Bill and ss. 342 and 351 of the *Fair Work Act* 2009. Section 351 makes adverse action against an employee or a prospective employee on a range of grounds unlawful. One of those grounds is religion. Section 351(2) says that subsection (1) does not apply in some circumstances. One of those is that the adverse action is taken against a staff member of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

Oddly, that applies to employees but not "prospective employees" - a term that is undefined in the Act and is somewhat ambiguous.

Another reason subsection (1) does not apply is that the adverse action is not unlawful under the relevant state or territory law. There is disagreement about the meaning of this. On one view, it could be interpreted as meaning that if an action is not prohibited by the law of a State or Territory, it is not prohibited in federal law. This is the view recently expressed by Perram J in *Rumble v The Partnership trading as HWL Ebsworth Lawyers* [2019] FCA 1409 (3 September 2019) at [143]. However, in another recent decision, a judge of the Federal Circuit Court has taken a narrower view: *Cameron v Goldwind Australia Pty Ltd* [2019] FCCA 1541 at [43]ff. The judge considered that s.351(2)(a) only concerns actions which provisions of an anti-discrimination law render not unlawful in express terms – for example by creating a defence or a specific exemption.

It will be important to consider the interaction of the proposed federal *Religious Discrimination Act* with s.351 of the Fair Work Act and with the different state and territory laws which are carve-outs from the operation of s.351. Section 60 of the Exposure Draft deals with the relationship between that legislation and state and territory laws, but the tripartite interactions between these sets of laws and the *Fair Work Act* does not seem to have been explored either in this legislation or in the consequential amendments Bill.

The State laws are structured in a variety of different ways and have different coverage. They will have different exemptions, and these will differ in turn from the Religious Discrimination law federally. It would be strange, to say the least, if adverse action on the basis of religion was lawful under the *Fair Work Act* (for example because it is covered by s.51(2) of the *Anti-Discrimination Act* 1998 in Tasmania or the broad exemption for private schools in NSW), but unlawful under the federal Religious Discrimination Act. That would mean an inconsistency between two laws of the Commonwealth.

It may be that the outcome of a careful analysis of the three-way interactions will be that notwithstanding the Government's intention to have a national law on this subject, there could be different rules in different States and Territories, with a great deal of uncertainty and confusion as a consequence.

Sorting out the problem

We submit that there is a simple solution. The way to deal with this issue is to make a positive statement in the Religious Discrimination Act that it is lawful for a religious body, a faith-based educational institution or a charity established for religious purposes, to appoint, or prefer to appoint, staff who practise the religion with which the organisation is associated, notwithstanding anything to the contrary in a State or Territory law or in other Commonwealth legislation.

We greatly prefer a simple and positive statement ("it is lawful") to the creation of yet another exemption in the Religious Discrimination Bill for employment in faith-based organisations. This is for three reasons. First, religious leaders, across a broad spectrum, want to get away from the language of having a "right to discriminate". The issue is a right to select, not a right to discriminate. There could not have been a clearer and more consistent message from religious leaders to law reform bodies and to the Government for some years now. Secondly, there is a lot of opposition from the left of politics to any exemptions under anti-discrimination laws. It is likely therefore that exemptions for religious organisations will come under continuing scrutiny and will be subject to campaigns for repeal. Indeed, the Australian Human Rights Commission is currently conducting consultations on the basis of a recently released Discussion Paper: *Priorities for Federal Discrimination Law Reform* (August 2019). It does not like exemptions in anti-discrimination laws. Indeed, it has expressed the view (p.16) that exemptions should:

- only exist in a permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people's rights that are required
- be regularly reviewed to ensure that they reflect community standards and appropriately balance competing rights.

Thirdly, in April, the Attorney-General gave a reference to the Australian Law Reform Commission to make recommendations about limiting or removing altogether (if practicable) religious exemptions to prohibitions on discrimination, "while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos." It does not make much sense to create new exemptions in legislation at the same time as two organisations that report to the Attorney are busily working to reduce or eliminate them. The proper place to deal with employment issues is either in section 10 or in the *Fair Work Act* 2009. A suggested way of drafting such a provision is attached as an appendix to this document.

Uses of property inconsistent with a religious purpose or religious beliefs

A further issue arises from s.10 as currently drafted. It would force religious organisations that fall into the definition of engaging "solely or primarily in commercial activities" to act contrary to their beliefs if they were never permitted to rely on good faith religious objections to the use of their premises. Imagine, for example, a Jewish organisation that provides aged care for Jewish people and which lets out the hall in the aged care home to community groups. Could it never refuse a radical Islamic group which denigrates Judaism and promotes anti-semitic sentiments? There are implications for all kinds of religious organisations that very occasionally, and for good reason, would not want their premises used for a purpose inconsistent with their beliefs and values.

Another example that could arise, depending on the drafting of state and territory euthanasia legislation, is if an aged care organisation is asked to facilitate the provision of euthanasia on its premises. So too, a religious hospital may not want to provide certain services in circumstances that create a conflict with their religious beliefs. If these faith-based

organisations do not have a right to insist on their religious ethos because they are deemed to be "commercial" then this would be a great setback to tolerance of different views and values within a multicultural society.

These issues can be resolved relatively easily by rethinking the reference to commercial activities.

Enrolment of students in faith-based educational institutions

As currently written, section 10 may not allow schools to preference students of a particular faith. So for example, Catholic schools may not be allowed to give preference for admission to children of parents who identify as Catholic. The reason is that the section only applies to "conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted." The reason for preferencing children from Catholic families (or whatever the faith group it is) might be thought not to arise from religious doctrines. It arises from a religious purpose – to educate these children in the faith. That is a right protected under Article 18.4 of the ICCPR.

If a school cannot preference children who belong to the faith with which the church is associated, it cannot fulfil its mission.

This issue may be resolved by adding a provision to section 11 specifically about faith-based educational institutions.

Other Improvements to the Bill

Section 5: Definition section: meaning of 'person'

It ought to be clear in the Bill that 'person' includes a corporation and an unincorporated association. Most Baptist churches, for example, are unincorporated associations and this is true of other churches as well. Religious student societies on campuses are unincorporated associations that may be subject to discrimination by the governing boards of student unions. In other Commonwealth laws, the position is clearer. See e.g. *Work Health and Safety Act* 2011 (Cth) s 5(2) which specifically refers to unincorporated associations.

It ought also to be made clear that a corporation or an association may hold a religious belief. Provision needs to be made in the Bill for how an organisation can demonstrate the religious beliefs that they hold so that courts are not in the position of adjudicating on what an organisation's religious beliefs are. In the case of a corporation, for example, that might be by resolution of the board of directors. For another organisation, it might be by statements in its governing documents or on a website.

Section 5: definition of relevant employer

This definition excludes any organisation, however large, that is a body established for a public purpose by or under a law of the Commonwealth, a State or a Territory. That includes most if not all universities, which typically have a governing statute and are established for a public purpose. The Government ought to have particular concern for freedom of speech in universities.

It is also surprising that the exemption for governmental bodies is so broad. Of course, as the High Court indicated in *Comcare v Banerji* [2019] HCA 23, a government has a legitimate interest in requiring public servants not to criticise government policy publicly. However it has no legitimate interest in preventing staff who it happens to employ from discussing religious issues unrelated to public policy outside of work hours. Governments, of course, are major employers; and people of faith are as entitled to have their private religious views respected by governments as much as by large private sector employers.

These issues are considered further below in discussion of section 8(3).

Section 5: definition of "religious activity"

In defining the term "religious activity", there ought to be consistency with international human rights law. The definition could include any 'manifestation of religion or belief in worship, observance, practice and teaching' (Article 18, ICCPR). A more substantial definition of religious activities could be drawn from Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

A difficulty is that the definition is confined only to 'lawful' religious activity. While the intention of this is entirely benign, it could undermine protections for religious liberty in Australia because anything which a State or Territory treats as unlawful will not be recognised as a religious activity in this Commonwealth statute. That makes the Commonwealth law subject to the laws of the State and Territories and possibly subverted by them.

It is not beyond imagination that a State or Territory could pass a law that makes unlawful a religious activity which is widely accepted elsewhere in the country as an unremarkable expression of faith. There are State and Territory legislatures that are unicameral and/or that routinely return governments that have policies outside of the political mainstream.

Clearly there is a need to address criminal activity such as acts of violence. That could be achieved by specifying that religious activity excludes conduct that is contrary to the criminal law of the Commonwealth or a State or Territory and that may carry a term of imprisonment. Section 27(2) provides a definition of a serious offence, so perhaps that term could be adopted in this context as well.

Section 8(1)(c)

In relation to indirect discrimination, it may no longer be sufficient to rely on a provision about reasonableness. More specifically, any condition should ensure reasonable accommodation of religious belief and activity and any limitation should not be stricter than necessary to achieve a legitimate purpose. Language of this kind is consistent with the Siracusa Principles that the Government said, in response to the Ruddock report, it would adopt in drafting legislation.

Section 8(3): Statements of belief outside of working hours

The attempt to protect statements of belief is welcome. Examples could include statements of belief about marriage, just to make it clear that this could be a genuine religious belief. Particular requirements are placed upon large companies. They cannot have an employer conduct rule that has the effect of restricting or preventing an employee of the employer from making a statement of belief at a time other than when the employee is performing work on behalf of the employer unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer.

The problem with framing it in this way is that large employers only have to justify an employer conduct rule in the abstract, not in relation to any particular circumstances. So a large employer may say that institutional shareholders such as superannuation funds will threaten to sell their shares if the company does not have an 'equity and diversity' policy placing constraints upon employees' private social media posts 24/7. The threatened sale of shares, with a consequent impact upon the share price of a public company, would satisfy the test in the Bill. The employer might say similarly that it fears a consumer boycott if it does not have a 24/7 social media policy for all employees. It is difficult to disprove an *anticipated* 'unjustifiable financial hardship'.

It may be that the best way to deal with this is to say that a condition imposed by a relevant employer that inhibits the expression of an employee's religious belief outside of working hours is presumed not to be reasonable within the meaning of s.8(1)(c). The onus then falls on the employer to justify it.

It might also be observed that the term 'employer conduct rule' is a little odd. The issue really is about rules governing employees' conduct.

Sections 8(4) and 41(2): Vilify

The word 'vilify' either should be deleted completely or needs a definition which is reasonably narrow and consistent with Articles 19 and 20.2 of the ICCPR. There are those who describe almost any view with which they disagree on social matters as "hate speech". This seems to be reflected in the Explanatory Notes which suggest an employer may restrict any speech which "may cause harm":

> These provisions acknowledge that employers may legitimately restrict their employees' religious expression where it may cause harm to a person, group of persons or the community at large.

This would arguably include any expression of a view against same-sex marriage, for example, or raising concerns about aspects of the transgender movement, since discussion of these issues is said by some to have the potential to cause harm to the mental health of LGBT+ young people.

This is an example of a passage in the Explanatory Notes that is quite problematic and offers an interpretation of the relevant provision which is difficult to reconcile with the intentions of the Government.

Sections 8(5) and (6): freedom of conscience

Like other provisions in the Bill, these subsections limit the operation of Commonwealth law so that State and Territory laws that provide inadequately for freedom of conscience are unaffected by Commonwealth law. For example, the law in Victoria and elsewhere requires a medical practitioner who has a conscientious objection to abortion to refer to another practitioner who has no such conscientious objection. That is a rule falling within subsection (5) and so subsection (6) will not assist a doctor whose conscientious objection is not adequately respected by the relevant State law.

The case of Dr Mark Hobart in Victoria is illustrative of the need for better protection of freedom of conscience. Dr Hobart, a GP, was requested by a couple to refer them to an abortion practitioner. The woman was 19 weeks' pregnant at the time. The reason for the request was that during a routine ultrasound, they had discovered that the baby was a girl. As Dr Hobart understood it, the requested abortion was purely for sex selection purposes. He refused to refer. The couple found another practitioner (information being widely available on the internet and elsewhere), and the abortion was carried out one week later. Nonetheless, there was a complaint against Dr Hobart. The Medical Board of Victoria conducted an investigation into his refusal to refer, resulting in a formal caution in 2013 after an investigation lasting 8 months, during which time Dr Hobart had cause for concern about his professional registration.

If the law is that a doctor has to be able to name another doctor who is comfortable performing a sex selection abortion, then the reality is that the doctor may have some difficulty in so doing. The same might be true for an abortion of a healthy baby late in pregnancy that is not necessary to protect the life of the mother or to prevent serious harm to her health. The Commonwealth has obligations in international law to protect freedom of conscience. It ought to take the modest and reasonable step of legislating for freedom of conscience for medical and health professionals, with compulsion against conscience to be possible only in circumstances of urgency involving risk to life or serious damage to physical health.

One way of doing this, which could be applied more generally, is to require employers to make reasonable accommodation for conscientious objection to the performance of a certain kind of

work. Consider, for example, a situation where an employee is eminently capable of performing a job, but issues of conscience make it hard for him or her to perform a particular task in a small proportion of instances; if there are other employees who have no such conscientious objection, then the employer ought to make reasonable accommodation for that conscientious objection. An example is the provision of IVF treatment where the doctor has a genuine conscientious objection in the particular circumstances of the case. If there are others who could perform the service then his or her genuine and deeply held conscientious objection should be respected.

Section 10: The inclusion of a reasonableness test

Section 10 is drafted quite widely, and includes "engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion". To avoid getting into controversies about what a religion teaches (some denominations hold together a disparate range of beliefs on secondary issues) it would be better to focus on genuineness. Thus, the test could be written as:

> "engaging in conduct that the religious body, or a person representing it, genuinely believes is in accordance with the doctrines, tenets, beliefs or teachings of the religion"

or words to that effect. This protects small religious organisations that have unusual or heterodox interpretations of the doctrines and beliefs of the religion with which they identify, but which are nonetheless genuinely held religious views. The problem with the word 'reasonable' is that it requires courts to make judgments about this. It would be better for the analysis to proceed by asking first, what is the belief on which the person relies; and secondly, whether limitations apply to the recognition to be given to that belief, for example to protect public safety. The word 'reasonable' is doing the work of the latter, when the issue is not the belief, but limitations that are appropriate upon the manifestation of that belief.

Section 31 – inherent requirements for an occupation

Across the world, a number of religious people have experienced discrimination because their religiously-based beliefs about homosexual practice are regarded as incompatible with their professional role. This has included students training for their profession. As the English Court of Appeal has explained in the Ngole case, the fact that a person holds certain religious beliefs concerning homosexuality does not mean that they will act in a discriminating or uncaring way towards a person with a different sexual orientation. After all, during the heights of the AIDS crisis in different parts of the world, many of those caring for the dying in hospices were Catholic nuns who may have held orthodox Catholic positions on homosexual activity. People of faith are often in the forefront of providing care for those in need without making judgments about their past or present conduct.

Because the section could allow discrimination against people of faith like Mr Ngole, the provision needs greater clarity. It would be better to express the test more clearly, along the following lines, first positively, in terms of occupations such as hospital chaplains:

(1) It is not unlawful to discriminate against another person in employment or in relation to a partnership, on the ground of the other person's religious belief or activity, if adhering to a religious belief, or a religious belief of a particular kind, is a genuine occupational requirement of the position.

Then where the position is incompatible with the religious belief:

(2) It is not unlawful to discriminate against another person in employment, or in relation to a partnership, if a person's adhering to a religious belief, or acting consistently with a religious belief is such as to make him or her wholly unable to perform the work required.

It is quite difficult to see any case for s.31(4). What qualifying body that is not a religious one could possibly have any reason for saying that a person should not qualify for a profession because religious faith is incompatible with the profession? Is there any profession with which religious faith is inherently incompatible? The mere suggestion of this in legislation is in itself quite disturbing. It may be that there are certain specific jobs for which a person who has particular religious beliefs is not suitable, but there is no need for any law about that. If I am a pacifist, I am unlikely to apply to join the army, and if I believe gambling is a sin I will probably not want to work in a casino. If on religious grounds I am teetotal I am unlikely to apply to work in a bar. These are examples of incompatibility, but none of these actually involve a profession for which there is a qualifying body and an accreditation process. Section 31(4) should, for these reasons, be deleted.

Section 41: State and Territory laws

This section, for completeness, needs to include the *Racial and Religious Tolerance Act* 2001 in Victoria.

Section 44 – advertisements

The way this is drafted is problematic. A person commits an offence if someone else could reasonably understand that he or she has an intention to engage in unlawful conduct, even if the court finds that in fact, the person did not so intend or the intended conduct is not unlawful. This follows from the wording that does not make it a necessary condition for committing the offence that the advertisement involves unlawful discrimination.

APPENDIX: SUGGESTED DRAFT OF NEW SECTION ON EMPLOYMENT

(1) This section applies to an institution that is conducted in accordance with religious doctrines, or otherwise established for religious purposes.

(2) It is lawful for an institution to which this section applies, or a person acting on behalf of such an institution, to –

(a) employ or engage a particular person, or allocate particular duties or responsibilities to that person, on the ground or condition that the person adheres to, acts in accordance with, the religious doctrines or religious purposes of the institution, or agrees to abide by a code of moral conduct;

(b) not employ or engage a particular person, terminate the employment or engagement of a particular person, or not allocate particular duties or responsibilities to a particular person, on the ground that the person does not or no longer adheres to or acts in accordance with the religious doctrines, tenets, beliefs, teachings or religious purposes of the institution or has not agreed to abide by or has breached a code of moral conduct of the institution;

(c) do acts ancillary or incidental to the acts referred to paragraphs (a) and (b), such as advertising for a position that requires the appointee to adhere to or act in accordance with the religious doctrines or religious purposes of the institution or to abide by a code of moral conduct;

provided that the institution has a policy that is publicly available on request, outlining its expectations of employees and others engaged by the institution.

(3) In this section –

(a) an institution includes any association, body, corporation, entity or organisation whether or not incorporated under any Commonwealth, State or Territory law;

(b) religious doctrines include religious beliefs, codes of moral conduct, practices, principles, teachings and tenets;

(c) the engagement of a person includes as a contract worker.

(4) Subject to subsection (5), this section has effect notwithstanding any other Commonwealth, State or Territory law.

(5) This section does not affect the operation of:

(a) the Racial Discrimination Act 1975;

(b) the Disability Discrimination Act 1992;

(c) the Age Discrimination Act 2004;

(d) section 5C, 7, 37 and 38 of the Sex Discrimination Act 1984.